

ARTICLES

CONSUMING IDENTITIES: LAW, SCHOOL LUNCHES, AND WHAT IT MEANS TO BE AMERICAN

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Food, eating, and the rituals surrounding food impact people as individuals, as groups, and as citizens. Through direct regulation, food aid, subsidies, and property rights, law shapes and even determines food choices in America. With it, law shapes, reflects, and may even—at times—dictate American identities.

Perhaps nowhere is the law's impact on food and identity more immediately apparent than in the context of the National School Lunch Program (NSLP). Federally subsidized school meals feed over fifty million students a day and serve over seven billion school meals annually. Whether it is pork's removal from snack lists being likened to "fatwa" or cafeterias segregating paying and non-paying students, the lessons of school meals go far beyond nutritional content and send resounding messages about civic values, inclusion, and exclusion. In recent years school meals have come under increasing scrutiny, but as legislative consideration of nutritional goals in the school lunch program has improved, discussion of political, social, and cultural goals has lagged.

This Article is the first to examine the social and political dimensions of school meals, and concludes that current treatment of these values in food regulation undermines key values in American civil society. The school lunch program teaches students a simplified, uniform, and even discriminatory account of what it means to eat and be American. Students under this regime must choose to either be American and sit down at the table with the "normal" kids or retain your beliefs, your identity, and perhaps even your health and well-being. This is a choice no child should have to make—especially not on an empty stomach.

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INTRODUCTION..... 2

I. THE NATIONAL SCHOOL LUNCH PROGRAM:
AN OVERVIEW 5

 A. *Who Participates in School Meals*..... 6

 B. *School Meals: Teaching Children What a “Good”
 Meal Is* 8

 C. *The Elephant at the Table: The Political Economy of
 School Meals* 10

II. CULTURAL CAPITAL OF FOOD: WHY SCHOOL MEALS ARE
DIFFERENT 14

 A. *Food Shapes Personhood, Community, and Self*..... 15

 B. *Food as Culture, Ethnicity, and Race* 16

 C. *Food Constructs Nationalism and National Identity* .. 18

 D. *The Particular Case of Schools* 21

III. SCHOOL MEALS: SIGNALING WHO AND WHAT IS
AMERICAN 22

 A. *American Identity, as Institutionalized in School
 Meals, Marginalizes Racial and Ethnic Minorities* ... 22

 B. *The School Meal Ritual Undermines Children of
 Different Faiths* 26

 C. *School Meals Exacerbate Class Stigma and Inhibit
 Upward Mobility* 29

IV. NEXT STEPS: MEALS FOR ALL AMERICANS..... 33

 A. *CRIAs, Adequate Study, and Full Acknowledgement
 of the Issue* 33

 B. *Revising Statutes and Rules* 34

 1. (Non)milk Money 35

 2. Facilitate Menu Diversification and
 Infrastructure 35

 3. A Place at the Table Requires Time—and a
 Table 37

V. THE COUNTERARGUMENT AND TRADE-OFFS 39

 A. *The Cost and Benefits of Inclusion* 39

 B. *The Limits of Local Action* 41

 C. *The Lunchbox Kid*..... 43

CONCLUSION..... 44

INTRODUCTION

Food, eating, and the rituals surrounding food impact people as individuals, groups, and citizens. Food may celebrate conceptions of his-

tory¹ or demarcate group membership;² it can reinforce class stratification³ and often reflects ethnicity and culture.⁴ As such, eating is more than a quotidian breakdown of nutritional values or a relief from hunger. It is a statement and symbol, a daily affirmation of the structure and values of our society and selves. Through direct regulation, food aid, subsidies, employment structures, and property rights, law shapes and even determines food choices in America. With it, law shapes, reflects, and may even—at times—dictate American identities.

Perhaps nowhere is the law's impact on food and identity more immediately apparent than in the context of the National School Lunch Program (NSLP). When Congress created the program, it was focused on adequate nutrition and supporting America's faltering agricultural sector.⁵ The establishment of a national ritual of broad ethnic, cultural, racial, and political significance was far from its agenda. However, that is precisely what the NSLP has become. The NSLP now feeds over fifty million students every day⁶ and serves over seven billion school meals annually.⁷ The program operates in over 100,000 public schools, nonprofit private schools, and residential childcare institutions nation-

¹ See generally Janet Siskind, *The Invention of Thanksgiving: A Ritual of American Nationality*, in *FOOD IN THE USA: A READER* 41 (Carole M. Counihan ed., 2002) (describing how the tradition of Thanksgiving in the United States celebrates a stylized version of the history of settlement in the United States).

² See Peter Smith, *Mythology and the Raw Milk Movement*, *SMITHSONIAN MAG.* (May 9, 2012), <http://www.smithsonianmag.com/arts-culture/mythology-and-the-raw-milk-movement-84299903/?no-ist> (explaining that some libertarians view the consumption of raw milk and the broader fight against food regulation as “a symbol of freedom”).

³ Mike Aivaz & Muriel Kane, *Huckabee: “We Used to Fry Squirrels in a Popcorn Popper”*, *THE RAW STORY* (Jan. 16, 2008), http://www.rawstory.com/news/2007/Huckabee_We_used_to_fry_squirrels_0116.html (reporting how a presidential candidate believed that he could identify with South Carolina voters because he knew how to fry squirrel). See also JOSÉE JOHNSTON & SHYON BAUMANN, *FOODIES: DEMOCRACY AND DISTINCTION IN THE GOURMET FOODSCAPE* 3 (2009) (discussing the socioeconomic class issues in the “foodie” or gourmet food movement).

⁴ PAMELA G KITTLER ET AL., *FOOD AND CULTURE* 4–12 (6th ed. 2012).

⁵ See Donald T. Kramer, Annotation, *Construction and Application of National School Lunch Act (42 U.S.C.A. §§ 1751 et seq.) and Child Nutrition Act of 1966 (42 U.S.C.A. §§ 1771 et seq.)*, 14 A.L.R. FED. 634, 636–37 (1973) (“The National School Lunch Act . . . was enacted to safeguard the health and well-being of all the nation’s schoolchildren . . . and to encourage the domestic consumption of the nation’s agricultural commodities.”); GORDON W. GUNDERSON, *THE NATIONAL SCHOOL LUNCH PROGRAM: BACKGROUND AND DEVELOPMENT* 10–18 (2003) (detailing how early school lunch programs leading up to the creation of the National School Lunch Act were a response to the concern that school children were malnourished).

⁶ Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. 2494, 2514 (Jan. 13, 2011) (to be codified at 7 C.F.R. pts. 210, 220).

⁷ JANET POPPENDIECK, *FREE FOR ALL: FIXING SCHOOL FOOD IN AMERICA* 3 (2011).

wide, making it one of the largest proverbial “communal tables” in the world.⁸

In recent years, school meals have come under increasing scrutiny.⁹ However, while legislative discussion of relevant *nutritional* goals in the school lunch program has broadened and improved,¹⁰ discussion of political, social, and cultural goals has lagged.¹¹ To date, legislators and federal administrators have not adequately considered the pressing cultural and social ramifications of food choices in federal entitlement programs despite their large-scale implementation and social impact.¹²

This Article is the first to examine the social and political dimensions of school meals, and concludes that current treatment of these values in food regulation undermines key values in American civil society. The school lunch program teaches students a simplified, uniform, even discriminatory account of what it means to eat American and therefore be American. It marginalizes minority religious, ethnic, and racial groups whose food traditions and needs are excluded from the school lunch experience. By failing to recognize the social value of food as commensurate with the nutritional value of food, the program unwittingly creates a culturally homogenizing force. Thus, the current construction of school lunch programs forces children in marginalized

⁸ FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., NATIONAL SCHOOL LUNCH PROGRAM FACT SHEET 1 (Sept. 2013), available at <http://www.fns.usda.gov/sites/default/files/NSLPFactSheet.pdf>.

⁹ 2010 saw the first significant revision in the National School Lunch Program in over thirty years with the Healthy Hunger-Free Kids Act of 2010. See Healthy Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183 (codified in scattered sections of 7 U.S.C., 20 U.S.C. and 42 U.S.C.).

¹⁰ See 7 C.F.R. § 210.10(c) (2014) (requiring increased inclusion of whole-grains, vegetables, and fruits on school menus); 42 U.S.C. § 1758(a)(5) (requiring drinking water be made available during meal times). See also 7 C.F.R. § 210.10 (2014) (setting maximum calorie limits on school lunches); 42 U.S.C. § 1758(a)(2)(A)(i) (requiring schools to offer low-fat milk consistent with the most recent Dietary Guidelines for Americans).

¹¹ The study of food in the legal context has traditionally been limited in scope. For example, “food law” casebooks currently on the market focus almost exclusively on the powers of the Food and Drug Administration and related regulations. See, e.g., HUTT ET AL., *Food and Drug Law* (3d ed. 2007). However, academics in related disciplines are longstanding and far more developed. See, e.g., CLAUDE LÉVI-STRAUSS, *THE ORIGINS OF TABLE MANNERS* (John & Doreen Weightman trans., 1968); SIDNEY MINTZ, *SWEETNESS AND POWER: THE PLACE OF SUGAR IN MODERN HISTORY* (1986); Carole M. Counihan, *Food Rules in the United States: Individualism, Control, and Hierarchy*, 65 ANTHROPOLOGICAL Q. 55 (1992) (examining how college students adhere to social hierarchies through their consumption of food); Mary Douglas, *Deciphering a Meal*, in MYTH, SYMBOL, AND CULTURE 61 (Clifford Geertz ed., 1971).

¹² Although the USDA requires a Civil Rights Impact Analysis of their proposed regulations, such analyses fail to take into account any of the cultural, class, or social stigma imbedded in food consumption and ritual. See OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF AGRIC., DR 4300-4, CIVIL RIGHTS IMPACT ANALYSIS (2003), available at <http://www.ocio.usda.gov/directives/doc/DR4300-4.pdf>.

groups to choose between ignoring their heritage, being singled out as an outsider, or not eating at all.

Part I of this Article gives a brief overview of the relevant aspects of the school meal program: outlining participation, the components of school meals, and the tensions already at play in deciding how to teach children to eat. Part II digs into the specific symbolic, political, and cultural power of food, making clear why teaching children about food is not only different than other school programs, but perhaps the most significant and personal activity the state seeks to shape at school. Part III applies these insights and examines how the school meal program impacts American identity by excluding some from the school meal experience and sending a general message about American values. In Part IV, the Article sets out solutions and concrete next steps to be taken to responsibly legislate over food in the school sphere. Part V addresses key counterarguments and trade-offs that might need to be made in order deliver nutritious and culturally sensitive school meals. Finally, the Article concludes that because food is more than nutrition, the law must recognize the interaction between food and identities.¹³ Congress must consider that the meaning of food beyond its scientific makeup must be weighed meaningfully alongside its nutritional counterparts. To do otherwise would be to leave a lasting and significant impact on the structure of American society to chance.

I. THE NATIONAL SCHOOL LUNCH PROGRAM: AN OVERVIEW

Law governs the form and content of the school lunch tray in detail.¹⁴ School lunches are not haphazard meals thrown together with whimsical creativity and reckless abandon.¹⁵ Rather, the school lunch and breakfast menu is a product of meticulous rules and regulations promulgated in accordance with law.¹⁶ School meal regulations are specific, vetted, and heavily contested. Titans of agricultural industry weigh

¹³ See VANDANA SHIVA, *STOLEN HARVEST: THE HIJACKING OF THE GLOBAL FOOD SUPPLY* 21 (2000) (“Food security is not just having access to adequate food. It is also having access to culturally appropriate food. Vegetarians can starve if asked to live on meat diets.”).

¹⁴ See, e.g., 7 C.F.R. §§ 210.10–220.23 (2014).

¹⁵ For example, schools must maintain certain federal certifications to participate in the NSLP. The road to certification is highly codified. To qualify, a school must show that it meets the Federal Nutritional Guidelines as promulgated. To do so, each school must (1) submit one week menu, menu worksheet and nutrient analysis; (2) submit one week menu, menu worksheet and simplified nutrient assessment, or (3) undergo state agency onsite review. U.S. DEP’T OF AGRIC., *CERTIFICATION OF COMPLIANCE WITH NEW MEAL PATTERN REQUIREMENTS* 10, available at <http://www.fns.usda.gov/sites/default/files/6centsrule.pdf> (last visited Aug. 8, 2014).

¹⁶ Menus must meet detailed regulations. Even after initial certification, school meal programs continue to be monitored under national requirements by state agencies. See 7 C.F.R. § 210.18 (2014).

in on the content of the regulations, as do physicians, action groups, parents, and Presidents.¹⁷ School meals are born of deliberation, concession, and legally codified process. Thus, school meals carry strong messages regarding who and what the state views as important.

A. *Who Participates in School Meals*

Information regarding the racial and religious demographics of school meal consumers is limited. What is undisputed is that general participation in the school meal program is widespread. Almost all school-age children in America attend school on any given school day.¹⁸ The overwhelming majority of the schools in the United States participate in the school meal program.¹⁹ To qualify for a free school lunch, a student must have a family income totaling less than 1.30 times the annual federal income poverty guidelines.²⁰ Students may also be “cate-

¹⁷ See, e.g., COMM. ON NUTRITION STANDARDS FOR NAT'L SCH. LUNCH AND BREAKFAST PROGRAMS, INST. OF MED. OF THE NAT'L ACADS., *SCHOOL MEALS: BUILDING BLOCKS FOR HEALTHY CHILDREN* (Virginia Stallings et al. eds., Oct. 20, 2009) (committee of physicians, educators, economists, nutritionists, and consultants proposing limitations on caloric content of meals for high-school children and increasing vegetable, fruit, and grain content of lunches); Letter from Geraldine Henchy, Dir. of Nutrition Policy, Food Research & Action Center, to William Wagoner, Policy and Program Dev. Branch, Food & Nutrition Serv., U.S. Dep't of Agric., Official Federal Register Comments to School Lunch Nutritional Standards, 7 C.F.R. §§ 210, 220 (Oct. 24, 2013) (commending USDA on proposed legislation to limit “competitive foods” sold in school vending machines); Letter from Eric Dell, Senior Vice President of Gov't Affairs, Nat'l Automatic Merch. Ass'n, to Julie Brewer, Chief, Policy and Program Dev. Branch, Food & Nutrition Serv., U.S. Dep't of Agric., Official Federal Register Comments to School Lunch Nutritional Standards, 7 C.F.R. §§ 210, 220 (April 9, 2013), available at <http://namavoice.org/uploads/sites/103/NAMACommentstoUSDAonSchoolNutritionRulesv12Final.pdf> (representing the interests of vending machine manufacturers in maintaining competitive foods on school campuses); Press Release, Food Research & Action Center, *New School Nutrition Standards Support Healthier and Well-Fed Children* (Sept. 27, 2012), available at http://origin.drupal.fns.usda.gov/sites/default/files/2_FoodResearchActionCenter.pdf (action group urging that scientific research regarding nutritional content should guide the content of the school lunch tray); Ron Nixon, *Congress Blocks New Rules on School Lunches*, N.Y. TIMES, Nov. 15, 2011, http://www.nytimes.com/2011/11/16/us/politics/congress-blocks-new-rules-on-school-lunches.html?_r=0 (reporting on the efforts of ConAgra, DelMonte, the National Potato Council, and the American Frozen Food Institute to block revisions to the vegetable content in school meals); Proclamation No. 9040, 3 C.F.R. 9040 (Oct. 11, 2013), available at <http://www.gpo.gov/fdsys/pkg/CFR-2014-title3-vol1/pdf/CFR-2014-title3-vol1-proc9040.pdf> (discussing the need to increase vegetable, fruits and whole grains in school meals to combat obesity concerns).

¹⁸ POPPENDIECK, *supra* note 7, at 12 (noting that more than 97% of children and youth in the U.S. are enrolled in school, with 90% of those attending on any given day).

¹⁹ See *Fast Facts: Educational Institutions*, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=84> (last visited Aug. 10, 2014) (noting that in 2010, there were approximately 131,000 public and private elementary and secondary schools in the United States); FOOD & NUTRITION SERV., *supra* note 8, at 1 (noting that in 2012, over 100,000 schools and childcare facilities participated in school meal programs).

²⁰ Child Nutrition Programs - Income Eligibility Guidelines, 77 Fed. Reg. 17,004, 17,005 (Mar. 23, 2012).

gorically eligible” for free or “reduced price” meals if they already participate in other qualifying government assistance programs or fall into designated risk categories.²¹ If a student does not qualify for free school lunch, they may still qualify for a reduced price lunch if their family makes less than 1.85 times the current federal income poverty guidelines.²² Reduced-price or “subsidized” lunches allow a student to pay forty cents per lunch, rather than the “full” rate.²³ However, the terms “subsidized” and “full rate” are misleading; all USDA compliant school meals are subsidized to some extent by the federal government.²⁴ Currently, regardless of local or general poverty level, the majority of school lunch participants receive free or reduced-price meals.²⁵

School meals serve a broadly diverse population of school children. The school lunch program categorizes schools where less than 25% of the students are eligible for free or reduced lunch as “low-poverty schools.”²⁶ Schools where 75% or more of the students are eligible for free or reduced lunch are categorized as “high-poverty schools.”²⁷ The most recent studies tracking racial demographics show that high-poverty schools have higher percentages of Hispanic, black, and American Indian students, while low-poverty schools have more white or Asian students.²⁸ Almost 49% of regular school lunch participants are nonwhite.²⁹ The largest minority group tracked is categorized as “Hispanic” and

²¹ FOOD & NUTRITION SERV., U.S. DEP’T OF AGRIC., ELIGIBILITY MANUAL FOR SCHOOL MEALS: DETERMINING AND VERIFYING ELIGIBILITY 11–12 (2014), available at <http://www.fns.usda.gov/sites/default/files/cn/EliMan.pdf> (stating that participation in SNAP, TANF, FDIPIR, Federal Head Start Program, State Funded Head Start Program, or being designated as homeless, runaway, migrant, or foster child grants a child categorical eligibility for school meals). The Healthy, Hunger-Free Kids Act also took measures to increase access to school lunches by improving state certification processes, using Medicaid data to certify children who meet income requirements, and allowing for universal access certification in high-poverty areas based on census data. THE WHITE HOUSE, FACT SHEET: CHILD NUTRITION REAUTHORIZATION HEALTHY, HUNGER-FREE KIDS ACT OF 2010 2 (2010), available at http://www.whitehouse.gov/sites/default/files/Child_Nutrition_Fact_Sheet_12_10_10.pdf.

²² Child Nutrition Programs - Income Eligibility Guidelines, 77 Fed. Reg. 17,004, 17,005 (Mar. 23, 2012).

²³ POPPENDIECK, *supra* note 7, at 4.

²⁴ *Federal Food/Nutrition Programs: National School Lunch Program*, FOOD RESEARCH & ACTION CTR., <http://frac.org/federal-foodnutrition-programs/national-school-lunch-program/> (last visited Aug. 11, 2014) (noting that in 2014–15 “paid” lunches (full rate) will be directly subsidized at a rate of \$0.28 per meal).

²⁵ FOOD & NUTRITION SERV., U.S. DEP’T OF AGRIC., NATIONAL SCHOOL LUNCH PROGRAM: PARTICIPATION AND LUNCHES SERVED (2014), available at <http://www.fns.usda.gov/sites/default/files/pd/slsummar.pdf> (noting that in 2013, 70.5% of the lunches served were free or reduced price lunches).

²⁶ NAT. CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF ED., THE CONDITION OF EDUCATION 2012 42 (2012), available at http://nces.ed.gov/pubs2012/2012045_3.pdf.

²⁷ *Id.*

²⁸ *Id.*

²⁹ FOOD & NUTRITION SERV., U.S. DEP’T OF AGRIC., CIVIL RIGHTS IMPACT ANALYSIS OF HEALTHY HUNGER-FREE KIDS ACT 3 (Nov. 17, 2011) (copy on file with author).

makes up 23.2% of the overall participants.³⁰ African American children follow as the next largest group and make up approximately 18.3% of the total participant pool. Finally, a catchall “other” group, that includes bi-racial children, composes the final 7.2% of the minority demographic.³¹ Demographic information regarding the disability status, national origin, or religious makeup of school lunch participants is typically not collected.³²

B. School Meals: Teaching Children What a “Good” Meal Is

The pedagogical purpose of school meals is a key component of administrative regulation and policymaking in this area. The United States Department of Agriculture (USDA) (charged with overseeing the school meal program and promulgating dietary guidelines)³³ recognizes that a key goal of school meals is to provide “nutrition education in a manner that promotes American agriculture and inspires public confidence.”³⁴ With this purpose in mind, the USDA requires the inclusion of various foodstuffs as meal components.³⁵ When going through the school lunch line, students must select a minimum number of USDA regulated meal components in order to form a “reimbursable meal.”³⁶ Meals must have a variety of components not only for nutrient-based reasons but “also [to] teach[] [students] to recognize the components of a balanced meal.”³⁷

The USDA details the types and quantities of food that allow a meal to qualify for federal reimbursement. In order to receive federal reimbursement school meals must have five basic components: meat/meat

³⁰ *Id.*

³¹ *Id.*

³² *See id.* (“There are no specific data on students with food related disabilities that that require accommodations in the NSLA or the SBP.”).

³³ *See* Child Nutrition Act of 1966, 42 U.S.C. §§ 1771–1789 (amended 2010); Richard B. Russell National School Lunch Act, 42 U.S.C. §§ 1751–1769 (2006) (vesting the United States Department of Agriculture (USDA) with the responsibility to establish nutritional guidelines for the school lunch program).

³⁴ Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088, 4108 (Jan. 26, 2012). As articulated by the USDA, the goal of the Food Nutrition Service is to “provide children access to food, a healthful diet, and nutrition education in a manner that promotes American agriculture and inspires public confidence.” *Id.*

³⁵ In addition to each meal having required food components, it must also fall within prescribed caloric, sodium, and fat limits to meet federal requirements. *Id.* at 4095.

³⁶ *Id.* at 4099.

³⁷ *Id.* at 4094.

substitute,³⁸ grain,³⁹ dairy,⁴⁰ fruit, and vegetables.⁴¹ Fluid milk is required at every school meal.⁴² Meat or meat alternatives are also required at every meal.⁴³ Regulations set the portions of fruits and vegetables,⁴⁴ their color, the types of acceptable vegetables, and the frequency with which each vegetable or fruit is served.⁴⁵ Even the form of foods (pureed, dried, mashed or juiced)⁴⁶ is examined in detail⁴⁷ with an eye towards setting norms and expectations for what a standard meal looks like.⁴⁸

In the most recent iteration of the Nutrition Standards for the National School Lunch and Breakfast program, the USDA took further steps to strengthen the use of school meals as a “teaching tool” by examining how meal components are presented to students.⁴⁹ In order “[t]o ensure that school meals reflect the key food groups recommended by the Dietary Guidelines,” the new nutrition standards required a shift to a “Food Based Menu Planning” (FBMP) approach.⁵⁰ FBMP requires schools to plan meals that include different types of foods, rather than specific nutrient targets.⁵¹ Federal meal components in every school meal must also be clearly labeled to “reinforce nutrition education

³⁸ *Id.*

³⁹ Every school lunch must have a grain component. Current rules require that grains must be “whole grain rich,” which means that 51% of their makeup must be whole grains and the remaining grain content of the product must be enriched. *Id.* at 4093 (listing whole wheat flour, oatmeal, whole cornmeal, and brown rice as meeting the whole grain rich requirement being phased in over five years).

⁴⁰ *Id.* at 4096.

⁴¹ *Id.* at 4091–92 (detailing fruit and vegetable requirements).

⁴² *Id.* at 4096.

⁴³ The USDA guidelines for school lunches mandate that schools must serve two ounces of meat or meat alternatives daily for students in grades 9–12, and one ounce for younger students at each school lunch. *Id.* at 4094.

⁴⁴ Under the current guidelines, one fruit and one vegetable must be offered as separate food items at every school lunch. *Id.* at 4091–92 (noting that in the past schools could choose between offering fruit or vegetables and often chose to offer fruit exclusively). The school breakfast program retains this interchangeability. *Id.* at 4092.

⁴⁵ *Id.* at 4091–92 (categorizing vegetable subgroups into roughly into four categories: dark green, red/orange, legumes, and other as defined in the Dietary Guidelines and requiring precise servings in intervals of one-half cup per week).

⁴⁶ No more than half of the fruit or vegetable requirements can be met with juice. *Id.* at 4103.

⁴⁷ Generally, the new guidelines encourage fruits and vegetables appearing on the menu in their most recognizable form, rather than in pastes, purees, or snack foods in order to count towards meal minimums. *Id.* at 4101. Note that the Food Buying Guide for Child Nutrition Programs delineates how to credit whole fruit. *Id.* at 4091.

⁴⁸ See *id.* at 4101 (“One of the goals of the School Meal Programs is to help children easily recognize the key food groups that contribute to a balanced meal, including fruits and vegetables.”).

⁴⁹ *Id.* at 4090 (“[A] single Food-Based Menu Planning (FBMP) approach . . . serves as a teaching tool to help children choose a balanced meal . . .”).

⁵⁰ *Id.*

⁵¹ *Id.*

messages that emphasize selecting healthy choices for a balanced meal.”⁵²

The USDA recognizes that “improved school meals can reinforce school-based nutrition education and promotion efforts and contribute significantly to the overall effectiveness of the school nutrition environment in promoting healthful food and physical activity choices.”⁵³ The USDA states clearly that it is their goal to create school meals with a lifelong impact on the behavior of students far beyond the lunchroom.⁵⁴

C. *The Elephant at the Table: The Political Economy of School Meals*

In 2013 alone, more than one billion dollars of funding went into school meal programs in the form of commodity bonuses and entitlements.⁵⁵ This highlights how the agricultural sector is a key player in the debate over school meals. So far, this Article has focused on a need to balance political, cultural, and social implications for food against their nutritional content. However, any article discussing school meals would be incomplete without acknowledging that nutrition is not the sole, and perhaps not even the primary focus, when it comes to determining the content of school meals. There are three competing interests in determining the content of school meals: the nutritional value of food, the political value of food, and the market value of food to producers and processors. All three collide in the context of the school meal program.

The traditional balancing of nutritional, political, and market values is rooted in the school meal program’s long history of serving two missions: to feed children and to support the U.S. agricultural sector.⁵⁶ These two interests aligned at the outset of the school meal program because the key concern was addressing caloric deficiencies in children.⁵⁷

⁵² *Id.* at 4101.

⁵³ *Id.* at 4133.

⁵⁴ *Id.* at 4089 (“[W]e are mindful that the overweight and obesity epidemic affecting many children in America requires that all sectors of our society, including schools, help children make significant changes in their diet to improve their overall health and become productive adults.”).

⁵⁵ FOOD & NUTRITION SERV., U.S. DEP’T OF AGRIC., FEDERAL COSTS OF SCHOOL FOOD PROGRAMS 1 (Aug. 8, 2014), available at <http://www.fns.usda.gov/sites/default/files/pd/cncost.pdf>.

⁵⁶ The purpose of the Nation School Lunch Act (NSLA) was “to safeguard the health and well-being of all the nation’s school children . . . and to encourage the domestic consumption of the nation’s agricultural commodities.” Kramer, *supra* note 5, at 636–37. See also Melissa D. Mortazavi, *Are Food Subsidies Making Our Kids Fat? Tensions Between the Healthy Hunger-Free Kids Act and the Farm Bill*, 68 WASH. & LEE L. REV. 1699, 1715 (2011) (discussing the history of the School Lunch Program), available at <http://scholarlycommons.law.wlu.edu/wlulr/vol68/iss4/4>.

⁵⁷ Representative Marcy Kaptur, the ranking member of the Appropriations Subcommittee, stated that “the school food program began because many young recruits in World War II

However, the concern that school children were getting too few calories has given way to a new concern that children consuming too many calories as calorically dense and nutritionally sparse foods flood the low-cost food market.⁵⁸ Thus, there are often complex tensions between agricultural sector obligations and the well-being of school children. The items required in a school meal certainly have nutritional value and are selected, in part, with nutritional values in mind. However, deciding what a “balanced” meal looks like in the school meal context cannot be divorced from the market pressure of the agricultural sector and the structure of agricultural subsidies.

Regulations regarding the content of school meals are subject to highly mobilized and well-funded lobbying by agricultural groups and food industries. For example, the new guidelines encourage the use of on school menus in their most recognizable form, rather than in pastes, purees, or snack foods.⁵⁹ However, the exception to this rule is tomato paste and tomato sauce, which, after considerable political debate and direct congressional intervention, continue to count significantly towards meeting vegetable requirements.⁶⁰ Potatoes provide another recent battleground. The USDA attempted to set limits on the number of starchy vegetables allowed per week in school meals in order to increase variety

were malnourished and physically incapable of meeting the demands of military life.” See Elizabeth Becker & Marian Burros, *Eat Your Vegetables? Only at a Few Schools*, N.Y. TIMES, Jan. 13, 2003, at A1, available at http://www.nytimes.com/learning/students/pop/20030114_snapuesday.html.

⁵⁸ The initial section of the NSLP regulations acknowledges:

New dietary concerns have emerged since the establishment of the NSLP. The overt nutritional deficiencies in children’s diets that led to the NSLP’s inception have largely been eliminated. In turn, overweight and obesity are now major health concerns affecting children and adolescents. Studies indicate that excess food consumption, poor food choices, and decreased physical activity are contributing to childhood . . . obesity[] and related chronic health conditions.

Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. 2494, 2495 (Jan. 13, 2011). See also, Latetia V. Moore et al., *Fast-Food Consumption, Diet Quality, and Neighborhood Exposure to Fast Food: The Multi-Ethnic Study of Atherosclerosis*, 170 AM. J. EPIDEMIOLOGY 29 (2009) (discussing the presence of food deserts, urban areas with little or no access to fresh produce and an abundance of fast food restaurants). The USDA has defined a food desert as “an area in the United States with limited access to affordable and nutritious food, particularly such an area composed of predominantly lower-income neighborhoods and communities.” *USDA Food Desert Locator Tool - Frequently Asked Questions*, USDA, <http://apps.ams.usda.gov/fooddeserts/FAQLocatorTool2-pgr.pdf> (last visited Aug. 10, 2014).

⁵⁹ Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. at 4101–03.

⁶⁰ Ron Nixon, *Congress Blocks New Rules on School Lunches*, N.Y. TIMES, Nov. 15, 2011, <http://www.nytimes.com/2011/11/16/us/politics/congress-blocks-new-rules-on-school-lunches.html> (noting that retaining old tomato paste regulations allows pizza with tomato sauce to still count as a vegetable serving).

and pull school lunches away from being overly dependent on potatoes.⁶¹ The potato industry rallied hard against the proposed regulation.⁶² As a result, the current regulations strike a compromise; they require that vegetables offered are from a variety of subgroups, however once subgroup minimums are met, there is no limit to how many times potatoes may count towards vegetable quotas.⁶³

In a less visible, but more entrenched way, the economic interests of the agricultural sector are balanced in the context of school meals through the purchase and placement of surplus commodities.⁶⁴ The National School Lunch Act, the Agricultural Act of 1949, and the Agricultural Adjustment Act of 1935, allow the USDA to make discretionary purchases for the school meal program.⁶⁵ In making such purchases the USDA considers “prior year purchases, likely school needs, expectations of available funds, and any anticipated surplus or other market conditions in the coming year.”⁶⁶ These commodity “bonus” purchases are designed specifically to respond to markets, not nutritional needs: “[P]urchases are made, often at the request of industry groups, after USDA has conducted a careful analysis of the need to provide market assistance to a specific product.”⁶⁷ The USDA often purchases meat for federal assistance programs to ease the economic burden of drought or

⁶¹ See *id.*; Lucy Komisar, *How the Food Industry Eats Your Kid's Lunch*, N.Y. TIMES, Dec. 3, 2011, http://www.nytimes.com/2011/12/04/opinion/sunday/school-lunches-and-the-food-industry.html?pagewanted=all&_r=0 (noting efforts by large food companies Aramark and Sodexo to oppose limitations on starchy vegetables and tomato paste usage as well as the inclusion of protein at breakfast).

⁶² Ron Nixon, *New Rules for School Aim at Reducing Obesity*, N.Y. TIMES, Jan. 25, 2012, http://www.nytimes.com/2012/01/26/us/politics/new-school-lunch-rules-aimed-at-reducing-obesity.html?_r=0 (“The National Potato Council . . . opposed the attempts to limit the serving of potatoes . . .”).

⁶³ Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. at 4090–95. The USDA also noted that the original rules required limiting the use of starchy vegetables to one cup per week but that they decided to change the rule in the face of opposition from local and state programs. *Id.* at 4095.

⁶⁴ See Nat'l Alliance for Nutrition & Activity, *USDA Foods: Commodities in the National School Lunch Program*, CTR. FOR SCIENCE IN THE PUBLIC INTEREST, http://cspinet.org/new/pdf/commodities_fact_sheet.pdf (last visited Aug. 18, 2014).

⁶⁵ See National School Lunch Act § 6, 42 U.S.C. § 1755 (2012) (providing a guaranteed level of assistance for USDA Foods at eleven cents per meal to be adjusted annually for inflation which is called the State's “USDA Foods Entitlement”); Agricultural Act of 1949 § 416, 7 U.S.C. § 1431 (2012) (permitting the donation of food commodities by the USDA to school lunch programs); Agricultural Adjustment Act of 1935 § 32, 7 U.S.C. § 612c (2012) (authorizing the equivalent of 30% of annual customs receipts to support the farm sector through a variety of activities, including bonus purchases).

⁶⁶ FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., WHITE PAPER: USDA FOODS IN THE NATIONAL SCHOOL LUNCH PROGRAM 6 (2010), available at <http://origin.drupal.fns.usda.gov/sites/default/files/WhitePaper.pdf> (discussing the use of section 32 funds, which need to be approved by the Secretary of Agriculture).

⁶⁷ *Id.*

other market externalities.⁶⁸ Schools spend an estimated 15–20% of school lunch spending on purchasing such entitlements⁶⁹ that are sold at a rate of 23.25 cents per meal.⁷⁰

Through the commodity program schools are able to obtain many processed meat products at a substantial discount.⁷¹ The USDA guidelines for school lunches mandate that schools must serve two ounces of meat or meat alternatives⁷² daily for students in grades nine through twelve, and one ounce for younger students at each school lunch.⁷³ Failure to meet these requirements will result in the termination of funding for a school meal program. There are also specific methods built into the structure of school meals to easily incorporate additional meat products. Once a meal has offered the minimum of one ounce of grain, a school meal may substitute meat/meat alternatives for the remainder of the grain requirement.⁷⁴ While some beans and peas qualify as meat alternatives, they cannot count towards the vegetable and the “meat” requirement in the same meal.⁷⁵

The prevalence of fluid milk in the school lunch program is also a balance between nutritional goals⁷⁶ and ongoing aid to the dairy indus-

⁶⁸ Alan Bjerga & Margaret Talev, *Obama Announces Meat Purchase to Help Farmers Through Drought*, BLOOMBERG BUSINESSWEEK (Aug. 13, 2012), <http://www.businessweek.com/news/2012-08-13/obama-to-urge-agriculture-bill-as-usda-buys-170-million-of-meat; USDA Agrees to Buy More Pork Products>, NATIONAL HOG FARMER (Nov. 11, 2009), <http://nationalhogfarmer.com/marketing/price-discovery/1111-USDA-more-pork>.

⁶⁹ Nat'l Alliance for Nutrition & Activity, *supra* note 64, at 3.

⁷⁰ FOOD & NUTRITION SERV., *supra* note 8.

⁷¹ The majority of the top entitlement foods reprocessed by the USDA for inexpensive purchase are meat products and include: cooked pork crumbles and shredded pork; beef and turkey crumbles; charbroiled beef patties and meatballs; chicken fajita strips, breast strips, nuggets, and patties; turkey ham and breast deli slices; and tomato “meat sauce.” See FOOD & NUTRITION SERV., U.S. DEP’T OF AGRIC., FOOD DISTRIBUTION FACT SHEET: USDA FOODS FURTHER PROCESSING (Nov. 2012), available at http://www.fns.usda.gov/sites/default/files/Processing_Fact_Sheet_final_112312-Revised_11-26-12.pdf.

⁷² Acceptable “protein foods” include lean or extra lean meats, seafood, and poultry; beans, and peas; fat-free and low-fat milk products such as yogurt and cheese; and unsalted nuts and seeds. After much debate during the notice and comment period, the USDA added tofu in 2012 as an acceptable meat alternative noting that tofu’s inclusion allows the program to “better meet the dietary needs of vegetarians and culturally diverse groups in schools.” Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088, 4094–95 (Jan. 26, 2012) (to be codified at 7 C.F.R. pts. 210, 220) (“Although tofu does not have an FDA standard of identity, the Dietary Guidelines recognize plant-based sources of protein such as tofu.”).

⁷³ *Id.* at 4094.

⁷⁴ *Id.*

⁷⁵ *Id.* at 4095.

⁷⁶ It is worthwhile to note that the nutritional value of cow’s milk is increasingly being called into question. Amy Joy Lanou et al., *Calcium, Dairy Products, and Bone Health in Children and Young Adults: A Reevaluation of the Evidence*, 115 PEDIATRICS 736, 736 (2005) (finding that children’s bone integrity showed no improvement from milk consumption).

try.⁷⁷ In 1966, the Child Nutrition Act (CNA) added a school milk and breakfast program, in part designed to encourage the consumption of milk and support U.S. dairy producers.⁷⁸ Dairy is included as both a “meat alternate” and its own separate “fluid milk” requirement in school meal programs.⁷⁹ Similarly, cheese is also a consistent commodity purchase that creates an outlet for surplus high-fat dairy. As such, the school milk program provides a reliable and regular outlet for excess milk and milk products.

This section has shown that school meals, even as conceived of by the USDA, are about more than providing children with nutritional intake. School meals are also an attempt to give students a standard conception of what a “good” meal looks like. However, this “good meal” coincides with the USDA’s duties to support agricultural products from politically well-connected producers. However, even assuming the best motivations, on the well-intentioned path to teach what a nutritionally “good” meal looks like, the NSLP also imparts value judgments regarding the social, cultural, and political legitimacy of marginalized groups through normalizing and recognizing certain food choices as more legitimate than others. Who does this impact and how?

II. CULTURAL CAPITAL OF FOOD: WHY SCHOOL MEALS ARE DIFFERENT

From the legal and regulatory framework of the NSLA and the CNA emerges the school lunch, a national ritual and rite of passage—one of the few unifying public experiences in America today. This section lays out why school food is different, how it is irrevocably infused with strong and lasting meaning that goes beyond nutritional content or market impact. As such, while the worth of a meal may be evaluated in terms of calories, fat, sodium, vitamins, and minerals, it must also be assessed for its symbolic, political, and cultural meanings.⁸⁰ In the United States, longstanding convention has dwelled on the former to the

⁷⁷ See Child Nutrition Act, 42 U.S.C. § 1771 (2006) (stating that it is the object of Congress to ensure the health of children and encourage domestic consumption of agriculture); 42 U.S.C. § 1773(b)(2)(C)(4) (2006) (allowing the Secretary of Agriculture to present breakfast providers unused or undervalued agricultural surplus).

⁷⁸ Child Nutrition Act, 42 U.S.C. §§ 1771–1773 (2006) (establishing the school breakfast program and a “specialized” program to encourage the consumption of milk).

⁷⁹ Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088, 4095 (Jan. 26, 2012) (to be codified at 7 C.F.R. pts. 210, 220).

⁸⁰ See Counihan, *supra* note 11, at 55 (“Because food has an unusually rich symbolic malleability, it is a particularly apt medium for displaying widely varying cultural ideologies.”) (citation omitted); SIDNEY MINTZ, TASTING FOOD, TASTING FREEDOM: EXCURSIONS INTO EATING, CULTURE, AND THE PAST 7 (1996) (“[E]ating is never a ‘purely biological’ activity . . . foods eaten have histories associated with the pasts of those who eat them; techniques employed to find, process, prepare, serve, and consume the foods are all culturally variable.”).

detriment of the latter.⁸¹ However, health concerns, though important, cannot exclusively dominate meaningful food discourse and policy.⁸² Food and the act of eating communally have multifaceted and profound significance for both the individual and the state. Ultimately, the simple truth is that what Americans eat and how we eat it defines who we are as a people and a nation.⁸³

A. *Food Shapes Personhood, Community, and Self*

Food is intimately intertwined with individual identity “perhaps because of its universality, but also because of the particular regularity with which individuals and groups eat.”⁸⁴ Claude Lévi-Strauss, a leading cultural anthropologist, was one of the first champions of food studies, and argued that what sets humans apart from animals is that we process our food before we consume it.⁸⁵ The act of sharing a meal itself has meaning because it is at “the same time a form of self-identification and of communication.”⁸⁶ Since “[e]ating is a daily []affirmation of cultural identity,”⁸⁷ the physical act of eating with others and how people eat together is a ritual of under-examined importance. A meal can bring people together or pull them apart.⁸⁸ Whether a communal meal is divisive or inclusive is a matter of the specific construction of the meal experience.⁸⁹ William Robertson Smith, a prominent figure in anthropological scholarship, explained the social significance of meals as follows: “Those who sit at a meal together are united for all social effects; those who do not eat together are aliens to one another without

⁸¹ Counihan, *supra* note 11, at 57 (“One salient intrinsic characteristic of food in the U.S. is its nutritional content.”).

⁸² *Id.* at 55 (“Rules about food are an important means through which human beings construct reality.”).

⁸³ *See, e.g.*, MINTZ, *supra* note 11, at 4 (“What we like, what we eat, how we eat it and how we feel about it are phenomenally interrelated matters; together, they speak eloquently to the question of how we perceive ourselves in relation to others.”).

⁸⁴ Thomas M. Wilson, *Food, Drink and Identity in Europe: Consumption and the Construction of Local, National and Cosmopolitan Culture*, 22 *EUROPEAN STUDIES* 11, 14 (2006).

⁸⁵ In his seminal works, *The Culinary Triangle* and *The Raw and the Cooked*, Lévi-Strauss pioneered a new discourse surrounding food. The human influence on food takes it from its raw state to a cooked one; conversely, the same food, if left in nature, would decay. Claude Lévi-Strauss, *The Culinary Triangle*, 33 *PARTISAN REVIEW* 586 (1966). *See also* CLAUDE LÉVI-STRAUSS, *THE RAW AND THE COOKED* (John & Doreen Weightman trans., Harper & Row 1969) (1964).

⁸⁶ MINTZ, *supra* note 80, at 13.

⁸⁷ KITTLER, *supra* note 4, at 4.

⁸⁸ Some scholars argue that while the exchange of food in non-capitalistic societies reduces social distance, in capitalistic societies it may function as the inverse; where food is a commodity, individuals are separated from each other by it, antagonistically vying for access. *See, e.g.*, Counihan, *supra* note 11, at 55.

⁸⁹ For example, eating with cutlery in close proximity to one another can indicate trust and familiarity, since cutlery was once viewed as dangerous and threatening. Douglas, *supra* note 11; LÉVI-STRAUSS *supra* note 11.

fellowship in religion and without reciprocal social duties.”⁹⁰ School officials in other countries have long recognized this significance in the school meals context where lunch is viewed as a community building ritual.⁹¹

B. *Food as Culture, Ethnicity, and Race*

Food is central in creating not only individual identity, but cultural, ethnic, and racial identities.⁹² It is integral in community and family gatherings. Food rules in a group may be highly codified and reflect generations of tradition; “[t]o eat is to distinguish and discriminate, include and exclude. Food choices establish boundaries and borders.”⁹³ The messages encoded in food choices express a pattern of social relations that “is about different degrees of hierarchy, inclusion and exclusion, boundaries and transactions across the boundaries.”⁹⁴ Thus, any lawyer or policymaker seeking to construct food related programs must have an awareness that “cultural values embedded in food rules is an important step towards challenging the unscrutinized value system that support social hierarchy.”⁹⁵ Traditions regarding food preparation, content, and consumption are often central to cultural identity and rooted in a shared history. When culturally appropriate, food imparts a sense of comfort, familiarity, and belonging.

Food choices signify adherence not only to a social group but, often, to a certain set of beliefs and values. Refraining from eating certain foods or food in general has long been associated with virtue.⁹⁶ Religious fasting rituals provide an example of how food and eating (or the lack of eating) is infused with moral meaning.⁹⁷ Eating meat is also

⁹⁰ MINTZ, *supra* note 11, at 4. Robertson Smith also observed that “the essence of the thing lies in the physical act of eating together.” WILLIAM ROBERTSON SMITH, LECTURES ON THE RELIGION OF THE SEMITES 253 (Edinburg, Adam & Charles Black 1889).

⁹¹ See, e.g., Karen Le Billon, *Guest Blog: French Kids School Lunch Project*, FED UP WITH LUNCH (May 14, 2012, 9:57 PM), <http://fedupwithlunch.com/2012/05/guest-blog-french-kids-school-lunch-project/>.

⁹² Catherine Palmer, *From Theory to Practice: Experiencing the Nation in Everyday Life*, 3 JOURNAL OF MATERIAL CULTURE 175, 188–89 (1998) (“[R]ituals and practices relating to food consumption are often used to define and maintain boundaries of identity; boundaries that serve to define the identity of a minority ethnic community from the dominant core . . .” (citing JUDITH OKELY, THE TRAVELLER-GYPSIES 84 (1983))).

⁹³ Warren Belasco, *Food Matters: Perspectives on an Emerging Field*, in FOOD NATIONS: SELLING TASTE IN CONSUMER SOCIETIES 2, 2 (Warren Belasco & Phillip Scranton eds., 2002).

⁹⁴ Douglas, *supra* note 11, at 61.

⁹⁵ Counihan, *supra* note 11, at 55.

⁹⁶ *Id.* at 62 (“For [students], eating is not the simple act of fueling the body, it is moral behavior through which they construct themselves as good or bad human beings.”).

⁹⁷ Most faiths fast as part of significant religious holidays, reinforcing the idea that eating is indulgent and abstaining from eating is pious, enlightening, and moral. See Carolyn Korsemeyer, *Preface to Part IV Body and Soul*, in THE TASTE CULTURE READER: EXPERIENC-

often infused with cultural and social meaning.⁹⁸ However, several religious groups have reservations about eating specific meats or meat in general. For example, both Muslims and Jews have specific rules regarding the slaughter of animals, the handling and preparation of meat, and its consumption.⁹⁹ Both of these groups also categorically refuse to consume pig, which is viewed as dirty.¹⁰⁰ All Hindus refuse to eat cow, which they view as sacred.¹⁰¹ As a general matter, observant Buddhists and Hindus reject meat consumption entirely.¹⁰² Certain sects of Christianity abstain from eating meat or limit meat consumption on holy days.¹⁰³

ING FOOD AND DRINK 145, 145 (Carolyn Korsemeyer ed., 2005). Muslims fast from sunrise to sunset during the twenty-nine or thirty days of Ramadan, consuming only water during daylight hours. See Natana Delong-Bas, *THE FIVE PILLARS OF ISLAM: OXFORD BIBLIOGRAPHIES ONLINE RESEARCH GUIDE* 15 (2010). In the Catholic faith, equating denial of food with piety manifests most obviously in the practice of Lent, which includes ritual fasting in conjunction with the holiday of Easter. See Caroline Walker Bynum, *HOLY FEAST AND HOLY FAST: THE RELIGIOUS SIGNIFICANCE OF FOOD TO MEDIEVAL WOMEN* 37 (1987). Jews observe six days of fasting throughout the year. The two most important, Tisha B'Av and Yom Kippur, are observed from sunset to the following day's dusk, while the other four are observed from sunrise to sunset. Other Jewish holidays also have fasting components, such as the Passover tradition of having firstborn sons fast the morning of the first Seder. See, e.g., *Yom Kippur—Day of Atonement*, REFORMJUDAISM.ORG, <http://www.reformjudaism.org/jewish-holidays/yom-kippur-day-atonement> (last visited Aug. 10, 2014). Fasting is integral to the Hindu faith; however, specific days of fasting often vary by region and purpose. KITTLER, *supra* note 4, at 98 (Hindus fast during various “Navratri” holidays that last nine days and ten nights and take place multiple times a year). Members of the Church of Jesus Christ of Latter-Day Saints are “encouraged to fast whenever their faith needs special fortification and to fast regularly once each month on fast day.” Elder Joseph B. Wirthlin, *The Law of the Fast*, LDS.ORG (July 2001), <http://www.lds.org/liahona/2001/07/the-law-of-the-fast?lang=eng>.

⁹⁸ Some legal scholars argue that the lack of consumption of meat acts as a proxy to enforce impermissible gender stereotypes in the context of employment law. See, e.g., Zachary Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 288, 290 (2011). Kramer's legal observations dovetail with theoretical work outlining meat's symbolic relationship with masculinity. See, e.g., CAROL ADAMS, *THE SEXUAL POLITICS OF MEAT* 28 (2002) (describing how men have historically been associated with the consumption of meat). As such, removing meat from a meal can be viewed as a hostile threat to societal cohesion and even a larger male dominated culture. Deirdre Wicks, *The Vegetarian Option*, in *A SOCIOLOGY OF FOOD AND NUTRITION* 289, 292 (John Germov & Lauren Williams eds., 2011). Other scholars discuss how eating meat is inherently enabling to a racist ethos in that it allows people to infer that any living being that they view as “subhuman” deserves to be persecuted, exploited, and physically harmed. See CHARLES PATTERSON, *ETERNAL TREBLINKA: OUR TREATMENT OF ANIMALS AND THE HOLOCAUST* 25 (2002).

⁹⁹ TIMOTHY LYTTON, *KOSHER: PRIVATE REGULATION IN THE AGE OF INDUSTRIAL FOOD* 40 (2013) (discussing kosher rules); PETER SMITH & DAVID WORDEN, *KEY BELIEFS, ULTIMATE QUESTIONS AND LIFE ISSUES* 114 (2003) (noting that both Judaism and Islam have centuries-old rules discussing the slaughter of animals and what type of meats may be eaten).

¹⁰⁰ See LYTTON, *supra* note 99, at 40.

¹⁰¹ SMITH & WORDEN, *supra* note 99, at 114.

¹⁰² *Id.* (noting that the refusal of Buddhists and Hindus to eat meat generally stems from a belief in nonviolence and reincarnation).

¹⁰³ Strict Catholics, for example, do not eat meat on Fridays; note, however, that they do consume fish, which they do not consider meat as it is associated with Christ and the Eucha-

C. *Food Constructs Nationalism and National Identity*

Nationalism and national identity are intimately intertwined with food traditions because food “articulates notions of inclusion and exclusion, of national pride and xenophobia.”¹⁰⁴ Often foods associated with a nation stand in for the entire population of a given country.¹⁰⁵ Since the emergence of the nation-state, a national identity and sense of nationalism has become a core aspect of individual identity and both are married in no small part to how and what we eat.¹⁰⁶ As such, “food is as much a ‘badge of identity’ as are the more obvious symbols of national belonging such as coins, anthems, costumes and ceremonies.”¹⁰⁷ In fact, “the history of any nation’s diet is the history of the nation itself, with food, fashion, fads and fancies mapping episodes of colonialism and migration, trade and exploration, cultural exchange and boundary-marking.”¹⁰⁸ New immigrant groups and minorities sense the importance of food and conform to perceived food norms in order to feel American.¹⁰⁹

Historically, eating patterns and food discourse have been mobilized to consciously build a sense of national identity. Particularly in wartime

rist. MICHAEL P. FOLEY, *WHY DO CATHOLICS EAT FISH ON FRIDAY?: THE CATHOLIC ORIGIN TO JUST ABOUT EVERYTHING* 29 (2005) (discussing the history of abstaining from meat consumption on Fridays as a penance for the crucifixion of Christ). Seventh-day Adventists abstain from eating meat entirely. Seventh-day Adventist Church, *Living a Healthful Life*, ADVENTIST.ORG, <http://www.adventist.org/vitality/health/> (last visited Aug. 10, 2014). The scriptures of the Church of Jesus Christ of Latter-day Saints state that, “flesh [] of beasts and of the fowls of the air,” are “to be used sparingly.” CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *THE DOCTRINE AND COVENANTS* § 89.12, available at <http://www.lds.org/scriptures/dc-testament/dc/89.12-13?lang=eng#11> (last visited Sept. 12, 2014).

¹⁰⁴ DAVID BELL & GILL VALENTINE, *CONSUMING GEOGRAPHIES: WE ARE WHERE WE EAT* 168 (1997).

¹⁰⁵ Mark Weiner, *Consumer Culture and Participatory Democracy: The Story of Coca-Cola During WWII*, in *FOOD IN THE USA* 123, 123 (Carole Counihan ed., 2002) (noting how certain countries are associated with certain food; France is associated with wine, Japan with rice, and Scotland with whiskey).

¹⁰⁶ See Palmer, *supra* note 92, at 188 (“[E]ating styles and habits say as much about a culture and a people as do systems of government . . .”). See also Kenyon Wallace, *Family Wins School Lunch Case Over Son’s Table Manners*, NATIONAL POST, Apr. 27, 2010, at A1 (discussing that a student’s way of eating by cutting with a fork and eating with a spoon was labeled by teachers as not Canadian and eating “like a pig”).

¹⁰⁷ Palmer, *supra* note 92, at 190; KAREN LE BILLON, *FRENCH KIDS EAT EVERYTHING* 23 (2012) (“French parents equate their national identity with respectful food behaviors . . .”); STEPHEN MENNELL, *ALL MANNERS OF FOOD* 3 (1985) (noting that “[w]ays of cooking become woven into the mythology and sense the identity of nations, social classes and religious groups. People take sides and exaggerate differences”).

¹⁰⁸ BELL & VALENTINE, *supra* note 104, at 168.

¹⁰⁹ Lytton, *supra* note 99, at 43 (“[M]any reform Jews consciously repudiated *kashrus* because it set them apart from other Americans.”). Lytton goes on to discuss various commercial and internally produced kosher cooking pamphlets promoting, “kosher versions of typical middle-class American recipes such as oatmeal cookies, meatloaf, and macaroni and cheese. Food companies played on this desire . . . by producing products such as kosher imitation bacon.” *Id.* at 44–45.

when food resources are heavily controlled by the state, rationed for both soldiers and civilians, and policymakers take a very active role in what people eat, eating patterns become a national and nationalizing experience.¹¹⁰ Food becomes a useful tool to build and form loyalties,¹¹¹ and to differentiate from the enemy.¹¹² What it means to be American is coded in what we eat and do not eat.

For example, during World War I, Americans recognized the affinity inherent in sharing food cultures with other nations and re-appropriated favorites: frankfurters were labeled as “hot dogs” and sauerkraut rebranded as “liberty cabbage.”¹¹³ During World War II, American soldiers were fed meat twenty-one times a week, far exceeding past domestic meat consumption, and sugar on a daily basis.¹¹⁴ Coca-Cola, now internationally synonymous with all things American, was made available to the troops, with sixty-four plants running in allied theatres of war, often manned by technicians provided by the armed forces.¹¹⁵ These soldiers returned home, bringing new meal expectations and habits with them, vastly modifying the American diet.¹¹⁶ Eating, and therefore being American, meant high meat and sugar consumption as well as an affinity for sugary drinks—a trend that continues to this day.¹¹⁷

¹¹⁰ MINTZ, *supra* note 80, at 25.

¹¹¹ Recent war efforts continue this trend with Afghan civilians receiving regular air-drops of culturally acceptable (halal) yet Western style food. See Associated Press, *U.S. Air-strikes Also Include Airdrops of Food, Medicine*, AUGUSTA CHRONICLE (Oct. 7, 2001), http://chronicle.augusta.com/stories/2001/10/07/wof_324787.shtml (noting the contents of the drops included peanut butter, strawberry jam, crackers, a fruit pastry, and entrees such as beans with tomato sauce and bean and potato vinaigrette).

¹¹² Disparaging terms for enemies often centers on calling them by their contrasting abhorrent food practices, such as referring to the French as “Frogs” or Germans as “Krauts.” See *Frog Definition*, OXFORD ENGLISH DICTIONARY, ONLINE EDITION 10 (2014) (defining “Frog” with a capital letter as a derogatory term for the French); *Kraut Definition*, OXFORD ENGLISH DICTIONARY, ONLINE EDITION 2 (2014) (defining “Kraut” as a derogatory term for a German, especially a German soldier).

¹¹³ See, e.g., *Liberty Cabbage Definition*, OXFORD ENGLISH DICTIONARY, ONLINE EDITION (2014) (defining “liberty cabbage” as an American noun “[a]dopted during the First World War (1914–18) to avoid the German associations of sauerkraut.”); *French Fries Back on House Menu*, BBC NEWS (Aug. 2, 2006), <http://news.bbc.co.uk/2/hi/americas/5240572.stm> (noting how current efforts to rename French fries were inspired “from similar protest action against Germany during World War I, when sauerkraut was renamed liberty cabbage and frankfurters became hot dogs”).

¹¹⁴ MINTZ, *supra* note 80, at 25.

¹¹⁵ *Id.* at 26.

¹¹⁶ See U.S. MEAT CONSUMPTION PER PERSON 1909–2012 (2012), EARTH POLICY INSTITUTE, http://www.earth-policy.org/data_center/C24 (follow hyperlink; then click “XLS” link adjacent to “Meat Consumption in the United States 1909–2012) (last visited Aug. 20, 2014) (noting that the annual consumption of meat in the U.S. rose from 16.2 billion pounds in 1943 to 19.0 billion pounds in 1953).

¹¹⁷ Tatiana Andreyeva et al., *Estimating the Potential of Taxes on Sugar-Sweetened Beverages to Reduce Consumption and Generate Revenue*, 52 PREVENTIVE MED. 413, 415 (2011) (noting that U.S. per capita consumption of carbonated soft drinks was 45.4 gallons in 2009);

Food content and rituals reinforce commitments to national identity and governmental structure.¹¹⁸ In the United States, Thanksgiving is an example of a created food heritage that now has a unifying force in defining Americanness. Despite the fact that the food commonly consumed at Thanksgiving is only loosely associated with indigenous foods: “each year . . . America pays collective homage to its American[n]ess. . . . Thanksgiving is a strangely intimate ritual. Recalling the first harvest of the Pilgrim Fathers, it has never become just another holiday [It] has been embraced by each immigrant wave as a sign of arrival, an assertion of American oneness.”¹¹⁹ It is a “participation in this ritual” that “transforms a collection of immigrants into Americans by connecting them to a cultural history stretching back to the ‘founding’ of the country.”¹²⁰ Thanksgiving as a holiday is infused with nationalism, patriotism, and a specific story of the American experience.¹²¹ Those associations and values are communicated through a food-based ritual, despite the fact that the actual food components of the meal are for the most part historically anachronistic.¹²²

Conversely, the exclusion of certain food traditions of others has also played a role in American national identity formation, because of the recognition by majority groups that “[a]s food practices change, notions of national identity are threatened.”¹²³ Thus, to safeguard and ossify existing populations’ conceptions of American identity, majority populations often sought to maintain control over food traditions as well. School meals, amongst other programs, played an active role in attempting to shape and limit the development of American identity to include its full citizenry.¹²⁴

U.S. DEP’T OF AGRIC., AGRICULTURE FACT BOOK 2001-2002 15 (2002), available at <http://www.usda.gov/documents/usda-factbook-2001-2002.pdf> (noting that “[n]ow more than ever, America is a nation of meat eaters” and that in 2000 the annual meat consumption of Americans totaled 195 pounds per person).

¹¹⁸ In European nations during wartime, food rationing reinforced a sense of democratization as access to food was more regular and equitable. See John Germov, *Food, Class and Identity*, in *A SOCIOLOGY OF FOOD AND NUTRITION: THE SOCIAL APPETITE* 264, 269 (John Germov & Lauren Williams eds., 3d ed. 2008).

¹¹⁹ Simon Jenkins, *The Politics of Giving Thanks*, *TIMES* (London), Nov. 27, 1993, at 16. See also Siskind *supra* note 1, at 42. For the great majority of Americans, of course, their relation to these Pilgrims is neither biological nor cultural, neither ethnic nor religious.

¹²⁰ Siskind, *supra* note 1, at 42.

¹²¹ See generally *id.*

¹²² *Id.* at 43–44.

¹²³ James L. Watson & Melissa L. Caldwell, *Introduction* to *THE CULTURAL POLITICS OF FOOD AND EATING: A READER* 1, 2 (James L. Watson & Melissa L. Caldwell eds., 2005).

¹²⁴ See, e.g., Carole Bardenstein, *Transmissions Interrupted: Reconfiguring Food, Memory, and Gender in the Cookbook—Memoirs of Middle Eastern Exiles*, 28 *SIGNS* 353, 357 n.6 (2002) (“At certain periods of extensive immigration to the United States, fear and antipathy felt by Americans toward immigrant groups extended to attitudes toward their food practices. What resulted was a series of efforts aimed at homogenizing or Americanizing what were

D. *The Particular Case of Schools*

The pedagogical setting of school amplifies the already charged messaging in school meals.¹²⁵ Because children are likely to be impressionable and education often determines “the employability, dignity, security and self-respect of individuals,” the impact of programs in public schools on national identity formation are great.¹²⁶ Some have argued that a national education system, “leads directly to the emergence of nationalism, to an awareness of national consciousness.”¹²⁷ This, coupled with the “powerful pressures towards sameness working particularly upon children,”¹²⁸ renders public school a crucible for a nascent sense of citizenship, ownership, and belonging. In the United States, “most newcomers have been encouraged to forgo their traditional cultures in order to ‘become American’ . . . the public educational system, above all . . . has helped to reshape the behavior and outlook of successive generations of new arrivals.”¹²⁹ As such, what is normalized (or stigmatized) in the school setting often directly modifies and supplants the child’s original sense of identity.

The scale and magnitude of the ritual of school meals dwarfs Thanksgiving in comparison. Because the state compels attendance of children in school, the presence of school lunches become *de facto* mandatory. It is not an optional ritual; it is a required one. Whether school children eat the state provided meal or not, they are subject to its normative impact as they are either included or excluded from eating together with their classmates. At this point, they are either peers or outsiders. Since the government actively controls (and often provides) the content of school meals, these food choices appear state-endorsed.¹³⁰ In contrast to Thanksgiving, which every family may appropriate and modify to incorporate their own particular food traditions, any modification to the “typical” meal in the schoolroom must come from the school authority. Unlike any other eating ritual in our country, school meals occur broadly, with a strong degree of uniformity, creating one of the few common experiences that young Americans share nationwide.

viewed as the maladjusted diets of immigrants, through school lunch programs, home economics classes, and recipe books.” (citation omitted).

¹²⁵ See Healthy Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183, 3224 (codified in scattered sections of 42 U.S.C.) (“Congress finds that—(I) eating habits and other wellness-related behavior habits are established early in life; and (II) good nutrition and wellness are important contributors to the overall health of young children and essential to cognitive development.”)

¹²⁶ ERNEST GELLNER, *NATIONS AND NATIONALISM* 36 (1983).

¹²⁷ Palmer, *supra* note 92, at 178.

¹²⁸ MINTZ, *supra* note 80, at 113.

¹²⁹ *Id.* at 112.

¹³⁰ See *infra* Part I (discussing the specific and detailed regulations governing school meals).

III. SCHOOL MEALS: SIGNALING WHO AND WHAT IS AMERICAN

Having established how school meal programs work and the sweeping social and political import of food systems, this section turns to specific questions: What does the ritual of school meals say about what it means to be American? Who is included and who is not? The following section explores these questions, examining the religious, racial, ethnic, and class dimensions of current school meal constructions. It concludes that the National School Lunch Program, as constructed by law, excludes many minority groups from full and meaningful participation both symbolically and as a nutritional matter, and it limits all school children's understanding of what being American means. School meals often reinforce an ideal of American identity that signals that nonwhite and non-Christian communities are lesser, irrelevant, strange, foreign, or even deviant. School meals reinforce class-related barriers to the status quo, leaving children of a particular class feeling embarrassed, ashamed, and even—hungry.

A. *American Identity, as Institutionalized in School Meals, Marginalizes Racial and Ethnic Minorities*

Racial and ethnic minorities are marginalized and undermined by school meals in terms of their physical needs, their emotional development, and by minimizing their rightful claims to being acknowledged as a valid and relevant part of the American polity.

In relation to physical health and emotional development, the school meal program's reliance on dairy products is particularly problematic for black, Native American, Latino, and Asian children who show high levels of lactose intolerance.¹³¹ School meal guidelines require that fluid milk be served with every meal and rely on the nutrients in this milk to meet stated health goals. Some argue that the USDA created "nutrition" based norms that pivot around a food that many minorities cannot eat—dairy—despite valid nondairy alternatives.¹³² The guidelines do not require other calcium rich foods such as collard greens, broccoli, kale, or beans in school meals and thus fail to teach children the value of such

¹³¹ Some estimate that up to 70% of African Americans, 70% of Native Americans, 53% percent of Latino Americans, and 90% of Asian Americans are lactose intolerant. See Salim Muwakkil, *Food Pyramid Scheme*, INTHESETIMES.COM (Aug. 7, 2000), <http://inthesetimes.com/issue/24/17/muwakkil2417.html>.

¹³² This may be a product of bias in the USDA dietary guidelines themselves because they provide scant alternatives to dairy. See, e.g., Milton Mills & Merlene Alicia Vassall, *Biased Food Guidelines Ignore African Americans*, PHYSICIANS COMM. FOR RESPONSIBLE MED., <http://www.pcrm.org/health/healthy-school-lunches/legislative/biased-food-guidelines-ignore-african-americans> (last visited Aug. 10, 2014).

dairy alternatives.¹³³ Because eating healthfully is viewed as virtuous and moral, failing to do so makes an individual a “bad” person instead of a “good” one.¹³⁴ Thus, pervasive milk requirements favor students with high lactose tolerance and reinforce in white students that they are good, virtuous people making good choices, while people of color are not.¹³⁵ Moreover, the guidelines’ heavy reliance on dairy may impede the ability of minority students to get the full-nutritional value they need out of meals. As such, lactose intolerant students are not only stigmatized as being outsiders and morally suspect, but they are also denied key elements of the nutritional entitlements the NSLP claims to provide. Thus, these children may leave the lunchroom without an adequate meal, impeding their ability to perform in the classroom.¹³⁶

Minorities also suffer from hypertension and obesity at much higher rates than Caucasians.¹³⁷ A third of the African American population suffers from high blood pressure.¹³⁸ Hypertension and obesity is even more common amongst Latinos.¹³⁹ Some have argued that the lack of access to healthy food coupled with prevalent fast food options in low-income neighborhoods has resulted in a “race—and class—based health crisis [that] constitutes ‘food oppression.’”¹⁴⁰ School menus do not sufficiently break with this structural inequity.¹⁴¹ Rather, despite these

¹³³ See Katherine L. Tucker et al., *Potassium, Magnesium, and Fruit and Vegetable Intakes are Associated with Greater Bone Mineral Density in Elderly Men and Women*, 69 AM. J. CLINICAL NUTRITION 727, 729 (1999) (noting that consuming substantial amounts of fruits and vegetables, particularly kale, broccoli, leafy greens, and beans will ensure calcium intake adequate to protect bones).

¹³⁴ See Counihan, *supra* note 11, at 55 (“For [students], eating is not the simple act of fueling the body, it is moral behavior through which they construct themselves as good or bad human beings.”).

¹³⁵ Some scholars have noted that the term “lactose intolerant” itself may connote cultural bias, since a wide swath of people cannot process dairy. See Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 U.C. IRVINE L. REV. 1247, 1262 (2013) (“It would therefore be more appropriate to label people who retain the enzyme lactase as ‘lactose persistent,’ instead of pathologizing the lack of the enzyme.”).

¹³⁶ Numerous studies show how hunger interferes with the ability to learn. See, e.g., POPPENDIECK, *supra* note 7, at 9.

¹³⁷ See Andrea Freeman, *Fast Food: Oppression Through Poor Nutrition*, 95 CALIF. L. REV. 2221, 2229 (2007) (“The National Health and Nutrition Examination Survey indicates that between 1999 and 2002, obesity rates were higher for both African American and Mexican American children than for white children, sometimes by as much as ten or twelve percentage points.”).

¹³⁸ See Mills & Vassall, *supra* note 132.

¹³⁹ See Mary Ann Bobinski, *Health Disparities and the Law: Wrongs in Search of a Right*, 29 AM. J.L. & MED. 363, 367 (2003); Shiriki Kumanyika & Sonya Grier, *Targeting Interventions for Ethnic Minority and Low-Income Populations*, 16 FUTURE CHILD 187, 188 (2006).

¹⁴⁰ See Freeman, *supra* note 137, at 2229.

¹⁴¹ It is important to note that weight-loss, like all interactions regarding food, is about more than health, it is often about affirming or claiming a superior place in society: “[b]y trying to control eating and body size, [individuals] can differentiate themselves from lower

prevalent race-related health issues, school lunches continue to recommend the consumption of meat and dairy products for all Americans, despite studies questioning the nutritional value of milk¹⁴² and showing that lower meat consumption can reduce both hypertension and obesity.¹⁴³ The USDA is aware of these issues and noted in its summary of comments on its guidelines that “[s]everal commentators addressed the need to accommodate lactose-intolerant students”¹⁴⁴ While regulators note that schools have the option to offer lactose free milk¹⁴⁵ or non-dairy milk¹⁴⁶ as part of a reimbursable meal if they choose to do so, federal regulations do not provide funding for an alternative.¹⁴⁷ By teaching children that meat and dairy are essential to a meal, school lunches instill eating habits that are physically harmful to many minority communities and perpetuate a “food oppression” cycle.¹⁴⁸

Given the fact that obesity carries with it the additional social costs of being viewed as less intelligent, moral, and capable, the impact of these choices reaches well beyond the public health issue. Weight is one of the oldest and most recognizable effects of power, privilege, and socioeconomic status.¹⁴⁹ In times of scarcity, access to any food is domi-

status ethnic and racial minorities and—perhaps unwittingly—uphold US racial hierarchy.” Counihan, *supra* note 11, at 61.

¹⁴² See Lanou, *supra* note 76, at 736 (stating that children’s bone integrity showed no improvement from milk consumption).

¹⁴³ See Muwakkil, *supra* note 131; Mills & Vassall, *supra* note 132.

¹⁴⁴ Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4095 (adopted Jan. 26, 2012) (to be codified at 7 C.F.R. pts. 210, 220).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ 7 C.F.R. § 210.10(m)(2)(i) (“Expenses incurred when providing substitutions for fluid milk that exceed program reimbursements must be paid by the school food authority”); FOOD & NUTRITION SERV., U.S. DEP’T OF AGRIC., CHILD NUTRITION REAUTHORIZATION 2010: NUTRITION REQUIREMENTS FOR FLUID MILK SUBSTITUTIONS IN THE CHILD AND ADULT CARE FOOD PROGRAM, QUESTIONS AND ANSWERS 2 (2011), www.fns.usda.gov/sites/default/files/CACFP-21-2011.pdf (noting that “[s]uch substitutions are at the option and the expense of the facility”).

¹⁴⁸ Higher obesity rates may also undermine school performance. See Mary Story et al., *The Role of Schools in Obesity Prevention*, 16 THE FUTURE OF CHILDREN, no. 1, 2006, at 109, 110 (“[S]everely overweight children and adolescents are four times more likely than their healthy-weight peers to report ‘impaired school functioning.’”).

¹⁴⁹ Germov, *supra* note 118, at 266–67. Indeed, the link of power and food is intuitive when one remembers that the deprivation of food is death: “[O]nly because most of us eat plentifully and frequently and have not known intense hunger may we sometimes too easily forget the astonishing, at times even terrifying, importance of food and eating . . . without at least minimal access to food and water, we die.” MINTZ, *supra* note 80, at 4. “Food is now connected to power. The connection is certainly not new . . . decisions are being made all the time that—by their inevitable consequences—end up causing people to die of hunger.” *Id.* at 11.

nated by the powerful and privileged.¹⁵⁰ In times of plenty, access to certain foods, exercises of taste, and restraint maintain class distinctions.¹⁵¹ At one time obesity was a sign of wealth, but today the inverse is true.¹⁵² Thinness now holds particular social capital and has a powerful impact in solidifying class differentiation.¹⁵³ Wealthier people are, on average, thinner than poorer people in the United States.¹⁵⁴ As such, weight loss is about more than health, it is often about affirming or claiming a superior place in society: “By trying to control eating and body size, [individuals] can differentiate themselves from lower status ethnic and racial minorities and—perhaps unwittingly—uphold U.S. racial hierarchy.”¹⁵⁵

Moreover, the various forms that foods take on the school menu also render many food traditions and ethnic communities silent. While 7 CFR § 210.10(m)(3) states that, “[s]chools should consider ethnic and religious preferences when planning and preparing meals,” the NSLP does not make such consideration mandatory and government circulated model menus do not demonstrate culturally diverse menu options.¹⁵⁶ By failing to cook foods from diverse cultural backgrounds, school lunches erroneously teach American children that American identity is homogeneous. The USDA has been directly lobbied for accommodations on school menus by “[m]inority communities determined to preserve their cultures” and notes that “proponents of multiculturalism favor inclusion of a wide variety of cuisines.”¹⁵⁷ Yet current model menus lack such dishes. Similarly, regulatory guidelines do not require schools to include foods from a broad variety of American cuisines or ethnic backgrounds.¹⁵⁸ Conspicuously absent from school menus are American dishes from nonwhite communities. For example, many staples of southern African-American cuisine are not included in school meals.¹⁵⁹ Like-

¹⁵⁰ See AMARTYA SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION* 1 (1981) (“Starvation is the characteristic of some people not having enough food to eat. It is not the characteristic of there being not enough food to eat.” (emphasis omitted)).

¹⁵¹ Germov, *supra* note 118, at 265–66.

¹⁵² Stephen Menell, *Culinary Cultures of Europe*, in *A SOCIOLOGY OF FOOD AND NUTRITION*, 253 (John Germov & Lauren Williams eds., 3d ed. 2009); Germov, *supra* note 118, at 266–67.

¹⁵³ Germov, *supra* note 118, at 267.

¹⁵⁴ See Counihan, *supra* note 11, at 60 (“The higher one’s class the thinner one is likely to be.”).

¹⁵⁵ *Id.* at 61.

¹⁵⁶ 7 C.F.R. § 210.10(m)(3) (2014); see HEALTHY HUNGER FREE KIDS ACT OF 2010, BEFORE/AFTER ELEMENTARY SCHOOL LUNCH SAMPLE MENU (2010), available at http://www.whitehouse.gov/sites/default/files/cnr_chart.pdf.

¹⁵⁷ POPPENDIECK, *supra* note 7, at 16.

¹⁵⁸ See BEFORE/AFTER ELEMENTARY SCHOOL LUNCH SAMPLE MENU, *supra* note 156.

¹⁵⁹ Some would call this cuisine “soul food”; however, the term “soul food” is not without controversy. While some celebrate this cuisine and terminology as a source of pride, others have condemned it as a “slave” diet intimately related to an oppressive past. See DORIS

wise, dishes from Latino, Native American, and Asian traditions are often absent or extremely limited. For example, the Asian staple tofu has only recently been allowed as a “meat alternative” in school lunches in the latest iteration of the school lunch act.¹⁶⁰

The prevalence of dairy and meat on school menus, and the exclusion of cultural staples, marginalizes many black, Native American, Latino, and Asian students. The lack of variety in school lunches also sends a false message to all students that American identity is uniform and driven by accommodating the dominant majority. However, there are many types of meals and Americans who should be allowed, indeed invited, to eat together. Current regulations risk failing to address not only the physical needs of minority children but also mislead children generally into a belief in a fictional homogenous American culture that ignores the significant cultural contributions of minority groups.¹⁶¹

B. The School Meal Ritual Undermines Children of Different Faiths

Real Americans eat meat. That is the resounding message a school meal sends. Yet, the children of various religious groups are unable to eat school meals with their peers due to the prevalence of meat products on the menu.¹⁶² The USDA requires the inclusion of meat or meat alternatives not only for various nutrient-based reasons but “also [to] teach [students] to recognize the components of a balanced meal.”¹⁶³ Several factors converge to promote the continued prevalence of meat on school menus. In particular, the need to place surplus commodities contributes to the prevalence of meat products in school lunch meals.¹⁶⁴

WITT, *BLACK HUNGER: SOUL FOOD AND AMERICA* 80 (1999) (discussing the view that soul food was food that white majorities were willing to discard). However, in his 1962 essay “Soul Food,” Amiri Baraka, a proponent of using soul food as an expression of pride, defined soul food as distinct from general southern cooking, noting that traditional dishes include chitterlings (pronounced chitlins), pork chops, fried porgies, potlikker, turnips, kale, watermelon, black-eyed peas, grits, Hoppin’ John, hushpuppies, dumplings, and okra; whereas southern cooking staples are fried chicken, sweet potato pie, collard greens, and barbecue. *See generally* LEROI JONES (AMIRI BARAKA), *Soul Food*, in *HOME: SOCIAL ESSAYS* 101, 101–04 (1961).

¹⁶⁰ *See* Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4094 (Jan. 26, 2012) (to be codified at 7 CFR pts. 210, 220).

¹⁶¹ Adolescents searching for acceptance gravitate towards “acceptable” foods, and school meals are only perpetuating a narrow view of such norms. MINTZ, *supra* note 80, at 113 (noting that the “homogeneity” of American food habits culminates in what are “acceptable adolescent behaviors” namely learning to eat hot dogs, hamburgers, ice cream, and pizza).

¹⁶² *See* Padmaja Patel, *Pack Your Kid an Awesome Veggie Lunch*, HINDUISM TODAY, Jan.–Mar. 2011, at 70, available at <http://www.hinduismtoday.com/modules/smartsection/item.php?itemid=5147> (noting the inadequacies of school meals for Hindu children); POPPENDIECK, *supra* note 7, at 143 (citing student complaints regarding lack of vegetarian options as one of the reasons why students avoid eating school meals).

¹⁶³ Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088, 4094 (Jan. 26, 2012) (to be codified at 7 C.F.R. pts. 210, 220).

¹⁶⁴ *See* Bjerga & Talev, *supra* note 68; NAT’L HOG FARMER, *supra* note 68.

However, many faiths have prohibitions against meat in general or against specific types of meats. For example, observant Jewish and Muslim children do not consume pork,¹⁶⁵ yet pork appears in many staples of the school lunchroom: sausages, tacos, hot dogs, sandwiches, and pepperoni pizza. Students who cannot eat food served at school meals report feeling “embarrassed” and that they “don’t want to make a big deal out of it.”¹⁶⁶ Because food is used to connect to other people, the inability of these children to participate in these meals and still maintain their cultural and religious traditions causes “[a] loss to the child’s growing sense of identity, as well as connection to family [that] is immeasurable.”¹⁶⁷ The widespread use of pork signals to all students that non-pork eaters are outsiders and irrelevant to the American government and polity.

To those who would argue that the prevalence of meat or meal products has no connection to identity issues, one need look no further than recent attempts by schools to discourage the use of pork products in the classroom. These instances demonstrate the strong cultural and social associations of food and the need of some to continue food dominance. For example, in 2013, a Nashville school district was roundly taken to task by national and local media over a handout distributed to third graders delineating appropriate snack items.¹⁶⁸ Amongst the guidance provided, teachers stated that deli meats were allowed except for “meats containing pork.”¹⁶⁹ The resulting public outcry made clear that what was offensive about the suggestion was not the attempt to regulate nutritional content or consideration of allergies in the classroom,¹⁷⁰ but specifically the possibility that this was an accommodation of Muslim students.¹⁷¹ Nashville has a growing Muslim population, including an

¹⁶⁵ See, e.g., KITTLER, *supra* note 4, at 73–74, 84–85 (detailing prohibited foods and food rules in the Jewish and Muslim faiths).

¹⁶⁶ Michelle Vazquez Jacobus & Reza Jalali, *Challenges to Food Access Among Lewiston’s African Immigrants: Analysis and Policy Implications*, 20 MAINE POL’Y REV. 1, 6, available at <http://people.usm.maine.edu/mjacobus/articles/African%20Immigrant%20Food%20Access.pdf>.

¹⁶⁷ *Id.* at 7.

¹⁶⁸ See *infra*, notes 169–75.

¹⁶⁹ Todd Starnes, *Why Did a Tennessee Grade School Ban Pork?*, FOX NEWS RADIO (Aug. 15, 2013), <http://radio.foxnews.com/toddstarnes/top-stories/why-did-a-tennessee-grade-school-ban-pork.html>; see also Emma J. Simpson, *TN School Tries to Ban Pork, Feels Backlash from Parents*, THE SOUTHERN NATIONALIST (August 16, 2013), <http://southernnationalist.com/blog/2013/08/16/tn-school-tries-to-ban-pork-feels-backlash-from-parents/> (“[M]any speculate [the rule] was intended to appease the area’s growing Muslim population.”).

¹⁷⁰ Allergies were viewed as legitimate concerns, as one parent noted that this ban must be illegitimate because they had “never heard of a life-threatening pork allergy.” See Brian Carey, *Tennessee School Backtracks After Banning Pork to Appease Muslims*, DOWNTREND (Aug. 16, 2013), <http://downtrend.com/brian-carey/tennessee-school-backtracks-after-banning-pork-to-appease-muslims/>.

¹⁷¹ *Id.* (stating “[s]core one for the good guys” when “sanity eventually prevailed, thanks in part to grass roots activism” and the school reversed directive regarding snack guidance).

influx of Kurdish and Iraqi refugees.¹⁷² Angry comments likening the pork ban to “fatwa” and alluding to Madrassa show the strong association of the food with nationalistic sentiment regarding the war on terror and the Middle East post-9-11.¹⁷³ Note that the school made no statement regarding supporting minority religious inclusiveness—rather, the very inference was broadly offensive to parents and the public at large.¹⁷⁴ The perceived siege on majority culture is apparent from the rhetoric of the discussion of the classroom directive: “Maybe it was because pork is said to be ‘the other white meat,’ and ‘white’ has come to have a bad rap” was one commentator’s explanation.¹⁷⁵ Clearly, food is not just about nutrition. In all the comments regarding the inclusion of pork, arguments regarding nutritional content were conspicuously absent. Inclusion of certain foods, the exclusion of others, is about who the government should care about, who it includes, and delineating what beliefs are legitimate and “American.”

Mandated meat requirements may also undermine service to a particularly needy demographic, children of recent refugees and immigrants.¹⁷⁶ Hindu, Buddhist, and Adventist students do not consume any meat as a matter of faith.¹⁷⁷ Many Asian and Southeast Asian societies traditionally consume little meat and may not be comfortable with meat-

¹⁷² Simpson, *supra* note 169 (reporting that in 2012 over 1,200 refugees relocated to Nashville, many from countries with large Muslim populations, and making the argument that it is “obvious that Third World immigration is a threat not only to our culture but to our economic well-being, too.”).

¹⁷³ See Starnes, *supra* note 169 (noting that Nashville radio host Michael DeGiorno described the handout as a “Typical list for a Madrassa,” and respondents to his radio show stated, “If you think this has anything to do with something besides appeasing Muslims then you are either stupid or willfully ignorant.”); see also Eric Owens, *Tennessee Elementary School Lifts Fatwa Against Pork After Parents Complain*, THE DAILY CALLER (Aug. 16, 2013), <http://dailycaller.com/2013/08/16/tennessee-elementary-school-lifts-fatwa-against-pork-after-parents-complain/#ixzz2t7pms3i>.

¹⁷⁴ See Starnes, *supra* note 169.

¹⁷⁵ Howard Portnoy, *Tennessee Grade School Lifts Ban on Pork After Parents Raise Stink*, THE EXAMINER (Aug. 16, 2013), <http://www.examiner.com/article/tennessee-grade-school-lifts-ban-on-pork-after-parents-raise-stink>.

¹⁷⁶ U.S. DEP’T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS 12–15, Table 3 (2012) (listing data regarding people obtaining legal permanent resident status in 2012: 66,434 from India; 17,383 from Burma; 14,740 from Pakistan; 1617 from Afghanistan; 3014 from Syria); *Id.* 40–41, Table 14 (2012) (listing data regarding refugees/asylum seekers in 2012: 14,160 from Burma; 12,163 from Iraq; 4,911 from Somalia; 1,758 from Iran; 1,077 from Sudan).

¹⁷⁷ See KITTLER, *supra* note 4, at 96–98 (detailing Hindu food practices prohibiting consumption of meat); *Official Statements: Caring for the Environment*, THE SEVENTH-DAY ADVENTIST CHURCH <http://www.adventist.org/en/information/official-statements/statements/article/go/0/caring-for-the-environment/42/> (“Because we recognize humans as part of God’s creation . . . We advocate a wholesome manner of living . . . and we promote a wholesome vegetarian diet.”) (last visited Aug. 20, 2014).

centric meals.¹⁷⁸ Falling outside of the majority creates a coercive environment through exclusion; however, there have also been instances of active coercion. For example, vegetarian students have been forced to eat meat at school meals.¹⁷⁹ The alternative for students who do not eat meat is to skip meals or meal components, which may also cause substantial collateral damage to the academic performance of these children as hungry children tend to underperform in the classroom.¹⁸⁰

While the USDA guidelines allow “meat alternative” options such as nuts, cheese, yogurt, legumes, and tofu, there is no requirement that any “meat alternative” be offered.¹⁸¹ Under current guidelines, schools are neither compelled nor encouraged to have regular vegetarian meals on the menu, despite recommendations by health professionals that such options would be nutritionally beneficial to all students.¹⁸² Rather, the very language of the school meal program is co-opted to disenfranchise food choices that do not include meat. The vegetarian food on the menu is discussed in terms of “meat” instead of requiring a certain amount of servings of “protein” every meal—a comparatively neutral nutritional guideline.¹⁸³ Thus, when the USDA requires “meat” or “meat alternatives” as meal components, it requires that even vegetarian food conform to certain dominant cultural views about the centrality of meat at the table.¹⁸⁴ The very structure of school lunches as meat centric and to a lesser extent pork oriented, sends the message to all students, that cultures, beliefs, and people who do not eat these foods are not normal or recognized, and perhaps not to be viewed as American.

C. *School Meals Exacerbate Class Stigma and Inhibit Upward Mobility*

How and what a person eats also has an inherent class dynamic. The structure of school meals supports existing class structures in three principal ways: (1) by failing to teach children skills about table customs

¹⁷⁸ See SHIVA, *supra* note 13, at 21 (“Asians [may] feel totally deprived on bread, potato and meat diets . . .”).

¹⁷⁹ Ben Fischer, *Taco Incident Under Investigation*, CINCINNATI ENQUIRER, June 12, 2009, <http://www.cincinnati.com/apps/pbcs.dll/article?AID=%2F20090612%2FNEWS0102%2F906130339>.

¹⁸⁰ See, e.g., R.E. Kleinman et al., *Diet, Breakfast, and Academic Performance in Children*, 46 ANNALS NUTRITION & METABOLISM 24, 24 (2002) (“Children who were at nutritional risk had significantly poorer attendance, punctuality, and grades at school . . .”).

¹⁸¹ Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088, 4094–95 (Jan. 26, 2012) (to be codified at 7 C.F.R. pts. 210, 220).

¹⁸² See POPPENDIECK, *supra* note 7, at 14 (noting that The Physicians Committee for Responsible Medicine is a strong advocate and proponent for vegetarian options to be available in school cafeterias).

¹⁸³ Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. at 4094.

¹⁸⁴ *Id.*

and how to eat different foods; (2) by failing to expose children to a broad variety of foods and therefore develop a broad sense of taste and comfort with various foods; and (3) by allowing competitive foods that highlight who is a free or subsidized meal participant.¹⁸⁵ Since proficiency in various table rituals and knowledge and comfort with a gamut of foods continue to be clear markers of class, the failure of school lunch to provide such experiences supports the socioeconomic status quo.

Rituals surrounding food create and reinforce class distinctions.¹⁸⁶ Taste and table etiquette have long been used as a proxy for status and power.¹⁸⁷ Table manners also often function as a tool to differentiate between different classes of people and different cultures.¹⁸⁸ The ability to discern when to employ and how to use certain eating utensils (whether chopsticks, forks, or elaborate formal place settings with multiple instruments) is an immediate indicator of social identity and status.¹⁸⁹ Thus, the mechanics of eating and the format of the ritual itself impacts whether an individual “belongs” and instantly codes them as being part of a certain group of people. In the class context this ordering is hierarchical. The importance of table manners in upward mobility is sufficiently recognized that some universities specifically offer programs and job preparation materials for graduates to teach table etiquette, many of which actually occur over the course of a meal.¹⁹⁰

However, despite awareness that school meals serve a pedagogical purpose, school meals set low expectations of student participation and fail to utilize mealtime to build student’s skills and understanding of food. Generally, school meals do not attempt to teach children table skills. Most schools serve finger foods, with disposable flatware and little or no cutlery.¹⁹¹ The prevalence of finger foods in school meals undermines the opportunity to teach children to eat with multiple utensils,

¹⁸⁵ See Katherine Unger Davis, *Racial Disparities in Childhood Obesity: Causes, Consequences, and Solutions*, 14 U. PA. J.L. & SOC. CHANGE 313, 324 (2011) (“The term ‘competitive foods’ is used to denote food and beverage sources in schools other than school-served lunch or breakfast—in other words, foods that compete with the meals being served. Vending machines, school stores, and snack bars are encompassed by this term.”).

¹⁸⁶ See MENNELL, *supra* note 107, at 17 (noting the historical class significance of food).

¹⁸⁷ See Germov, *supra* note 118, at 264 (noting that “good taste” and “good manners” have long been a proxy for differentiating between classes).

¹⁸⁸ MARGARET VISSER, *THE RITUALS OF DINNER* 2–3, 41 (1992); LÉVI-STRAUSS, *supra* note 11.

¹⁸⁹ For example, in 2010, a plaintiff was successful in asserting an anti-discrimination suit against a Canadian school district on the basis of comments on the use of a student’s utensils during lunch and the need to “eat like a Canadian.” Wallace, *supra* note 106.

¹⁹⁰ See, e.g., Clio Smurto, *Professional Etiquette Dinner*, HARVARD OFFICE OF CAREER SERVICES BLOG (Jan. 25, 2011), <http://ocsharvard.tumblr.com/post/2927731296/professional-etiquette-dinner> (explaining that the Harvard Office of Career Services holds etiquette dinners to train students in dining etiquette).

¹⁹¹ POPPENDIECK, *supra* note 7, at 150.

including forks, spoons, and chopsticks.¹⁹² School meals are also often exceedingly short.¹⁹³ This leaves little or no time for eating, let alone any type of conversation or general instruction.¹⁹⁴

Taste is another area where poorer students are being disadvantaged by the current school menu. Ultimately, even our senses are not objective in evaluating food. Taste and smell are more intertwined with access to food, culture, and class than any objective evaluation of the inherent quality of the food itself.¹⁹⁵ “[A] palate is trained,” rather than born.¹⁹⁶ Thus, distinct tastes are the means to create and reproduce rigid class distinctions.¹⁹⁷ Today, this plays out in the context of choice and exposure with wealthier classes of people having access to more kinds of foods (think food tourism) and alternative sources for food such as

¹⁹² There are some promising exceptions to this general rule. For example, at some public schools teachers sit down with students at a meal every week to discuss and practice eating together, while others create a more “restaurant” style environment for students to improve table manners. One such program reports that students participating in the program show increased confidence and relate better with their peers over time. See, e.g., Rob Rogers, *Manners Govern Milleville Lunch Table*, REDDING RECORD SEARCHLIGHT, Sept. 10, 2009, <http://www.redding.com/news/2009/sep/10/manners-govern-milleville-lunch-table/>; Alison Shea, *Putnam School’s Café Teaches Table Manners*, NORWICH BULLETIN (Jan. 2, 2011), <http://www.norwichbulletin.com/article/20110123/News/301239957> (discussing how efforts to treat school mealtime as a more formal dining experience have translated into “more respectful behavior toward staff and property.”).

¹⁹³ See Eric Westervelt, *These Days, School Lunch Hours Are More Like 15 Minutes*, NPR (Dec. 4, 2013, 5:05 PM) <http://www.npr.org/blogs/thesalt/2013/12/04/248511038/these-days-school-lunch-hours-are-more-like-15-minutes> (“At many public schools today, kids are lucky to get more than fifteen minutes to eat.”); Nancy Hellmich, *Cutting Short Lunch Time in School May Lead to Obesity*, USA TODAY, Aug. 17, 2011, <http://usatoday30.usatoday.com/news/health/wellness/story/2011/08/Students-feel-rushed-at-school-lunch/50027612/1> (reporting that in a 2011 study conducted by the School Nutrition Association indicated that elementary school students receive twenty-five minutes for lunch and high school students receive thirty minutes, including the time it takes to go to the restroom, wash hands, go through the school meal line, and travel to and from the classroom).

¹⁹⁴ See Hellmich, *supra* note 193; POPPENDIECK, *supra* note 7, at 149 (describing students saying that they did not eat because they did not have time after waiting in lines); Carol Ann Marples & Diana-Marie Spillman, *Factors Affecting Students’ Participation in the Cincinnati Public Schools Lunch Program*, 30 J. Adolescence 745, 749 (1995) (stating that 82% of public school students reported they did not have adequate time to consume lunch).

¹⁹⁵ See MARY DOUGLAS, *CULTURAL BIAS* 59 (1978) (“[T]he notion persists that what makes an item of food acceptable is some quality inherent in the thing itself. Present research into palatability tends to concentrate on individual reactions to individual items. It seeks to screen out cultural effects as so much interference. Whereas . . . the cultural controls on perception are precisely what needs to be analyzed.”).

¹⁹⁶ See *id.* (“Nutritionists know that the palate is trained, that taste and smell are subject to cultural control. Yet for lack of other hypotheses, the notion persists that what makes an item of food acceptable is some quality inherent in the thing itself. Present research into palatability tends to concentrate on individual reactions to individual items. It seeks to screen out cultural effects as so much interference. Whereas . . . the cultural controls on perception are precisely what needs to be analyzed.”).

¹⁹⁷ PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* 185 (Richard Nice, trans., 1984).

farmer's market produce, organics, import specialties, or controversial "raw foods."¹⁹⁸ Research into the history of food in Europe suggests that, "the rate of change in 'taste' accelerates when the strata of society become more closely and equally interdependent."¹⁹⁹ Thus, a dialogue between tastes with not only the trickle down of tastes from the upper classes but the trickle up of tastes from the less privileged may indicate a "democratization of eating."²⁰⁰ As such, the inclusion of broader food traditions in the school meal program would present a convergence of several interests: (1) it positively sends the message to all students that various ethnicities are important members of American society; (2) it signals that a key American value is including and learning about the traditions of different Americans; and (3) it allows increased upward mobility as less privileged children lose the intimidation factor with relation to unfamiliar foods.

Finally, while Food Based Menu Planning clarifies what are required components of school meals, it also highlights the distinction between meals that comply with the NSLP, and "competitive" or "a la carte" food items, which up until 2011 were not subject to USDA regulations.²⁰¹ These foods are usually used by school officials to increase revenue and often include soda, candy, and fast food from outside vendors.²⁰² Because there is stigma attached to receiving a free lunch, children who are unable to buy competitive foods may abstain from eating rather than label themselves in front of their peers. Similarly, other students who are subsidized or pay the "full" amount are deterred from buying federally subsidized lunches.²⁰³ As a wealth indicator, "a la carte" or

¹⁹⁸ See generally JOHNSTON & BAUMANN, *supra* note 3.

¹⁹⁹ MENNELL *supra* note 107, at 250.

²⁰⁰ *Id.* at 257.

²⁰¹ Courts had previously deemed competitive foods outside of the ambit of the USDA's regulatory sphere of influence. See *Nat'l Soft Drink Ass'n v. Block*, 721 F.2d 1348, 1353 (D.C. Cir. 1983) (holding that, though the rules were not promulgated in an arbitrary or capricious fashion, the Secretary of Agriculture nevertheless exceeded his authority by barring the sale of competitive foods on school premises until after the last lunch period). The Healthy, Hunger-Free Kids Act gave the USDA regulatory authority over the nutritional content of "competitive foods" during school lunch—foods that are not subsidized by the federal government. See Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, § 208, 124 Stat. 3183, 3221 (to be codified as amended at 42 U.S.C. § 1779) (making nutrition standards applicable to all foods sold on the school campus). See also Mortazavi, *supra* note 56, at 1708–11.

²⁰² There is an extensive literature regarding the prevalence of "pouring rights" contracts, where a soda company makes large payments to a school district for the right to sell its products exclusively throughout the district's schools. See, e.g., MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 197 (2002).

²⁰³ POPPENDIECK, *supra* note 7, at 193–94 (noting that individuals who qualify for free or reduced meals report skipping meals rather than identifying as needy due to embarrassment and social stigma). Recognizing this stigma and the need to get as many qualifying students as possible covered, the NSLP has taken steps in high poverty areas to provide blanket free meal coverage called "community eligibility." National School Lunch Program and School Breakfast Program: Eliminating Applications Through Community Eligibility as Required by the

“competitive” foods take on a particular cache. Some schools actually segregate eating areas for parties purchasing such foods, and have a section of the cafeteria that does not take school lunch vouchers.²⁰⁴ Such programs may also result in segregation of students by race and ethnicity.²⁰⁵ As such, competitive foods become the marker of privilege, wealth, and status.

IV. NEXT STEPS: MEALS FOR ALL AMERICANS

“[B]ecause [foodways] reflect and recreate the gender, race, and class hierarchies so prevalent in American society, deconstructing food rules is part of the process of dismantling the hierarchies that limit the potential and life chance of subordinate groups.”²⁰⁶

A. *CRIs, Adequate Study, and Full Acknowledgement of the Issue*

A first step in understanding the pedagogical tradeoffs happening daily in the school meal context is to seriously consider cultural, class, racial, and ethnic identity when forming relevant school meal laws, regulation, and policies. As it stands today, very little information is gathered regarding the demographic breakdown of school meal participants and their interactions with the school meal program. However, this information gap could be remedied as there is already an administrative mechanism in place to facilitate a meaningful inquiry into the impact of school meals on identity formation.

Under USDA Regulation 4300-4, USDA Agencies must conduct a “Civil Rights Impact Analysis,” (CRIA) to identify and address any civil rights impacts proposed rulemaking may have on the USDA workforce or program participants on the basis of their membership in a protected class.²⁰⁷ Protected classes are limited to those protected from

Healthy, Hunger-Free Kids Act of 2010, 78 Fed. Reg. 65890 (proposed Nov. 4, 2013) (to be codified at 7 C.F.R. pt. 245). Some cities have also affirmatively taken steps to offer free meals to all children in public schools. See, e.g., *BPS Offers Universal Free Meals for Every Child*, BOSTON PUBLIC SCHOOLS, <http://bostonpublicschools.org/site/default.aspx?PageType=3&DomainID=4&ModuleInstanceID=14&ViewID=047E6BE3-6D87-4130-8424-D8E4E9ED6C2A&RenderLoc=0&FlexDataID=3160&PageID=1&GroupByField=DisplayDate&GroupYear=2013&GroupMonth=12&Tag=> (last visited Aug. 9, 2014); see also James Vaznis, *Without Paperwork, School Lunch Free in Boston*, BOSTON GLOBE, Sept. 3, 2013, <http://www.bostonglobe.com/metro/2013/09/02/boston-public-schools-will-offer-free-lunches-all-students/2aaUy5sxJjIak9ndGDHxkJ/story.html> (last visited Aug. 9, 2014).

²⁰⁴ POPPENDIECK, *supra* note 7, at 196–97 (reporting on a New Rochelle High School that separates the cafeteria into an upstairs “Café” which does not accept school vouchers and a downstairs lunch space where federally subsidized meals are served).

²⁰⁵ *Id.* at 197 (discussing how the separation of paying and nonpaying meal spaces has led to segregation of white students from African American and Latino students).

²⁰⁶ Counihan, *supra* note 11, at 56.

²⁰⁷ U.S. DEP’T OF AGRIC. OFFICE OF CIVIL RIGHTS, DR 4300-4, CIVIL RIGHTS IMPACT ANALYSIS (2003), available at <http://www.ocio.usda.gov/directives/doc/DR4300-4.pdf>.

discrimination by federal law and executive orders.²⁰⁸ A CRIA must consider the impacts on the following groups or classes: “[R]ace, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetics, political beliefs, or receipt of income from any public assistance program.”²⁰⁹

Currently, in relation to school meals, the CRIA remains perfunctory and fragmented rather than substantive. In analyzing the new Federal Nutrition Guidelines for School Meals, the Food Nutrition Service (FNS) considered “the intent and proposed provisions of the proposed rule.”²¹⁰ The FNS then relied on dated demographic information culled from other reports to conclude that “this [] rule is not expected to limit program access or otherwise adversely impact [] protected classes.”²¹¹ It conducted no independent study, despite the fact that the most recent demographic data regarding school lunch participants dates back to 2005 and does not include any breakdowns by religion, ethnicity, or national origin.²¹² Based on this limited information, the FNS asserted that, “[t]he impact of this rule on Tribal and culturally diverse communities is expected to be positive because it will support local efforts to reduce childhood obesity, diabetes, and other chronic disease associated with diet.”²¹³ However, much of the report is conclusory and not grounded in well-researched facts.

In order to effectively weigh the costs to minority populations against costs to the agriculture sector or nutrition goals, we simply need more information regarding the makeup of school meals, what are the attributable causes of plate waste, and how many children identify at least broadly with groups that require additional representation in the school meal program.

B. Revising Statutes and Rules

The next step, after adequate study and consideration, is to revise the applicable statutes and regulations to align the school meal system with a stronger awareness of the broad significance of food practice in defining identity and to utilize school meals as an inclusive polity building activity. To do so, Congress and the USDA should revise school

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4105 (Jan. 26, 2012) (to be codified at 7 C.F.R. pts. 210, 220).

²¹¹ FOOD & NUTRITION SERV., *supra* note 29, at 6

²¹² U.S. DEP’T OF AGRIC., SCHOOL NUTRITION DIETARY ASSESSMENT STUDY III, VOLUME II: STUDENT PARTICIPATION AND DIETARY INTAKES (2007), *available at* <http://www.fns.usda.gov/sites/default/files/SNDIII-Vol2.pdf>.

²¹³ FOOD & NUTRITION SERV., *supra* note 29, at 6.

meal requirements to appropriately account for the cultural, racial and economic impact of food. There are many possible avenues of such redress, some costly, others not.

1. (Non)milk Money

Modest targeted appropriations could be maximized to reap immediate benefits for marginalized groups. For example, schools are allowed to provide substitutions to students who cannot consume fluid milk for non-disability reasons; however there are no requirements that a school do so.²¹⁴ In addition, Congress does not allocate any additional funding for fluid milk substitutions.²¹⁵ This places any excess funding burdens squarely on local authorities.²¹⁶ Thus, to combat the issue of lactose intolerance disproportionately affecting minority children, Congress could appropriate funding to provide protein-rich and nutritious milk substitutions such as soy milk.

2. Facilitate Menu Diversification and Infrastructure

Cultural, religious, and ethnic limitations could also be addressed by creating a more diverse and inclusive school lunch menu within existing parameters. To qualify for the NSLP, schools are already required to submit menu worksheets. These worksheets must document a full week of meals in the month prior to submission, with breakdowns by age group. Each worksheet must list food items and quantities for compliance assessment.²¹⁷ Federal Regulations require that schools maintain and submit standardized recipes for foods cooked in conjunction with school meals.²¹⁸ Thus, the basic institutional framework for using and disseminating a broad array of recipes is already in place.

Since schools already rely heavily on set federal meal plans in navigating the myriad of requirements at play in school lunches,²¹⁹ the

²¹⁴ 7 C.F.R. § 210.10(m)(2) (2014).

²¹⁵ See 7 C.F.R. § 210.10(m)(2)(i) (“Expenses incurred when providing substitutions for fluid milk that exceed program reimbursements must be paid by the school food authority.”); FOOD & NUTRITION SERV., *supra* note 147, at 2 (“[Fluid milk] substitutions are at the option and the expense of the facility”).

²¹⁶ 7 C.F.R. § 210.10(m)(2)(i). See also Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4094 (Jan. 26, 2012) (to be codified at 7 C.F.R. pts. 210, 220) (noting that there are “children that do not drink milk” and that meals ought to be allowed flexibility to accommodate those children).

²¹⁷ U.S. DEP’T OF AGRIC., CERTIFICATION OF COMPLIANCE WITH NEW MEAL PATTERN REQUIREMENTS 14–16, available at <http://www.fns.usda.gov/sites/default/files/6centsrule.pdf>.

²¹⁸ Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. at 4146 (“All schools must develop and follow standardized recipes. . . . Schools must add any recipes to their local database as outline in FNS guidance.”).

²¹⁹ For example, because certification of requirements, like that for whole grain rich food, can be more complicated when schools prepare the grain product themselves, schools calculate whole grain ratios based on recipes. See Nutrition Standards in the National School Lunch and

USDA could create a database of qualifying recipes that reflected a broader array of American food traditions by soliciting recipes from various ethnic and racial communities.²²⁰ In a well-received local program, a Seattle school asked students and parents to submit recipes that reflected their culture in order to build a new school menu.²²¹ In addition, other resources may prove useful in expanding school menu options. For example, several nonprofit groups, including the Physicians Committee For Responsible Medicine, have created materials that begin to tackle the task of creating school meals that meet USDA requirements without meat and sometimes without dairy.²²²

With a variety of recipes available in a database, USDA regulations could be modified to require a certain number of meals drawing recipes from this database on a monthly or weekly basis. Properly constructed, the database would allow schools to search for recipes based on what requirements they needed to meet: for example, sorting only recipes that include an orange vegetable, one green vegetable, one grain, and one meat/meat alternative. Because foods from marginalized cultural traditions may include different and more plant based foods, broadening the recipe base may actually make it easier to incorporate new required meal standards and components. As such, a culturally diverse recipe bank could provide an opportunity for schools to model inclusive meal practices and meet their current dietary requirements efficiently.

Another option would be to require a nutritionally balanced regular vegetarian meal option each meal. This would allow many students who are currently excluded for religious, cultural, and health reasons to consistently participate in the school lunch program. While many school kitchens would have difficulty meeting strict kosher and halal standards, moderate Jewish and Muslim students would most likely be able to eat

School Breakfast Programs, 77 Fed. Reg. at 4093 (“For foods prepared by the school food service, the recipe is used as the basis for a calculation to determine whether the total weight of whole grain ingredients exceeds the total weight of non-whole grain ingredients.”); POP-PENDIECK, *supra* note 7, at 102.

²²⁰ There is some indication that parents of excluded children would welcome the opportunity to incorporate more of their recipes into school meals given their willingness to engage with school lunch officials to preserve important cultural food practices. See JENNIFER DECKER, EATING HABITS OF MEMBERS OF THE SOMALI COMMUNITY: DISCUSSION SUMMARY (2005), available at <http://snap.nal.usda.gov/snap/resourcefinder/EatingHabits.pdf> (noting immigrant group’s suggestion to include traditional recipes in school meal program).

²²¹ Kiri Tannenbaum, *Cool Cafeterias: The New Wave of School Lunch: Slide 10: Seattle’s Public Schools*; Seattle, WA, DELISH, <http://www.delish.com/recipes/cooking-recipes/best-school-cafeterias#slide-10> (last visited Aug. 9, 2014) (describing the inclusion of recipes drawn from the community in school lunch menu).

²²² See, e.g., PHYSICIANS COMM. FOR RESPONSIBLE MED., VEGETARIAN OPTIONS FOR SCHOOL LUNCH PROGRAMS 8, http://www.pcrm.org/pdfs/health/School_Lunch_Guide.pdf (outlining a vegan menu and various meal options that meet USDA Standards).

many non-pork and vegetarian options.²²³ This would also teach children who normally eat meat that meat is not a necessary component of an American meal or lifestyle.

In order to cook culturally and ethnically diverse dishes, school kitchens need to be able to cook and serve meals.²²⁴ Schools must revamp their kitchens with equipment to cook, rather than just heat. They must also train kitchen staff with real cooking and preparation skills.²²⁵ Revamping school kitchens to be places that can cook, rather than merely warm food, and training skilled staff so that schools would have the ability to respond to food needs with more flexibility on site would have an enormous impact on the feasibility of new recipe implementation. It would also teach children that cooking is a valuable skill and process, not the act of heating or warming. This would dramatically change the relationship many people have with food.

3. A Place at the Table Requires Time—and a Table

In relation to some of the class implications of school meals and the lost opportunity to build community values, federal regulations currently provide no guidance on the duration of an acceptable school meal period. However, the USDA is aware that school meal periods are often short and may include feeding students on the bus.²²⁶ Although localities and schools have discretion over the amount of time allotted to meal periods, studies have shown that the average school lunch period lasts thirty minutes or less.²²⁷ Thirty minutes includes the time it takes students to walk

²²³ It is worthwhile to note, however, that common meals such as cheeseburgers and burritos that couple meat with cheese would violate kosher rules—as would meat that is not slaughtered according to kosher standards. That said, there has been a marked rise in industrial kosher food availability, and certain foods such as vegetables, fruit, and grains are inherently kosher, so long as they are not comingled with meat or other forbidden products. LYTTON, *supra* note 99, at 40. Notably, kosher foods have seen growth as an industry as secular consumers have taken to purchasing kosher foods for food safety or ethical reasons. Kim Severson, *For Some, 'Kosher' Equals Pure*, N.Y. TIMES, Jan. 13, 2010, <http://www.nytimes.com/2010/01/13/dining/13kosh.html? r=1>.

²²⁴ Although initial administrative costs may seem high, in the long term, having more inclusive options could simplify school lunches and protect schools from potential litigation from students claiming health or civil rights abuses.

²²⁵ NourishLife, *Michael Pollan: School Lunch*, YOUTUBE (Sept. 28, 2011), <http://www.youtube.com/watch?v=3bauJhztUQA> (“the school cafeterias . . . no longer have kitchens, they have giant microwaves.”).

²²⁶ Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088, 4091 (Jan. 26, 2012) (to be codified at 7 C.F.R. pts. 210, 220) (“Commenters also emphasized that students usually have very little time to eat breakfast at school and are concerned about the logistics of offering more food through alternative breakfast delivery methods such as Breakfast in the Classroom or on the bus.”).

²²⁷ Martha T. Conklin, Laurel G. Lambert & Janet B. Anderson, *How Long Does it Take Students to Eat Lunch*, J. CHILD NUTRITION & MGMT. (Spring 2002), <http://docs.schoolnutrition.org/newsroom/jcnm/02spring/conklin/> (noting that total time in the cafeteria averaged between 20 and 24 minutes for elementary and high school students).

to the cafeteria, wash their hands, obtain and pay for their lunches, as well as clean up and return to class afterwards.²²⁸ Taking all this into account, a student may spend as little as ten minutes actually sitting down and eating, and some students report no time to eat after waiting in line.²²⁹ Despite indications that short lunch periods and rushed eating leads to increased plate waste, decreased nutritional intake, and obesity,²³⁰ the length of school meal periods has markedly declined in the last ten years.²³¹

Thus, the USDA could designate a minimum amount of mealtime for each federally subsidized meal and help improve the quality of school meals. On the serving side, supporting a more meaningful lunch experience means reintroducing flatware to the school lunchroom in addition to extending the amount of time students are given to eat. It means making sure there are enough tables and chairs for students to sit at. In the words of a school food service director, “not only do we serve food, but meal time is supposed to be community time.”²³² Longer mealtimes would also encourage slower eating and leave more time for communion at the table amongst the students and time for instructions on table skills, all with significant collateral health benefits.²³³ Longer meal periods would also give students time to purchase meals, rather than snacks which would encourage participation in the more diversified school meal program.²³⁴ Food service directors noted that non-processed plated foods that require chewing, eating with utensils, and cutting simply take longer

²²⁸ Hellmich, *supra* note 193.

²²⁹ *Id.*; POPPENDIECK, *supra* note 7, at 149 (reporting students stating that they did not eat because they did not have time after waiting in lines); Marples & Spillman, *supra* note 194, at 749 (finding that 82% of public school students reported that they did not have adequate time to consume lunch).

²³⁰ Hellmich, *supra* note 193 (outlining links between obesity and rushed eating and arguing that healthy foods require more time to consume); Ethan A. Bergman, *The Relationship Between the Length of the Lunch Period and Nutrient Consumption in the Elementary School Lunch Setting*, J. CHILD NUTRITION & MGMT. (Fall 2004), <http://docs.schoolnutrition.org/newsroom/jcnm/04fall/bergman/bergman2.asp> (outlining the increase in children’s intake of nutrients and substantial decrease in plate waste when longer lunch periods are given).

²³¹ POPPENDIECK, *supra* note 7, at 150 (relaying results of a School Nutrition Association report and noting that since 2003, the average elementary school lunch period has declined more than 20%).

²³² *Id.*

²³³ *Id.* The National Education Association has already developed some basic materials regarding manners that might provide a good starting point for developing useful materials for schools. See Phil Nast, *Learning and Practicing Good Manners, Grades 6–8: Lessons, Resources, and Activities to Practice Good Manners*, NAT’L EDUC. ASS’N, <http://www.nea.org/tools/lessons/learning-and-practicing-good-manners-grades-6-8.html> (last visited Aug. 9, 2014).

²³⁴ POPPENDIECK, *supra* note 7, at 149 (noting that students identify long lines as why they often need to bring food from home or resort to the snack line to eat anything during the lunch period).

to eat than soft portable foods like breaded chicken and hamburgers.²³⁵ Also, because children eat in “reverse order,” eating what they know and like best first and then eating the less familiar or favored items as time permits, longer meal periods will encourage students to try new foods.²³⁶ As such, mandating minimum times would not only foster a sense of community in the lunchroom, but also supports eating a broader variety of foods and using the lunch period as a teaching opportunity.

V. THE COUNTERARGUMENT AND TRADE-OFFS

A. *The Cost and Benefits of Inclusion*

Several of the suggestions made above require capital investment. This begs the question: if more money is needed to support children’s education, why should it go to food? More specifically, why should we prioritize school meal dollars in relation to the cultural impact of food at all?

As an initial matter, it is unclear that the reforms outlined above will cost additional funds when projected over the long term. As such, rather than thinking of these suggestions as additional allocations, they are better understood in terms of reallocation. Emerging research indicates that processing foods outside of schools does not save schools money, thus internal processing and preparation of food could be an efficient way to reallocate funds.²³⁷ Facilitating menu diversity through creating a recipe bank and diverse menu options may have two financial benefits: (1) to curb plate waste and (2) to consolidate the cost of menu creation and development. Currently, the maintenance of a list of compliant menu options is a sunk cost carried by each school or school district individually. Thus, creating a diversified USDA menu bank that has been vetted and tested on the national level to meet nutritional requirements would likely provide cost savings to local schools in terms of administration and developing their own menus. Incorporating more vegetarian meals need not be costly; legumes and other vegetarian sources of protein are exceedingly inexpensive.²³⁸ Reallocation of discretionary commodity spending dollars could also modify the cost balance in favor of less prob-

²³⁵ Hellmich, *supra* note 193.

²³⁶ POPPENDIECK *supra* note 7, at 150.

²³⁷ See generally ROLAND ZULLO, PRIVATIZED SCHOOL FOOD SERVICE AND STUDENT PERFORMANCES IN MICHIGAN: A PRELIMINARY REPORT (2008), available at <http://lrlee.umich.edu/Publications/Docs/PrivatizedSchoolFoodServiceAndStudentPerformance.pdf> (suggesting that the use of private companies to prepare and serve food in Michigan schools yields no significant cost savings).

²³⁸ For example, the USDA currently prices lentils at \$0.15 a cup. *Fruit and Vegetable Prices: Lentils—Average Retail Price Per Pound and Per Cup Equivalent 2008*, U. S. DEPT OF AGRIC., http://www.ers.usda.gov/data-products/fruit-and-vegetable-prices.aspx#_U_Yf3PIdVNQ (last updated Feb. 7, 2011).

lematic yet nutritionally rich options. However, incorporation of vegetarian and multicultural options does require more flexibility in the USDA regulations regarding the mixing of components in order to allow dishes like stews, noodle dishes, soups, stir-fries, and curries. Essentially, the USDA must acknowledge that a complete meal does not only take the format of entrée and two sides. It may just be one big entrée; it may look like three sides.

Of the proposals above, infrastructure costs remain the highest and while some of those costs may be offset by less plate waste, infrastructure does require an upfront capital commitment. That commitment will be worth the investment in local skilled jobs created,²³⁹ in the relationship children have with food, the potential to develop farm-to-school programs, and the integration of produce from school gardens. If schools had fully functional kitchens, they could function as dual purpose facilities, where elective courses on food preparation and nutrition could be taught or the facilities could be rented for local events that require catering facilities. In the interim, between when such infrastructure changes can take place, the USDA should use its considerable buying power to leverage mass producers of foods to produce culturally diverse options for the school market. At seven billion meals a year, school meals should be an attractive enough market to garnish industry interest.²⁴⁰

As to the final inquiry, why spend school meal dollars on creating more inclusive meals, there is a strong utility argument even leaving aside arguments regarding American national identity. Even if the primary goal of the school meal program is public health, the USDA acknowledges that, a “complexity of factors [] contribute both to overall food consumption and to obesity,”²⁴¹ and yet the bulk of those various factors are unexplored. If the goal is to have students consume nutritionally rich meals, then the NSLP must create meaningful formats for students to modify how they eat and approach food in the long term. It must therefore be amenable to their identity as a whole. The ritual of eating must have meaning; it must carry over to lasting habits and expectations. From a health standpoint, undeniably, slower eating is better. If carrying the nutritional lessons of the school meal room outside of the school meal context is the goal, providing nutrition in a format where it is likely to be eaten is better.

²³⁹ POPPENDIECK *supra* note 7, at 91 (noting that cooks in kitchens are “highly skilled” while only lower skilled workers are needed to “finish and prepare” meals).

²⁴⁰ *Id.* at 3.

²⁴¹ Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088, 4107 (Jan. 26, 2012) (to be codified at 7 C.F.R. pts. 210, 220).

While opponents of such reforms may argue that the inclusion of ethnic, vegetarian, and other less widely familiar foods will alienate some students and lead to waste,²⁴² existing studies and pilot programs indicate otherwise.²⁴³ Schools participating in pilot programs regarding vegetarian meals report great success and increased sales of school meals with the addition of vegetarian lunch options.²⁴⁴ When well prepared, the students report enjoying vegetable options and different foods from what they normally eat at home.²⁴⁵ In addition, one of the most common recurring complaints students have about school food is that it lacks variety and that they would appreciate more food options.²⁴⁶ Infusing the menu with more variety addresses this problem and may actually lead to increased participation. When schools in one Florida district began to offer sushi as part of their school meal program, it immediately sold out.²⁴⁷ As for a concern with plate waste, the most direct way to address this concern is simply to provide more time to eat, not to provide students with faster food.²⁴⁸

B. *The Limits of Local Action*

Local and state actors have been highly active in supplementing and altering school meals to address scientific and nutritional concerns regarding food. The poster child for this movement to bring fresh foods to school is the Berkeley Unified School District in Northern California. There, the entire district was overhauled in two years from packaged food to food made almost exclusively from scratch using fresh local in-

²⁴² “Other [state and local program operators] argued that children will not eat vegetables they are not familiar with and, therefore, the vegetable subgroup requirements will result in plate waste.” Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. at 4092.

²⁴³ See *infra* notes 246–47 and accompanying text.

²⁴⁴ PHYSICIANS COMM. FOR RESPONSIBLE MED., *supra* note 222, at 7 (“[S]chool lunch sales have tripled since these healthy choices were added to the menu.”).

²⁴⁵ When asked about the food at Promise Academy in Harlem, children there comment on how they “love” eating the vegetables at school and how it is much healthier fare than what they eat at home. Mariah Summers, *Harlem’s Promise Academy Students Enjoy Hot, Healthy School Lunch . . . at a Cost*, N.Y. DAILY NEWS (Feb. 1, 2010), http://articles.nydailynews.com/2010-02-01/local/27055019_1_green-beans-love-tomatoes-brussels-sprouts. Children at other schools serving vegetable heavy dishes and salads were noted as “gobbl[ing]” them up and “asking for more.” *Id.*

²⁴⁶ See POPPENDIECK, *supra* note 7, at 140 (discussing how a range of studies of student evaluations of public school meals all reflected similar complaints about the food including a lack of various food options).

²⁴⁷ See Tannenbaum, *supra* note 221.

²⁴⁸ See Bergman, *supra* note 230 (outlining the increase in children’s intake of nutrients and substantial decrease in plate waste when longer lunch periods are given).

redients.²⁴⁹ This transformation was hardly an isolated incident—other schools from California to Minnesota to New York have taken actions to transform school meals into healthier fare.²⁵⁰

Likewise, individual schools and localities have not limited their modifications of the school meal program to nutritional issues. Rather, local willingness to include foods from a broad array of cultural traditions predates the National School Lunch Program.²⁵¹ For example, in Hawaii, public schools have made efforts to include taro, the island's ancient staple, in school meal programs.²⁵² This program was developed in response to parent concerns over the “messages [school] meals communicate to children” and attempts to “conserve a culture.”²⁵³ Some schools with large Muslim populations have modified their menus to be halal friendly.²⁵⁴ Other schools have chosen to offer vegetarian meal lines or regular vegetarian options to their students.²⁵⁵ Non-federal action in the food arena shows clear acknowledgement by many localities of the cultural, class, and ethnic identity meanings imbedded in food and particularly in school meals.

As such, to the extent that issues of identity are implicated in the school meal program, why not leave the resolution to localities? Isn't the solution less regulation? Yes and no. Yes, the USDA should rework regulations to have more flexibility in the form meals take and even ease nutritional standards if necessary to allow for inclusion of more cultural staples (as the USDA did recently in allowing tofu to be recognized as a

²⁴⁹ See Burkhard Bilger, *The Lunchroom Rebellion*, THE NEW YORKER, Sept. 2006, at 72, available at http://www.columbia.org/pdf_files/chezpanisse5.pdf; ANN COOPER & LISA HOLMES, LUNCH LESSONS: CHANGING THE WAY WE FEED OUR CHILDREN (2006).

²⁵⁰ See, e.g., Summers, *supra* note 245 (describing Promise Academy Charter School in Harlem, which serves a wide variety of hot healthy meals in addition to a salad bar also stocked in part from their school garden); POPPENDIECK, *supra* note 7, at 223–24.

²⁵¹ At the turn of the century, the chair of New York City's lunch committee argued that meals should not only be healthful but take into account the demographic and cultural background of the student populations. *Early School Lunch Exhibition*, NEW YORK PUB. LIBRARY, <http://exhibitions.nypl.org/lunchhour/exhibits/show/lunchhour/charity/school> (last visited Aug. 9, 2014) (noting that the early director of the program modified the menu to accommodate different “race[s]” of children: hearty soups for Irish children, pasta based dishes to reflect Italian eating habits, and vegetarian or Kosher meals for Jewish children).

²⁵² POPPENDIECK, *supra* note 7, at 222–23.

²⁵³ *Id.* at 223.

²⁵⁴ See *San Diego Arab Public School Implements Shari'a - Forms Taxpayer Funded Madrassah*, MILITANT ISLAM MONITOR (Jun. 12, 2007), <http://www.militantislammonitor.org/article/id/2969>.

²⁵⁵ See Juliann Schaeffer, *What's for Lunch? Schools Bring Vegetarian Options to the Table*, TODAY'S DIETITIAN (Apr. 2008), <http://www.todaysdietitian.com/newarchives/tdapril2008pg36.shtml> (discussing the School Nutrition Association's 2007 School Nutrition Operations survey that found that more than half of U.S. school districts provided vegetarian entrée options (up from 33%) while 16% offered up vegan entrée choices); PHYSICIANS COMM. FOR RESPONSIBLE MED., *supra* note 222, at 6 (noting that Grady High School in Atlanta offers a vegetarian-only school line).

meat alternative).²⁵⁶ Regulations should focus on the entire message communicated in school meal choices. This includes nutritional and social content, as well as preparation and means of consumption. However, local action on such issues tends to be in areas where there is a “critical mass” of a certain minority population, leaving children who do not live in an area with a robust minority community alone at the lunch table. Moreover, local fixes cannot and will not alter how school meals are shaping a sense of American nationalism. Specifically, local programs would fail to address how school meals impart values nationally regarding equality, inclusion, responsibility, and respect.²⁵⁷

Local impacts are innately limited in this regard. At best, local action can allow the population of a single school or school district to use food to foster inclusiveness and broader identity recognition. At worst, localities can use the school meal program as a vehicle to actively target minority children from unpopular groups.²⁵⁸ What local action can never do is mobilize this unique national ritual as an opportunity to address broad societal inequities.

C. *The Lunchbox Kid*

Some might argue that there is no compulsion to buy or participate in the school lunch program, that students whose belief or culture does not conform to school lunch can bring their lunch from home. This statement does not adequately capture the complex social, economic, and pedagogical dynamics of school lunches. First, bringing lunch from home may not be possible for students from poor families. Hunger and food scarcity is a problem for many communities, including a disproport-

²⁵⁶ The current rules expand meat alternatives to include tofu as a source of protein to “better meet the dietary needs of vegetarians and culturally diverse groups in schools.” Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088, 4094–95 (Jan. 26, 2012) (to be codified at 7 C.F.R. pts. 210, 220). The USDA has also shown a willingness to adopt more flexible rules for schools in areas with unique local cuisines such as American Samoa, Puerto Rico and the Virgin Islands. Schools in those areas are now allowed to substitute staples of local cuisine such as yams, plantains, or sweet potatoes, to meet the required grain component of school meals. *Id.* at 4145–46.

²⁵⁷ The values communicated in school meals already face some controversy. Some would argue that by offering free and subsidized meals, the school meal program is inherently un-American as it sends messages that undermine work ethic and discourages self-sufficiency. *See, e.g.,* Amanda Terkel, *Rep. Jack Kingston Proposes That Poor Students Sweep Floors in Exchange for Lunch*, HUFFINGTON POST (Dec. 18, 2013) http://www.huffingtonpost.com/2013/12/18/jack-kingston-school-lunch_n_4467711.html (presenting the argument that poor students in public schools should sweep the floor or pay a nominal amount of money to instill the value that “there is no such thing as a free lunch”).

²⁵⁸ *See supra* notes 165–72 and accompanying text.

tionate number of minority communities.²⁵⁹ Many children have no alternative to the school lunch program.

However even if a student can bring a lunch to school, the act of doing so estranges them from the American identity formed in the communal meal. Bringing lunch from home signifies that the school provided meal, the American meal, is not for the lunchbox kid. Such students tag themselves as the “other,” outside the relevant mainstream and subject themselves to ridicule.²⁶⁰ School meals teach students not only that there are dominant and sub-classes of American society, but where exactly they stand in each.²⁶¹ Students not buying school meals are distanced from their peers physically; they do not go through the lunch line and they wait at lunch tables alone until peers get their food. Their lunchbox itself might be unfamiliar to peers with compartments for various items like soup, vegetables, and spices.²⁶²

Lunchbox kids may also be socially ostracized. Non-participation may indicate to peers that something is “wrong” with those students—that they are either “sick” (with diabetes, lactose intolerance, allergies) or just weird (kid-speak for every other cultural dietary restriction that would bar participation in school lunch). In some cases, bringing lunch may signify status (the children of foodie parents) but in many cases, it does not. In these cases, and particularly where the contents do not conform with majority food culture, a lunchbox is a mark of shame.

CONCLUSION

The School Lunch program serves millions of meals a day, billions of meals a year, without significant thought or care given to the national identity it is creating and the identities it is marginalizing. American lawmakers have failed to legislate with the identity politics of food in mind; rather, to the extent they have focused on children’s needs it has been with tunnel vision on foods’ nutritional value and its placement as an agricultural commodity. This reduces the social importance of food to a numbers game. The importance of meals, food choices, and food in defining people as individuals and members of broader communities is

²⁵⁹ *Hunger and Poverty Statistics*, FEEDINGAMERICA.ORG, <http://feedingamerica.org/hunger-in-america/hunger-facts/hunger-and-poverty-statistics.aspx> (last visited Aug. 21, 2014), (noting that “households that had higher rates of food insecurity than the national average included households with children (20%), especially . . . Black non-Hispanic households (25%) and Hispanic households (23%).”).

²⁶⁰ See Patel, *supra* note 162, at 70–71 (noting that packing Indian food for lunch may mark a child as an “outsider” provoking “derision” and ridicule).

²⁶¹ The seating in High School cafeterias often demonstrates stratification among social groups, with students segregating themselves by race, grade, popularity, or gender. See *id.* at 70.

²⁶² Such as a traditional Tiffin Walla, bento box, or stackable lunchbox.

intuitive. Because of this intuitive understanding, it is understandable that this area can be under-theorized generally, particularly in the law.²⁶³

However, a national school system is a key factor in creating identity, particularly national identity. Therefore, the rituals and practices imbedded in a national school education system can reinforce or alleviate elitism and oppressive hierarchies, the non-democratic structure of society. The existing legal and regulatory forces at play over food in America impact more than health and weight but the very structure of civil society. In doing so, the National School Lunch Program emerges as perhaps the most powerful unifying force in defining what it means to be American today. Nowhere else do so many Americans from so many different backgrounds sit together and share a fundamental human experience—in this case, eating.

As such, school meals present a rare opportunity to support and build an inclusive American polity, to make and foster democratic ownership and civic mindedness. These meals are opportunities every day to teach future citizens how to meaningfully coexist in a pluralistic society. Instead, school lunches today exclude and stigmatize children of various faiths and racial and ethnic minorities by failing to offer racially, religiously, or culturally appropriate food and by creating rituals that reinforce class and cultural hierarchy. Students under this regime must choose—be American, sit down at the table with the “normal” kids—or retain your beliefs, your identity, perhaps even your health and well-being. This is a choice no child should have to make—especially not on an empty stomach.

²⁶³ See Counihan, *supra* note 11, at 56 (“[F]ood rules are part of a usually unscrutinized cultural ideology which continuously leads to the reinforcement of life as it is. Because eating is such a basic condition of existence, people take their foodways for granted . . .”).

