THE ATTACK ON FOOD FREEDOM

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PERSPECTIVES ON ECONOMIC LIBERTY

Perspectives on Economic Liberty

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You may have noticed that in recent years much of America has become a battleground over food. And you no doubt know that much of American history involves the struggle to defend individual rights and limit government power. But did you know that—as is the case today—food has often been at the center of these struggles?

Today, from the federal government on down to states and cities, elected officials and regulators are cracking down with increasing relentlessness on the lives and livelihoods of the farmers, chefs, artisans, restaurateurs, food truck operators and others who raise, produce, make, cook and sell the food we eat—and in the process, undermining their right to earn an honest living and provide for themselves. For example, some state regulations prevent small farmers from selling products like pasta made on the farm to the local consumers who demand it. Or they ban the sale of products like subjectively large sodas. Overly burdensome federal regulations push small artisanal food entrepreneurs out of business. Local laws target food trucks and food carts and make it difficult for these small businesses to earn a living—often for no other reason than unjustly protecting existing restaurants from competition. This is just a sampling of the many attacks on food freedom and economic liberty.

Economic liberty is essential to food freedom.

FOOD FREEDOM

These bans and strict regulations ultimately limit the choices available to eaters—a group that includes you, me and quite literally everyone in America. In doing so, they restrict a right that's increasingly being referred to by people who eat in many different ways as "food freedom."

Just what is food freedom? The term refers to your right to grow, raise, produce, buy, sell, share, cook, eat and drink the foods you want. Food freedom very much embraces food tastes, preferences and trends of all sorts—from food truck entrepreneurs, raw milk sellers and home gardeners to convenience store owners and high-end restaurateurs and chefs. And yet, as this report demonstrates, each of these food choices—and so many more—is under attack in one way or another. Food freedom is under attack.

But these bans and red tape don't just restrict food freedom. They also severely undermine another important and concomitant right: the ability of food entrepreneurs to earn an honest living.

Christine Anderson, owner of Cast Iron Farm in Oregon, sells raw milk (but was prohibited from advertising it).

ECONOMIC LIBERTY

"Economic liberty" refers to a person's right to engage in a trade free from arbitrary, protectionist or otherwise needlessly burdensome regulations. Georgetown University Constitutional Law Professor Randy Barnett defines economic liberty as "the right to acquire, use, and possess private property" and to enter into lawful contracts.[1] Economic liberty is essential to food freedom.

The U.S. Constitution contains a number of provisions that protect economic liberty. For example, Congress passed the Fourteenth Amendment[2] to the Constitution in the wake of the Civil War to ensure that the horrific badges and emblems of slavery—among them the systematic suppression of the rights of African Americans in the South to enjoy freely the fruits of their own labor—would rightly perish.[3] Primarily through its "Privileges or Immunities" Clause, the Fourteenth Amendment aimed to ensure the economic liberty of newly freed slaves. The Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." At the time, the term "privileges or immunities" was synonymous with "rights" and included all of those rights that differentiated slaves from free men—including economic liberty.

Entrepreneurs of all sorts—including farmers, chefs, artisans, restaurateurs, food truck operators and others—ought to be free of unjust, arbitrary or protectionist laws and regulations.

Economic liberty enjoys protection in other provisions of the Constitution, as well. For example, the Commerce Clause prevents the states from enacting laws designed to protect in-state businesses from out-of-state competition. And the Due Process Clause of the Fourteenth Amendment protects Americans from arbitrary and irrational laws that interfere with their ability to earn a living—such as laws favoring one class of business or businessperson over another or creating artificial barriers to entry for new market entrants.

Economic liberty is no less relevant and important today than it was when these various constitutional provisions were adopted. Entrepreneurs of all sorts—including farmers, chefs, artisans, restaurateurs, food truck operators and others—ought to be free of unjust, arbitrary or protectionist laws and regulations. Yet many laws and regulations that restrict food freedom and economic liberty persist at all levels of government. How did our food system get to such a regretful state?

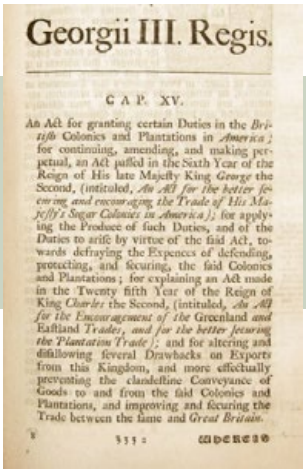
Economic Liberty and Food Freedom: Origins & Evolution

In order to answer that question, it is important to look back to the centuries before the constitutional provisions discussed above were adopted. For while the Constitution protects economic liberty, the right to enjoy the bounty of one's own labor has even earlier origins. And as we look back, we find the origins of economic liberty are deeply intertwined with those of food freedom.

What does food freedom have to do with economic liberty? Almost everything. From the earliest times, crops and food were among a person's most important and valuable property. England's John Locke, the father of modern property rights theory, recognized in the Seventeenth Century the interrelationship of food and agriculture with economic liberty and prosperity.[4] A century later, the eminent English jurist Sir William Blackstone discussed agriculture in much the same terms that Locke had, writing that men sought "a permanent property in their flocks and herds, in order to sustain themselves."[5]

Locke and Blackstone each had an enormous influence on America's Founding Fathers. Just how much so is evident in the writings of the then-recent English expatriate (and new American patriot) Thomas Paine, who wrote in his remarkable Revolutionary War-era pamphlet Common Sense that "[t]he commerce, by which [America] hath enriched herself, are the necessaries of life, and will always have a market while eating is the custom of Europe."[6] Here, Paine is acknowledging not just that the colonists had embraced the interrelationship between food, economic liberty and prosperity that Locke noted had been lacking in the colonies a century before. He's recognizing that America's colonists had become wealthy largely

The Sugar Act of 1764 imposed unprecedented restrictions on the food-freedom of the colonists.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CAP. XV.

An Act for granting certain Duties in the British Colonies and Plantations in America; for continuing, amending, and making perpetual, an Act passed in the Sixth Year of the Reign of His late Majesty King George the Second, (intituled, An Act for the better securing and encouraging the Trade of His Majesty's Sugar Colonies in America); for applying the Produce of such Duties, and of the Duties to arise by virtue of the said Act, towards defraying the Expences of defending, protecting, and securing, the said Colonies and Plantations; for explaining an Act made in the Twenty fifth Year of the Reign of King Charles the Second, (intituled, An Act for the Encouragement of the Greenland and Eastland Trades, and for the better securing the Plantation Trade); and for altering and disallowing several Drawbacks on Exports from this Kingdom, and more effectually preventing the clandestine Conveyance of Goods to and from the said Colonies and Plantations, and improving and securing the Trade between the same and Great Britain.

The Boston Tea Party, 1773.

as a result of her food trade.

But by the 1770s, when Paine was writing, America's British colonial overlords had sought to restrict the successful food trade of the colonies. Why? And why did Paine's work, which served to inflame the passions of American colonists for revolution and independence upon its release in 1776, note the connection between food and economic liberty?

Prior to the 1760s, with few notable exceptions,[7] the British had largely respected the economic liberty of American colonists—generally and in relation to food specifically. Colonists were mostly free to grow, raise, produce, buy, sell, share, cook, eat and drink the foods they wanted. But the British altered the status quo dramatically in the years leading up to the American Revolution. This was largely due to British efforts to tax the American colonists' newfound wealth as the means to pay off British debts in the wake of the French & Indian War.

The first such law that the British thrust upon the colonists was the Sugar Act of 1764,[8] which imposed new taxes on sugar and molasses (key ingredients for making rum), effectively banned some food import, and created heinous new search and seizure provisions. The rallying cry of "taxation without representation" was borne out of the Sugar Act, and it only strengthened as subsequent British acts also targeted the food and economic liberty of the colonists. Had the British never clamped down on the rights of American colonists to earn a living through a variety of food-related pursuits—from distilling rum to fishing—the cause of American Independence may never have arisen in the 1760s and 1770s.

The colonists fought back. They did so first through smuggling.[9] The fact that many Founding Fathers were forced to turn to smuggling molasses, sugar and other goods, is evidence of the pervasive British attack on colonists' economic liberty. But it's also proof of the deeply and uniquely intertwined roots of food freedom and economic liberty in this country. Later, through openly hostile acts like the Boston Tea Party and in the pitched battles of Lexington and Concord, these same colonists announced to the world that Revolution was at hand.

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Most Americans know that the Revolutionary War, which ended in 1783, helped America cast off once and for all the increasingly severe shackles of subjugation by the British. But what was the primary thrust of that subjugation? It was directed by the British largely against America's food trade. And it was the shackles the British placed on America's food bounty that led Paine and the Founding Fathers to revolt.

What's more, those same early Americans used what they learned from these oppressive British food laws to ensure that future Americans—including those today—would never have to face the same struggles again. Constitutional limits on federal power and guarantees of individual rights in the Bill of Rights were intended to safeguard the economic rights and food freedom of everyday Americans.

Photo credit: Mrs. John J. Brady

Joseph Lochner was fined $50 for allowing an employee to work more than 60 hours a week in his bakery.

That worked for many Americans. But not for all. Passage of the Fourteenth Amendment (along with the Thirteenth Amendment,[10] which ended slavery) helped extend the protection of food freedom and economic liberty to every American.

But in the century that followed, the Supreme Court had a troubled relationship with economic liberty. Perhaps not surprisingly—given the close historical connection between food and economic liberty—that troubled relationship often manifested itself in cases dealing with food freedom issues. For example, in *The Slaughter-House Cases*,[11] decided just five years after adoption of the Fourteenth Amendment, the Supreme Court pushed aside the Amendment's Privileges or Immunities Clause to uphold a state-created monopoly over Louisiana's animal-slaughter industry. In that case, the state had passed legislation that banned animal slaughtering in and around New Orleans, save for one location below New Orleans. The legislature gave the Crescent City Company an exclusive 25-year monopoly contract to build and operate a slaughterhouse in that location. The law also required any independent butchers to pay fees to work in the slaughterhouse. The independent butchers challenged the state-mandated monopoly as a violation of their rights to earn an honest living under the Privileges or Immunities Clause. The Court disagreed, and essentially gutted the Fourteenth Amendment of its intended protection of economic liberty.

In the ensuing decades, in cases like *Lochner v. New York*,[12] the Court temporarily reversed course and began providing meaningful protection for economic liberty through the Due Process Clause of the Fourteenth Amendment. In *Lochner*, the Court sided with a bakery owner and its workers over New York State regulators who sought to impair freedom of contract in the state. The owner and workers successfully challenged, under the Due Process Clause, a state law limiting the number of hours that a baker could work each day or week. The Court found that the number of

hours bakers may work in a day or week is something the Constitution leaves to bakers and their employers, not state legislators.

But while *Lochner* and other cases temporarily reinvigorated the protection of economic liberty inherent in the Fourteenth Amendment, subsequent Court decisions once again largely neutered the protections that the Amendment—and other provisions of the Constitution—afforded food freedom and economic liberty. In many of these cases, the Court used the Commerce Clause to expand the government's power at the expense of individual rights, economic liberty and food freedom.

The Commerce Clause provides Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States."[13] In this way, it gives the federal government the exclusive power to regulate commerce that occurs between individuals and businesses in different states, such that any one state cannot protect its own industries from competition with people and businesses in other states. That is the positive side of the Commerce Clause coin. But Congress has also used this potent authority to restrict food freedom. In fact, many of the Supreme Court cases that have chipped away at food freedom and economic liberty have centered on questions about the reach of federal power under the Commerce Clause.

In *Collins v. New Hampshire*,[14] the Supreme Court struck down a New Hampshire law that required margarine to be colored pink—in order both to distinguish it from butter and to discourage its sale. The law served wrongly to protect the dairy industry from competition by the newfangled margarine industry. The Court, which also struck down two other states' prohibitions on margarine the same day it issued its decision in *Collins*, held that the New Hampshire law was unconstitutional because it "amounts in law to a prohibition."[15] The Court observed that the law required the producer to render his product "unsalable" and found that the Commerce Clause barred states from exercising such power. This trio of decisions was a victory for food freedom and economic liberty.

But while the Court's interpretation in *Collins* of a strong Commerce Clause that superseded state food prohibitions was a victory, the victory would not last. Congress soon passed a law, the Oleomargarine Act of 1902,[16] which permitted states to regulate

A farmer protests the New Deal program.

margarine once within their borders in virtually any manner they saw fit.

Within a generation, the Court would expand the scope of the federal government's power under the Commerce Clause in unprecedented new directions under President Franklin D. Roosevelt. Under his "New Deal," President Roosevelt launched a series of controversial programs to plan and manage the economy during the Great Depression. In most instances, the Supreme Court strained constitutional credulity to uphold these New Deal programs. Two Supreme Court cases in particular paved the way for this expansive view of the government's legislative power.

In *United States v. Carolene Products*,[17] a manufacturer of "filled milk"—like margarine, a dairy substitute—brought suit challenging a congressional ban on that product being shipped between states. While the Court had earlier overturned the state margarine bans, the New Deal-era Court held that Congress' filled milk ban—or, indeed, any economic regulation—was presumptively constitutional. *Carolene Products* dealt a serious blow to food freedom and economic liberty because it shifted the burden of proof in most such cases from those who make and enforce the law to those subject to the law.

In *Wickard v. Filburn*,[18] the federal government argued that Ohio wheat farmer Roscoe Filburn had exceeded his quota of wheat production under the Agricultural Adjustment Act of 1938,[19] part of President Roosevelt's New Deal. The law capped how much wheat a farmer could grow, so as to inflate wheat prices artificially during the Great Depression. Filburn responded that any excess wheat he grew was for personal consumption alone and thus had no effect on interstate commerce. The Supreme Court found that even if Filburn were to consume the wheat he grew, that action alone could have an impact on interstate commerce because it would mean that Filburn would not have to enter the marketplace to buy wheat.

Filburn was both a dramatic expansion of Congress's power under the Commerce Clause and a dramatic misreading of the Clause itself. And, like *Carolene Products*, the Court's decision in *Filburn* helped introduce a Supreme Court tradition of deference to Congress's power that looms over the Court to this day.

Many scholars consider the Court's decision in *Filburn* to be a low point for economic liberty. But *Filburn* also serves as a nadir for food freedom. The case illustrates the intrinsic link between food freedom and economic liberty—and highlights the government's assault on those freedoms. For when the government can declare that a farmer is not free to grow food both for sale and for his own family, then Americans no longer

For when the government can declare that a farmer is not free to grow food both for sale and for his own family, then Americans no longer have either food freedom or economic liberty.

California farmer Marvin Horne.
Photo by Chris Hardy/Getty Images

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Despite precedents like *Carolene Products* and *Filburn*, there have been some recent victories at the Supreme Court in favor of economic liberty for food producers. In *Granholm v. Heald*,[20] out-of-state wine producers challenged a New York State law prohibiting out-of-state wineries from shipping wine directly to consumers in the state. These protectionist laws, intended to protect in-state wineries from competition, deprived consumers of choice and wineries of new and emerging markets, including online sales. In a victory for food freedom, the Court struck down the laws as violating the dormant Commerce Clause doctrine,[21] which holds that because Congress has plenary authority over interstate commerce under the Commerce Clause, individual states necessarily lack such power.

Just this past term, the Supreme Court again addressed food freedom. In *Horne v. United States Department of Agriculture*,[22] raisin handlers brought suit to challenge another New Deal-era program that requires them to give the federal government nearly fifty percent of their raisins—without compensation. As with the law at issue in *Filburn*, the New Deal-era raisin law at issue in *Horne* was intended to raise the prices of crops by limiting the supply. The plaintiffs in *Horne* claimed the scheme was an unconstitutional taking under the Fifth Amendment. The Fifth Amendment's Takings Clause prohibits property from being taken for a public use without just compensation and applies to the states through the Fourteenth Amendment. Although the Supreme Court remanded *Horne* to a lower court—which has yet to rule on the case—the Court's justices appeared highly skeptical of the USDA law used to justify the raisin takings. Justice Elena Kagan, for example, mused on the bench that the scheme might be the world's most outdated law.[23]

The fact that *Horne* reached the Supreme Court as a Takings Clause case focused on individual rights—rather than as a Commerce Clause case focused on federal government power—may be evidence of a subtle but welcome shift in favor of challenging federal power on food freedom issues on individual rights grounds. Such a shift would emphasize the primacy of individual rights and economic liberty as guaranteed under the Due Process Clauses of the Fifth and Fourteenth Amendments and, in cases like *Horne*, of food freedom, rather than

the longstanding focus on the boundaries of federal and state power under the Commerce Clause. *Horne* is evidence, too, that advocates of economic liberty will continue to seek out and utilize new and effective strategies at the Supreme Court to challenge the government's pervasive attacks on food freedom.

The Assault on Food Freedom

Nearly 225 years after Congress voted to adopt the Bill of Rights, and nearly 150 years since adoption of the Fourteenth Amendment, the struggle for food freedom and economic liberty is being fought all over again.

Today's attacks on food freedom and economic liberty are troubling not just because they target entrepreneurs of all sizes—on whom we rely every day in order to eat—but also because early Americans fought for and won our nation's independence in a war that was largely a struggle against British oppression of the food freedom and economic liberty of the colonists. Then, in the 1800s, Americans fought to end slavery and to ensure the government would protect the rights of *all* people.

Why has America moved away from protecting food freedom and economic liberty? And just how far in the wrong direction have we gone?

While there are several types of modern laws and regulations that restrict food freedom and economic liberty, many fall into one of three key categories. *Overzealous food safety regulations* mandate processes for preventing microbial or other contamination—even if those processes are more expensive and no more effective than other methods. *Bureaucratic hoops* refer to licensing or other government regulations that often handcuff entrepreneurs and food producers for little or no reason. Finally, regulations based on the so-called *"new" public health* seek to use state power to nudge food consumers into making decisions the government believes are "better" for consumers, undermining the consumer's ability to decide how she wants to spend her money and what she wants to eat.

A growing number of these truly awful food regulations are evident at the federal, state and local level—from regulations prohibiting farmers from advertising unpasteurized milk to laws protecting brick-and-mortar restaurants against competition from food trucks. These laws—and many others—act as a direct assault on economic liberty and food freedom.

Overzealous Food Safety Regulations

Because they impact every food producer and seller in America, overly burdensome food safety laws and regulations represent perhaps the most pervasive regulatory challenge to food freedom. These rules often have a particularly adverse impact on small farmers and other small entrepreneurs who

These rules often have a particularly adverse impact on small farmers and other small entrepreneurs who produce safe food but who, unlike their much larger counterparts, are unable to bear the high cost of complying with food safety regulations.

Taos Food Center in Taos, N.M.
Photo courtesy of
http://www.tcedc.org/

produce safe food but who, unlike their much larger counterparts, are unable to bear the high cost of complying with food safety regulations.[24]

The Food Safety Modernization Act (FSMA),[25] a 2011 law that updated and expanded the oversight authority of the Food and Drug Administration (FDA) and has been billed as the most important overhaul of federal food safety laws in more than 75 years, is one dreaded recent example. While Congress passed the law three years ago, major portions of the FSMA have yet to be finalized due in large part to concerns over how they would impact small farmers, who were supposed to be largely exempt from the FSMA thanks to language included in an amendment that passed as part of the law.

But regulations the FDA proposed under FSMA early in 2013 would in fact impact small farmers, who would be forced under the rules to spend thousands of dollars every year to comply with completely inapt food safety rules. For example, the proposed rules would force apple farmers in Washington State to comply with higher water filtration standards intended to apply to nut farmers.[26] That compliance would drive up the costs for apple farmers—particularly for smaller farmers—without making their already safe apples any safer. Consumers ultimately would pay the cost of this and other FSMA rules. Consequently, small farmers railed against the FSMA at public hearings around the country. What's more, the FDA itself determined that even in the extraordinary event that its proposed produce rules were to be implemented with 100 percent precision, that success would translate into *at best* a 5.7 percent decrease in foodborne illness nationwide—all at a cost of hundreds of millions of dollars per year.[27]

Widespread outrage over the potential impact of the rules on small farmers forced the FDA to withdraw the proposed FSMA rules late in 2013 and to send them back to the drawing board. But there's no telling if the revised rules will be any better. After all, it wasn't just small farmers who would be squeezed by the rules.

Other small food entrepreneurs might not escape the tentacles of the FSMA, either.[28] For example, the Taos Food Center at the Taos Economic Development Corporation in Taos, N.M., is a nonprofit that enhances the economic liberty and well-being of Native American and Latino food entrepreneurs in the area by providing food production facilities to more than three-dozen small local food entrepreneurs.[29]

These budding entrepreneurs use the food center's licensed commercial kitchen, which was launched in 2000, to produce everything from "fresh traditional salsas to delicious organic scones." Besides great food, the food center helps cook up success stories. Renting space in the kitchen, which costs about $12 per

hour, has helped some entrepreneurs sell more than $100,000 of food products annually.[30] The food center also provides free educational opportunities to the public on food marketing, safety, regulation and entrepreneurship.

But all this might change under the FMSA. Supporters of the food center fear the FSMA regulations would require the food center to register with the federal government as a food facility, a holding facility and a processing facility. That means paying steep new fees and being subject to tough new federal regulations. And any violation of the federal rules could bring crippling fines.

Another unlikely potential victim of the FSMA is Duke University's Campus Farm.[31] The one-acre farm on the university's campus, founded in 2010, has already helped educate hundreds of students and members of the school community about small-scale organic farming. It also sells produce at the Duke Farmers Market and helps provide thousands of pounds of healthy fruits and vegetables to campus dining halls.[32] The farm even helps teach Duke law students about food safety regulations.

But according to farm manager Emily Sloss, parts of the proposed FSMA rules would have seriously hurt the ability of the Campus Farm to continue to thrive. New federal composting rules—which would have a disproportionately negative and unnecessary impact on organic farms—could "make a lot of our land unusable for parts of the year," Sloss told the *Duke Chronicle*, a campus newspaper.[33] The high cost of complying with the composting rules and other FSMA provisions could spell doom. "The regulations and costs that would go into enforcing this to be certified—it would be crazy," Sloss told the *Chronicle*.

The FSMA is a direct threat to small apple farms, to nonprofits that help budding food entrepreneurs flourish and to university farms that serve both to provide healthy, fresh produce and to educate students about farming and agricultural regulation, among many others. It's a solution in search of a problem.

Meanwhile, the food businesses that supported passage of the FSMA are large, nationally focused farms and corporate chains that can more easily absorb the steep costs of complying with the new law. And if the FSMA crushes some of their smaller competitors in the process? All the better for them.

Another symbol of the FDA's attack on food freedom in the name of so-called food safety is the agency's heavy-handed enforcement of its ban on the interstate shipment and

Students at the Duke Campus Farm.

Supporters of Amish farmer Dan Allgyer protest at the Capitol.

sale of unpasteurized (raw) milk. Many states also ban the sale of raw milk. The FDA adopted its ban reluctantly in the late 1980s due to a lawsuit by Public Citizen that ultimately forced the agency's hand.[34]

Why the fuss over raw milk? Opponents of raw milk argue, correctly, that pasteurization kills bacteria that may cause harm to those who consume unpasteurized dairy products. Supporters of the right to sell raw milk argue, also correctly, that the federal government does not prohibit agricultural producers from marketing all sorts of potentially hazardous raw foods—including spinach, cantaloupe, beef, chicken, fish and pork, each of which may contain harmful bacteria if consumed raw or undercooked. Instead of banning those foods, the government rightly warns consumers about the potential food safety issues related to those foods and rightly leaves the choice to consume such products up to consumers.[35] Many small dairy farmers and raw milk consumers claim that raw milk boasts numerous health benefits.

Raw milk has risen in popularity in recent years, thanks in large part to renewed interest in direct sales from farms and the growth of the local food movement.[36] But this growth is no thanks to the federal government. In 2011, for example, the FDA—along with U.S. Marshals and a state police officer—carried out an armed early morning raid on the rural Pennsylvania farm of Dan Allgyer.[37] The raid was the culmination of a yearlong undercover investigation into Allgyer, who the FDA determined was providing raw milk to consumers in the Washington, D.C. area, in violation of the agency's ban on interstate sales. Never mind that Allgyer's milk wasn't alleged to have sickened anyone. What's more, consumers in Washington and Maryland had willingly and knowingly sought out and consumed Allgyer's unpasteurized dairy products. Even so, the FDA ordered Allgyer, a member of Pennsylvania's Amish community, to stop providing milk to consumers or to risk jail. Allgyer was forced to comply, shutting down his dairy farm in the process.

This is not to say that the FDA has a monopoly on regulatory excesses pertaining to food safety. Just ask Mark DeNittis. A chef by training and first generation Italian-American,[38] DeNittis was riding high as the proprietor of Il Mondo Vecchio, an award-winning producer of artisanal cured meats in Denver. The company employed "Old World techniques of natural process while following New World regulations," its website stated, and had been

Mark DeNittis's award-winning Il Mondo Vecchio was shut down by the USDA.

Time and time again, the move toward stricter food-safety regulations like the FSMA has jeopardized the livelihoods of small entrepreneurs and flown in the face of the wishes of consumers.

doing so for years.[39] Then the U.S. Department of Agriculture (USDA), which had inspected and approved Il Mondo Vecchio's products since 2009, suddenly decided its techniques no longer complied with USDA regulations.[40] The rules hadn't changed. But the USDA's interpretation of them had. The USDA's new approach forced DeNittis to close up shop in 2012.

Time and time again, the move toward stricter food-safety regulations like the FSMA has jeopardized the livelihoods of small entrepreneurs and flown in the face of the wishes of consumers. Fewer producers mean fewer choices for consumers. And the producers that remain as the result of this consolidation-by-regulation—in which stricter food safety rules supported by large businesses squeeze out smaller, often local and independent producers are the larger ones that can pay the costs of compliance.

BUREAUCRATIC HOOPS

Bureaucratic rules often act to restrict food freedom. These laws and regulations exist at all levels of government. They are often among the most mind-boggling and arcane of restrictions and have severe implications for the economic liberty of small business owners.

As mentioned above, earlier this year in *Horne v. U.S. Department of Agriculture*,[41] the Supreme Court heard the case of Marvin and Laura Horne, who sued the USDA over the agency's claim to half of their raisin crop. What had the Hornes done to deserve having half of their raisins—worth nearly $500,000—seized by the government? Nothing at all. In fact, the Horne family is just another victim of a New Deal-era USDA program. Recall farmer Roscoe Filburn. While the government seized Filburn's wheat, for the Hornes, the law meant they had to turn over nearly half of their raisin crop—without question or compensation—as a matter of course. Under the raisin program, implemented 75 years ago "to insulate farmers from competitive market forces" as part of "a national policy of stabilizing prices for agricultural commodities[,]"[42] the USDA puts these raisins into a reserve of sorts, and is free to do with the raisins as it likes. The USDA program violates the most fundamental rights of the Hornes and others to grow and sell their own food and to receive just compensation for any property taken by the government for public use.

But it's just one of many such programs. Because the USDA oversees many similar programs that take food or money out of the hands of farmers and ranchers around the country[43]—including the agency's milk marketing orders[44] and beef checkoff program[45]—a decision in the *Horne* case might prove to be the most important decision on food freedom and economic liberty in more than a generation.

Statewide laws and regulations that force some set of bureaucracy on food producers and sellers are common—especially in the area of alcohol regulation. Some states prohibit beer breweries from selling beer to consumers, while others ban breweries from letting consumers even taste beer.[46] Still other states prohibit bars from adding infused flavor to liquors.[47]

Perhaps the most inane alcohol regulation anywhere in the country is Utah's so-called

A "Zion curtain" at Finca in Salt Lake City, Utah.
Photo by Shauna L. Der, theminty.com

"Zion curtain."[48] The 2009 law requires restaurants to erect a literal (and costly) wall between bartenders who pour and mix drinks and the customers who order them. The state legislators who continue to support the controversial measure argue that "letting the public see drinks being prepared would lead to more alcohol sales and more alcohol consumption."[49] In fact—as so often happens with the unintended consequences of restricting food freedom—it appears the opposite may be the case. The expensive and impersonal Zion curtain is pushing more Utah restaurants to convert into bars, which are not subject to the rule. That means a law intended to crack down on alcohol sales and consumption is responsible for creating more establishments devoted to drinking alcohol.[50]

The movement toward eating locally grown food has been growing for years. And what could be more local than fruits and vegetables you grow yourself in your own yard? But too often these days, the gardener's green thumb is wrapped up in red tape. In 2011, a woman in Oak Park, Mich., faced the possibility of jail time for having kept an edible garden in her front yard. The city claimed the woman's vegetable garden didn't fit its definition of "suitable live plant material."[51]

In 2012, a Newton, Mass. resident was forced by the city to dig up the tomato garden he planted in his front yard or face a fine.[52] That same year, Tulsa, Okla., code enforcement officers trampled onto an unemployed woman's front yard and ripped up the edible garden she had planted to help feed herself

Hermine Ricketts and Tom Carroll of Miami Shores Village, Fla.

during lean times.[53] In 2013, Miami Shores, Fla., amended its ordinance to prohibit front-yard vegetable gardens and informed Hermine Ricketts and her husband Tom Carroll that they faced fines of $50 a day if they did not destroy their beautiful garden.[54]

These are outrageous affronts to this most basic shared principle of food freedom and economic liberty: the right to provide oneself and one's family with food. They also recall the worst offenses of the British against American colonists and apply the government excesses evident in *Filburn* and *Horne* to home gardeners merely trying to raise food in their own yards.

Ultimately these actions are the result of arcane and intrusive rules and bureaucracy established and enforced by local zoning boards around the country. Supporters of zoning claim that restrictions on land use help prevent nuisances from arising. But as residents in Oak Park, Newton, Tulsa, Miami Shores, and other cities around the country can attest, zoning that restricts food freedom can create the very nuisances that zoning rules were meant to combat.

These are outrageous affronts to this most basic shared principle of food freedom and economic liberty: the right to provide oneself and one's family with food.

Another set of laws that are often deeply unjust are those pertaining to food trucks, which have become roving culinary ambassadors and popular lunch options in cities around the country. But many have been subject to myriad bureaucratic rules that have made it anywhere from difficult to impossible for them to sell food to customers.[55] Cities from Boston to San Francisco and Chicago to Miami have restricted where food trucks may sell food, how long they may serve customers, what times they may operate, how close to a brick-and-mortar restaurant they may park and even whether they may cook food.

While cities often cite various justifications for these restrictions, none of them withstands scrutiny. Worse, the root of almost any restriction on food trucks often boils down to nothing more than a case of special interests currying favor with government in exchange for government picking winners and losers. That's economic protectionism—where government favors the interests of one (typically) powerful and entrenched market segment against competition by new or smaller competitors. And economic protectionism around food is the opposite of economic liberty and food freedom.

In the case of food trucks, for example, municipal laws restricting their right to park within a defined proximity of a brick-and-mortar restaurant exist for no other reason than to stifle the ability of food truck entrepreneurs to compete with brick-and-mortar restaurants for consumers' food dollars. And even when rules restricting food trucks aren't blatantly protectionist—as in the case

Laura Pekarik, owner of the Cupcakes for Courage food truck in Chicago, is fighting unconstitutional regulations.

of Maryland rules barring food trucks from selling anything but produce or seafood on state-owned roads[56]—they're almost always indefensible on their face just the same.

The New Public Health

For generations, the public health community was as valuable as it was effective. But in recent years, some in the community have strayed from their mission and begun to focus on social engineering in relation to food.

Whereas the valuable "old" public health seeks to promote sanitation and prevent the spread of viral and bacterial illnesses between and among people, animals and food,[57] the "new" public health movement targets health-related issues unrelated to sanitation or transmissible illness, including a person's "choice to eat certain foods" that government has deemed unhealthy when eaten to excess.[58]

In San Francisco, for example, the city council voted in 2010 to ban free toys from Happy Meals and other fast food meals typically purchased for children by their parents.[59] Meanwhile, in Los Angeles, the city council has banned any new fast food restaurants from opening in certain lower-income parts of the city since 2008.[60]

While these laws appear irregularly in California and elsewhere across the country, nowhere better typifies the breadth of the new public health approach than New York City under former Mayor Michael Bloomberg.[61] In 2012, Mayor Bloomberg's health department announced a city plan to ban the sale of some sodas greater than sixteen ounces in size. The ban would apply to restaurants, food trucks and some groceries but not—it turns out—to

most convenience stores in the city (including 7-Eleven, home of the "Big Gulp"). The mayor claimed the plan would help combat obesity in the city. But critics argued the proposal would do nothing of the sort. One indicator that critics seized on was that the chief scientific study cited by the health department to justify the ban had actually concluded that the increased use of *technology*—rather than soda consumption, which had been declining for more than a decade—was the likely culprit behind rising obesity rates. The soda ban was just the latest slipshod plan by the Bloomberg administration to limit food freedom in the city—from enforcing mandatory menu labeling rules and banning trans fats to restricting donations to the homeless and less fortunate. In that latter instance, Mayor Bloomberg justified the ban as necessary "because the city can't assess the[] salt, fat and fiber content" of food donations made by concerned New York City residents.[62]

Bad "new" public health laws often jump from local to state to national scope. New York City's menu labeling law, for example, has spread across the country and is now set to become part of federal law, under rules that passed as part of the Affordable Care Act (commonly referred to as "Obamacare").

Food freedom mandates that the government respect every person's right to make his or her own food choices.

While Congress intended the law to apply only to quick-service and dine-in chain restaurants like McDonald's and Olive Garden, there's now a move afoot in Congress to expand the law to include grocers, convenience stores, and takeout and delivery pizza sellers.[63] And the law could have a dramatic impact on these latter groups.

Why? Grocers sell thousands of food items—including deli-sliced cheeses and prepared foods like potato salad. Meanwhile, many pizza sellers and convenience stores are franchises owned by small businesspeople whose livelihoods could be jeopardized by increased costs. For example, there are currently almost 150,000 convenience stores in America.[64] Many of those are franchises owned by small businesspeople—including more than 8,000 7-Eleven franchise locations in the United States today.[65] Meanwhile, more than 75,000 pizza franchises—many owned by individual businesspeople—would have to spend nearly $5,000 per location in order to meet the signage mandates of the law.[66]

Sign protesting New York City's plan to ban the sale of some sodas greater than sixteen ounces.
Photo by The Daily Heller

Who pays for all this new—and often vague and superfluous—signage? Consumers, in the form of higher prices. Meanwhile, those same consumers are made no healthier by these "new" public health regulations, while entrepreneurs suffer as they are forced to charge their consumers higher prices—and lose business in the process.

Whether public health regulations prey on small, artisanal producers of handcrafted salumi and farmers who sell raw milk or they target convenience stores, pizza makers and soda producers, the principles behind opposing those rules are the same. Food freedom mandates that the government respect every person's right to make his or her own food choices.

Pushing Back: Turning the Tide in Favor of Food Freedom

The protection of the economic liberty of food producers is essential to ensuring that consumers have access to the widest array of food options possible and that food entrepreneurs have the opportunity to earn a living unencumbered by arbitrary, protectionist or otherwise needlessly burdensome regulations.

In the face of an onslaught, is there any hope for food freedom and economic liberty? Or have the battles all been fought and the war lost? Thankfully, a movement defending food freedom is largely coalescing at this very moment.

The protection of the economic liberty of food producers is essential to ensuring that consumers have access to the widest array of food options possible and that food entrepreneurs have the opportunity to earn a living unencumbered by arbitrary, protectionist or otherwise needlessly burdensome regulations.

Legislative reform has been successful in a number of areas. For example, more than forty states around the country have passed so-called "cottage food" laws that permit small, home-based entrepreneurs to prepare and sell some foods that are unlikely to cause foodborne illness.[67] Some of

Jane Astramecki is challenging Minnesota's restrictions on cottage food sales.

these laws themselves are overly restrictive and may be little better than an outright ban; for example, Minnesota prohibits the sale of cottage foods anywhere other than at a farmers' market or community event, and limits a producer's revenue to $5,000 annually.[68] But many others have given nascent entrepreneurs a legal space within which to test, refine and grow a market for their homemade foods before diving into the wider commercial market.

Another area in which legislative reform has been successful in some cases is in the regulation of farmers' markets. According to a 2012 report by Harvard Law School's Food Law & Policy Clinic, a new Pennsylvania law regulating farmers' markets helped simplify and lower the regulatory burden faced by farmers in the state.[69] Given that the number of farmers' markets in the United States has risen from 1,755 in 1994 to 8,144 in 2013,[70] deregulating farmers' markets is an incredibly valuable tool for expanding food freedom and economic liberty nationwide.

Where food freedom is threatened and legislative reform isn't possible, litigation often proves to be the only answer. In New York City, for example, a coalition of groups representing companies, restaurants, unions and minority-owned businesses sued the Bloomberg administration to overturn the city's soda ban.[71] When laws have unfairly restricted the rights of food trucks, the Institute for Justice and other advocates have sued cities across the country—including Chicago, El Paso and Los Angeles—to ensure that food freedom keeps rolling.[72]

Food freedom is under attack. Your right to grow, raise, produce, buy, sell, share, cook, eat or drink the foods you want is in the crosshairs of lawmakers and bureaucrats.

Conclusion

Food freedom is under attack. Your right to grow, raise, produce, buy, sell, share, cook, eat or drink the foods you want is in the crosshairs of lawmakers and bureaucrats. Whether you're a farmer, chef, grocer or just—like most of us—an eater, laws and regulations are limiting your right to make your own food choices. The Founding Fathers fought against British laws just like these, and sought in the Bill of Rights to ensure that no American government would ever mimic Britain's wayward colonial attacks on food freedom.

America became a wealthy nation—as Thomas Paine wrote—and an independent one thanks in large part to the fight in this country for food freedom and economic liberty. The Fourteenth Amendment expanded those protections to more Americans. But the Supreme Court has dealt blows to food freedom and economic liberty in the nearly 150 years since the Amendment's passage. That has emboldened Congress and state and local governments, which now often treat food freedom and economic liberty as afterthoughts.

That's how we've arrived at a point where the federal government can order a farmer not to sell his cow's milk. And to a point where a state can tell a bartender she must hide behind a veil in order to mix a drink. And to where a city can fine a person for growing vegetables in his yard.

The lessons Americans learned in the 1700s and 1800s have been forgotten—from Los Angeles to New York City; Oak Park, Mich., to Newton, Mass.; Tulsa, Okla., to the halls of Congress. A key element of economic liberty is food freedom—your right to grow, raise, produce, buy, sell, share, cook, eat and drink what you want. It's time to remind our elected officials of the lessons of food freedom and to demand the return of our intertwined rights of food freedom and economic liberty.

Activists advocate for food freedom.

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