

2021

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Recommended Citation

Steph Tai, *Environmental Health, Public Health, or Individual Health? The Complications of Using Eco-Labels for Food Governance*, 31 Health Matrix 369 ()

Available at: <https://scholarlycommons.law.case.edu/healthmatrix/vol31/iss1/14>

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ENVIRONMENTAL HEALTH, PUBLIC HEALTH, OR INDIVIDUAL HEALTH? THE COMPLICATIONS OF USING ECO-LABELS FOR FOOD GOVERNANCE

Steph Tai†

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ABSTRACT

Labeling details on food products have become increasingly common, as some consumers demand “more” from their food. This essay explores various labels and describes how many of the requirements behind labels approach “health” from mixed perspectives of environmental, public, and individual health. Based on the muddled ways in which consumers approach health labels, as well as the weaknesses of legal accountability mechanisms, the essay argues that food labels are weak in providing incentives to provide “healthy” food, either from an environmental, public, or individual health perspective.

I. PRIVATE ENVIRONMENTAL GOVERNANCE AND LABELS

Private environmental governance has been touted as a means of achieving sustainability without engaging in coercive government actions.¹ As described in Michael Vandenberg’s seminal paper, private governance is “the development and enforcement by private parties of requirements designed to achieve traditionally governmental ends.”² While he did not recommend private environmental governance as the sole means by which society achieves environmental benefits, he did argue that scholars examine the ways in which the private sphere responds to similar environmental concerns as scholars have focused on in the public sphere.

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1. Michael P. Vandenberg, *Private Environmental Governance*, 99 CORNELL L. REV. 129 (2013).
2. *Id.* at 147.

Private environmental governance can take a number of different forms. One such form is eco-labeling.³ “The concept [of eco-labeling] is simple—to reduce an evaluation of a product or process into a simple, environmentally beneficial sign.”⁴ The idea is that accurate eco-labels can allow consumers to express their desire—via market forces—to support environmentally friendly production processes. For example, the Seafood Watch standard,⁵ provides ratings for seafood based on “standards for fisheries, aquaculture and salmon-specific fisheries [that] undergo regular review and revision to ensure the latest science and best management practices are incorporated.” The purported goal of these labels is to ensure that “audiences have the robust and accurate information they need to influence positive change on the water.”⁶

Scholars have explored the use of labels as a form of governance in a number of areas. For example, Professors Samuel Wiseman and Hannah Wiseman recently surveyed a number of available eco-labels for food, and found them lacking in utility.⁷ That is, “although several types of foods sold in the United States have robust environmental labeling programs for a limited set of environmental attributes, it is now largely impossible for a consumer to decipher whether her food comes from a farm or ranch that has implemented certain environmental practices, such as preserving forest or other wildlife habitat, reducing runoff and other pollution, conserving water, or implementing other environmental conservation practices.”⁸ They also explore looking toward existing agricultural conservation programs under the U.S. Department of Agriculture (USDA) as potential models for development of an appropriate eco-label for food, and conclude that while the voluntary nature of the USDA’s conservation programs might provide inadequate protection, it still could provide a more holistic framework for labeling.⁹

Similarly, Professor Sarah Morath has investigated a number of animal welfare labels, concluding that “the effectiveness of private animal welfare governance ultimately depends on implementing,

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3. See, e.g., Sarah E. Light & Eric W. Orts, *Parallels in Public and Private Environmental Governance*, 5 MICH. J. ENVTL. & ADMIN. L. 1, 44–45 (2015).
 4. Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 136 (2001).
 5. See *Seafood Watch: Our Standards*, MONTEREY BAY AQUARIUM, <https://www.seafoodwatch.org/seafood-recommendations/our-standards> [<https://perma.cc/48FJ-DVA5>].
 6. *Id.*
 7. Samuel R. Wiseman & Hannah J. Wiseman, *Food Labeling and the Environment*, 34 J. ENVTL. L. & LITIG. 1 (2019).
 8. *Id.* at 16.
 9. *Id.* at 19–22.

monitoring, and enforcing animal welfare claims.”¹⁰ Otherwise, the lack of “transparency, clarity, and trust” fail to attract widespread use by consumers.¹¹

II. THE COMPLICATED DRIVERS BEHIND CONSUMER INTEREST IN FOOD ECO-LABELS

As described above, much of the private environmental governance literature involving the use of eco-labels has focused on the use of “green” labels to leverage consumer pressure for products with lower environmental footprints or animal friendliness.¹² This makes sense. Survey after survey demonstrates that consumers are deeply interested in food labels.¹³ The latest report by the International Food Information Council Foundation—the 2020 Food and Health Survey—describes a survey of over 1000 Americans suggesting that “healthfulness” of food is the major factor driving consumer food purchases today.¹⁴ And consumers look to labels in identifying “healthfulness;” the sorts of labels used as proxy for consumer values include labels such as “natural” and “no added hormones or steroids.”¹⁵

However, the same studies suggest that consumers approach labels in a more ambiguous fashion than addressed in the private governance literature.¹⁶ That is, a number of consumers view eco-labels and other types of food production as proxies for “healthfulness,” rather than using them in order to make their purchases more sustainable (which, in turn, can also imply some degree of public health). For example, 43% of the surveyed consumers say the stated that foods labeled “plant-based” would likely be healthier.¹⁷ And 44% of those surveyed also

10. Sarah J. Morath, *Private Governance and Animal Welfare*, 9 GEO. WASH. J. ENERGY & ENVTL. L. 21, 32 (2018).

11. *Id.*

12. *See supra* Part I.

13. *See* INT’L FOOD INFO. COUNCIL, 2020 FOOD & HEALTH SURVEY 53, 60, 64 (2020) [hereinafter 2020 FOOD AND HEALTH SURVEY], <https://foodinsight.org/wp-content/uploads/2020/06/IFIC-Food-and-Health-Survey-2020.pdf> [<https://perma.cc/2GX5-FTBJ>]; *see also* *Food Labeling Survey*, INT’L FOOD INFO. COUNCIL FOUND. (Jan. 2019) <https://foodinsight.org/wp-content/uploads/2019/01/IFIC-FDN-AHA-Report.pdf> [<https://perma.cc/2YM3-HF6N>]; *See* CONSUMER REPORTS NAT’L RSCH. CTR., NATURAL FOOD LABELS SURVEY 2 (2015), <https://foodpolitics.com/wp-content/uploads/Consumer-Reports-Natural-Food-Labels-Survey-Report.pdf> [<https://perma.cc/9XBJQ-WQ8C>].

14. 2020 FOOD AND HEALTH SURVEY, *supra* note 13, at 6.

15. *Id.* at 60.

16. *See, e.g.*, Wiseman & Wiseman, *supra* note 7; Morath, *supra* note 10.

17. 2020 FOOD AND HEALTH SURVEY, *supra* note 13, at 11.

stated that “natural” foods would likely be healthier, even if they contained similar nutritional contents as unlabeled foods.¹⁸

Similarly, consumers use other eco-related labels for personal health versus environmental reasons. For example, in a Pew Research Center report in 2016, “[t]hree-quarters of U.S. adults who bought organic foods in the past month (76%) say they were looking for healthier foods. Fewer organic food consumers say that helping the environment (33%) or convenience (22%) were reasons for buying organic.”¹⁹ Consumers also use other labels such as “kosher” as a proxy for “healthfulness,” with “51 percent [of surveyed consumers in 2010] say[ing] they buy kosher for its ‘general healthfulness.’”²⁰

In addition to healthfulness, both with respect to individual health and public health, consumers also desire sustainability in their food. Again, the 2020 Food and Health Survey points out that “[n]early 6 in 10 consumers [in 2020] say it is important that the food products they purchase or consume are produced in an environmentally sustainable way (similar to the 54% who said the same in 2019). 43% also say it is important that a food manufacturer ‘has a commitment’ to sustainability and 40% say the same about knowing food was produced using farming technologies that seek to reduce the impact on natural resources.”²¹ Consumers also complained about the use of labels to identify sustainable production, however, as the 2020 Food and Health Survey pointed out, “‘Sustainably sourced’ labels and recyclable packaging are common signals for this, but over 6 in 10 find it hard to know whether their food choices are environmentally sustainable.”²²

What this means is that the drivers behind consumer use of eco-labels are complex, and often muddled. While some consumer pressure comes from consumer desire for sustainable food system outcomes, a significant driver of labeling also comes from perceptions of healthfulness, and, in particular, a belief that a consumer’s personal health is protected by purchasing these foods.²³

This phenomenon—of consumer use of eco-labels as proxies for health labeling—is striking. The U.S. Food and Drug Administration already has a regulatory structure devoted to regulating “healthy” food

18. *Id.* at 11, 60.

19. *The New Food Fights: U.S. Public Divides Over Food Science*, PEW RES. CTR. (Dec. 1, 2016), <https://www.pewresearch.org/science/2016/12/01/americans-views-about-and-consumption-of-organic-foods/> [<https://perma.cc/MMY8-ZSHC>].

20. Karen Barrow, *More People Choosing Kosher for Health*, N.Y. TIMES (April 13, 2010), <https://well.blogs.nytimes.com/2010/04/13/morepeople-choosing-kosher-for-health/> [<https://perma.cc/S6ZY-Q4DB>].

21. 2020 FOOD AND HEALTH SURVEY, *supra* note 13, at 11, 60.

22. *Id.*

23. *See id.* at 11.

claims. That is, under the Nutrition Labeling and Education Act of 1990 (NLEA), Congress directed the FDA to issue regulations for the use of health claims on food labels.²⁴ Congress's concern was that food labels, especially health claims, needed to be structured to "assist consumers in maintaining healthy dietary practices."²⁵

The FDA did so, taking the stance that "To be approved by the FDA as an authorized health claim, there must be significant scientific agreement (SSA) among qualified experts that the claim is supported by the totality of publicly available scientific evidence for a substance/disease relationship. The SSA standard is intended to be a strong standard that provides a high level of confidence in the validity of the substance/disease relationship."²⁶

Examples of regulated health claims include claims that calcium may reduce the risk of osteoporosis, claims that low-fat diets rich in fruits and vegetables may reduce the risk of some types of cancer, a disease associated with many factors, and claims that 25 grams of soy protein a day, as part of a low in saturated fat and cholesterol, may reduce the risk of heart disease.²⁷ All of these claims require positive substantiation that foods labeled with such specific health claims meet particular content requirements for those foods.²⁸ For example, if a producer wants to claim that a particular food reduces the risk of osteoporosis because it contains calcium, it must ensure that that food does indeed contain calcium in amounts that bear some relationship to reducing the risk of osteoporosis.

But when food producers use more general claims of "healthfulness," the FDA regulates using negative, not positive, requirements. The FDA prohibits foods from being labeled as "healthy" if they "(1) Are not low in total fat, but have a fat profile makeup of predominantly mono and polyunsaturated fats; or (2) contain at least ten percent of the Daily Value (DV) per reference amount customarily

24. Nutrition Labeling and Education Act of 1990 (NLEA), Pub. L. No. 101-535, 104 Stat. 2353 (1990).

25. NLEA § 3(a)(2).

26. *Authorized Health Claims That Meet the Significant Scientific Agreement (SSA) Standard*, FDA (Jan. 12, 2018), <https://www.fda.gov/food/foodlabeling-nutrition/authorized-health-claims-meet-significant-scientificagreement-ssastandard#:~:text=To%20be%20approved%20by%20the,for%20a%20substance%2Fdisease%20relationship> [<https://perma.cc/6WQF-2TWX>].

27. FDA, A FOOD LABELING GUIDE 95–125 (2013), <https://www.fda.gov/media/81606/download> [<https://perma.cc/KS7V-VJXC>] (addressing general health claims and qualified health claims).

28. *Id.* at 95–104.

consumed (RACC) of potassium or vitamin D.”²⁹ Otherwise, the use of the term “healthy” connotes no other positive health requirements.

Commentators have critiqued the FDA as inadequately ensuring that food producers “provid[e] consumers with accurate and relevant food label information,”³⁰ which, as pointed out earlier, was part of Congress’s intent in passing the NLEA.³¹ Nevertheless, the results of consumer response surveys suggest that food producers can still access the positive reputation (and potentially higher prices) that comes with claims of healthfulness without even meeting that more minimum level of regulatory requirements through healthfulness claims.³² That means two things: food producers can use eco-labels as an end-run around regulatory requirements for food labels, especially since eco-labels are inadequately regulated,³³ and private governance scholars should recognize that consumers using eco-labels are not always seeking actual sustainability as a goal, and might therefore be less concerned about the metrics behind sustainability measurements.

III. ANALYSIS

The crux of this essay revolves around a few conflicting phenomena: the desire of public governance advocates to use labels to amplify consumer pressure; the overbreadth with which consumers review eco-label claims as also including health claims; and the potential for producers to avoid the federal regulatory burden of making actual health claims by taking advantage of eco-labels as a proxy for actual health claims. Is there a way to make these three phenomena work together, rather than against each other?

My suggestion is that sustainability and health advocates must tackle this conflict head on. For example, in a thoughtful and comprehensive article, Professors Emily Broad Leib and Margot Pollans argue for a “new food safety,” as defined by an overall protection of the food system writ large.³⁴ The authors provide detailed outlines of the

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29. FDA, GUIDANCE FOR INDUSTRY: USE OF THE TERM “HEALTHY” IN THE LABELING OF HUMAN FOOD PRODUCTS (2016), <https://www.fda.gov/regulatory-information/searchfda-guidance-documents/guidance-industry-use-term-healthy-labeling-humanfoodproducts> [<https://perma.cc/P8VX-EXAH>].
30. See, e.g., Patrick Meyer, *The Crazy Maze of Food Labeling and Food Claims Laws*, 92 ST. JOHN’S L. REV. 233, 234 (Summer 2018); see also Shmuel I. Becher et al., *Hungry for Change: The Law and Policy of Food Health Labeling*, 54 WAKE FOREST L. REV. 1305, 1312–13 (2019).
31. NLEA § 3(a)(2).
32. See 2020 FOOD AND HEALTH SURVEY, *supra* note 13, at 11.
33. See Morath, *supra* note 10.
34. Emily M. Broad Leib & Margot J. Pollans, *The New Food Safety*, 107 CALIF. L. REV. 1173, 1173 (2019).

ways in which the current U.S. federal regulatory system for food safety protects only a “narrow” understanding of food safety—that is, ingestion-related risks.³⁵ And they provide a wonderful explanation of how this narrow food safety regulatory protection is driven by factors of political economy.³⁶ Ultimately, the authors develop a well-substantiated argument that the federal regulation of “food safety,” at least normatively, should encompass both nutritional, environmental, and workplace safety concerns.³⁷

I absolutely agree with these arguments. The regulation of food safety is, as the authors observe, fragmented between multiple federal agencies with “silo[ed]” agendas.³⁸ And a comprehensive federal regulatory reform would be quite welcome. Indeed, what consumer studies make clear is that without actual federal (or state) regulatory reform, companies have few incentives to address any need for more comprehensive food safety governance. That is, a governance that takes into account public health, environmental health, and individual health—since consumers lack the distinct drivers necessary to create the incentives for systems of private governance.³⁹

CONCLUSION

The concerns expressed in this essay are especially pertinent during this time of coronavirus. We already see the conflation of public values with respect to the use of masks, where the use is driven by a mixture of public health and individual health concerns. What the analysis provides in this essay suggests is that for private governance actions to

35. *See id.* at 1181–84.

36. *See id.* at 1199–1204.

37. *See id.* at 1246.

38. *Id.* at 1175; *see also* Steph Tai, *Whole Foods: The FSMA and the Challenges of Defragmenting Food Safety Regulation*, 41 AM. J. L. & MED. 447 (2015).

39. *See, e.g.*, Michael Vandenberg, *Social Checks and Balances: A Private Fairness Doctrine*, 73 VAND. L. REV. 811, 826–27 (2020) (“The drivers of participation in private governance initiatives are not fully understood and likely vary across participants and initiatives, but research in several fields has provided an initial snapshot. Private governance initiatives often arise after advocacy groups have conducted naming-and-shaming campaigns to induce companies to participate in the formation of the standards. Companies respond to these campaigns for a complex mix of reasons that likely include concerns that the advocacy groups will be able to stimulate shifts in market behavior (e.g., actions by consumers, employees, managers, investors, and lenders) or nonmarket social behavior (e.g., pressure from individuals and religious, university, civic, and cultural organizations).”); *cf.* Darcy Freedman et al., *Public Health Literacy Defined*, 36 AM. J. PREV. MED. 446 (2009) (describing adequate literacy with respect to public understanding of the concept of public health.).

be a viable means of protecting environmental, public, and individual health with respect to food, more public education is needed on the distinctions on the varieties of “health” involved with health-related claims.⁴⁰

40. *See, e.g., id.*