

# THE SYMBOLIC GARDEN: AN INTERSECTION OF THE FOOD MOVEMENT AND THE FIRST AMENDMENT

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## THE SYMBOLIC GARDEN: AN INTERSECTION OF THE FOOD MOVEMENT AND THE FIRST AMENDMENT

*Jaime Bouvier\**

*What I stand for / is what I stand on.* – Wendell Berry<sup>1</sup>

### I. INTRODUCTION

What is communicated when a neighbor raises raspberries instead of roses on the porch trellis, grows lacinato kale rather than creeping bentgrass in the front yard, or keeps Buckeye hens rather than a Bulldog? This essay asserts that these and other urban agricultural practices are expressive—that they are not just ends in themselves but are communicative acts. These acts are intended to educate neighbors, assert a viewpoint, establish identity, and are widely viewed as symbols of support for a social and political movement—what Michael Pollan has dubbed the “Food Movement.”<sup>2</sup> And, as symbolic acts, they deserve protection under the First Amendment.

This article will first examine the recognition of the Food Movement as a social and political movement. It will then look at how gardens and other urban homesteading practices, like raising chickens and bees, are broadly asserted and accepted as symbols of the Food Movement. Finally, it will assess how First Amendment principles will apply to these urban agricultural practices and the degree of constitutional protection they should receive.

*Good food is a right, not a privilege.* – Alice Waters<sup>3</sup>

### II. THE FOOD MOVEMENT: THE BELIEF THAT THE CONVENTIONAL FOOD SYSTEM IS UNHEALTHY AND UNSUSTAINABLE AND THE ENDEAVOR TO CREATE SUSTAINABLE ALTERNATIVES

We are in the midst of a Food Movement—both nationally<sup>4</sup> and

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1. Wendell Berry, *Below*, in *THE SELECTED POEMS OF WENDELL BERRY* 142 (1998).

2. Michael Pollan, *The Food Movement Rising*, N. Y. REVIEW OF BOOKS, Jun. 10, 2010, <http://www.nybooks.com/articles/archives/2010/jun/10/food-movement-rising/?pagination=false>.

3. Nancie Kerper, *Voting With Your Fork*, in *FODOR'S SOUTHWEST FRANCE: THE COLLECTED TRAVELER: THE VERY BEST WRITINGS AND RESOURCES* 130 (Barrier Kerper ed., 2003).

4. See e.g., Michael Pollan, *Vote for the Dinner Party*, N.Y. TIMES (Oct. 10, 2012), [http://www.nytimes.com/2012/10/14/magazine/why-californias-proposition-37-should-matter-to-anyone-who-cares-about-food.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/10/14/magazine/why-californias-proposition-37-should-matter-to-anyone-who-cares-about-food.html?pagewanted=all&_r=0) [hereinafter *Dinner Party*]; Rebecca Solnit, *Revolutionary Plots*, ORION MAG., Jul./Aug. 2012, available at <http://www.orionmagazine.org/index.php/articles/article/6918>; TANYA DENCKLA COBB, *RECLAIMING OUR FOOD: HOW THE GRASSROOTS FOOD MOVEMENT IS CHANGING THE WAY WE EAT* (2011); Michael Pollan, *The Food Movement Rising*, N.Y. REVIEW OF BOOKS (June 10, 2010), <http://www.nybooks.com/articles/archives/2010/jun/10/food-movement-rising/?pagination=false> [hereinafter *Movement Rising*]; AT ISSUE ENV'T, *THE LOCAL FOOD MOVEMENT* (Amy Francis,

internationally.<sup>5</sup> Michael Pollan, who has been an instigator, catalyst, and documentarian of the movement, describes it as an economic, social, and burgeoning political movement.<sup>6</sup> While the movement is not fully coherent, nor centrally organized, it shares common goals. Like many movements, the goals are political, but also more than political. Pollan writes that people are attracted to the movement because it is also striving for something much broader and deeper than just seeking a change in the law:

It would be a mistake to conclude that the food movement's agenda can be reduced to a set of laws, policies, and regulations, important as these may be. What is attracting so many people to the movement today (and young people in particular) is a much less conventional kind of politics, one that is about something more than food. The food movement is also about community, identity, pleasure, and, most notably, about carving out a new social and economic space removed from the influence of big corporations on the one side and government on the other.<sup>7</sup>

He later states more succinctly, "Put another way, the food movement has set out to foster new forms of civil society."<sup>8</sup>

Political scientist Janet Flammang, in her book *The Taste for Civilization: Food, Politics, and Civil Society*, views the food movement as a collective yearning to return to a more civil society.<sup>9</sup> She asserts "the mealtime rituals of food preparation, serving and dining—lay the foundation for a proper education on the value of civility, the importance of the common good, and what it means to be a good citizen."<sup>10</sup> And, because our food system has become "industrialized and profit-centered," and food-work and the rituals surrounding it have been devalued, "civility is eroding."<sup>11</sup>

In finding that the values that underlie the Food Movement provide a path to civility, Flammang points to the work of recognized leaders within the movement such as Carlo Petrini, the founder of Slow Food, an organization that started in Italy to protest McDonald's but is now a global movement to create and preserve alternate food channels that benefit, celebrate, and bind local communities.<sup>12</sup> Flammang quotes the Slow Food Manifesto to show that the values of the Food Movement are political and civic values:

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ed., 2010); ROBERT GOTTLIEB & ANUPAMA JOSHI, *FOOD JUSTICE* (2010); SANDOR ELLIX KATZ, *THE REVOLUTION WILL NOT BE MICROWAVED: INSIDE AMERICA'S UNDERGROUND FOOD MOVEMENTS* (2006).

5. See, e.g., MATTHEW REED, *REBELS FOR THE SOIL: THE RISE OF THE GLOBAL ORGANIC FOOD AND FARMING MOVEMENT* (2010); CARLO PETRINI, *TERRA MADRE, FORGING A NEW GLOBAL NETWORK OF SUSTAINABLE FOOD COMMUNITIES* (2010).

6. Pollan, *supra* note 4.

7. Pollan, *supra* note 2.

8. *Id.*

9. JANET A. FLAMMANG, *THE TASTE FOR CIVILIZATION: FOOD, POLITICS, AND CIVIL SOCIETY 2* (2009).

10. *About*, *THE TASTE FOR CIVILIZATION* (Jan. 31, 2010), <http://www.tasteforcivilization.com/about/>.

11. *Id.*

12. Flammang, *supra* note 9, at 70. See also SLOW FOOD, <http://www.slowfood.com> (last visited Dec. 27, 2012).

Our century, which began and has developed under the insignia of industrial civilization, first invented the machine and then took it as its life model. We are enslaved by speed and have all succumbed to the same insidious virus: Fast Life, which disrupts our habits, pervades the privacy of our homes and forces us to eat Fast Foods. . . . A firm defense of quiet material pleasure is the only way to oppose the universal folly of Fast Life. . . . Our defense should begin at the table with Slow Food. Let us rediscover the flavors and savors of regional cooking and banish the degrading effects of Fast Food. In the name of productivity, Fast Life has changed our way of being and threatens our environment and our landscapes. So Slow Food is now the only truly progressive answer.<sup>13</sup>

She also points to the work of Alice Waters, a chef who founded the restaurant Chez Panisse, and her *Delicious Revolution*, a revolution that places our relationship to local farmers and fresh local organic food at the center of its philosophy.<sup>14</sup> In her book, Flammang quotes Alice Waters to support her assertion that the Food Movement is the basis of a new kind of politics—one that places sustainability, connection, and civility at its center. She states that if you choose to eat mass-produced fast food, you are supporting

a network of supply and demand that is destroying local communities and traditional ways of life all over the world—a system that replaces self-sufficiency with dependence. And you are supporting a method of agriculture that is ecologically unsound—that depletes the soil and leaves harmful chemical residues in our food. But if you decide to eat fresh food in season—and only in season—that is locally grown by farmers who take care of the earth, then you are contributing to the health and stability of local agriculture and local communities.<sup>15</sup>

Flammang also uses a quote from Alice Waters to support the idea that the food movement is political and, in fact, should be the central concern of the polity:

Food . . . [is] the center of a wheel with all these spokes going out. It addresses all of the other problems that we're having: about health, education, and the environment. . . . People who do not see eating as part of politics are certainly missing out on a way of connecting with people and seducing them to your point of view because everyone wants to eat good food. They need to eat. So it's just a mystery why politics are really not about food policy. And of course I see it as the center of politics. I think that when you make the right decisions about what you are going to eat, you make the right decisions about everything that you are doing in your life. It's a place where you can find meaning in your life.<sup>16</sup>

Flammang argues that the central tenets of the food movement, placing appreciation for the way food is grown, prepared, and shared at the center of our lives, is necessary to reverse the decline in civility.<sup>17</sup>

Matthew Reed, a sociologist, in his book, *Rebels for the Soil*, defines the

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13. Flammang, *supra* note 9, at 70.

14. *Id.* at 189. See also Alice Waters *Executive Chef, Founder and Owner*, CHEZ PANISSE, <http://www.chezpanisse.com/about/alice-waters/> (last visited Jan. 31, 2013).

15. Flammang, *supra* note 9, at 186 (citing Alice Waters, Address Delivered at Mills College Commencement: The Ethics of Eating (May 22, 1994)).

16. Flammang, *supra* note 9, at 189.

17. *Id.*

movement as global—and compares it to the civil rights movement in that it is “a collection of people who seek a mutual set of goals or pursue collective ideas,”<sup>18</sup> who “undertake purposeful social action to advance their aims”<sup>19</sup> and who “create a range of organizations to sustain and further not only their ideas but also to support their sense of togetherness.”<sup>20</sup> Reed also asserts that, like the civil rights movement, it is not just a national struggle to change laws, but an international movement to change society.<sup>21</sup>

In recognition of the food movement, news organizations and universities are responding. The New York Times has dedicated a full-time columnist—Mark Bittman—to explore issues related to food, health, and the environment.<sup>22</sup> His column is featured in the Opinion Pages: a section dedicated to political commentary.<sup>23</sup> The University of California at Berkeley has an online course entitled, *Edible Education: The Rise and Future of the Food Movement*, featuring recognized leaders of the movement such as Carlo Petrini and Alice Waters, already mentioned, and Marion Nestle, a nutritionist who has written several books about how the industrial food system negatively affects public and individual health.<sup>24</sup> It also features Ann Cooper, who founded lunchbox.org to find ways to link school cafeterias to local and organic food.<sup>25</sup>

While this movement has recognized leaders, it is not just about a few authors who have written books documenting abuses in our current food system; it involves the work of many communities, organizations, and individuals. Food Policy Councils, which are quasi-governmental organizations, are being established in many cities and states across the country to help create and support alternate local food systems.<sup>26</sup> Numerous non-profit organizations support these alternate food

18. REED, *supra* note 5, at 11.

19. *Id.* at 10.

20. *Id.*

21. *Id.* at 27.

22. Mark Bittman, N.Y. TIMES,

[http://topics.nytimes.com/top/reference/timestopics/people/b/mark\\_bittman/index.html](http://topics.nytimes.com/top/reference/timestopics/people/b/mark_bittman/index.html) (last visited Jan. 31, 2013).

23. *E.g.*, Mark Bittman, *Lawns Into Gardens*, N.Y. TIMES, Jan. 29, 2013, available at <http://opinionator.blogs.nytimes.com/2013/01/29/lawns-into-gardens/>; Mark Bittman, *Everyone Eats There*, N.Y. TIMES, Oct. 10, 2012, available at <http://www.nytimes.com/2012/10/14/magazine/californias-central-valley-land-of-a-billion-vegetables.html?ref=markbittman>; Mark Bittman, *GMOs, Let's Label 'Em*, N.Y. TIMES, Sept. 16, 2012, available at

<http://query.nytimes.com/gst/fullpage.html?res=9500E4DE1031F935A2575AC0A9649D8B63&ref=markbittman>; Mark Bittman, *Celebrate the Farmer*, N.Y. TIMES, Aug. 21, 2012, available at <http://opinionator.blogs.nytimes.com/2012/08/21/celebrate-the-farmer/?ref=markbittman>.

24. MARION NESTLE, *SAFE FOOD: THE POLITICS OF FOOD SAFETY* (2010) [hereinafter *FOOD SAFETY*]; MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* (2003) [hereinafter *FOOD POLITICS*].

25. *About the Lunch Box Project and The Food, Family, Farming Foundation*, THE LUNCHBOX.ORG, <http://www.thelunchbox.org/about-us> (last visited Dec. 27, 2012).

26. *See State, Local and Native American Tribal Food Policy Council Profiles* STATE & LOCAL FOOD POLICY COUNCILS, <http://www.statefoodpolicy.org/?pageID=profiles> (last visited Dec. 27, 2012); Kimberly Hodgson, *Food Policy Councils, Helping local, regional, and state governments address food system challenges*, AMERICAN PLANNING ASSOCIATION, available at

channels, which include farmer's markets, Community Supported Agriculture (CSA) programs, urban farms, community gardens, and individual gardeners in urban environments.<sup>27</sup> And in an effort to reconnect with where their food comes from, individuals are seeking ways to grow and raise more of the food they eat themselves.<sup>28</sup>

While leaders of this movement come from different places and approach their activism from different angles, most agree that, at its heart, this movement is a challenge to and a denouncement of the current industrial food system—what Pollan calls “Big Food.”<sup>29</sup> This challenge is grounded in the belief that the existing food system, including the way food is grown, processed, transported, sold, prepared, and consumed is unhealthy and unsustainable.<sup>30</sup> Some of the concerns come from a fear that the current method of growing commodity crops like corn and soybeans as a mono-culture crop, heavily dependent on petroleum-based fertilizers and chemical herbicides, is depleting the soil and causing irreparable harm to biodiversity and the environment.<sup>31</sup> There are also concerns that the overproduction of these commodity crops is causing an abundance of corn, providing a cheap, albeit unnatural, food source for livestock.<sup>32</sup> And this abundance is leading to raising livestock in densely populated indoor Confined Animal Feeding Operations (CAFOs), which—because so many animals are confined in a small space—makes it difficult for the proprietors to maintain

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<http://www.planning.org/nationalcenters/health/briefingpapers/foodcouncils.htm> (last visited Dec. 27, 2012).

27. There are hundreds, if not thousands, of non-profit organizations supporting different aspects of the food movement. As befitting a movement concerned with strengthening local communities and reclaiming a sense of place, many of these are hyper-local. *E.g.*, LEAF: LAKEWOOD EARTH AND FOOD COMMUNITY, <http://www.leafcommunity.org> (last visited Feb. 2, 2013) (managing community gardens, CSA programs, and a farmer's market, and providing education about growing and preparing food in the city of Lakewood, Ohio). A very select list of some of the more well-recognized ones with national influence include the following: AM. COMMUNITY GARDENING ASS'N, <http://www.communitygarden.org/> (last visited Feb. 4, 2013) (supporting community gardens); FOOD ROUTES NETWORK, <http://www.foodroutes.org/> (last visited Feb. 14, 2013) (supporting local farmers' markets); GROWING POWER, INC., <http://www.growingpower.org> (last visited Feb. 10, 2013) (supporting urban farms); KITCHEN GARDENERS INT'L, <http://kgi.org/> (last visited Feb. 4, 2013) (supporting individual gardeners); LOCALHARVEST, <http://www.localharvest.org> (last visited Feb. 4, 2013) (supporting local CSA programs); NAT'L ASS'N FARMERS' MARKET NUTRITION PROGRAMS, <http://www.nafmnp.org/about> (last visited Feb. 4, 2013).

28. Barbara Kingsolver is a widely regarded spokesperson in this movement when she chronicled her year of attempting to raise all of the food for herself and her family. But she did so in a rural setting. BARBARA KINGSOLVER WITH STEVEN L. HOPP & CAMILLE KINGSOLVER, *ANIMAL, VEGETABLE, MIRACLE, A YEAR OF FOOD LIFE* (2007). Many others have documented their quests to raise their own food in urban settings. *E.g.*, BRETT L. MARKHAM, *MINI-FARMING SELF-SUFFICIENCY ON ¼ ACRE* (2010); NOVELLA CARPENTER, *FARM CITY: THE EDUCATION OF AN URBAN FARMER* (2009); HEATHER C. FLORES, *FOOD NOT LAWNS: HOW TO TURN YOUR YARD INTO A GARDEN AND YOUR NEIGHBORHOOD INTO A COMMUNITY* (2006).

29. Pollan, *supra* note 4.

30. Pollan, *supra* note 2, at 5; REED, *supra* note 5, at 2.

31. MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* 47-49 (2006).

32. *See id.* at 50.

sanitary and humane conditions.<sup>33</sup> And because of their unnatural diet, animals raised in CAFOs often have diseases such as variants of E. coli that potentially can harm the people who eat them.<sup>34</sup> Some of the concerns stem from the unknown risks of genetically modifying our food.<sup>35</sup> Some stem from the way much of our food is grown so that it can survive being shipped across vast distances and still look appealing in the grocery store.<sup>36</sup> Some are concerned with the security of our food system, because so much of our food travels so far from producer to consumer that we have made ourselves vulnerable to food shortages caused by terrorist attacks or natural disasters.<sup>37</sup> Some are concerned with the way that much of our food is heavily processed, stripped of nutrients, while adding fat and sugar to chemically engineer a product that people will want to eat.<sup>38</sup> And, some are concerned that the average person's attenuation and distance from how food is grown, produced, and prepared is a factor in why many of these problems currently exist.<sup>39</sup>

Portions of the food movement address these concerns through advocating for organic food,<sup>40</sup> campaigning against genetically modified crops,<sup>41</sup> reforming the school lunch program,<sup>42</sup> reforming the farm bill,<sup>43</sup> and encouraging locavorism<sup>44</sup>

33. See generally ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* (Harper Perennial 2005) (2001); *FOOD, INC.* (Magnolia Pictures 2009).

34. E.g., Doug Gurian-Sherman, *CAFOS Uncovered, The Untold Costs of Confined Animal Feeding Operations*, UNION OF CONCERNED SCIENTISTS 5 (Apr. 2008), [http://www.ucsusa.org/assets/documents/food\\_and\\_agriculture/cafos-uncovered.pdf](http://www.ucsusa.org/assets/documents/food_and_agriculture/cafos-uncovered.pdf); IOWA STATE UNIV. & THE UNIV. OF IOWA STUDY GROUP, *IOWA CONCENTRATED ANIMAL FEEDING OPERATIONS AIR QUALITY STUDY: FINAL REPORT 37, 122* (Feb. 2002), available at <http://www.public-health.uiowa.edu/ehsrc/cafostudy.htm> (finding extensive literature documenting acute and chronic respiratory diseases and dysfunction among poultry workers exposed to complex mixtures of particulates, gases, and vapors within CAFO units).

35. See, e.g., MAE-WAN HO & LIM LI CHING, *GMO FREE: EXPOSING THE HAZARDS OF BIOTECHNOLOGY TO ENSURE THE INTEGRITY OF OUR FOOD SUPPLY* (2004).

36. See, e.g., G.C., *Babbage Blog: Cardboard Tomatoes, Not Like They Used To Be*, *ECONOMIST* (Jun. 28, 2012, 10:16 AM), <http://www.economist.com/blogs/babbage/2012/06/cardboard-tomatoes>.

37. Cf. David Orr, *Security by Design*, 3 *SOLUTIONS* 1 (Jan. 2012) available at <http://www.thejournal.com/node/1041> (discussing the nation's "capacity for self-renewal"); *Community Food Security: Issues of Concern*, KERR CENTER SUSTAINABLE AGRIC., [http://www.kerrcenter.com/community\\_food/definitions.htm](http://www.kerrcenter.com/community_food/definitions.htm) (last visited Dec. 28, 2012) (discussing the need for community-based strategies to address food availability).

38. See, e.g., *FOOD POLITICS*, *supra* note 24, at 295.

39. See, e.g., MICHAEL POLLAN, *IN DEFENSE OF FOOD: AN EATER'S MANIFESTO* 160 (2008) [hereinafter *IN DEFENSE OF FOOD*].

40. See *The Principles of Organic Agriculture*, INT'L FED'N ORGANIC AGRIC. MOVEMENTS, [http://www.ifoam.org/about\\_ifoam/principles/index.html](http://www.ifoam.org/about_ifoam/principles/index.html) (last visited Dec. 28, 2012); *About the OCA: Who We Are and What We're Doing*, ORGANIC CONSUMERS ASSOCIATION, available at <http://www.organicconsumers.org/aboutus.cfm> (last visited Dec. 28, 2012).

41. E.g., *History of the Non-GMO Project*, NON-GMO PROJECT, <http://www.nongmoproject.org/about/history/> (last visited Dec. 28, 2012).

42. E.g., *About Us*, NAT'L FARM TO SCHOOL NETWORK, <http://www.farmtoschool.org/aboutus.php> (last visited Dec. 28, 2012).

43. See generally DANIEL IMHOFF, *FOOD FIGHT, THE CITIZEN'S GUIDE TO THE NEXT FOOD AND FARM BILL* (2012).

44. See generally KATHERINE GUSTAFSON, *CHANGE COMES TO DINNER: HOW VERTICAL FARMERS, URBAN GROWERS, AND OTHER INNOVATORS ARE REVOLUTIONIZING HOW AMERICA EATS* (2012).

and urban agriculture.<sup>45</sup> While each of these is a different approach to reforming the conventional food system, these portions are all part of the same meal; they are all concerned with communicating to others that our food system is unsustainable and that we, collectively, must do something about it—either as growers, preparers, or eaters of food.

This movement has already had a political impact. The government is responding symbolically, with changes in policy and with changes to the law. As discussed in more detail below, the President and the Secretary of Agriculture have established organic gardens on government property with the purpose of educating others about the value of local and organic food.<sup>46</sup> The USDA has established a “Know Your Food, Know Your Farmer” initiative to promote sustainable local and regional food systems.<sup>47</sup> The Congressional Research Service has recently released a policy paper about what the government is currently doing to support local food systems and what more the government could do in the next farm bill.<sup>48</sup> Federal legislators have proposed bills to support urban agricultural practices and local food.<sup>49</sup> And many local governments have recently changed their ordinances to allow for and support urban agricultural initiatives like micro-livestock and community gardens.<sup>50</sup>

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45. See JENNIFER COCKRALL-KING, *FOOD AND THE CITY: URBAN AGRICULTURE AND THE NEW FOOD REVOLUTION* (2012); MARK GORGOLEWSKI ET AL., *CARROT CITY: CREATING PLACES FOR URBAN AGRICULTURE* (2011).

46. See *infra* Part III.

47. *Know Your Farmer, Know Your Food*, U.S.D.A., <http://www.usda.gov/wps/portal/usda/usdahome?navid=KNOWYOURFARMER> (last visited Dec. 28, 2012).

48. RENEE JOHNSON ET AL., CONG. RESEARCH SERV., R42155, *THE ROLE OF LOCAL FOOD SYSTEMS IN U.S. FARM POLICY* (Apr. 4, 2012), available at <http://www.nationalaglawcenter.org/assets/crs/R42155.pdf>.

49. *E.g.*, Senator Brown and Pingree, Local Farm, Foods, and Jobs Act of 2011, H.R. 3286, 112th Cong. (2011); Marcy Kaptur, Community Agriculture Development and Jobs Act, H.R. 3225, 112th Cong. (2011); Senator Michael Bennet, Locally Grown Foods for Older Americans Act, S. 3592, 112th Cong. (2012); Peter Welch, Local School Foods Act, H.R. 3092, 112th Cong. (2011). See also Senator Saxby Chambliss, Proposed Senate amend. 2432 to S.3240, 112th Cong. (2012) (“[t]o repeal mandatory funding for the farmers market and local food promotion program”).

50. *E.g.*, KIMBERLY HODGSON ET AL., *URBAN AGRICULTURE: GROWING HEALTHY SUSTAINABLE PLACES*, (AM. PLANNING ASS’N PLANNING ADVISORY SERV., Report No. 563, Jan. 2011) [hereinafter *GROWING HEALTHY SUSTAINABLE PLACES*] (surveying various cities’ urban agricultural ordinances); Anne Marie Chaker, *Backyard Farming Gets Fancy*, WALL ST. J., Jan. 29, 2013, available at [http://online.wsj.com/article\\_email/SB10001424127887323375204578271740933991354-IMyQjAxMTAzMDMwMTEzNDYyWj.html?mod=wsj\\_valettop\\_email](http://online.wsj.com/article_email/SB10001424127887323375204578271740933991354-IMyQjAxMTAzMDMwMTEzNDYyWj.html?mod=wsj_valettop_email) (reporting that “[h]undreds of local restrictions on backyard chickens have been lifted in the past five years . . .”); Department of Planning and Development, *Urban Agriculture in Seattle*, SEATTLE.GOV, <http://www.seattle.gov/dpd/planning/urbanagriculture/Overview/> (last visited Dec. 28, 2012) (describing how Seattle changed its zoning ordinances to allow for urban farms and community gardens in all zones, permit residents to sell food grown on their property, and raised the number of hens allowed per lot from 3 to 8); *Recent Updates to Cleveland’s Zoning Code*, CITY CLEVELAND CITY PLAN. COMMISSION, <http://planning.city.cleveland.oh.us/zoning/cpc.php> (last visited Dec. 28, 2012) (describing updates to zoning ordinances to allow an urban garden district and to allow residents to keep chickens, goats, and bees); Chad Deal, *City Council Unanimously Votes in Favor of Urban Agriculture Amendments*, SAN DIEGO READER (Jan. 31, 2012), <http://www.sandiegoreader.com/weblogs/news-ticker/2012/jan/31/city-council-unanimously-in-favor-of-urban-agricul/> (describing how San Diego adopted amendments to



This essay concerns individual acts within the Food Movement—asserting the ultimate control over the food system and developing a closer relationship to food by growing one’s own food.<sup>51</sup> This essay asserts that participating in the local food movement through agricultural practices, like gardening and raising micro-livestock such as chickens and bees, is a communicative act. An urban garden displayed in the front yard shows solidarity with and educates neighbors about the food movement. Such a garden is not just any communicative act; it is a statement on the political, economic, and environmental status quo—a statement that is at the core of the First Amendment’s protection of free speech.<sup>52</sup> Because the First Amendment protects communicative acts, the constitutional protection can lead to friction with local zoning ordinances that ban many of the symbols at the core of this movement.<sup>53</sup> The burgeoning recognition of the Food Movement as a social and political movement, and agricultural practices as symbols of the movement, should, therefore, lead to municipalities reconsidering bans on urban agricultural practices, both in response to political pressure from the movement itself—something that is already happening<sup>54</sup>—and in response to the unconstitutional nature of any law that bans symbolic speech.

*Certain gardens are described as retreats when they are really attacks.* – Ian Hamilton Finlay<sup>55</sup>

### III. THE SYMBOLIC GARDEN

Matthew Reed, in categorizing the Food Movement as a social and political movement, emphasizes that symbols and symbolic acts are important components of the movement. “The diffusion and formulation of symbols in a movement is an important activity and one that has a central place in the organic food and farming movement.”<sup>56</sup> The symbols specific to this movement are agricultural. Reed asserts that both the means of growing food and the food itself are symbolic: “[o]rganic food exists both as a material manifestation of the ideas of the movement but also as exemplars of its ideas, which in part explains why they are

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allow farmer’s markets on private property, make it easier to establish community gardens, and ease restrictions on chickens, goats, and bees); Charles Burrell, *Council Passes Law for Home Chickens, Bees, Pigs, Goats*, EL CERRITO PATCH (Nov. 8, 2011), <http://elcerrito.patch.com/articles/council-adopts-law-for-home-chickens-bees-pigs-goats>; Cara Mannion, *Waldo Welcomes Chickens, Goats, and Bees*, ALUCHUA COUNTY TODAY (Nov. 11, 2011, 6:53 PM), <http://www.alachuacountytoday.com/news-featured/latest/1952-waldo-welcomes-chickens-goats-and-bees>.

51. Cobb, *supra* note 4, at 12 (“Instead of despairing over a system that is out of their control, people are finding respite and renewal in seeking out what they can control.”).

52. Meyer v. Grant, 486 U.S. 414, 422 n.5 (1988) (finding that core political speech is “informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues . . .”).

53. Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TUL. L. REV. 231 (Dec. 2012) (describing how many cities ban common urban agricultural practices at the heart of the food movement).

54. See *supra* note 49.

55. MATTHEW POTTEIGER AND JAMIE PURINTON, *LANDSCAPE NARRATIVES: DESIGN PRACTICES FOR TELLING STORIES* 166 (1998).

56. REED, *supra* note 5, at 26.

often so carefully and critically scrutinized.”<sup>57</sup>

One of the foremost symbols of the Food Movement in the United States is the organic garden that First Lady Michelle Obama planted on the White House lawn in March of 2009.<sup>58</sup> Though many other presidents had gardens at the White House,<sup>59</sup> this garden is the biggest and most expansive. Notably, it is not the first White House garden grown for an expressly symbolic purpose; in 1943, Eleanor Roosevelt planted a Victory Garden on the White House lawn with the purpose of inspiring other Americans to do the same to support the war effort.<sup>60</sup> The current garden is, however, the first garden at the White House in support of the Food Movement.

It is also the first White House garden that was the result of organized advocacy efforts to raise awareness about local food. Kitchen Garden International, a non-profit group that describes its mission as one to “empower individuals, families, and communities to achieve greater levels of food self-reliance through the promotion of kitchen gardening, home-cooking, and sustainable local food systems,” claims responsibility for the White House Garden through its “Eat the View” campaign.<sup>61</sup> This campaign targeted the President and First Lady to encourage them to grow a garden on the White House Lawn and worked to achieve that goal through a White House garden petition, massive national and international press coverage, and lobbying efforts from thousands of people and gardeners.<sup>62</sup> Kitchen Gardeners International targeted the White House because “one patch of land stood out as having more symbolic power than any other...the mother of all large, grassy lawns in need of an edible makeover...”<sup>63</sup>

First Lady Michelle Obama has capitalized on the symbolic nature of the garden by using it as a tool to educate others about solutions to her signature issue in President Obama’s first term—childhood obesity. When she announced that she was planting the garden, she acknowledged its symbolic purpose by announcing that the garden was meant to educate children about the healthfulness of local produce at a time when many children suffer from obesity and diabetes caused by a poor diet.<sup>64</sup> In an interview with the New York Times, Ms. Obama said, “My hope

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57. *Id.* at 27.

58. Promila Shastri, *The White House Kitchen Garden and the Power of Symbolism*, EXAMINER.COM (Mar. 21, 2009), <http://www.examiner.com/article/the-white-house-kitchen-garden-and-the-power-of-symbolism>.

59. Tara Parker-Pope, *Growing Food on the White House Lawn*, N.Y. TIMES WELL BLOG (Jan. 23, 2009, 10:58 AM), <http://well.blogs.nytimes.com/2009/01/23/growing-food-on-the-white-house-lawn/>.

60. *Id.* See also Kate H. Brown & Andrew L. Jameton, *Public Health Implications of Urban Agriculture*, 21 J. PUB. HEALTH POL’Y 20, 22 (2000) (explaining that Victory Gardens were a symbolic gesture to support the war effort, but also greatly aided food security during the war because home gardeners were able to grow 40% of the nation’s vegetables). For a more in-depth history that connects Victory Gardens to American self-expression, see Char Miller, *In the Sweat of Our Brow: Citizenship in American Domestic Practice During WWII—Victory Gardens*, 26 J. AM. CULTURE 395, 406 (2003).

61. *About KGI*, KITCHEN GARDENERS INT’L, <http://kgi.org/about-KGI> (last visited Dec. 28, 2012).

62. *Our Successful White House Kitchen Garden Campaign*, KITCHEN GARDENERS INT’L, <http://kgi.org/white-house-kitchen-garden-campaign> (last visited Dec. 28, 2012).

63. *Id.* at Slide Presentation. Slide 3 of 48.

64. MICHELLE OBAMA, AMERICAN GROWN: THE STORY OF THE WHITE HOUSE KITCHEN GARDEN AND GARDENS ACROSS AMERICA 9 (2012) (“I hoped this garden would help begin a conversation about

... is that through children, they will begin to educate their families and that will, in turn, begin to educate our communities.”<sup>65</sup> She followed that up with saying that she wanted to share what she learned about fresh and local foods with “a broader base of people. And what better way to do it than to plant a vegetable garden in the South Lawn of the White House?”<sup>66</sup> Ms. Obama later added bees to the garden, thus also providing a symbol for the micro-livestock movement.<sup>67</sup> And this year she published a book about the garden, where she identifies gardens as part of a nationwide movement by writing, “All across this great country of ours, something truly special is taking root. And that is the story I want to tell in this book: the story of how, together, in gardens large and small, we have begun to grow a healthier nation.”<sup>68</sup> She also explicitly ties the garden to the food movement’s opposition to the conventional food system by divulging a concern of a Lieutenant General of the U.S. Army. She relates an anecdote where the officer told her that under the nation’s current food system, 41% of people applying to join the army are overweight or obese, and many have brittle bones from lack of calcium and rotting teeth from too much sugar and processed food.<sup>69</sup> Ms. Obama is demonstrating that there is something wrong with our current system and that alternative food channels, like gardening, local food, and organic food, are solutions to the problem.<sup>70</sup>

This is not the only symbolic government garden at the federal level. Tom Vilsack, the Agriculture Secretary and thus the head of the United States Department of Agriculture (USDA), has started a People’s Garden on the entire grounds of a federal building—the USDA Jamie L. Whitten Building.<sup>71</sup> The garden is meant to showcase a sustainable landscape, with plans to become fully certified as organic.<sup>72</sup> Secretary Vilsack also embraces the symbolic and communicative power of the garden when he announced that “(t)he garden will help explain to the public how small things they can do at home, at their business

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this issue [childhood obesity]—a conversation about the food we eat, the lives we lead, and how all of that affects our children.”)

65. Marian Burros, *Obamas to Plant Vegetable Garden at White House*, N.Y. Times (Mar. 19, 2009), <http://www.nytimes.com/2009/03/20/dining/20garden.html?r=2&partner=rss&remc=rss>.

66. *Id.*

67. Kim Flottum, *An Addition to Michelle Obama's White House Garden: Honey Bees*, DAILY GREEN, (Mar. 23, 2009, 8:33 AM), <http://www.thedailygreen.com/environmental-news/blogs/bees/bees-white-house-garden-88032302>.

68. OBAMA, *supra* note 64, at 19.

69. Dominique Browning, *Gardening, Michelle Obama's 'American Grown' and More*, N.Y. TIMES (June 1, 2012), [http://www.nytimes.com/2012/06/03/books/review/michelle-obamas-american-grown-and-more.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/06/03/books/review/michelle-obamas-american-grown-and-more.html?pagewanted=all&_r=0); OBAMA, *supra* note 64, at 174.

70. The conventional food industry took notice. Marc Montefusco, *Agricultural Chemical Industry Shudders at Organic White House Garden*, EXAMINER.COM (Mar. 29, 2009), <http://www.examiner.com/article/agricultural-chemical-industry-shudders-at-organic-white-house-garden> (reporting that the lobbying organization for the agricultural chemical industry sent a letter to Mrs. Obama asking her to consider tending the garden “conventionally.”).

71. Press Release, Nayyera Haq & Angela Harless, USDA, Agriculture Secretary Vilsack Expands “The People’s Garden” to Promote Healthy Food, People and Communities Across the Nation (Apr. 22, 2009), *available at* <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2009/04/0121.xml>.

72. *Id.*

or on their farm or ranch, can promote sustainability, conserve the nation's natural resources, and make America a leader in combating climate change."<sup>73</sup> The People's Garden, however, is not only located in DC, the USDA has nearly 600 People's Gardens across the country that USDA employees created. The USDA also supports nearly 700 community gardens as partners in the People's Garden Initiative.<sup>74</sup>

The symbolic power of a garden is not limited to government gardens at the federal level. Every garden has the power to educate others about local food and to signal to society that the person growing it is showing solidarity with an international social and political movement. Michelle Obama recognizes the power of other gardens by dedicating much of her book to describing other community garden projects.<sup>75</sup> The Environmental Protection Agency also recognizes the educational and symbolic value of all gardens when it states, in an information page about urban agriculture, that urban gardens can "connect cultures and encourage healthy eating habits while teaching useful skills."<sup>76</sup>

And, of course, numerous non-governmental sources recognize the symbolic power of urban agricultural practices. Rebecca Solnit, in her article *Revolutionary Plots* goes even further and writes that urban gardens are not just *a* symbol but *the* symbol for this generation.<sup>77</sup> She notes that the garden is where this generation locates their idealism: "Thought of just as means of producing food, the achievements of urban agriculture may be modest, but as means of producing understanding, community, social transformation, and catalytic action, they may be the opposite. When they're at their best, urban farms and gardens are a way to change the world."<sup>78</sup> Barbara Kingsolver, in her book *Animal, Vegetable, Miracle*, adds raising micro-livestock to the mix of symbols for this movement when she writes that raising chickens is a communicative act: "[m]aintaining a naturally breeding poultry flock is a rebellion, at the most basic level, against the wholly artificial nature of how foods are produced."<sup>79</sup>

The recognition that gardens are symbols ranges beyond politicians and writers. The American Planning Association has recognized the symbolic importance of urban agricultural practices when it announced that "backyard and community gardens in places big and small have become important symbols of the local food movement."<sup>80</sup> And people who raise backyard chickens often do so

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73. *Id.*

74. Press Release, Robert Wallace, USDA, Keep America Beautiful and the Department of Agriculture Team Up to Grow Nearly 700 People's Gardens (Dec. 7, 2010), <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2010/12/0636.xml&contentidonly=true>.

75. OBAMA, *supra* note 64.

76. *Urban Agriculture: Basic Information*, EPA, <http://www.epa.gov/brownfields/urbanag/basic.htm> (last visited Feb. 14, 2013).

77. Solnit, *supra* note 4 ("I sometimes find myself telling the students that baby boomers in their youth famously had sex, drugs, and rock-and-roll, but the young now have gardens.").

78. *Id.*

79. KINGSOLVER, *supra* note 28, at 322. She also writes more poetically later that "the heirloom turkeys are not just large birds but symbols of a precarious hold on a vanishing honesty. The chickens are secondary protagonists, the tomatoes are allegorical. The zucchini may be just zucchini." *Id.* at 335.

80. *APA Resources on Food Systems*, AM. PLAN. ASS'N, <http://www.planning.org/resources/ontheradar/food/> (last visited Mar. 18, 2013).

expressly to show they embrace the Food Movement.<sup>81</sup> Guinevere Higgins, who helped found the Charlottesville League of Urban Chicken Keepers (CLUCK), says, “This is just another great way of opting out of an industrial food system that people are really not happy about.”<sup>82</sup> Denis Stearns, a lawyer who represents victims of food-borne illnesses, writes that keeping chickens is a symbolic way of protesting the exile of agriculture from the city limits, which, because it contributes to the concept that raising livestock should be hidden from public view, allows livestock to be raised in inhumane, cruel, and ultimately unhealthy ways.<sup>83</sup> He writes, “[o]ne significant benefit, then, of backyard chickens is how they reverse, even if only to a small or symbolic degree, the banishment of agriculture from our cities and suburbs.”<sup>84</sup>

And perhaps the contentious nature of some urban agricultural practices, like front-yard gardens and backyard chickens, is because of the symbolic impact of these practices—because they are understood to be communicating condemnation of the conventional food system. Barak Y. Orbach and Frances R. Sjoberg have written several articles documenting disputes over legalizing backyard chickens in urban areas.<sup>85</sup> A central point in their articles is that the contentiousness surrounding the issue is much higher than the issue at stake.<sup>86</sup> To support this, they quote one mayor as stating that “[t]here’s a lot of anger around this issue for some reason. More so than the war by far.”<sup>87</sup> When debating whether to legalize keeping chickens in the city, one concern comes up repeatedly: the belief that chickens simply do not belong in cities.<sup>88</sup> This poorly articulated rejection of chickens (and other agricultural practices) as not belonging in cities is a rejection of some of the central tenets of the Food Movement—that we need to reconnect with how our

81. Sarah Tarver-Wahlquist, *The Many Benefits of Backyard Chickens*, GREEN AM., Jul./Aug. 2012, available at <http://www.greenamerica.org/livinggreen/benefits-of-backyard-chickens-eggs-hens.cfm> (“Most chicken-owners have the same reason for starting up their flocks: eggs. By getting eggs from your own chickens, you avoid supporting industrial farms that produce the majority of eggs sold in the US.”).

82. Samantha Koon, *Albemarle Man Fighting to Keep Backyard Chickens*, RICHMOND TIMES-DISPATCH (Nov. 26, 2012, 12:00 AM), [http://www.timesdispatch.com/news/state-regional/albemarle-man-fighting-to-keep-backyard-chickens/article\\_031a0273-0c30-5d52-8b65-bbe13da50910.html](http://www.timesdispatch.com/news/state-regional/albemarle-man-fighting-to-keep-backyard-chickens/article_031a0273-0c30-5d52-8b65-bbe13da50910.html).

83. Denis Stearns, *On Civic Agriculture: Why Backyard Chickens Matter*, FOOD SAFETY NEWS (Apr. 12, 2010), <http://www.foodsafetynews.com/2010/04/on-civic-agriculture-why-backyard-chickens-matter/#.UMIixIWGFJM>.

84. *Id.*

85. Barak Y. Orbach & Frances R. Sjoberg, *Excessive Speech, Civility Norms, and the Clucking Theorem*, 44 CONN. L. REV. 1 (Nov. 2011) [hereinafter *Clucking Theorem*]; Barak Y. Orbach & Frances R. Sjoberg, *Debating Over Backyard Chickens*, 44 CONN. L. REV. CONNTEMPLATIONS (Winter 2012), available at <http://connecticutlawreview.org/conntemplation/debating-over-backyard-chickens/> [hereinafter *Debating over Backyard Chickens*].

86. Orbach & Sjoberg, *supra* note 85, at 11 (“While we do not quantify the social costs of the debates, controversies, and disputes, we do show that they were unexpectedly high, considering the fact that the issue at stake—whether and how to permit backyard chickens—is relatively insignificant.”).

87. Orbach & Sjoberg, *supra* note 85, at 24.

88. Patricia E. Salkin., *Feeding the Locavores, One Chicken at a Time: Regulating Backyard Chickens*, 34:3 ZONING & PLAN. L. REP. 669 (Mar. 2011); Orbach & Sjoberg, *supra* note 85, at 36, 54 (citing a mayor as stating, ““You can’t raise animals or livestock in the city.”” and a Chicago alderwoman as stating, ““I think chickens should be raised on a farm.””).

food is grown and raised.<sup>89</sup> Thus, while some cities may try to cast the terms of the debate as being over whether neighbors are comfortable with a chicken coop next door or the aesthetics of a front-yard garden, this is not really what the debate is about. These debates over city ordinances are actually a debate about the larger concerns of the food movement—that the way we currently get most of our food is unsustainable and that we need to forge alternate food systems. And, at that level, it becomes apparent that city governments that ban urban agricultural practices have taken a position within the larger argument over where individuals fit within the existing food system by making it illegal for its citizens to exempt themselves from it, even symbolically. These cities have aligned themselves with the conventional food system, the status quo.

Viewing urban agricultural acts, such as front-yard gardens and backyard chickens, through the lens of the greater Food Movement, it also becomes apparent that these symbols may be offensive, and thus controversial, exactly because of their symbolic nature—because they are a condemnation of the existing food system and thus could be viewed as a denouncement or judgment of anyone who either embraces or refuses to question it. Because a neighbor's backyard chicken might cause another neighbor to feel judged over eating a Chicken McNugget, the underlying symbolism imbued in these practices may, in fact, be the reason that amending zoning ordinances to allow for them has been so contentious.

And the Food Movement is certainly not without its critics. Some have rejected it as anti-regulatory and laying the fault of obesity on the individual.<sup>90</sup> Others deride it as a passing fad for fickle hipsters.<sup>91</sup> And still others lodge that it is an elitist fascination with peasant agriculture that cannot hope to solve the world's hunger problems.<sup>92</sup> These detractors show that an urban garden is not just a banal and agreeable balm, like a politician declaring that he loves his mother and the American flag, but can be a foray into the combative political realm.

Because the speaker is known, the use of one's property to show support for a movement is, moreover, a statement of identity.<sup>93</sup> “Yards are a very public

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89. IN DEFENSE OF FOOD, *supra* note 39.

90. See, e.g., Julie Guthman, *The Food Police*, UTNE READER, Jan./Feb. 2008, available at <http://www.utne.com/2008-01-01/Politics/The-Food-Police.aspx>.

91. See, e.g., James McWilliams, *The Butcher Next Door*, SLATE MAGAZINE (June 6, 2012, 6:42 AM), [http://www.slate.com/articles/life/food/2012/06/diy\\_animal\\_slaughter\\_urban\\_hipsters\\_think\\_it\\_s\\_a\\_goo\\_d\\_idea\\_it\\_isn\\_t.html](http://www.slate.com/articles/life/food/2012/06/diy_animal_slaughter_urban_hipsters_think_it_s_a_goo_d_idea_it_isn_t.html).

92. See, e.g., PIERRE DESROCHERS & HIROKO SHIMIZU, *THE LOCAVORE'S DILEMMA: IN PRAISE OF THE 10,000-MILE DIET* (2012); Paul Collier, *The Politics of Hunger: How Illusion and Greed Fan the Food Crisis*, FOREIGN AFFAIRS, Nov./Dec. 2008, available at <http://www.foreignaffairs.com/articles/64607/paul-collier/the-politics-of-hunger>.

93. See Kelli L. Larson et al., *Residents' Yard Choices and Rationales in a Desert City: Social Priorities, Ecological Impacts, and Decision Tradeoffs*, 44 ENVTL. MGMT. 921 (2009) (“landscapes represent fashionable and symbolic expressions of personal pride and social identity.”); Christopher G. Boone et al., *Landscape, Vegetation Characteristics, and Group Identity in an Urban and Suburban Watershed: Why the 60s Matter*, 13 URBAN ECOSYSTEMS 255 (2010) (asserting that front yards are evidence of group identity. “Group identity can be expressed in a number of material ways, from gang colors, to uniforms, to flags. It can also be manifest in the landscape . . .”). See also Marta Sicinska, *Turning Beantown into Beetown: A Sociological Analysis of Urban Apiculture in Boston*, Massachusetts 20 (Apr. 5, 2012) (unpublished B.A. thesis, Smith College) (on file with the Smith

demonstration of personal values, and can be a significant source of satisfaction and of connection to the community.”<sup>94</sup> And, how people are using their front yards is changing across the country. Front yards are showcasing increasing individuation evidencing a “shift . . . from public display[s] of social conformity to private expressions of identity and personal enjoyment.”<sup>95</sup>

The idea of a garden as both a symbol of support for the food movement and a statement of personal identity is evidenced in a recent controversy in Orlando, Florida, where the city cited a couple for planting a garden in their front yard.<sup>96</sup> When describing their reason for the garden, the couple, Jennifer and Jason Helveston, said, “We want to be sustainable.” Jason calls the garden “a patriot garden” neatly referencing both the USDA’s People’s Gardens and the Victory Gardens of World War II. Jason also acknowledges that his fight to keep his front-yard garden has had communicative impact in drumming up support for the values of the Food Movement. “We didn’t want this to happen . . . but it’s a blessing. It’s gotten more people planting gardens.”<sup>97</sup>

And a garden as political protest is not a new idea. In 1979, Wendell Berry, widely considered a kind of godfather of the Food Movement, wrote an essay arguing that gardens are a protest of the conventional food system because they signal a symbolic independence from it.<sup>98</sup> In considering the ineffectiveness of his participation in a protest against building a nuclear power plant near his house, he wrote that gardens are a better form of protest because they are complete: they not only signal rejection of growing industrialization of our lives but also provide a solution.<sup>99</sup> He writes, “Some people will object at this point that it belittles the idea of gardening to think of it as an act of opposition or protest. I agree. That is exactly my point. Gardening—or the best kind of gardening—is a *complete* action. It is so effective a protest because it is so much more than a protest.”<sup>100</sup>

Gardening as a statement of social and political identity is no longer a fringe concept but is a widely accepted and recognized symbol. As Charlie Nardozzi, a

College Library system) (finding that beekeepers “typically kept bees to fulfill personal needs or for ideological reasons”).

94. Susan Clayton, *Domesticated Nature: Motivations for Gardening and Perceptions of Environmental Impact*, 27 J. ENVTL. PSYCHOL. 215, 216 (2007).

95. Jamie Kirkpatrick et al., *An Antipodean Test of Spatial Contagion in Front Garden Character*, 93 LANDSCAPE & URB. PLAN., 103, 104 (2009).

96. Steven Kurutz, *The Battlefront in the Front Yard*, N.Y. TIMES, Dec. 19, 2012, <http://www.nytimes.com/2012/12/20/garden/gardeners-fight-with-neighbors-and-city-hall-over-their-lawns.html?pagewanted=all> (last updated Jan. 10, 2013).

97. *Id.* See also Aaron Dykes, *Another Front Yard Garden Deemed Illegal*, INFOWARS.COM (Nov. 8, 2012, 1:00 PM), <http://www.infowars.com/another-front-yard-garden-deemed-illegal/> (“In the age of centralized, factory farming dominance and GMO prevalence, self-sufficiency, home gardens, raw milk and independence itself have become threats against the establishment.”); Roger Doiron, *Subversive Plots: Grow Your Own Food to Disconnect from the Industrial System*, MOTHER EARTH NEWS, Aug./Sept. 2012, available at <http://www.motherearthnews.com/organic-gardening/grow-your-own-food-zm0z12asmat.aspx?page=3> (encouraging gardeners to move gardens to the front yard to disconnect from the industrial food system).

98. Wendell Berry, *The Reactor and the Garden*, in *THE GIFT OF GOOD LAND: FURTHER ESSAYS CULTURAL AND AGRICULTURAL*, 161 (Wendell Berry, ed., 1981).

99. *Id.*

100. *Id.* at 167.

senior horticulturist at the National Gardening Association said in an interview with Time Magazine, “growing your own food can be a political statement that you have a personal connection with your food and where it’s coming from, versus going to a grocery store and grabbing whatever is on the shelf.”<sup>101</sup> The act of how to use one’s yard, to display beets or a beehive, is akin to putting up a yard sign to support a political movement. It is as much an act of expressing identity as deciding what clothes to wear or what organizations to belong to. It is declaring one’s values to one’s neighbors and the world.

*It is the nature of idea to be communicated: written, spoken, done. The idea is like grass. It craves light, likes crowds, thrives on cross breeding, grows better for being stepped on.* –Ursula K. Le Guin<sup>102</sup>

#### IV. THE PRACTICAL APPLICATION OF THE FIRST AMENDMENT TO URBAN AGRICULTURAL PRACTICES.

Urban agricultural practices are many and varied. They can include relatively uncontroversial practices such as gardening in the backyard or container gardens on the porch.<sup>103</sup> They also include more controversial practices that many localities have banned such as gardening on the front lawn or raising micro-livestock, like chickens or bees.<sup>104</sup> While this essay asserts that both the non-controversial and controversial practices carry symbolic meaning, recognizing that these practices deserve First Amendment protection will have practical impact on the more controversial practices.

Because urban agricultural practices do not involve text or talking, and do not involve artistic depictions generally viewed as having First Amendment protection such as paintings, theatre, or dance,<sup>105</sup> the first issue to determine is where these practices fall on the constitutional line between protected speech and unprotected action.<sup>106</sup> If these practices do not qualify as expressive conduct, then the First

101. M.J. Stephey, *The Incredible, Edible Front Lawn*, TIME (June 26, 2008), <http://www.time.com/time/nation/article/0,8599,1816764,00.html>. See also FOOD NOT LAWNS, <http://www.foodnotlawn.com/> (last visited Feb. 14, 2013) (inviting people to “Occupy Your Lawn!”).

102. URSULA K. LE GUIN, *THE DISPOSSESSED* ch. 3 (HarperCollins e-books 2006), 1974.

103. Some cities do ban all gardening in certain zones. See Schindler, *supra* note 53, at 239. These gardens also deserve first-amendment protection as long as the gardener intends the garden to be a communicative act.

104. See Schindler, *supra* note 53 (providing multiple examples of municipalities that ban front-yard gardens and backyard chickens); Jaime Bouvier, *Illegal Fowl: A Survey of Municipal Laws Relating to Backyard Poultry and a Model Ordinance for Regulating City Chickens*, 42 ENV. L. REV. 10888, 10899 n.171 (Sept. 2012) (providing multiple examples of municipalities that ban backyard chickens).

105. Ryan J. Walsh, *Painting on a Canvas of Skin: Tattooing and the First Amendment*, 78 U. CHI. L. REV. 1063 (2011) (comparing tattoos to other areas of artistic depictions that the First Amendment protects—such as paintings, theatre, and dance). Although there is some argument that gardens are works of art, for instance the gardens at Versailles are recognized as art, see, e.g., STEPHANIE ROSS, *WHAT GARDENS MEAN* 6-10 (1998) (arguing that formal gardens should be accepted as works of art akin to painting or poetry), productive vegetable gardens are not widely viewed as the kind of garden that would deserve this status.

106. This is not the first article to address this issue. Bret Rappaport assumes that restoring natural vegetation is protected under the first-amendment as expressive conduct. Bret Rappaport, *As Natural Landscaping Takes Root We Must Weed Out the Bad Laws: How Natural Landscaping and Leopold's*



Amendment inquiry ends. If these practices do qualify as expressive conduct, the next step is to determine what level of protection they will receive.<sup>107</sup> If the restriction is content-based, then strict scrutiny will apply, requiring that any restriction be “narrowly tailored to serve a compelling state interest.”<sup>108</sup> But if the restriction is unrelated to the suppression of free expression, then the restriction must still overcome a “substantial showing of need”<sup>109</sup> and will be subject to the test the court laid down in *United States v. O’Brien*.<sup>110</sup>

This essay also demonstrates that First Amendment protection of symbolic speech is not absolute. If gardens, and other common urban homesteading practices, are accepted as expressive, a city may not be able to ban such practices but has not lost the ability to regulate them. To regulate, however, the city must demonstrate something more than an aesthetic preference for lawns over gardens or an unsubstantiated belief that micro-livestock do not belong in cities. The level of government interest required will depend on whether the restrictions are found to be content-based or not. Each of these issues will be explored in more depth below.

#### A. *Is It Conduct or Is It Speech?*

The first hurdle to overcome is to determine whether urban agricultural practices can qualify as speech. The Supreme Court has recognized that it could not accept “the view than an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”<sup>111</sup> Thus, to determine whether an act should be deemed expressive it is necessary to determine whether the “activity [is] sufficiently imbued with elements of communication” for the First Amendment to protect it.<sup>112</sup>

To be sufficiently imbued with communication, the act must overcome a two-part test requiring that it be both intended and understood as expressive; there must be (1) “(a)n intent to convey a particularized message,” and (2) “in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”<sup>113</sup> Because intent is subjective to the person raising a First Amendment claim, this essay will assume that the first prong of the test will be met. The more knotty issue is whether others objectively view controversial urban agricultural practices, such as front-yard gardens or keeping small livestock like chickens and bees, as carrying a message.

Before delving into that issue, it helps to understand what kinds of acts have

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*Land Ethic Collide with Unenlightened Weed Laws and What Must Be Done About It*, 26 J. MARSHALL L. REV. 865, 907-08 n. 129 (1993), available at <http://www.epa.gov/greenacres/weedlaws/index.html>. James Charles Smith also argues that a decision to plant natural landscaping motivated by ecological concerns should be protected symbolic speech and that modern weed ordinances infringe on this form of expression. James Charles Smith, *The Law of Yards*, 33 ECOLOGY L.Q. 203 (2006).

107. *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

108. *Boos v. Barry*, 485 U.S. 312, 334 (1988).

109. *Johnson*, 491 U.S. at 406.

110. *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

111. *Id.* at 376.

112. *Spence v. Washington*, 418 U.S. 405, 409 (1974).

113. *Id.* at 410-11.

been deemed symbolic. Both before and after devising the test for expressive conduct, the Supreme Court has either found or assumed that the following acts are expressive: raising a red flag in a private children's summer camp,<sup>114</sup> participating in a sit-in,<sup>115</sup> burning a draft card,<sup>116</sup> wearing a black arm-band to school,<sup>117</sup> hanging an American flag upside-down with a peace symbol affixed to it in the window of a private residence,<sup>118</sup> wearing a military uniform in a play,<sup>119</sup> picketing for a cause,<sup>120</sup> soliciting charitable funds,<sup>121</sup> sleeping in tents on public property at a demonstration for the homeless,<sup>122</sup> burning the American flag,<sup>123</sup> dancing in the nude (but only marginally),<sup>124</sup> placing a burning cross in a private front yard,<sup>125</sup> marching in a parade,<sup>126</sup> and giving and spending money in support of political issues.<sup>127</sup>

Recognizing symbols or acts as speech, moreover, goes back to our nation's founding.<sup>128</sup> One of the first major protests of the Stamp Act involved a "Liberty Tree," which was a large elm decorated with various effigies.<sup>129</sup> Liberty trees and liberty poles were also widely recognized symbols after the Revolutionary War period as protests against the policies of the new government.<sup>130</sup>

Though many scholars have attempted to construct a defensible framework for these findings,<sup>131</sup> it is difficult to detect consistency in the above-listed acts. All of them, however, have been at least tacitly accepted to have a message that would be understood by those who viewed it. Several of these cases involve symbols that were widely recognized at their time to convey solidarity with a movement. In the 1930s, a red flag was understood as supporting communism.<sup>132</sup> In the 1960s, a black-arm band was understood as support for ending the Vietnam War.<sup>133</sup> These

114. *Stromberg v. California*, 283 U.S. 359 (1931).

115. *Brown v. Louisiana*, 383 U.S. 131 (1966).

116. *United States v. O'Brien*, 391 U.S. 367 (1968).

117. *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503 (1969).

118. *Spence*, 418 U.S. 405.

119. *Schacht v. United States*, 398 U.S. 58 (1970).

120. *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *United States v. Grace*, 461 U.S. 171 (1983).

121. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980).

122. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984).

123. *Texas v. Johnson*, 491 U.S. 397 (1989).

124. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

125. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

126. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.* 515 U.S. 557 (1995).

127. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Citizens United v. FEC*, 558 U.S. 310 (2010). See generally Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953 (2010) (describing these cases as holding that giving and spending money in support of political issues is protected speech).

128. Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1060 (Apr. 2009).

129. *Id.*

130. See generally Arthur M. Schlesinger, *Liberty Tree: A Genealogy*, 25 NEW ENG. Q. 435 (Dec. 1952).

131. See, e.g., John Greenman, *On Communication*, 106 MICH. L. REV. 1337 (May 2008) (free will versus forced thought theory of communication); Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971 (1995) (mind versus body theory of communication).

132. *Stromberg v. California*, 283 U.S. 359, 362 (1931).

133. *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

symbols, however, lose their meaning outside of the context of the movement. The term “red flag” today more readily evokes a football coach challenging a referee’s call than it does communism. And black armbands are being worn simply to draw attention to upper-arm definition. Thus, the meaning of a symbol can change over time and in response to a social or political movement.

While a symbol within the context of an established movement may be more easily recognized as symbolic, the Court does not require a cohesive or widely recognized movement to find an act to be expressive. The Court emphasized the contextual and even ephemeral nature of understanding a message in *Spence v. Washington*.<sup>134</sup> In this case, a young man hung the American flag upside down with a peace symbol taped over it around the same time as the Cambodian incursion and the Kent State tragedy.<sup>135</sup> The Court found that the surrounding context of those national events provided enough basis to imbue the flag with sufficient meaning, even though that meaning was fleeting: “A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant’s point at the time that he made it.”<sup>136</sup> Thus, the meaning of a symbol can change over time and what might have once been seen as merely bizarre can, in another cultural context, be understood as carrying meaning.

Here, urban agricultural practices have the benefit of the surrounding context of the Food Movement. While gardens may have long been seen as personal retreats with little or no symbolic value (outside of literary references to the Bible), circumstances have changed. With the popular recognition of the Food Movement, as described in Part II, and the popular recognition of gardens and other urban agricultural practices as being symbols of support for and solidarity with the Food Movement as described in Part III, the surrounding context supports the understanding that these urban agricultural acts have meaning. Putting a garden in one’s front yard is not aberrant or “bizarre behavior” as many local ordinances assume, but is widely asserted and accepted as a communicative act.

Other commonly banned urban agricultural practices, like raising chickens in the backyard are more problematic because they are less public. While a chicken owner may argue that keeping the chickens is intended as a communicative act in support of a political movement, if the chickens are kept in a place where no one would be likely to see them, it would be difficult to conclude that others are receiving the message. The First Amendment, however, does not carry a requirement that a minimum number of people must receive a message for it to receive protection.<sup>137</sup> If the person kept chickens in a place where neighbors could see, then the neighbors are capable of receiving the message. If the chicken owner participates in chicken coop tours, an event that commonly occurs in many cities,

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134. 418 U.S. 405 (1974).

135. *Id.* at 408.

136. *Id.* at 410.

137. Speech is protected even if only one other person hears it. *See, e.g., Rankin v. McPherson*, 483 U.S. 378, 389 (1987) (holding that the First Amendment protected a government employee who made a statement of public concern in a private conversation with one other person).

<sup>138</sup> or invites neighbors and friends over to meet the flock, then the owner should be able to more easily show that there is an audience for the message he is conveying.

The list of cases above where acts were found to be communicated, moreover, show that what is being communicated, or the underlying message of those acts, does not need to be precisely defined or to easily translate into a written statement. The Court recognized this when stating that symbolism is a “primitive but effective way of communicating ideas . . . a short cut from mind to mind.”<sup>139</sup> While the Court has stated that the message must be “particularized,”<sup>140</sup> in many of the areas where the Court has found an act to be sufficiently imbued with communication, what exactly the act is communicating remains unclear.

For instance, the message involved in burning the American flag cannot easily be reduced to words other than being a vague rejection of the United States government or perhaps its policies. In *Texas v. Johnson*, Johnson burned the flag at the political convention re-nominating Ronald Reagan for President.<sup>141</sup> The Court quoted Johnson’s reasons for burning the flag as: “It’s quite a just position [juxtaposition]. We had new patriotism and no patriotism.”<sup>142</sup> Even with Johnson attempting to articulate the message, it certainly did not coalesce into any particular demand or even into support for an identified movement. Yet, the Court found that the “expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent.”<sup>143</sup> In *Spence v. Washington*, where Spence displayed the flag upside down with a peace sign taped over it, the Court did not attempt to define the message beyond saying that “it was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government.”<sup>144</sup> Thus, to be viewed as symbolic, the meaning does not have to translate into an easily articulated demand, nor does such message even need to be attached to a recognized social or political movement.<sup>145</sup>

There is an outer limit to this concept, however. The message must not be so oblique as to require articulation to be understood. In *Rumsfeld v. F.A.I.R.*, the Court held that law schools’ exclusion of military recruiters from campus was “not inherently expressive” because the “expressive component of a law school’s actions is not created by the conduct itself but by the speech that accompanies it.”<sup>146</sup> And

138. E.g., Jerry James Stone, *The 6 Best Chicken Coop Tours Around the Country*, TREEHUGGER.COM, (July 31, 2012) <http://www.treehugger.com/sustainable-agriculture/6-best-chicken-coop-tours-around-country.html>.

139. *Spence*, 418 U.S. at 410 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)).

140. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

141. *Id.* at 406.

142. *Id.*

143. *Id.*

144. *Spence*, 418 U.S. at 410.

145. While this is not necessary, it may still be helpful. Under *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), and *Bd. of Dirs. of Rotary Int’l, v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987), when looking at the right to expressive association, the Court found a “corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts*, 468 U.S. at 622. Thus, when a symbolic act takes place as part of a political movement, this should strengthen the First Amendment’s recognition of the act as communicative and strengthen the First Amendment’s protection of the act.

146. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006).

because “explanatory speech” was necessary, this was “strong evidence” that the conduct was not expressive enough to require protection.<sup>147</sup>

The test that the Court employs for whether the conduct should be protected as expressive appears, thus, to be whether the Court implicitly understood what the conduct was meant to convey. Because gardens and other agricultural practices have long histories of being employed for private purposes of respite, or practical purposes of growing food, it is uncertain whether a garden’s intended symbolic conduct will be readily understood as “overwhelmingly apparent.”<sup>148</sup> But, even though historic use of a symbol may aid it to be recognized as such,<sup>149</sup> the Court has not required such historic meaning and indeed recognized symbols as communicative acts when those symbols were fairly recently introduced,<sup>150</sup> or even where they were of a transient and original nature.<sup>151</sup> Here, courts should recognize these acts as symbolic because, while a garden may have been imbued with symbolism only fairly recently, this symbolism is not as recently introduced as the armband in *Tinker*, nor as original as the defaced flag in *Spence*. Gardens and other urban agricultural practices are widely documented symbols of a larger political movement. This movement has been recognized for at least several years, if not decades.<sup>152</sup> And, because the symbolism of gardens are being embraced by the highest levels of government, like the White House garden and the USDA’s People’s Garden, and are widely disseminated in the popular press, these practices should implicitly be understood as symbolic.

These practices, moreover, do not stumble into the pitfall of *Rumsfeld v. F.A.I.R.*<sup>153</sup> First, urban agricultural acts are tangible and persistent symbols. Hosting a recruiter on campus is an ephemeral event, happening only once or twice a year in a back room and likely unseen, or at least unnoticed, at a physical, visual level by the people on campus. A garden, by contrast, is a permanent, physical symbol—more easily compared to a sign, a flag, or perhaps a Liberty Tree. More importantly, gardens do not require explanation and are generally not accompanied by one. While many people have discussed the symbolic nature of gardening and urban agricultural practices in books, articles, and over the internet, people who engage in these practices generally do not post a placard next to the garden or chicken coops stating what they mean. And, like burning or defacing a flag have been translated as fairly inarticulate rejections of governmental policies, the

147. *Id.*

148. *Johnson*, 491 U.S. at 406.

149. *Id.* at 405 (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)) (“The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design.”).

150. *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S., 503, 504 (1969) (“In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year’s Eve.”)

151. *Spence v. Washington*, 418 U.S. 405, 410 (1974).

152. See *supra* note 4 for books and articles documenting the Food Movement as a movement existing at least as far back as 2006.

153. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006).

gardens are widely seen and understood to be a rejection of the conventional food system (which is supported by many governmental policies). Like any symbolic act, there is a great deal of communication about what a garden means, socially, politically, civically, educationally, and environmentally contained in one garden, as shown by what First Lady Michelle Obama, Agricultural Secretary Tom Vilsack, and many other gardeners say when they talk about what they hope their garden communicates to others.<sup>154</sup>

Another issue is that not every gardener will agree that a garden is communicating something. Gardening has been an accepted backyard avocation, even in city lots, for many years. Some gardeners would be surprised to hear that their garden is a statement. Others may want to put a garden in the front yard simply because they like fresh tomatoes and the front yard gets more sun.

But, just because all gardeners may not agree with what their garden communicates, that should not mean that no garden should have symbolic value. Black armbands, for instance, can demonstrate support for aboriginal resistance in Australia or support for the IRA in Ireland; they can demonstrate grief or mourning; or they can be worn purely as a fashion statement to draw attention to upper-arm definition.<sup>155</sup> The fact that the armband can mean several different things or nothing at all should not detract from its symbolic meaning when it is worn with symbolic purpose. This is especially true where there is a recognized movement and the armband is a recognized symbol within the movement. Here, these urban agricultural acts fit the bill. There is wide recognition that we are in the midst of a food movement by scholars, activists, and the popular press. And agricultural acts like front-yard gardens and keeping small livestock are widely accepted symbols of the movement. Thus, just because some may not intend their garden to convey any message, it should not detract from others who do intend for their garden to educate others, convey identity, and show support for a larger political movement.

Urban agricultural acts should qualify for protection under the First Amendment as communicative acts. They intend to display a particularized message that is tied to a widely recognized Food Movement. And in the current cultural context of government, community, and institutional and individual support for gardens as symbols of this movement, the likelihood is great that those who view it understand the message it carries.

### *B. Are the Laws Banning Urban Agricultural Practices Content-Based?*

In determining that urban agricultural practices are expressive, the next question is whether the laws banning them are content-based. To answer this question, it is necessary to look at the kinds of laws that ban agricultural practices in the city. There is little consistency in these laws because they are enacted at a

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154. See *supra* Part III.

155. See Anna Clark, *History in Black and White: A Critical Analysis of the Black Armband Debate*, 26 J. AUSTL. STUD. 1 (2002); Dianne Gereluk, *What Not to Wear: Dress Codes and Uniform Policies in the Common School*, 41 J. PHIL. & LEGAL EDUC. 643, 644 (2007); John Branch, *In Name of Fashion, Embracing a Trend*, N.Y. TIMES (Sept. 17, 2008), <http://www.nytimes.com/2008/09/18/sports/football/18bands.html>.

local level and most of them do not follow a standard or model code.<sup>156</sup>

Laws that ban front-yard gardens sometimes do so expressly by providing that no person shall grow a vegetable garden in the front yard.<sup>157</sup> They more often, however, are not explicit; city officials interpret vague aesthetic guidelines to effectively prohibit front-yard gardens. For example, in Orlando, Florida, city officials attempted to prosecute a homeowner for growing a front-yard garden<sup>158</sup> based on its ordinance providing that “[g]round covers shall be planted in a manner so as to present a finished appearance . . . .”<sup>159</sup> Oak Park, Michigan attempted to prosecute another homeowner<sup>160</sup> on the basis of its ordinance providing that “[a]ll unpaved portions of the site shall be planted with grass ground cover, shrubbery, or other suitable live plant material.”<sup>161</sup>

Laws that ban chickens are equally diverse.<sup>162</sup> Some ban chickens as dangerous animals,<sup>163</sup> some relegate chickens to only agriculturally zoned lands,<sup>164</sup> and some seemingly allow chickens, but require very large setbacks or a very large parcel of land so most property owners within the city would be unable to keep them.<sup>165</sup>

As expected, the author has not come across any ordinance that provides that the reason that the city bans any of these practices is explicitly to ban a political symbol. But the First Amendment has not been interpreted to require such

156. There are model codes and the latest versions of them appear to allow for gardens in both the front and back yard. *E.g.*, INT’L PROP. MAINT. CODE § 302.4 (2009) (appearing to allow for front-yard gardens by exempting them from the definition of weeds: “All noxious weeds shall be prohibited on developed properties. Weeds shall be defined as all grasses, annual plants and vegetation, other than trees or shrubs provided: however, this term shall not include cultivated flowers and gardens.”).

157. *See* Schindler, *supra* note 53, at 240 n. 36 (citing BEDFORD, OHIO, CODIFIED ORDINANCES § 1341.19 (2012)) (“No vegetable gardens shall extend beyond the front building line of the house.”).

158. Dykes, *supra* note 97.

159. ORLANDO, FLA., CODE § 60.207 (2013).

160. Steven Hoffer, *Oak Park, Michigan Resident Julie Bass Faces 93 Days in Jail for Vegetable Garden*, HUFFINGTON POST (July 8, 2011, 5:07 PM), [http://www.huffingtonpost.com/2011/07/08/julie-bass-jail-vegetable-garden\\_n\\_893436.html](http://www.huffingtonpost.com/2011/07/08/julie-bass-jail-vegetable-garden_n_893436.html) (last updated Sept. 7, 2011, 6:12 AM). The city later withdrew the charges, but without prejudice. Steven Hoffer, *Oak Park Drops Gardening Charges against Julie Bass, Goes After Her Dogs*, HUFFINGTON POST (July 15, 2011, 5:49 PM), [http://www.huffingtonpost.com/2011/07/15/julie-bass-front-yard-gar\\_n\\_899723.html](http://www.huffingtonpost.com/2011/07/15/julie-bass-front-yard-gar_n_899723.html) (last updated Sept. 14, 2011, 6:12 AM).

161. OAK PARK, MICH., CODE § 1716(A)(5) (2013).

162. *See* Bouvier, *supra* note 104, at 10888; *see also* Salkin, *supra* note 88.

163. LAKEWOOD, OHIO, ORDINANCES § 505.18 (2011).

164. *E.g.*, BIRMINGHAM, ALA., ZONING ORDINANCE § 2.4.1 (2007) (restricting chickens to land zoned for agricultural use); HIALEAH, FLA., CODE OF ORDINANCES § 10.1, 10.2 (2011) (restricting chickens to land zoned for agricultural use); JACKSONVILLE, FLA., ORDINANCE CODE tit. XIII, ch. 462 (2011) (restricting chickens to agricultural or low-density residential zones); MONTGOMERY, ALA., CODE OF ORDINANCES ch.4 art. I (2011); *id.* app. C, art. VII (2011) (restricting chickens to agricultural or low-density residential zones); VIRGINIA BEACH, VA., CITY CODE § 5-545, app. A (2011) (restricting chickens to land zoned for agricultural use).

165. OKLAHOMA CITY, OKLA., \CODE chs. 8, 9, § 59-9350.8 (2011) (restricting chickens to properties with one acre or more); RICHMOND, VA., CODE § 10-88 (2011) (restricting chickens to properties with 50,000 square feet or more with a 500 foot setback from the neighboring dwelling); D.C. MUN. REGS. tit. 24, § 902.7 (2013) (250 ft. setback from property line without consent of neighbors). For ordinances dealing with beekeeping, *see* Patricia E. Salkin, *Honey, It’s All the Buzz: Regulating Neighborhood Beehives*, 39 B.C. ENVTL. AFF. L. REV. 55 (2012).

explicitness. The Court has found laws unconstitutional under the First Amendment when they allow debate in only “one direction”<sup>166</sup> or “attempt to give one side of a debatable public question an advantage in expressing its views to the people.”<sup>167</sup> In other words, it is unconstitutional “[t]o allow a government the choice of permissible subjects for public debate” because this would “allow that government control over the search for political truth.”<sup>168</sup>

Here, when a city bans urban agricultural practices, it is actually taking a side within a debate over where cities fit within our food system and implicitly endorsing the status quo by forbidding urban dwellers to symbolize support for alternative food systems or to personally participate in growing or raising food. There is a strong thread within the food movement that is concerned with how our laws and social mores have worked to distance from the consumer how food is grown and raised.<sup>169</sup> And many people within the food movement have argued that this distance, imposed socially but also legislatively through laws that prohibit urban agricultural practices within a city, is exactly what has allowed some of the current abuses in our food system, such as CAFOs, to occur. Thus, deciding that urban areas should be free of certain agricultural uses, like backyard chickens, is to create a culture and endorse the concept that an entire group of people should not and cannot participate in the production side of the food system. It is also siding with the argument that how our food is raised should be hidden, perhaps because it may be disquieting to be faced every day with animals that are being raised for food purposes.<sup>170</sup>

While a city may assert that it is merely applying generally accepted aesthetic principles of how an urban area should look, these aesthetic principles are no longer without controversy. While it is questionable whether there ever was an aesthetic principle that everyone agreed to regarding how a front-yard must look, it is certainly no longer the case now that front-yard gardening is gaining wider press and mass appeal. There is also a concern that these aesthetic principles that encourage yards of non-native grasses shorn by mechanical means are unsustainable and unsuitable uses of land. So, by relying on outdated norms of aesthetics, the city is perpetuating and, in fact, demanding unsustainable practices. The interest in aesthetics, thus, becomes no more than a veil to detract attention from the real underlying debate of the sustainability of our current food systems. And through purportedly aesthetic interests, the city is forbidding individuals to show support for alternatives to that food system, both symbolically and practically.

By deciding to ban certain agricultural practices from the city, the city is, in effect, taking a side in this debate and controlling the acceptable methods under which to have this debate. If the city uses its police power to make these practices

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166. *Texas v. Johnson*, 491 U.S. 397, 417 (1989).

167. *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978)).

168. *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 538 (1980).

169. *IN DEFENSE OF FOOD*, *supra* note 39. Cobb, *supra* note 4, at 29.

170. Cobb, *supra* note 4, at 29 (“We also make sure, as does the factory farming industry, that we never come face to face with these animals in any form until they are shrink-wrapped beyond recognition . . .”).



illegal, the movement is, in a sense, stymied, because people are legally prohibited from showing support for and participating within the movement. This may lead to a false sense that this movement is more marginalized than it actually is. If people are concerned that they risk fines, or even jail time, for expressing their solidarity with a movement by putting their garden in the front-yard, or raising chickens in the back, the movement itself is being squashed.

The content-based argument, however, can get thorny for a few reasons. One reason may be that, because these are acts, even if they are acts with communicative effect, they are not only just symbols of the debate, but in some ways the very issues at stake in the debate. So by declaring these acts communicative, one could argue that the debate is circumvented and the Food Movement wins. This is the concern that Justice Scalia expressed when he said “virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose...”<sup>171</sup> For instance, if a person believes that property should not be owned but should be shared communally and then shoplifts a candy bar from the corner store as an expressive act to demonstrate his political belief, the First Amendment should not protect this act. If it did, this would mean that, through the First Amendment, any person could make an end-run around any law that they disagree with simply by symbolically disobeying it. If the First Amendment protected the expressive shoplifter, ownership in private property would be obliterated.

But this is not what is happening here for two reasons. The first is that these urban agricultural acts are not the movement itself, but are just one portion of it—and a largely symbolic portion at that.<sup>172</sup> The Food Movement is about dissatisfaction with the way that our current food system works. It seeks to raise awareness of the problems in our food system, to change it, and to develop alternate food systems. Finding certain urban agricultural practices to be protected as communicative acts does not circumvent the debate altogether—because this movement is about more than just growing one’s food for oneself. It does, however, provide a more level playing field on which the debate can occur. Banning these practices, in essence, allows “one side of the debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules”<sup>173</sup> because it only allows people to present in their front yard what the city, or even just a single city official, deems to fit community standards of aesthetics, and

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171. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576 (1991) (Scalia, J., concurring).

172. Several recent studies have found that cities like Detroit and Cleveland could grow between 20% to over 70% of the fresh produce necessary to meet the needs of their residents. Sharanbir S. Grewal & Parwinder S. Grewal, *Can Cities become Self-Reliant in Food?*, 29 CITIES 1 (Feb. 2012). See generally, Kathryn Colasanti et al., *Growing Food in the City: Production Potential of Vacant Land*, 5 C.S. MOTT GRP. FOR SUSTAINABLE FOOD SYS. (Jun. 2010). These studies start with the premise that the majority of vacant land would be used for agricultural purposes. This starting premise, as the authors concede, is ambitious because much urban land suffers from pollution and other problems that render it unsuitable for growing food. Even with this starting premise, however, a city cannot raise all of the food necessary to feed it, nor can most individuals on city-sized lots raise all of the food necessary for that individual. Thus, urban agriculture, while an important symbol of the food movement, and perhaps part of the solution for creating alternate channels to the industrialized food system, is not *the* solution of the food movement.

173. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

outlaws any dissenting use of one's front yard. Legitimizing these practices, either by a city deciding to remove the bans, or through constitutional protection, will allow those who want to show support for the food movement to do so on their own property without fear of censure.

The second reason this is not like the shoplifting example is that shoplifting carries with it fairly obvious economic harm to the shop-owner and to society as a whole. Thus, the government ought to be able to ban it on the basis of that harm—or because of its secondary effects. Under this theory, if the conduct is communicative and the government restriction is content-based, then the government can still regulate the conduct on the basis of negative secondary effects associated with the conduct.<sup>174</sup> In *City of Renton v. Playtime Theatres, Inc.*, a zoning ordinance banning theatres that showed adult films from locating “within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school” was upheld because its reason for doing so was to prevent that type of speech from increasing crime in areas surrounding them.<sup>175</sup> The Court held that because the city was concerned about the secondary effects and not the message contained within the adult films themselves, the ban was content-neutral and therefore valid.<sup>176</sup> The Court also found that the City did not need to demonstrate these secondary effects with studies conducted in the same city, but could rely on other cities' studies of the secondary effects associated with adult theatres. In that case Renton had relied on Seattle's study of secondary effects, which included “expert testimony on the adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts” and “detailed findings” supported by “substantial evidence” that adult theatres contribute to neighborhood blight.<sup>177</sup>

A city here may argue that the ban on urban agricultural practices is content neutral because it is actually concerned with the secondary effects of such practices, rather than the practices themselves. For front yard gardens, a city may raise the concern that if the yard does not adhere to community expectations of beauty and acceptable uses of front yards it may affect property values.<sup>178</sup> And, for backyard chickens a city may raise concerns with odor, noise, or diseases.<sup>179</sup>

The problem with this argument, however, is that there are no empirical studies that support these concerns. While these concerns may be common, the scholarship in this area has found that gardens increase property values,<sup>180</sup> that

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174. See *Barnes*, 501 U.S. at 582 (Souter, J., concurring, arguing that Indiana's ban on nudity was meant to combat the secondary effects of such nudity); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986).

175. *Renton*, 475 U.S. at 57 (Brennan, J., dissenting).

176. *Id.* at 48 (majority opinion).

177. *Id.* at 51 (citing *Northend Cinema, Inc. v. Seattle*, 90 Wash. 2d 709, 713 (1978)). See also *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (holding that a ban on sleeping in a public place was content-neutral because it was aimed at the damage overnight camping can cause and not to the communicative content of sleeping).

178. Schindler, *supra* note 53, at 269.

179. Salkin, *supra* note 88, at 1; Bouvier, *supra* note 104, at 10894.

180. The research in this area has concerned community gardens. See, e.g., Vicki Been & Ioan Voicu, *The Effect of Community Gardens on Neighboring Property Values*, (N.Y.U. L. & ECON., WORKING PAPER No. 46, March 14, 2006), available at

urban agricultural practices increase a sense of community in a neighborhood,<sup>181</sup> and that the concerns with raising chickens in the city are unjustified as long as the practice is properly regulated.<sup>182</sup> While the Court allowed Renton to rely on Seattle's study, it still required that there be "substantial evidence" supported by expert testimony and detailed findings that such secondary effects exist. Here, cities should not be allowed to rely on unsubstantiated concerns when evidence of the possible negative effects of allowing these practices are not readily apparent. In fact, there is much evidence that these practices are, on balance, beneficial to both the individual and the community.<sup>183</sup>

*C. Do Bans on Urban Agricultural Practices Overcome the Test for Content-Neutral Laws That Restrict Symbolic Conduct?*

If one does not accept that these bans are content-based, the bans still must overcome the test for content-neutral laws that restrict symbolic conduct established in *O'Brien*.<sup>184</sup> And, even if one is having difficulty with the concept of a garden as expressive conduct, the milieu of expressive conduct is not terribly exclusive; the Court has applied the *O'Brien* test to conduct that has been found to be only marginally at the "outer perimeters" of the First Amendment protection.<sup>185</sup> Under *O'Brien*, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."<sup>186</sup> Thus, "a government regulation is sufficiently justified

- [(1)] if it is within the constitutional power of the Government;
- [(2)] if it furthers an important or substantial governmental interest;
- [(3)] if the governmental interest is unrelated to the suppression of free expression;
- and
- [(4)] if the incidental restriction on alleged First Amendment freedoms is no

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[http://lsr.nellco.org/cgi/viewcontent.cgi?article=1049&context=nyu\\_lewp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1049&context=nyu_lewp) (finding that community gardens increase property values, especially in the most disadvantaged neighborhoods).

181. GROWING HEALTHY SUSTAINABLE PLACES, *supra* note 50, at 3 (citing LORRAINE JOHNSON, CITY FARMER: ADVENTURES IN URBAN FOOD GROWING (2010), and H. PATRICIA HYNES, A PATCH OF EDEN: AMERICA'S INNER-CITY GARDENERS (1996)).

182. S. L. Pollock et al., *Raising Chickens in City Backyards: The Public Health Role*, 37 J. COMMUNITY HEALTH 734 (2012) (finding that public health concerns about infectious diseases and other nuisances that might be caused by keeping hens in an urban setting cannot be supported by literature specific to the urban agriculture context and recommending that public health practitioners approach this issue in a manner analogous to concerns over keeping domestic pets).

183. See GROWING HEALTHY SUSTAINABLE PLACES, *supra* note 50, at 3; H. PATRICIA HYNES & RUSS LOPEZ, URBAN HEALTH: READINGS IN THE SOCIAL, BUILT, AND PHYSICAL ENVIRONMENTS OF U.S. CITIES, 267-71 (2009) (surveying research studies on the benefits of urban agricultural practices); Colasanti, *supra* note 169, at 9-12 (surveying research studies on the benefits of urban agricultural practices); DARRIN NORDAHL, PUBLIC PRODUCE: THE NEW URBAN AGRICULTURE 114 (2009) (finding that gardens can serve aesthetic concerns and require no more maintenance than the landscape plants that most cities currently allow).

184. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

185. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991).

186. *O'Brien*, 391 U.S. at 376.

greater than is essential to the furtherance of that interest.<sup>187</sup>

The Court has also observed that “this test has been interpreted to embody much the same standards as” time, place, or manner restrictions.<sup>188</sup>

The first prong is satisfied—zoning restrictions, in general, are within the constitutional power of the government.<sup>189</sup> Whether the government interest is unrelated to the suppression of free expression has already been addressed in Part IV(B) exploring whether these restrictions are content-based. The remainder of this essay assumes that they are not. But even if they are not, the government must still show an important or substantial government interest and that the restriction is no greater than is essential to the furtherance of that interest.

While the government’s interest in aesthetics has qualified as an important interest in cases dealing with private speech, such as signs and billboards, on public property, it has not been found sufficient to justify a ban that forecloses an entire medium of expression on a person’s own private property.<sup>190</sup>

The line of case law most closely aligned to the interests at stake here are the cases concerning signs on private property.<sup>191</sup> This is because those cases recognize that it is especially problematic when the government chooses to foreclose an entire medium of expression.<sup>192</sup> These cases also recognize that the rules slightly shift to make the First Amendment more protective to a person’s means of expressing themselves when that expression takes place on that person’s own private property.<sup>193</sup> And, although these cases do not concern symbolic conduct but written speech, these cases rest on the admittedly similar “time, place, or manner test.”<sup>194</sup>

In *City of Ladue v. Gilleo*, a ban on residential signs was found to be unconstitutional.<sup>195</sup> The city stated its interest was aesthetic: “minimizing the visual clutter associated with signs.”<sup>196</sup> While the Court found this interest to be

187. *Id.* at 377.

188. *Barnes*, 501 U.S. at 566 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984)).

189. Zoning restrictions, in general, are constitutional under *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). While there is an issue whether certain restrictions on urban agricultural uses could be found unconstitutional under *Euclid* for being “clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals, or general welfare,” *id.* at 395, suits brought under this standard have not met with much success. See *Schindler*, *supra* note 53, at 251 (listing cases).

190. *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 816-17 (1984) (finding that city’s aesthetic interest in avoiding “visual clutter” justifies the city’s routine removal of signs on public property, such as sidewalks, lamp posts, and telephone poles); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510-12 (1981) (stating that interests in traffic safety and aesthetic interests can be valid reasons for drawing a distinction between on-site and off-site commercial advertising, but is not a valid basis to draw a distinction between on-site commercial and on-site non-commercial speech).

191. See, e.g., *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85 (1977); *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994).

192. See *Ladue*, 512 U.S. at 53.

193. See *id.* at 58.

194. *Id.* at 56. (finding that *Ladue*’s ordinance prohibiting only certain kinds of yard signs could be under-inclusive, but ultimately deciding that amending the statute to prohibit more speech would not qualify as a time, place, and manner restriction because it foreclosed an entire medium of expression).

195. *Id.* at 59.

196. *Id.* at 54.

valid, it rejected it as not compelling enough to justify the ban.<sup>197</sup> This was because the ban on residential signs foreclosed an entire medium of speech and did not “leave open ample alternative channels for communication.”<sup>198</sup> The city countered that a resident could still communicate by other means—such as with “hand-held signs, letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings.”<sup>199</sup> The Court rejected this because there was no practical substitute for a yard sign.<sup>200</sup> This was because yard signs were cheap, convenient, and an especially effective way to reach neighbors, “an audience that could not be reached nearly as well by other means.”<sup>201</sup>

The Court also emphasized that speech that takes place in one’s home or on one’s own property deserves more protection: “A special respect of individual liberty in the home has long been part of our culture and our law . . . that principle has special resonance when the government seeks to constrain a person’s ability to *speak* there.”<sup>202</sup> The Court goes on to state that “[w]hereas the government’s need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable . . . its need to regulate temperate speech from the home is surely much less pressing.”<sup>203</sup> Thus, government interests like extra cost for security and for cleaning a public area might justify a ban on sleeping in a public park—even if the sleeping is expressive, because it is meant to draw attention to the plight of the homeless, but those sorts of costs should not come into play when the government is dealing with speech on a person’s own private property.<sup>204</sup> This suggests that the government would have to show a heightened interest to justify burdening speech, even symbolic speech, that takes place on one’s personal property. It also suggests that the government interests put forth for regulating property use, such as “visual clutter” or other closely related aesthetic interests, do not provide a sufficient reason for entirely banning a means of expression on private land. A medium of expression, moreover, is not limited to means of conveying written speech, but also includes areas of symbolic expressions such as live entertainment.<sup>205</sup>

Finally, the Court emphasized that speech that takes place on one’s property, by its location, is a statement of personal identity. That it concerns identity is important because “the identity of the speaker is an important component of many attempts to persuade.”<sup>206</sup> As an example, the Court stated that the “espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich

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197. *Id.*

198. *Id.* at 56 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

199. *Ladue*, 512 U.S. at 56.

200. *Id.*

201. *Id.* at 57.

202. *Id.* at 58.

203. *Id.*

204. *See Clark*, 468 U.S. 288.

205. *Ladue*, 512 U.S. at 55 (citing cases where the court invalidated ordinances that “foreclose[d] an entire medium of expression,” such as live entertainment in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75-76 (1981)).

206. *Ladue*, 512 U.S. at 56.

board.”<sup>207</sup>

Here, these rationales easily transfer to using property for urban agricultural acts—such as a front-yard garden or keeping backyard chickens. First, by banning a front-yard garden, a city is foreclosing that medium of speech. While it is possible for a person to put a sign in the yard, or put a bumper sticker on her car stating, “Down with Big Food—Grow Your Own” or “Food is the Basis for Civil Society” none of these signs carry quite the same message as an actual front-yard garden, which carries these messages plus much more. As for chickens, while it is possible for a person to put a sign in the backyard or hand out leaflets stating, “Ask Me About Industrial Farming, C.A.F.O.s, and Why Backyard Eggs Taste Better,” these, and many other signs one could come up with, do not carry the same message. As Wendell Berry pointed out, the garden as protest is a complete act; it is not only a denunciation of the conventional food system—it is also expressing a positive solution. In symbolic speech, the medium is the message, and by banning the symbol, the city is foreclosing an entire medium of expression.<sup>208</sup>

One could argue that there are sufficient channels, at least for gardening as speech, because most cities do allow gardens in the backyard where they could still reach neighbors. This is not a satisfying substitute for several reasons, however. The communicative impact of something placed in the backyard, though it may still have impact, has far less impact than what takes place within the front yard for all to see. So, even if all gardens are accepted to be communicative, what is happening in the front yard surely carries the most symbolic weight. It is difficult to imagine the Court finding that the ability to post a sign in the backyard creates a sufficient channel for that medium of speech.<sup>209</sup> Also, many people grow a garden in the front yard just because there is not sufficient light or land in the backyard. For these people, their ability to garden at all, and thus wield this potent political symbol, will be foreclosed if they cannot do so in the front yard.

Next, because these symbols take place on private property, they deserve heightened First Amendment protection. Here, like a yard sign, displaying a garden is an act of identity.<sup>210</sup> And, it carries more persuasive impact because the identity of the speaker is known. For example, like a mansion bearing a sign in support of socialism, a garden consisting of collard greens, rainbow chard, and golden beets in the front yard of a neighbor known to work as a nurse carries special meaning. Likewise, a garden of the three sisters, corn, beans, and squash, in the front yard of the local history enthusiast, and ground cherries, persimmons, and paw paws in the front yard of the local teacher are certainly revealing something about the identity of the owner and educating the neighbors about the

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207. *Id.* at 56-57.

208. *See, e.g.*, MARK FRANCIS & RANDOLPH T. HESTER, JR., *THE MEANING OF GARDENS: IDEA, PLACE, AND ACTION* (1990) (asserting that gardens are important and long-recognized mediums of cultural and personal expression).

209. It is equally difficult to imagine that the Court would find that a sign in the backyard has no communicative value at all.

210. Frances M. Kiesling & Christie M. Manning, *How Green is Your Thumb? Environmental Gardening Identity and Ecological Gardening Practices*, 30 J. ENVTL. PSYCHOL. 315 (2010) (finding that a garden is a significant aspect of identity—especially for those who consider themselves to be environmentally friendly).

history and diversity of our food and our culture at the same time.

In *Ladue*, the Court concluded that even though the ban on residential signs was invalid, the City could still address its interests in visual clutter through other means.<sup>211</sup> While first noting that residents' own incentives to keep up their own property values by preventing visual clutter in their yards diminishes "the danger of the 'unlimited' proliferation of residential signs," the Court stated that "more temperate measures" could satisfy Ladue's regulatory interests.

This also applies to urban agriculture. First, the fear that urban agricultural practices will somehow overrun the city, like Ladue's concerns about the danger of unlimited proliferation of residential signs, is likely overrated. And, just as the Court noted in *Ladue*, a resident's self interest in keeping up his property values will mean most front-yard gardens will be neat and well-kept. That being said, however, cities can and should have the ability to regulate these practices—that is to take "more temperate measures" short of banning them.<sup>212</sup> Allowing front-yard gardens does not require that the city accept an unkempt, overgrown lot of rotting vegetables. And, allowing chickens does not mean that a city must accept a large flock kept in CAFO-like conditions. But the city's application of aesthetics should be expanded to allow for political symbols—like communicative gardens—in much the same way that cities must tolerate for sale and political signs.

Thus, even if gardens and other urban agricultural practices are found to be expressive, this does not mean that a city cannot regulate them, but to do so it must demonstrate an interest above the interest in "visual clutter" that the Court found to be insufficient in *Ladue*. To fully ban a practice, a city should be able to provide evidence, at least at the level of evidence required in *City of Renton v. Playtime Theatres*, of actual, real deleterious secondary effects. And cities' concerns about the nuisance value of these practices should be based on valid, provable concerns, with actual impact—not vague prejudices such as gardens should be kept out of sight or that chickens do not belong in the city.<sup>213</sup>

Because many city-dwellers have been separated from agriculture for so long, they lack the agricultural knowledge to understand what kinds of practices can flourish in more densely populated city environments. This essay cannot attempt to draw clear lines between what a city must accept, what a city should be able to ban, and to what level a city can regulate. But this essay does assert that front-yard gardens and urban animal husbandry of micro-livestock like chickens and bees, should be protected. The First Amendment should overcome any ban on front-yard gardens, because, by virtue of being placed in the front yard, its communicative power is high. And, as most cities already allow gardening, albeit in the backyard, it is difficult to find any deleterious secondary effects that would supersede the kinds of concerns with "visual clutter" that have already been found to be

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211. *Ladue*, 512 U.S. at 58.

212. *Id.*

213. Other scholars have asserted that actual nuisance, rather than secondary effects, should be the test when First Amendment rights are at stake. Shelley Ross Saxer, *Zoning Away First Amendment Rights*, 53 WASH. U. J. URB. & CONTEMP. L. 1, 6 (1998). Saxer asserts that courts should analyze zoning as a prior restraint when the challenged regulation has the potential to impact First Amendment rights. *Id.* at 95. Then the affected actions should be adjudicated as common law nuisance actions that address the actual harms caused by the alleged offending land use activities. *Id.* at 100.

insufficient to overcome First Amendment protection. Backyard chickens and other micro-livestock should also be protected from complete bans because their communicative value and symbolic power is high and it has been demonstrated that the nuisance concerns surrounding them are low.<sup>214</sup>

On the other side of the line, cities may be able to outlaw keeping a herd of Chianina cattle or a drift of Duroc hogs because the city will be able to show that lot sizes are too small to raise the animals responsibly and nuisance concerns are real. Cities should also be able to regulate gardens to ensure that they are well-tended and regulate micro-livestock so that they are cared for, kept in humane and sanitary conditions and do not cause nuisance. Other currently contentious issues in urban agriculture, such as selling produce from lots zoned residential, or allowing market gardens or small urban farms on land not zoned for agricultural use, or on land unconnected to a dwelling remain to be figured out. Over time, city governments, city planners, agricultural experts, and city dwellers should be able to define the line more definitively, but this should not stop us from recognizing that certain agricultural practices, like front-yard gardens and backyard chickens, which many cities currently ban, deserve First Amendment protection now.

#### V. CONCLUSION

*Better than any argument is to rise at dawn / and pick dew-wet red berries in a cup.* – Wendell Berry<sup>215</sup>

While the idea of a garden as a means of expression may initially strike some as being absurd because they think of a garden as merely a practical means for growing food, this essay has shown that this is an outdated lens through which to view many urban agricultural practices. Gardens, and other urban agricultural practices like keeping micro-livestock, are widely recognized symbols of a national and international social and political movement—the Food Movement. Scholars are studying the Food Movement, governments are changing laws and policies based on it, and the popular press is documenting all aspects of it. And, individuals are showing support and solidarity, educating their neighbors, and declaring their identity through displaying the symbols of this movement in their own yards. The First Amendment, therefore, should protect the communicative aspects of these symbolic acts. This means that cities should no longer be able to ban such practices as front-yard gardens and backyard chickens based on aesthetic declarations that gardens do not belong in front yards or unsupported beliefs that agricultural practices like keeping micro-livestock do not belong in cities. Cities, however, should retain their ability to regulate these practices to curb nuisance concerns, as long as those concerns are real, documented, and supported by

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214. See e.g., COBB, *supra* note 4, at 25-27 (discussing how chickens, goats, and bees can thrive in an urban environment); BOUVIER, *supra* note 104, at 10893-96 (discussing that the concerns that cities raise about backyard chickens are mostly without basis as long as the city properly regulates the practice). This essay has always spoken of chickens in the back yard, and with good reason, chickens in the front yard may cause neighborhood dogs to behave in a predatory manner, which should be a sufficient interest to allow cities to relegate chickens to a less visible area of the yard. See BOUVIER, *supra* note 104, at 10918.

215. Berry, *supra* note 1, at 91.



evidence. Recognizing that a city requires more than vague aesthetic interests or prejudices against agricultural practices to support a ban on a communicative act will strike the right balance under our constitutional principles. Then the larger debate between the values of the Food Movement and the status quo of our current food system can play out on even ground.

