

# OF MILK AND THE CONSTITUTION

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## ABSTRACT

*Central cases in our constitutional law canon share an unexpected similarity: they all arose out of litigation involving cattle and milk. The Slaughter-House Cases, *Nebbia v. New York*, *Carolene Products*, and *Wickard v. Filburn* are familiar to generations of law students as iconic cases that address key concepts such as equal protection, the states' police powers, and Congress' commerce powers. Importantly, they also ground the Supreme Court's "dairy jurisprudence"—the series of cases about milk and cattle decided between the 1880s and the early 2000s.*

*This Article argues that this dairy jurisprudence expresses an underlying ideology of nutrition, which glorifies milk as "nature's perfect food." In the Court's discourse, milk drinking is channeled through the language of constitutional rights, creating what this Article calls a "quasi-constitutionalization" of milk. The privileged status of milk is in tension with other constitutional principles, in particular with equal protection, reinforcing race, as well as class, gender, species, and other inequities. Its detrimental effects are particularly salient for racial and ethnic minorities who are more likely to be lactose intolerant than whites of European descent. Despite these problems with milk, dairy jurisprudence could pave the way for the recognition of a broad constitutional right to food, which would benefit all Americans.*

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#### INTRODUCTION

The *Slaughter-House Cases*,<sup>1</sup> *Nebbia v. New York*,<sup>2</sup> *United States v. Carolene Products Co.*,<sup>3</sup> *Wickard v. Filburn*,<sup>4</sup> and *West Lynn Creamery, Inc. v. Healy*<sup>5</sup> figure prominently in the canon of American constitutional law. These landmark decisions are known for articulating central constitutional doctrines such as privileges and immunities, due process, equal protection, the states' police powers, Congress' commerce powers, tiers of scrutiny, and dormant commerce. Yet these cases share another less obvious commonality: they all originated in disputes concerning cattle and milk.

Though milk is not mentioned in the Constitution, over the past two centuries, milk litigation has been a vehicle of choice for the Justices to articulate key constitutional principles. The frequency with which milk cases appear on the Supreme Court's docket is a testament to the central place of milk in everyday American life, but it also reflects the Justices' own ideology of milk. "Dairy jurisprudence," as I call the Court's milk cases, spanned from the 1880s to the 2000s. These decisions pertain to multiple aspects of milk, from health and safety to price control, licensing, land use, and taxation, fundamentally redefining the place of milk in American society.

Legal activism surrounding milk can be explained by a confluence of social, economic, scientific, and political factors. In the nineteenth century, as a growing number of Americans settled in cities, milk was a solution to a major social problem—feeding the new urban classes, especially infants and

<sup>1</sup> 83 U.S. 36 (1872).

<sup>2</sup> 291 U.S. 502 (1934).

<sup>3</sup> 304 U.S. 144 (1938).

<sup>4</sup> 317 U.S. 111 (1942).

<sup>5</sup> 512 U.S. 186 (1994).

young children.<sup>6</sup> Milk and its byproducts provided a relatively cheap source of nutrition.<sup>7</sup> The science of the day claimed that milk products contained essential nutrients and promoted growth.<sup>8</sup> Dairying was a key economic sector.<sup>9</sup> Milk made work. Dairy farmers were an important constituency, soon organized into a powerful lobby.<sup>10</sup> Yet milk also posed a safety risk. It was highly perishable and, when spoiled or adulterated, could turn deadly.<sup>11</sup> Because of its spreading use as a substitute for breast milk for babies and toddlers, milk was more urgently in need of regulation than any other food during the Progressive Era.<sup>12</sup> The national government and nearly every state in the union became involved in regulating a commodity that not only fed Americans, but also employed them.<sup>13</sup>

This dairy focus has not escaped the attention of a few constitutional law scholars who recognized American law's predilection for milk.<sup>14</sup> As Ronald Wright and Paul Huck observe, milk figures in "the canon of [American] legal history."<sup>15</sup> James Chen goes so far as to proclaim: "[o]urs

<sup>6</sup> See RICHARD A. MECKEL, *SAVE THE BABIES: AMERICAN PUBLIC HEALTH REFORM AND THE PREVENTION OF INFANT MORTALITY, 1850–1929* at 62–91 (1990) (telling the ambivalent story of milk as an infant food).

<sup>7</sup> See DEBORAH VALENZE, *MILK: A LOCAL AND GLOBAL HISTORY* 88 (2011).

<sup>8</sup> On the idea of milk as essential to growth, see ANDREA S. WILEY, *RE-IMAGINING MILK* 64–82 (2011) (retracing the history of the common belief that milk contains indispensable nutrients and makes children grow taller and develop stronger bones).

<sup>9</sup> See, e.g., ERIC E. LAMPARD, *THE RISE OF THE DAIRY INDUSTRY IN WISCONSIN: A STUDY IN AGRICULTURAL CHANGE, 1820–1920* (1963) (showing based on the Wisconsin example how dairy products became one of the country's most important sources of farm income).

<sup>10</sup> See generally Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83 (1989) (examining the origins of the dairy lobby).

<sup>11</sup> See MECKEL, *supra* note 6, at 76.

<sup>12</sup> See generally Daniel Block, *Purity, Economy, and Social Welfare in the Progressive Era Pure Milk Movement*, 3 J. FOR STUDY FOOD & SOC'Y 20 (1999) (examining the pure milk movement during the Progressive Era).

<sup>13</sup> See generally, Jim Phillips & Michael French, *State Regulation and the Hazards of Milk, 1900–1939*, 12 SOC. HIST. MED. 371 (1999) (describing the contentious rise of milk regulation in the early twentieth century).

<sup>14</sup> See Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 404–06 (1987) (analyzing *Carolene Products* as the result of special interest politics and litigation); Ronald F. Wright & Paul Huck, *Counting Cases About Milk, Our "Most Nearly Perfect" Food, 1860–1940*, 36 LAW & SOC'Y REV. 51, 52 (2002) (looking at milk cases as "demonstrat[ing] that the enforcement of . . . health laws became more difficult during the Progressive Era"). See generally Miller, *supra* note 10 (discussing milk cases as illustrating public choice theory); James M. Chen, *The Potable Constitution*, 15 CONST. COMMENT 1 (1998) (embarking on a tour of American constitutional law using cases involving liquor, beer, wine, and milk). All these authors have in common that they look at milk as a proxy for the courts to reach other broad societal and legal problems. Not seeing milk as an object of jurisprudence in and of itself, they do not consider the negative impact of the Court and the governments' milk ideology on the population. Geoffrey Miller touches upon the anti-Asian sentiment animating federal milk legislation, but he does not address the broader racial exclusion implicated by the Court's partiality for milk. Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 421–22 (1987).

<sup>15</sup> Wright & Huck, *supra* note 14, at 52.

is a potable Constitution, a legal tradition in which many generations of lawyers have floated to wisdom on a stream of milk.”<sup>16</sup> What has so far been neglected in the literature, however, is that milk itself is the object of a distinct jurisprudence, rather than merely a proxy used by the Court to develop doctrines on other topics of constitutional relevance. In and of itself, milk’s recurring presence in constitutional adjudication has had deep legal, social, and political significance.

This Article argues that milk’s ubiquitous judicial presence has led not only to its construction as a cultural icon, but also to its status as a “quasi-constitutional” right. In addition to formally recognized constitutional rights, either enshrined in the text of the Constitution or elevated to the rank of “unenumerated” rights by judicial interpretation, the Court has identified a number of public goods as special without taking the step of constitutionalizing them. These are best described as “quasi-constitutional.” A concept of quasi-constitutionality is popular in Canadian constitutional theory, but it lacks a unified meaning among American constitutional scholars.<sup>17</sup> This Article proposes a conception of quasi-constitutionality that not only accounts for milk’s privileged legal position, but also elucidates the distinctive status of interests such as public education, a healthy environment, public health, and national security in constitutional adjudication.<sup>18</sup>

Historically, the Supreme Court’s quasi-constitutionalization of milk both reflected and reinforced America’s infatuation with milk. The United States has a long tradition of raising cattle and consuming dairy products, going back to the early colonial period.<sup>19</sup> Yet *drinking* milk is a relatively recent phenomenon. For much of human history, people rarely made a habit of drinking fresh (so-called “fluid”) milk, which soured quickly without refrigeration, preferring to consume it in cultured form—as buttermilk, cheese, butter, cream, or, more recently, yogurt.<sup>20</sup> It was not until the end of the nineteenth century that emphasis was placed on consuming milk in fresh drinkable form. This particular mode of consumption has become a staple of the American diet, promoted by both the dairy industry and governmental agencies.<sup>21</sup>

America’s passion for fluid milk is all the more puzzling in that milk drinking is neither ideal nor necessary in and of itself.<sup>22</sup> A large portion of

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<sup>16</sup> Jim Chen, *Around the World in Eighty Centiliters*, 15 MINN. J. INT’L L. 1, 3 (2006).

<sup>17</sup> See *infra* note 111 and accompanying text.

<sup>18</sup> See *infra* Part II.C.

<sup>19</sup> See *infra* Part I.A.

<sup>20</sup> See ANNE MENDELSON, *MILK: THE SURPRISING STORY OF MILK THROUGH THE AGES* 19 (2008).

<sup>21</sup> See generally Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 U.C. IRVINE L. REV. 1251, 1263–68 (2013) (discussing the role of the U.S. Department of Agriculture in maximizing the profits of the dairy industry and promoting milk drinking).

<sup>22</sup> See *id.* at 1258–60 (summarizing the scientific and medical arguments against milk consumption).

the population suffers from lactose intolerance (also known as lactase deficiency, hypolactasia, or lactase impersistence), which may result in a cluster of uncomfortable physiological, typically gastrointestinal, reactions to milk consumption, including nausea, vomiting, bloating, cramps, and excess flatulence.<sup>23</sup> A wide range of systemic symptoms can also be caused by lactase impersistence, “including headaches and light headedness, loss of concentration, difficulty with short term memory, severe tiredness, muscle and joint pain, various allergies, heart arrhythmia, mouth ulcers, sore throat, and increased frequency of micturition.”<sup>24</sup> It may also interfere with the absorption of other nutrients, which can lead to a host of medical conditions.<sup>25</sup> The popular expression “lactose intolerance” suggests that lactose “tolerance,” or the ability to drink milk beyond infancy, is the norm. The reverse is true; a significant number of adults—particularly in minority populations—have low levels of the enzyme lactase, which is necessary to digest milk. As anthropologist Andrea Willey notes:

With the increasing presence of peoples of Asian, Latin American, or African descent in the United States, up to 25 percent of the adult population may be lactase impersistent. The NDC [the National Dairy Council] recognizes that approximately 100 percent of all Native Americans, 90 percent of all Asian Americans, 80 percent of all African Americans, 53 percent of all Hispanic Americans, and 15 percent of all Caucasians are “lactose maldigesters.”<sup>26</sup>

Despite these figures, since the early twentieth century, Americans have considered milk to be “nature’s perfect food.”<sup>27</sup> Even now, public health officials’ credo remains that “[t]o consume milk in the United States is to be

<sup>23</sup> See Miranda C.E. Lomer et al., *Lactose Intolerance in Clinical Practice—Myths and Realities*, 27 ALIMENTARY PHARMACOLOGY & THERAPEUTICS 93 (2008) (reviewing common symptoms of lactase impersistence); see also Piero Vernia et al., *Lactose Malabsorption and Irritable Bowel Syndrome: Effect of a Long-Term Lactose-Free Diet*, 27 ITALIAN J. GASTROENTEROLOGY 117 (1995) (suggesting a correlation between lactose malabsorption and irritable bowel syndrome).

<sup>24</sup> Stephanie B. Matthews et al., *Systemic Lactose Intolerance: A New Perspective on an Old Problem*, 81 POSTGRAD MED. J. 167, 168 (2005).

<sup>25</sup> See R. Honkanen et al., *Lactose Intolerance Associated with Fractures of Weight-Bearing Bones in Finnish Women Aged 38–57 Years*, 21 BONE 473, 476 (1997) (indicating that lactose intolerant women have a higher risk of fracture due to calcium deficiency); J Ji et al., *Lactose Intolerance and Risk of Lung, Breast and Ovarian Cancers: Aetiological Clues from a Population-Based Study in Sweden*, 112 BRITISH J. CANCER 149, 150 (2015) (surmising that decreased risks of lung, breast, and ovarian cancers among a sample of lactose intolerant subjects may have been a result of the subjects’ low intake of milk and dairy).

<sup>26</sup> Andrea S. Wiley, “Drink Milk for Fitness”: *The Cultural Politics of Human Biological Variation and Milk Consumption in the United States*, 106 AM. ANTHROPOLOGIST 506, 510 (2004).

<sup>27</sup> See generally E. MELANIE DUPUIS, *NATURE’S PERFECT FOOD: HOW MILK BECAME AMERICA’S DRINK* (2002) (telling the story of how Americans came to consider milk as “nature’s perfect food”).

healthy; to avoid milk is to put oneself at risk of a variety of long-term ailments. . . . Drinking milk is no less than full enculturation into U.S. life.”<sup>28</sup> Milk is a symbol of identity in American society. Not just a cultural icon, it is also a legal one. Not only has milk been of great significance to the development of American law, but its consumption has assumed constitutional proportions.<sup>29</sup>

Scholarship to date has failed to examine the special role played by the courts in furthering milk’s hegemony in popular, political, as well as legal culture. This Article seeks to fill this gap by concentrating on the peculiar role milk played in shaping the Supreme Court’s constitutional jurisprudence and, reciprocally, on the role the Court played in advancing milk’s position in American law and culture. While there are hundreds of milk cases at the state and federal level, the defining cases for our dairy jurisprudence are a series of major interventions by the Supreme Court between the 1880s and 2000s.<sup>30</sup> I supplement the analysis of these cases with an examination of the legislative history preceding the enactment of major federal statutes pertaining to dairy products.<sup>31</sup>

What are we to make of this preoccupation with milk? This Article harbors deep concerns about the legitimacy and utility of affording milk a privileged legal status. The quasi-constitutionalization of milk is especially problematic given that it is in tension with other constitutional rights, in particular equal protection. The milk currently produced and consumed in the United States is far from a perfect food for *all* Americans. The campaign for milk has had detrimental effects on racial and ethnic minorities who are more likely to be lactose intolerant than the predominantly white lawyers and policy-makers of European descent who devised dairy jurisprudence, which in turn supported the government subsidization of the dairy industry. Even more troubling, this Article claims that racial bias animated some of the battles for the enactment of major federal legislation to protect dairy farmers against the competition represented by non-dairy substitutes.<sup>32</sup> Several segments of the population have suffered from milk’s prominence, especially those subjected to multiple levels of subordination based on race, gender, and class.<sup>33</sup> The result is a mismatch between the cultural and legal

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<sup>28</sup> Wiley, *supra* note 26, at 514.

<sup>29</sup> See *infra* Part II.A (explaining the elevation of milk to a quasi-constitutional right).

<sup>30</sup> See *infra* Appendix where I list the close to fifty cases I selected because of the salience of dairy interests they involved. I am chiefly interested in the nationwide conversation about milk and its constitutional implications, yet these cases are just the tip of the iceberg. A larger sample including all Supreme Court as well as lower federal court decisions and state cases pertaining to milk and dairying would deliver a more diverse picture of milk litigation, but it would go beyond the cultural theory angle and national and constitutional scope of this project.

<sup>31</sup> In particular, the 1886 Oleomargarine Act, the 1923 Filled Milk Act, and the 1933 and 1937 Agricultural Adjustment Acts.

<sup>32</sup> See *infra* Part III.B.

<sup>33</sup> My analysis draws on central insights of critical race theory, in particular the interconnection of race, class, and other dimensions of power and identity. See, e.g., Angela P.

importance of milk and milk's nutritive, economic, and social value to the majority of Americans. Having said that, milk's quasi-constitutional status could be used in an affirmative way to prompt a reimagining of the right to food in a way that would further food justice for all.<sup>34</sup>

This Article proceeds in four parts. Part I briefly recounts the history of milk in the United States, before describing central themes in the Supreme Court's dairy case law. Part II argues that milk has been quasi-constitutionalized as a staple of the American diet and a locus of moral and political control of American bodies. Part III explores what dairy jurisprudence implies about our conception of social structures and status hierarchies. It examines a number of concerns raised by the quasi-constitutionalization of milk, such as its race, gender, and class biases. Part IV considers pathways for a new understanding of milk in light of the deleterious human and environmental impact of current production and consumption patterns, arguing in favor of a constitutional right to food.

## I. CASES ABOUT MILK

A few legal scholars have pointed out that constitutional adjudication is replete with cases arising out of milk or cattle litigation.<sup>35</sup> According to the conventional story, milk is a means to address other legal issues. Indeed, dairy cases have contributed to shaping modern American law in multiple areas, including health and food safety,<sup>36</sup> commercial law,<sup>37</sup> antitrust,<sup>38</sup> regulatory crimes,<sup>39</sup> taxation,<sup>40</sup> and land use.<sup>41</sup> However, dairy cases have been especially important to the development of constitutional law. This Part pro-

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Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); see also Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (same).

<sup>34</sup> See *infra* Part IV.C.

<sup>35</sup> See sources cited *supra* note 14.

<sup>36</sup> See *infra* Part I.B.

<sup>37</sup> See *infra* Part I.C.

<sup>38</sup> See, e.g., *United States v. Borden Co.*, 370 U.S. 460, 465, 471 (1962) (finding that the Borden Company and the Bowman Dairy Company had violated the Clayton Act by selling milk at prices that discriminated between independently owned grocery stores and grocery store chains); *FTC v. Borden Co.*, 383 U.S. 637, 640 (1966) (finding, where the Borden Company charged a lower price for its private label evaporated milk than for its otherwise indistinguishable branded evaporated milk based on the contention that the two products were of a different grade, that brand names and labels were not determinants of grade and quality).

<sup>39</sup> See Wright & Huck, *supra* note 14, at 53 (arguing that milk litigation shaped "the origins of white-collar crimes").

<sup>40</sup> To protect the dairy industry and one of its more profitable products—butter—during the first half of the twentieth century, state and federal governments used their taxing powers to either restrict the sale of margarine or to exclude it entirely. The courts generally upheld these anti-oleomargarine tax statutes. See, e.g., *A. Magnano v. Hamilton*, 292 U.S. 40, 43 (1934) (holding that the differences between butter and oleomargarine were sufficient to justify their separate classification for taxation purposes).

vides a brief cultural history of milk in the United States, before presenting the two central themes of milk litigation—health and safety, and commerce—which took milk directly into constitutional law, raising core issues such as federalism and civil liberties.

### A. *A Brief History of Milk in the United States*

From the early colonial period, cattle and milk were central to the history and prosperity of the country.<sup>42</sup> Domestic cattle were an essential part of life for the pioneers who landed in the New World.<sup>43</sup> In early modern Europe, cattle ownership was a mark of wealth.<sup>44</sup> Europeans had a long history of breeding and using cattle for milk, meat, leather, and farm labor.<sup>45</sup> Most Europeans, rich or poor, consumed dairy as a matter of course.<sup>46</sup> The meager few dairy animals imported by early settlers has grown into a mammoth herd—there is now approximately one cow for every three Americans.<sup>47</sup> The New World proved to be a particularly fitting environment: it offered climate, grass, rainfall, and vast lands favorable for raising cattle on pasture. Cattle were central to the American ethos of the frontier, as ranching boosted

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<sup>41</sup> See *Powell v. Pennsylvania*, 127 U.S. 678, 686–87 (1888) (upholding a state statute prohibiting the sale of oleomargarine as within the police powers and neither violating equal protection nor depriving persons of their property without just compensation).

<sup>42</sup> See Sarah F. McMahon, *A Comfortable Subsistence: The Changing Composition of Diet in Rural New England, 1610–1840*, 42 WM. & MARY Q. 26, 38 (1985) (pointing out that “dairy played an important part in the routine of food production on most New England farms”).

<sup>43</sup> See generally G.A. Bowling, *The Introduction of Cattle into Colonial North America*, 25 J. DAIRY SCI. 129 (1942) (describing the mass importation of cattle from the colonizing European countries in the seventeenth century); see also VALENZE, *supra* note 7, at 97 (recounting the first import of Dutch cows by New York settlers as early as 1629).

<sup>44</sup> See Keith Hart & Louise Sperling, *Cattle as Capital*, 52 ETHNOS 324, 326–27 (1987) (showing that the conflation of cattle and capital is reflected in the etymology of the word cattle—derived from the Latin *caput*, head, which in the neuter form *capitale* refers to property—and the use of the expression livestock, a seventeenth century merger between the words “live” and “stock”).

<sup>45</sup> See THE CAMBRIDGE ECONOMIC HISTORY OF MODERN EUROPE: VOLUME 1: 1700–1870 at 148–49 (Stephen Broadberry & Kevin H. O’Rourke eds., 2010).

<sup>46</sup> See KEN ALBALA, *FOOD IN EARLY MODERN EUROPE* 77–79 (2003) (pointing out that drinking fluid milk was typically reserved to children and the elderly, but cheese and other dairy products, such as butter, were widely consumed).

<sup>47</sup> See INTERAGENCY AGRIC. PROJECTIONS COMM., U.S. DEP’T AGRIC., USDA AGRICULTURAL PROJECTIONS TO 2023 76 (2014) (stating that “total cattle inventory” was projected to be just below 88 million “heads” at the beginning of 2014); SANDRA L. COLBY & JENNIFER M. ORTMAN, U.S. CENSUS BUREAU, PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060 2 (2015) (identifying the U.S. population to be about 319 million in 2014).



geographical expansion.<sup>48</sup> Cows proved a prized source of dairy products: colonists drank some milk and converted the rest into butter and cheese.<sup>49</sup>

If Amelia Simmons' 1796 *American Cookery*—the first known cookbook written by an American—is any indication, fresh milk, “tight, waxy, yellow butter,” and “smooth moist coated” cheese had become key components in American cooking by the end of the eighteenth century.<sup>50</sup> They figured as ingredients in a number of favorite dishes, including biscuits, cakes, cookies, custards, puddings, pancakes, pies, roasts, stuffing, and so on.<sup>51</sup> Nearly every *American Cookery* recipe specified some form of dairy product by the pound, and at least one recipe, titled “To make a fine Syllabub from the Cow,” assumes that the reader owns a dairy cow.<sup>52</sup> Syllabub was an old English dessert consisting of cream curdled by the addition of an alcoholic beverage such as cider or wine. To prepare her version of syllabub, Amelia Simmons instructed:

Sweeten a quart of cyder with double refined sugar, grate nutmeg into it, then *milk your cow into your liquor*, when you have thus added what quantity of milk you think proper, pour half a pint or more, in proportion to the quantity of syllabub you make, of the sweetest cream you can get all over it.<sup>53</sup>

This prescription makes sense considering that most of the population lived in rural areas until the 1900s,<sup>54</sup> often residing on farms<sup>55</sup> that also housed cows, and also that milk had become central in culinary culture, national identity, and agricultural economy by the eighteenth century.

Sociologist Melanie DuPuis links the rise of milk drinking in the nineteenth century to industrialization and mobility, pointing out that fluid milk was primarily seen as a food for infants.<sup>56</sup> Rapid urbanization meant that an increasing number of women could no longer breastfeed their babies, typically because they were working outside the home. In the antebellum period, the institution of slavery may have furthered the use of animal milk as an

<sup>48</sup> See VALENZE, *supra* note 7, at 149 (“The desire for more land for cows lay beneath the legendary split of the community at Cambridge, where some settlers petitioned for permission to move into Connecticut.”).

<sup>49</sup> See ANDREW SMITH, *THE OXFORD ENCYCLOPEDIA OF FOOD AND DRINK IN AMERICA*, VOLUME 2 109–15 (2004). Some colonists were more committed to dairy farming than others. The Dutch, for example, were heavily involved in dairying and recruited dairy farmers to settle in the colonies. See *id.* at 190–91; ANDREW SMITH, *THE OXFORD ENCYCLOPEDIA OF FOOD AND DRINK IN AMERICA*, VOLUME 1 415–16 (2004).

<sup>50</sup> AMELIA SIMMONS, *THE FIRST AMERICAN COOKBOOK: A FACSIMILE OF “AMERICAN COOKERY,”* 1796, 9, 25 (1958)

<sup>51</sup> *Id.* at 17–38 (providing dozens of such recipes).

<sup>52</sup> *Id.* at 31.

<sup>53</sup> *Id.*

<sup>54</sup> See, e.g., ALAN S. BERGER, *THE CITY: URBAN COMMUNITIES AND THEIR PROBLEMS* 192 (1978).

<sup>55</sup> See, e.g., JOAN SHELLEY RUBIN, PAUL S. BOYER, SCOTT E. CASPER, *THE OXFORD ENCYCLOPEDIA OF AMERICAN CULTURAL AND INTELLECTUAL HISTORY* 339 (2013).

<sup>56</sup> See DUPUIS, *supra* note 27, at 54–55.

infant food. Female slaves were often prevented from breastfeeding their children, be it because they were forced to nurse their white masters' offspring or because their torturous labor did not leave room for nursing.<sup>57</sup> Early weaning explains in part the high mortality and health problems of young slave children who in the best case scenario were fed bovine milk and in the worst case were fed "cornbread, hominy and fat."<sup>58</sup> Toward the end of the nineteenth century, working women of all races increasingly turned to animal milk and "hand feeding"—or what later came to be known as "bottle feeding"—as a substitute for breastfeeding or the hiring of a wet nurse.<sup>59</sup>

This shift contributed to an increased demand for cow's milk year-round.<sup>60</sup> Yet, as cities expanded, dairies moved farther and farther from the people they supplied, creating a host of sanitary hazards. In the late 1800s, milk was no longer only consumed locally, on the farm or its surroundings, but as a liquid that traveled to urban centers.<sup>61</sup> Milk found in cities was often of poor quality—spoiled due to lack of refrigerated transportation and storage, contaminated with bacteria and viruses, and adulterated or diluted by middlemen trying to increase their profit margins.<sup>62</sup> Aggravating the matter further, consumers typically obtained their milk by "open dipping" from vendors' open cans, multiplying opportunities for unsanitary handling and

<sup>57</sup> See JANET GOLDEN, *A SOCIAL HISTORY OF WET NURSING IN AMERICA: FROM BREAST TO BOTTLE* 25–26 (1996) (describing the use of slaves as wet nurses). *But see* Thomas Affleck, *On the Hygiene of Cotton Plantation and the Management of Negro Slaves*, 2 S. MED. REPORTS 429, 435 (1850) (indicating that slave women were able to nurse their babies during their workday on some plantations by taking breaks "every three and a half to four hours").

<sup>58</sup> Kenneth F. Kiple & Virginia H. Kiple, *Slave Child Mortality: Some Nutritional Answers to a Perennial Puzzle*, 10 J. SOC. HIST. 284, 288 (1977) (discussing the inadequacy of slave children's diets); *see also* Richard H. Steckel, *A Peculiar Population: The Nutrition, Health, and Mortality of American Slaves from Childhood to Maturity*, 46 J. ECON. HIST. 721, 732 (1986) (suggesting that the forced transition away from breast milk to solid foods and manual feeding could explain slave children's elevated rates of illness and mortality); HERBERT C. COVEY & DWIGHT EISNACH, *WHAT THE SLAVES ATE: RECOLLECTIONS OF AFRICAN AMERICAN FOODS AND FOODWAYS FROM SLAVE NARRATIVES* 135–43 (2009) (reporting contrasting narratives of dairy consumption by children and adult slaves, with some suggesting that milk was plentiful, at least for children, and others suggesting that it was in short supply). *But see* Nicholas Scott Cardell & Mark Myron Hopkins, *The Effect of Milk Intolerance on the Consumption of Milk by Slaves in 1860*, 8 J. INTERDISCIPLINARY HIST. 507, 507 (1978) (arguing that slaves' consumption of milk was considerably lower in the second half on the nineteenth century than the average population's because they were known to be lactose intolerant).

<sup>59</sup> On the demise of wet nurses, see GOLDEN, *supra* note 57, at 157–200 (arguing that the disappearance of wet nurses reflected a variety of phenomena, including the changing cultural perception of motherhood and infancy linked to the rise of the middle class and the class, ethnic, and religious conflicts embodied by wet nursing).

<sup>60</sup> *Id.* at 178.

<sup>61</sup> See DUPUIS, *supra* note 27, at 18 (describing New York City's milk supply in those years).

<sup>62</sup> *Id.* at 18–19; J. Cheston Morris, *The Milk-Supply of Our Large Cities: The Extent of Adulteration and its Consequences: Methods of Prevention*, PUBLIC HEALTH PAP REP. 1884; 10: 248.

contamination from human contact.<sup>63</sup> As a consequence, milk became a major public health issue. It was blamed for a number of illnesses, from typhoid to tuberculosis, diphtheria, diarrheal diseases, scarlet fever, and so on, all leading causes of infant mortality.<sup>64</sup>

### B. *Health and Safety Regulation*

The history of milk regulation and adjudication provides a critical illustration of the wave of health and safety legislation that emerged during the Progressive Era. In the mid- to late nineteenth century, public health reformers mobilized as a result of mounting rates of milk-related infant mortality.<sup>65</sup> By then, scientists and medical professionals had connected the chemical composition of milk to infant nutrition and health.<sup>66</sup> Reformers “refocused their attention on improving the quality and purity of the urban milk supply and on making clean and wholesome milk available to those infants at highest risk.”<sup>67</sup> Cities’ milk supplies were the focus of journalistic exposés, investigative committees and reports, and private philanthropists’ initiatives, prompting a growing public constituency to push for the enactment of protective legislation.<sup>68</sup> Starting in the 1860s and throughout the late nineteenth century, municipal, state, and later federal legislation sought to prohibit milk adulteration and ensure quality milk supply in cities.<sup>69</sup> Reformers’ efforts paid off: milk became one of the most heavily regulated commodities.<sup>70</sup>

The judiciary was soon confronted with enforcement of and challenges to the new regulations. From the late 1800s until the 1970s, state and federal

<sup>63</sup> JUDITH W. LEAVITT, *THE HEALTHIEST CITY: MILWAUKEE AND THE POLITICS OF HEALTH REFORM* 158 (1982).

<sup>64</sup> See SAMUEL H. PRESTON & MICHAEL R. HAINES, *FATAL YEARS: CHILD MORTALITY IN LATE NINETEENTH-CENTURY AMERICA* 23 (1991) (describing systematic study of child mortality in the United States in the late nineteenth century).

<sup>65</sup> See MECKEL, *supra* note 6, at 4–5 (recounting the American campaign against infant mortality in the period between 1850 and the Depression of 1929).

<sup>66</sup> See *id.* at 68 (quoting physicians linking infant mortality in cities to “artificial milk” and adulterated animal milk).

<sup>67</sup> *Id.* at 6 (noting that reformers shifted their attention from general environmental conditions to milk).

<sup>68</sup> See *id.* at 154–58.

<sup>69</sup> City ordinances appeared in Boston, New York, and other large cities, soon followed by state legislation. See *id.* at 68 (showing that from 1880–1895 twenty-three American municipalities passed or strengthened ordinances governing the sale of milk and recounting). The 1906 Food and Drug Act was the first major federal law to address food safety, ending piecemeal legislation and inconsistent state standards. See Ilyse D. Barkan, *Industry Invites Regulation: The Passage of the Pure Food and Drug Act of 1906*, 75 AM. J. PUB. HEALTH 18, 18 (1985). While the Act is often presented as a consumer-protection measure, in fact many food and drug manufacturers pushed for the passage of the statute in the hope of securing advantage over domestic competitors and expanding markets to interstate and foreign commerce. See *id.* at 23–24 (arguing that industrial support prompted congressional action).

<sup>70</sup> See FDA: A CENTURY OF CONSUMER PROTECTION 28 (Wayne L. Pines ed., 2006) (“Milk was one of the most heavily adulterated products in urban America at the turn of the century; it was frequently watered down and preserved with formaldehyde.”).

courts had repeated occasions to review state and federal milk safety legislation pertaining to such issues as pasteurization,<sup>71</sup> milk containers,<sup>72</sup> bovine illnesses,<sup>73</sup> inspection areas,<sup>74</sup> and the state's role as a licensor of milk dealers.<sup>75</sup> The constitutional question raised was typically whether these new forms of health and safety legislation were valid exercises of police powers on the part of the states or legitimate uses of the commerce powers on the part of Congress. The courts used the concept of public health as a sorting device to determine whether milk regulation fell to the states or the federal government. As Wendy Parmet has argued, "[p]ublic health, as a concept and as a metaphor, played its greatest role in constitutional law in the years between Reconstruction and the New Deal, the so-called classical period of American constitutional law, launched by *Slaughter-House* and epitomized by *Lochner*."<sup>76</sup> In their study of 440 state and federal judicial decisions dealing with milk safety between 1860 and 1940, Ronald Wright and Paul Huck claim that the judicial enforcement of milk safety laws was "a key example of attempts . . . to enforce Progressive Era health legislation."<sup>77</sup> In other words, milk safety litigation played out as an exercise in line drawing between the constitutional powers of states and federal authorities. The major question became: who was responsible for ensuring that milk was safe for consumption?

To illustrate the type of issue the Justices grappled with, consider the 1904 case, *Fischer v. City of St. Louis*, where the Court recognized the pub-

<sup>71</sup> For an overview of early state court decisions dealing with pasteurization, see James A. Tobey, *Court Decisions on Pasteurization*, 42 PUBLIC HEALTH REPORTS (1896-1970) 1756, 1756-60 (1927); see also *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 350-57 (1951) (holding a Madison, Wisconsin ordinance which required that milk sold in the city had to be pasteurized within five miles of the city to be an unconstitutional violation of the dormant Commerce Clause).

<sup>72</sup> See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-70 (1981) (upholding a Minnesota statute prohibiting the sale of milk in plastic nonreturnable containers as an environmental and energy conservation measure).

<sup>73</sup> See *Adams v. City of Milwaukee*, 228 U.S. 572, 580-82 (1913) (upholding a Milwaukee ordinance requiring a tuberculin test for milk drawn from cows outside of the city because they cannot be inspected by the health officers); *Mintz v. Baldwin*, 289 U.S. 346, 349-50 (1933) (upholding a New York order requiring that out-of-state cattle brought into the state for dairy or breeding purposes have a certificate certifying that the animals are free of Bang's disease).

<sup>74</sup> See *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 536-39 (1949) (striking down the New York Commissioner of Agriculture's decision to deny a Massachusetts corporation's license application to operate a fourth milk plant in New York as a burden on interstate commerce); *Dean Milk Co.*, 340 U.S. at 350-57 (striking down a Wisconsin municipal ordinance that limited the sale of milk to products pasteurized and bottled at an approved plant within five miles of the city).

<sup>75</sup> See *Milk Control Bd. of Pa. v. Eisenberg Farm Prods.*, 306 U.S. 346, 353 (1939) (upholding the Pennsylvania Milk Control Board's authority to require licensure for milk dealers so long as the effects of the requirements were local and thus not burdening interstate commerce).

<sup>76</sup> Wendy E. Parmet, *From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 AM. J. LEGAL HIST. 476, 478 (1996) (citation omitted).

<sup>77</sup> See Wright & Huck, *supra* note 14, at 52.

lic health interest of a city to regulate conditions under which milk is sold within its limits.<sup>78</sup> The Court upheld a Saint Louis ordinance providing that no dairy or cow stable should be erected within the city without permission from the municipal assembly.<sup>79</sup> In so doing, the Court accepted that such a police measure was permitted to make classifications by “granting a license to one and denying it to another,” so long as the goal was to ensure “the discrimination is made *in the interest of the public*, and upon conditions applying to the *health* and comfort of the neighborhood.”<sup>80</sup> In a similar vein, the next year, reaffirming the states’ dominion over public health, the Court upheld a provision of the New York City Sanitary Code requiring a permit from the board of health as a condition to selling milk in the city.<sup>81</sup> This time, the Court emphasized the public health implications of milk production by pointing out that the milk “business . . . unless controlled, may be *highly dangerous to the health of the community*.”<sup>82</sup>

In addition to its public health dimension, milk became a central subject of commercial regulation in the interwar period, a testament to milk’s growing consumption and economic importance. Milk was a constitutional battleground for defining the economic regulatory powers of both state and federal authorities.

### C. Commercial Regulation

Milk has long constituted a large portion of the food market in the United States.<sup>83</sup> This economic importance is reflected in the vast number of cases pertaining to the commerce of milk. As the Supreme Court itself acknowledged in 1994, “[a] surprisingly large number of our Commerce Clause cases arose out of attempts to protect local dairy farmers.”<sup>84</sup> Some of the most famous examples include iconic cases such as *Nebbia v. New York*,<sup>85</sup> *United States v. Carolene Products*,<sup>86</sup> and *Filburn v. Wickard*.<sup>87</sup>

Why so many milk cases? In the face of the post-World War I depression, followed by the Great Depression and the accelerated drop in milk

<sup>78</sup> 194 U.S. 361, 371 (1904).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (emphasis added).

<sup>81</sup> *Lieberman v. Van de Carr*, 199 U.S. 552, 562–63 (1905).

<sup>82</sup> *Id.* at 563 (emphasis added).

<sup>83</sup> See Wright & Huck, *supra* note 14, at 60 (“The value of milk and milk products was 19% of gross farm revenue in 1939, or roughly double the value of wheat, corn, and the other grain crops combined.”) (citing ROY H. THOMAS ET AL., *DAIRY FARMING IN THE SOUTH* 19 (2d ed. 1949)).

<sup>84</sup> *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 206 n.22 (1994).

<sup>85</sup> 291 U.S. 502 (1934).

<sup>86</sup> 304 U.S. 144 (1938).

<sup>87</sup> 317 U.S. 111 (1942). While *Wickard v. Filburn* is typically remembered in the constitutional canon as a case about wheat, Roscoe Filburn was primarily a dairy farmer. See Jim Chen, *The Story of Wickard v. Filburn: Agriculture, Aggregation, and Commerce*, in *CONSTITUTIONAL LAW STORIES* 69, 81 (Michael C. Dorf ed., 2d ed. 2009).

prices that ensued, both the state and federal governments began to intervene massively in milk production and marketing. Their goal was to resolve the so-called “milk problem,” which was twofold: the price structure of milk and milk’s seasonal production.<sup>88</sup> The price of milk depends on its intended use, i.e., either as fluid milk to be drunk or “non-fluid” milk to be converted into cream, butter, cheese, milk powder, and other less perishable products. The distinction between the two types of milk created a dual price structure, which could easily be manipulated. Producers could sell their milk for higher prices if it was destined for fluid purposes rather than for non-fluid products.<sup>89</sup> This was partly due to the fact that fluid milk, subject to stricter sanitary requirements, was more costly to produce.<sup>90</sup> “Milk used in food products [was] paid for according to the market value of the products,” which was low—even when the milk was produced under the same conditions as that intended for fluid use.<sup>91</sup> The second aspect of the problem was that the supply of milk was subject to seasonal variations: production of milk in the spring and summer months is greater than in winter, but consumption is stable year-round.<sup>92</sup> For adequate supply of milk in the colder months to exist, producers maintain excessively large herds, resulting in an excess production in warmer months. The existence of this seasonal surplus, conjoined with the dual structure of fluid versus non-fluid milk led to price fluctuation.<sup>93</sup> Some producers contributed to the instability by undercutting existing milk prices in an attempt to sell their product.<sup>94</sup> This disorderliness threatened to drive farmers out of business.

In response, the state<sup>95</sup> and federal governments<sup>96</sup> enacted a series of statutes aimed at stabilizing milk markets and increasing milk prices at the

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<sup>88</sup> See *Queensboro Farms Products v. Wickard*, 137 F.2d 969, 974 (2d Cir. 1943).

<sup>89</sup> See *United States v. Rock Royal Co-Op*, 307 U.S. 533, 550 (1939) (“The market for fluid milk for use as a food beverage is the most profitable to the producer.”).

<sup>90</sup> See ERIC M. ERBA & ANDREW M. NOVAKOVIC, CORNELL PROGRAM ON DAIRY MKTS. & POLICY, *THE EVOLUTION OF MILK PRICING AND GOVERNMENT INTERVENTION IN DAIRY MARKETS* 3 (1995).

<sup>91</sup> Frank E. Coho, *Milk Price Control—A Developing Field of Administrative Law*, 45 DICK. L. REV. 254, 255 (1941).

<sup>92</sup> See *Brannan v. Stark*, 342 U.S. 451, 460 (1952) (“A principal source of the problems of milk marketing is the seasonal character of milk production. Herds sufficient to meet the demand for fluid milk during the winter months produce much more than enough to satisfy that demand during the summer months.”).

<sup>93</sup> See generally CLYDE L. KING, *THE PRICE OF MILK* (1920) (presenting the various factors that determined the price of milk and its fluctuation prior to the development of milk marketing legislation).

<sup>94</sup> See, e.g., Coho, *supra* note 91, at 264 (arguing that “[i]f all producers cut minimum prices, all would face the ruination that the milk control laws were designed to prevent”).

<sup>95</sup> State statutes authorized administrative agencies to fix prices to be paid to producers. See *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (finding that the power of a state to fix prices for milk is constitutional because “upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells”).

<sup>96</sup> The Agricultural Marketing Agreement Act of 1937 authorized the pricing of milk under a federal marketing order; specifically, to distribute the economic burden of surplus

farm level. Their efforts focused on so-called “milk control legislation,” which covered a range of businesses practices, including entry into business, licensing, grading and classification of milk, establishment of marketing areas, and most contentiously, the determination of retail pricing as well as the fixing of a minimum price that dealers or handlers had to pay producers for their milk.<sup>97</sup> The federal price-support system is so intricate that a number of judges and commentators have claimed that hardly anyone understands it,<sup>98</sup> not even the cast of successive Secretaries of Agriculture.<sup>99</sup> Suffice it to say that according to the system, producers supply raw milk to handlers, who are then required to pay money into a centralized pool called the “producer settlement fund.”<sup>100</sup> The money paid into the fund is proportionally redistributed to milk producers who then receive a “blend price” based on the quantity of milk sold so that all dairy farmers receive the same price for their milk regardless of its ultimate use—fluid or non-fluid.<sup>101</sup> Additional adjustments encourage farmers to stabilize their production year-round.<sup>102</sup>

Initially the courts interpreted the federal government’s authority to regulate milk markets with little latitude, leading to a proliferation of state legislation. With the jurisprudential shift of the Supreme Court toward a broader understanding of congressional powers in the late 1930s,<sup>103</sup> milk cases became a major battlefield for the delimitation of federal-state relations. The two recurring constitutional issues Justices were called to examine could be seen as two sides of the same coin. On the one hand, the question was whether federal milk marketing orders were valid exercises of Congress’ commerce powers—rather than an infringement on state powers. On the other hand, the question was whether the state regulation of milk prices ex-

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milk among all producers in a regional market, the Act authorizes the Secretary of Agriculture to govern the pricing between milk processors and distributors and dairy farmers. 7 U.S.C. §§ 608c(1), (5), (18) (2012). See *United States v. Rock Royal Co-Op*, 307 U.S. 533, 569–70 (1939) (sustaining that federal milk control legislation can fix minimum milk prices because “[t]he authority of the Federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce”).

<sup>97</sup> See generally Charles S. Mangum, Jr., *Milk Control Laws in the United States*, 38 N.C. L. REV. 419 (1960) (providing an overview of efforts to stabilize milk markets).

<sup>98</sup> See, e.g., *Zuber v. Allen*, 396 U.S. 168, 172 (1969) (declaring that “[o]nce again this Court must traverse the labyrinth of the federal milk marketing regulation provisions”).

<sup>99</sup> See Mendelson, *supra* note 20, at 47.

<sup>100</sup> See *Rock Royal Co-Op*, 307 U.S. at 555–56.

<sup>101</sup> See 7 U.S.C. § 608c(5)(B)(ii) (2012).

<sup>102</sup> See, e.g., Neil Brooks, *The Pricing of Milk Under Federal Marketing Orders*, 26 GEO. WASH. L. REV. 181, 200 (1958) (explaining that milk marketing orders may determine volumes of production).

<sup>103</sup> The Supreme Court famously reverted course from its *Lochner* era jurisprudence and began upholding state and federal economic legislation, in particular New Deal legislation, recognizing broader congressional powers to regulate the economy. The shift is often referred to as “the switch in time that saved nine.” See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (acting as the first of several decisions to mark this shift in the court).

ceeded police powers by infringing on Congress' commerce powers.<sup>104</sup> As Jim Chen has suggested, "the Supreme Court's dormant [C]ommerce [C]ause jurisprudence can be written in milk."<sup>105</sup> The Court was tackling central issues of federalism, which turned upon contested readings of the Commerce Clause. The clause had become an interpretive hook, first used to limit, and later to secure, an unprecedented national area of free trade.

*H.P. Hood & Sons, Inc. v. DuMond*,<sup>106</sup> a 1949 case, illustrates the Supreme Court's role in redefining the American economy and society in the context of milk. In *Hood*, the Court invalidated the New York Commissioner of Agriculture's denial of a license to build a new milk processing plant to Boston distributor H.P. Hood & Sons.<sup>107</sup> New York wanted to control the size and scale of milk plants to protect its farmers from the operations of the modern American agricultural market, with its monopsonistic tendencies, and to halt rural flight.<sup>108</sup> In a decision that contributed to the expansion of the federal commerce power, the Court found that the license denial impermissibly burdened interstate commerce.<sup>109</sup> By precluding a state from controlling the size of agricultural processing operations, *Hood* contributed to transforming the country from a "collection of locally controlled rural communities" to "a nationally controlled, industrial economy and society."<sup>110</sup> Justice Jackson's majority opinion articulates a vision of economic nationalism:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties [sic] or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.<sup>111</sup>

Anchoring his opinion in the myth of the founders, Jackson embraced the shift from local control over economic and social matters to national

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<sup>104</sup> This interpretation of the Commerce Clause as imposing a self-executing limitation on the power of the states is commonly referred to as the "dormant Commerce Clause."

<sup>105</sup> Jim Chen, *Get Green or Get Out: Decoupling Environmental from Economic Objectives in Agricultural Regulation*, 48 Okla. L. Rev. 333, 346 (1995).

<sup>106</sup> 336 U.S. 525 (1949).

<sup>107</sup> *Id.* at 545.

<sup>108</sup> *See id.* at 546 (Black, J., dissenting).

<sup>109</sup> *Id.* at 545.

<sup>110</sup> Jack Michel, *Hood v. DuMond: A Study of the Supreme Court and the Ideology of Capitalism*, 134 U. PA. L. REV. 657, 657 (1986).

<sup>111</sup> *DuMond*, 336 U.S. at 539.



control, leaving behind small-scale, local farm interests to prioritize a national farm interest at odds with traditional rural culture.

A close reading of the Court's milk cases confirms that milk played a significant role in the Court's shifting conception of federalism. But something more is at stake in these milk cases. In the Court's discourse, not only is milk consumption normal and normative, but it is also characterized as a form of quasi-constitutional right, resulting in a distinct dairy jurisprudence.

## II. THE QUASI-CONSTITUTIONALIZATION OF MILK

What can account for the abundance of legislation and litigation pertaining to milk products? Not only health, safety, and economic considerations, but also a form of dairy jurisprudence. In case after case, the Supreme Court assumed that a safe milk supply was essential to the flourishing of the American people both because milk is an essential staple of the American diet and because the dairy industry is a critical economic player. These premises lay the basis for what I call the "quasi-constitutionalization" of milk. I choose this term because it highlights milk's enjoyment of a privileged status no other food product, or perhaps even no other mass production product, has achieved in constitutional discourse. This Part fleshes out what I understand to be the scope and limits of milk's "quasi-constitutionality," before examining the three social values the Court protects with its dairy jurisprudence: nutrition, economics, and a distinct form of political morality.

### A. *Quasi-Constitutionality*

Though a full understanding of quasi-constitutionality in American law would require a separate study, for the purposes of this Article, I will limit myself to a brief outline of what it means in the context of milk. I define a quasi-constitutional right or principle as an interest that is recognized to be of central importance for the nation and that over a period of time sticks in the public culture such that it influences constitutional adjudication. Though the expression "quasi-constitutional" has been used now and then in American constitutional scholarship, it lacks a unified meaning.<sup>112</sup> The concept is

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<sup>112</sup> See generally HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 70 (1990) (defining a "quasi-constitutional custom" as "a set of institutional norms generated by the historical interaction of two or more federal branches with one another . . . [that] represent informal accommodations between two or more branches on the question of who decides with regard to particular foreign policy matters"); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (arguing that the Supreme Court's use of canons of statutory construction such as clear statement rules to restrict congressional powers has created "quasi-constitutional law" in certain areas); Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1404 (1994) ("GATT [the General Agreement on Tariffs and

popular in Canadian constitutional theory, where it has a technical significance that does not apply to the American context.<sup>113</sup> In the United States, legal scholars tend to separate American law into constitutional rights and principles entrenched in the Constitution (or through judicial interpretation) and everything else (i.e., non-constitutional rights), which, in theory, is left to the discretion of federal and state legislators.<sup>114</sup> My reading of the Court's jurisprudence breaks down this division. In addition to formally recognized constitutional rights, which are either enshrined in the text of the Constitution or elevated to the rank of "unenumerated" rights by judicial interpretation,<sup>115</sup> the Court has identified a number of public goods without taking steps to constitutionalize them. These are concepts that figure so recurrently in the Court's jurisprudence as interests to be protected that they become entrenched. Interpreting the notion of constitutional law broadly, I call them "quasi-constitutional."

Recourse to quasi-constitutionality is particularly expedient when there has been a national public debate over, and widespread acceptance of, cultural and policy norms, which the Supreme Court seeks to acknowledge through a continuing process of deliberation, but is not ready to fully constitutionalize. Quasi-constitutional principles both contribute to and feed off of

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Trade] can . . . be considered quasi-constitutional because it is designed to channel the ordinary legislative processes of GATT member governments."); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215–17 (2001) (arguing that certain statutes "penetrate public normative and institutional culture in a deep way" such that they can be called "super-statutes," which can be considered quasi-constitutional in that they are "trumping like constitutional law, but more . . . susceptible to override"). For applications to specific areas, see also Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 767–69 (1977) (considering cases in which reviewing courts override normal principles of statutory interpretation in order to protect environmental interests, which are nonetheless not recognized as constitutional rights); Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 485–86 (2000) (arguing that tribal courts are empowered to provide independent interpretation of constitutional rights and federal law).

<sup>113</sup> In Canadian jurisprudence, quasi-constitutionality refers to legislative statutes that pertain to constitutional subjects—such as individual rights or language rights—and trump other statutes, even those enacted subsequently and that conflict with them. *See, e.g.*, Québec Inc. v. Québec (*Régie des permis d'alcool*), [1996] S.C.R. 919, 923 (Can.) (L'Heureux-Dubé, J., concurring) ("The Charter [of Human Rights and Freedoms] has legal preeminence over the common law because of its quasi-constitutional status.").

<sup>114</sup> *But see generally* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 408 (2008) (arguing that the Constitution should be defined more broadly to "include not only the canonical document but also a variety of statutes, executive materials, and practices that structure [the] government").

<sup>115</sup> *See, e.g.*, LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 76 (2004) (arguing in favor of "living Constitution" theories of unenumerated individual rights by claiming that judges should be equal "partners" to the Framers of the Constitution and "bring[] our political community better into conformity with fundamental requirements of political justice").

social norms. Examples include the courts' musing on public education,<sup>116</sup> a healthful environment,<sup>117</sup> public health,<sup>118</sup> and perhaps even national security.<sup>119</sup> The Court has identified some rights, such as public education, as candidates for constitutionalization, only to reject them expressly.<sup>120</sup> Even those forsaken principles have remained stubbornly persistent in constitutional adjudication, belying their non-constitutional status.<sup>121</sup> Others, such as public health, are more diffuse in the case law, not as explicitly thematized as potential constitutional principles.<sup>122</sup> Yet, there was a time when public health was an operative constitutional standard in the sense that cases were decided based on protecting it.<sup>123</sup> Health law scholar Wendy Parmet, for instance, has

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<sup>116</sup> See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (discussing "the importance of education to our democratic society" as "a right which must be made available to all on equal terms").

<sup>117</sup> See, e.g., *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 624 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1965); see also *Palisades Citizens Ass'n v. Civ. Aeronautics Bd.*, 420 F.2d 188, 192 (D.C. Cir. 1969) (interpreting agency mandates to require consideration of environmental interests in addition to power or transportation needs).

<sup>118</sup> See, e.g., *Mayor of New York v. Miln*, 36 U.S. 102, 133 (1837) (upholding a New York law that required reports on passengers on arriving ships and the payment of security on the grounds that the state police power includes the right to pass "health laws of every description," including the power to prevent the introduction of what is dangerous to the safety and health of the people).

<sup>119</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (justifying government action "because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily").

<sup>120</sup> Education provides a case in point. As the Court famously declared in *Brown v. Board of Education*, "[t]oday, education is perhaps the most important function of state and local governments." *Brown*, 347 U.S. at 493. Yet, the Court later denied education constitutional status. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (denying appellant claims that unequal education funding violated a fundamental right and the Equal Protection Clause, all while singing a paean to education).

<sup>121</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (striking down a Texas statute denying funding for education for undocumented immigrant children and supporting the idea that education requires a more stringent level of scrutiny than rational basis. The Court stated that "[p]ublic education is not a 'right' granted to individuals by the Constitution . . . neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation.").

<sup>122</sup> See, e.g., WENDY E. PARMET, *POPULATIONS, PUBLIC HEALTH, AND THE LAW* 42 (2009) (noting the ambiguous constitutional status of public health, with the Court asserting "the value and importance of public health to constitutional law" before retreating later in the century).

<sup>123</sup> See, e.g., *The Slaughter-House Cases*, 83 U.S. 36, 61–65 (1873) (upholding a Louisiana statute regulating slaughtering in New Orleans as protecting public health and thus being within the state's police power); see also *Lochner v. New York*, 198 U.S. 45, 57–58 (1905) (striking down a New York law that limited the number of hours bakers could work that was based, inter alia, on the goal of protecting bakers' occupational health and the public's access to healthful bread. While the court accepted the doctrine that the state could act to protect public health, Justice Peckham failed to see how the regulation was "necessary or appropriate as a health law to safeguard the public health, or the health of individuals who are following the trade of a baker.").

shown that the Court “constitutionalized” public health during the antebellum and Reconstruction periods, using the notion to define and circumscribe the states’ police powers.<sup>124</sup> During the acme of dairy jurisprudence, milk’s constitutional status echoed that of public health a century earlier. In much the same way that the Court had used public health as an excuse to find a broad governmental authority to protect the health, safety, and welfare of the population, in the twentieth century, the Court held that ensuring a safe and affordable milk supply for the American public was an interest strong enough to justify government interventions in the production, pricing, and distribution of milk.

Quasi-constitutional principles figure in the case law as responses to historical moments or developing social movements, but their judicial elaboration by the high court also contributes to their recognition as public values throughout the country. Though the Supreme Court is unlikely to use a substantive due process theory to constitutionalize these interests any time soon, they are (or were for a time) so frequently articulated in constitutional terms both inside and outside of the courts that they operate as quasi-constitutional. Outside the courts, discussions take place through the political process, for example by proposals to amend the Constitution, or within the legal community by way of advocacy in favor of constitutionalization.<sup>125</sup> Inside the courts, quasi-constitutional rights are operative concepts resembling constitutional rights in the sense that judges decide cases based on protecting them.<sup>126</sup> I do not propose a test according to which, for an interest to be deemed quasi-constitutional, the courts must have addressed it explicitly as a candidate for constitutionalization or constitutional amendments must have been proposed to constitutionalize it. Perhaps future research will produce a more precise definition of quasi-constitutionality, but for the time being, suffice it to be said that what sets apart quasi-constitutional principles from other legal interests is that their articulation in constitutional terms is frequently found in judicial discourse. But unlike constitutional rights proper, the Court neither commits to regarding quasi-constitutional interests as trumps in future cases nor attempts to specify their scope and limits. Social norms appear and disappear in idiosyncratic ways based on current circum-

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<sup>124</sup> Parmet, *supra* note 76, at 478, 502 (arguing that public health was later “deconstitutionalized” by the New Deal Court when it no longer needed the concept to separate the public from private spheres of authority).

<sup>125</sup> Environmental quality amendments to the Constitution “surfaced” in the late 1960s and “had their heyday” in the 1970s. See J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don’t Measure Up*, 74 NOTRE DAME L. REV. 245, 247 (1999). In 2003, a resolution to propose a constitutional amendment regarding “the right of citizens of the United States to health care of equal high quality” was introduced (but not enacted) in Congress by Jesse Jackson, Jr. of Illinois. See H.R.J. Res. 30, 108th Cong. (2003). There have been a couple of proposed education amendments “regarding the right of all citizens of the United States to a public education of equal high quality,” introduced in every Congress from 1999 to 2012, including one introduced by Jesse Jackson, Jr.

<sup>126</sup> See, e.g., sources cited *supra* notes 116–19.

stances. Because the Court's response to those circumstances varies, additional criteria for quasi-constitutionalization cannot be laid out precisely, so the notion remains, by definition, a malleable go-between.

Despite major transformations in constitutional law over the course of the dairy jurisprudence period, the Court's approach to milk legislation remains relatively constant. Be it during the pre- or the post-New Deal era, milk's quasi-constitutional status explains why the Court allowed the state and federal governments to engage in stabilizing programs such as price fixing or controlling entry into milk markets, which would have been constitutionally prohibited if other commodities were involved.<sup>127</sup> In theory, the only goods justifying this type of market interference are public utilities—minimum price-fixing, in particular, being a common form of utility regulation.<sup>128</sup> Yet, when persuaded that market regulation is beneficial for milk production and safety, the Court yields, evidencing the dairy industry's anomalous position, halfway between a private enterprise and a public utility, as I will argue below.<sup>129</sup> But is the quasi-constitutional right to milk a right to *drink* milk or to *produce* and *sell* it? In other words, who benefits from milk's quasi-constitutionalization? Milk cases refer to a range of protected interests, from dairy farmers' economic interests generally; to dealers, handlers, and other intermediaries' economic interests; to the free commerce of milk between the states; to consumers' access to safe and plentiful milk.

Not only do these values come into conflict with each other, but their relative emphasis also evolves over time. Consumers' interests appeared more prevalent during the last decades of the nineteenth century, when health and safety laws preoccupied the courts,<sup>130</sup> while dairy producers and dealers' commercial interests came to the forefront in the 1920s with the development of economic milk regulation. But this is only a broad trend, given that milk cases typically take the form of competition *between* dairy constituencies. Whether they turn on tax, due process, equal protection, commerce, or antitrust grounds, milk cases implicate different and often conflicting interests, such as those of non-producing dealers and distributors

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<sup>127</sup> The Court consistently held the view that it was permissible for both the state and federal governments to engage in price fixing of milk. *See, e.g.*, *United States v. Rock Royal Co-Op*, 307 U.S. 533, 570–71, 581 (1939) (upholding the federal price fixing scheme ordered by the Secretary of Agriculture under the authority of the Agricultural Marketing Agreement Act of 1937); *see also* *H.P. Hood & Sons v. U.S.*, 307 U.S. 588, 594–95 (1939) (same); *Nebbia v. New York*, 291 U.S. 502, 539 (1934) (upholding the state of New York's milk price fixing scheme); *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163, 170 (1934) (finding New York's price fixing constitutional, as “[t]he Fourteenth Amendment does not protect a business against the hazards of competition”).

<sup>128</sup> *See* Henry S. Manley, *Nebbia Plus Fifteen*, 13 ALB. L. REV. 11, 16–19 (1949) (narrating events from *Nebbia* where Manley served as Counsel and emphasizing milk's atypical position between public utility and private enterprise).

<sup>129</sup> *See infra* notes 167–70 and accompanying text.

<sup>130</sup> *But see infra* notes 239–45 and accompanying text (the end of the nineteenth century was also characterized by the butter wars, which the dairy industry fought in court in an attempt to put margarine producers out of business).

versus those of dairy farmers,<sup>131</sup> milk consumers versus dealers,<sup>132</sup> local dealers and producers versus their out-of-state counterparts,<sup>133</sup> small versus large dealers,<sup>134</sup> new versus established dealers,<sup>135</sup> or dairy versus dairy-alternative products manufacturers.<sup>136</sup> The common thread is that the winning party succeeds in convincing the Court that its actions foster the “maintenance and distribution of an adequate supply of milk.”<sup>137</sup> Depending on the case, it means that one or the other of these antagonist dairy constituencies prevails—when the victor is not the federal or the state government, whose interventions typically benefit some dairy constituencies at the expense of others.

In sum, though milk’s quasi-constitutional status is roughly predictive of the Court’s indulgence toward milk regulation, no stable group of rights holders can be identified. What holds constant despite the changing beneficiaries of dairy jurisprudence, however, is the Court’s persistent defense of the three social values it attributes to milk— nutrition, economics, and political morality—which I discuss in the next sections.

<sup>131</sup> See, e.g., *Hegeman Farms Corp.*, 293 U.S. at 170–71 (1934) (protecting farmers, rather than dealers, in upholding minimum milk price fixing); see also *Nebbia*, 291 U.S. at 530 (arguing against New York’s price fixing’s scheme in that it harmed farmers who could not compete with dealers by selling their milk below the minimum price); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539–41 (1949) (holding that denying a milk dealer’s application to open a new milk plant violates the Commerce Clause, even if the new plant may harm local dairy farmers).

<sup>132</sup> See, e.g., *New York v. Van de Carr*, 199 U.S. 552, 563 (1905) (purporting to protect consumers’ health against milk distributors by upholding permit regulation); *Nebbia*, 291 U.S. at 541, 556–57 (arguing against the New York’s Milk Control Board orders of minimum price regulation because it prevented consumer access to cheap milk); *FTC v. Borden Co.*, 383 U.S. 637, 643–47 (1966) (protecting consumers by preventing milk dealers from using different brand names or labels to sell identical milk at different prices).

<sup>133</sup> See, e.g., *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 361 (1964) (holding that a state regulation which reserved to local producers a substantial share of the local milk market was an unconstitutional burden on interstate commerce); see also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461–70 (1981) (upholding a state statute which arguably promoted the economic interests of the local dairy and pulpwood industries at the expense of competing economic groups).

<sup>134</sup> See, e.g., *Borden’s Farm Products Co. v. Ten Eyck*, 297 U.S. 251, 261–62 (1936) (highlighting the conflict between unadvertised milk dealers, which were presumably smaller, and well-advertised milk dealers, which were likely bigger).

<sup>135</sup> See, e.g., *Mayflower Farms v. Ten Eyck*, 297 U.S. 266, 271–72 (1936) (emphasizing the conflict between unadvertised milk dealers who were in the dairy business before a certain date and those in the same class who entered after the date).

<sup>136</sup> See, e.g., *Schollenberger v. Pennsylvania*, 171 U.S. 1, 11–12 (1898) (showing the conflict between the interest of the dairy and the oleomargarine industry). For cases opposing dairy dealers and producers to “filled milk” manufacturers who add fats or oils other than milk fat in their products, see generally *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Hebe Co. v. Shaw*, 248 U.S. 297 (1919); *Sage Stores Co. v. Kansas ex rel. Mitchell*, 323 U.S. 32 (1944).

<sup>137</sup> *United States v. Rock Royal Co-Op*, 307 U.S. 533, 549 (1939).

### B. Dairy Nutrition

The ideology of twentieth century American public health officials and dieticians is summarized in public health reformers Samuel Crumbine and James Tobey's flowery assertion that milk is "the modern elixir of life. Without dealing in superlatives, it can indeed be said that milk is the most nearly perfect of human foods for it is the only single article of diet which contains practically all of the elements necessary to sustain and nourish the human system."<sup>138</sup> As Melanie DuPuis has shown, in the past couple of centuries, this milk ideology has reconstructed the United States into a "milk-drinking nation" and milk into nature's "perfect food."<sup>139</sup> During the same period, as fluid milk consumption soared, the successive Justices sitting on the Supreme Court treated milk as a core food and defining element of the American diet. As early as 1906, the Court sustained state legislation discriminating between different classes of milk producers so long as "the purpose of the law [was] to *secure to the population*, adult and infant, milk attaining a certain standard of purity and strength."<sup>140</sup> A few decades later, in *Nebbia*, the 1934 landmark case that upheld New York's milk price regulation, the majority cited a New York senate legislative report approvingly, concluding that "[m]ilk is an essential item of diet," that "[t]he production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people," and that "milk, an essential food, must be available as demanded by consumers every day in the year."<sup>141</sup> The Court's repeated endorsement of legislators' exalted statements on milk reflects in part its then jurisprudential commitment to deference and taking statutory language at face value,<sup>142</sup> but it also reveals its view of milk as a symbol of identity in American society.

The new scientific study of foods and popular beliefs about nutrition may explain why milk acquired a privileged status in the Court's jurisprudence. Like the rest of the nation, Justices were intrigued by nutritionist ideas that were anchored in major scientific discoveries in biochemical re-

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<sup>138</sup> SAMUEL J. CRUMBINE & JAMES A. TOBEY, *THE MOST NEARLY PERFECT FOOD: THE STORY OF MILK* 17 (1930).

<sup>139</sup> See DuPuis, *supra* note 27, at 4.

<sup>140</sup> *St. John v. New York*, 201 U.S. 633, 637 (1906) (emphasis added).

<sup>141</sup> *Nebbia v. New York*, 291 U.S. 502, 515–17 (1934). McReynolds' separate opinion also endorses the argument that milk production is "affected with a public interest," and claims that in fact milk is a "greater family necessity than ice." *Id.* at 542 (McReynolds, J., dissenting); see also *id.* ("The production of milk is, on account of its great importance as human food, a chief industry of the state of New York. . . . It is of such paramount importance as to justify the assertion that the general welfare and prosperity of the state in a very large and real sense depend upon it.") (alteration in original); *Rock Royal Co-Op*, 307 U.S. at 549 (describing milk as "an essential item of diet"); *Zuber v. Allen*, 396 U.S. 168, 172 (1969) (presenting milk as "a fluid staple of daily consumer diet").

<sup>142</sup> See, e.g., Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1, 9 (2004).

search.<sup>143</sup> Chemists had begun to reveal the significance of a number of key nutrients in food, shifting public health reformers' attention from actual foods to constituent nutrient compounds within them.<sup>144</sup> As early as 1919, the Court declared that state governments could legislate with the "purposes to secure a certain minimum of nutritive elements."<sup>145</sup> In line with this nutrient-based mindset, milk fat and vitamins became particular objects of judicial glorification. In 1916, the Court upheld an Iowa statute prohibiting any product containing less than a certain fixed percentage of butter fat from being sold as ice cream.<sup>146</sup> According to Justice Brandeis, writing for the Court, without such regulation a purchaser "presumably believes that cream or at least rich milk is among the important ingredients; and he may make his purchase with a *knowledge that butter fat is the principal food value in cream or milk.*"<sup>147</sup>

Historian Rima Apple has written that vitamins "captured the imagination and attention of many in the scientific community and among the general public" between the wars.<sup>148</sup> Vitamins became credited in popular culture with multiple virtues and the power to prevent and cure diseases.<sup>149</sup> Justices were men of their time, and their opinions track the then prevalent scientific understanding of milk, regularly drawing on congressional reports as well as the emerging scientific literature on vitamins. In *Carolene's* lesser-known footnote 2, the Court summarizes a congressional report finding that "[b]utter fat, which constitutes an important part of the food value of pure milk, is rich in vitamins, food elements which are essential to proper nutri-

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<sup>143</sup> To illustrate this national obsession, the White House held a conference on child welfare and nutrition in 1930 which discussed at length the scientific studies relevant to nutrition, and milk in particular, that had been conducted since the turn of the century. See PRELIMINARY REPORTS OF THE WHITE HOUSE CONFERENCE ON CHILD HEALTH AND PROTECTION I-1 (1930) [hereinafter WHITE HOUSE]. The resulting report declares that "[m]ilk is an almost complete food" and that "[m]ilk and the dairy industry are inseparably linked to the nation's health and the normal growth and development of its people. Scientific studies have shown that the food people eat, especially during the periods of rapid growth, in early childhood, has a lasting effect on the size of the entire race." *Id.* at xxxii, xxxvii-xxxviii.

<sup>144</sup> See Dennis Roth, *America's Fascination with Nutrition*, 23 FOOD REVIEW 32, 34-36 (2000) (arguing that the nineteenth century "new nutritionism" encouraged reformers to think about foods in terms of their nutrient composition).

<sup>145</sup> *Hebe Co. v. Shaw*, 248 U.S. 297, 303 (1919); see also *United States v. Carolene Products Co.*, 304 U.S. 144, 148 (1938) (reaffirming "[t]he power of the Legislature to secure a minimum of particular nutritive elements in a widely used article of food").

<sup>146</sup> *Hutchinson Ice Cream Co. v. Iowa*, 242 U.S. 153 (1916).

<sup>147</sup> *Id.* at 159 (emphasis added).

<sup>148</sup> RIMA D. APPLE, *VITAMANIA: VITAMINS IN AMERICAN CULTURE* 13 (1996).

<sup>149</sup> See generally Louis Rosenfeld, *Vitamine—Vitamin. The Early Years of Discovery*, 43 CLINICAL CHEMISTRY 680, 680, 683 (1997) (describing the discovery in 1913 of what came to be known as vitamin A and D following an experiment on animals fed purified proteins, carbohydrates, fats, inorganic salts, and water who would only thrive if small amounts of milk were added to their diet).



tion, and are wanting in vegetable oils.”<sup>150</sup> Attached to the next sentence, footnote 3 refers to the science of vitamins A and D as essential food factors: [t]here is now an extensive literature indicating wide recognition by scientists and dietitians of the great importance to the public health of butter fat and whole milk as the prime source of vitamins, which are essential growth producing and disease preventing elements in the diet.”<sup>151</sup> To back that statement, the Court cites a number of scientists and dieticians, in particular biochemist Elmer McCollum’s classic textbook on nutrition, which claims that plant-based proteins do not even approximate the value of milk proteins, for the support of maintenance or growth.<sup>152</sup> In later years, dieticians began to include minerals, in particular calcium, in their odes to milk.<sup>153</sup> The Justices followed suit, maintaining in a 1943 case about the federal regulation of vitamin enrichment in food products that “[m]ilk is the most satisfactory source of calcium in digestible form.”<sup>154</sup>

While touting the nutritional merits of milk, the Court’s dairy jurisprudence often belittles non-dairy substitutes or milk products mixed with non-dairy ingredients such as “filled milk” (milk reconstituted with non-dairy fats, usually vegetable oils) and margarine (originally composed of skimmed milk and beef tallow but later made of compounds of vegetable oil and water, with the occasional addition of milk). A few years after *Carolene*, the Court thus upheld a state ban on filled milk, quoting evidence of the nutritive “deficiencies” in filled milk, which:

is inferior to evaporated whole milk in the content of fatty acids, phospholipins, sterols and Vitamins E and K, all of which are essential in human nutrition, with the probable exception of Vitamin E in the diet of infants. In addition, evaporated whole milk contains a superior growthpromoting property, found in butterfat and not in cottonseed oil, essential to the optimum growth of infants.<sup>155</sup>

Filled milk and margarine are consistently portrayed as the dark alter egos of milk products, lacking the desirable nutritional characteristics of “pure” milk such as vitamins, but also fats: “[b]y reason of the extraction of the natural milk fat the compounded product [filled milk] can be manu-

<sup>150</sup> *Carolene Products Co.*, 304 U.S. at 149 n.2 (summarizing the congressional report which served as the factual basis for Congress’s enactment of the 1923 Filled Milk Act).

<sup>151</sup> *Id.* at 150 n.3.

<sup>152</sup> E. V. MCCOLLUM & NINA SIMMONDS, *THE NEWER KNOWLEDGE OF NUTRITION* 144–53 (1929). Note that Elmer McCollum testified on behalf of the state of Ohio during the trial which led to a precursor of the *Carolene* case. See *Hebe Co. v. Shaw*, 248 U.S. 297 (1919).

<sup>153</sup> See, e.g., E. V. McCollum et al., *Studies on Experimental Ricketts. XXI. An Experimental Demonstration of the Existence of a Vitamin Which Promotes Calcium Deposition*, 53 J. BIOL. CHEM. 293, 311 (1922).

<sup>154</sup> *Fed. Sec. Adm’r v. Quaker Oats Co.*, 318 U.S. 218, 225 (1943).

<sup>155</sup> *Sage Stores Co. v. Kansas ex rel. Mitchell*, 323 U.S. 32, 35 (1944).

factured and sold at a lower cost than pure milk.”<sup>156</sup> In the Court’s view, these alternative products are not only inferior to dairy products in objective nutritional properties, but also morally problematic in that they are suspected of being marginally fraudulent.<sup>157</sup> They fool consumers who cannot distinguish them, falling prey to “food substitute[s] for pure milk.”<sup>158</sup> For example, in a 1919 case, *Hebe Co. v. Shaw*, the Court held that a condensed milk manufacturer could not circumvent an Ohio prohibition on condensed milk:

by adding a small amount of cocoa nut oil. We may assume that the product is improved by the addition, but the body of it still is condensed skimmed milk, and this improvement consists merely in making the cheaper and forbidden substance more like the dearer and better one and thus at the same time more available for a fraudulent substitute.<sup>159</sup>

The Court is not only concerned with consumer protection, however. The dairy industry itself is presented as in need of protection against the unfair competition created by “the cheaper and forbidden substance.”<sup>160</sup>

### C. Dairy Economics

The Court’s dairy jurisprudence not only singles out dairy products as staples of the American diet, but also identifies the dairy industry as an essential national institution—what I think of as “dairy nationalism.” Farmers, especially dairy farmers, have long occupied a special place in the American imagination, perceived by many as central to the frontier ethos defined by independence, land ownership, and westward expansion.<sup>161</sup> The image of the farm as both a pastoral and key component of colonialism and the American frontier continued as an article of cultural nationalism well into the age of the industrial revolution and beyond. At the height of the Court’s dairy jurisprudence, in the 1940s, close to one in five working Americans was em-

<sup>156</sup> *Carolene Products Co.*, 304 U.S. at 149 n.2 (summarizing the congressional report which served as the factual basis for Congress’s enactment of the 1923 Filled Milk Act).

<sup>157</sup> See, e.g., *Shaw*, 248 U.S. at 303 (arguing that adding cocoa nut oil to condensed milk makes it “more available for a fraudulent substitute”); *Carolene Products Co.*, 304 U.S. at 149 (citing approvingly the house and senate congressional committees on agriculture that concluded that filled milk “facilitates fraud on the public”); *Sage Stores Co.*, 323 U.S. at 36 (accepting the argument that one of the purposes of a Kansas prohibition of filled milk “was the prevention of fraud and deception”).

<sup>158</sup> *Carolene Products Co.*, 304 U.S. at 149 n.2 (summarizing the congressional report which served as the factual basis for Congress’s enactment of the 1923 Filled Milk Act).

<sup>159</sup> *Shaw*, 248 U.S. at 303.

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

<sup>161</sup> See JEAN O’MALLEY HALLEY, *THE PARALLEL LIVES OF WOMEN AND COWS: MEAT MARKETS* 23–30, 57–76 (2012) (critically describing the place of dairy and cattle farmers in a national story of origins idealizing the frontier).

ployed in agriculture<sup>162</sup> and seventy-six percent of all American farms included milk cows.<sup>163</sup> These rural-agrarian roots surface in the legislative history of the 1886 Oleomargarine Act,<sup>164</sup> and later the 1923 Filled Milk Act,<sup>165</sup> in which Congress was keen to tie the nation's interests to those of the dairy industry.<sup>166</sup> The House Report for the Filled Milk Act quotes the testimony of C.W. Larson, Chief of the Department of Agriculture's Dairy Division, declaring, "I believe that in a nation that has one outstanding industry like agriculture in this country it is to the interest of all the people of the Nation to develop and further that industry. I further believe that the dairy industry is vitally connected with our whole agriculture."<sup>167</sup>

There is, too, a nationalist thrust behind the Court's dairy jurisprudence, which often seems to assume milk's distinct contributions to the political and economic success of the country. For instance, in a 1937 case, Justice Cardozo reaffirmed, with a sense of urgency, "[t]he power of a state to fix a minimum price for milk *in order to save producers, and with them the consuming public.*"<sup>168</sup> Dairy farmers and distributors are depicted as key players in the economy whose interests must be protected. In the 1949 *Hood* case about the denial of a distribution license to a Boston milk distributor mentioned earlier, the Court declared that the "[p]roduction and distribution of milk are so intimately related to public health and welfare that the need for

<sup>162</sup> See CAROLYN DIMITRI ET AL., U.S. DEP'T AGRIC., ECONOMIC INFORMATION BULLETIN NUMBER 3, THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY 2 (2005).

<sup>163</sup> See DON P. BLAYNEY, U.S. DEP'T AGRIC., STATISTICAL BULLETIN NUMBER 978, THE CHANGING LANDSCAPE OF U.S. MILK PRODUCTION 4 (2002).

<sup>164</sup> The 1886 Oleomargarine Act was an anti-margarine statute and the result of successful lobbying by the dairy industry for protection of their interests against the competition represented by the margarine industry. The Act included a labeling requirement as well as a prohibitive rate of taxation for margarine. The House Report submitted by the Committee on Agriculture emphasized the importance of dairy interest, stating "[t]hat the dairy interest is a necessity to all other branches of agriculture, as it is the cheapest and most reliable means of producing or continuing the conditions of soil necessary to the production of crops . . . That such imitations [of dairy products] are not only disastrous to the dairy interest directly and to all branches of agriculture indirectly, but that they are detrimental to public health, being the fruitful cause of dyspepsia and other diseases." H.R. REP. NO. 49-2028, at 2 (1886).

<sup>165</sup> The 1923 Filled Milk Act, 21 U.S.C. §61-63, had also originated in a dairy industry campaign against non-dairy substitutes. It prohibited the shipment into interstate commerce of skimmed milk that had been combined with any fat or oil other than milk fat.

<sup>166</sup> The executive branch was also instrumental in associating the dairy industry with the fate of the nation. See WHITE HOUSE, *supra* note 143, at xxxviii (citing then Secretary of Commerce Herbert Hoover at the World's Dairy Congress in 1923 declaring that "[t]he exhaustive researches of nutritional science during the last two decades have, by the demonstration of the imperative need of dairy products for the special growth and development of children, raised this industry to one of the deepest national and community concern").

<sup>167</sup> H.R. REP. NO. 67-355, at 4 (1921).

<sup>168</sup> *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 611 (1937) (emphasis added).

regulation to protect those interests has long been recognized, and is, from a constitutional standpoint, hardly controversial.”<sup>169</sup>

The Court, however, does not explicitly count milk as a public utility on par with water, electricity, natural gas, or railroads.<sup>170</sup> In *Nebbia*, the 1934 case that upheld New York’s milk price control legislation, the majority conceded, “the dairy industry is not, in the accepted sense of the phrase, a public utility.”<sup>171</sup> But it proposed that this was only the case because dairy producers “are in no way dependent upon public grants or franchises for the privilege of conducting their activities.”<sup>172</sup> Just like other public utilities, the Court noted that milk “is subject to regulation in the public interest,”<sup>173</sup> which justifies government interference in production and marketing. Most notably, milk was treated differently from any other food products or even from basic necessities such as oil and ice, which were indispensable commodities at a time of unprecedented mobility and before home refrigerators became available.<sup>174</sup> A few years before *Nebbia*, in 1929, the Court had declared that the gasoline business was not “affected with a public interest,” concluding that state legislation to fix its price violated the due process clause.<sup>175</sup> In 1932, it found that the manufacture and sale of ice was a private business not so affected with a public interest that a legislature may constitutionally limit the number of those who may engage in it in order to control competition.<sup>176</sup> By contrast, milk legislation, which embodied a policy of strict control of competition via licensing over entry into the market as well as price fixing, passed constitutional muster in more than one instance, suggesting that milk was indeed conceptualized as a form of public utility in dairy jurisprudence.

The idea of milk as a form of public utility and the portrayal of dairy farming as an intrinsic part of the economy are particularly visible in the Court’s oleomargarine cases. Toward the end of the nineteenth century, the butter industry became “the most lucrative destination for milk.”<sup>177</sup> Yet, at about the same time, a new, cheaper competing product, which came to be

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<sup>169</sup> *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 529 (1949).

<sup>170</sup> In the 1930s, policy makers, lawyers, and economists fiercely debated the question whether milk should be considered a public utility. *See generally* Henry S. Manley, *Constitutionality of Regulating Milk as a Public Utility*, 18 CORNELL L.Q. 410 (1933) (laying out the arguments for and against applying the public utility concept to the distribution of milk and concluding in favor); *see also* W. P. Mortenson, *Distribution of Milk Under Public Utility Regulation*, 26 AM. ECON. REV. 23, 39–40 (1936) (arguing in favor).

<sup>171</sup> *Nebbia v. New York*, 291 U.S. 502, 531 (1934).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See generally* SUSANNE FREIDBERG, *FRESH: A PERISHABLE HISTORY* (2009) (investigating the notion of freshness in its relation to transportation and the changing food markets).

<sup>175</sup> *Williams v. Standard Oil Co.*, 278 U.S. 235, 240 (1929).

<sup>176</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 277–80 (1932).

<sup>177</sup> MENDELSON, *supra* note 20, at 45.

known as margarine, arrived on the market.<sup>178</sup> There was considerable resistance by dairy farmers, who feared a precipitous decline of butter consumption.<sup>179</sup> According to Geoffrey Miller, the dairy industry “entered politics in earnest in 1877, when margarine began to challenge the hegemony of butter in the nation’s diet.”<sup>180</sup> As soon as margarine production commenced, individual states began banning or restricting its manufacture and sale, emulated shortly thereafter by the federal government.<sup>181</sup> Some states passed so called “pink laws” demanding that margarine be dyed off-putting colors, most famously pink, to deter consumers.<sup>182</sup> Anti-margarine legislation was the construct of a “powerful, highly sophisticated special interest: the American dairy industry.”<sup>183</sup> At the time, the dairy industry was on its way to becoming one of the nation’s most potent political lobbies, representing “approximately five million dairy farmers and thousands of factory owners and middlemen.”<sup>184</sup> The legal battle over margarine provides one of the earliest examples of special interest lobbying for government protection by one domestic industry against competition from another, less powerful, domestic industry. Later on, with the appearance on the market of products such as condensed milk laced with vegetable oils and filled milk, the war was expanded to other non-dairy products.<sup>185</sup>

When dairy and non-dairy producers took their disputes to the courts, the Supreme Court tended to side with dairy producers, upholding state and federal restrictions on non-dairy substitutes’ production and sale. The most famous illustration of this trend is the *Carolene Products* case.<sup>186</sup> The federal statute at stake, the 1923 Filled Milk Act, prohibited the interstate shipment of skimmed milk laced with vegetable oil, had been pushed by the dairy

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<sup>178</sup> Richard A. Ball & J. Robert Lilly, *The Menace of Margarine: The Rise and Fall of a Social Problem*, 29 *SOCIAL PROBLEMS* 488, 489 (1982) (describing the invention of margarine in 1869 by French chemist Hippolyte Mege-Mouriez).

<sup>179</sup> See Miller, *supra* note 10, at 105 (noting that margarine particularly threatened cheaper grades of butter).

<sup>180</sup> *Id.*

<sup>181</sup> Geoffrey Miller has shown that for close to a century, between the 1870s and the 1950s, “margarine was the victim of a sustained and concerted pattern of discrimination by the national government and almost every state in the union.” *Id.* at 83; see also Ball & Lilly, *supra* note 178, at 489 (referring to a Missouri ban in 1881 and a New York ban in 1884). New York’s highest court struck down the New York statute as unconstitutional in *People v Marx*, but just a few years later the U.S. Supreme Court upheld an almost identical Pennsylvania statute. 99 N.Y. 377, 377 (N.Y. 1885); *Powell v. Pennsylvania*, 127 U.S. 678, 686–87 (1888). Federal legislation soon followed with the 1886 Oleomargarine Act, which imposed a restrictive tax on margarine and steep licensing fees on manufacturers, wholesalers, and retailers.

<sup>182</sup> See, e.g., *Collins v. New Hampshire*, 171 U.S. 30, 34 (1898) (overturning a “pink law” by finding that a New Hampshire statute which prohibited the sale of oleomargarine as a substitute for butter unless it was of a pink color violated the Commerce Clause).

<sup>183</sup> Miller, *supra* note 10, at 83.

<sup>184</sup> *Id.* at 85.

<sup>185</sup> See Miller, *supra* note 14, at 404–06.

<sup>186</sup> *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

industry.<sup>187</sup> As Geoffrey Miller notes, dairy “[f]armers understood, correctly, that the imported coconut oil in filled milk undercut the domestic butterfat market.”<sup>188</sup> As discussed above, the Court’s stance against filled milk was partly grounded on the Justices’ belief that it threatened public health on the premise that vegetable oils are vitamin deficient. According to Miller, the Court was also persuaded by the dairy industry’s claim that its economic viability would be undermined if filled milk were left unregulated.<sup>189</sup> Yet, despite its special interest quality, the Court framed its dairy jurisprudence as protecting a national interest, the assumption being that the overwhelming majority of Americans are dairy consumers and that dairy farming benefits the economy. The Court regularly presented its interventions as protecting both milk producers *and* consumers. For example, in a 1939 case upholding a state statute fixing minimum prices to be paid to milk producers, the Court declared: “[t]he purpose of the statute under review obviously is to reach a domestic situation *in the interest of the welfare of the producers and consumers of milk.*”<sup>190</sup> Through this intersection of support for the dairy industry and concern for the public’s continued access to milk, the Court instilled a form of political morality in its dairy jurisprudence, presenting milk as a “pure and wholesome” substance that could reform the American body politics.

#### D. Dairy Body Politics

The Court varied in its actual support for different dairy constituencies, but it never departed from its stated commitment to ensure “the maintenance

<sup>187</sup> See Miller, *supra* note 14, at 409–10.

<sup>188</sup> *Id.* at 404.

<sup>189</sup> See generally Miller, *supra* note 14 (recounting the background economic and political history behind the *Carolene* case).

<sup>190</sup> Milk Control Bd. of Pa. v. Eisenberg Farm Prods., 306 U.S. 346, 352 (1939) (emphasis added); see also West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 214–15 (1994) (holding that a Massachusetts statute requiring all dealers selling milk to Massachusetts retailers to make a monthly premium payment to an equalization fund was unconstitutional and noting that there are “at least two strong interest groups opposed to the milk order—consumers and milk dealers”); H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 542–45 (1949) (striking down a New York decision by the Commissioner of Agriculture on the grounds that it attempted to protect the interests of local milk consumers at the expense of national consumers); Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 611 (1937) (“The power of a state to fix a minimum price for milk in order to save producers, and with them the consuming public, from price cutting so destructive as to endanger the supply, was affirmed by this Court in *Nebbia v. New York* . . .”); *Nebbia v. New York*, 291 U.S. 502, 538 (1934) (concluding that without government intervention to control milk prices, the “economic maladjustment” of prices “threatens harm to the producer at one end of the series and the consumer at the other”). *But see* Block v. Cmty. Nutrition Inst., 467 U.S. 340, 347–48 (1984) (holding that milk consumers cannot challenge milk regulations that raise prices on reconstituted milk made from dry milk); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) (rejecting “the argument of the state that economic security for farmers in the milk shed may be a means of assuring to consumers a steady supply of a food of prime necessity”).

of a regular and adequate supply of pure and wholesome milk.”<sup>191</sup> The quasi-constitutional right to milk is operationalized in different ways, but central to its articulation are notions of “purity” and “wholesomeness.”<sup>192</sup> As early as 1906, upholding a New York statute that prohibited the sale of adulterated milk, the Court emphasized, “the purpose of the law is to secure to the population, adult and infant, *milk attaining a certain standard of purity and strength*. All other milk is declared [in the statute under review] to be ‘unclean, impure, unhealthy, adulterated, or unwholesome.’”<sup>193</sup> A few decades later, Justice Black, in one of his series of dairy jurisprudence dissents, emphasized the “power of the people to *guard the purity* of their daily diet of milk.”<sup>194</sup>

The language of purity and wholesomeness goes beyond the liquid’s sanitary and dietetic properties as well as its economic importance. When describing milk, Justices distinguish between various quality dimensions. They mention concrete nutritional attributes, such as fat content. But they also emphasize less measurable, abstract entities such as purity, healthfulness, or wholesomeness, which reflect a form of political morality rather than a statement about nutrition or marketability. The tropes of purity, healthfulness, and wholesomeness reveal Justices’ concern with milk regulation as a way of disciplining an unruly liquid, and ultimately, perhaps, the drinkers themselves.<sup>195</sup> By the early twentieth century, milk had become a

<sup>191</sup> *Baldwin*, 294 U.S. at 523.

<sup>192</sup> The Court seems to borrow the phrase “pure and wholesome milk” from state legislatures, as it was standard in milk legislation at the turn of the century, for example, Chapter 166, Laws of the 31st General Assembly, Supp. To the Code, Sections 4999-a15 to 4999-a43; section I of Indiana Acts of 1935, ch. 281, page 1365, Chapter 338 of the Agricultural Law of New York (1893); Chapter 158 of the New York Laws of 1933, Art. 25, § 312; Pennsylvania Milk Control Act of April 28, 1937, P. L. 417, 420, 444–45, 31 PS Sec. 700j-801; Section 12725 of the General Code of Ohio in the 1910s, Virginia Laws of 1934, Chapter 357, known as the “Milk and Cream Act.” Water use and regulation is the only other context in which the Court consistently uses the phrase. *See, e.g.*, *New Orleans Water-Works Co. v. Rivers*, 115 U.S. 674, 676 (1885) (discussing “pure and wholesome water”); *City of Columbus v. Mercantile Trust & Deposit Co. of Baltimore*, 218 U.S. 645, 650 (1910) (same); *Bankers Trust Co. v. City of Raton*, 258 U.S. 328, 336 (1922) (same).

<sup>193</sup> *St. John v. New York*, 201 U.S. 633, 637 (1906) (concluding that the statute’s “ultimate purpose is that wholesome milk shall reach the consumer”) (emphasis added).

<sup>194</sup> *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 359 (1951) (emphasis added). Black accorded wide latitude to state legislatures in the field of economic relations under the Commerce Clause and was not as willing as his brethren to declare that Congress had preempted state powers. *See, e.g.*, *Lehigh Val. Coop. Farmers, Inc. v. United States*, 370 U.S. 76, 77, 101 (1962) (Black, J., dissenting) (lamenting the majority’s overturning of a New York-New Jersey milk-marketing order requiring handlers to provide a “compensatory payment” as inconsistent with congressional policy expressed in the Agricultural Marketing Agreement Act of 1937 because it would be “at the expense of the farmers themselves—for whose benefit the national program was primarily passed”); *Zuber v. Allen*, 396 U.S. 168, 198 (1969) (Black, J., dissenting) (arguing that the majority’s invalidation of a Florida regulation, which reserved to local producers a substantial share of the local milk market, was in contradiction with congressional intent).

<sup>195</sup> Milk is a notoriously unstable liquid as it sours quickly and can turn lethal if not handled properly. *See generally* PETER J ATKINS, *LIQUID MATERIALITIES: A HISTORY OF*

key instrument of social, moral, and racial purity, especially in the growing urban areas. The U.S. Supreme Court declared in 1939, “[t]he people of great cities depend largely upon an adequate supply of pure fresh milk.”<sup>196</sup> Dairy jurisprudence can be read as construing milk as a white liquid that not only nourishes, but also cleanses American cities and citizens.<sup>197</sup> Notably, milk drinking could serve as a substitute for alcohol consumption, which was seen as inconsistent with capitalism and its growing need for disciplined factory workers in the cities.<sup>198</sup> The Temperance movement aimed at curbing the consumption of alcohol, successfully pushing for National Prohibition from its 1920 enactment to its 1933 demise, can indeed be connected to the promotion of milk.<sup>199</sup> Alcohol was blamed as a major cause of social problems such as poverty, crime, and disease.<sup>200</sup> By contrast, milk conjured up images of health and wealth—drinking it could be equated to a civic duty inasmuch as it encouraged sobriety.<sup>201</sup> Tellingly, as Prohibition began to falter in the late 1920s, Deets Pickett, a member of the Methodist Board of Temperance, Prohibition and Public Morals, reminisced about its early dry

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MILK, SCIENCE AND THE LAW 225–45 (2010) (describing the reverence and fear inspired by milk, including attempts to purify it of dirt and disease).

<sup>196</sup> *United States v. Rock Royal Co-Op*, 307 U.S. 533, 570 (1939); *see also* *Fischer v. City of St. Louis*, 194 U.S. 361, 371–72 (1904) (upholding on health and safety grounds a Saint Louis ordinance requiring permission for the erection of dairy cow stables within the city limits but recognizing a right to milk for city dwellers by emphasizing that making the ordinance universal “would operate with great hardship upon persons who desire to establish dairies and cow stables in the outskirts of the city, as well as inconvenience to the inhabitants, who, to that extent, would be limited in their supply of milk”).

<sup>197</sup> In fact, the urban origin of the milk problem is reflected in the disproportionate number of dairy cases arising from New York, which can be explained by a series of factors. New York, as a leading dairy state and home to the most populous American city, was at the forefront of milk regulation, with the first milk legislation dating back to 1862. Michael Egan, *Organizing Protest in the Changing City: Swill Milk and Social Activism in New York City, 1842–1864*, 86 N.Y. Hist. 205, 223 (2005). As the Court notes, “[s]ave the conduct of railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry.” *Nebbia v. New York*, 291 U.S. 502, 521 (1934); *see also* *Wright & Huck*, *supra* note 14, at 87 (suggesting that “New York handled more milk health litigation (published or unpublished) than any other state, particularly since New York boasted one of the most well-funded and active health departments in the country”).

<sup>198</sup> *See generally* JOHN J. RUMBARGER, PROFITS, POWER, AND PROHIBITION: ALCOHOL REFORM AND THE INDUSTRIALIZING OF AMERICA, 1800–1930 at 155–88 (1989) (tying liquor reform and Prohibition to employers’ efforts to maintain an efficient labor force).

<sup>199</sup> Barbara Orland has shown that in the context of Germany, milk officially became an alcohol substitute for factory workers for the “benefit of a powerful dairy lobby facing periodical overproduction of liquid milk.” Barbara Orland, *Bad Habits and Liquid Pleasures: Milk and the Alcohol Abstinence Movement in Late 19th Century Germany*, 5 *FOOD & HIST.* 173, 189 (2007). I surmise that something similar occurred in the United States. *See id.* at 173, 189.

<sup>200</sup> *See* Joel Bernard, *From Fasting to Abstinence: The Origins of the American Temperance Movement*, in *DRINKING: BEHAVIOR AND BELIEF IN MODERN HISTORY* 337, 344 (Susanna Barrows ed., 1991).

<sup>201</sup> *Id.* at 345 (pointing out that Benjamin Rush, the physician who popularized the connection between drinking alcohol and disease, implied that “if a man habitually drank milk and water . . . he would enjoy health, wealth, and a long life; if he habitually drank spirits, he would finish in the poorhouse or at the hospital.”).



days, declaring, “[w]e learned to drink milk as never before.”<sup>202</sup> During Prohibition, some breweries had reconfigured their facilities to manufacture ice cream.<sup>203</sup> “Milkshakes,” which were alcoholic whiskey beverages in the 1880s,<sup>204</sup> were reinvented as wholesome treats containing ice cream in the first decades of the twentieth century.<sup>205</sup> By the 1930s, milkshakes and other dairy-based drinks were ubiquitous at malt shops, which served as meeting and gathering spaces replicating the social function of drinking establishments such as bars and saloons.<sup>206</sup>

In the Court’s discourse, milk is a symbol of urban moral reform. If Americans have a quasi-constitutional right to milk, it is not just to any type of milk whatsoever. Constitutionally protected milk must be of a certain quality. By studying the words and metaphors employed in opinions to describe dairy products, we can detect the implicit recognition of a right for Americans to procure milk imagined as a superior moral substance.<sup>207</sup> While health and safety regulation arose in the late nineteenth century because of the poor quality of the urban milk supply, by the twentieth century, the discursive shift to superlatives such as “pure and wholesome” when discussing milk signals a cultural change.<sup>208</sup> Milk was no longer the source of hidden dangers, a carrier of diseases. It was now associated with health and cleanliness, but also with racial, gender, and class hierarchies. Milk’s whiteness and its newly acquired homogeneous aspect resonated with the modernist aesthetic of urban reform, which sought to ensure clean, airy dwellings, and a safe food supply for the growing white middle class.<sup>209</sup> In increasingly crowded cities, where women worked outside the home more frequently

<sup>202</sup> See DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 119 (2010).

<sup>203</sup> See *id.* at 251.

<sup>204</sup> See ADAM RIED, *THOROUGHLY MODERN MILKSHAKES* 14 (2009).

<sup>205</sup> See *id.* at 197 (noting that Charles Walgreen is credited for introducing the milkshake in 1922).

<sup>206</sup> See RAY OLDENBURG, *THE GREAT GOOD PLACE: CAFÉS, COFFEE SHOPS, BOOKSTORES, BARS, HAIR SALONS, AND OTHER HANGOUTS AT THE HEART OF A COMMUNITY* 14–19 (1999) (arguing that “third places” where people can gather, which are neither home nor work, have central social functions).

<sup>207</sup> See *infra* Part II.C–D.

<sup>208</sup> This change had been pinpointed as early as 1912 by Milton Rosenau, the medical director of the U.S. Public Health Service’s Hygiene Division, who wrote: “Milk everywhere and always has been held up as an emblem of purity. The fact that it is the sole food for babies during the first few months of life, its bland nature, and wholesome character, lend countenance to this belief. Its very whiteness helps to give it a good character. It therefore comes as a shock to know that the pure whiteness covers dark dangers and that the land of milk and honey may be a valley of death and disease.” M.J. ROSENAU, *The Milk Question* 6 (1912).

<sup>209</sup> Here, I have in mind the so-called “white architecture” of the modernist “international style,” recognizable for its flat, typically white painted buildings made with modern materials, containing no ornamentation, which became popular in the 1920s in Europe and soon spread to the United States. See Jadwiga Urbanik & Agnieszka Gryglewska, *Colour: an Unknown Feature of Wrocław “Neues Bauen” Architecture*, in *LA RÉCEPTION DE L’ARCHITECTURE DU MOUVEMENT MODERNE: IMAGE, USAGE, HÉRITAGE* 307, 309 (Jean-Yves Andrieux & Fabienne Chevallier eds., 2005).

than ever before and could not always breastfeed, cow's milk provided nutrition at a relatively low price, particularly for children.<sup>210</sup> Milk was a visual icon of progress. It was also a central vector of racial oppression.

In a 1919 address calling for "the necessity of more rapid Americanization of our foreign population," future President Herbert Hoover tied the nation's success to dairy consumption.<sup>211</sup> Pointing out to "proper feeding of children," especially in cities, as the bottom line for population health, he declared, "[t]he white race can not survive without dairy products."<sup>212</sup> A few years later, at the 1923 World Dairy Congress, he declared, "it is not alone the well-being of our people, but it is the very growth and the virility of our race to which you [dairy products and the dairy industry] contribute."<sup>213</sup> Milk appeared endowed with the power to nourish Americans both physically and morally, allowing them alternatively to transcend and to reinforce structural socio-economic and racial inequalities.<sup>214</sup> Justice Murphy's concurrence in a wartime case, which held that Pennsylvania could enforce its milk price regulation even applied to milk sold to the army, is particularly resonant with the nativist rhetoric of dairy jurisprudence:

We are not concerned here with just an ordinary state regulatory statute of non-discriminatory character which affects the federal government in some degree, but with a general measure designed to safeguard the health and well-being of the public by insuring an adequate supply of wholesome milk at stable prices. The preservation of public health is a matter of grave and primary concern to the states and the nation at all times, but even more so in time of war. Then indeed a healthy citizenry is essential to national survival, for the waging of modern "total war", if it is to be done with maximum effectiveness, requires a sound and healthy people, as well as a sturdy fighting force.<sup>215</sup>

Murphy's declaration illustrates how the milk question links the health of individuals and populations within a territorial system for economic and

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<sup>210</sup> Cf. Block, *supra* note 12, at 20, 21 (analyzing the economy of milk as a cheap source of nutrients during the Progressive Era).

<sup>211</sup> The speech was subsequently published as Herbert Hoover, *Unto the Least of These: Child Welfare as the Foundation of Democracy—Right Feeding Corrects Wrong Thinking*, 44 *SUNSET* 24 (Feb. 1920).

<sup>212</sup> *Id.* Note that since his days as the head of the United States Food Administration, Hoover had been an early follower of biochemist Elmer McCollum and his milk gospel. See VALENZE, *supra* note 7, at 259. See also *infra* note 214 and accompanying text.

<sup>213</sup> WHITE HOUSE, *supra* note 143, at xxxviii.

<sup>214</sup> See, e.g., 62 *CONG. REC.* 7607 (1922) (during the debates leading to the adoption of the 1923 Filled Milk Act prohibiting the interstate shipment of milk mixed with non-dairy substances, Rep. Gernernd construed such milk as "impure" and "unwholesome": "the Nation prospers and advances in proportion as its population conserves its physical strength. The vitality of the race is dependent upon the health of the parent and the care with which infants are nourished.").

<sup>215</sup> *Penn Dairies, Inc. v. Milk Control Comm'n of Pa.*, 318 U.S. 261, 279 (1943) (Murphy, J., concurring) (citation omitted).

political security.<sup>216</sup> Through its language of health, purity, and hygiene, the Court constructs milk as a biological tool for the control of the nation. Milk is not only needed as a literal food to feed the nation's children and soldiers, but also, and perhaps most importantly, as a metaphorical substance which can purify and reform American society as a whole, from its military personnel to its growing class of urbanites to its immigrants. Biochemist and dairy lobbyist Elmer McCollum, who was later cited in *Carolene*,<sup>217</sup> testified before the House Committee on Agriculture in advance of Congress' discussion of what became the 1923 Filled Milk Act.<sup>218</sup> He asserted that milk consumption could change the body of immigrants originating from non-drinking cultures:

Look at the Japanese—a small and physically inferior people. The Japanese children born in California in the last 15 years are larger in both sexes and in all ages, notably larger, than are the children of Japanese born in Japan. Why? Just because the diet of America is a better diet than the diet of Japan.<sup>219</sup>

Echoing this racialized conception of milk, some of the briefs filed in milk litigation before the Supreme Court portray milk through the trope of personification as a quintessentially national good to be guarded against “foreign” imports such as “oriental” coconut oil.<sup>220</sup>

In sum, dairy jurisprudence mirrors the evolution of milk in American society from a marginal and untrusted food product to a beverage so essential that it must be available on a daily basis. But the Court goes further, protecting as a quasi-constitutional right a liquid, which has become identified with the nation's battle against various forms of otherness. The question I address in the next Part is whether this quasi-constitutionalization has benefited Americans equally across multiple axes, including race, gender, and class.

### III. THE UNEQUAL PROTECTION OF MILK

This Part argues that the quasi-constitutionalization of milk is particularly troubling as it is in tension with central constitutional principles such as equal protection, revealing some of constitutional law's inner contradictions. Most strikingly, dairy jurisprudence expresses the embedded socio-eco-

<sup>216</sup> And in fact, twenty years later, in *Paul v. United States*, 371 U.S. 245, 254–55 (1963), the Supreme Court, distinguishing *Penn Dairies*, held that California could not enforce minimum wholesale price regulations for milk sold to the United States at military installations if the milk was solely used for military consumption.

<sup>217</sup> 304 U.S. 144, 150 n.3 (1938).

<sup>218</sup> See H.R. REP. NO. 67-355 to accompany H.R. 8086, 67th Cong. (1921).

<sup>219</sup> 62 CONG. REC. 7587 (1922).

<sup>220</sup> See, e.g., Brief for Ohio at 17, *Hebe Co. v. Shaw*, 248 U.S. 297 (1919). See also Brief for the United States at 33, 58, *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

conomic, gender, and racial preferences of constitutional law. Though for expository purposes this Part examines these axes somewhat separately, the analysis does not essentialize, recognizing that the legal, social, and political framework surrounding milk exacerbates intersectional harm, causing, for example, low-income women and children of color to experience greater harms than other groups.<sup>221</sup>

### A. *Class and Gender Inequities*

One of the effects of the government's massive intervention in the economic and sanitary regulation of milk—intervention which was typically supported by the judiciary—has been to facilitate the transformation of dairying from a small scale, family-centered mode of production to a highly concentrated, male-dominated industry. This shift produced both class and gender inequities: the poorest consumers were arguably harmed in the process and women were displaced from their traditional role as milk providers.

The model of the diverse farming system, which integrates crops and livestock, at stake in the landmark 1942 case *Wickard v. Filburn*,<sup>222</sup> has become nearly extinct in contemporary America. Roscoe Filburn “owned and operated a small farm in . . . Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs.”<sup>223</sup> He also grew wheat “to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding.”<sup>224</sup> As James Chen has pointed out, “*Filburn* drove the final sinker into the pinewood coffin of the American family farm.”<sup>225</sup> These days, large, specialized food systems dominate the production and distribution of foods. Dairy farm operations have become larger year after year, mirroring huge changes in the production, distribution, and consumption of milk, but also the goals of the federal milk marketing orders upheld by the Supreme Court. Milk evolved from being primarily an item produced on a nearby farm or in one's own backyard to being an industrialized liquid handled by a long chain of processors and distributors. While farms that counted a dozen cows were average in the 1940s,<sup>226</sup> today a middle-sized farm tends to have hundreds of cows, with the largest farms counting over 15,000 cows.<sup>227</sup>

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<sup>221</sup> See generally Harris, *supra* note 33 (discussing the concept of intersectionality in critical race theory); Crenshaw, *supra* note 33 (same).

<sup>222</sup> 317 U.S. 111 (1942).

<sup>223</sup> *Id.* at 114.

<sup>224</sup> *Id.*

<sup>225</sup> Chen, *supra* note 87, at 105.

<sup>226</sup> See KENDRA SMITH-HOWARD, PURE AND MODERN MILK: AN ENVIRONMENTAL HISTORY SINCE 1900, at 108 (2014).

<sup>227</sup> See JAMES M. MACDONALD ET AL., U.S. DEP'T AGRIC., ECONOMIC RESEARCH REPORT NUMBER 47, PROFITS, COSTS, AND THE CHANGING STRUCTURE OF DAIRY FARMING 2 (2007).

Milk production was once a family farm affair, spearheaded by females. Milk—both human and animal—has been at times an agent of power and identity for women.<sup>228</sup> In cultures where they were otherwise oppressed, nursing babies and dairying represented zones of relative autonomy in which female expertise and economic contribution was recognized.<sup>229</sup> For centuries, dairy production, especially when it was a household's principal economic activity, made the wife's role preeminent, while the husband's authority was relegated to raising cattle. Sociologist Pierre Boisard has shown that in the nineteenth century, when dairy production became industrialized in rural France, men were at first unable to "resign themselves" to dairy work due to its feminine connotation.<sup>230</sup> At the turn of the century, milk was reconstructed as masculine rather than feminine, becoming the realm of distant experts and industrialists. Women's dairy work came under attack as incompatible with sanitary and profit-oriented methods.<sup>231</sup> The health reform movement, conjoined with industrialization, led male workers to take over milk production under the supervision of male veterinarians, doctors, scientists, dairy inspectors, handlers, distributors, wholesalers, and retailers.<sup>232</sup>

The ideology of "scientific motherhood," which developed during the same period, exhorted women to feed their infants animal milk and formula composed by male doctors and manufacturers rather than breastfeeding.<sup>233</sup> As I have argued elsewhere, the rise of animal milk as a ubiquitous food product has gone hand in hand, historically, with declining rates in breastfeeding and the development of alternative infant feeding methods.<sup>234</sup> Animal milk was first promoted as a substitute for breastfeeding among poor

<sup>228</sup> Historically, breastfeeding has also been an instrument of oppression calling for the exploitation of typically single, poor, immigrant and/or minority women as wet nurses, when they were not already enslaved. See Mathilde Cohen, *Regulating Milk: Women and Cows in France and the United States*, 65 AM. J. COMP. L. (forthcoming 2017) (describing certain aspects of wetnursing as a form of intersectional oppression).

<sup>229</sup> See, e.g., JANET GOLDEN, *A SOCIAL HISTORY OF WET NURSING IN AMERICA: FROM BREAST TO BOTTLE* 44 (1996) (reporting that "Antebellum mothers in the urban North . . . found in breast-feeding a source of power, self-esteem, and autonomy."); Cara Anzilotti, *Autonomy and the Female Planter in Colonial South Carolina*, 63 J. S. HIST. 239, 263–64 (1997) (describing South Carolina female planters' role in the plantation enterprise, which included dairying).

<sup>230</sup> See PIERRE BOISARD, *CAMEMBERT: A NATIONAL MYTH* 46 (2003).

<sup>231</sup> See generally Deborah Valenze, *The Art of Women and the Business of Men: Women's Work and the Dairy Industry c. 1740–1840*, 130 PAST & PRESENT 142 (1991) (analyzing discussions on women and dairy work which reflect contemporary understandings of gender).

<sup>232</sup> See generally Daniel R. Block, *Saving Milk Through Masculinity: Public Health Officers and Pure Milk, 1880–1930*, 13 FOOD & FOODWAYS 115, 115 (2005) (arguing that in the early twentieth and late nineteenth centuries, "male public health officers took control of a substance that, because of its association with women and child-rearing, was considered feminine").

<sup>233</sup> See Rima D. Apple, *Constructing Mothers: Scientific Motherhood in the Nineteenth and Twentieth Centuries*, 8 SOC. HIST. MED. 161, 161 (1995) ("Scientific motherhood is the insistence that women require expert scientific and medical advice to raise their children healthfully.")

<sup>234</sup> See Cohen, *supra* note 228.

working mothers who could not nurse their babies themselves and were unable to afford the services of a wet nurse.<sup>235</sup> Animal milk and formula later became the first choice for middle-class mothers who followed their doctor's recommendations and believed in the superiority of scientifically engineered milk. Women were thus doubly excluded from milk: pushed out of the dairy and discouraged from nursing their own children. The justification for their ouster was similar in both instances: male-dominated science and technology had devised more hygienic and efficient methods of producing milk, putting "modern" dairymen, a period term for dairy farmers, in charge. The gender role reversal is particularly striking considering the etymology of the word "dairy," which comes from the Middle English *dey*, which meant female servant.<sup>236</sup> Women's displacement was also a state issue. As geographer Daniel Block has pointed out, milk "was separated from its female origins through technology and regulation."<sup>237</sup> No longer viewed as a "private," family affair, milk had become a matter of "public" interest, as evidenced in its near public utility status, which justified male takeover.<sup>238</sup> It is under this male leadership that cow's milk could become truly "pure and wholesome":

<sup>235</sup> See Block, *supra* note 232, at 120.

<sup>236</sup> See MARGARET VISSER, MUCH DEPENDS ON DINNER: THE EXTRAORDINARY HISTORY AND MYTHOLOGY, ALLURE AND OBSESSIONS, PERILS AND TABOOS, OF AN ORDINARY MEAL 87 (1986).

<sup>237</sup> Block, *supra* note 232, at 115.

<sup>238</sup> See sources cited *supra* notes 168–71 and accompanying text. The evolution of milk's legal, cultural, and political status illustrates the classic gender divide between the private and the public realms, whereby women are supposed to be confined to the "private sphere" defined by the home, while the rest of the world, defined as "public," belongs to men. See generally Susan B. Boyd, *Challenging the Public/Private Divide: An Overview*, in CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW, AND PUBLIC POLICY 3–33 (Susan B. Boyd ed., 1997) (examining both the history and current dynamics of the public/private divide). This distinction between two separate and mutually exclusive spheres has arguably been construed *in order to* produce and reinforce the gender binary and gender segregation, all the while subordinating "women" by circumscribing them to the private sphere. See generally *id.* But if milk has become an increasingly public, masculinized substance, milk producers, i.e., cows, have remained hidden from the public gaze, confined to the "privacy" of their farms under the dominion of their owners, much like generations of women before them were confined to the privacy of their home under the dominion of their husbands. This private status may explain in part why American law fails to protect their well-being. Farm animals, including dairy animals, are famously excluded from the definition of the word "animal" in the Animal Welfare Act, 7 U.S.C. § 2132 (2013). Along similar lines, state cruelty laws typically leave farm animals unprotected under customary farming practices exceptions and exemptions. See David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205–07 (Cass R. Sunstein & Martha C. Nussbaum, eds., 2004). So-called "ag-gag" state laws, which prohibit undercover reporting on farms without their owners' consent, have proliferated, further reinforcing dairy animals' "private" status. See generally Jessica Pitts, "Ag-Gag" Legislation and Public Choice Theory: Maintaining a Diffuse Public by Limiting Information, 40 AM. J. CRIM. L. 95 (2013) (describing various ag-gag regimes as advancing the food industry). In sum, the more ubiquitous and visible milk has become in American culture, the more invisible and hidden cows' labor and suffering has become.

a disembodied liquid, divorced from the dangerous and impure female body that had generated it.<sup>239</sup>

Women were not the only victims of the privileged legal status of milk in American society. Consumers, especially poor consumers, were particularly affected by the government and the judicial support of the dairy industry.<sup>240</sup> Federal and state interventions typically aimed to rationalize dairy markets and to prevent price-cutting. Since the Agricultural Marketing Agreement Act of 1937, the federal scheme of “dairy regulation [has] levie[d] the heaviest taxes against poorer people to subsidize mainly richer farmers,”<sup>241</sup> and was consistently upheld by the Court.<sup>242</sup> According to Daniel Farber, the dairy industry is a paradigmatic example of “rent-seeking special interests,” meaning that the government is subsidizing dairy farmers and passing the cost on to consumers and taxpayers in the form of higher milk prices and programs such as food stamps and school lunches.<sup>243</sup> This is still true today, according to libertarian Judge Janice Rogers Brown sitting on the D.C. Circuit, who declared in a 2012 concurrence that federal milk regulation has “thwarted the free market, and ultimately hurt consumers, to protect the economic interests of a powerful faction.”<sup>244</sup>

A particularly striking illustration of the class bias inherent in dairy jurisprudence can be found in the war on oleomargarine and other non-dairy substitutes, which was waged both inside and outside the courtroom. As discussed earlier, starting at the turn of the century, the dairy industry lobbied the state and federal governments to restrict the production and sale of mar-

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<sup>239</sup> Note that a similar process has been at work since the early 1900s via the quest to medicalize human milk. With the invention of human milk banks and the growing scientific research on infant feeding, human milk was reinvented as a medical substance produced under the auspices of male science and scientists. See Cohen, *supra* note 228.

<sup>240</sup> *Nebbia* is a particularly compelling illustration. In that case, the Supreme Court determined that the state of New York could regulate the price of milk for farmers, dealers, and retailers. *Nebbia v. New York*, 291 U.S. 502, 538–39 (1934). This meant that the New York Milk Control Board could continue its price-fixing policy despite the fact that it could be fashioned to benefit dairy dealers over farmers and consumers. See Manley, *supra* note 128, at 12 (conceding that the first Milk Board orders had only “fixed minimum prices to be charged by milk dealers and stores in their sales to consumers. . . . Not until May did the Board take the further steps of fixing minimum prices that dealers must pay farmers”).

<sup>241</sup> Robert Tempest Masson & Philip M. Eisenstat, *The Pricing Policies and Goals of Federal Milk Order Regulations: Time for Reevaluation*, 23 S.D. L. REV. 662, 663 (1978).

<sup>242</sup> The first test came with *United States v. Rock Royal Co-Op*, 307 U.S. 533, 581 (1939) (upholding the Act). See also John M. Crespi, *Generic Advertising’s Long History and Uncertain Future*, in *THE ECONOMICS OF COMMODITY PROMOTION PROGRAMS: LESSONS FROM CALIFORNIA* 48 (Harry M. Kaiser et al. eds., 2005) (pointing out the strength of the Court’s decision in *Rock Royal Co-Op*, evidenced by “the fact that there would be no serious challenge to the constitutionality of the AMAA [Agricultural Marketing Agreement Act] for nearly fifty years”).

<sup>243</sup> Daniel A. Farber, *Positive Theory as Normative Critique*, 68 S. CAL. L. REV. 1565, 1571 (1995).

<sup>244</sup> *Hettinga v. United States*, 677 F.3d 471, 482 (D.C. Cir. 2012) (Brown, J., concurring).

garine, filled milk, and other non-dairy substitutes, which could be produced and sold more cheaply than milk products. Given their price differential, however, dairy and non-dairy products served different sections of the population. “Margarine consumers were poor, unorganized and relatively powerless,” wrote a commentator in the 1940s.<sup>245</sup> This was such common knowledge at the time that the question of how the federal tax on margarine would impact the laboring class was discussed during the legislative debates leading up to the adoption of the 1886 Oleomargarine Act.<sup>246</sup> There were those who agreed with representative Hopkins who declared, this “is legislation against the laboring man; . . . [ ]margarine is the poor’s man butter, and to tax it is to take the amount of the tax out of his hard earnings.”<sup>247</sup> But the majority of congresspersons apparently sided with Representative Frederick, who asked, “[w]here is the man, be he ever so poor, who will buy a compound of villainous mixtures knowingly for food for his family?”<sup>248</sup>

In one sense, the debate is still open given the continued vitality of the butter wars. Throughout the past century, the roles of the villain and the hero have switched several times. I, for one, grew up at a time when butter was blamed for all sorts of health conditions, including heart disease, while margarine was praised for its healthfulness. Since then, margarine has experienced a formidable reversal of fortune, while butter has been absolved from most of its sins.<sup>249</sup> Did the Oleomargarine Act deprive Americans of an affordable source of nutrition or did it (temporarily) spare them from the ill effects of highly processed foods and trans fats? Contemporary legal commentators tend to think that anti margarine and filled milk activism penalized indigent Americans.<sup>250</sup> Geoffrey Miller notes, for example, that the effect of the *Carolene Products* decision, which upheld the federal ban on filled milk, was “to deprive working and poor people of a healthful, nutritious, and low-cost food; and to impair the health of the nation’s children by encouraging the use as baby food of a sweetened condensed milk product that was 42 percent sugar.”<sup>251</sup>

Another illustration of the socio-economic effects of dairy jurisprudence is what one could call the “dumping” of dairy products onto the economically disadvantaged resulting from the promotion and protection of milk by the government, in particular through federal nutrition assistance programs such as food stamps, school lunches, the Special Milk Program, and the Nutritional Assistance Program for Women, Infants, and Children

<sup>245</sup> Ball & Lilly, *supra* note 178, at 491; *see also* W. T. Mickle, *Margarine Legislation*, 23 J. FARM. ECON. 567, 580 (1941).

<sup>246</sup> *See, e.g.*, 17 CONG. REC. 4901 (1886).

<sup>247</sup> 17 CONG. REC. 4869 (1886).

<sup>248</sup> 17 CONG. REC. 4901 (1886).

<sup>249</sup> *See, e.g.*, Richard W. Hartel & AnnaKate Hartel, *Butter or Margarine?*, in *FOOD BITES* 55 (Richard W. Hartel & AnnaKate Hartel, eds., 2008) (summarizing the current nutritional orthodoxy on butter versus margarine).

<sup>250</sup> *See, e.g.*, Ball & Lilly, *supra* note 178, at 491.

<sup>251</sup> Miller, *supra* note 14, at 399.



(WIC).<sup>252</sup> The Supplemental Nutrition Assistance Program, formerly known as the Food Stamp Program, was first created in 1939 with the explicit goal of matching farm surpluses, such as milk surpluses, with poor urban families.<sup>253</sup> From the program's inception, some stamps were restricted to foods that the United States Department of Agriculture (USDA) had listed as surplus, including milk.<sup>254</sup> In a similar vein, since the establishment of the National School Lunch Program in 1946, the government has required that fluid milk be offered as part of meals eligible for federal reimbursement.<sup>255</sup> The Special Milk Program "was established in 1954 to support dairy prices by providing for increased fluid milk consumption by children" in schools and childcare institutions that do not participate in other Federal meal service programs.<sup>256</sup> Yet another example of milk favoritism lies in WIC, which was authorized in 1972 to provide subsidies for specific nutrient-rich foods for women and children.<sup>257</sup> Only certain foods are eligible, including fluid, cultured, evaporated or dry milk, and cheese.<sup>258</sup>

These programs and others have contributed to making milk products widely available to underprivileged families. But are these the types of foods Americans need? The programs are heavily tilted toward industrially pro-

<sup>252</sup> Another way of maintaining milk prices in the postwar period took the form of disposing of surpluses via international food aid. See BRUCE A SCHOLTEN, *INDIA'S WHITE REVOLUTION* 122-124 (2010).

<sup>253</sup> See RONALD J. DANIELS & MICHAEL J. TREBILCOCK, *RETHINKING THE WELFARE STATE: THE PROSPECTS FOR GOVERNMENT BY VOUCHER* 45-58 (2005). The program's first administrator, Milo Perkins, declared: "We got a picture of a gorge, with farm surpluses on one cliff, and under-nourished city folks with outstretched hands on the other. We set out to find a practical way to build a bridge across that chasm." See *id.* See also Michael Lipsky & Marc A. Thibodeau, *Feeding the Hungry with Surplus Commodities*, 103 POL. SCI. Q. 223, 223 (1988) (describing the government's distribution of food surpluses, including dairy surplus, to needy families in the 1980s).

<sup>254</sup> See NAT'L ACADS. SCI., *SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: EXAMINING THE EVIDENCE TO DEFINE BENEFIT ADEQUACY* 29 (Julie A. Caswell & Ann L. Yaktine eds., 2013).

<sup>255</sup> See Wiley, *supra* note 26, at 511. Note that the "Special Milk Program" provides milk to children in schools and childcare institutions that do not participate in other federal meal service programs. The program reimburses schools for the milk they serve. *Id.*

<sup>256</sup> JOHN S. ROBINSON, *SPECIAL MILK PROGRAM EVALUATION AND NATIONAL SCHOOL LUNCH PROGRAM SURVEY I* (1978).

<sup>257</sup> See VICTOR OLIVEIRA ET AL., U.S. DEP'T AGRIC., *FOOD ASSISTANCE AND NUTRITION RESEARCH REPORT NUMBER 27, THE WIC PROGRAM: BACKGROUND, TRENDS, AND ISSUES I* (2002).

<sup>258</sup> In recognition of individuals with "special" dietary needs, WIC allows lactose-reduced or lactose-free milk or the substitution of more cheese for milk in its food packages, but in some states it does not allow nondairy substitutes. See Wiley, *supra* note 26, at 511. In others (typically the top soybean-producing states where the soy lobby is strong), soy products are allowed as substitutes provided that recipients present a doctor's note documenting their lactose intolerance. See, e.g., MARYLAND WIC PROGRAM MEDICAL DOCUMENTATION FORM, <http://phpa.dhmh.maryland.gov/wic/SiteAssets/SitePages/wic-hcp/Medical%20Documentation%20Form%2001-2014%20-%201.pdf?Mobile=1> [<https://perma.cc/B8DU-RXCS>]; FLORIDA DEPARTMENT OF HEALTH WIC PROGRAM DOCUMENTATION FOR FORMULA AND FOOD, [http://www.floridahealth.gov/programs-and-services/wic/health-providers/\\_documents/medical-documentation-formula-food.pdf](http://www.floridahealth.gov/programs-and-services/wic/health-providers/_documents/medical-documentation-formula-food.pdf) [<https://perma.cc/CC9B-MXE9>].

duced, pasteurized, and often low-fat milk products rather than humanely, sustainably, and organically produced raw, whole fat dairy products or non-dairy substitutes.<sup>259</sup> Middle class consumers can choose what type of milk to consume, and increasingly turn toward the dizzying range of alternatives to conventional dairy products available these days. But low- or no-income Americans are captive consumers of the subsidized conventional dairy industry.<sup>260</sup> Women and their children are particularly harmed by food aid programs' focus on "giving" foods such as dairy products or infant formula as a form of charity, rather than tackling the structural inequalities that maintain them in a state of food insecurity. Approximately half of all infants born in the United States receive services through WIC.<sup>261</sup> Reports indicate that breastfeeding initiation rates and breastfeeding duration are dramatically lower among WIC participants compared with other mothers.<sup>262</sup> What factors explain the discrepancy? There is a real lack of choice for indigent women and their children. The poorer the mother, the more the state intervenes in her reproductive, parenting, and food choices.<sup>263</sup> Instead of fostering their autonomy by ensuring that they have meaningful choices, poor women are sermonized to breastfeed during their pregnancies,<sup>264</sup> but not provided with the necessary economic, physical, and emotional conditions to do it successfully. Critics also point to the fact that WIC participants have the option to

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<sup>259</sup> See Paul A. Diller, *Combating Obesity with a Right to Nutrition*, 101 GEO. L.J. 969, 977–78 (2013) (noting that federal food aid programs do not care about the quality of the food that is purchased and arguing that in doing so they may promote obesity).

<sup>260</sup> Cf. Helene Hill & Fidelma Lynchehaun, *Organic Milk: Attitudes and Consumption Patterns*, 104 BRITISH FOOD J. 526, 530 (2002) (finding that in the UK, affluent households are more likely to purchase organic milk, a result that is probably replicable in the United States); Angela Renee Katafiasz & Paul Bartlett, *Motivation for Unpasteurized Milk Consumption in Michigan*, 2011, 32 FOOD PROTECTION TRENDS 124, 126 (2012) (finding that most consumers of raw milk are well-educated young adults).

<sup>261</sup> Elizabeth Jensen & Miriam Labbok, *Unintended Consequences of the WIC Formula Rebate Program on Infant Feeding Outcomes: Will the New Food Packages Be Enough?*, 6 BREASTFEEDING MED. 145, 145 (2011).

<sup>262</sup> See Margaret F. McCann et al., *Breastfeeding Attitudes and Reported Problems in a National Sample of WIC Participants*, 23 J. HUM. LACTATION 314, 314 (2007). But see STEVEN CARLSON & ZOË NEUBERGER, WIC WORKS ADDRESSING THE NUTRITION AND HEALTH NEEDS OF LOW-INCOME FAMILIES FOR 40 YEARS 11 (2015), <http://www.cbpp.org/sites/default/files/atoms/files/5-4-15fa.pdf> [<https://perma.cc/5V5J-XYLR>] (showing that due to a variety of initiatives and new incentive structures, breastfeeding rates among WIC participants have significantly increased between 2001 and 2011).

<sup>263</sup> See, e.g., Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 116, 119 (2011) (arguing that reliance on the welfare state makes poor women and their families "public," leading to "gross and substantial intrusion by the government into poor, pregnant women's private lives").

<sup>264</sup> Breastfeeding promotion in WIC programs became federally mandated in 1991. See Laura E. Caulfield et al., *WIC-Based Interventions to Promote Breastfeeding Among African-American Women in Baltimore: Effects on Breastfeeding Initiation and Continuation*, 14 J. HUM. LACTATION 15, 15 (1998). In states such as New York, pregnant patients who rely upon Medicaid, specifically the Prenatal Care Assistance Program, must receive "basic nutrition education and counseling . . . regarding infant feeding choices. Such individualized counseling must address the advantages and disadvantages of breastfeeding." N.Y. COMP. CODES R. & REGS. tit. 10 § 85.40 (f) (5) (iii).

receive infant formula in their monthly supplemental food package, and as a result, *more than half the infant formula used in the United States* is provided through WIC.<sup>265</sup> While few of the social, economic, and cultural obstacles to breastfeeding are being remedied (from the lack of high-quality subsidized childcare, to the inexistence of mandatory fully paid parental leaves, to the inaccessibility to free, qualified, and supportive lactation consultants, to the continued inadequacy of “public” and work spaces to accommodate breastfeeding parents), virtually free formula is provided to low-income families to the detriment of their health and to the benefit of formula companies.<sup>266</sup> This state of affairs is particularly detrimental to a number of racial and ethnic groups suffering from greater incidence of lactase impersistence.<sup>267</sup>

### B. Race and Dietary Guidelines

A particularly disturbing aspect of the quasi-constitutionalization of milk in American legal culture is its impact on racial and ethnic minorities. Official food and nutrition policies recommend milk consumption for all U.S. groups despite variation in adult populations’ abilities to digest milk, which has been documented by medical anthropologists such as Andrea Wiley.<sup>268</sup> To digest fluid milk, humans need an enzyme called lactase to break down lactose into energy; healthy baby mammals naturally produce the enzyme, but at some point in their development lactase production may diminish or stop.<sup>269</sup> Only a minority of the world population maintains lactase activity throughout adulthood, “a condition known as lactase persistence that is as anomalous as a fawn’s keeping its spots once they have served their

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<sup>265</sup> See George Kent, *WIC’s Promotion of Infant Formula in the United States*, 1 INT’L BREASTFEEDING J. 1, 1 (2006).

<sup>266</sup> On the risks of formula feeding for infants, see, e.g., Melinda E. McNiel, et al., *What are the Risks Associated with Formula Feeding? A Re-Analysis and Review*, 37 BIRTH 50, 51–56 (2010). By formula feeding, women also forego benefits to their own health from immediate benefits such as the release of the hormone oxytocin, which prevents postpartum hemorrhage, to long-term benefits such as reduced risk of various cancers. See Alicia Dermer, *A Well-Kept Secret: Breastfeeding’s Benefits to Mothers*, 18 NEW BEGINNINGS 124, 124 (2001).

<sup>267</sup> See Fernando P. Polack et al., *Changing Partners: The Dance of Infant Formula Changes*, 38 CLINICAL PEDIATRICS 703, 704 (1999) (noting that while WIC participants can elect to obtain lactose-free infant formula, the most commonly used formula are made with cow’s milk and that at least until 1999, soy-based formula was the only lactose-free formula available through the program); see generally Kenneth D. R. Setchell et al., *Exposure of Infants to Phyto-Oestrogens From Soy-Based Infant Formulas*, 350 LANCET 23 (1997) (finding that the intakes of isoflavones from soy-based formula might exert adverse effects on infant development, which suggests that parents of lactase impersistent babies may have been stuck between a rock and a hard place when it came to finding a human milk substitute).

<sup>268</sup> See, e.g., ANDREA S. WILEY, *CULTURES OF MILK: THE BIOLOGY AND MEANING OF DAIRY PRODUCTS IN THE UNITED STATES AND INDIA* 25–52 (2014).

<sup>269</sup> *Id.* at 9.

purpose.”<sup>270</sup> What is known today as lactose intolerance (or lactase impersistence) is in fact the default, or “normal” condition for the human species. Yet our language and culture tend to medicalize it and treat it as the deviant condition.

The capacity to digest milk in adulthood is highly correlated with racial and ethnic origin. As Andrea Wiley has pointed out, “[c]ross-culturally, persistence of lactase activity into adulthood correlates with (1) fresh milk consumption; (2) a central role for milk production in the domestic economy; (3) positive evaluation of milk and other dairy products; and (4) physiological capacity to digest and, hence, tolerate lactose.”<sup>271</sup> In practice, the highest rates of lactase persistence “are found only among northern Europeans; South Asians; herding populations of the Middle East, Arabian Peninsula, and sub-Saharan Africa; and descendants of these populations.”<sup>272</sup> This means that many Americans are lactose intolerant, including close to 100 percent of Native Americans,<sup>273</sup> and approximately ninety percent of Asian Americans, seventy-nine percent of African Americans, and seventy-four percent of Mexican Americans.<sup>274</sup> Taken together, the Supreme Court’s sanction of the past and ongoing government support and subsidization of the dairy industry, conjoined with the promotion of dairy products through food and nutrition policies and federally funded nutrition programs reflect a form of “nutritional racism,”<sup>275</sup> which may arise out of intentional discrimination, unconscious biases, structural forces, a total lack of appreciation for population diversity in physiological responses to lactose, or all of the above.

For the first 180 years of the Court’s existence, Justices have almost always been white Protestants,<sup>276</sup> that is, likely to be lactase persistent considering that the highest rates of lactase persistence are found among descendants of northern European populations.<sup>277</sup> Federal and state legislators have been and remain disproportionately (non-Hispanic) white when compared with the U.S. population.<sup>278</sup> This lack of racial and ethnic diversity may explain in part lawmakers and judges’ zealous embrace of milk as an essential element in the diet, revealing an “ethno- or biocentric bias” insofar

<sup>270</sup> MENDELSON, *supra* note 20, at 31 (emphasis omitted).

<sup>271</sup> Wiley, *supra* note 26, at 506.

<sup>272</sup> *Id.* at 507.

<sup>273</sup> DEVON ABBOTT MIHESUAH, *RECOVERING OUR ANCESTORS’ GARDENS: INDIGENOUS RECIPES AND GUIDE TO DIET AND FITNESS* 16 (2005).

<sup>274</sup> See Freeman, *supra* note 21, at 1262.

<sup>275</sup> I borrow the expression from Andrea Freeman. See Freeman, *supra* note 21, at 1268–69.

<sup>276</sup> Louis Brandeis became the first Jewish Justice in 1916; Thurgood Marshall the first African-American Justice in 1967; and Sonia Sotomayor the first Latina Justice in 2009. We are still waiting for the first Native-American and Asian-American Justices.

<sup>277</sup> See Pascale Gerbault, et al., *Evolution of Lactase Persistence: An Example of Human Niche Construction*, 366 *PHIL. TRANS. R. SOC. B* 863, 864 (2011) (pointing out that “[h]igh frequencies of LP [lactase persistence, or the ability to digest the lactose found in fresh milk] are generally observed in northern European populations”).

<sup>278</sup> See ROGER H DAVIDSON, ET AL., *CONGRESS AND ITS MEMBERS* 106–07 (14th ed. 2013).

as their embrace of milk production and consumption neglects the “significance of other biologies.”<sup>279</sup> In a way, as Melanie DuPuis argues, milk embodies “the politics of American identity over the last 150 years,” linking “[t]he perfect whiteness of this food and the white body genetically capable of digesting it.”<sup>280</sup> The medical documentation of lactase impersistence is relatively recent, dating back to the 1960s, with its underlying genetics only worked out in the 1970s.<sup>281</sup> Yet, the ill effects of milk consumption on certain individuals as well as entire population groups had long been recognized.<sup>282</sup> This is particularly true of the adverse effects of milk on African Americans.<sup>283</sup>

As Nicholas Scott Cardell and Mark Myron Hopkins have suggested in their investigation of American slaves’ low milk consumption in the late nineteenth century, the reason why they were allowed to abstain from milk was unlikely their owners’ concern for their dietary preferences, but the realization that milk would make them sick.<sup>284</sup> “Slaves were valuable property, and most masters would have responded by changing the diet accordingly”<sup>285</sup> when faced with the obvious fact that milk was an unsuitable food for them. In the 1850s, the medical and household literature on slave management admonished caution in giving milk to slave children, counseling planters to serve instead buttermilk or milk in soured form, which we now know contain much less lactose than regular milk and are therefore more easily digestible.<sup>286</sup> Historians Kenneth Kiple and Virginia Kiple go as far as to wondering whether “southern planters did not pioneer in recognizing and

<sup>279</sup> Wiley, *supra* note 26, at 506.

<sup>280</sup> DuPuis, *supra* note 27, at 8, 11.

<sup>281</sup> In the United States, lactase impersistence was only discovered in the 1960s, and the genetic explanation was worked out later, in the 1970s. See WILEY, *supra* note 8, at 19–22.

<sup>282</sup> See, e.g., ROBERT L. ANEMONE, *RACE AND HUMAN DIVERSITY: A BIOCULTURAL APPROACH* 135 (2011) (claiming that “[s]ince the time of the ancient Greeks, people have recognized that many adults experience a series of uncomfortable gastrointestinal symptoms after ingesting dairy products”); see also Frederick J. Simoons, *The Traditional Limits of Milking and Milk Use in Southern Asia*, 65 *ANTHROPOS* 547, 547, 552–53 (1970) (pointing out that anthropologists have long recorded “prejudices” against milk as food in the form of disgusted attitudes or taboos in nonmilking Asian and African cultures, which may have a medical basis in populations’ lactose intolerance).

<sup>283</sup> See generally Theodore M. Bayless & Norton S. Rosensweig, *A Racial Difference in Incidence of Lactase Deficiency: A Survey of Milk Intolerance and Lactase Deficiency in Healthy Adult Males*, 197 *JAMA* 968 (1966); Theodore M. Bayless & Norton S. Rosensweig, *Incidence and Implications of Lactase Deficiency and Milk Intolerance in White and Negro Populations*, 121 *JOHNS HOPKINS MED. J.* 54 (1967) (finding based on volunteers from a correctional facility that 70% of healthy adult African-American men but only 10% of European-American adult men had “lactase deficiency”).

<sup>284</sup> See Cardell & Hopkins, *supra* note 58, at 512–13.

<sup>285</sup> *Id.* at 513.

<sup>286</sup> See Kiple & Kiple, *supra* note 58, at 302 n.31 (referencing a series of articles published in the 1850s which recommended that slaves receive milk in soured form); see also M. I. Gurr, *Nutritional Aspects of Fermented Milk Products*, 46 *FEMS MICROBIOLOGY REVS.* 337, 338 (1987) (discussing the lower lactose content of fermented milk products).

treating the problem [of lactase impersistence] in blacks.”<sup>287</sup> East Asian, Southern European, as well as Native American populations’ high rates of lactase impersistence were common knowledge before the 1960s “discovery” of lactase impersistence, as suggested via references in the scientific and medical literature to these populations’ alleged aversion to drinking milk.<sup>288</sup> The notion that milk was an inadequate food for certain racial and ethnic groups was very much part of the background culture, demonstrating that the racial and cultural biases behind milk’s privileged legal position may not be simply fortuitous, unintended consequences.

As hinted at above,<sup>289</sup> at the turn of the century, the promotion of milk in American society was partly motivated by a eugenically minded project. This was a time of nativist hostility and fear of “race suicide” due in part to the growing “foreign stock”<sup>290</sup> of the body politic. The anxiety produced by the presence of the immigrant other was translated into a discourse about “what we eat” versus “what they eat.” Ideas of whiteness, masculinity, and superiority were aligned with food practices, especially meat consumption.<sup>291</sup> A 1902 American Federation of Labor (AFL) pamphlet written to support the renewal of the 1882 Chinese Exclusion Act was thus published under the nutritionally focused title, *Some Reasons for Chinese Exclusion. Meat versus Rice: American Manhood against Asiatic Coolieism. Which Shall Survive?* Chinese workers’ supposed eating habits signaled, according to the authors, AFL president Samuel Gompers and writer Herman Guttstadt, a devaluation of labor and a loss of racial and economic priority for white workingmen.<sup>292</sup> They quoted Senator James Blaine, who had admonished the Senate in 1879:

<sup>287</sup> Kiple & Kiple, *supra* note 58, at 302, n.31.

<sup>288</sup> See, e.g., Isidore Snapper, *Food Preferences in Man: Special Cravings and Aversions*, 63 ANNALS OF THE N.Y. ACAD. OF SCI. 92, 96 (1955) (pointing that the “greater number of the Chinese loathe dairy products as much as the Americans crave them”); DONNA R. GABACCIA, *WE ARE WHAT WE EAT: ETHNIC FOOD AND THE MAKING OF AMERICANS* 124 (1998) (noting that during the interwar period, the lack of interest in milk among Asian and southern European immigrants was “shocking to American sensibilities,” suggesting that it was already widely recognized). See also *infra* notes 289–95 and accompanying text.

<sup>289</sup> See sources cited *supra* notes 208–14 and accompanying text.

<sup>290</sup> Miriam King & Steven Ruggles, *American Immigration, Fertility, and Race Suicide at the Turn of the Century*, 20 J. INTERDISC. HIST. 347, 347–48 (1990) (discussing race suicide and nativism at the turn of the century).

<sup>291</sup> Food, race, and gender identities intersect in many ways. See generally CAROL J. ADAMS, *THE SEXUAL POLITICS OF MEAT: A FEMINIST-VEGETARIAN CRITICAL THEORY* (1990) (showing that emotional concern for farmed animals and the farmed animals themselves have historically been feminized and denigrated, while slaughter and meat-eating are masculinized and celebrated); see also Cathryn Bailey, *We are What We Eat: Feminist Vegetarianism and the Reproduction of Racial Identity*, 22 HYPATIA 39, 39 (2007) (showing how the reproduction of racial and ethnic identities depends upon eating practices, in particular meat consumption).

<sup>292</sup> The anti-Chinese movement, which culminated around the time of the passage of the 1882 Chinese Exclusion Act, presented the Chinese as culturally threatening: supposedly thrifty and abstemious Chinese immigrants were depicted as contributing nothing to the American economy. See generally Rosanne Currarino, “Meat vs. Rice”: *The Ideal of Manly Labor and Anti-Chinese Hysteria in Nineteenth-century America*, 9 MEN & MAS-

You can not work a man who must have beef and bread, and would prefer beef, alongside of a man who can live on rice. In all such conflicts, and in all such struggles, the result is not to bring up the man who lives on rice to the beef-and-bread standard, but it is to bring down the beef-and-bread man to the rice standard.<sup>293</sup>

Eating differently, and being able to subsist “on the most meager food,”<sup>294</sup> without animal products, was seen as threatening. Racial biases toward immigrants and racial minorities found a mirror, and a cure, in milk’s whiteness. The connection between whiteness and milk was not only metaphorical, but also founded on science. The new discipline of nutrition was in part an enterprise aimed at countering “racial degeneracy.”<sup>295</sup> Viewing diet not simply as a matter of personal and cultural taste, but a set of practices governed by inherited biological needs, nutrition experts pushed the notion that certain foods were more adapted than others to the (white) American body. Elmer McCollum, the famed biochemist known for his role in the discovery of vitamins and whom the Supreme Court cites in one of the *Carolene* footnotes, was an overt racist.<sup>296</sup> Since the early 1920s, he had become akin to a professional expert witness on behalf of the dairy lobby, testifying before legislative committees and courts. His “scientific” apology of milk was premised on the supposed superiority of (white) milk-drinking cultures.<sup>297</sup> McCollum “asserted that milk drinkers had always enjoyed cultural and physical superiority over their leaf-chewing cousins.”<sup>298</sup>

This racialized conception of milk was not only widespread among researchers, including social scientists,<sup>299</sup> but it also motivated some of the state and national legislators at the forefront of milk regulation. Representative Edward Voigt of Wisconsin, “America’s Dairyland,” was the author of the 1923 Filled Milk Act, which banned the interstate transport of milk prod-

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CULINITIES 476 (2007) (examining representations of Chinese laborers in the late nineteenth century anti-Chinese literature in America).

<sup>293</sup> SAMUEL GOMPERS & HERMAN GUTSTADT, AM. FED’N LABOR, SOME REASONS FOR CHINESE EXCLUSION: MEAT VERSUS RICE; AMERICAN MANHOOD VERSUS ASIATIC COOLIEISM—WHICH SHALL SURVIVE? 24 (1902).

<sup>294</sup> *Id.* at 27.

<sup>295</sup> *See, e.g.*, WILLIAM S. SADLER, RACE DECADENCE: AN EXAMINATION OF THE CAUSES OF RACIAL DEGENERACY IN THE UNITED STATES 186–88 (1928) (the eugenicist physician committed to eradicating “race decadence” dedicates a section to “the art of eating”). *See also* Rebecca L. Spang, *The Cultural Habits of a Food Committee*, 2 FOOD & FOODWAYS 359, 359–60 (1987) (showing that racial ideas animated the U.S. government’s attempt at instructing its civilian population in what to eat during World War II based on the sciences of nutrition and anthropology).

<sup>296</sup> *See* source cited *supra* note 214 and accompanying text.

<sup>297</sup> *See* DUPUIS, *supra* note 27, at 117–18.

<sup>298</sup> *See* Miller, *supra* note 14, at 421.

<sup>299</sup> *See, e.g.*, Berthold Laufer, *Some Fundamental Ideas of Chinese Culture*, 5 J. RACE DEV. 160, 170 (1914) (linking peoples’ “mental achievements” to milk consumption by noting “a peculiar coincidence that all these peoples of epic songs [i.e., the Indo-Europeans] are also milk-consumers, while those [the Chinese and “all other peoples of eastern Asia”] who abstain from milk are deficient in epic poems”).

ucts compounded with any fat or oil other than milk fat.<sup>300</sup> Voigt was an admirer of McCollum<sup>301</sup> and shared his racism. During the floor debates, Voigt declared:

The superiority of the white race is due to at least to some extent to the fact that it is a milk-consuming race. Natives of tropical countries who use the products of the coconut are stunted in body and mind. I believe that one reason why they are inferior is that they do not use the milk of cows or other animals. We owe a great deal to the dairy cow, a great deal more than the general public gives her credit for. We can not afford to injure the dairy industry; if we do, we injure the Nation.<sup>302</sup>

Other congresspersons subscribed to this opinion. Representative Haugen of Iowa, a Wisconsin native who served as the chairman to the Agriculture Committee, made a point of reading to the House floor excerpts from the transcript of McCollum's committee hearings. According to McCollum's testimony, the "finest people" are found in "those places where milk and dairy products form one of the prominent, the most prominent constituent of the diet," such as "in Europe, in America, and on the plains of Asia."<sup>303</sup> In contrast, McCollum proclaimed, "[l]ook at the Chinaman who does your laundry and see what he is. Almost without exception he is an undersized individual. He is poorly developed physically."<sup>304</sup> Long before the publication of studies documenting lactase's unequal distribution in humans' small intestine in the 1960–70s, the Court's reliance on extralegal data and legislative history reveal that milk had been a substance of choice to govern the biology of a population as a scientific racist project.

In spite of, or perhaps in part because of its racialized construction, throughout the twentieth century, milk acquired a prominent place in official dietary recommendations. More than any other organization or entity, the USDA shaped the way Americans think about a healthy diet. The ubiquity of the USDA *Food Guide Pyramid* exemplifies the Department's influence on American culture.<sup>305</sup> Its guidelines have been widely used in nutrition, health, and education settings, in the media, and in the food industry, appearing on posters, textbooks, in school lunchrooms, food packaging, and the

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<sup>300</sup> See Barry Cushman, *Carolene Products and Constitutional Structure*, 2012 SUP. CT. REV. 321, 354.

<sup>301</sup> See, e.g., 62 CONG. REC. 7581 (1922) (Rep. Voigt remarking: "Doctor McCollum . . . who is probably the greatest expert on nutrition in the world . . . [has shown that t]he vitamins which have been found so necessary for the growth of infants and children and for the grown body as well are absent from this filled milk.").

<sup>302</sup> *Id.* at 7583.

<sup>303</sup> *Id.* at 7587.

<sup>304</sup> *Id.*

<sup>305</sup> See JESSICA J. MUDRY, *MEASURED MEALS: NUTRITION IN AMERICA* 77–103 (2009).



like.<sup>306</sup> They are the basis for federally funded nutrition programs, such as the School Breakfast Program, the National School Lunch Program, food stamps, and the WIC program.<sup>307</sup> The overall presentation of the guidelines significantly evolved over the past hundred years.<sup>308</sup> The early “Basic Seven” food groups mutated into the “Basic Four” before converting into a pyramid divided into six vertical stripes in the 1990s, and since 2011, into the “MyPlate” food circle.<sup>309</sup> Constant throughout these changes has been the salient place afforded to milk products, which have constituted their own food group since the 1940s.<sup>310</sup> The food pyramid (Fig. 1) included a separate category for dairy products, prescribing two to three servings per day. The new design, MyPlate (Fig. 2), is a pie chart split into four sections, for fruit, vegetables, grains and protein. A smaller circle sits beside it for dairy products, with recommended daily amounts varying from two to three cups depending on people’s age. While the food pyramid depicted cheese and other dairy products in the dairy section, the new design, which symbolizes the dairy category via the iconic glass of milk accompanying the American meal, visually emphasizes the prominence of fluid milk. In an effort to simplify its visuals, the USDA now straightforwardly illustrates its long-standing partiality for fluid milk. A welcome evolution of the MyPlate guidelines is to suggest that “[f]or those who are lactose intolerant,” soy milk counts as a “dairy” product. At the same time, the guidelines still recommend that people who do not digest milk nonetheless consume milk products, albeit in “smaller portions” or in “[l]actose-free and lower-lactose” form.<sup>311</sup>

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<sup>306</sup> See U.S. DEP’T AGRIC., AGRICULTURE INFORMATION BULLETIN NUMBER 750, AMERICA’S EATING HABITS: CHANGES AND CONSEQUENCES 43–44 (1999) [hereinafter AIB No. 750].

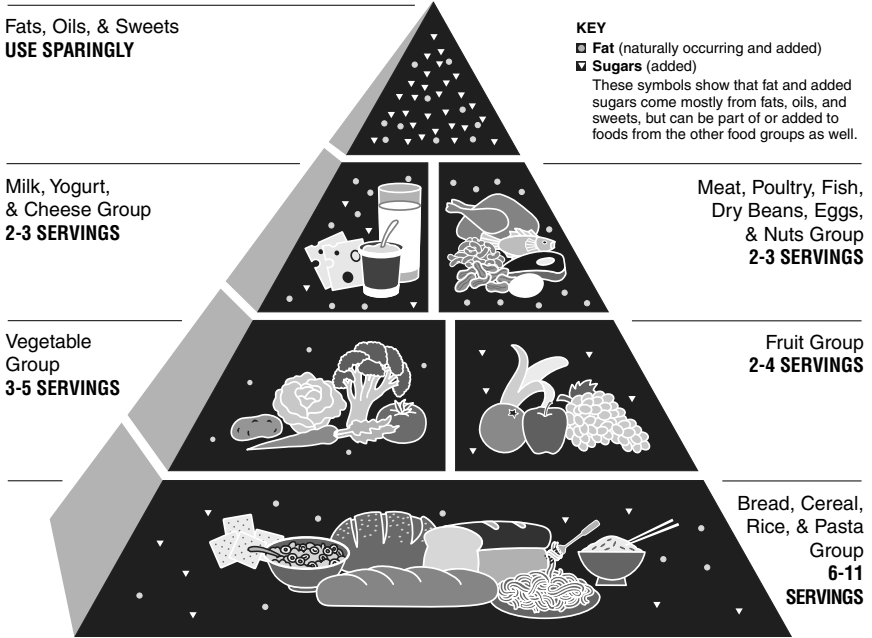
<sup>307</sup> *Id.* at 124.

<sup>308</sup> The earliest dietary guidelines published by the USDA date back to 1894, and the first recommendations addressed to consumers were published in 1916, which emphasized milk among other protein-rich foods. See Susan Welsh, *Atwater to the Present: Evolution of Nutrition Education*, 124 J. NUTRITION 1799S, 1799S–1800S (1994).

<sup>309</sup> For an overview, see AIB No. 750, *supra* note 306, at 36. See also *infra* Figure 2.

<sup>310</sup> See Welsh, *supra* note 308, at 1800S.

<sup>311</sup> See *All About the Dairy Group*, U.S. DEP’T AGRIC., <https://www.choosemyplate.gov/dairy> [https://perma.cc/5KGY-G9N5].



Source: U.S. Department of Agriculture/U.S. Department of Health and Human Services

FIGURE 1 The Food Guide Pyramid. USDA 1992

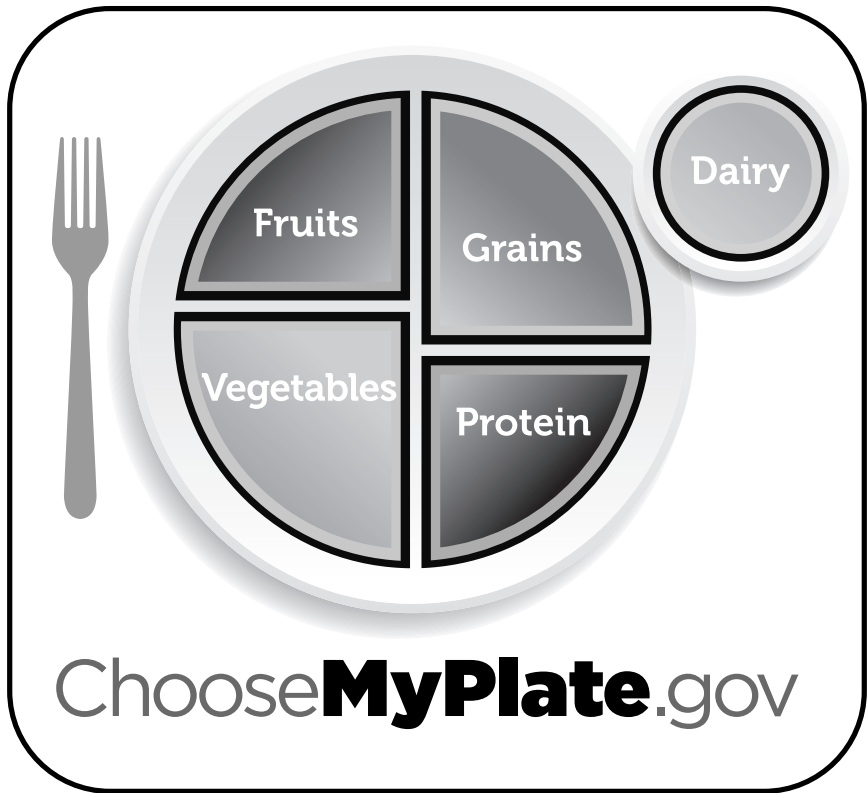


FIGURE 2 *MyPlate*, U.S. DEP'T AGRIC., <https://www.choosemyplate.gov/> MyPlate [<https://perma.cc/QSA7-X6BT>].

This government-sponsored promotion of milk products (along with the subsidization of the dairy industry)<sup>312</sup> “reflect[s] persistent cultural and racial biases that undermine the health status of Americans.”<sup>313</sup> As Andrea Freeman has shown, the omnipresence of dairy products in American society is constitutive of “food oppression,” which she defines as “institutional, systemic, food-related action or policy that physically debilitates a socially subordinated group.”<sup>314</sup> Individuals who already experience multiple levels of structural subordination are also those most negatively affected by dairy

<sup>312</sup> See Wiley, *supra* note 26, at 509 (“The USDA has a dual mandate within the U.S. government: to promote U.S. agricultural interests and to issue food and nutrition guidelines that promote the health of U.S. citizens. That these two missions might be at odds with one another was apparently not considered when the USDA was created. . . . Dairy products make up about 11 percent of U.S. agricultural commodities.”).

<sup>313</sup> Patricia Bertron, Neal D. Barnard & Milton Mills, *Racial Bias in Federal Nutrition Policy, Part 1: The Public Health Implications of Variations in Lactase Persistence*, 91 J. NAT'L MED. ASS'N. 151, 151 (1999).

<sup>314</sup> Freeman, *supra* note 21, at 1253.

jurisprudence,<sup>315</sup> such as “low-income African Americans and Latina/os who live in urban centers dominated by fast food restaurants,”<sup>316</sup> as well as Native Americans for whom “current federal dietary guidelines . . . amount[ ] to, perhaps inadvertently, the nutritional equivalent of smallpox-infected blankets.”<sup>317</sup> In addition, children are typically served milk at public schools and underprivileged families are often given milk products as part of their food aid package.<sup>318</sup> As a result, low-income African Americans and Latina/os who rely in part on government-funded program to meet their nutritional needs are disproportionately harmed by milk’s favored position, particularly women and children who rely on a combination of federal programs such as the Supplemental Nutrition Assistance Program (SNAP), the National School Lunch Program, the School Breakfast Program, and WIC.

As the USDA data indicates, SNAP and WIC participants tend to disproportionately identify (or be identified) as racial and ethnic minorities compared to their distribution in the overall U.S. population.<sup>319</sup> Non Hispanic African Americans are overrepresented among SNAP recipients, comprising 25.8% the program’s households, compared to 12.6% of the general U.S. population.<sup>320</sup> The disproportion is even more striking for the WIC population: 11.1% falls into the American Indian or Alaska native category (compared to 0.8% of the U.S. population), 20.3% into the African American group (compared to 12.6% of the U.S. population), and 41.6% into the Hispanic/Latino group, defined as including whites and non-whites, (compared to 16.6% of the U.S. population).<sup>321</sup> Yet, the program’s administration seems to have been insufficiently responsive to biological and cultural differences. Anthropologists Catherine Kingfisher and Ann Millard have shown that in the clinical setting low income, predominantly African American and

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<sup>315</sup> Historically, the dairy industry has also relied on the exploitation of minority farm workers, with an ethnic shift from black (including African American and Caribbean) to Latino workers in the late twentieth century. See generally MARGARET GRAY, LABOR AND THE LOCAVORE: THE MAKING OF A COMPREHENSIVE FOOD ETHIC (2014) (exposing the exploitative labor practices of Hudson Valley’s small dairy farms that typically employ undocumented Latino immigrants).

<sup>316</sup> Freeman, *supra* note 21, at 1252 (noting that some of the most commonly produced foods in the fast food industry are laden with dairy products).

<sup>317</sup> Devon A. Mihesuah, *Decolonizing Our Diets by Recovering Our Ancestors’ Gardens*, 27 AM. IND. Q. 807, 807 (2003) (quoting Neal D. Barnard & Derek M. Brown, *Commentary: U.S. Dietary Guidelines Unfit for Native Americans*).

<sup>318</sup> See, e.g., David M. Paige, et al., *Milk Programs: Helpful or Harmful to Negro Children?* 62 AM. J. PUB. HEALTH 1486, 1488 (1972) (pointing out, to no avail, that African American children who did not consume the milk distributed at school did so because of the “biological fact of low/levels lactase,” calling “for a reevaluation of the efficacy of our present milk programs”).

<sup>319</sup> See USDA, CHARACTERISTICS OF SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM HOUSEHOLDS: FISCAL YEAR table A.21 at 59 (2015); USDA, WIC PARTICIPANT AND PROGRAM CHARACTERISTICS 2014 FINAL REPORT 24-25 (2015).

<sup>320</sup> See USDA, CHARACTERISTICS OF SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM HOUSEHOLDS: FISCAL YEAR table A.21 at 59 (2015).

<sup>321</sup> See USDA, WIC PARTICIPANT AND PROGRAM CHARACTERISTICS 2014 FINAL REPORT table II.6 at 27 (2015).

Mexican American women are told by nutritionists, nurses and other health professionals to consume dairy products despite their declared aversion to those foods and their trouble digesting milk.<sup>322</sup> They argue that “while in theory the [WIC] program is responsive to biological and cultural differences” and is “designed to accommodate lactose intolerance by providing other dietary advice and other foods for those identified as lactose intolerant,” in practice the interactions they observed “block that route of accommodation.”<sup>323</sup> They conclude that “[t]he assumption that what is appropriate for one segment of the population is also appropriate for everyone else is ethnocentric and can present barriers to effective health care. . . . As a result, a major goal of the prenatal and WIC programs—the nutritional well-being of pregnant women and their offspring—may be undermined.”<sup>324</sup>

More broadly, milk’s place in our legal and cultural institutions may be harmful not only to racial and ethnic minorities and low-income individuals, but also to just about everyone. A growing body of evidence suggests that humans, even those who are lactase persistent, do not need milk in their diets.<sup>325</sup> In fact, most people globally do not consume animal milk in fluid form, but rather as fermented products containing less lactose such as kefir, yogurt, and cheese.<sup>326</sup> More disquieting, a number of studies suggest the existence of links between dairy consumption and a variety of ailments, from autoimmune diseases to low bone density to Type 1 diabetes to some forms of cancer.<sup>327</sup> These claims are highly debated, given that the health effects of dairy consumption would be best determined in randomized controlled trials, which have yet to be performed.<sup>328</sup> Yet, the potential hazards of milk should at least sow the seed of a doubt in the legal recognition of milk as an essential component of the American diet.

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<sup>322</sup> Catherine P. Kingfisher & Ann V. Millard, “*Milk Makes Me Sick but My Body Needs It*”: Conflict and Contradiction in the Establishment of Authoritative Knowledge, 12 *MED. ANTHROPOLOGY Q.* 447, 452, 455 (1998).

<sup>323</sup> *Id.*, at 463.

<sup>324</sup> *Id.*

<sup>325</sup> See Freeman, *supra* note 21, at 1258–60 (summarizing the scientific and medical arguments against milk consumption).

<sup>326</sup> See WILLIAM H. DURHAM, *COEVOLUTION: GENES, CULTURE, AND HUMAN DIVERSITY* 245 (1991) (discussing the hypothesis according to which several world populations circumvented the lactose issue by processing fresh milk into soured and fermented milk products which have reduced lactose concentration).

<sup>327</sup> See generally T. COLIN CAMPBELL & THOMAS M. CAMPBELL II, *THE CHINA STUDY: STARTLING IMPLICATIONS FOR DIET, WEIGHT LOSS AND LONG-TERM HEALTH* (2006) (claiming that there is an association between dairy consumption and chronic diseases in Western populations which are relatively unheard of in places where dairy is not consumed); see also Amy Joy Lanou, *Should Dairy Be Recommended as Part of a Healthy Vegetarian Diet?* *Counterpoint*, 89 *AM. J. CLINICAL NUTRITION* 1638S, 1638S (2009) (presenting evidence suggesting that milk and milk product consumption may contribute to the risk of bone fractures, prostate and ovarian cancers, autoimmune diseases, and some childhood ailments).

<sup>328</sup> For a skeptical review of the anti-milk literature, see generally Peter C. Elwood, et al., *The Consumption of Milk and Dairy Foods and the Incidence of Vascular Disease and Diabetes: An Overview of the Evidence*, 45 *LIPIDS* 925 (2010).

This Part examined the problematic distributional consequences of dairy jurisprudence on the American people, pointing in particular to the gender, racial, and ethnic bias behind America's infatuation with milk. As the next Part highlights, milk's favored status is also damaging to non-human animals and the environment, calling for a reevaluation of our farming and eating practices. In fact, many voices have arisen in the past years, advocating for new ways to produce and consume milk.

#### IV. THE FUTURE OF MILK

The dangers of milk production and consumption are not limited to human health. As this Part argues, they also extend, even more directly, to animal welfare and the environment, making dairy production unsustainable in the long run and requiring alternative ways to produce and consume milk.

##### A. *Animals and the Environment*

Dairy jurisprudence is almost entirely divorced from the reality of milk production, to the point where it appears speciesist, i.e., discriminating against non-human animals. This detachment is typical of our mainstream urban culture, which has not only abstracted itself from agriculture, but also lost its ties to the animal world. As Daniel Block has argued, the distance between lactating animals and milk drinkers has grown so much over time that there is now a "technological wall" separating them.<sup>329</sup> Machine milking has erased the distinctly female origin of milk as a substance extracted from the udder during the calving season. Various forms of processing, such as milk testing for bacteria and viruses or the pooling of milk from multiple cows, have converted an idiosyncratic fluid into a standardized commodity.<sup>330</sup> The increasing scale of dairy farming has replaced cherished domestic animals with anonymous cattle, reflecting the modern invention of the dairy cow as a milk machine.<sup>331</sup> Scientific breeders identified the best "milkers" and accentuated their advantages by breeding.<sup>332</sup> On conventional farms, ef-

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<sup>329</sup> Block, *supra* note 232, at 121.

<sup>330</sup> See ATKINS, *supra* note 195, at 278.

<sup>331</sup> See generally Barbara Orland, *Turbo-Cows: Producing a Competitive Animal in the Nineteenth and Early Twentieth Centuries*, in *INDUSTRIALIZING ORGANISMS: INTRODUCING EVOLUTIONARY HISTORY* 167 (Susan R. Schrepfer & Philip Scranton eds., 2004) (telling the story of European agriculture's engineering of the cow as a "turbo" cow beginning at the end of the nineteenth century).

<sup>332</sup> Holstein-Friesians make up more than 90% of today's U.S. dairy-cow population because their average yield is higher than other breeds. See Kathryn Gillespie, *Sexualized Violence and the Gendered Commodification of the Animal Body in Pacific Northwest US Dairy Production*, 21 *GENDER, PLACE & CULTURE* 1321, 1325 (2014). Some researchers have argued, controversially, that the A1 protein most often found in milk from Holstein cows is linked to lactose intolerance, while the A2 protein, which predominates in other breeds, is more easily digested. See KEITH WOODFORD, *DEVIL IN THE MILK: ILLNESS, HEALTH, AND THE POLITICS OF A1 AND A2 MILK* 47, 161 (2009).

ficient milk production is paramount. Cows have switched from an all-forage diet to a diet of grains, protein, and fat supplements designed to increase yield.<sup>333</sup> Everything they eat is measured and adjusted based on milk output.<sup>334</sup> As a result, today's cows produce considerably more milk than their predecessors—close to a 4-fold increase in one hundred years.<sup>335</sup>

Farm animals and the environment occupy a disfavored position in the legal and cultural hierarchy. With a single exception,<sup>336</sup> none of the milk cases studied for this Article exhibits concern for the welfare or working conditions of cows.<sup>337</sup> The role of dairy cows (and other animals raised for their milk) can be conceptualized as a form of labor, yet an unpaid and involuntary one.<sup>338</sup> Cows produce milk while respecting or resisting rules such as not lying down, not blocking other cows, and not refusing to go into the milking robot.<sup>339</sup> Much like other industries, modern agriculture is based on the principle of division of labor, with animals and farmers having become specialized—hence the unprecedented separation between dairy and beef cattle.<sup>340</sup> The first are raised for milk while the second are destined to become meat.<sup>341</sup> Today, farm animals are “workers operating in the shadows, an ultraflexible underproletariat, exploitable and destructible at will.”<sup>342</sup> An even more radical, posthumanist view of dairying defined by a substantive focus on animals would point out that all forms of dairying, be it small-scale and supposedly humane or large-scale and intensive constitute a violent form of gendered speciesism.<sup>343</sup> Ecofeminists argue that oppression is intersectional; in particular some of the ways in which women are exploited and

<sup>333</sup> See, e.g., JOHN R. CAMPBELL & ROBERT T. MARSHALL, *DAIRY PRODUCTION AND PROCESSING: THE SCIENCE OF MILK AND MILK PRODUCTS* 112 (2016) (discussing the effects of high-grain, low-forage diets on dairy cows).

<sup>334</sup> The goal is to improve “productive efficiency,” defined as milk output per feed resource input. See, e.g., PHILIP C. GARNSWORTHY, *NUTRITION AND LACTATION IN THE DAIRY COW* 217–18 (1988).

<sup>335</sup> See M. J. VandeHaar & N. St-Pierre, *Major Advances in Nutrition: Relevance to the Sustainability of the Dairy Industry*, 89 J. DAIRY SCI. 1280, 1280–81 (2006).

<sup>336</sup> See *Balt. & Ohio Sw. R.R. Co. v. United States*, 220 U.S. 94, 105–06 (1911) (finding that a railroad violated a federal law meant to prevent cruelty to livestock during transfer).

<sup>337</sup> It should be noted that the Court recently invalidated a federal statute criminalizing the commercial production, sale, or possession of depictions of cruelty to animals as a violation of freedom of speech. See *United States v. Stevens*, 559 U.S. 460, 495 (2010).

<sup>338</sup> On the idea that animals have become anonymous “workers,” see generally Jocelyn Porcher & Tiphaine Schmitt, *Dairy Cows: Workers in the Shadows?*, 20 *SOC'Y & ANIMALS* 39 (2012).

<sup>339</sup> See *id.* at 46.

<sup>340</sup> On the specialization of dairy farming and dairy cows in particular, see Orland, *supra* note 331, at 169, 177.

<sup>341</sup> But there are interconnections, given that the male offspring of dairy cows often ends up as veal meat. See, e.g., LISA KEMMERER, *SISTER SPECIES: WOMEN, ANIMALS AND SOCIAL JUSTICE* 174 (2011).

<sup>342</sup> Porcher & Schmitt, *supra* note 338, at 42.

<sup>343</sup> See, e.g., Greta Gaard, *Toward a Feminist Postcolonial Milk Studies*, 65 *AM. Q.* 595, 595–96 (2013) (critiquing the appropriation of women and animals' milk from an ecofeminist, postcolonial perspective).

harmed resemble the way in which other female animals are.<sup>344</sup> A striking example of this intersection is found in milk. Taking the milk of another female, whether human or non-human, exploits her reproductive and productive labor (and has devastating effects on her offspring—children and calves).<sup>345</sup>

Dairy cows live particularly miserable lives. Their reproductive labor is manipulated to produce food. Because milk consumption has become central to people's diet, its production is no longer governed by the calendar of nature. Left to their own devices, cows give birth to calves in the spring and lactate from the time their calf is born until the fall.<sup>346</sup> To ensure uninterrupted milk supply, however, cows are now kept in lactation year round through an endless cycle of pregnancies.<sup>347</sup> Though a cow could go for several years on one lactation cycle through continuous milking, dairy farmers use artificial insemination to keep them at peak lactation.<sup>348</sup> In addition, cows are subject to a host of brutal treatments, including being separated from their calves at birth, kept in confinement, and suffering painful lesions from constant mechanized milking.<sup>349</sup> As a result, their life expectancy is shorter today than it ever was: while a cow's natural lifespan is about twenty to twenty-five years,<sup>350</sup> dairy cows used in the dairy industry are typically killed after four or five years when they are "spent" from near-constant pregnancies and lactation.<sup>351</sup>

Yet another overlooked consequence of milk's quasi-constitutionalization is its environmental impact, considering reports according to which cows' emissions of greenhouse gases, methane, and nitrous oxide are more damaging to the planet than carbon dioxide from cars.<sup>352</sup> Dairy production

<sup>344</sup> See, e.g., CAROL J. ADAMS & JOSEPHINE DONOVAN, *ANIMALS AND WOMEN: FEMINIST THEORETICAL EXPLORATIONS* 1–7 (1995) (a collection of pioneering essays exploring the connections between feminism and the status of animals).

<sup>345</sup> See generally Cohen, *supra* note 228 (systematically comparing the treatment of women and cows in relation to their milk).

<sup>346</sup> See VALENZE, *supra* note 7, at 35.

<sup>347</sup> See, e.g., Gillespie, *supra* note 332 at 1326–27 (describing this cycle).

<sup>348</sup> See *id.*

<sup>349</sup> See generally Sherry F. Colb, "Never Having Loved at All": An Overlooked Interest That Grounds the Abortion Right, 48 CONN. L. REV. 933 (2016) (comparing dairy cows' forced pregnancies and separation from their calves to one of the interests protected by the right to abortion—women's interest in avoiding the trauma of giving birth to a baby only to have to be separated from that baby).

<sup>350</sup> Greta Gaard, *Toward a Feminist Postcolonial Milk Studies*, 65 AM. Q. 595, 603 (2013).

<sup>351</sup> See, e.g., Gillespie, *supra* note 332, at 1325–27 (giving an eye-opening account of the abysmal typical life of a dairy cow on a Northwest American intensive farm).

<sup>352</sup> See, e.g., Tara Garnett, *Livestock-Related Greenhouse Gas Emissions: Impacts and Options for Policy Makers*, 12 ENVTL. SCI. & POL'Y 491 (2009) (discussing the impact of "livestock production" and "livestock products" on greenhouse gas emissions); Geoffrey Lean, *Cow 'Emissions' More Damaging to Planet than CO2 from Cars*, INDEPENDENT (Dec. 9, 2006), <http://www.independent.co.uk/environment/climate-change/cow-emissions-more-damaging-to-planet-than-co2-from-cars-427843.html> [https://perma.cc/5FR8-32FL].



creates a series of environmental hazards, including water use and waste output,<sup>353</sup> carbon emission,<sup>354</sup> destabilized soil structures and increased soil erosion,<sup>355</sup> and increased fossil fuel consumption<sup>356</sup>. Dairy farming's toll on natural resources suggests that, beyond speciesism, there may be an anti-environmental bias in milk's legal and cultural status. The passion for milk is inseparable from a dualist and instrumental construction of nature and animals as ultimate "others," which exist to serve humans. Against this backdrop of intersectional oppression, it is time for the courts to acknowledge the rise of alternative milk cultures in the United States.

### B. *Multiple Milks*

Anthropologists have long shown that humans construct their foodways within limits set by biology, economics, and psychology. Law too plays a crucial role in determining what we eat and drink and how we conceptualize food. In that sense, legal and cultural constructions of food are inseparable. Through its dairy jurisprudence, the Supreme Court has been at the forefront of the moral and political construction of milk in American society. By endorsing milk as a central component of American life and health, it has bequeathed to us an implicit definition of what "milk" is. What does the law call milk? A dairy, industrial, and sanitized liquid. This "legal" milk is animal milk (mostly from cows) rather than human or plant-based milk. It is industrially produced, with the majority of milk consumed in the United States coming from large commercial dairies.<sup>357</sup> It is a highly processed beverage, typically pasteurized, homogenized, and fortified, resulting in a bland taste and uniform appearance.<sup>358</sup> There is a mismatch, however, between the legal and popular discourse on milk and a series of competing voices laying

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<sup>353</sup> Cows excrete excess nutrients including nitrogen and phosphorus, two major environmental pollutants. See, e.g., Darrell J. Bosch, Mary Leigh Wolfe & Katharine F. Knowlton, *Reducing Phosphorus Runoff from Dairy Farms*, 35 J. ENVTL. QUALITY 918, 918 (2006).

<sup>354</sup> Livestock metabolism emits carbon dioxide, one of the major sources of greenhouse gas emissions. See, e.g., NAT'L RESEARCH COUNCIL, AIR EMISSIONS FROM ANIMAL FEEDING OPERATIONS: CURRENT KNOWLEDGE, FUTURE NEEDS (2003).

<sup>355</sup> Cultivation of agricultural land to produce feed is associated with soil erosion. See, e.g., David R. Montgomery, *Soil Erosion and Agricultural Sustainability*, 104 PROC. NAT'L ACAD. SCI. 13268, 13269 (2007).

<sup>356</sup> Energy is required from fossil fuels for cropping and electricity for milk production, see, e.g., J. L. Capper, R. A. Cady & D. E. Bauman, *The Environmental Impact of Dairy Production: 1944 Compared with 2007*, 87 J. ANIMAL SCI. 2160, 2165 (2009).

<sup>357</sup> See Mark Kurlansky, *Inside the Milk Machine: How Modern Dairy Works*, MODERN FARMER (Mar. 17, 2014), <http://modernfarmer.com/2014/03/real-talk-milk> [<https://perma.cc/C62G-LUYJ>] (describing the state of the current American dairy industry).

<sup>358</sup> See generally Heather Paxson, *Post-Pasteurian Cultures: The Microbiopolitics of Raw-Milk Cheese in the United States*, 23 CULTURAL ANTHROPOLOGY 15 (2008) (using the concept of microbiolitics to analyze the dairy industry and consumers' "Pasteurian" hygienic attitudes toward the milk used for cheese-making).

claims to what milk should be.<sup>359</sup> Over the last century milk has been paraded as a substance supposedly uniting a diverse polity in its superior nutritional value and universal availability, but it has become highly contested.<sup>360</sup>

While cow's milk consumption is plummeting<sup>361</sup> and the general public is changing its perception of milk,<sup>362</sup> the federal courts have maintained a pro-milk stance in line with dairy jurisprudence. In 2007, the Court of Appeals for the District of Columbia tossed the claims of a group of lactose-intolerant milk drinkers<sup>363</sup> who argued that D.C. milk sellers should have informed consumers about the possible risks of lactose intolerance.<sup>364</sup> Refusing to engage plaintiffs' contention "that the extent to which people suffer from this condition has been minimized by the milk industry and 'the government's marketing efforts,'" <sup>365</sup> the three-judge panel ruled that "[a] bout of gas or indigestion does not justify a race to the courthouse."<sup>366</sup> Though allergy warnings have become ubiquitous on food items, the panel agreed with the lower court that tort law does not provide protection from the obvious or "widely known" risks of consuming a particular food.<sup>367</sup> It concluded that D.C. may not require labeling requirements for milk different from those the federal law imposes, concurring with the district court that "because lactose intolerance is a widely known condition and results in less severe symptoms than many common allergies (such as shellfish allergies), there is no duty to warn of the risk of consuming milk."<sup>368</sup> In so doing, the

<sup>359</sup> See *id.* at 32 (critiquing the dominant hygienic, large scale approach to milk); see also Gaard, *supra* note 350, at 595–99 (advocating against the consumption of animal milk from an ecofeminist perspective).

<sup>360</sup> For an illustration of milk's growingly controversial status in popular culture, see generally Josh Harkinson, *The Scary New Science That Shows Milk Is Bad for You*, MOTHER JONES (2015), <http://www.motherjones.com/environment/2015/10/dairy-industry-milk-federal-dietary-guidelines> [<https://perma.cc/97JY-TAZP>] (presenting the mounting scientific evidence against milk drinking and denouncing the government's collusion with the dairy industry).

<sup>361</sup> See Roberto A. Ferdman, *The Mysterious Case of America's Plummeting Milk Consumption*, WASH. POST (Jun. 20, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/06/20/the-mysterious-case-of-americas-plummeting-milk-consumption> [<https://perma.cc/P4EF-LRWT>].

<sup>362</sup> See Harkinson, *supra* note 360.

<sup>363</sup> Ten plaintiffs brought a putative class action on behalf of "all those lactose intolerant persons who, unaware of their condition, have purchased milk in Washington, D.C., and suffered the consequences of their condition." *Mills v. Giant of Md., LLC*, 441 F.Supp.2d 104, 105 (D.D.C. 2006).

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> *Mills v. Giant of Md., LLC*, 508 F.3d 11, 12 (D.C. Cir. 2007).

<sup>367</sup> The *Mills* court noted that, "[i]n the food context . . . tort-law principles foreclose failure-to-warn liability when the risk that some people might have an adverse reaction to the food is 'widely known.'" *Id.* at 13–14. Citing the Third Restatement of Torts, the court wrote that, "when 'both the presence of an allergenic ingredient in the product and the risks presented by such ingredient are widely known, instructions and warnings about that danger are unnecessary.'" *Id.* at 14.

<sup>368</sup> *Id.* at 13.

court closed off some of the avenues for the legal recognition of milk's negative health effects on Americans. While this case perpetuates dairy jurisprudence, the contemporary shifting political landscape regarding milk suggests that eventually a different dairy constituency, entertaining different ideas of milk, may start winning in court.

Despite dairy jurisprudence's enduring appeal, the liquid we call "milk" is under scrutiny, with some reclaiming it as a human female fluid to feed babies as well as adults;<sup>369</sup> others fighting to rehabilitate raw, artisanally produced animal milk;<sup>370</sup> and still others advocating in favor of non-dairy milks such as nut milks, grain milks, soymilk, and the like.<sup>371</sup> This split into multiple milk subcultures—or rather, counter-cultures—reflects a growing claim for food sovereignty, that is, the right for communities to control the way food is produced, traded, and consumed.<sup>372</sup> But it also entails differentiated consumption patterns, creating market niches and a measure of elitism.<sup>373</sup> The contemporary fragmentation of milk mirrors our society's social

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<sup>369</sup> See generally Cohen, *supra* note 228. According to the ecofeminist perspective, consuming milk from non-consenting female mammals is a form of oppression. In that view, human milk consumption should prioritize milk that is biologically adapted to their species and that can be obtained with consent, i.e., human milk or plant-based milk. For an example of this perspective, see generally Gaard, *supra* note 343 (critiquing the postcolonial appropriation of milk). There is in fact a market for breast milk among adults, be it for medical reasons (for example some cancer patients turn to human milk to ease the effect of chemotherapy), for aesthetic-health reasons (drinking breast milk is popular among bodybuilders to enhance muscle growth), or simply for an alternative source of nutrition (with a few recent attempts by restaurateurs to serve breast milk cheese or ice cream). See e. g., Jessica Firger, *Adults Really Shouldn't Drink Human Breast Milk*, NEWSWEEK (Jun. 20, 2015), <http://www.newsweek.com/adults-really-shouldnt-drink-human-breast-milk-345288> [<https://perma.cc/E9EF-P6UR>].

<sup>370</sup> See, e.g., Hilda Kurtz, Amy Trauger & Catarina Passidomo, *The Contested Terrain of Biological Citizenship in the Seizure of Raw Milk in Athens, Georgia*, 48 GEOFORUM 136, 136 (2013) (describing conflicts over the sale of raw milk as "flashpoints in a biopolitical struggle between producers and the state over who decides what constitutes health or disease in the food system").

<sup>371</sup> The movement in favor of non-dairy milk consumption may be animated by a concern for animal welfare or the recognition of the harmful effects of dairy consumption on human health, or both.

<sup>372</sup> The concept of "food sovereignty" refers to the right of peoples to "healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems." Alison Hope Alkon & Teresa Marie Mares, *Food Sovereignty in US Food Movements: Radical Visions and Neoliberal Constraints*, 29 AGRIC. & HUM. VALUES 347, 347 (2012) (internal citations omitted).

<sup>373</sup> Long-term breastfeeding is correlated with socio-demographic factors because it requires time, resources, and support to be feasible. See, e.g., Meedya Shahla, Kathleen Fahy & Ashley K. Kable, *Factors that Positively Influence Breastfeeding Duration to 6 Months: A Literature Review*, 23 WOMEN & BIRTH 135, 137 (2010) (examining socio-demographic factors among others as positively associated with breastfeeding duration). Similarly, consuming artisanally produced raw milk or plant milk remains more costly and less widely available than regular, industrial cow's milk, creating race and class-based disparities between consumers. See generally Julie Guthman, "If They Only Knew." *The Unbearable Whiteness of Alternative Food*, in CULTIVATING FOOD JUSTICE: RACE, CLASS, AND SUSTAINABILITY 263 (Alison Hope Alkon & Julian Agyeman eds., 2011)

fragmentation and the engineering of food injustice.<sup>374</sup> Proponents of and participants in the redefinition of milk are typically well-educated, middle and upper class consumers who can afford to turn to alternative milks.<sup>375</sup> While the data on alternative milk consumption are ambivalent in terms of racial and ethnic breakdown, some studies suggest that raw and non-dairy milk consumers are more racially diverse than consumers of conventional pasteurized cow's milk, with Latina/os appearing to be major consumers of raw milk,<sup>376</sup> and "households qualified as black, Asian, and other consum[ing] a significantly larger volume of soymilk . . . than households classified as white. . . . Also, Hispanic households are more likely to purchase soymilk than non-Hispanic households."<sup>377</sup> It is therefore primarily low-income Americans who disproportionately continue to consume industrially produced and government-subsidized cow's milk. In its fluid or powder form, it remains by far the cheapest milk on the market and may even be supplied free of charge by food assistance programs.<sup>378</sup>

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(critiquing the alternative food movement as coding its foods as white and primarily serving white middle- to upper-income populations).

<sup>374</sup> On the notion of food justice, see generally ROBERT GOTTLIEB & ANUPAMA JOSHI, *FOOD JUSTICE* (2010) (telling the story of the movement for food justice, which emerged in recent years seeking to transform the food system from seed to table, combating various forms of inequities Americans face in relation to their food production and consumption).

<sup>375</sup> See, e.g., Katarfiasz & Bartlett, *supra* note 260, at 124 (finding, based on a Michigan survey which does not include race and ethnicity, that "the typical raw milk consumer in Michigan is a well-educated adult in his/her late 20s."); Senarath Dharmasena & Oral Capps, Jr., *Unraveling Demand for Dairy-Alternative Beverages in the United States: The Case of Soymilk*, 43 *AGRIC. & RES. ECON. REV.* 140, 147 (2014) (showing that higher income, college-educated households tend to drink more soymilk); Aunchalee E. L. Palmquist & Kirsten Doehler, *Human Milk Sharing Practices in the U.S.*, 12 *MATERNAL & CHILD NUTRITION* 278, 279 (2016) (noting that human milk sharing is commonplace among "middle-income, college educated women who self identify as Caucasian/white").

<sup>376</sup> See Marcia L. Headrick et al., *Profile of Raw Milk Consumers in California*, 112 *PUB. HEALTH REP.* 418, 418 (1997) (showing that in California, "[r]aw milk drinkers were more likely than nondrinkers to be younger than age 40, male, and Hispanic and to have less than a high school education"); Jean C. Buzby et al., *Characteristics of Consumers of Unpasteurized Milk in the United States*, 47 *J. CONSUMER AFFAIRS* 153, 159 (2013) (noting that "[o]ver 17% of unpasteurized milk consumers were Hispanic, compared with only 4.7% percent of those who did not consume unpasteurized milk").

<sup>377</sup> Dharmasena & Capps, *supra* note 375, at 150. *But see* Alicia Copeland & Senarath Dharmasena, Dep't of Agric. Econ., Tex. A&M Univ., *Consumer Demand for Dairy Alternative Beverages in the United States and its Implication to U.S. Dairy Industry* (July 25–26, 2015) (paper presented at Agricultural & Applied Economics Association and Western Agricultural Economics Association Annual Meeting) [http://ageconsearch.umn.edu/bitstream/205334/2/Dharmasena\\_Copeland%20Dairy%20Alternatives%20AAEA%202015%20May%2027.pdf](http://ageconsearch.umn.edu/bitstream/205334/2/Dharmasena_Copeland%20Dairy%20Alternatives%20AAEA%202015%20May%2027.pdf), [<https://perma.cc/69BZ-LXY8>] (noting that "[w]hites consume more soymilk and almond milk").

<sup>378</sup> See U.S. DEP'T AGRIC., *FOOD ASSISTANCE AND NUTRITION RESEARCH REPORT NUMBER 19-3, EFFECTS OF FOOD ASSISTANCE AND NUTRITION PROGRAMS ON NUTRITION AND HEALTH: VOLUME 3, LITERATURE REVIEW 4 tbl.2* (Mary Kay Fox, William Hamilton & Biing-Hwan Lin eds., 2004).

The challenge for the years to come will be for the law to accept and foster greater milk diversity without excluding vulnerable groups that would often most benefit from alternative milks. This will necessitate the rethinking, not only of environmental and agricultural regulations, but also of our diets. At the same time, the Court's existing dairy jurisprudence could be used in an affirmative way to lay the basis for the recognition of a broader constitutional right to food that would benefit all Americans.

### C. *Toward a Constitutional Right to Food?*

While this Article's stance on dairy jurisprudence has been mostly critical, this final section suggests that milk's quasi-constitutional stature could help prompt a reimagining of the right to food in U.S. constitutional law. Food has emerged as a major topic of social, political, and legal debate at the beginning of the twenty-first century.<sup>379</sup> Worldwide, there is a growing recognition that the right to food is a human right.<sup>380</sup> An increasing number of countries have protected the right to food as an explicit or implicit constitutional right.<sup>381</sup> The right to adequate food is laid out in the most important human rights documents such as the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights.<sup>382</sup> This movement has not gained much traction in the United States, however, with the government consistently opposing the formal recognition of a right to food as overly burdensome and inconsistent with constitutional law.<sup>383</sup>

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<sup>379</sup> See Baylen J. Linnekin & Emily Broad Leib, *Food and Law*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF FOOD STUDIES 238, 238–39 (Ken Albala ed., 2013).

<sup>380</sup> See generally Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT'L L. 691 (2006) (critically presenting the international legal framework for the right to food).

<sup>381</sup> See generally Mathilde Cohen, *The Right to Food*, MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (forthcoming 2017) (recounting the development of the right to food from a comparative constitutional law perspective). See also LIDIJA KNUTH & MARGARET VIDAR, FOOD & AGRIC. ORG., CONSTITUTIONAL AND LEGAL PROTECTION OF THE RIGHT TO FOOD AROUND THE WORLD 21 (2011) (describing the different constitutional and legal mechanisms in place to protect the right to food).

<sup>382</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) art. 25(1) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food . . ."); G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) arts. 11(1), 11(2) (pursuant to article 11(1), State Parties "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions," while pursuant to article 11(2) they recognize that more immediate and urgent steps may be needed to ensure "the fundamental right of everyone to be free from hunger").

<sup>383</sup> The U.S. Department of State's position is that economic, social, and cultural rights, including the right to food, are not recognized or protected under the U.S. Constitution. See U.S. GENERAL ACCOUNTING OFFICE, FOOD SECURITY: PREPARATIONS FOR THE 1996 WORLD FOOD SUMMIT, NSIAD-97-44 6–7, 27–28 (1996). But see Craig Kuehl, *Explanation of Position by Craig Kuehl, United States Advisor, on Resolution L.30, Rev. 1—The Right to Food, in the Third Committee of the Sixty-fourth Session of the United Nations General Assembly*, U.S. MISSION TO THE UNITED NATIONS (NOV. 19, 2009),

The United States Constitution is a notoriously short document, known for establishing a tradition of “negative” rights against the government rather than “positive” rights obliging the government to take certain actions.<sup>384</sup> It contains neither an explicit, stand-alone right to food, nor broader rights that could include the right to food, such as the right to an adequate standard of living. Embedded in U.S. constitutional culture is the idea that social and economic rights are the realm of legislation and should not be constitutionalized.<sup>385</sup> However, both those who deplore and those who applaud this constitutional outlook may have concluded too quickly that there is an absence of a right to food under the U.S. Constitution. Indeed, this Article has demonstrated that one particular type of food, milk and its derivatives, has acquired a quasi-constitutional status in American law and society. If the Court has identified milk as an essential food, perhaps will it be willing to acknowledge a broader right to food, which furthers, rather than hinders, equal protection, in line with other countries and international law.<sup>386</sup> Under international law, the right to food is an “inclusive right,” “not simply a right to a minimum ration of calories, proteins and other specific nutrients. It is a right to all nutritional elements that a person needs to live a healthy and active life, and to the means to access them.”<sup>387</sup> Based on that understanding, the constitutional recognition of the right to food involves the satisfaction of people’s dietary and cultural needs, rather than merely the right to a specific food such as milk, which may be harmful or culturally inappropriate to certain segments of the population.

Two precedents suggest that the Court possesses the doctrinal apparatus to engage in the recognition of such a path, having already begun to judicially enforce something akin a constitutional right to food. In 1973, the Court invalidated a 1971 amendment to the 1964 Food Stamp Act that sought to exclude from the food assistance program households containing

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<http://usun.state.gov/remarks/4560>, [<https://perma.cc/4NAP-VV79>] (in which, for the first time, the United States joined a non-binding U.N. Declaration on the right to food, all the while denying any legal obligation arising from customary international law on the right to food).

<sup>384</sup> On the distinction between positive and negative liberty, see generally Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 121–34 (1969).

<sup>385</sup> *But see* Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 *MERCER L. REV.* 525, 525–27 (1992) (arguing for finding that the U.S. Constitution provides rights to minimum entitlements, including food).

<sup>386</sup> In fact, early discussions of a constitutional right to food can be found in margarine litigation, e.g., *Powell v. Pennsylvania*, 127 U.S. 678, 692 (1888) (Field, J., dissenting) (disagreeing with the majority’s upholding a Pennsylvania ordinance prohibiting the manufacture of margarine by declaring, “[t]he right to procure healthy and nutritious food, by which life may be preserved and enjoyed, and to manufacture it, is among these inalienable rights, which, in my judgment, no state can give, and no state can take away, except in punishment for crime. It is involved in the right to pursue one’s happiness.”).

<sup>387</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *THE RIGHT TO ADEQUATE FOOD*, FACT SHEET NO. 34 2 (2010), <http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf> [<https://perma.cc/FR7H-C2DP>].

one or more unrelated persons.<sup>388</sup> The amendment's legislative history indicated that it "was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."<sup>389</sup> The Court held that the classification used by Congress violated the equal protection component of the Due Process Clause of the Fifth Amendment.<sup>390</sup> Though it did not ground its decision on a constitutional interest in food or nutrition, it noted that the Act's purpose was "to safeguard the health and wellbeing of the Nation's population and raise levels of nutrition among low income households,"<sup>391</sup> identifying it as "*essential* federal food assistance."<sup>392</sup> This "essential" status of food assistance for the nation may explain why the Court struck down the challenged classification, despite the fact that it was using the hyper-deferential rational basis standard. It is not only that the "desire to harm a politically unpopular group" such as hippies is not a "*legitimate* governmental interest,"<sup>393</sup> but also, perhaps as importantly, that food security is too important a goal to restrict food stamps to certain low-income households rather than others.

In 1978, the Court came even closer to recognizing a constitutional right to food.<sup>394</sup> It found that Arkansas inmates' conditions in punitive isolation, which included a prolonged calorie deficient diet consisting primarily of "gruel," "a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste," violated the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>395</sup> Implicit in this holding is the notion that the Constitution requires the government to not only provide confined individuals with a minimum ration of calories, but also with nutritionally adequate food. As the Ninth Circuit later noted, prison sustenance needs "not be tasty or aesthetically pleasing,"<sup>396</sup> but it should be of sufficient quantity and quality so that inmates maintain their weight<sup>397</sup> and health.<sup>398</sup>

Drawing on the quasi-constitutionalization of milk, these precedents, and the public's awakened consciousness regarding food production, con-

<sup>388</sup> U.S. Dep't Agric. v. Moreno, 413 U.S. 528, 533–38 (1973). See also its companion case, U.S. Dep't Agric. v. Murry, 413 U.S. 508, 511–14 (1973) (striking down the congressional attempt to disqualify households containing members 18 years or older claimed by someone as a tax dependent from the food assistance program).

<sup>389</sup> *Moreno*, 413 U.S. at 534.

<sup>390</sup> *Id.* at 532–33, 538.

<sup>391</sup> *Id.* at 533 (citing Food Stamp Act, 7 U.S.C. § 2011 (1970)).

<sup>392</sup> *Id.* at 535–36 (emphasis added).

<sup>393</sup> *Id.* at 534 (emphasis added).

<sup>394</sup> See *Hutto v. Finney*, 437 U.S. 678, 682–87 (1978).

<sup>395</sup> *Id.* at 683, 867–68.

<sup>396</sup> *LeMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993).

<sup>397</sup> The major problem with gruel was that it provided the prisoners with fewer than 1,000 calories, and practically all inmates were losing weight while on it. See *Hutto*, 437 U.S. at 683–84.

<sup>398</sup> See *LeMaire*, 12 F.3d at 1456 (9th Cir. 1993) (holding that "[t]he Eighth Amendment requires only that prisoners receive food that is adequate to maintain health.").

sumption, and distribution,<sup>399</sup> the federal courts should recognize a constitutional right to food going beyond the narrow contexts of federal food assistance and incarceration. This right is necessary to fulfill the Declaration of Independence's promise of "[l]ife, [l]iberty and the pursuit of [h]appiness,"<sup>400</sup> the Fifth and Fourteenth Amendment's protection of "life, liberty, [and] property,"<sup>401</sup> as well as the Fourteenth Amendment's equal protection guarantee.<sup>402</sup> Eating an adequate diet is essential to sustain human life and flourishing.<sup>403</sup> Determining which foods one eats and how they are produced is an element of liberty.<sup>404</sup> Ensuring food justice, i.e., that food be accessible to all individuals, both physically and economically, and sustainably produced is necessary to comply with equal protection.<sup>405</sup> Ideally, the constitutional right to food would not only mean that people should be free of hunger. It would also require the government to ensure that people have access to affordable, sustainably produced foods that are safe and nutritious, meet their dietary needs, and are appropriate to their cultural backgrounds.<sup>406</sup>

As this Article has illustrated through the example of milk, though there are no food shortages in the United States, people are malnourished because the foods most widely available—and artificially low priced—are not suitable to satisfy dietary needs.<sup>407</sup> Energy-dense, low-nutrient foods such as soft

<sup>399</sup> See Michael Pollan, *The Food Movement, Rising*, N.Y. REV. BOOKS (Jun. 10, 2010), <http://www.nybooks.com/articles/2010/06/10/food-movement-rising>, [https://perma.cc/NPC7-CWA3] (reviewing a series of books on food and eating practices and arguing that food has never been as politically visible as in recent years).

<sup>400</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>401</sup> U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

<sup>402</sup> U.S. Const. amend. XIV, § 1.

<sup>403</sup> See Tamlin S. Conner, et al., *On Carrots and Curiosity: Eating Fruit and Vegetables Is Associated with Greater Flourishing in Daily Life*, 20 BRITISH J. HEALTH PSYCHOLOGY 413, 413 (2015) (finding that fruit and vegetables consumption predicts greater eudaemonic well-being, curiosity, and creativity).

<sup>404</sup> See, e.g., Baylen J. Linnekin, *The "California Effect" and the Future of American Food: How California's Growing Crackdown on Food & Agriculture Harms the State & the Nation*, 13 CHAP. L. REV. 357, 387–88 (2010) (suggesting that there is an unenumerated, fundamental right to food with some justices recognizing a "negative right," which is not an "explicit right" to eat food but may provide a "right to make and procure food" and protect against certain food bans); Samuel R. Wiseman, *Liberty of Palate*, 65 ME. L. REV. 737, 738 (2013) (arguing that "[w]hile no fundamental right to a liberty of palate exists, there likely is a right to be free of mandates to consume any particular type of food").

<sup>405</sup> See GOTTLIEB & ANUPAMA, *supra* note 374, at 1–10.

<sup>406</sup> I am following the language of the U.N. Committee on Economic, Social & Cultural Rights, General Comment No. 12: The right to adequate food, ¶ 8, U.N. Doc. E/C.12/1999/5 (1999) ("The Committee considers that the core content of the right to adequate food implies: The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture . . ."). See also Diller, *supra* note 259, at 972 (arguing that in the U.S. context, the right to food should be "reoriented toward nutrition" and could emerge not only as a constitutional right, but also as a common law concern, through a public-utility paradigm, or as a matter of legislative grace).

<sup>407</sup> See generally Andrea Freeman, *Fast Food: Oppression Through Poor Nutrition*, 95 CAL. L. REV. 2221 (2007) (suggesting that an overabundance of fast food and lack of



drinks, sugary cereals, baked products, and candy, which may contribute to obesity and other illnesses, are other examples of ubiquitous, yet inadequate foods.<sup>408</sup> Highly processed foods containing large amounts of sugars, added fat, sodium, and dairy have become a major source of alimentation for low-income and minority groups across the country.<sup>409</sup> In light of the structural perpetuation of this race and class-based health crisis, the courts should step in to press the federal and state governments to adopt new food policies. A constitutional approach to food would offer a way forward by shifting the focus from food assistance as charity to adequate food as a constitutional right, which could be enforced in court.<sup>410</sup> This shift would give the government a mandate to address the root causes of food injustice, from seed to table, rather than simply tackling its symptoms via nutrition assistance programs, which themselves perpetuate malnutrition and food oppression.

In sum it is time for the American legal system to face the significant costs—to the environment, to animals, to public health, to equal citizenship—associated with dairy jurisprudence. Through dairy jurisprudence, the Court as well as other branches of government, subscribed to a vision of milk as a perfect food, asserting its nutritional, economic, and moral values.<sup>411</sup> In line with these three sets of values, reform is needed of the entire U.S. food system to guarantee that nutritious and safe foods are sustainably produced and made economically and physically accessible to all. The constitutionalization of the right to adequate food offers the hope to accomplish that goal by recognizing individuals as rights holders, not simply passive consumers or recipients of food aid.

### CONCLUSION

The constitutional law of milk is full of surprises. Contrary to previous scholarship noting the odd presence of milk in our case law, this Article has argued that the Supreme Court's dairy cases are truly *about* milk, even as they also articulate central doctrines of constitutional law such as equal protection, the states' police powers, and Congress' commerce powers. In doing so, this Article identifies a fissure in the traditional dichotomy between constitutional law and ordinary law: the intermediate category of quasi-constitu-

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access to healthier foods in African American and Latino communities increases their vulnerability to food-related death and disease and constitutes "food oppression").

<sup>408</sup> See, e.g., Ronette R. Briefel, Ander Wilson & Philip M. Gleason, *Consumption of Low-Nutrient, Energy-Dense Foods and Beverages at School, Home, and Other Locations Among School Lunch Participants and Nonparticipants*, 109 J. AM. DIETIC ASS'N S79, S79–S80 (2009) (describing patterns of consumption of "empty calories").

<sup>409</sup> See Freeman, *supra* note 407, at 2221, 2226–30.

<sup>410</sup> For a human rights version of this argument, see generally INTERNATIONAL HUMAN RIGHTS CLINIC, NYU SCH. L., *NOURISHING CHANGE: FULFILLING THE RIGHT TO FOOD IN THE UNITED STATES* (2013) (advocating for a human rights approach to food in the United States).

<sup>411</sup> See *supra* Part II.

tional rights, which includes the right to milk. According to the Court, the purpose of this right is “to secure to the population, adult and infant, milk attaining a certain standard of purity and strength.”<sup>412</sup> But as this Article has shown, low-income Americans, women, racial and ethnic minorities, especially those whose identities intersect within multiple systems of oppression, but also animals and the environment, do not benefit from milk’s favored status. In fact, milk’s privileged legal position undermines the health and physical strength of already socially marginalized groups. More generally, all Americans may be harmed by milk’s deleterious health and environmental impact.

In quasi-constitutionalizing milk, therefore, the Court has created a tension with other constitutional rights, in particular with equal protection understood as an anti-discrimination principle. The Court’s promotion of milk as a cultural icon and quasi-constitutional right is discriminatory toward the most vulnerable segments of the population. At the same time, the Court’s involvement in defining a quasi-constitutional right to milk could serve to open new channels of liberty. The promotion of milk carries a political force in linking what Americans eat and drink with who they are. If certain foods, such as milk, are deemed essential, perhaps the Court will come to recognize a broader right to food, in line with other countries and international law which protect the fundamental right for people to feed themselves healthfully and in dignity.<sup>413</sup> In that way, the law of milk, which was until now an instrument of food oppression, could be used to propel the United States to the forefront of the food justice movement.

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<sup>412</sup> *St. John v. New York*, 201 U.S. 633, 637 (1906).

<sup>413</sup> *See Cohen*, *supra* note 381.

## APPENDIX

## SUPREME COURT DAIRY CASES LISTED CHRONOLOGICALLY

- Powell v. Com. Pennsylvania*, 127 U.S. 678 (1888).  
*Kimmish v. Ball*, 129 U.S. 217 (1889).  
*Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898).  
*Collins v. New Hampshire*, 171 U.S. 30 (1898).  
*Capital City Dairy Co. v. Ohio*, 183 U.S. 238 (1902).  
*McCray v. U.S.*, 195 U.S. 27 (1904).  
*Cliff v. United States*, 195 U.S. 159 (1904).  
*Fischer v. St. Louis*, 194 U.S. 361 (1904).  
*Lieberman v. Van de Carr*, 199 U.S. 552 (1905).  
*St. John v. New York*, 201 U.S. 633 (1906).  
*Moxley v. Hertz*, 216 U.S. 344 (1910).  
*Baltimore & OSWR v. U.S.*, 220 U.S. 94 (1911).  
*Adams v. Milwaukee*, 228 U.S. 572 (1913).  
*Hutchinson Ice Cream Co. v. Iowa*, 242 U.S. 153 (1916).  
*Hebe v. Shaw*, 248 U.S. 297?(1919).  
*Miller v. Standard Nut Co. of Fla.*, 284 U.S. 498 (1932).  
*Mintz v. Baldwin*, 289 U.S. 346 (1933).  
*A. Magnano v. Hamilton*, 292 U.S. 40 (1934).  
*Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163 (1934).  
*Nebbia v. New York*, 291 U.S. 502 (1934).  
*Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).  
*Borden's Farm Prods. Co. v. Ten Eyck*, 297 U.S. 251 (1936).  
*Mayflower Farms v. Ten Eyck*, 297 U.S. 266 (1936).  
*Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937).  
*United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).  
*Milk Control Bd. of Pa. v. Eisenberg Farm Prods.*, 306 U.S. 346 (1939).  
*United States v. Rock Royal Co-op.*, 307 U.S. 533 (1939).

- H.P. Hood & Sons v. United States*, 307 U.S. 588 (1939).  
*United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942).  
*Penn Dairies v. Milk Control Comm'n of Pa.*, 318 U.S. 261 (1943).  
*Pacific Coast Dairy v. Dep't of Agric. of Cal.*, 318 U.S. 285 (1943).  
*Sage Stores Co. v. State of Kansas ex rel. Mitchell*, 323 U.S. 32 (1944).  
*Stark v. Wickard*, 321 U.S. 288 (1944).  
*H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949).  
*Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349 (1951).  
*Lehigh Val. Co-op Farmers Inc. v. U.S.*, 370 U.S. 76 (1962).  
*Brannan v. Stark*, 342 U.S. 451 (1952).  
*United States v. Borden Co.*, 370 U.S. 460 (1962).  
*Paul v. United States*, 371 U.S. 245 (1963).  
*Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964).  
*FTC v. Borden Co.*, 383 U.S. 637 (1966).  
*Zuber v. Allen*, 396 U.S. 168 (1969).  
*Great Atlantic and Pacific Tea Company, Inc. v. Cottrell*, 424 U.S. 366 (1976).  
*Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).  
*Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984).  
*West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).  
*Hillside Dairy Inc. v. Lyons*, 539 U.S. 59 (2003).