

Farms, Food, and Freedom: Informed Consumerism in Utah



SUMMARY

As industrialization of America's food system has increased in the past several decades, so too has its centralization. The average person has become almost totally disconnected from their food supply.

This distance between farm and fork has led to a lengthy list of regulations, intended to protect the health of uninformed consumers who aren't able to independently learn about the safety, security, or quality of food products.

Such regulations are unnecessary, and therefore should not be required, of producers who sell directly to informed consumers who can either inspect the farm's assets and processes, or voluntarily assume risk by buying a product that it is not subject to regulation.

Freeing up small farmers will increase their number, reduce compliance costs, and protect the freedom of both parties, thereby confining regulation to its proper domain.

While regulation can protect the health of consumers not connected to their food, it is not needed—and should not be required—in direct-sales situations.

Christian Christiansen of Vernon, Utah, opened a small family ranch in 2007 to produce beef, pork, and chicken. Within two years, the poultry operation was shut down by state regulators. Nobody had filed a complaint against his business, nor were there any outbreaks or reported problems. Instead, Christian had failed to adhere to a complex labyrinth of regulations, many of which he thought did not apply to his small farm.

Threatened with a class B misdemeanor, he got out of the chicken business; his customers weren't happy. "There are a lot of regulations," Christian told Libertas Institute in an interview, the enforcement of which "can depend a lot on the particular inspector."

He's not alone—farmers throughout Utah and across the country feel the ever-present weight of the regulatory state. Unfortunately, most of them are compelled to operate in an environment suited more to large-scale, chemical-intensive, monocropping and commodity agriculture corporations.

For those who sell their products to the general public in retail, restaurant, or commercial markets, it makes sense to have a middleman that can ensure the safety of the product. This model should not be used, however, for direct sale situations in which the consumer is informed and aware of the source of the food.

A Right to Food?

In asserting the right to be free from such regulation in a direct sale relationship between farmer and consumer, a more fundamental question is raised: is there a right to food?

The simplest way to address the question is to imagine the absence



of government—in a society free of legal restraint, would you have the right to grow, share, and consume food in a free exchange with others? Clearly the answer is yes.

Another way to address the question is to consider whether you can morally and legitimately use force against your neighbor for growing, sharing, and consuming food in a free exchange with others. Clearly the answer is no; lacking this authority, we cannot delegate it to the government as a third party enforcer.

As the famous farmer Joel Salatin has said, "The only reason the founders of our great republic did not include food rights alongside the right to bear arms, to speak, and to worship was because no one at that time could have envisioned a day when citizens could not acquire the food of their choice from the source of their choice."¹

Regulators, perhaps unsurprisingly, disagree. In response to a 2010 lawsuit filed by the Farmer-to-Consumer Legal Defense Fund, the U.S. Food and Drug Administration (FDA) argued

that "There is no absolute right to consume... any particular food." They continued:

*Plaintiffs' assertion of a fundamental right to their own physical and bodily health, which includes what foods they do and do not choose to consume for themselves... is similarly unavailing because plaintiffs do not have a fundamental right to obtain any food they wish.*²

Rational minds can recognize the logical errors in the FDA's arguments, and the absurdity to which regulators are reaching in order to control the actions of innocent and law-abiding Americans.

The government legitimately exists to protect—and not violate—one's rights; as Thomas Jefferson noted in the Declaration of Independence, "governments are instituted" to "secure [our] rights." It therefore follows that the ability to grow, share, and consume food is something with which the government should not interfere without just cause.

Why Regulations?

Beginning in the latter half of the nineteenth century, states began to increasingly regulate food production. This trend can be traced to a few primary factors:

1. Division of labor, specialization in production and processing, and residential urbanization made consumers increasingly distant from—and thus unaware of—the source of their food.³
2. Technological innovation led to new products and complexity in food.⁴ As a result, many consumers were concerned about food safety and adulteration. Further, market disruption led traditional food producers to demand regulations as an imposition on new competitors.⁵
3. Complexity of food made detecting adulteration more difficult, leading many to support regulatory oversight as a preventive measure.

While early regulation dealt with label accuracy, imports and exports, and weights and measures, increased technology and specialization has led to a corresponding increase in the breadth and depth of modern regulations. These regulations often focus on things such as recipes, storage temperature, sanitation processes, packaging types, and other details.

Modern food regulations aim to protect the public from bad actors about whom they do not, and never would, have the necessary information to make an informed choice. In its regulations, for example, the Utah Department of Agriculture and Food states that the regulations it enforces are to “protect

public health and ensure a safe food supply.”⁶

While state agencies have traditionally regulated food producers, in most states they also incorporate federal regulations governing the food production and distribution process. By administrative rule⁷, for example, the Utah Department of Health has incorporated the 2009 edition of the FDA food code—a nearly 700-page document.⁸

Regulatory Concerns

The past several decades have seen regulatory boards and bureaucracies increase in size, scope, and authority, leading many small farmers to feel overpowered by decisions and directives that are costly or untenable for their operations. Like other forms of regulation, the larger industry players—with access to monetary and political capital—attempt to commandeer or compromise the regulatory bodies for their economic benefit.

Economists have long noted how industry groups favor—and in many cases, actively lobby for—regulations that place their smaller rivals at a competitive disadvantage. For instance, detailed regulations dealing with food production, storage, and distribution may make it cost prohibitive for newer products and services to enter the market and compete against well established, powerful companies.⁹

Public health is clearly a laudable and important goal, but regulation too often serves instead as a barrier to entry—one that was created, or supported, by powerful industry members who use their financial and political influence to shield themselves from competition. Known as “regulatory capture,” this trend is seen not just in the food

industry, but in every significant industry that has regulatory oversight.

Farmer Joel Salatin pointed out a personal example indicative of others’ experiences dealing with bureaucracy using “public health” as a justification for regulatory overreach. Salatin was butchering chickens outdoors on his farm, on a set of tables in the open air, which drew the ire of regulators enforcing a rule that required the farmer to sanitize all surfaces—and because there were no walls where he was working, they argued that he was violating the regulation.

Salatin took his case to court and won, demonstrating in the process that his meat product had a small fraction of the bacterial contamination found on several other processed chickens randomly selected from grocery stores. Once again, “public health” was being used to justify burdensome and unnecessary regulations.



Cottage Food Laws

Over 40 states, including Utah¹⁰, have a “cottage food law” that allows individuals to process food for sale using their home kitchen, thereby avoiding the costs associated with an industrial kitchen that meets regulatory standards. While it may seem reasonable to rely on this exception to regulatory oversight for small producers, it’s not the right approach.

The process to obtain a cottage food permit in Utah is lengthy, requiring applications, training, inspections, and submission of detailed written recipes for products that will be made in the home kitchen. Additionally, a sample from every batch of product must be kept for 14 days—and some products must be submitted for laboratory testing. A number of other regulations, such as who may access the kitchen, and how the kitchen may be used, are imposed upon producers selling food under a cottage food permit. Utah now has over 200 cottage food producers.¹¹

There are two main issues with this approach for small producers. The first is that the state is incurring liability for certifying things that cannot be certified—the safety of the food and facility in which it is processed. Only an initial inspection is required of a cottage food kitchen, unless there is reason to suspect the producer of foul play. Leading the public to believe that such operations have any significant regulatory oversight—even when requiring them to put “home produced” on the label—is a problematic public policy.

Second, cottage food establishments must produce food only according to their approved recipes. Any variation from this list of ingredients

and amounts is prohibited. Cooks regularly experiment with the food they produce, often in an attempt to increase customer satisfaction, edge out a competitor, or innovate. Subjecting this highly dynamic process to regulatory control is untenable for small producers simply looking to sell to the public what they have produced in their home.

Utah’s cottage food law, like most of the other states which have one, is limited only to “non-potentially hazardous” food that does not require “time/temperature controls for safety” so as to “limit pathogenic microorganism growth or toxin formation.” This excludes many foods such as “a food of animal origin,” cut melons or tomatoes, and some low-sugar jams and canned vegetables.

While the cottage food law allows limited freedom to small producers if their food product is on the approved list, there is a better public policy approach to regulating food sold directly from farmer to consumer.

The Food Freedom Movement

In early 2015, a new law took effect in Wyoming that exempts producers from “licensure, permitting, certification, inspection, packaging, or labeling” regulations when selling food (with the exception of non-poultry, processed meat) directly to the “informed end consumer” for personal use. Titled the “Wyoming Food Freedom Act” and sponsored by a freshman legislator, it passed the House 57-1 and passed the Senate 20-8.

Wyoming’s effort may likely see replication elsewhere; similar legislation has been filed in Missouri, Maine, and Virginia, with legislators in other states signaling interest and intent to

see their state join the food freedom movement.

In Maine, eleven cities have enacted “food sovereignty” ordinances purporting to exempt their citizens from state and federal regulations for direct farmer-to-consumer sales.¹² Additionally, state legislators in Maine have introduced a constitutional amendment to recognize and protect the right to food in addition to proposed legislation to statutorily exempt direct-to-sale transactions from food and safety regulations.

Underlying the efforts in Wyoming and elsewhere is a desire to shift liability from producer to consumer. The “buyer beware” approach implicitly requires consumers to inform themselves about the product they’re considering purchasing, the people behind it, and the processes they use. Recognizing that regulations do not guarantee safety and often come at a very high cost to producers—costs that are inevitably passed on to the consumer—many believe that private certification or the “buyer beware” approach are best when the consumer is able to purchase directly from the producer.

Due in part to increased costs—but also out of a desire to enjoy the freedom to determine what they will consume without having regulatory bodies making these decisions for them—the food freedom movement is being led not by the producers, but by consumers. Farmers and food producers in these states have certainly been active and engaged in the process, yet the strongest—and most important—voices have been the very people for whom the food is intended.

Libertas Institute believes that Utah should be the next state to join this movement.

Food Freedom in Utah

The consumer-led food freedom movement is already visible in Utah through a recently successful legislative effort to relax “raw milk” laws, the creation of “Utah’s Own” to promote local food products, and increasing consumer demand for non-industrial food products, non-GMO foods, free range eggs, raw food, and local, directly sourced food products.

Utah law does not prohibit offering home-produced food for free to others. Neighborly sharing of baked bread, canned jam or salsa, casseroles, and other produced foods is commonplace in our state.

Unregulated food sales are also common; church, school, and scouting groups regularly hold bake sales and barbecues offering food products for sale to the public that were made in an unregulated, uninspected home kitchen or grill. These routine transactions occur without incident or public outcry.

When the recipient of the food offers money in exchange for the food instead of mere gratitude, the food itself is not altered—it is no more or

less dangerous than if the recipient did not pay. As such, regulation cannot be justified on the sole basis that compensation has been made in exchange for the food.

In recent years, the only substantive attempt at “food freedom” by the Utah legislature came in the form of House Bill 249 in 2011, when proposed revisions to federal food regulations faced widespread criticism and opposition. While HB249 was initially an attempt to exempt *intrastate* agriculture from federal regulations, the bill was eventually substituted and narrowed in scope.

The substituted bill would have “recognize[d] the right of an individual... to grow food for personal use by the individual... without being subject to local, state, or federal laws, ordinances, or rules” so long as the food was legal, lawfully possessed, and did not pose a health risk. HB249 passed the House 49-15 but was sent to the Senate late in the session and, as a result, no further action was taken.

Whether by signing an explicit waiver or having the implicit right to assume the burden of investigating what they

are buying and ingesting, consumers throughout Utah should be free to purchase food directly from producers without being subjected to regulations and their associated costs intended for and properly applied only to food for sale in retail, restaurant, and commercial markets where no relationship to, or connection with, the producer exists.

Utah has an opportunity to join an important movement—one based on individual liberty, informed consumerism, and a recognition of the right to commerce free from unreasonable restrictions and regulations.

We encourage the Utah legislature to pass the following, for which we propose suggested language on the following page:

1. A constitutional amendment recognizing and protecting a person’s right to food; and
2. A statute exempting direct sales between food producer and an informed consumer from local, state, and federal food and safety regulations.



PROPOSED UTAH CONSTITUTIONAL AMENDMENT

ARTICLE I, SECTION 30 [Right to Food]

The individual right of the people to grow food for their own consumption, or acquire farm-produced food directly at the farm with the agreement from the farmer who produced it, shall not be infringed; but nothing herein shall prevent the Legislature from regulating the production, processing, and distribution of food for retail, restaurant, or commercial use.

PROPOSED STATUTE

Title 4, Chapter 5a: Food Freedom Act

SECTION 101: TITLE

This chapter is known as the “Food Freedom Act.”

SECTION 102: DEFINITIONS

As used in this chapter:

1. “**Delivery**” means the transfer of a product resulting from a transaction between a producer, or producer’s agent, and an informed end consumer at a direct-to-sale location.
2. “**Direct-to-sale location**” means a farm, ranch, farmers market, home, office, or any location agreed to by both the producer and the informed end consumer.
3. “**Farmers market**” means a public or private facility or area where producers gather on a regular basis to sell fresh foods, locally grown products, and other food items directly to consumers.
4. “**Home consumption**” means consumed within a private home, or food from a private home that is only consumed by family members, employees or nonpaying guests of the producer.
5. “**Homemade**” means food that is prepared in a private home kitchen that is not licensed, inspected or regulated.
6. “**Informed end consumer**” means a person who is the last person to purchase any product, who does not resell the product, and who has been informed that the product is not certified, licensed, regulated or inspected by the state.
7. “**Producer**” means any person who harvests or produces any product which may be consumed as food or drink.

SECTION 103: FARMER-TO-CONSUMER DIRECT SALES – EXEMPT FROM REGULATION

1. A producer is exempt from state, county, or city licensing, permitting, certification, inspection, packaging, and labeling requirements under this title for the preparation, serving, use, consumption, or storage of food and food products that are:
 - a. produced and sold within the state;
 - b. sold directly to an informed end consumer; and
 - c. for home consumption.
2. Food and food products exempt under this chapter may not be sold to, or used by, a retail, restaurant, or commercial establishment.
3. A producer selling food or food products exempt under this section shall inform the end consumer that the food or food product is not certified, licensed, regulated, or inspected by the state.
4. Nothing in this chapter shall be construed to impede the Department of Health in an investigation of foodborne illness.

Endnotes

1. For a detailed legal analysis of this question, see David J. Berg, "Food Choice is a Fundamental Liberty Right," *Journal of Food Law & Policy*, vol. 9, 2013, 173-221, available at: <http://www.extension.org/pages/71012/food-choice-as-a-fundamental-liberty-right>.
2. "Joel Salatin's Testimony on Food Freedom in Maine," Farm to Consumer Legal Defense Fund, May 1, 2015, <http://www.farmtoconsumer.org/joel-salatins-testimony-on-food-freedom-in-maine/>
3. "FDA's Response to FTCLDF Suit over Interstate Raw Milk Ban," Farm-to-Consumer Legal Defense Fund, May 6, 2010, <http://farmtoconsumer.org/litigation-FDA-status.htm>.
4. John J. Wallis and Douglass C. North, "Measuring the Transaction Sector of the American Economic, 1870-1970." In *Long Term Factors in American Economic Growth* (Chicago: University of Chicago Press, 1986), 95-148.
5. Strasser, Susan, *Satisfaction Guaranteed: The Making of the American Mass Market* (New York: Pantheon Books, 1989).
6. Donna J. Wood, *The Strategic Use of Public Policy: Business and Government in the Progressive Era* (Marshfield, MA: Pitman Publishing, 1986).
7. "Rule R70-560. Inspection and Regulation of Cottage Food Production Operations," Utah Administrative Code, <http://www.rules.utah.gov/publicat/code/r070/r070-560.htm#T1>
8. Rule R392-100, "Food Service Sanitation," Utah Administrative Code. Effective May 1, 2015.
9. "Food Code, 2009," FDA, accessed May 28, 2015, <http://www.fda.gov/downloads/Food/GuidanceRegulation/UCM189448.pdf>.
10. Marc T. Law, "History of Food and Drug Regulation in the United States," Economic History Association, <http://eh.net/encyclopedia/history-of-food-and-drug-regulation-in-the-united-states/>
11. See Utah Code Annotated, Title 4, Chapter 5, Section 9.5.
12. "Cottage Food Production," Utah Department of Agriculture and Food, <http://ag.utah.gov/cottage-food-production.html>
13. "Food Sovereignty Ordinance to be considered by Freedom voters," Bangor Daily News, February 17, 2015, <http://bangordailynews.com/community/food-sovereignty-ordinance-to-be-considered-by-freedom-voters/>.

PUBLIC POLICY BRIEF

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FREQUENT
RECURRENCE
===== TO =====
FUNDAMENTAL
PRINCIPLES IS
ESSENTIAL
===== TO =====
THE SECURITY
===== OF =====
INDIVIDUAL
RIGHTS

UTAH CONSTITUTION
ARTICLE I, SEC 27