*European Journal of Risk Regulation* (2024), **15**, 222–231
doi:10.1017/err.2024.41

CAMBRIDGE UNIVERSITY PRESS

PREFACE

# Democratising Food Safety: Why We Need to Look Beyond Government Regulation and Provide a Citizen Right of Action

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## Abstract

Imperfect information on food safety and risk has created a system with less safety than the public wants. Consumers cannot pay for the level of safety they desire. Tort under-compensates for foodborne illness due to difficulty proving causation. When market controls are ineffective at producing the level of safety desired by consumers, the classic approach is government regulation. However, government regulators face challenges that impede the translation of scientific knowledge into regulatory controls. This often results in an equilibrium of private interests and bureaucratic interests rather than the public interest. To restore republican deliberation on food safety we need greater citizen involvement in the decision-making. Access to the courts is an effective means for citizens to participate directly in the decisions affecting food safety; thus, a private cause of action to our national food safety laws is proposed.

**Keywords:** citizen right of action; food law; food regulation; food safety

## I. Introduction

Who represents the consumers' interest in food safety? Is it the food manufacturers because they have an interest in producing safe food – but that may also be conflicted over profits? Is it the government – which represents the people – but also represents the interests of the owners of corporations and internal agency interests and pressures?

Food companies have a critical role in ensuring food safety. No system of food regulation will succeed unless the vast majority of companies strive to produce safe and wholesome food. Food safety regulation is largely an honor system.

Governments have a role in regulating the safety of food. The history of food commerce over thousands of years informs us that government regulation is necessary to prevent food fraud and food adulteration. Without government intervention, free market forces can and have created perverse financial incentives to cut food safety corners and sell substandard food.

However, the consumers are largely left out and cannot directly represent their interests. The government regulators represent the public, but they are only partial surrogates. The public includes the food companies as well as consumers, so the government cannot be purely a representative of the consumers. Government agencies also face internal pressures and are subject to industry capture.

Food companies want to produce food that meets the interests of the public in safe and wholesome food. Food companies also have an interest in being profitable. No company can invest unlimited resources towards unlimited food safety measures and stay in

business. This is not a lack of altruism or goodwill to their fellow citizens, but food safety is a continuum, and cutoffs must be made to remain in business in a competitive market with narrow margins.

Consumers want to pay more for food safety. Unfortunately, consumers have imperfect information about which food is safer than another; therefore, consumers cannot pay for the level of safety they desire, and food companies cannot be economically rewarded for producing safer food. Imperfect information about the safety of the food we eat has created a system with less safety than the public wants.

In addition, there is imperfect information about food safety after consumption. Personal injury lawsuits under-compensate for foodborne illness due to difficulty proving causation.

When market controls are ineffective at producing the level of safety desired by consumers, the classic approach is government regulation. However, government regulators face challenges that impede the translation of scientific knowledge into regulatory controls. This often results in an equilibrium of private interests and bureaucratic interests rather than the public interest. To restore democratic deliberation on food safety we need greater citizen involvement in the decision making. A right of action in the courts is an effective means for citizens to participate directly in decisions affecting food safety. Thus, adding a private cause of action to our national food safety laws is proposed.

This paper discusses the above situation in more detail. The first part of this paper covers the market failure for food safety with the result that consumers cannot pay for the level of safety they desire. The second part discusses the limits of tort law in compensating the victims of unsafe food. The third part covers the limits of government regulators. The fourth part proposes a solution to these limitations in democratising food safety by allowing citizens a right of action.

This discussion revolves around US law and US examples. Nevertheless, the underlying concepts regarding the structure of a food safety regulatory system are universal.

## II. The market failure for food safety

### *1. Consumers cannot pay for the level of food safety they desire*

Food safety is a market failure. Consumers cannot know the safety of food before or after purchase. Consumers can observe, sniff, and squeeze, but they are vastly limited in their ability to assess food safety before purchase. Pathogenic microbes are invisible to the naked eye. Dangerous food may present no physical decay or spoilage. Moreover, while spoilage microorganisms make food gross and unappetising, they are not necessarily dangerous. On the other hand, food pathogens can be odorless and tasteless.[1]

For the market forces to create the level of food safety that consumers desire, consumers would need to know the relative safety of foods before purchasing. Given full safety information, consumers could pay for the level of safety they want, and consumers want to spend more for food safety.[2]

Because consumers cannot determine the safety of food before purchase, they cannot select food producers with superior safety controls. For example, romaine lettuce produced within a few feet of a cattle rearing unit is sold at the same price as romaine lettuce grown miles from livestock faeces. Similarly, food producers cannot receive a market benefit from implementing the expense of additional safety measures. For

[1] John M. Antle, *Choice and Efficiency in Food Safety Policy* 44–45, 54–55 (AEI Press 1995).

[2] Craig Harris, Andrew Knight, and Michelle R. Worosz, "Shopping for Food Safety and the Public Trust: What Supply Chain Stakeholders Need to Know About Consumer Attitudes" (Jun/Jul 2006) Food Safety Mag 52.

instance, a produce grower who installs a ten-foot fence to exclude wild animals from the fields does not receive a corresponding premium price.

Moreover, there is no good proxy for food safety. There are various seals and certifications related to safety, but those are imperfect. All certifications have limits. Some limits are transparent. For example, organic certification may ensure lower pesticide residue than non-organic food, but the seal does not assure reduced foodborne pathogens. Moreover, many certification audits have pre-arranged inspection dates, therefore companies have time to prepare and hide deficiencies. Even when audits are by surprise, they are a brief snapshot in time and cannot ensure the absence of deficiencies before or after. By way of illustration of the gaps in certification, a company with a history of food safety certifications was responsible for a disease outbreak with 714 illnesses, 9 deaths, and the largest food recall in US history.[3] Another company with food safety certification was responsible for a disease outbreak with 36 death, the largest foodborne illness death toll in US history.[4]

Further, food companies cannot effectively market improved food safety because it means comparing to unsafe food — the "Our food has reduced filth and disease" dilemma. In the romaine lettuce example above, a grower cannot gain market advantage with consumers by touting that their produce is "Feces Free!" Companies cannot market food safety because it increases consumers' focus on the risks in food.

While consumers want to pay more for food safety, the market failure makes it impossible to buy the level of safety they want. The converse consequence of this market failure is that food companies are under-rewarded for food safety measures. This creates a perverse incentive to cut food safety costs. Competition is fierce among food processing companies and profit margins are lower than the average industry.[5] Food companies must compete, and thus cost-cutting is vital. Anyone who believes in the power of free markets should expect that food companies will tend to cut food safety measures where those measures result in no financial benefit in the marketplace.

## 2. *The burden and the problem*

The magnitude of the problem created by this market failure includes foodborne illness and its economic costs. Each year in the United States, roughly one in six, or 48 million get sick. Every day roughly 350 require hospitalisation and 8 die.[6]

[3] A 2008–09 foodborne *Salmonella* Typhimurium outbreak linked to peanut paste sold by Peanut Corporation of America (PCA) was magnified because PCA was an intermediate processor, and its peanut products were used as ingredients in more than 3,900 products. The CDC attributed 714 cases of illness and 9 deaths. Kelsey Wittenberger and Erik Dohlman, "Impacts of the 2008–09 Foodborne Illness Outbreak Linked to Salmonella in Peanuts" (February 2010) Economic Research Service, US Department of Agriculture. See also, US Centers for Disease Control and Prevention, "Multistate Outbreak of Salmonella Infections Associated with Peanut Butter and Peanut Butter-Containing Products – United States, 2008–2009" (Feb 6, 2009) 58(04) Mortality and Morbidity Weekly Rep 85.

[4] In 2011, Jensen Farms cantaloupe caused a *Listeria monocytogenes* outbreak that infected at least 146 people in 28 states with 36 deaths and one miscarriage. US Centers for Disease Control and Prevention, "Multistate Outbreak of Listeriosis Linked to Whole Cantaloupes from Jensen Farms, Colorado" (Final Update) (27 August 2012) https://www.cdc.gov/listeria/outbreaks/cantaloupes-jensen-farms/index.html#print (last accessed 17 January 2024).

[5] Troy Segal, "Profit Margins for the Food and Beverage Sector" (28 February 2023) Investopedia, https://www.investopedia.com/ask/answers/071015/what-profit-margin-usual-company-food-and-beverage-sector.asp and CSIMarket (last visited 16 December 2023); Food Processing Industry Profitability https://csimarket.com/Industry/industry_Profitability_Ratios.php?ind=505 (last accessed 16 December 2023).

[6] US Centers for Disease Control and Prevention, *Burden of Foodborne Illness: Findings,* https://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html (last accessed 17 December 2023). ("CDC estimates that each year roughly 1 in 6 Americans (or 48 million people) gets sick, 128,000 are hospitalised, and 3,000 die of foodborne diseases."); Elaine Scallan, and others, "Foodborne Illness Acquired in the United States—Major Pathogens" (2011) 17(1) Emerging Infectious Diseases 7.

The US Department of Agriculture (USDA) Economic Research Service estimated the economic burden of 15 major pathogens in the United States at $17.6 billion in 2018.[7] This estimate is based on the cost of medical care and associated lost wages. An additional burden on the economy is the loss of markets when consumer confidence is eroded in a product or commodity. For example, a nationwide peanut butter recall in 2009 is estimated to have cost US peanut farmers hundreds of millions of dollars in lost production and sales.[8] In addition, there is no measure for the loss of leisure time, the pain and suffering, and the disruption of daily life.

## III. The limits of tort law

A standard fix for market failure is private lawsuits for damages. Payment of damages for food safety lapses can have a prophylactic effect on businesses to invest more in food safety. However, tort lawsuits grossly undercompensate those who experience a foodborne illness. Although there is some measure of fear of being sued, tort liability is reactive, therefore it has reduced preventive power. Moreover, reactive financial compensation cannot make someone whole who faces a lifetime of disability or dies.

There are several reasons that lawsuits undercompensate victims of foodborne illness, such as the hurdles of transaction costs, such as the cost of hiring a lawyer and also the emotional cost of reliving memories of an illness. However, the main reason that tort under-compensates for foodborne illnesses is the difficulty in proving causation.

Tracing foodborne illness to the cause has many steps and most illnesses never are connected to a confirmed source. Minor illnesses that do not result in lost work or hospitalisation are tracked by no one and are not included in the number of illnesses cited above. Even among serious foodborne illnesses, not all seek the care of a medical professional. Among those who seek care, few have a specimen taken. Only some specimens tested reveal a likely organism and fewer still are confirmed in the laboratory. Finally, a smaller subset yet is reported to a health department or the US Centers for Disease Control and Prevention (CDC) where a pathogen might be linked to a food.

The consequence is that very few foodborne illnesses end up in court – typically only 0.000024 percent or roughly 1 in every 4 million serious foodborne illnesses.[9] Companies that cut preventative safety costs externalise the burden of those food safety risks to the public. No lack of altruism is necessary. Simply, the 1-in-4 million risk of a lawsuit is a weak and inadequate deterrent. This imperfect risk feedback to the food industry results in a lack of enthusiasm for implementing controls where risks are unseen.

## IV. The limits of government regulators

The classic solution to this type of market inefficiency is government regulation so that firms cannot profit from creating undesirable externalities (i.e., creating foodborne illness, for which society pays the cost). Historically, this approach has been through laws mandating safety measures with penalty provisions for non-compliance. In this remedial approach, a firm's economic benefits from failing to implement safety measures should be

[7] USDA Economic Research Service, "Cost Estimates of Foodborne Illness" https://www.ers.usda.gov/data-products/cost-estimates-of-foodborne-illnesses.aspx (last accessed 17 December 2023).

[8] Paul L. Hollis, "Peanut Scare Could Cost Growers $1 billion" (17 April 2009) Farm Progress, ("[W]e could see total losses of a billion dollars due to this recall," Don Loehler, executive director of the Georgia Peanut Commission, said during testimony before members of Congress.") https://www.farmprogress.com/peanut/peanut-scare-could-cost-growers-1-billion (last accessed 17 December 2023).

[9] Tanya Roberts, "WTP Estimates of the Societal Costs of Food-borne Illness" (2007) 89:5 Amer J Agr Econ 1183, 1184.

eliminated through monetary penalties equal to or exceeding the economic benefit from failing to implement the required risk controls.

Government regulation can provide preventive corrections for market inefficiency, but like tort law is inadequate. Government systems have limited resources, cannot outrun the changes in complex international supply chains and changing food manufacturing, and face resource and structural limitations. In addition, government regulators face challenges that impede the translation of scientific knowledge into regulatory controls. This can result in an equilibrium of private interests and bureaucratic interests rather than the public interest.

Another limitation found with government regulation is capture. Agency capture has been described as when a regulated firm wins "the hearts and minds of the regulators."[10] However, agency capture is not always bold but can be a matter of degrees. Capture exists any time an agency accommodates a single interest by moving away from its statutory mission. Regulated firms have a significant and direct stake in regulatory outcomes, and they can have the resources to hire lawyers, experts, and lobbyists. On the other hand, regulatory agency resources are limited. Inadequate funding of the regulatory agencies charged with the noble-minded goals for the public's health and safety laws is so common it can be characterised as a tradition. At the same time, most members of the public have little at stake individually in specific agency actions or inactions. There should be no surprise that administrative bureaucracies sometimes sacrifice the societal interests that are diffused among scattered beneficiaries in favor of well-organised business and bureaucratic interests.[11]

As important as agency capture can be, perhaps a more universal concern is sub-optimisation. Agency retreat and slowness to act are rational patterns of human social and bureaucratic behavior.[12] Simply put, an agreeable work life is preferable to one filled with conflict.[13] Government inaction may result because agencies reach an equilibrium of private–government interests. Moreover, a regulator who proposes more stringent food safety rules is likely to face resistance from other regulatory officials simply because it will mean more work, but also the social and hierarchal structures in the agency can create and distort incentives.

Sub-optimising may simply be failing to question whether traditional industry practices need to change. For example, by the 1940s, the science was clear that pasteurisation of milk would save lives and prevent untold illness and suffering. The US state of Michigan required the pasteurisation of milk in 1947, but it was 40 years before the US Food and Drug Administration (FDA) required pasteurisation nationally.[14] Even then, it took a lawsuit against the FDA to compel agency action.[15]

Government agencies face constraints such as budget limits, conflicting stakeholders, and internal and external constituencies. To an agency insider, the best decision balances these interests. Bureaucracy rewards attendance to the agency's priorities, not innovation, so we should not be surprised when our food safety bureaucrats act rationally and rise to internal concerns, rather than push for improvements. One dilemma with agency inaction is that agencies use enforcement discretion to shield these policy decisions from judicial review.[16]

[10] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) 63.

[11] Richard B. Stewart and Cass R. Sunstein, "Public Programs and Private Rights" (1982) 95 Harv L Rev 1193, 1196.

[12] Neal D. Fortin, "The Hang-Up With HACCP: The Resistance to Translating Science into Food Safety Law" (2003) 58:4 Food & Drug L J 53.

[13] Ayres and Braithwaite, n 10, 80.

[14] Carl W. Hall and G. Malcolm Trout, *Milk Pasteurization* (1968) 2–4.

[15] *Public Citizen v Heckler* (1985) 602 F Supp 611, 612, 614; *Public Citizen v Heckler* (D.D.C. 1986) 653 F Supp 1229, 1241.

[16] Glen Staszewski, "The Federal Inaction Commission" (2009) 59 Emory L J 369 (addressing the chronic problem of nonenforcement decisions).

More insidious than agency capture, suboptimisation is harder to prevent. Traditional protective measures against agency capture have little curative effect against suboptimisation because the situation is not one where an agency has gone astray. The agency is acting rationally and according to what it believes is the best course of balance. Honorable, intelligent and high-minded public officials are as likely to be caught up in sub-optimising behavior as unprincipled ones.

Simply put, the dilemma is that the bureaucratic perspective does not represent the public's perspective. Our reliance on the perspective of bureaucratic middlemen to solely represent the public interest is the root of the dilemma. The administrative agency perspective poses as the public interest, but the bureaucratic process tends to produce the voice of the bureaucrat rather than the voice of the people.

The result is that our food regulatory systems act in spasms, reacting to crises and scandals to create fits of public outrage to propel improvements. We should not depend on coffins as the impetus for improving food safety. We should not depend on scandals as the impetus for improving the honesty of food presentation.

## V. Democratising food safety

For all the above reasons, government regulatory systems often stray from democratic outcomes. Blame doesn't lie with honourable government officials but with bureaucratic systems that cannot be expected to reliably represent republican determination of the public interest. Too often they result in an equilibrium of private interests with government interests rather than the public interest.

The solution is more citizen involvement. After all, citizens and not their bureaucratic surrogates are in the public interest. Democratisation of food regulation is needed; that is, a means for citizens to participate directly in food regulation. An effective means for citizens to participate directly would be access to the courts through a private cause of action in the public food laws. Citizen actions can help ensure that food law enforcement democratically reflects the public interest rather than an equilibrium of private interests with government interests.

For more than 50 years, US environmental laws have allowed citizens to sue on behalf of the government for violations of those laws.[17] Beginning with the Clean Air Act in 1970, all the major US environmental laws were given a citizen suit provision, specifically the Federal Water Pollution Control Act, commonly known as the Clean Water Act,[18] the Resource Conservation and Recovery Act,[19] and the Comprehensive Environmental Response, Compensation and Liability Act,[20] the Toxic Substances Control Act,[21] and the Surface Mining Control and Reclamation Act.[22]

Although only a rough snapshot of the relative importance of private enforcement, in 2018 the United States was a plaintiff in 3,298 of the 179,308 complaints asserting statutory claims filed in US district courts.[23] Enforcement in the US federal courts is dominated by private plaintiffs.

Private enforcement supplements not only agency resources but supplements agency expertise. Especially regarding situational knowledge of violations, citizen actions enhance

[17] The Clean Air Act was enacted in 1970, 42 USC §§ 7401–7671.
[18] 33 USC §§ 1251–1387.
[19] 42 USC §§ 6901–6992.
[20] 42 USC §§ 9601–9675.
[21] 15 USC 33 2601–2692.
[22] 30 USC §§ 1201–1328.
[23] Michael Sant'Ambrogio, "Private Enforcement in Administrative Courts" (2019) 72 Vand L Rev 425.

the scope of enforcement. Diversifying enforcement also reduces the risk of agency capture.[24] Moreover, citizen actions can remedy agency suboptimisation and inaction.

### 1. Can there be an implied citizens' right of action?

While citizens' suits have been effective in environmental laws, the US Federal Food, Drug, and Cosmetic Act (FDCA) does not explicitly create a private cause of action. FDCA section 310 reads, "[A]ll such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States."[25] This can be interpreted to mean that only the US Attorney General has the authority to enforce the act and not citizens. Arguably, there is a glimmer of ambiguity in the use of the word "shall" rather than "must."[26] However, nothing in the legislative history indicates an intent to create a private cause of action.[27] Before the passage of the FDCA, Congress considered and rejected a version that would have allowed a private right of action.[28] Moreover, in 1990, Congress amended section 310 to permit actions by a US "State ... in its own name and within its jurisdiction" under certain sections of the FDCA,[29] yet it made no change regarding private actions.

The Supreme Court of the United States indirectly addressed this issue in *Merrell Dow Pharmaceuticals, Inc. v Thompson.* The Court held that there was no federal cause of action for FDCA violations as an element of a state-based cause of action sufficed to confer federal-question jurisdiction.[30] Although the decision did not consider whether the Act alone authorised a citizen suit, no federal court has found an implied private cause of action. In each case raising a private claim of action, the court denied the FDCA permits a private action.[31]

In theory, the federal courts could use their powers of equity to recognise an implied right of action that would further the purpose of the federal Food, Drug, and Cosmetic Act (FDCA).[32] However, the Supreme Court of the United States allows inferring an implied right of action only when Congress intended such a right.[33] The plain language of the statute and the legislative history indicate that Congress intended no private cause of action under the FDCA. The inescapable conclusion is that the FDCA has no private right of action.

### 2. Creating a citizens' right of action

Accordingly, the pathway to a right of action is through Congress amending the Act. A citizen suit provision would be consistent with the intent of the FDCA. It would alleviate

[24] Ibid.

[25] 21 USC § 337(a).

[26] Bruce Dennis Sales, "Does the FDC Act Create a Private Right of Action" (1973) 28 Food Drug Cosm L J 501.

[27] Ibid 503.

[28] *Baily v Johnson* (1995) 48 F.3d 965 (6th Cir.) (citing Hearings on S.1944 Subcommittee of Committee on Commerce 73d Cong., 2d Sess.); Sales (n 26) 505–508.

[29] 21 USC § 337(b).

[30] *Merrell Dow Pharmaceuticals, Inc. v Thompson* (1986) 478 US 804, 810.

[31] See, e.g., *Pacific Trading Co. v Wilson and Co.* (1976) 547 F.2d 367, 370–71 (7th Cir.); *Griffin v O'Neal, Jones and Feldman, Inc.* (1985) 604 F.Supp. 717 (S.D. Ohio); *Keil v Eli Lilly & Co.* (1980) 490 F.Supp. 479, 480 (E.D.Mich.); *National Women's Health Network, Inc. v A. H. Robins Co.* (1982) 545 F.Supp. 1177 (D. Mass.); *American Home Products Corp. v Johnson and Johnson* (1977) 436 F.Supp. 785, 791 (S.D.N.Y.); *Clairol, Inc. v Suburban Cosmetics and Beauty Supply, Inc.* (1968) 278 F.Supp. 859, 860–61 (N.D. Ill.).

[32] Article III, § 2, of the US Constitution provides that the federal judicial power shall extend to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

[33] *Touche Ross & Co. v Redington* (1979) 442 US 560.

some of the burden on the FDA for enforcement, complement inadequate agency resources and incomplete enforcement, foster more prompt agency action, and reinforce uniform interpretation of the law.[34]

Proof of the value and effectiveness of citizen suits can be found in the environmental laws. The wordings of these environmental law citizen-suit provisions derive from and are close to the text in the Clean Air Act.[35] The first part of the provision is straightforward and simply provides that any citizen may bring a civil action on his or her own behalf against a person who violates the act. To prevent conflict with the government, the second part requires that notice must be given to the applicable agency before commencing legal action. In addition, an action cannot be brought if the agency has already commenced or is diligently prosecuting that specific matter in court or has entered a consent order with the violator.

A third part provides that when enforcers of the law prevail in their lawsuits, they may recover their cost of litigation, including reasonable attorney fees.[36] Without such fee shifting, the cost of litigation could make citizen suits impractical for addressing many problems.[37] The dollar value of a single consumer's damage award can be too small to cover the cost of litigation; however, the cumulative effect of a violation can have a significant impact on public health. For example, pastries labeled as "low fat" or "no fat" but that contain significant saturated fat content can, unknown to the consumers, increase their risk of cardiovascular disease.[38] A citizen suit provision must contain a way for citizens to pay reasonable attorney fees.

Although providing citizens' rights of action might seem like a recipe for a flood of litigation, the experience with US environmental laws indicates the opposite. Implementation of the citizen suits has discouraged frivolous lawsuits, and the courts were not inundated with private suits.[39] We can expect a similar effect with the FDCA. Because there is no citizen action in the federal law, lawsuits are brought under parallel state laws. The absence of an overarching national lawsuit can lead to a proliferation of multiple state lawsuits. In addition, differing resolution in various states creates non-uniform results. Moreover, with state law lawsuits, there is no notification or involvement of the FDA. Lawsuits under state law have been brought prematurely while the FDA is in the process of resolving an issue.[40]

Another unfounded fear is the spectre of lawsuit-happy plaintiffs' attorneys circling like sharks. However, citizen suits are also brought by companies facing unfair competition. For example, a commercial bakery's analytical laboratory may discover a competitor selling "low fat" and "no fat" doughnuts that are, in truth, full-fat doughnuts. Similarly, industry leaders may develop citizen actions to self-police in preference to government oversight. The National Advertising Division of the Council of Better Business Bureaus operates a voluntary oversight mechanism for a similar purpose.

### 3. *Agency administrative courts*

In addition to recourse to the courts, a similar but partial measure of benefit could be achieved with the creation of citizen right of action through agency administrative

[34] Robert D. Snook, "Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce" (1998) 20 W New Eng L Rev 311.

[35] 33 USC § 1365.

[36] Ibid.

[37] Adam Babich, "Citizen Suits: The Teeth in Public Participation" (1995) 25 Envtl L Rep News & Analysis 10141.

[38] James Springer, "The Success of the Citizen Suit: Protecting Consumers from Inaccurate Food Labeling by Amending the Federal Food, Drug, and Cosmetic Act" (2013) 68 Food & Drug L J 401.

[39] Ibid.

[40] Ibid.

adjudication. Agency adjudication has the advantage of the agency's specialised expertise and being more informal, less costly, and more expeditious than the courts. It would also permit the agency to implement a coherent and uniform national policy.[41] In addition, agency adjudication requires the agency to go on the record with the facts and reasoning behind policy decisions. This promotes some measure of accountability by creating more transparency in agency actions and inactions.[42]

A downside of agency adjudication is that there still exists the risk of capture and suboptimisation. One of the purposes of private enforcement is to counter agency capture and suboptimisation. Putting agencies back in charge is a bit like putting the fox into the henhouse.[43] There are egregious examples of agency inaction on administrative proceedings. For example, with the change in presidential administration in 2016, the Department of Education (DOE), which has exclusive authority to initiate administrative proceedings against schools to recoup student loans in cases of fraud or misrepresentation, for nearly a year did not adjudicate a single student borrower claim of fraud. The backlog of claims grew to more than 87,000.[44]

In the end, and most importantly, judicial review provides the most vigorous check on agency inaction.

## VI. Conclusion

The time is due for a private cause of action in food law for when the government fails to act on violations. Citizens, not their bureaucratic surrogates, are the public interest. Oversight of the FDA and other regulatory agencies occurs, but, unfortunately, these controls are designed to protect against capture and cannot protect against inadequate resources or prevent bureaucratic sub-optimising.

Citizens have an interest in the cessation of unsafe food practices and should not have to wait until illness or death strikes before taking action. Citizen suits can allow persons who lack injury in fact from a foodborne illness to sue instead for an injury in law based on violations of the food law that undermine the prevention of illness.

"Citizen suit" may conjure the image of plaintiffs' attorneys and ambulance chasers. When in fact, it is industry insiders who often know more about the actions of their competitors than the government regulators. Through citizen suits, companies can insist that rogue competitors play by the rules. A citizen suit provision in the FDCA would also create more uniformity and discourage frivolous lawsuits similar to what is observed with rights of action in federal environmental laws. While the creation of a citizen suit in US food law is novel, the concept is not new and has been successful with US environmental laws.

A citizens' right of action under the food law would create a trilateral food regulatory system. A three-legged stool is substantially stronger than a two-legged one. A private cause of action will allow enforcement when the government does not act on violations. Access to the courts can provide the best solution to the risk of agency capture, inadequate government resources, and the dilemma of the insider perspective.

There is a commonality of interest between the food industry and the consumer desire for stringent food safety standards. The short-term cost of meeting food safety standards

[41] Sant'Ambrogio, n 23.

[42] Glen Staszewski, "Reason-Giving and Accountability" (2009) 93 Minn L Rev 1253, 1281

[43] Ibid. 621 (citing David Freeman Engstrom, Agencies as Litigation Gatekeepers (2013) 123 Yale LJ 616 ("Given that private enforcement is designed at least in part to counter possible agency capture, bringing agencies back into the picture risks returning the fox to the henhouse.").

[44] Sant'Ambrogio, n 23, 424.

will result in long-term benefits of providing for consumer and societal concerns plus achieving improved long-term competitive advantage.[45]

This approach relies on one of our oldest legal traditions – that courts are a proper means for citizens to participate in decision-making that affects their lives. For the above reasons, I propose adding a citizens' right of action to the regulatory food law, which in the US, is the Federal Food, Drug, and Cosmetic Act.

[45] Michael E. Porter, *The Competitive Advantage of Nations* (2011).

**Cite this article:** ND Fortin (2024). "Democratising Food Safety: Why We Need to Look Beyond Government Regulation and Provide a Citizen Right of Action". *European Journal of Risk Regulation* **15**, 222–231. https://doi.org/10.1017/err.2024.41