

BRINGING THE COW TO COURT:  
THE FUTURE OF THE LEGAL BATTLE OVER RAW MILK

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# Bringing the Cow to Court: The Future of the Legal Battle over Raw Milk

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## I. INTRODUCTION

“From the great weight of the evidence it is plain that raw milk as a general thing is more nutritious, easier assimilated, and better food, especially for children, than pasteurized milk . . . .”<sup>1</sup> Such a decisive declaration by a court today would send shockwaves through the dairy industry, delighting raw milk activists and alarming dairy executives in its path. Unfortunately, the consensus reached by the Supreme Court of Missouri in 1926 has disintegrated over time into what is now a highly controversial conflict, both in courts and in state legislatures, over human health and innate human rights. Thus, the time is ripe to address the legal future of raw milk consumption, in an attempt to arrive at a common understanding of the constitutional issues presented by this seemingly pure substance.

Given its importance in the life cycle of mammals, it should come as no surprise that milk has long been praised as an idyllic, even medicinal, liquid in poetry and prose.<sup>2</sup> However, despite its deep roots in the annals of human history, there is much modern debate about the health benefits and risks stemming from raw (unpasteurized) milk consumption.<sup>3</sup> Most agree the rise of pasteurization in the 20<sup>th</sup> century made milk consumption significantly safer, but it also

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<sup>1</sup> State *ex rel.* Knese v. Kinsey, 314 Mo. 80, 94 (Mo. 1926).

<sup>2</sup> See e.g., WILLIAM S. ANDERSON, OVID’S *METAMORPHOSES*: BOOKS 1-5 163 (1997) (discussing Ovid’s use of milk in *Metamorphoses*: “Milk and honey often appear in descriptions of marvelous worlds”); HELEN KING, HIPPOCRATES’ WOMAN: READING THE FEMALE BODY IN ANCIENT GREECE 49, 71, 121 (1998) (referencing the use of milk in medical procedures in ancient Hippocratic texts).

<sup>3</sup> See e.g., THE WESTON A. PRICE FOUNDATION, RESPONSE TO THE FDA (2007), <http://www.realmilk.com/> [hereinafter RESPONSE TO THE FDA] (follow “Slide By Slide Response to FDA PowerPoint” hyperlink) (presenting scientific evidence about raw milk consumption in conflict with the FDA’s scientific findings).

fueled a countermovement of raw milk activism.<sup>4</sup> Raw milk activists contend that milk in its unpasteurized, unaltered form is more healthful, and even curative.<sup>5</sup> However, the federal government maintains that raw milk is “inherently dangerous,” and has consequently regulated the substance on the federal level, in addition to state regulations.<sup>6</sup> These regulations have spawned a backlash of creative attempts to circumvent the prohibitions.<sup>7</sup> The exploitation of the legal loopholes has in turn instigated court battles aimed at interpreting state prohibitions and regulations.<sup>8</sup> Furthermore, many of the state statutes are in flux, as the governments without complete bans struggle to arrive at a balance between the public safety and freedom of choice.<sup>9</sup> Hence, it seems the United States is on the brink of sweeping reform in raw milk regulation. Complete constitutional and policy analyses are necessary to prepare the states for the implications of their future decisions on this increasingly weighty issue.

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<sup>4</sup> See Linda Bren, *Got Milk? Make Sure It's Pasteurized*, FDA CONSUMER MAGAZINE, Sept.-Oct. 2004, available at [http://www.fda.gov/fdac/features/2004/504\\_milk.html](http://www.fda.gov/fdac/features/2004/504_milk.html).

<sup>5</sup> See e.g., RawMilk.org Frequently Asked Questions, <http://www.rawmilk.org/faq.php> (last visited Apr. 20, 2009).

<sup>6</sup> John F. Sheehan, U.S. Food and Drug Administration, ON THE SAFETY OF RAW MILK 3 (2005), <http://www.cfsan.fda.gov/~ear/milksafe.html>; see Bren, *supra* note 4, at “The Law.”

<sup>7</sup> See e.g., Wendy Cole, *Got Raw Milk? Be Very Quiet*, TIME, Mar. 13, 2007, available at <http://www.time.com/time/health/article/0,8599,1598525,00.html> (discussing “herd-sharing” groups who “lease” a portion of a cow rather than buying the milk in order to fall under exemptions for owners of cows); Suzanne Nelson, *Raw Milk may Lose its Gray Dye*, INDEPENDENT WEEKLY, Jul. 2, 2008, available at <http://www.indyweek.com/gyrobase/index> (discussing North Carolinians buying raw milk for their own consumption by claiming it is for an animal, which is allowed by North Carolina law).

<sup>8</sup> See e.g., *Schmitmeyer v. Ohio*, No. 06-CV-63277 (Darke County, Ohio Ct. Com. Pl. Dec. 29, 2006); *Meadowsweet Dairy v. N.Y. Dep't of Agric.*, No. 10306874 (County of Albany N.Y. Sup. Ct. Nov. 18, 2008); *Carbaugh v. Solem*, 225 Va. 310 (Va. 1983).

<sup>9</sup> See e.g., Jan Ellen Spiegel, *Bill Proposes Restrictions on Raw Milk Sales*, N.Y. TIMES, Mar. 12, 2009, [http://www.nytimes.com/2009/03/15/nyregion/connecticut/15milkct.html?\\_r=2&hp](http://www.nytimes.com/2009/03/15/nyregion/connecticut/15milkct.html?_r=2&hp) (discussing Connecticut’s proposed bill that would only allow raw milk sales at farms); *Md. Bill Would Permit Cow Ownership Agreements*, LANCASTER FARMING, Feb. 20, 2009, <http://www.lancasterfarming.com/node/1753> [hereinafter LANCASTER FARMING] (discussing a bill that would explicitly legalize cow share agreements); Proposed New Rules for Milk and Dairy, Title 25, Texas Administrative Code, Chapter 217 (Tex. 2009), available at <http://www.dshs.state.tx.us/milk/draft.shtm> (discussing Texas’ new proposed rules for dairy).

This comment will analyze the constitutionality of raw milk regulations and proffer policy recommendations. Section II will provide background on the debate over the health benefits and risks associated with the consumption of raw milk. Next, Section III will provide an overview of the current federal and state regulations of raw milk, as well as the enforcement of those laws and citizens' responses to them. Section IV contains an analysis of the constitutionality of the myriad of state regulations. The constitutional analysis will be followed by Section V, which will provide policy concerns and recommendations. Lastly, the conclusion is contained in Section VI.

## II. HEALTH BACKGROUND

### A. JUDICIAL VIEWS

The judiciary has proven inconsistent in its assessments of the health risks and benefits of raw milk consumption over time. In early raw milk cases, at least two courts acknowledged the health utility of raw milk consumption in children, and a third court referred to raw milk as “harmless.”<sup>10</sup> However, one of the same courts, as well as several other courts in the early 20<sup>th</sup> century, also expressed concern over contamination or the need for pasteurization.<sup>11</sup> Unfortunately, the imprecision in judicial treatment has continued into the 21<sup>st</sup> century.

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<sup>10</sup> See *State ex rel. Knese v. Kinsey*, 314 Mo. 80, 94 (Mo. 1926) (explaining the health benefits of raw milk consumption by children); *Nelson v. W. Coast Dairy Co.*, 5 Wash.2d 284, 286 (Wash. 1940) (noting that raw milk was proscribed by a doctor for a young girl suffering from malnutrition); *Shelton v. City of Shelton*, 150 A. 811, 816 (Conn. 1930) (calling raw milk “harmless”).

<sup>11</sup> See *e.g.*, *Nelson v. West Coast Dairy Co.*, 5 Wash.2d 284, 292 (Wash. 1940) (noting the risk of contracting undulant fever from raw milk consumption); *Sorenson v. City of New Haven*, 4 Conn.Supp. 369 at 1 (Conn. Super. Ct. 1936) (holding that “Milk, universally used as a food, is peculiarly liable to contamination and adulteration and therefore in the interest of public health and safety, the regulation of its production, marketing and sale are within the proper exercise of the police power of the state.”); *People ex rel. Empire State Dairy Co. v. Sohmer*, 218 N.Y. 199, 202-03 (N.Y. 1916) (extolling the virtues of pasteurization).

Today, courts have not strongly allied with the government’s position that raw milk is “inherently dangerous.”<sup>12</sup> The few courts that have addressed raw milk sales in recent years have either not discussed the health risks and benefits, or have merely vaguely alluded to their position on the issue.<sup>13</sup> Most notably, the New York Supreme Court stated in an opinion last year that the state legislature’s purpose in enacting its raw milk regulation was to protect public health.<sup>14</sup> While this acknowledgement of risks is far from a stinging indictment of raw milk, an Ohio Court of Common Pleas professed even less concern over potential dangers, concluding that cow share programs (in which consumers purchase a share of a cow in order to access raw milk under the regulatory exception for cow owners) pose no health emergency to the public.<sup>15</sup> Combined, these modern judicial references to the danger of raw milk consumption certainly fail to express the government’s dire determinations.

## B. SCIENTIFIC VIEWS

The federal government maintains that raw milk consumption is dangerous and unadvisable; however, the scientific evidence is not unequivocal, and various groups publicize

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<sup>12</sup> Sheehan, *supra* note 6, at 3.

<sup>13</sup> *See* Carbaugh v. Solem, 225 Va. 310, 313 (Va. 1983) (the sole mention of public health refers only to the lower trial judge’s refusal to find a threat to public health and safety that was sufficient to warrant an injunction against the sale of raw goat milk); Schmitmeyer v. Ohio, No. 06-CV-63277 at 12 (Darke County, Ohio Ct. Com. Pl. Dec. 29, 2006) (noting merely that “The Record does not provide any facts for the Court to conclude that there was an emergency which presented a clear and present danger to the public’s health that would have warranted an immediate suspension . . . .”); Meadowsweet Dairy v. N.Y. Dep’t of Agric., No. 10306874 at 18 (County of Albany N.Y. Sup. Ct. Nov. 18, 2008).

<sup>14</sup> *See* Meadowsweet Dairy v. N.Y. Dep’t of Agric., No. 10306874 at 18 (County of Albany N.Y. Sup. Ct. Nov. 18, 2008) (noting merely that the New York legislature’s intent in enacting raw milk regulations was to protect public health).

<sup>15</sup> *See* Schmitmeyer v. Ohio, No. 06-CV-63277 at 12 (Darke County, Ohio Ct. Com. Pl. Dec. 29, 2006) (noting merely that “The Record does not provide any facts for the Court to conclude that there was an emergency which presented a clear and present danger to the public’s health that would have warranted an immediate suspension . . . .”).

different evidence and opinions according to their particular motives.<sup>16</sup> This dispersal of views leaves consumers confused about the scientific consensus, or lack thereof. The following overview of scientific opinions samples the positions of the government, the dairy producers, and raw milk advocates.

First, the federal government is staunch in its position that raw milk consumption is “inherently dangerous.”<sup>17</sup> The U.S. Food and Drug Administration (“FDA”) and the Center for Food Safety and Applied Nutrition (“CFSAN”) under the FDA serve as the primary ambassadors for the federal government on the issue of raw milk consumption, and they have consistently cited evidence discouraging raw milk consumption over the past five years.<sup>18</sup> In 2004, the FDA publicized a number of raw milk illness incidents across the country, ranging from *Salmonella* to *Listeria*, in the FDA Consumer Magazine.<sup>19</sup> The publication explains that a wide variety of pathogens may be found in raw milk, causing consumers to contract various illnesses.<sup>20</sup>

Furthermore, it claims that pasteurization kills these harmful bacteria, and that “[s]cience has not

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<sup>16</sup> For a sampling of government raw milk warnings, see for example Sheehan, *supra* note 6, at 3 (labeling raw milk as “inherently dangerous”); Bren, *supra* note 4 (discussing illnesses induced by raw milk consumption and noting that “Drinking raw (untreated) milk or eating raw milk products is ‘like playing Russian roulette with your health,’ . . .”). For a discussion of the variant scientific views, see *infra* part II.B.

<sup>17</sup> Sheehan, *supra* note 6, at 3 (labeling raw milk as “inherently dangerous”).

<sup>18</sup> See e.g., Bren, *supra* note 4 (noting the involvement of the FDA and the CFSAN in raw milk research and law enforcement); U.S. Food and Drug Administration, *FDA Warns Consumers to Avoid Drinking Raw Milk*, FDA NEWS, Dec. 16, 2005, <http://www.fda.gov/bbs/topics/NEWS/2005/NEW01278.html>; Center for Food Safety and Applied Nutrition, *The Dangers of Raw Milk: Unpasteurized Milk Can Pose a Serious Health Risk*, FOOD FACTS, Oct. 2006, available at <http://www.cfsan.fda.gov/~dms/rawmilk.html>; U.S. Food and Drug Administration, *FDA and CDC Remind Consumers of the Dangers of Drinking Raw Milk*, FDA NEWS, Mar. 1, 2007, <http://www.fda.gov/bbs/topics/NEWS/2007/NEW01576.html>.

<sup>19</sup> See Bren, *supra* note 4.

<sup>20</sup> *Id.* (noting that raw milk may contain “the bacteria campylobacter, escherichia, listeria, salmonella, yersinia, and brucella” and may cause a *Listeria monocytogenes*-caused illness or *Escherichia coli* infection, in addition to many other diseases).

shown a connection between drinking raw milk and disease prevention.”<sup>21</sup> This stance was published again following an outbreak in Washington in 2005, and has been periodically re-released by the government to remind the public of its position and of the outbreaks of illness related to raw milk consumption.<sup>22</sup> Two PowerPoint presentations have also been released to the public with more comprehensive explanations of the government’s position.<sup>23</sup> Lastly, in a 2007 testimonial to the Maryland House of Delegates, John Sheehan, Director of the Division of Plant and Dairy Food Safety in the CFSAN, directly rebuts many of the claims of raw milk advocates, such as the claims that raw milk actually kills pathogens, that pasteurized milk causes lactose intolerance, and that raw milk is probiotic, less allergenic, and more protein-rich.<sup>24</sup> In sum, the federal government is unwavering in its position that the consumption of raw milk carries severe health risks.

Likewise, the dairy industry also warns that raw milk consumption is dangerous. The National Dairy Council (“NDC”), for example, strongly opposes raw milk sales.<sup>25</sup> In fact, the

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<sup>21</sup> *Id.*

<sup>22</sup> See U.S. Food and Drug Administration, *FDA Warns Consumers to Avoid Drinking Raw Milk*, FDA NEWS, Dec. 16, 2005, <http://www.fda.gov/bbs/topics/NEWS/2005/NEW01278.html>; Center for Food Safety and Applied Nutrition, *The Dangers of Raw Milk: Unpasteurized Milk Can Pose a Serious Health Risk*, FOOD FACTS, Oct. 2006, available at <http://www.cfsan.fda.gov/~dms/rawmilk.html>; U.S. Food and Drug Administration, *FDA and CDC Remind Consumers of the Dangers of Drinking Raw Milk*, FDA NEWS, Mar. 1, 2007, <http://www.fda.gov/bbs/topics/NEWS/2007/NEW01576.html>.

<sup>23</sup> See Sheehan, *supra* note 6; Dairy and Egg Safety Division, U.S. Food and Drug Administration, RAW MILK-ASSOCIATED PUBLIC HEALTH RISKS (2007), <http://www.cfsan.fda.gov/~dms/rawmilk2.html>.

<sup>24</sup> See Testimony of John F. Sheehan, U.S. Food and Drug Administration, before the Health and Government Operations Committee Maryland House of Delegates, March 15, 2007, at 9-14, available at [www.cfsan.fda.gov/~acrobot/rawmilk3.pdf](http://www.cfsan.fda.gov/~acrobot/rawmilk3.pdf).

<sup>25</sup> See generally National Dairy Council, *Modern Dairy Farming Practices & Milk Quality: Myths & Facts*, 78 DAIRY COUNCIL DIGEST ARCHIVES 3 (2007), <http://www.nationaldairycouncil.org/NationalDairyCouncil/Health/Digest/dcd78-3Page1.htm> [hereinafter National Dairy Council] (noting that “Although some people believe that raw (unpasteurized) milk, either conventionally or organically produced, is a healthy alternative to pasteurized milk, consuming raw milk and milk products has been linked to outbreaks of foodborne illness.”). The NDC is the

NDC unapologetically brands raw milk activists' primary claim, namely that raw milk is healthier, a "myth."<sup>26</sup> Simultaneously, the organization notes the documentation of illnesses associated with raw milk consumption, and assures the public that due to government regulation, all pasteurized milk is safe.<sup>27</sup> The NDC, like the FDA, supports its position with data about the risks of contracting *E. coli*, *Listeria*, and *Salmonella* from raw milk.<sup>28</sup> They also extol the virtues of pasteurization, and add that pasteurized milk is even healthier than raw milk because it is fortified with vitamin D.<sup>29</sup> Thus, with the addition of milk marketing plugs, the dairy industry's position on the science of raw milk mimics that of the government. The Dairy Farmers of America organization even provides links to government websites for information about food safety, legislative issues, and policy issues on its website.<sup>30</sup> Clearly, the dairy industry endorses the federal government's views on raw milk, although the reason for its support is most likely a result of its fear that raw milk contaminations will hurt the milk industry.

In stark contrast, raw milk activists vehemently maintain that raw milk is safe and is healthier than its pasteurized counterpart. Some of the most common arguments in favor of raw milk are that it can prevent allergies, is protective against foodborne illnesses, retains important

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"nutrition marketing arm" of Dairy Management Inc., and "has been the leader in dairy nutrition research, education and communication since 1915." National Dairy Council, About Us, <http://www.nationaldairyCouncil.org/nationaldairyCouncil/aboutus> (last visited Apr. 20, 2009).

<sup>26</sup> National Dairy Council, *supra* note 24.

<sup>27</sup> *See id.*

<sup>28</sup> *See* National Dairy Council, Raw Milk Fact Sheet, <http://www.nationaldairyCouncil.org/NationalDairyCouncil/Nutrition/Safety/RawMilkFactSheet.htm>.

<sup>29</sup> *See id.*

<sup>30</sup> *See* Dairy Farmers of America, Issues Important to Dairy, [http://www.dfamilk.com/newsroom/issues/issues\\_index.html](http://www.dfamilk.com/newsroom/issues/issues_index.html) (last visited Apr. 20, 2009).

nutrients that pasteurization eliminates, is no more risky than other foods (with one study showing that it is less likely to cause illness than deli meats), and that it can be made safer through better sanitation and the use of pasture feeding.<sup>31</sup> One of the most prolific gatherers and distributors of literature on the health benefits of raw milk is the Weston A. Price Foundation project called, “A Campaign for Real Milk.”<sup>32</sup> This organization most notably published a slide-by-slide rebuttal presentation to the FDA’s *On The Safety of Raw Milk*, but it has also published retorts to everything from an article in the *Clinical Infectious Diseases* journal, to a blog by an anti-raw milk attorney.<sup>33</sup> In addition to these rebuttals, the organization has affirmatively published the scientific views it supports.

First, the organization has posted the views of Dr. Theodore Beals on its website. In a 2008 California Superior Court case styled *Organic Pastures Dairy Co. v. State of California*, Dr. Beals served as an expert witness and claimed that raw mammalian milk contains beneficial

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<sup>31</sup> See RESPONSE TO THE FDA, *supra* note 3, at ii-iii.

<sup>32</sup> See A Campaign for Real Milk, <http://www.realmilk.com/> (last visited Apr. 20, 2009).

<sup>33</sup> See THE WESTON A. PRICE FOUNDATION, RESPONSE TO ANTI-RAW MILK ARTICLE PUBLISHED IN CLINICAL INFECTIOUS DISEASES (2009), <http://www.realmilk.com/> (follow “Response to Article Published in Infectious Clinical Disease, January 2009” hyperlink) (the rebuttal criticizes the authors, who threatened that any physician supporting raw milk consumption faces future legal woes, for ignoring much of the scientific evidence on the benefits of raw milk and negatives of pasteurization, and then engages in a detailed rebuttal of many of the article’s scientific claims); THE WESTON A. PRICE FOUNDATION, RAW MILK: WHAT THE SCIENTIFIC LITERATURE REALLY SAYS: A RESPONSE TO BILL MARLER, JD, <http://www.realmilk.com/> (follow “Raw Milk: What the Scientific Literature Really Says” hyperlink) (In addition to providing scientific rebuttals, this response criticizes attorney Bill Marler for failing to note whether raw milk is “uniquely dangerous” or whether citizens’ liberty in drinking the product should be limited by government); The Weston A. Price Foundation, Response to Anti-Raw Milk Position Paper by Bill Marler, JD, <http://www.realmilk.com/> (follow “Response to Anti-Raw Milk Position Paper by Bill Marler, JD” hyperlink) (criticizing attorney Bill Marler for defining “the ‘hygiene hypothesis’ in a way that clearly includes exposure to pathogens but does not clearly include or exclude exposure to nonpathogenic or symbiotic organisms,” in addition to proffering further scientific rebuttal); RESPONSE TO THE FDA, *supra* note 3 (offering a slide-by-slide rebuttal to the FDA’s presentation *On The Safety of Raw Milk*).

bacteria.<sup>34</sup> Next, in an extensive PowerPoint presentation, the Campaign for Raw Milk discusses the “built-in protective systems in raw milk,” the “destruction of built-in safety systems by pasteurization,” the pathogen-fighting power of coliforms, and many other scientific claims in support of raw milk sales.<sup>35</sup> Although the Weston A. Price Foundation is arguably the most well known organization, other raw milk activists have also gathered arsenals of scientific data to use in online informational campaigns.<sup>36</sup>

To conclude, there is a wide range of scientific views that can be shaped to support a speaker’s particular interests, and the truth likely lies somewhere in between the two dichotomous positions. The federal government and the dairy industry’s claim that raw milk is no healthier than pasteurized milk, and in fact has the potential to harm health, is supported by at least one recent researcher at Ohio State University.<sup>37</sup> However, raw milk activists also cite at

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<sup>34</sup> See Oral Testimony at 30, *Organic Pastures Dairy Co. v. State of California*, No. CU-07-00204 (Apr. 25, 2008), available at <http://www.realmilk.com/> [hereinafter Oral Testimony] (follow “Expert Witnesses Defend Bacteria in Raw Milk” hyperlink).

<sup>35</sup> WESTON A. PRICE FOUNDATION, A CAMPAIGN FOR REAL MILK, <http://www.realmilk.com/> (follow “Raw Milk and Raw Milk Products: Safety, Health, Economic, and Legal Issues” hyperlink; then follow “Raw Milk PowerPoint -12 AUG 2008 Update” hyperlink).

<sup>36</sup> See e.g., Raw-Milk-Facts.com, <http://www.raw-milk-facts.com/> (last visited Apr. 20, 2009); RawMilk.Org, <http://www.rawmilk.org/default.php> (last visited Apr. 20, 2009). For an especially illuminating report on the health risks and benefits of pasteurized and raw dairy, the nutritional value of each, and, interestingly enough, data to support the beneficial effects of raw milk on infants and children as recognized by the early American courts (discussed in *supra* Part II.A), see WILLIAM CAMPBELL DOUGLASS AND AAJONUS VONDERPLANITZ, REPORT IN FAVOR OF RAW MILK: EXPERT REPORT AND RECOMMENDATIONS (2001), available at <http://www.rawmilk.org/resouces.php> (follow “Report in Favor of Raw Milk” hyperlink).

<sup>37</sup> See Bob Meyer, *Ohio State researcher says drinking raw milk is not a good idea*, BROWNFIELD: AG NEWS FOR AMERICA, Jan. 21, 2009, <http://www.brownfieldnetwork.com/gestalt/go.cfm?objectid=FB51D90B-5056-B82A-D05BDC8220755D85> (noting that “Jeff LeJeune, a microbiologist and veterinary researcher says ‘Although milk and dairy products are important components of a healthy diet, if consumed unpasteurized, they can present a health hazard due to possible contamination with pathogenic bacteria,’” and that LeJeune finds that pasteurization “does not change the nutritional value of milk.”).

least one recent expert opinion on the virtues of the product.<sup>38</sup> Thus, scientific opinions can be found both in support of and in opposition to human raw milk consumption.

### III. REGULATION OF RAW MILK IN THE UNITED STATES

#### A. FEDERAL REGULATION

The promulgation of the current federal rule banning the interstate sale of raw milk has its origin in a 1986 ruling, *Public Citizen v. Heckler*.<sup>39</sup> In that case, the D.C. District Court held that the Department of Human Health Services' decision not to engage in rulemaking to prohibit these sales was arbitrary; furthermore, the court ordered that the Department of Human Health Services ("HHS") draft a rule banning all interstate raw milk sales for human consumption.<sup>40</sup> In accordance with this decision, HHS promulgated rule 21 CFR §1240.61, which states that all milk intended for human consumption that enters interstate commerce must be pasteurized.<sup>41</sup> Interestingly, Congressman Ron Paul recently introduced a bill to repeal this rule.<sup>42</sup> The bill would simply "authorize the interstate traffic of unpasteurized milk and milk products that are packaged for direct human consumption."<sup>43</sup> The bill is currently under consideration by the House Committee on Energy and Commerce.<sup>44</sup> Regardless of whether the bill ultimately

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<sup>38</sup> See e.g., Oral Testimony, *supra* note 34.

<sup>39</sup> See *Public Citizen v. Heckler*, 653 F. Supp. 1229, 1242 (D.C. 1986).

<sup>40</sup> *Id.*

<sup>41</sup> 21 C.F.R. Ch. §1240.61 (1992), available at [edocket.access.gpo.gov/cfr\\_2001/aprqttr/pdf/21cfr1240.62.pdf](http://edocket.access.gpo.gov/cfr_2001/aprqttr/pdf/21cfr1240.62.pdf).

<sup>42</sup> H.R. 778, 111<sup>th</sup> Cong. (2009), available at [http://thomas.loc.gov/home/gpoxmlc111/h778\\_ih.xml](http://thomas.loc.gov/home/gpoxmlc111/h778_ih.xml).

<sup>43</sup> *Id.*

<sup>44</sup> The Library of Congress, [http://www.thomas.gov/cgi-bin/bdquery/D?d111:778:/list/bss/d111HR.lst::\[TOM:/bss/111search.html](http://www.thomas.gov/cgi-bin/bdquery/D?d111:778:/list/bss/d111HR.lst::[TOM:/bss/111search.html) (last visited Apr. 20, 2009).

becomes law, it evinces momentum for change in federal raw milk regulation.

## B. STATE REGULATION

State regulation of raw milk is also in flux. The court in *Public Citizen v. Heckler* refused to include intrastate sales of raw milk in its order; therefore, raw milk regulation within states has been left to the discretion of each individual government since that decision.<sup>45</sup> In a 2008 survey, the National Association of State Departments of Agriculture (“NASDA”) collected information on each state’s regulatory approach to this issue.<sup>46</sup> Most states that do not completely ban raw milk fall within one of two categories, although there is much variation within these groups.<sup>47</sup> Specifically, twelve states allow the sale of raw milk only at farms, and thirteen states allow the sale of raw milk at both farms and retail stores.<sup>48</sup> In all, twenty-nine states allow some form of raw milk sales for human consumption, as of 2008.<sup>49</sup> However, many state regulations are undergoing changes.

Of the six states sampled here, half of the recent actions and proposals regarding raw milk indicate a liberalization of policy, and half suggest a tightening of state regulation. At least three states, Maryland, North Carolina, and Pennsylvania, either have loosened, or have bills that would loosen, their raw milk regulations. Most notably, Maryland proposed to explicitly allow

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<sup>45</sup> See *Public Citizen v. Heckler*, 653 F. Supp. 1229, 1241 (1986).

<sup>46</sup> See NATIONAL ASSOCIATION OF STATE DEPARTMENTS OF AGRICULTURE, 2008 RAW MILK SURVEY RESULTS (2008), available at <http://nasda.org/cms/0/0/0/-3/9061.aspx?qsearch=raw+milk> [hereinafter SURVEY RESULTS] (follow “2008 Raw Milk Survey Results” hyperlink).

<sup>47</sup> Two of the more interesting state laws that do not fall under one of these categories, are the laws in Kentucky and Rhode Island, which both allow raw goat milk, not cow milk, for human consumption, but only if the human has obtained a physician’s prescription for it. *Id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

agreements, more commonly known as cow share agreements, in which buyers pay for a share of cow ownership in return for the raw milk from that cow.<sup>50</sup> Nine states have taken the opposite approach by explicitly banning cow share agreements as ways to circumvent raw milk regulations, and seven more were considering such policies in 2008.<sup>51</sup> Thus, Maryland's bill, if passed, would mark the beginning of a potential sea change in states' approaches to cow share agreements. The Maryland Delegate who introduced the bill invoked the current economic recession as ammunition for his position. He said of the bill, "[i]t is especially important right now that farmers be able take advantage of all economic opportunities available to them. I hope to see Maryland dairy farms thrive once this legislation passes . . . ."<sup>52</sup> This economic rationale may prove appealing to other states that see their citizens going across state lines to obtain milk.

In contrast, North Carolina's recent change is seemingly minor; yet, the victory is a meaningful one for raw milk activists in that state, who had previously faced a unique phenomenon: gray milk. Prior to July 2008, North Carolina required that all raw milk, which is only allowed for animal consumption in that state, be colored with a charcoal gray dye to discourage accidental or purposeful human consumption.<sup>53</sup> However, on July 11, 2008, the Governor signed into law a bill repealing that rule.<sup>54</sup> Although raw milk consumption is still disapproved for human consumption in the state, the removal of the dye is a small step towards

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<sup>50</sup> See H.B. 1080, 426<sup>th</sup> Session of General Assembly, (Md. 2009), [mlis.state.md.us/2009rs/bills/hb/hb1080f.pdf](http://mlis.state.md.us/2009rs/bills/hb/hb1080f.pdf); LANCASTER FARMING, *supra* note 9 (discussing the introduction of Maryland House Bill 1080).

<sup>51</sup> See SURVEY RESULTS, *supra* note 46.

<sup>52</sup> LANCASTER FARMING, *supra* note 9.

<sup>53</sup> See Suzanne Nelson, *Raw milk may lose its gray dye*, Jul. 2, 2008, INDEPENDENCE WEEKLY, <http://www.indyweek.com/gyrobase/Content?oid=oid%3A260526>.

<sup>54</sup> See General Assembly of North Carolina, House Bill 2524 / S.L. 2008-88, <http://www.ncleg.net/gascripts/BillLookup/BillLookup.pl?Session=2007&BillID=H2524>.

milk liberalization.

Lastly, in Pennsylvania, two bills would loosen raw milk regulation. First, House Bill 2596 would expand the number of raw dairy products allowed to be sold by adding soft cheeses, butter, yogurt, and ice cream.<sup>55</sup> Second, House Bill 2597 would expand the types of entities that may conduct the requisite inspections for raw milk facilities.<sup>56</sup> These expansions, if passed, would facilitate the sale of raw dairy in Pennsylvania.

On the other hand, at least three states show signs of tightening, or at least not liberalizing, their raw milk regulations. Of these, Connecticut's recent bill marks the most significant retraction of previously liberal policies. Connecticut's bill calls for the removal of raw milk in retail stores; if passed into law, it would only allow raw milk sales at farms.<sup>57</sup> The proposed change in policy was prompted by an outbreak of *E. coli* in the state in summer 2008 due to raw milk contamination stemming from a local farm.<sup>58</sup> Thus, due to public health concerns, one of the nation's most liberal raw milk policies is likely to be withdrawn.<sup>59</sup> The proposed law would also increase the amount of inspection and impose additional container labeling requirements for raw milk.<sup>60</sup> These added costs concern dairy farmers, who fear the

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<sup>55</sup> See H.B. 2596, 192nd Leg., 1st Reg. Sess. (Pa. 2008), available at <http://www.legis.state.pa.us/cfdocs/billinfo/BilInfo.cfm?year=2007&sind=0&body=H&type=B&bn=2596>.

<sup>56</sup> See H.B. 2597, 192nd Leg., 1st Reg. Sess. (Pa. 2008), available at <http://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2007&sessInd=0&billBody=H&billTyp=B&billNbr=2597&pn=3889>.

<sup>57</sup> See H.B. 6313, 1<sup>st</sup> Reg. Sess. (Conn. 2009), <http://www.cga.ct.gov/2009/TOB/H/2009HB-06313-R00-HB.htm>; Ellen Spiegel, *Bill Proposes Restrictions on Raw Milk Sales*, NEW YORK TIMES, Mar. 12, 2009, [http://www.nytimes.com/2009/03/15/nyregion/connecticut/15milkct.html?\\_r=2&hp](http://www.nytimes.com/2009/03/15/nyregion/connecticut/15milkct.html?_r=2&hp).

<sup>58</sup> See Spiegel, *supra* note 57.

<sup>59</sup> See *id.* (noting that Connecticut has one of the most liberal raw milk policies in the country).

<sup>60</sup> See *New raw milk rules worry dairymen*, AG WEEKLY, Jan. 20, 2009, <http://www.agweekly.com/articles/2009/01/20/commodities/dairy/dairy31.txt>.

new rule would put them out of business.<sup>61</sup> It remains to be seen whether economic or health concerns will prevail in the Connecticut legislature.

Texas also seeks to further restrict its raw milk sales. In Texas, raw milk sales are only allowed at farms.<sup>62</sup> However, the proposed bill would restrict sales even further by requiring that the sale be made directly to the ultimate consumer.<sup>63</sup> This slight change is a significant one because some raw milk consumers in states that only allow farm sales purchase their milk through milk club arrangements, in which members take turns going to the farm to bring back enough milk for all.<sup>64</sup> Under the new law, of course, this type of arrangement would be prohibited.

Finally, California's Governor Schwarzenegger recently vetoed a bill that would have provided raw milk producers with an alternative method of compliance with state regulations.<sup>65</sup> Thus, although California's regulations remain the same, the state has opted not to liberalize them further by providing farmers with additional regulatory options.

### III. CONSTITUTIONAL ANALYSIS

The federal and state laws that infringe on citizens' right to consume unpasteurized milk naturally prompt constitutional concerns. After all, milk is a food product, not a drug, and there

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<sup>61</sup> *See id.*

<sup>62</sup> *See* WESTON A. PRICE FOUNDATION, TEXAS RAW MILK LAW TO CHANGE (2009), <http://www.westonaprice.org/federalupdate/aa2009/26feb09.html> [hereinafter TEXAS].

<sup>63</sup> *See* Proposed New Rules for Milk and Dairy, Title 25, Texas Administrative Code, Chapter 217 (Tex. 2009), available at <http://www.dshs.state.tx.us/milk/draft.shtm>.

<sup>64</sup> *See* TEXAS, *supra* note 62.

<sup>65</sup> Specifically, the bill would have allowed farmers to forgo the current coliform and temperature requirements; instead, farmers would have the option of creating a "Hazard Analysis Critical Control Point plan" and conducting biweekly tests of the milk. S.B. 201, 1st Reg. Sess. (Cal. 2007), [http://info.sen.ca.gov/pub/07-08/bill/sen/sb\\_0201-0250/sb\\_201\\_bill\\_20080902\\_enrolled.html](http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0201-0250/sb_201_bill_20080902_enrolled.html).

are no comparable laws against consuming raw beef or raw eggs.<sup>66</sup> Yet, some unlucky citizens are being arrested and fined for raw milk violations, while others gorge on cookie dough, happily risking *Salmonella* with each bite.<sup>67</sup> The justification for this distinction is unclear. The government could argue the risk of illness is greater with raw milk, but such a scientific claim is debatable.<sup>68</sup> Another possible distinction is that industry can easily pasteurize raw milk, but consumers cannot, whereas consumers may easily cook meat and eggs. Lastly, the government can outlaw raw milk because there is not currently a high demand for it; in contrast, the government cannot outlaw all raw meat and egg products because there is a very high public demand for raw meat and eggs that can be cooked at home. Regardless of the reason for the distinction though, the more pressing question is whether the government may constitutionally distinguish between raw milk and other raw animal products.

There are a multitude of constitutional challenges that may be made against raw milk regulations, but all of them are likely to fail for the foregoing reasons.

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<sup>66</sup> It should be noted that the government is concerned about *salmonella*, *E. coli*, and *listeria* contaminations in raw beef and eggs, which are the same pathogenic concerns cited by the FDA for raw milk. See U.S. DEPARTMENT OF AGRICULTURE, FOCUS ON GROUND BEEF (2002), [http://www.fsis.usda.gov/Fact\\_Sheets/Ground\\_Beef\\_and\\_Food\\_Safety/index.asp](http://www.fsis.usda.gov/Fact_Sheets/Ground_Beef_and_Food_Safety/index.asp) [hereinafter BEEF] (noting that raw beef may contain *salmonella*, *E. coli*, or *listeria*, among other pathogens); U.S. FOOD AND DRUG ADMINISTRATION, SHELL EGGS FROM FARM TO TABLE (2008), [http://www.fsis.usda.gov/Fact\\_Sheets/Focus\\_On\\_Shell\\_Eggs/index.asp](http://www.fsis.usda.gov/Fact_Sheets/Focus_On_Shell_Eggs/index.asp) [hereinafter EGGS] (noting that raw eggs may contain *salmonella*); cf. *supra* notes 19-20 and accompanying text (noting that raw milk may contain *salmonella*, *E. coli*, or *listeria*). However, the FDA merely requires warning labels on eggs and raw beef. See EGGS, *supra* (noting that eggs not treated to destroy salmonella must contain a safe food handling label that reads: “To prevent illness from bacteria: Keep eggs refrigerated, cook eggs until yolks are firm, and cook foods containing eggs thoroughly.”); BEEF, *supra* (noting that raw beef must contain a safe food handling label that “tells the consumer how to safely store, prepare, and handle raw meat and poultry products in the home.”).

<sup>67</sup> Interestingly, the consumption of cookie dough is explicitly mentioned, along with eggnog, as a dangerous holiday habit on the FDA’s website. U.S. Food and Drug Administration, *FDA Reminds Consumers to Practice Egg Safety this Holiday Season*, FDA NEWS, Dec. 20, 2006, <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01535.html>.

<sup>68</sup> See *supra* note 31 and accompanying text (noting that at least one study suggests that deli meat causes more illnesses than raw milk).

## A. CONSTITUTIONAL CHALLENGE TO THE FEDERAL LAW

### 1. COMMERCE CLAUSE

The most plausible constitutional challenge to the federal raw milk law is a claim that the law violates the Commerce Clause.<sup>69</sup> In brief, the Commerce Clause, contained in Article I § 8 of the Constitution, gives Congress the power to regulate interstate commerce, defined most infamously in *United States v. Lopez* as “the use of channels of interstate commerce,” “the instrumentalities of interstate commerce,” or “activities having a substantial relation to interstate commerce.”<sup>70</sup> It is nearly indisputable that the sale of raw milk across state lines is interstate commerce under the *Lopez* test. In fact, Congress ensured that there is no possibility the law exceeds its Commerce Clause powers by explicitly using the words “interstate commerce” in the text.<sup>71</sup> Because the statute does not regulate intrastate sales of raw milk in any way, the fear of federal regulation of purely local activity present in *Wickard v. Filburn* and *Gonzales v. Raich* lawsuits is absent here; however, those cases strongly suggest that even if the statute did regulate

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<sup>69</sup> I decline to discuss a potential 10<sup>th</sup> amendment challenge here because in the three most recent Supreme Court cases that have ruled on the 10<sup>th</sup> amendment limit to federal legislative power, the Court has struck down laws that mandate specific state regulation, but it upheld a law that merely prohibited conduct. See *New York v. United States*, 505 U.S. 144, 178 (1992) (noting that “No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.”); *Printz v. United States*, 521 U.S. 898, 924 (1997) (citing *New York* for the proposition that Congress cannot control state regulation); *Reno v. Condon*, 528 U.S. 141, 143; 149-51 (2000) (noting that unlike in *New York* and *Printz*, the Driver’s Privacy Protection Act of 1994 merely prohibits the sale of personal information under certain conditions, and does not require the state legislature “to enact any laws or regulations . . .”). The federal raw milk law, like the Driver’s Privacy Protection Act, merely prohibits certain raw milk sales, and does not require state legislature to enact any particular regulations; thus, it does not run afoul of the 10<sup>th</sup> amendment.

<sup>70</sup> *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

<sup>71</sup> 21 C.F.R. Ch. §1240.61 (1992), *available at* [edocket.access.gpo.gov/cfr\\_2001/aprqr/pdf/21cfr1240.62.pdf](http://edocket.access.gpo.gov/cfr_2001/aprqr/pdf/21cfr1240.62.pdf).

The Court has held that prohibitions of economic activity, defined as “the production, distribution, and consumption of commodities” are constitutional under the Commerce Clause. *Gonzales v. Raich*, 545 U.S. 1, 25-26 (2005) (noting that the Controlled Substances Act “is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.”).

purely local raw milk sales, the regulation would be permissible.<sup>72</sup> Thus, the federal law prohibiting the interstate sale of raw milk is constitutional under the Commerce Clause.<sup>73</sup>

## B. CONSTITUTIONAL CHALLENGES TO THE STATE LAWS<sup>74</sup>

### 1. DORMANT COMMERCE CLAUSE

Unlike Congress, the states must follow the negative inverse of the Commerce Clause, which has been interpreted to mean that they cannot “mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”<sup>75</sup>

Fortunately for the states, state regulations of raw milk sales, unlike other state dairy laws such as price controls, should not violate the dormant commerce clause because they *must* discriminate against out of state raw milk by prohibiting it under the federal law.<sup>76</sup> Thus, because interstate sale of raw milk is banned by federal law, all of the categories of state raw milk regulations are constitutional under the dormant commerce clause.

### 2. ECONOMIC SUBSTANTIVE DUE PROCESS

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<sup>72</sup> See *Gonzales*, 545 U.S. at 17 (citing *Perez v. United States*, 402 U.S. 146 151 (1971); *Wickard v. Filburn*, 317 U.S. 111, 128-129 (1942)) (noting that “Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic “class of activities” that have a substantial effect on interstate commerce).

<sup>73</sup> It should be noted that the federal law could also be challenged on an economic substantive due process theory, but this argument is almost certainly without merit given recent jurisprudence on the topic. For a discussion of economic substantive due process, and for the reasons it is likely to fail as a challenge to both state and federal raw milk laws, see *infra* Part III.B.2.

<sup>74</sup> Although there is a wide variety of state laws, I will group them into three particularly probative, common categories when a distinction should be made for purposes of this analysis: laws that prohibit cow share agreements, laws that completely ban raw milk, and laws that allow raw milk transactions on farms.

<sup>75</sup> *Granholt v. Heald*, 544 U.S. 460, 472 (2005).

<sup>76</sup> For an example of a dormant commerce clause challenge to a state dairy law, see *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Marketing Bd.*, 462 F.3d 249, 273 (3d Cir. 2006) (noting that the constitutionality of Pennsylvania's mandatory price controls is in doubt under the dormant commerce clause); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 198-207 (1994) (considering whether a Massachusetts pricing order violated the dormant commerce clause).

Economic substantive due process refers to the protection of economic rights under the Due Process Clause. Under this theory, constitutional challenges to state economic regulations, such as raw milk sales laws, can be made under the Due Process Clause. However, *Lochner v. New York* announced that such challenges must fail when there is a legitimate public welfare rationale behind the law, or in other words, when the state has properly used its “police power.”<sup>77</sup> Common law has consistently recognized that the state sovereignty provided for in the Constitution includes certain “police powers,” which allow the state to enact laws that interfere with individuals’ 14<sup>th</sup> amendment rights only when the law is related to the “safety, health, morals, and general welfare of the public.”<sup>78</sup>

Police power challenges to raw milk laws have been made in the United States for many years. In fact, perhaps the most common constitutional challenge to local raw milk regulations throughout the 20<sup>th</sup> century was the argument that local city or county laws exceeded the state’s

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<sup>77</sup> See *Lochner v. New York*, 198 U.S. 45, 53 (1905) (noting that although economic rights are included in the term liberty referred to in the due process clause, the state may overcome the due process protection of economic rights with a proper use of its police powers). It should be noted that the Contracts Clause and the Takings Clause are two other constitutional provisions protecting economic rights, but they are inapplicable here. First, the Contracts Clause, which states that states shall not pass laws “impairing the Obligation of Contracts,” is inapplicable to the state raw milk regulations at issue here because the Contracts Clause only acts as a limit to contracts that were already in existence when the law was made; therefore, laws that impair future contracts cannot be challenged under the Contracts Clause. U.S. CONST. art. I, §10; *Ogden v. Saunders*, 25 U.S. 213, 234 (1827). This standard seems to foreclose the option of raw milk law challenges under the Contracts Clause because all of the state laws, when enacted, prohibit future sales of various varieties. The laws could not possibly undo previous milk sales retroactively. Even if a particular state law could be construed to apply retroactively to existing milk sale contracts (for example, if a purchaser had a long term raw milk contract with a producer which was necessarily ended or otherwise impaired by the enactment of a new state law), a challenge under the Contracts Clause would still likely fail because the Court has held that laws will be upheld unless they create a “substantial impairment,” and do not serve a legitimate public purpose under states’ police power, and raw milk regulations will likely survive this test because they serve a very important public health function. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978); *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22-23 (1977). Next, the Takings Clause of the Fifth Amendment provides that private property shall not “be taken for public use, without just compensation.” U.S. CONST. amend. V. However, this provision is inapplicable to the state raw milk regulations because the statutes do not mandate the collection of milk for public use.

<sup>78</sup> *Lochner v. New York*, 198 U.S. 45, 53 (1905).

police power, which these courts imputed to cities and counties.<sup>79</sup> However, these economic due process challenges to local raw milk regulations have significantly dwindled in number over time. One potential explanation for the decrease is simply that few local regulations remain. For example, an extensive search of Pennsylvania cities and counties unearthed only one local regulation in the state.<sup>80</sup> More likely though, because there is no dearth of state laws that could be challenged on the same grounds, the consumer health law decisions both before and during the *Lochner* era, have dissuaded these claims.<sup>81</sup>

If it were not for the decisions upholding consumer health protection laws under economic substantive due process challenges before and during the *Lochner* Era, we would likely have witnessed the relocation of the prolific police power challenges from the city and county context to the state context. However, in light of these decisions upholding consumer health laws, the cases have instead simply disappeared. Interestingly, one of the first cases to address an economic substantive due process claim in the context of consumer health laws was a

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<sup>79</sup> See e.g., *Com. ex rel. Allegheny County v. Shenot*, 207 Pa.Super. 351, 358 (Pa. Super. Ct. 1966) (holding that Allegheny County's complete ban on raw milk sales, which were not banned by the state, exceeded its police power); *Melton v. City of Weslaco*, 301 S.W.2d 470, 472 (Tex. Civ. App. 1957) (finding that a city ordinance prohibiting raw milk sales, which was in contradiction with state and federal law at the time, was an "unreasonable exercise" of the city's police power); *Shelton v. City of Shelton*, 150 A. 811, 816 (Conn. 1930) (holding that the city's prohibition against raw milk sales, which was in contradiction with the state law on the subject, exceeded the city's police power); *Sorenson v. City of New Haven*, 4 Conn.Supp. 369, at 2-3 (Conn. Super. Ct. 1936) (holding that the Board of Health Commissioners had the power under the city charter to pass a raw milk prohibition because it protected public health).

<sup>80</sup> Allegheny County, Pa., Health Dep't, Art. III, §301.2B (2009), available at <http://www.achd.net/legal/legal.html> (follow "Food Safety Regulations" hyperlink) (prohibiting the sale of raw milk in any facility other than a farm); Caitlin Price, *Raw milk fans meet opposition in county*, PITTSBURGH POST-GAZETTE, Aug. 16, 2007, available at <http://www.post-gazette.com/pg/07228/809687-34.stm> (discussing the extra regulation imposed by Allegheny County, PA in addition to the state regulations).

<sup>81</sup> Regardless of the reason, it is crucial that state legislatures examine any remaining local regulations because the possible preemptions and conflicts between state and local regulations have not disappeared with the case law. For example, the Pennsylvania Milk Sanitation Law seems to both allow and disallow local regulation of raw milk. 31 P.S. § 649 (2008) (seeming to allow municipal ordinances that are at least as stringent as the state law); cf. 31 P.S. § 660b (2008) (seeming to prohibit local departments of health from enforcing any regulations other than those of the state).

suit challenging a law that prohibited adulterated dairy products, including a product called “oleomargarine butter.”<sup>82</sup> The Court upheld the law, finding that the public health concerns justified the state’s use of its police power, that it did not violate Due Process nor the Equal Protection Clause, and it did not constitute a taking of property without compensation.<sup>83</sup> The idea of due process as a check on state police powers next truly gained steam in the context of laws regulating employment contracts, in an era commonly referred to as the *Lochner* Era.<sup>84</sup>

After a rash of employment contract cases, the Court again turned to consumer health laws.<sup>85</sup> In a famous *Lochner* Era case, the Court held that a state law prohibiting the use of secondhand material in bedding because of health concerns violated the Due Process Clause because the material was not “inherently dangerous,” there were effective ways to sanitize it, and there was demand for the product.<sup>86</sup> Thus, the Court recognized a due process right for consumers to enter into purchasing contracts with producers for safe, useful goods, and invalidated a law for violating this principle. This standard was expanded on in the 1931 case of *People v. Carolene Products Co.*, which synthesized much of the economic due process common law and succinctly declared, “If it is manifest that the statute or ordinance, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, it is void as an

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<sup>82</sup> See *Powell v. Com. of Pa.*, 127 U.S. 678, 679 (1888).

<sup>83</sup> See *id.* at 686-87.

<sup>84</sup> See *Lochner*, 198 U.S. at 58 (holding that the state’s law regulating the number of hours bakers could work exceeded the state’s police power); *R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc.*, 527 S.E.2d 763, 765 n.2 (S.C. 2000) (explaining that the *Lochner* Era lasted between 1905 and 1937).

<sup>85</sup> See e.g., *Lochner*, 198 U.S. at 58; *Muller v. State of Oregon*; 208 U.S. 412, 423 (1908); *Coppage v. State of Kansas*, 236 U.S. 1, 26 (1915).

<sup>86</sup> See *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 412-15 (1926).

invasion of the property rights of the individual.”<sup>87</sup> According to this criterion, the determinative factor is the safety of the product.

In spite of some early court findings that raw milk is safe and healthy, and thus that prohibitions of it exceed states’ police powers, it is unlikely that any state law would now be invalidated for violating the state’s police power given the current uncertainty in the scientific community about raw milk.<sup>88</sup> More importantly, the Court has not struck down a single law under an economic substantive due process theory since 1937.<sup>89</sup> Therefore, it is highly unlikely that any state raw milk regulation would be deemed unconstitutional under an economic substantive due process theory.

### 3. ADDITIONAL DUE PROCESS CONCERNS

In addition to economic substantive due process, there are a number of other due process claims that may be brought against state raw milk regulations. First, one can argue that a state law violates substantive due process because the regulation is “arbitrary and unreasonable,” but such a claim will warrant only rational basis review unless a fundamental constitutional right is implicated, or unless the challenge implicates race, national origin, or a foreign “alien.”<sup>90</sup>

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<sup>87</sup> *People v. Carolene Products Co.*, 177 N.E. 698, 700 (Ill. 1931).

<sup>88</sup> *See e.g.*, *Frost v. City of Los Angeles*, 181 Cal. 22, 28 (Cal. 1919) (noting that the legislature “cannot, under the guise of the police power, unreasonably interfere with a lawful and useful occupation or business which is not inherently, or because of the manner in which it is carried on, injurious to persons or property, or to the public health, convenience, comfort, safety, or morals.”); *Alta-Dena Dairy v. San Diego County*, 271 Cal.App.2d 66, 73 (Cal. Ct. App. 1969) (noting that “If it is true [that the milk] presents no danger to the public health and is safe for human consumption, the order prohibiting its sale exceeds the authority conferred by the regulation and amounts to an abuse of discretion.”); *Shelton v. City of Shelton*, 150 A. 811, 816 (Conn. 1930) (noting that “the ordinance purports to forbid a citizen his constitutional right to deal in that lawful and harmless product”); *see supra* Part II.B.

<sup>89</sup> *See* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 545 (2nd ed. 2005).

<sup>90</sup> *Traditions Tavern v. Columbus*, 870 N.E.2d 1197, 1204 (Ohio Ct. App. 2006) (noting that the correct due process inquiry against a smoking ban is whether the ban is arbitrary and unreasonable, but also noting that because the ban does not implicate any constitutional rights, they need only find a rational relationship to a government interest); *Toyosaburo Korematsu v. U.S.*, 323 U.S. 214, 216 (1944) (finding that racial interests are subject to strict scrutiny);

Rational basis reviews almost never result in the invalidation of statutes because the standard is a low one: statutes are deemed constitutional unless there is not a rational relationship between the law and a legitimate government interest.<sup>91</sup> Because public health is a legitimate public interest, and because raw milk regulations are enacted to protect public health, a raw milk law will not be invalidated under rational basis review.<sup>92</sup> Therefore, in order to succeed in a substantive due process challenge, plaintiffs will almost certainly need to prove that their claim warrants strict scrutiny review.

Strict scrutiny analysis requires that the government show a compelling government interest and that the statute is narrowly tailored to its purpose; thus, there is a higher probability of success under this standard.<sup>93</sup> Under strict scrutiny analysis, a raw milk regulation that completely bans raw milk may be overturned for a lack of narrow tailoring because some states have demonstrated through their less restrictive laws that the compelling government interest of protecting public health may be effectuated through various safety measures, such as sanitation requirements at farms, or the sale of the product only at its farm source. In contrast, laws that allow some milk sales but prohibit cow share agreements, and laws that allow only farm transactions, will likely be upheld under a strict scrutiny review of a substantive due process claim because they serve a legitimate government purpose and are narrowly tailored to that goal

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Graham v. Richardson, 403 U.S. 365, 372 (1971) (finding that claims “based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”).

<sup>91</sup> See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

<sup>92</sup> Due Process challenges to smoking bans have likewise failed due to the legitimate public interest in protecting the health of citizens. See e.g., *Players, Inc. v. City of N.Y.*, 371 F.Supp.2d 522, 547-48 (S.D.N.Y. 2005); *Beatie v. City of N.Y.*, 123 F.3d 707, 713 (2d Cir. 1997); *Traditions Tavern v. Columbus*, 870 N.E.2d 1197, 1204 (Ohio Ct. App. 2006).

<sup>93</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

by prohibiting only some of the more dangerous types of raw milk sales. However, this analysis is likely moot. Because raw milk laws do not implicate race, national origin, or alienage, a putative plaintiff must identify a fundamental right in order to garner strict scrutiny review for a substantive due process claim, and there is not likely a fundamental right implicated in raw milk sales.

The Court has recognized a number of non-enumerated fundamental rights, but only two of them may rationally be deemed to include the consumption of raw milk. First, the Court has recognized the upbringing of one's children as a fundamental right.<sup>94</sup> Parents wishing to challenge raw milk laws may argue that, like the right to make educational decisions for children, which was recognized in *Meyer v. Nebraska* and in *Pierce v. Society of Sisters*, parents have a fundamental right to decide what food products their children consume.<sup>95</sup> However, if the court determines that raw milk is inherently dangerous, as declared by the government, this argument will likely fail because the right to control the upbringing of one's children is tempered by the state's right to protect children, as recognized in *Prince v. Massachusetts*.<sup>96</sup>

Alternatively, a non-parent wishing to challenge a state raw milk law may argue that the law interferes with the fundamental rights involving medical care. However, such an argument is unlikely to succeed because jurisprudence currently only recognize these rights in three distinct circumstances, none of which would include the right to consume raw milk for health reasons. First, the right is implicated when the government has a duty to provide medical care,

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<sup>94</sup> See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>95</sup> See *id.*; *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

<sup>96</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

which is very rarely found.<sup>97</sup> Next, there is a limited right to refuse medical care.<sup>98</sup> Lastly, there was a right to physician-assisted suicide, but this third right has been overturned and thus is no longer recognized.<sup>99</sup> Because raw milk regulations implicate none of these rights, a fourth medical care right protecting citizens' right to self medicate with natural food products would have to be created in order to succeed in a medical right argument.

In light of the very small chance of success under existing fundamental rights, a citizen challenging a raw milk regulation may want to argue for the recognition of a new fundamental right. Although courts are reluctant to recognize new rights, the Court has noted that fundamental rights are "deeply rooted in this Nation's history and tradition."<sup>100</sup> At first glance, one may think that the consumption of raw dairy is deeply rooted in our nation's history because prior to pasteurization, of course, all dairy was raw. However, courts have held that smoking, which citizens have also done throughout our nation's history, is not a deeply rooted right.<sup>101</sup> Therefore, under this historical view, courts are unlikely to recognize a new fundamental right that would include raw milk consumption.

On the other hand, food consumption is a necessary life sustaining activity, unlike

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<sup>97</sup> See *e.g.*, *Estelle v. Gamble*, 429 U.S. 97 (1976); *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982).

<sup>98</sup> See *Washington v. Harper*, 494 U.S. 210, 221-22 (1990); *cf.* *Jacobson v. Mass.*, 197 U.S. 11 (1905).

<sup>99</sup> See *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).

<sup>100</sup> See *Am. Legion Post #149 v. Wash. State Dep't of Health*, 192 P.3d 306, 322 (Wash. 2008) (citing *Wash. v. Glucksberg*, 521 U.S. 702, 720 (1997)) (noting that court are reluctant to recognize new fundamental rights); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977).

<sup>101</sup> See *American Legion Post #149 v. Wash. State Dept. of Health*, 192 P.3d 306, 322 (2008) (finding that smoking is not a fundamental right under the deeply rooted in national history standard); *Castaways Backwater Cafe, Inc. v. Marstiller*, No. 2:05-cv-273, 2006 WL 2474034, at \*4 (M.D.Fla. 2006) (finding that restaurant patron smoking is "clearly" not deeply rooted in our nation's history).

smoking. Therefore, a new fundamental right to make one's own food consumption decisions is a more plausible suggestion. One court even noted that legislatures should consider "the rights in a free society for individuals to consume foods of their choice" when drafting legislation on raw milk.<sup>102</sup> Such language seems to suggest a fundamental right to eat what one chooses. This new fundamental right would garner support not only from raw milk consumers, but also from consumers who are troubled by the recent rash of public health laws forbidding trans fats and limiting fast food.<sup>103</sup> Still, the creation of a new fundamental right is unlikely given its rarity in jurisprudence.<sup>104</sup> Thus, rational basis review is likely the unkind fate of a raw milk due process challenge.

However, if the consumption of raw milk is deemed a fundamental right under one of the foregoing scenarios, one could not only make a substantive due process argument, but could also argue that the deprivation of that liberty interest under a state law violates procedural due process. The Fourteenth Amendment prohibits state deprivation "of life, liberty, or property without due process of law," and the procedures guaranteed by this language are referred to as procedural due process.<sup>105</sup> Clearly, life is not deprived as a result of any raw milk regulation. Property is not deprived either because raw milk regulations generally contain exceptions for

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<sup>102</sup> *Schmitmeyer v. Ohio*, No. 06-CV-63277 at 10 (Darke County, Ohio Ct. Com. Pl. Dec. 29, 2006).

<sup>103</sup> *See e.g.*, L.A., Cal., Ordinance 180103 (Aug. 4, 2008), *available at* [http://clkrep.lacity.org/onlinedocs/2007/07-1658\\_ord\\_180103.pdf](http://clkrep.lacity.org/onlinedocs/2007/07-1658_ord_180103.pdf) (ordinance banning the construction of new fast food restaurants in an area of L.A.); DEPARTMENT OF HEALTH AND MENTAL HYGIENE BOARD OF HEALTH, NOTICE OF ADOPTION OF AN AMENDMENT (§81.08) TO ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE (2006), *available at* <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-08.pdf> (resolution of an amendment to the New York City Health Code that bans trans fats).

<sup>104</sup> *See Am. Legion Post #149 v. Wash. State Dep't of Health*, 192 P.3d 306, 322 (Wash. 2008) (citing *Wash. v. Glucksberg*, 521 U.S. 702, 720 (1997)) (noting that courts are reluctant to recognize new fundamental rights).

<sup>105</sup> U.S. CONST. amend. XIV; *Carey v. Piphus*, 435 U.S. 247, 259 (1978) (referring to the procedures due under the Fourteenth Amendment as "procedural due process").

cow owners, as evidenced by the popularity of cow share agreements. However, raw milk regulations could deprive a person of liberty if the consumption of raw milk is deemed a fundamental right.<sup>106</sup> Whether procedures accompanying a deprivation of a liberty right are sufficient is a highly factual determination. Therefore, a ruling on this issue in a raw milk challenge will greatly depend on the facts of each case, and an inquiry into the likelihood of success under this claim in the abstract would prove futile.

Lastly, one may argue that a particular state statute should be voided for vagueness. The Supreme Court has held that “a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . .”<sup>107</sup> Such arguments have been made against smoking bans, but they have repeatedly failed.<sup>108</sup> Thus, unless a statute is so ambiguous that it is unclear what conduct is prohibited, raw milk regulations are not likely to be invalidated for vagueness.

#### 4. EQUAL PROTECTION CLAUSE

The Equal Protection Clause provides that “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>109</sup> Before making an equal protection argument, one must establish the existence of a classification under the challenged law, and one

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<sup>106</sup> Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (requiring that liberty interests “be ‘fundamental’ . . . .” for purposes of due process challenges).

<sup>107</sup> McGautha v. California, 402 U.S. 183, 262 (1971).

<sup>108</sup> See e.g., Houston Ass'n of Alcoholic Beverage Permit Holders v. City of Houston, 508 F.Supp.2d 576, 584 (S.D. Tex. 2007) (finding that Houston's smoking ban is not unconstitutionally vague and noting that when bans which do not prohibit “constitutionally protected conduct” are challenged in the fifth circuit, “in order to survive a facial vagueness challenge, the ordinance must be ‘impermissibly vague in all of its applications.’”); NYC C.L.A.S.H., Inc. v. City of N.Y., 315 F.Supp.2d 461, 485 (S.D.N.Y. 2004); Traditions Tavern v. Columbus, 870 N.E.2d 1197, 1205 (Ohio Ct. App. 2006).

<sup>109</sup> U.S. CONST. amend. XIV.

must identify the appropriate level of scrutiny.<sup>110</sup> In order to prove a classification, plaintiffs may either demonstrate the facial existence of a classification or, if facially neutral, they must prove a discriminatory purpose behind the law; discriminatory impact is not sufficient to make out a claim.<sup>111</sup> The appropriate level of scrutiny depends on the nature of the claim.<sup>112</sup> Race, national origin, and “alien” challenges receive strict scrutiny.<sup>113</sup> Gender and non-marital children challenges receive intermediate scrutiny.<sup>114</sup> All other challenges are reviewed under rational basis.<sup>115</sup>

Constitutional challenges under the Equal Protection Clause have been made against smoking bans, but like the vagueness challenges, they have largely failed.<sup>116</sup> The smoking ban cases sampled here all held that there was neither a suspect classification nor a constitutional right involved.<sup>117</sup> Any distinction made within the laws was analyzed under rational basis review, and all of the courts found rational reasons for the distinctions.<sup>118</sup>

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<sup>110</sup> See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-91 (1978) (discussing first the existence of a classification, then determining the level of scrutiny).

<sup>111</sup> See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

<sup>112</sup> See *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

<sup>113</sup> *Korematsu*, 323 U.S. at 216; *Graham*, 403 U.S. at 372.

<sup>114</sup> See *Frontiero*, 411 U.S. at 686.

<sup>115</sup> See *Clark*, 486 U.S. at 461.

<sup>116</sup> See e.g., *Players, Inc. v. City of New York*, 371 F.Supp.2d 522, 541-43 (S.D.N.Y. 2005); *Traditions Tavern v. Columbus*, 870 N.E.2d 1197 171 (Ohio Ct. App. 2006); *City of Tucson v. Grezaffi*, 23 P.3d 675, 681 (Ariz. Ct. App. 2001).

<sup>117</sup> See *id.*

<sup>118</sup> See *id.*

Like the courts in the smoking ban cases, the courts hearing raw milk challenges will likely find that there is no suspect classification at issue and no fundamental right involved. Of course, the validity of an equal protection argument will depend on the particular statute involved, but given the categories of state regulations in existence, it is difficult to conceive of a classification that is more likely to receive suspect classification status than the distinctions drawn in smoking bans. Like the different standards often applied in smoking bans for different restaurants and bars, some raw milk laws prohibit sales only at stores, but not at farms. These bans are the most likely to run afoul of the Equal Protection Clause, but because there is likely no suspect class at issue, such a challenge will only succeed if the law is deemed to have a discriminatory purpose. Such a finding is unlikely given the rational health justifications for the distinction. Moreover, because there is no fundamental right involved (assuming one is not found under one of the scenarios discussed in *supra* Part III.B.3), statutes will not be struck down unless there is no rational reason for the distinction. The risk of confusing consumers in stores, which may lead to some accidental purchases of raw milk, would almost certainly be deemed a rational health justification.

Next, the regulations that allow some raw milk sales, but prohibit cow share agreements, could be deemed to discriminate against cow purchasers, but this argument is a weak one because the courts are unlikely to recognize a new suspect class for such a small, diverse group.<sup>119</sup> Lastly, the laws that completely prohibit raw milk contain no perceptible distinction for equal protection purposes. Thus, it is unlikely that a suspect classification will be found in any state law. Additionally, as discussed in *supra* Part III.B.3, there is also likely no

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<sup>119</sup> *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 442-43 (1985) (refusing to recognize a new right for people who are mentally retarded, in part because they are a diverse group).

fundamental right at issue. Therefore, rational basis will apply, and under that standard it is highly unlikely an equal protection claim will survive because the state can simply, and convincingly, claim that public health is their rationale behind each distinction.

## 5. FREEDOM OF ASSOCIATION

Raw milk regulations may be challenged on the grounds that they interfere with citizens' freedom of association. The Supreme Court has recognized two variant kinds of freedom of association: the expressive freedom of association and the intimate freedom of association.<sup>120</sup> The former variety protects the “right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion,” and the latter variety protects “choices to enter into and maintain certain intimate human relationships.”<sup>121</sup> Due to the dearth of case law on this issue in the raw milk context, local smoking ban challenges will be utilized as a starting point to explore these rights in the context of a public health ordinance.

### A. EXPRESSIVE ASSOCIATION

Courts have struck down expressive association challenges to smoking bans when the law at issue does not restrict the ability to participate in First Amendment activity.<sup>122</sup> Furthermore, the Supreme Court has held that in order to violate the freedom of association, a law must “directly and substantially interfere” with the ability to associate, and the groups must be

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<sup>120</sup> See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

<sup>121</sup> *Id.*

<sup>122</sup> See e.g., *Taverns for Tots, Inc. v. City of Toledo*, 341 F.Supp.2d 844, 851 (N.D. Ohio 2004) (noting that “The Clean Indoor Air Act and its accompanying exemption application do not interfere with the ability of its members to get together for any lawful purpose, including the exercise of expressive activity related to political, social, economic, educational, religious, or cultural ends.”); *NYC C.L.A.S.H., Inc. v. City of New York*, 315 F.Supp.2d 461, 475-76 (S.D.N.Y. 2004) (finding that “the Smoking Bans present no material impediment to a smoker's ability to freely associate and assemble under the First Amendment.”).

engaged in expressive activity because mere social association is not sufficient.<sup>123</sup>

Raw milk regulations are constitutional under these standards because they typically only regulate the sale of raw milk, and do not contain any provisions restricting speech or other expressive activities by producers or consumers.<sup>124</sup> Admittedly, some states now explicitly prohibit cow share agreements; however, because these groups merely purchase portions of cows and take milk in return, there are no probable First Amendment activities involved.<sup>125</sup> Therefore, it is highly unlikely a court will find that a raw milk regulation directly restricts citizens' right to expressive association. It is true that raw milk regulations and public smoking bans are distinguishable, most notably because smoking bans prohibit the act of smoking in certain places, while raw milk regulations do not prohibit the end consumption activity, but rather merely regulate the initial sale. However, if anything, this factual distinction makes raw milk regulation claims even less likely to succeed under an expressive association argument because the act of smoking can more easily be characterized as an expressive association activity than the act of purchasing raw milk.

It should be noted that in addition to these direct impact arguments, an expressive association argument could also be made under an indirect impact theory. A law may be deemed to indirectly violate the right to expressive association if there is a mandatory submission of

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<sup>123</sup> See *Lyng v. Int'l Union*, 485 U.S. 360, 366 (1988); *City of Dallas v. Stanglin*, 490 U.S. 19, 24, 25 (1989).

<sup>124</sup> A raw milk activist group engaged in promotion could challenge a regulation on the grounds that it inhibits their expressive activities, but the very existence of the group would refute their argument that the regulation restricts their expressive activity.

<sup>125</sup> See *supra* note 51 and accompanying text. It should be noted that although prohibitions against cow share agreements do not implicate free speech concerns, they do implicate freedom of contract concerns, as discussed in *infra* Part III.B.2.

information under the law that would chill individuals' right to engage in free speech activity.<sup>126</sup> However, when an organization opposed to a smoking ban made the claim that reporting requirements for a "membership association" exemption to the law violated their right to expressive association, the United States District Court for the Northern District of Ohio rejected the argument on the grounds that the exemption application required only the names of the group's officers, not all members, and that the state had a legitimate interest in the information.<sup>127</sup> The indirect impact argument is also likely to fail in the raw milk context. Although many regulations that permit some raw milk sales have reporting requirements for raw milk sale permits, even if a law requires the reporting of names of all producers and consumers (comparable to officers and members), which is unlikely, the state has a legitimate public health interest in keeping records of the sales of raw milk. In sum, right to expressive association claims are likely to fail in the raw milk context.

#### B. INTIMATE ASSOCIATION

A challenge under the freedom to form intimate associations must allege that the raw milk regulations interfere with producers' or consumers' ability to enter into intimate relationships. In deciding whether a right to intimate association exists, courts consider whether the group is small, selective, and secluded.<sup>128</sup> Members of various groups have challenged smoking bans with intimate association arguments; however, these attempts have largely failed

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<sup>126</sup> See *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462-63 (1958) (finding that mandatory disclosure of Alabama NAACP members had negative consequences for those members whose names were revealed, and this could lead to the withdrawal of some members and a decreased ability for the organization to engage in its advocacy actions).

<sup>127</sup> See *Taverns for Tots*, 341 F.Supp.2d at 853.

<sup>128</sup> See *Roberts*, 468 U.S. at 620.

because either the groups are not very selective in membership, or are small, or even if the group meets the three criteria, the smoking ban does not in any way inhibit the members' abilities to form these intimate relationships.<sup>129</sup> Raw milk associations of producers or consumers would encounter these same problems because they are likely to be small, likely would not restrict membership, and would not be hampered in their abilities to form close relationships by the regulation. In fact, the existence of the regulation is likely the impetus for the formation of these groups because without restrictions on raw milk sales, there would be no need to organize. Furthermore, unlike in the smoking ban context, there are unlikely to be clubs that claim milk drinking is an important part of their meetings. Thus, a raw milk organization is even less likely to succeed with a right to intimate association argument than the failed attempts by groups impacted by smoking bans.

In sum, there are fundamental flaws in many of the plausible constitutional arguments against raw milk regulations. Substantive and procedural due process arguments, and to a lesser extent equal protection arguments, are the most likely to succeed, but these claims will likely fail without the recognition of a fundamental right to consume raw milk. Thus, the key to successful constitutional challenges in the future will be the recognition of a new fundamental right that encompasses raw milk consumption. Although creations of fundamental rights are rare, the increase in public health laws in recent years may create the political momentum necessary for courts to establish a right to consume food products of one's choice. Of course, even if a

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<sup>129</sup> See e.g., *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wash.2d 570, 604 (2008) (finding that "Even if the Post were deemed to facilitate intimate human relationships, the ban does not directly interfere with such relationships or a person's ability to join the Post."); *Players, Inc. v. City of New York*, 371 F.Supp.2d 522, 544-45, n.16 (S.D.N.Y. 2005) (finding that the group was large and that even if it was small, New York's smoking ban did not effect membership in The Players Club, nor the ability of its members to enter into personal relationships); *Taverns for Tots, Inc. v. City of Toledo*, 341 F.Supp.2d 844, 849-50 (N.D. Ohio 2004) (finding that the plaintiff group is neither small nor selective).

fundamental right is recognized, the government may still succeed in constitutional claims if public health is deemed a compelling government interest, and if the law at issue is narrowly tailored to that goal.

#### IV. POLICY CONCERNS

Raw milk regulations pit a well-intentioned, safety-conscious government against consumers who strongly believe in their right to take risks and consume what they believe is a healthful product. In this way, the confrontation is a typical manifestation of the common government struggle to help and protect its people, without controlling them unduly. In its approach to raw milk, the government now lies at the border between helpful supervision and undue control, although raw milk activists claim they have already passed into the forbidden territory of individuals' personal rights. Certainly, the arrests and fines that have been imposed against raw milk regulation violators raise legitimate concerns that the activists may be right.<sup>130</sup> In addition to strict enforcement though, state governments have been amending their laws to explicitly ban consumer attempts to circumvent the regulations. This pattern could prove dangerous because although states may be able to constitutionally ban cow share agreements, consumers will find other ways to exploit exceptions in the laws, and if the states respond to each circumvention attempt with a ban, the states will soon be catapulted down that infamous slippery slope towards a seemingly unconstitutional ban on drinking the product of one's own property. However, frighteningly, it is not completely clear that such a ban would prove unconstitutional.

No matter how strict, it will be difficult to declare a raw milk law unconstitutional unless

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<sup>130</sup> See e.g., *Pa. Cracks Down on Non-Permit Raw Milk Sales*, LANCASTER FARMING, Aug. 24, 2007, <http://www.lancasterfarming.com/node/773>; Ross Pifer, *Dairy Farmers Found Guilty of Selling Raw Milk Without Permit*, 1 THE AGRICULTURAL LAW RESOURCE & REFERENCE CENTER LEGAL UPDATE, May 30, 2008, available at <http://www.dsl.psu.edu/centers/aglaw/pastupdates.cfm>.

science supports a finding that the product is generally safe, which is unlikely since all food carries some risk. The government has already declared that citizens cannot consume certain drugs, such as marijuana, even when grown by a citizen for his or her own consumption, because it has found that the product is generally unsafe.<sup>131</sup> Under that logic, the government could constitutionally also prohibit the consumption of raw milk by citizens who raise cows.<sup>132</sup>

However, even if its actions are technically constitutional, the government must thoughtfully analyze the extent to which it should invade the private sphere of food choice in the name of public health, because such laws may result in citizen unrest. If the Constitution ultimately does not check the government in its regulation of raw milk, hints of tyranny will. The protection of the public is an important purpose of government, but in the field of food choice, it must be especially careful not to infringe on individuals' rights because all food choices carry some risk.

The fact that food is both necessary and inherently risk laden should warrant unique treatment in the law to protect it from undue governmental interference. Unfortunately, jurisprudence suggests that judicial protection, whether in the form of a fundamental right or

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<sup>131</sup> See *Gonzales v. Raich*, 545 U.S. 1, 31-33 (2005).

<sup>132</sup> Of course, drugs and food are distinguishable, and as was previously mentioned, a new fundamental right to consume food of one's choice could conceivably be recognized in the future. However, the government often carves out exceptions to rights when necessary to protect public health, and if it were to recognize a right to consume food of one's choice, it may include such a caveat. If so, the future of raw milk regulation would hinge on whether the government continues to be convinced that raw milk is inherently dangerous. On the other hand, if the creation of a food fundamental right were a response to concerns over public health laws, such a caveat would seem to defeat the purpose of the fundamental right. In the end, in spite of growing public momentum, it seems unlikely that the government will recognize a new fundamental right to protect consumers from invasive public health laws because the judiciary has always highly valued regulations aimed at protecting public health and welfare. For example, the police power discussed in *supra* Part III.B.2 is designed to allow the government to infringe on citizens' rights when necessary to protect the public health and welfare. Even if a fundamental right is developed, strict scrutiny analysis will not result in the invalidation of raw milk laws unless the government's interest is not compelling and not narrowly tailored to its purpose, and as long as there are legitimate health concerns, the government's interest will be deemed compelling.

some other protection, will continue to be trumped by health concerns.<sup>133</sup> Because unique judicial treatment is unlikely, the most effective path to raw milk liberalization is through liberal state and federal statutes. By regulating raw milk production and sales without prohibiting the substance, the government could serve its twin goals of protecting the public, but also allowing individuals to make their own choices in food consumption. This middle ground is the most effective compromise given the scientific uncertainty and the government's need to protect its citizens.

## V. CONCLUSION

In conclusion, raw milk regulation has a long history of evolution in the United States, and it continues to change in reaction to current scientific findings and public demand. Today, scientists are split over the relative health risks and benefits of raw milk, but the government remains staunch in its position that the product is dangerous. Consequently, the federal government has banned all interstate sale of raw milk, and state governments have enacted a wide variety of state laws designed to protect their citizens.

Both the federal and state laws, of all varieties, are likely constitutional under the Commerce Clause and Dormant Commerce Clause, economic and noneconomic due process challenges, the Equal Protection Clause, and the right to free association. However, a new fundamental constitutional right protecting the right to consume food of one's choice should be recognized. The plethora of public health laws regulating food consumption, from raw milk to trans fat to fast food, raise disturbing constitutional issues for which no proper remedy exists. If a fundamental right is not created though, raw milk statutes should be liberalized as much as possible without compromising sanitation. Food is fundamental to life, and citizens should be

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<sup>133</sup> See *supra* Part III.

free to act in accordance with their personal levels of risk aversion. Truly, all food carries some risk of foodborne illness, and it should be left to our own personal discretion, not the government's, where to draw the line between safe and unsafe food.