

## Food Law at the Outset of the Trump Administration

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### ABSTRACT

Food policy remains one of the main levers by which we can work to address some of the most intractable problems of our time because of food's effect on health, the environment, and the economy. For this reason, it is important to consider the implications of the Trump administration's policies in this arena. Moreover, a look at some of the food law and policy initiatives that may be delayed or suspended under the new administration provides a window into the new administration's anti-regulatory stance more generally and we can see how state and local governments will act to fill regulatory and policy gaps.

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## TABLE OF CONTENTS

INTRODUCTION.....	30
I. REGULATORY ROLLBACK.....	31
A. Executive Orders .....	32
B. Legislation .....	34
C. Appointments and Supreme Court Nomination .....	35
II. FOOD POLICY.....	37
A. Labeling.....	37
B. Food Safety Modernization Act.....	39
C. School Lunch Program .....	41
III. IMPACT .....	41
A. National Impact.....	41
B. Subnational Action.....	42
CONCLUSION .....	44

## INTRODUCTION

In these first few months of the Trump presidency, food policy has not been a focus despite the administration's deregulatory agenda being a priority. The Trump administration's anti-regulatory stance, lack of attention to important food policy positions, and indifference to food policy in general is itself a policy choice. Over the last decade a loose coalition of groups and individuals working to improve the nation's food systems began to cohere.<sup>1</sup> This "movement" is multivalent and diverse, with numerous methods and goals, some of which work at cross-purposes with each other. As Michael Pollan explained, it is better to say: "[M]ovements," since [the food movement] is unified as yet by little more than the recognition that industrial food production is in need of reform because its social/environmental/public health/animal welfare/gastronomic costs are too high.<sup>2</sup> This movement was buttressed by attention and resources from the Obama administration. Under the Trump administration, however, this diffuse movement, supported and supplemented by subnational policy efforts more than federal initiatives, will drive any progress in food policy going forward.

Food policy remains one of the main levers by which we can work to address some of the most intractable problems of our time because of food's effect on health, the environment, and the economy. For this reason, it is important to consider the implications of the new administration's policies in this context. Moreover, a look at some of the food law and policy initiatives that may be delayed or suspended under the new administration provides a window into the new administration's anti-regulatory stance more generally. We can also see how state and local governments will act to fill regulatory and policy gaps left by an anti-regulatory federal administration that is indifferent to the progressive food policy that has been developing over the last few years.<sup>3</sup> State and local action in food policy and regulation

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1. See Andrew Lawler, *Has the Food Movement's Moment Finally Arrived?*, SLATE (Nov. 17, 2014, 1:50 PM), [http://www.slate.com/articles/life/food/2014/11/michael\\_pollan\\_and\\_mark\\_bittman\\_s\\_food\\_policy\\_proposal\\_at\\_the\\_stone\\_barns.html](http://www.slate.com/articles/life/food/2014/11/michael_pollan_and_mark_bittman_s_food_policy_proposal_at_the_stone_barns.html) [https://perma.cc/P92L-4XCE] ("At the moment, the food movement is, at best, in an awkward and confused adolescence."); Michael Pollan, *The Food Movement, Rising*, N.Y. REV. BOOKS (June 10, 2010), <http://www.nybooks.com/articles/2010/06/10/food-movement-rising> [https://perma.cc/N4HF-W7X8] ("It might sound odd to say this about something people deal with at least three times a day, but food in America has been more or less invisible, politically speaking, until very recently.").
  2. Pollan, *supra* note 1.
  3. State and local governments will act to fill regulatory and policy gaps left by the Trump administration in other areas too, including climate change policy. See Hiroko Tabuchi &

is not a new development. Subnational action on food policy has been an area of foment for years as these entities work to fill gaps left by federal action. Consider, for example, how New York banned trans fats and mandated menu labeling before these became federal requirements,<sup>4</sup> how Vermont passed a genetically engineered ingredient labeling law before there was federal law on this issue,<sup>5</sup> and how municipalities are passing soda taxes to address the overconsumption of sugar sweetened beverages.<sup>6</sup>

In this Essay, I first summarize the Trump administration's anti-regulatory position, looking at executive orders, legislation, and appointments. I then provide an overview of recent developments in food policy, including labeling initiatives and food safety developments. Finally, I discuss what the field may face moving forward in regards to national policy and in local arenas.

## I. REGULATORY ROLLBACK

At the Conservative Political Action Conference held in late February 2017, Stephen K. Bannon, President Trump's chief strategist, explained that the new administration was committed to the "deconstruction of the administrative state."<sup>7</sup> The prioritization of this dismantling is apparent in several executive orders issued by the President, two bills introduced by Congress,

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Henry Fountain, *Bucking Trump, These Cities, States and Companies Commit to Paris Accord*, N.Y. TIMES (June 1, 2017), [https://www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html?\\_r=0](https://www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html?_r=0) (explaining how subnational units and private companies will work to address climate change in the absence of federal leadership in the area).

4. See Amanda MacMillan, *NYC's Fat Ban Paying Off*, CNN (July 16, 2012, 5:03 PM), <http://www.cnn.com/2012/07/16/health/nyc-fat-ban-paying-off/index.html> [<https://perma.cc/M8PV-AZQ9>]; see also Thomas A. Farley et al., *New York City's Fight Over Calorie Labeling*, 28 HEALTH AFF. 1098 (2009); *FDA Cuts Trans Fat in Processed Foods*, FDA (Mar. 17, 2017), <https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm372915.htm> [<https://perma.cc/2Z7F-8NNZ>].
5. See Dan Charles & Allison Aubrey, *How Little Vermont Got Big Food Companies to Label GMOs*, NPR (Mar. 27, 2016, 8:07 AM), <http://www.npr.org/sections/thesalt/2016/03/27/471759643/how-little-vermont-got-big-food-companies-to-label-gmos>; see also Paul Blake, *Obama Signs Bill Mandating GMO Labeling*, ABC NEWS (July 29, 2016, 6:10 PM), <http://abcnews.go.com/US/obama-signs-bill-mandating-gmo-labeling/story?id=41004057> [<https://perma.cc/W764-HK6V>].
6. See, e.g., Bruce Y. Lee, *5 More Locations Pass Soda Taxes: What's Next for Big Soda?*, FORBES (Nov. 14, 2016, 10:08 AM), <https://www.forbes.com/sites/brucelee/2016/11/14/5-more-locations-pass-soda-taxes-whats-next-for-big-soda/#31aaf19ed19> [<https://perma.cc/4WUR-DB75>].
7. Philip Rucker, *Bannon: Trump Administration Is in Unending Battle for 'Deconstruction of the Administrative State'*, WASH. POST (Feb. 23, 2017), [https://www.washingtonpost.com/news/powerpost/wp/2017/02/23/bannon-trump-administration-is-in-unending-battle-for-deconstruction-of-the-administrative-state/?utm\\_term=.41e5ce69fe24](https://www.washingtonpost.com/news/powerpost/wp/2017/02/23/bannon-trump-administration-is-in-unending-battle-for-deconstruction-of-the-administrative-state/?utm_term=.41e5ce69fe24) [<https://perma.cc/95PF-B3PR>].

and the position on judicial deference to administrative agency decision-making by Neil Gorsuch, the newly confirmed U.S. Supreme Court Justice nominated by the President.

### A. Executive Orders

On January 30, 2017, the President issued an “Executive Order on Reducing Regulation and Controlling Regulatory Costs,” which became known as the two-for-one Executive Order (EO).<sup>8</sup> This order requires agencies to “identify at least two existing regulations to be repealed” when it “publicly proposes for notice and comment or otherwise promulgates a new regulation.”<sup>9</sup> The Office of Information and Regulatory Affairs (OIRA) issued an interim guidance a few days later, clarifying some of the EO’s directives.<sup>10</sup>

There has been strong opposition to the requirements of this EO. Soon after this order was issued, several advocacy groups and the Communications Workers of America filed suit against Trump, the Acting Director of the Office of Management and Budget (OMB), and the heads of various departments and agencies, including the Department of Energy (DOE), the Department of the Interior (DOI), the Department of Transportation (DOT), and the Environmental Protection Agency (EPA). The suit seeks to enjoin the implementation of the two-for-one EO, alleging that the EO

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8. Press Release, White House Office of the Press Secretary, Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs, (Jan. 30, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling> [<https://perma.cc/NB39-4TT4>]; cf. Josh Gerstein, *Trump Faces Suit Over 2-for-1 Executive Order on Regulations*, POLITICO (Feb. 8, 2017, 10:50 AM), <http://www.politico.com/story/2017/02/trump-sued-2-for-1-regulations-234788> [<https://perma.cc/N8EZ-SFFA>].

9. Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017).

10. See Memorandum from Dominic J. Mancini, Acting Adm’r, Office of Info. & Regulatory Affairs to Regulatory Policy Officers at Exec. Dep’ts & Agencies & Managing & Exec. Dirs. of Certain Agencies & Comm’ns (Feb. 2, 2017), [https://www.whitehouse.gov/sites/whitehouse.gov/files/briefing-room/presidential-actions/related-omb-material/eo\\_iterim\\_guidance\\_reducing\\_regulations\\_controlling\\_regulatory\\_costs.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/briefing-room/presidential-actions/related-omb-material/eo_iterim_guidance_reducing_regulations_controlling_regulatory_costs.pdf) [<https://perma.cc/JJ4Y-2GEE>]. The guidance explains that the two-for-one Executive Order (EO) does not apply to independent agencies, but only to “those agencies required to submit significant regulatory actions to [the Office of Regulatory Affairs (OIRA)] for review under EO 12866,” and only to “significant regulatory actions, as defined in Section 3(f) of Executive Order 12866, an agency issues between noon on January 20 and September 30, 2017.” *Id.* at 2, 3. EO 12866 was issued by President Bill Clinton in 1993 and continued the OIRA’s cost-benefit review of regulations with an impact over 100 million dollars. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1267, 1271 (2006).

violates separation of powers and the Take Care Clause of the U.S. Constitution, directs the heads of departments and agencies to take actions that exceed their authority, and violates the Administrative Procedure Act.<sup>11</sup> At the end of February, 137 groups, including the Environmental Defense Fund, the League of Women Voters, and Public Citizen signed a letter to President Trump opposing the order, arguing that “its flawed reasoning and vague drafting would leave Americans more vulnerable to financial, safety, health, and environmental hazards.”<sup>12</sup>

On February 24, 2017, President Trump signed the “Executive Order on Enforcing the Regulatory Reform Agenda”<sup>13</sup> designed to reduce what the administration has depicted as excessive regulatory burdens.<sup>14</sup> This EO requires each agency to designate a Regulatory Reform Officer, establish a regulatory reform task force to evaluate existing regulations and identify ones that can be eliminated or modified, and to track and measure its progress in these areas.<sup>15</sup> Agency efforts to cut regulations have met with some resistance. For example, after the EPA asked for public comment on whether to cut regulations, and if so, which one, the agency has received almost 60,000 comments to date.<sup>16</sup> A group of eighty-five administrative and environmental law professors submitted a comment to the EPA explaining that the agency could not engage in a wholesale repeal of EPA regulations because of certain specific statutory mandates.<sup>17</sup>

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11. See Complaint for Declaratory and Injunctive Relief, *Pub. Citizen, Inc. v. Trump*, No. 1:17-cv-00253 (D.D.C. Feb. 8, 2017); C. Ryan Barber, *Trump's 2-for-1 Regulatory Slashing Spurs New LawsUIT*, NAT'L L.J. (Feb. 8, 2017), <http://www.nationallawjournal.com/id=1202778726980/Trumps-2for1-Regulatory-Slashing-Spurs-New-Lawsuit?slreturn=20170222210347> [<https://perma.cc/V9MV-2Z2E>].
  12. Letter from 350 Maine et al., to Donald Trump, President of the U.S. (Feb. 28, 2017), <https://www.nrdc.org/sites/default/files/groups-oppose-regulatory-executive-order-letter-20170228.pdf> [<https://perma.cc/V8KE-DD4L>].
  13. Press Release, White House Office of the Press Secretary, *supra* note 8.
  14. See Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017).
  15. *Id.*
  16. See *Evaluation of Existing Regulations*, REGULATIONS.GOV, <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=EPA-HQ-OA-2017-0190> [<https://perma.cc/Y224-4YAJ>]; see also Jennifer Ludden, *Public to EPA on Cutting Regulations: No!*, NPR: THE TWO-WAY (May 19, 2017, 4:38 AM), <http://www.npr.org/sections/thetwo-way/2017/05/19/528993681/public-to-epa-on-cutting-regulations-no>; cf. David Doniger, *NRDC to Scott Pruitt: Stop Sham “Reg Reform” and Do Your Job*, NRDC: EXPERT BLOG (Apr. 24, 2017), <https://www.nrdc.org/experts/david-doniger/nrdc-scott-pruitt-stop-sham-reg-reform-do-your-job> [<https://perma.cc/2YTE-YP8Y>].
  17. Alfred C. Aman, Jr. et al., Comment Letter on EPA Docket Request ID: EPA-HQ-OA-2017-0190-0042 (May 15, 2017) (on file with the author, a signatory to the comment).

## B. Legislation

Two bills have recently passed the U.S. House of Representatives and are currently before the U.S. Senate. The first, called the Regulations from the Executive in Need of Scrutiny Act (REINS), requires congressional approval for all “major” rules, and outlines a procedure for the congressional disapproval of non-major rules.<sup>18</sup> REINS would change the balance of power from the executive branch to the legislative. The second, the Regulatory Accountability Act (RAA), would change the way that agencies promulgate proposed rules, greatly increasing the agency’s procedural and substantive burdens before proposed rulemaking.<sup>19</sup> For example, the bill imposes a requirement for formal hearings when an agency proposes to pass rules that will have a significant economic impact.<sup>20</sup> The bill would also change the way that agencies must measure the cost/benefit impact of proposed rules.<sup>21</sup> Some commentators have written that these additional requirements will have the effect of decreasing the issuance of new regulations,<sup>22</sup>

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18. See Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. §§ 802–803 (2017), <https://www.congress.gov/115/bills/hr26/BILLS-115hr26rfs.pdf> [<https://perma.cc/8SVM-AS97>]. “Major rules” are defined in the bill as:  
 [A]ny rule, including an interim final rule, that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual cost on the economy of \$100,000,000 or more, adjusted annually for inflation; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.  
*Id.* at § 804, at 17–18.
19. See Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017), <https://www.congress.gov/115/bills/hr5/BILLS-115hr5rfs.pdf> [<https://perma.cc/VQS2-QD2D>]. A separate version of this bill has also been introduced in the U.S. Senate and was approved in May 2017 by the Senate Committee on Homeland Security and Governmental Affairs. See Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017), <https://www.congress.gov/115/bills/s951/BILLS-115s951is.pdf> [<https://perma.cc/U9HB-SVPZ>]; *Assessing the Regulatory Accountability Act*, REG. REV. (May 30, 2017), <https://www.theregreview.org/2017/05/30/assessing-regulatory-accountability-act/> [<https://perma.cc/9GP3-9G7R>].
20. See H.R. 5 § 103(e); Kent Barnett, Opinion, *Looking More Closely at the Platypus of Formal Rulemaking*, REG. REV. (May 11, 2017), <https://www.theregreview.org/2017/05/11/barnett-platypus-formal-rulemaking> [<https://perma.cc/W3T5-QRUS>].
21. See H.R. 5; Martha Roberts, Opinion, *The Misguided Regulatory Accountability Act*, REG. REV. (Mar. 29, 2017), <https://www.theregreview.org/2017/03/29/roberts-misguided-regulatory-accountability-act> [<https://perma.cc/7S2A-BSM9>].
22. See, e.g., William Funk, Opinion, *Requiring Formal Rulemaking Is a Thinly Veiled Attempt to Halt Regulation*, REG. REV. (May 18, 2017), <https://www.theregreview.org/2017/05/18/funk-formal-rulemaking-halt-regulation> [<https://perma.cc/9YMB-BQQH>]; George

which comports with the Trump administration's stated objective of dismantling the administrative state.<sup>23</sup> Each of these acts has been proposed before, though neither became law.<sup>24</sup>

### C. Appointments and Supreme Court Nomination

The new administration's anti-regulatory stance is also apparent in appointments to important positions in the regulatory state. At the 2017 Conservative Political Action Conference (CPAC), Bannon explained: "If you look at these Cabinet nominees, they were selected for a reason, and that is deconstruction [of the administrative state]."<sup>25</sup> For example, Scott Pruitt, the new head of the EPA (who before becoming head of the agency sued it fourteen times) spoke to CPAC about certain "regulations that in the near term need to be rolled back in a very aggressive way."<sup>26</sup> Scott Gottlieb, the new Director of the Food and Drug Administration (FDA), has advocated for reducing regulatory barriers to bringing new drugs to market.<sup>27</sup>

The U.S. Department of Agriculture (USDA) works independently and with other agencies to oversee agricultural production, food safety in regards to meat, poultry, and eggs, food product marketing, nutrition policy, and food programs for low income Americans.<sup>28</sup> Sonny Perdue, the administration's pick as the USDA Secretary, was the Governor of Georgia from 2003 to 2011, and has been involved in a number of farming businesses, including

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Will, *Put the REINS Act and a Keystone Pipeline Bill on President Trump's Desk*, NAT'L REV. (Nov. 16, 2016, 8:00 PM), <http://www.nationalreview.com/article/442237/donald-trump-republicans-reins-act-keystone-pipeline-bills> [<https://perma.cc/6W33-4HCG>].

23. See *supra* text accompanying note 7.

24. See Tim Devaney, *Obama Waves Veto Pen at GOP Regulations Bill*, HILL (Jan. 12, 2015, 5:53 PM), <http://thehill.com/regulation/229258-white-house-threatens-veto-of-anti-regs-bill> [<https://perma.cc/XYS9-4KW4>]; see also Clyde Wayne Crews Jr., *The Problem With the White House Threat to Veto the REINS Act*, FORBES (July 28, 2015, 1:22 PM), <https://www.forbes.com/sites/waynecrews/2015/07/28/the-problem-with-the-white-house-threat-to-veto-the-reins-act/#3031bade447e>.

25. Rucker, *supra* note 7.

26. Max Greenwood, *EPA Chief Calls for 'Aggressive' Rollback of Regulations at CPAC*, HILL (Feb. 25, 2017, 6:21 PM), <http://thehill.com/policy/energy-environment/321188-scott-pruitt-calls-for-aggressive-rollbacks-of-environmental> [<https://perma.cc/6JHS-AMF4>].

27. See Sandee LaMotte, *Scott Gottlieb: Conflicts Surround Trump's FDA Pick*, CNN (Apr. 4, 2017, 10:15 AM), <http://www.cnn.com/2017/04/04/health/fda-gottlieb-background-qualifications/index.html> [<https://perma.cc/23EQ-JQCB>]; see also Melissa Healy, *Speed Up Drug Approvals at FDA? It's Already Faster Than Europe's Drug Agency*, L.A. TIMES (Apr. 6, 2017, 11:05 AM), <http://www.latimes.com/science/sciencenow/la-sci-sn-fda-european-medicine-20170405-story.html> [<http://perma.cc/G3SU-SYN6>].

28. See *About the U.S. Department of Agriculture*, USDA, <https://www.usda.gov/our-agency/about-usda> [<https://perma.cc/6TMG-BGTY>].

companies that sell fertilizer and seed to farmers.<sup>29</sup> Media and advocacy groups have speculated that Perdue is unlikely to resist the Trump administration's focus on deregulation.<sup>30</sup> It is also significant that although Perdue was nominated for the post in early January, the first hearing on his appointment was not scheduled until the end of March.<sup>31</sup> The delay in filling key regulatory positions can be seen as a manifestation of the administration's deprioritization of health and safety regulation.<sup>32</sup>

Trump's newly confirmed nominee for the Supreme Court, Neil M. Gorsuch, will also likely have an effect on the regulatory state. Justice Gorsuch, previously a Tenth Circuit Court of Appeals Judge, has written extensively on what he sees as an imbalance of power between the judiciary and the executive branch in regard to interpreting congressional regulatory mandates.<sup>33</sup> He advocates for the abandonment of the *Chevron* doctrine, which requires the court to defer to the agency's interpretation of a Congressional statute, provided the agency's interpretation is reasonable and Congress has not addressed the precise issue before the court.<sup>34</sup> Gorsuch

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29. See Brian Barth, *Former Georgia Governor Sonny Perdue Nominated as USDA Secretary*, MOD. FARMER (Jan. 19, 2017), <http://modernfarmer.com/2017/01/former-georgia-governor-sonny-perdue-nominated-usda-secretary/> [https://perma.cc/EV97-4H9J].
30. See, e.g., *id.* ("There is nothing in Perdue's biography that would suggest he will resist Trump's stated plans to roll back Obama-era environmental regulations, many of which touch on the agricultural sector."); Chris Mooney & John Wagner, *Trump Picks Sonny Perdue for Agriculture Secretary*, WASH. POST (Jan. 19, 2017), [https://www.washingtonpost.com/politics/trump-picks-sonny-perdue-for-agriculture-secretary/2017/01/18/a26abb0-ddec-11e6-ad42-f3375f271c9c\\_story.html?utm\\_term=.bea452485ed4](https://www.washingtonpost.com/politics/trump-picks-sonny-perdue-for-agriculture-secretary/2017/01/18/a26abb0-ddec-11e6-ad42-f3375f271c9c_story.html?utm_term=.bea452485ed4) [https://perma.cc/REC8-24SB].
31. See Dan Flynn, *Vacant Positions Are Slowing Things Down at FDA and FSIS*, FOOD SAFETY NEWS (Mar. 9, 2017), <http://www.foodsafetynews.com/2017/03/vacant-positions-are-slowing-things-down-at-fda-and-fsis/#.WSUY1RPyv-Z> [https://perma.cc/HJK3-PDW9]; *Perdue Confirmation Hearing Set for March 23*, POLITICO (Mar. 16, 2017, 9:33 PM), <http://www.politico.com/story/2017/03/sonny-perdue-confirmation-hearing-agriculture-236157> [https://perma.cc/R6YE-E9R8].
32. The delay in filling posts may also be seen as the manifestation of dysfunction. Many major posts remained unfilled, well into 2017. See Danny Vinik, *Trump's Biggest Unfilled Jobs*, POLITICO (Apr. 25, 2017, 1:24 PM), <http://www.politico.com/agenda/story/2017/04/25/top-unfilled-jobs-trump-administration-000426> [https://perma.cc/KKZ4-PKLY]; see also Chris Mooney, *85 Percent of the Top Science Jobs in Trump's Government Don't Even Have a Nominee*, WASH. POST (June 6, 2017), [https://www.washingtonpost.com/news/energy-environment/wp/2017/06/06/trump-has-filled-just-15-percent-of-the-governments-top-science-jobs/?utm\\_term=.734b5d9ef819](https://www.washingtonpost.com/news/energy-environment/wp/2017/06/06/trump-has-filled-just-15-percent-of-the-governments-top-science-jobs/?utm_term=.734b5d9ef819).
33. See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (calling for the reversal of *Chevron, U.S.A., Inc. v. National Resources Defense Council Inc.*, 467 U.S. 837 (1984)); *Caring Hearts Pers. Home Servs., Inc. v. Burwell*, 824 F.3d 968, 969 (10th Cir. 2016) (noting that *Chevron* allows agencies "not only to enforce legislation but to revise and reshape it through the exercise of so-called 'delegated' legislative authority," and that this has troubling implications).
34. See *Chevron*, 467 U.S. at 865–866.

sees this deference as granting too much power to the executive branch at the expense of the other branches of government, in violation of the Constitution. He writes:

Chevron invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law. Under its terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive).<sup>35</sup>

He calls for this doctrine to be abandoned and the judiciary to be reinvested with the power to review agency action independently without being shackled by *Chevron* deference. This “*de novo*” judicial review of the law’s meaning would limit the ability of an agency to alter and amend existing law.”<sup>36</sup> While not being directly anti-regulatory, Gorsuch’s stance on agency decisionmaking removes power from agencies to interpret and implement laws, and places that power in the judiciary.

In short, through rhetoric, EOs, proposed legislation, and nominations for prominent positions, the Trump administration has taken a strong anti-regulatory stance for the articulated purpose of streamlining government to make it more efficient and to foster economic growth.

## II. FOOD POLICY

Food policy will be affected directly and indirectly by the new administration’s antiregulatory bent. It still remains to be seen how the two-for-one EO will be implemented in practice, but there are several food policy rulemakings that may be directly affected, discussed below. Indirectly, the lack of attention to food policy at a national level will turn the focus on regulatory progress to the state and local level.

### A. Labeling

In 2015 and 2016, the FDA announced several actions designed to improve the quality of information provided to consumers on food labels.<sup>37</sup> These include an update to the nutrition facts panel—the table containing

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35. *Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J., concurring).

36. *Id.* at 1158.

37. See *Changes to the Nutrition Facts Label*, FDA (Apr. 25, 2017), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm> [<https://perma.cc/9S42-H5HL>].

quantities of calories and certain designated nutrients that appears on most packaged food.<sup>38</sup> The FDA also asked for comments regarding whether the agency should define the term “natural,”<sup>39</sup> and redefine the term “healthy.”<sup>40</sup>

The nutrition facts panel implements the Nutrition Labeling and Education Act’s (NLEA) requirement that food labels contain nutrition information.<sup>41</sup> This highly recognizable table on most packaged foods contains information such as calories, saturated fat, sodium, total carbohydrates, sugars, protein, and various vitamins and minerals.<sup>42</sup> In 2014, the FDA proposed a rule updating this label, which was finalized in mid-2016.<sup>43</sup> The new label will update serving sizes, require manufacturers to list added sugars in addition to total sugars, and change the nutrients required to be listed on the label.<sup>44</sup> Although the compliance date was set for July 2018, the FDA has now indefinitely postponed this date for the stated purpose of reducing industry cost and improving compliance directives.<sup>45</sup> While some food manufacturers cheered this delay, others have already complied with the updated requirements.<sup>46</sup>

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38. *Id.*

39. See “Natural” on Food Labeling, FDA (Sept. 14, 2016), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm456090.htm> [<https://perma.cc/6SFK-3C2V>]. There is no FDA definition for the term “natural,” and previously the FDA has refused (in response to citizen petitions and judicial queries) to issue such a definition. For a more in-depth discussion of this changes, see Diana R. H. Winters, *Less May Be More: Reading Into FDA’s Labeling Requirements*, 19 SMU SCI. & TECH. L. REV. 419 (2016).

40. See FDA to Redefine “Healthy” Claim for Food Labeling, FDA (Dec. 29, 2016), <http://www.fda.gov/Food/NewsEvents/ConstituentUpdates/ucm520703.htm> [<https://perma.cc/4G9G-UXYM>]. Although there is a regulation defining “healthy,” it has not been updated in over two decades and does not comport with current scientific understanding about nutrition. For example, although the definition restricts the amounts of fats that can be in food products termed “healthy,” there are no requirements regarding sugar. Cf. Allison Aubrey, *FDA Is Redefining the Term ‘Healthy’ on Food Labels*, NPR: THE SALT (Oct. 3, 2016, 5:11 AM), <http://www.npr.org/sections/thesalt/2016/10/03/496064796/fda-is-redefining-the-term-healthy-on-food-labels>.

41. 21 U.S.C. § 343(q)(1) (2012).

42. See FDA Nutrition Labeling of Food, 21 C.F.R. § 101.9(c) (2017).

43. See *Changes to the Nutrition Facts Label*, *supra* note 37; see also Press Release, FDA, FDA Revises Proposed Nutrition Facts Label Rule to Include a Daily Value for Added Sugars (July 24, 2015), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm455837.htm> [<https://perma.cc/6FWW-KG37>].

44. *Changes to the Nutrition Facts Label*, *supra* note 37. For more, see Winters, *supra* note 39.

45. *Changes to the Nutrition Facts Label*, *supra* note 37.

46. See Caitlin Dewey, *Trump’s FDA Just Took Another Swipe at Michelle Obama’s Food Legacy*, WASH. POST: WONKBLOG (June 13, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/06/13/trumps-fda-just-took-another-swipe-at-michelle-obamas-food-legacy/?utm\\_term=.16c180abab3b](https://www.washingtonpost.com/news/wonk/wp/2017/06/13/trumps-fda-just-took-another-swipe-at-michelle-obamas-food-legacy/?utm_term=.16c180abab3b) [<https://perma.cc/R43G-HCJS>].

The FDA regulates the definition of “healthy,” but has not updated the definition since the early 1990s.<sup>47</sup> In September 2016, the agency issued a call for public comment on redefining the term.<sup>48</sup> The agency held a public meeting to discuss the term on March 9, 2017, and the comment period closed on April 26, 2017. There was significant disagreement among commenters on how to redefine the term, with stakeholders differing about the amount of fat, cholesterol, and added sugar that should be allowed in foods carrying the label “healthy,” which nutrients should be encouraged, and whether fruit juice can be labeled healthy, among other things.<sup>49</sup> As to the term “natural,” the agency has never issued a formal definition of the term, but in late 2015, it requested public comment on the issue and received close to 8,000 comments before the comment period closed in May 2016.<sup>50</sup>

## B. Food Safety Modernization Act

The Food Safety Modernization Act (FSMA) was passed in 2010 and marks the biggest increase in the FDA’s food safety authority since the Food Drug and Cosmetic Act was passed in 1938.<sup>51</sup> FSMA required the FDA to implement preventative controls on the portion of the food supply over which it has authority, to improve its inspection regime, and to increase its oversight over imported foods, and provided the agency with tools to respond more quickly and comprehensively to foodborne illness outbreaks.<sup>52</sup>

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47. U.S. FOOD & DRUG ADMIN., USE OF THE TERM “HEALTHY” IN THE LABELING OF HUMAN FOOD PRODUCTS: GUIDANCE FOR INDUSTRY 5 (2016), <https://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/UCM521692.pdf> [<https://perma.cc/GY8P-HVTZ>].
  48. “Healthy” on Food Labeling, FDA (Dec. 29, 2016), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm520695.htm> [<https://perma.cc/EL7T-NDCZ>].
  49. *Id.*; FDA Announcing Public Meeting to Discuss Use of the Term “Healthy” in Food Labeling, FDA (Feb. 15, 2017), <https://www.fda.gov/Food/NewsEvents/ConstituentUpdates/ucm538925.htm> [<https://perma.cc/3JNP-J2BX>]; Elaine Watson, *Healthy’ Bones of Contention: Stakeholders at Odds Over Added Sugar and Saturated Fat*, FOOD NAVIGATOR-USA.COM (Apr. 28, 2017, 7:32 PM), <http://www.foodnavigator-usa.com/Regulation/FDA-healthy-claims-comments-reveal-split-over-added-sugar> [<https://perma.cc/PB7M-J2KC>].
  50. “Natural” on Food Labeling, *supra* note 39.
  51. See FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011); *FDA Food Safety Modernization Act (FSMA)*, FDA (May 11, 2017), <https://www.fda.gov/food/guidanceregulation/fsma/default.htm> [<https://perma.cc/PV6S-LH62>].
  52. See FDA Food Safety Modernization Act, 124 Stat. 3885; see also RENÉE JOHNSON, CONG. RESEARCH SERV., R42885, FOOD SAFETY ISSUES FOR THE 114TH CONGRESS 8–9 (2015).

Although many of the final rules implementing the Act have been issued—for instance, the final rule on preventive controls for human food was issued in September 2015 and the final rule on produce safety was issued in November 2015—there are many implementation details still being worked out. For example, the agency is reviewing water standards that are a part of the final produce safety rule because of pushback from the industry, which could delay the date of compliance.<sup>53</sup> Even beyond the potential for conflict, the amount of complexity involved in the implementation of a law this size means continual communication between the agency and regulated entities, including the issuance of guidance.<sup>54</sup> For example, at the end of January 2017, the FDA issued a draft guidance on “Compliance with and Recommendations for Implementation of the Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption for Sprout Operations.”<sup>55</sup> This kind of dialogue, as manifested in both informal and formal agency communications, will be ongoing, and can potentially be impacted by an antipathy to regulation. As an example of how this kind of dialogue can be affected, we can look at USDA’s new animal welfare standards for organic foods, published in January 2017. The effective date for these standards has been postponed twice, and commentators are worried that the Trump administration’s anti-regulatory stance puts this rule in jeopardy.<sup>56</sup> Although this rule was not issued under FSMA, it shows how a focus on deregulation can affect the implementation of rules, even those already issued.

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53. *FDA Considering Simplifying Agricultural Water Standards*, FDA (Mar. 20, 2017), <https://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm546089.htm> [<https://perma.cc/GL83-M9DZ>]; see also Dan Flynn, *More Delay for Produce Safety Rule as Industry Balks Over Water Testing*, FOOD SAFETY NEWS (Mar. 20, 2017), <http://www.foodsafetynews.com/2017/03/more-delay-for-produce-safety-rule-as-industry-balks-over-water-testing/#.WSV2khPyv-Z> [<https://perma.cc/4LKM-QESJ>].

54. Guidance is a form of official but nonbinding agency communication that explains the agency’s position on laws and regulation without being a legal requirement. See PETER BARTON HUTT ET AL., *FOOD AND DRUG LAW: CASES AND MATERIALS* 54 (4th ed. 2014).

55. U.S. FOOD & DRUG ADMIN., *COMPLIANCE WITH AND RECOMMENDATIONS FOR IMPLEMENTATION OF THE STANDARDS FOR THE GROWING, HARVESTING, PACKING, AND HOLDING OF PRODUCE FOR HUMAN CONSUMPTION FOR SPROUT OPERATIONS: GUIDANCE FOR INDUSTRY* (2017), <https://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/UCM537031.pdf> [<https://perma.cc/8S7T-T5TK>].

56. *National Organic Program: Organic Livestock and Poultry Practices*, REGULATIONS.GOV (June 9, 2017), <https://www.regulations.gov/document?D=AMS-NOP-17-0031-0002> [<https://perma.cc/79SX-EP8L>]; Michael Pellman Rowland, *Organic’s New Animal Welfare Standards Are in Jeopardy*, FORBES (Feb. 2, 2017, 11:10 AM), <https://www.forbes.com/sites/michaelpellmanrowland/2017/02/02/organic-animal-welfare-standards/#6681eacf4293> [<https://perma.cc/8M97-8ACQ>].

### C. School Lunch Program

In 2012, the USDA issued updated nutrition standards for school lunches pursuant to the Healthy, Hunger-Free Kids Act of 2010. This was the first time that nutrition standards for school lunches had been updated in fifteen years. The new standards limited the amount of calories, reduced salt and fats, and increased offerings of whole grain and reduced fat foods in the meals.<sup>57</sup> These standards, which were seen as one of Michelle Obama's significant accomplishments as first lady,<sup>58</sup> were the object of much opprobrium. In May of this year, Sonny Perdue, the Secretary of Agriculture, relaxed the standards for schools for the upcoming year, specifically in regards to targets schools were supposed to meet for the amount and kind of whole grains, salt, and milk students should receive.<sup>59</sup>

## III. IMPACT

### A. National Impact

The administration's focus on deregulation and concerted opposition to new government regulation, combined with planned funding cuts, will most likely mean a delay or full stop to completely new food policy regulation. I do not expect, for example, the FDA to spend time and resources to define "natural," an endeavor the agency has previously treated with ambivalence, when the administration directed it to reduce regulation.<sup>60</sup> In areas where agencies are working to refine regulation, like FDA's proposed updates to the term "healthy" and clarifications of FSMA's final rules, the EOs and proposed legislation affecting regulatory process may put a damper on further action. Several advocacy groups working to improve food safety have given the Regulatory Accountability Act the nickname,

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57. Press Release, USDA, *USDA Unveils Historic Improvements to Meals Served in America's Schools* (Apr. 10, 2015), <https://www.fns.usda.gov/pressrelease/002312> [<https://perma.cc/SXK7-A32D>].

58. See Betsy Klein, *Michelle Obama's Healthy School Lunch Program in Jeopardy?*, CNN (Mar. 15, 2017, 4:29 AM), <http://www.cnn.com/2017/03/14/politics/michelle-obama-healthy-hunger-free-kids-act/index.html> [<https://perma.cc/ZP2Y-ELEB>].

59. Susan Scutti, *USDA Shifts Obama-Era School Lunch Guidelines*, CNN (May 2, 2017, 3:25 PM), <http://www.cnn.com/2017/05/02/health/school-lunch-changes/index.html> [<https://perma.cc/E58Z-U5FY>].

60. See *supra* note 39 and accompanying text.

“Filthy Food Act” because of its potential to inhibit the writing of food safety rules.<sup>61</sup>

Moreover, even if not directly affected by the EOs or proposed legislation, other food policy initiatives, such as the school lunch nutrition standards, and the menu labeling initiative that is part of the Affordable Care Act,<sup>62</sup> may become targets because of their association with what is seen as heavy-handed regulation and a “nanny state” ideology.

Layered on to these more direct effects is an indirect one too—the effect of inattention. The new and loosely cohered “food movement,” was supported by the Obama administration directly—through Michelle Obama’s attention to healthy eating and nutrition policy—and indirectly, through its embrace of policy focusing on improving health through preventive measures and bettering social determinants of health, and its attention to the environment and natural resources. Unless this movement can thrive without the attention of the federal government, it will wither on the vine. Fortunately, however, it was never a top-down movement, but was driven and supported by a variety of entities and interests.

## B. Subnational Action

Even before the election on November 8, 2016, food policy regulation at the state and local levels was a vibrant area of foment. Over the last decade, several state and local governments in the United States passed laws to address gaps in and perceived problems with federal food policy, including a Vermont law mandating the labeling of genetically engineered ingredients (since preempted by federal legislation), a California law regulating the use of medically important antibiotics in animal feed, the strictest in the country, and several California humane treatment laws.<sup>63</sup>

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61. See Letter from Ctr. for Foodborne Illness Research & Prevention et al., to Ron Johnson, Chair, & Claire McCaskill, Ranking Member, Senate Comm. on Homeland Sec. & Governmental Aff., (Mar. 21, 2017), [https://cdn.ewg.org/sites/default/files/testimony/Reject%20the%20Filthy%20Food%20Act%20letter%20to%20HSGAC%20Members%203-21-17.pdf?\\_ga=1.149022390.1485946865.1490225254](https://cdn.ewg.org/sites/default/files/testimony/Reject%20the%20Filthy%20Food%20Act%20letter%20to%20HSGAC%20Members%203-21-17.pdf?_ga=1.149022390.1485946865.1490225254) [https://perma.cc/W8Q6-AUTN].

62. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4205, 124 Stat. 119, 573–76 (2010); T.R. GOLDMAN, HEALTH AFF., THE FDA’S MENU-LABELING RULE (2015), [http://healthaffairs.org/healthpolicybriefs/brief\\_pdfs/healthpolicybrief\\_140.pdf](http://healthaffairs.org/healthpolicybriefs/brief_pdfs/healthpolicybrief_140.pdf) [https://perma.cc/8YUS-XR6N].

63. See CAL. FOOD & AGRIC. CODE §§ 14400–14408 (West Supp. 2017); VT. STAT. ANN. tit. 9 § 3043 (2017); Diana R. H. Winters, *The Benefits of Regulatory Friction in Shaping Policy*, 71 FOOD & DRUG L.J. 228, 230 (2016); Lydia Zuraw, *California Governor Signs Bill Regulating Animal Antibiotics*, FOOD SAFETY NEWS (Oct. 10, 2015), <http://www.foodsafetynews.com>

This decentralization of food regulation allowed smaller governmental units to experiment with policy solutions, permitted food policy to be responsive to local populaces, and promoted accountability for state and local officials in charge of implementing the food system.

In legislation that was somewhat overlooked on November 8, 2016, three municipalities in California, as well as the city of Boulder, Colorado, passed soda taxes.<sup>64</sup> Additionally, Massachusetts passed a minimum size requirement for farm animal containment.<sup>65</sup> On November 11, Cook County, Illinois also passed a soda tax.<sup>66</sup> Here, the benefits of federalism promotes “choice, competition, participation, experimentation, and the diffusion of power.”<sup>67</sup> Moreover, even conflicts between different levels of regulatory authority will start dialogue about food policy, and foster interest and understanding. Local action and its interaction with national action has the potential to create meaningful change in the food systems sphere, and to increase the democratic engagement of the citizenry.<sup>68</sup> In a time of regulatory stagnation, this local action becomes even more important, and we may see smaller units of government driving policy in many different areas going forward.<sup>69</sup>

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/2015/10/california-governor-signs-groundbreaking-bill-regulating-animal-antibiotics/#.WTjU6nXyvq0.

64. See, e.g., S.F., CAL., BUS. & TAX REGULATIONS CODE, art. 8, §§ 550–560 (2016); see also *Soda Taxes Spread After Votes in Four U.S. Cities*, REUTERS (Nov. 9, 2016, 12:21 PM), <http://www.reuters.com/article/us-usa-election-soda-tax-idUSKBN1341FL> [<https://perma.cc/RUD5-U5J7>].
65. See MASS. GEN. LAWS ANN. ch. 129, § 1-1(West Supp. 2017); *Massachusetts Minimum Size Requirements for Farm Animal Containment, Question 3 (2016)*, BALLOTPEdia, [https://ballotpedia.org/Massachusetts\\_Minimum\\_Size\\_Requirements\\_for\\_Farm\\_Animal\\_Containment,\\_Question\\_3\\_\(2016\)](https://ballotpedia.org/Massachusetts_Minimum_Size_Requirements_for_Farm_Animal_Containment,_Question_3_(2016)) [<https://perma.cc/KS7V-BY6Q>].
66. See COOK COUNTY, ILL., ORDINANCES, art. 22, §§ 74-850–74-859 (2016); Hal Dardick, *Cook County Soda Pop Tax Approved With Preckwinkle Breaking Tie Vote*, CHI. TRIB. (Nov. 11, 2016, 9:19 AM), <http://www.chicagotribune.com/news/local/politics/ct-cook-county-soda-pop-tax-vote-met-1111-20161110-story.html>.
67. Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 6 (2010) (“The Court reels these arguments off as easily as do scholars.”).
68. See Diana R. H. Winters, *The Benefits of Regulatory Friction in Shaping Policy*, 71 FOOD & DRUG L.J. 228 (2016); Winters, *supra* note 63.
69. This is true in many contexts, and has been noted by scholars and advocates. For example, in the context of health care, see Nicholas Bagley, *Federalism and the End of Obamacare*, 127 YALE L.J.F. 1 (2017). In the context of climate change, see Jonah Engel Bromwich, *Defying Trump, Hawaii Becomes First State to Pass Law Committing to Paris Climate Scord*, N.Y. TIMES (June 7, 2017), [https://www.nytimes.com/2017/06/07/climate/hawaii-climate-paris-trump.html?\\_r=0](https://www.nytimes.com/2017/06/07/climate/hawaii-climate-paris-trump.html?_r=0), and Lesley McAllister, *The Puzzle of California’s Climate Leadership*, ENVTL. L. PROF. BLOG (Mar. 13, 2017), <http://lawprofessors.typepad.com/environmental>

## CONCLUSION

Food policy, including the ways in which our society regulates production practices, distribution, equity, nutrition, waste, and more, is as important today as it was before the election. Food is important because of its intimacy and universality—we all eat every day—but also because it is a lens into and a reflection of society writ large. The difference in the way we eat and the food to which we have access demonstrates cultural, ethnic, racial, and economic disparities and is affected and exacerbated by the inequality endemic to our society. The current administration’s stifling of progress in food policy—through its actions and its inattention—reverberates beyond its specific context. Food policy and the multifarious struggle for a safer, healthier, and more equitable food supply is a space for democratic engagement and interaction with the physical and political spheres, and the way our society deals with food and the feeding of its populace is a window into its health.<sup>70</sup>

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[\\_law/2017/03/the-puzzle-of-californias-spectacular-climate-leadership-.html](http://law/2017/03/the-puzzle-of-californias-spectacular-climate-leadership-.html)  
[<https://perma.cc/35U5-BGFQ>].

70. *See* BEE WILSON, SWINDLED, at xiii (2008) (“Governments have sought to police food fraud because to permit it to carry on unpunished is a sign of anarchy. A society in which swindling is rife is one in which fundamental trust between citizens has broken down.”).