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McNeighbor? Legal Barriers to a National Food-Sharing Economy

Evelyn Schwalb*

Introduction

Few would dispute that Uber and Airbnb have revolutionized the transportation and lodging industries in the U.S. and around the world, in the short time span of ten years. Why hasn't this same "sharing economy" model—with all of its technology-harvesting efficiency—been applied to the everyday challenge of securing a healthy, home-cooked meal (without having to cook it yourself or pay the inflated prices of fast-food chains and restaurants)? There is no true "Uber for food"—or the ability to buy prepared meals from your neighbor rather than a company—because food-sharing as a business is illegal in most states.¹

The recent rise and fall of a promising food-sharing business in California called Josephine, which was effectively shuttered by existing food law in 2018, provides a timely vehicle for exploring the legal obstacles to a national food revolution.² Even better, the California House bill prompted by Josephine's struggle ("AB-626")—which became law effective January 1, 2019—provides a model that should be mimicked by other states.³

This Comment provides an instructive history of the larger sharing economy and its associated legal battles—which are still active in the courts—to provide a pertinent context to the food-sharing economy issue and to proffer a solution informed by the story of Josephine's legislative collaboration. In short, this comment attempts to provide one tiny step in the forward march of the food movement. The ramifications for low-income families, people of color, women, and even global health would be enormous, and even farther-reaching than Uber and Airbnb—for, although we all may not need a cheap ride or hotel, we all need to eat.

The Comment will proceed in four parts: Part I shares the story of Josephine, the California food-sharing business that flourished until food law shut it down, as an illustrative example of the rich possibilities that a food-sharing economy would provide. This section also reveals the revolutionary legislation that Josephine's founders proposed, which passed in November 2018 and legalized home-based restaurants: the first law of its kind in the nation. Part II explores the national landscape for home-kitchen businesses, presenting typical state legislation (often referred to as cottage food laws) as well as several maverick states that have passed "Food Freedom Laws" in an attempt to empower their citizenry, but not to the extent that California has. This section further presents an international example of food-sharing success on a national level—Greece— and also dissects the fundamental argument against home-kitchen businesses: fear of food-borne illness, proffering solutions for the legitimate public purpose of maintaining a healthy national food supply.

Part III presents the significant positive impact as a matter of public policy that legalization of a full food-sharing economy would provide, which includes decreased rates of obesity and other food-related illnesses, lower medical costs, and economic empowerment for women and low-income families. Part IV examines how other shared-economy start-ups, such as Uber and Airbnb, managed to avoid regulatory shutdown, comparing their strategy with Josephine's in an attempt to provide guidance to food entrepreneurs wishing to pursue an "AB-626" bill for their own state. Finally, the Conclusion envisions a

* J.D. Candidate, 2021, Barry University School of Law; B.A. in English, Columbia University, magna cum laude, Phi Beta Kappa, 2001. I dedicate this article to the memory of my dear lifelong friend, Professor Lesley McAllister, who introduced me to Food Law and who remains a shining example of humanity at its best.

¹ Sarah Kessler, *The Food-Sharing Economy is Delicious and Illegal—Will it Survive?*, FAST CO. (Jul. 7, 2016), <https://www.fastcompany.com/3061498/the-food-sharing-economy-is-delicious-and-illegal-will-it-survive>, archived at <https://perma.cc/2K65-BMFU>.

² *Id.*

³ *Cooks and Hungry Neighbors Call on LA Board of Supervisors to Opt-In to AB 626*, CISION PR NEWSWIRE (Jan. 6, 2020), <https://www.prnewswire.com/news-releases/cooks-and-hungry-neighbors-call-on-la-board-of-supervisors-to-opt-in-to-ab-626-300981402.html>, archived at <https://perma.cc/N7E8-RGG8>.

future in which Americans are able to spend their food dollars with a McNeighbor rather than with a McDonald's.

I. Death by Regulation: Josephine and the Legislative Aftermath

Charley Wang first thought of creating a home-cooking business while enjoying the respite of a savory, fresh meal – home-cooked by his friend's mother, Josephine, on April 27, 2014, in Santa Monica, California.⁴ The experience was a welcome change because, for him and many of his busy Silicon Valley friends, the vast majority of daily meals were products of convenience: commercial fast-food or restaurant food delivered.⁵ He imagined a service where, instead of having restaurant or fast food delivered, his company could deliver home-cooked meals.⁶ Toward that end, he launched his start-up business in the San Francisco Bay Area, named his new company "Josephine," and began recruiting cooks at local school PTA meetings.⁷ After recruiting cooks—who were often stay-at-home moms, retirees, or disabled workers—his company would visit their homes and inspect their kitchens, asking if they kept all food six inches above the ground, set the refrigerator at the right temperature, and held a California Food Handler Card.⁸ If the kitchen passed muster, Josephine would employ the cook as an independent contractor—and also provide free training, advertising, and insurance for up to \$1 million in liability—in exchange for ten percent of his or her sales.⁹ Utilizing Josephine's online platform, consumers would locate a neighborhood cook, order lunch or dinner, and pick it up from that cook's home, just like restaurant take-out, but without any middleman.¹⁰

Just two years from his initial idea, Mr. Wang was employing 75 cooks and Josephine had just been named one of "the 50 coolest new businesses in America" by *Business Insider*.¹¹ But soon after this positive publicity, health department officials appeared on the doorsteps of several home cooks with "cease and desist" orders, warning the cooks that their acts were illegal and punishable by fine.¹² The business headquarters received similar letters that also alleged criminal "facilitation" and "aiding and abetting."¹³ Josephine soon learned that the California retail food code prohibits the sale of meals made in home (rather than commercial) kitchens.¹⁴ Compliance with the code would require that each home cook invest approximately \$50,000 to upgrade to a commercial kitchen meeting state standards.¹⁵ Alternatively, home cooks could rent commercial kitchen space, a prohibitive option for most based on price (rates ranged from \$20 to \$40 an hour) and logistics (having to leave home and transport ingredients if they are caregivers, elderly, or disabled); when Josephine rented commercial kitchen space for the home cooks to use, no one showed up.¹⁶

Deciding to engage with the government rather than work around it, a choice against the advice of potential investors and other entrepreneurs,¹⁷ Josephine drafted and proposed a bill, submitted to the California House of Representatives by Assembly Member Cheryl Brown in February 2016, that would legalize the sale of home cooking.¹⁸ Although the original bill was withdrawn after opposition by the California Conference of Directors of Environmental Health, an expanded version was re-submitted in

⁴ *Id.* at 8.

⁵ *Id.*

⁶ *Id.* at 9.

⁷ *Id.*

⁸ *Id.* at 2, 9.

⁹ *Id.* at 9.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 2.

¹² *Id.* at 3-4.

¹³ *Id.* at 4.

¹⁴ *Id.* at 10. Note that foods considered non-hazardous, such as baked goods, were permitted for sale under "cottage food laws," which will be addressed *infra*; this Comment addresses the criminalization of selling full, home-cooked meals.

¹⁵ *Id.* at 6.

¹⁶ *Id.* at 6, 10.

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 10. See also, California Legislature 2015-2016 Regular Session, Assembly Bill No. 2593 (Feb. 19, 2016), http://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB2593, archived at <https://perma.cc/M4L9-3BRV>.

February 2017, approved by both Houses, and signed into law by the Governor on September 18, 2018.¹⁹ But it did not pass in time for Josephine: the company officially closed for business on March 30, 2018.²⁰ Still, due to Josephine’s struggle and the many similar economic opportunities it represented, when the new law went into effect on January 1, 2019, California decriminalized the food-sharing economy.²¹

II. The National Legislative Landscape for a Food Sharing Economy

California was not the first to legalize the sale of meals made at home. In 2015, the “food freedom” political movement formally began when Wyoming passed the “Food Freedom Act,” allowing the direct sale to consumers of home-cooked meals as long as they did not contain meat other than poultry (beef, pork, or lamb).²² North Dakota claimed to follow suit²³ with the “North Dakota Food Freedom Act” enacted in 2017, but their statute’s language prohibits sale over the internet,²⁴ which would quash many home-based businesses like Josephine that utilized an online marketplace.²⁵ Also in 2017, Maine passed the “Maine Food Sovereignty Act” to allow direct producer-to-consumer transactions without the internet restriction.²⁶ Finally, Utah enacted its “Home Consumption and Homemade Food Act” in 2018, modeled on Wyoming’s law.²⁷

Of all of these laws, California’s is still the first of its kind, because it doesn’t exclude meat,²⁸ which is a staple in many American households.²⁹ California’s law (AB-626) also provides regulation unique to micro-enterprise home kitchens that will help keep these operations safe, both literally and in the public eye.³⁰ Furthermore, AB-626 places a cap of \$50,000 in gross annual sales on these home-based operations³¹, which promises to keep them distinct from large-scale, mass-produced, commercial food enterprises such as fast-food franchises and traditional restaurants. In other words, the law provides a middle ground: while it doesn’t require the prohibitive regulations that commercial kitchens must meet, it still monitors small business home kitchens for health and safety.

In contrast, the Food Freedom laws of Wyoming, North Dakota, Maine, and Utah adopt a completely “hands-off” approach, simply stating that home food businesses are exempt from commercial kitchen regulations—more of a “buyer beware” standard:

¹⁹ AB-626 California Retail Food Code: microenterprise home kitchen operations.

https://leginfo.ca.gov/faces/billHistoryClient.xhtml?bill_id=20170180AB626, archived at <https://perma.cc/8E4M-KQVN> (last visited Mar. 24, 2019).

²⁰ Charley Wang, *Josephine is closing its doors*, MEDIUM (Feb. 1, 2018), <https://medium.com/the-dish/josephine-is-winding-down-d1a4feb5837e>, archived at <https://perma.cc/A82H-Y76J>.

²¹ Ananda Rochita, *Why there’s a hold up after Gov. Brown signed bill to legalize home cooking sales*, ABC NEWS 10, CALIFORNIA (May 21, 2019), <https://www.abc10.com/article/news/why-theres-a-hold-up-after-governor-brown-signed-bill-to-legalize-home-cooking-sales/103-53031f99-430a-4b70-81be-9d1c09f0a663>, archived at <https://perma.cc/XQ57-HNLY>

²² WYO. STAT. § 11-49-103 (2017).

²³ Ken Akopiantz, *Food Freedom*, SMALL FARMER’S JOURNAL, <https://smallfarmersjournal.com/food-freedom/>, archived at <https://perma.cc/ZGJ5-6T46> (last visited Mar. 24, 2019) (“North Dakota has followed Wyoming’s lead.”).

²⁴ N.D. CENT. CODE § 23-09.5-02 (2018). Note that North Dakota has since essentially revoked its food freedom law: Conor Beck, *North Dakota Health Department Guts Food Freedom Law*, INSTITUTE FOR JUSTICE (Dec. 3, 2019), <https://ij.org/press-release/north-dakota-health-department-guts-food-freedom-law/>, archived at <https://perma.cc/WWR9-3RRD>.

²⁵ Sarah Kessler, *The Food-Sharing Economy is Delicious and Illegal—Will it Survive?*, FAST CO. (Jul. 7, 2016), <https://www.fastcompany.com/3061498/the-food-sharing-economy-is-delicious-and-illegal-will-it-survive>, archived at <https://perma.cc/5TVA-DPTX>.

²⁶ 2017 ME. LAWS 314.

²⁷ 2018 UTAH LAWS 377.

²⁸ CAL. HEALTH & SAFETY CODE § 114367.1 (2020).

²⁹ Rob Smith, *These are the countries that eat the most meat*, WORLD ECONOMIC FORUM (Aug. 29, 2018), <https://www.weforum.org/agenda/2018/08/these-countries-eat-the-most-meat-03bdf469-f40a-41e3-ade7-fe4ddb2a709a/>, archived at <https://perma.cc/A8SA-TVF5> (Americans eat more meat than any country in the world, consuming an average of 97kg per person per year; also, in 2018, only 3% of Americans identified as vegan and 5% as vegetarian; 92% of Americans eat meat). See also Maura Judkis, *You might think there are more vegetarians than ever. You’d be wrong.*, WASH. POST (Aug. 3, 2018), https://www.washingtonpost.com/news/food/wp/2018/08/03/you-might-think-there-are-more-vegetarians-than-ever-you-d-be-wrong/?noredirect=on&utm_term=.1107526a0838, archived at <https://perma.cc/EV94-5Y4F>.

³⁰ CAL. HEALTH & SAFETY CODE § 114367.1 (2020).

³¹ AB-626, *supra* note 19.

(b) Homemade food products produced, sold and consumed in compliance with the Wyoming Food Freedom Act shall be exempt from state licensure, permitting, inspection, packaging and labeling requirements.³²

Still, the statute requires the producer to inform the end consumer that the product has not been subject to any of these regulatory measures.³³ Significantly, these states also prohibit the sale of meat (beef, pork, and lamb) and limit the sale of poultry (vendors can only sell chicken if they slaughter less than 1,000 per year).³⁴ Unlike the remaining states in the nation, cooked vegetables are permitted as well.³⁵ As a result, between the poultry and cooked vegetable allowances, home cooks can feed their neighbors something more than snacks and desserts; they can actually run a “mini-restaurant” from their homes.

Although the legislation in this handful of states is certainly promising progress toward a national food-sharing economy, the rest of the country lags far behind. While 49 of the 50 states (excepting New Jersey) have “cottage food laws,”³⁶ which do allow the sale of food produced in home kitchens, the offerings are restricted to baked goods and other “non-potentially hazardous” items that do not constitute actual meals.³⁷ For example, the “Texas Cottage Food Law” allows the sale of:

Non-potentially hazardous baked goods, candy, coated and uncoated nuts, unroasted nut butters, fruit butters, canned jams and jellies, fruit pies, dehydrated fruit and vegetables including dried beans, popcorn and popcorn snacks, cereals including granola, dry mix, vinegar, pickles, mustard, roasted coffee, dry tea, and dried herbs.³⁸

This description is typical of cottage food laws across the states,³⁹ and the list immediately conjures an image of the standard farmer’s market, while also illustrating why farmer’s markets never provide actual meals. Although cottage food laws are often pointed to by supporters of existing food laws as evidence of “food freedom,” scrutiny of the actual items allowed reveals restrictions that are significant: cottage food laws allow for the purchase of snacks and food accessories, which fortunately supports the consumption of local, home-made foods but it does not provide the much-needed commodity of convenient, wholesome meals.⁴⁰ As a result, this legislation fails to disrupt the nationwide reliance on fast-food for the bulk of dietary delivery: breakfast, lunch, and dinner. In the vast majority of states, which operate under traditional cottage food laws, a business like Josephine could not exist.

Of course, state cottage food laws flow from federal regulations, specifically the U.S. Food and Drug Administration Food Code (“FDA Food Code”).⁴¹ Although states have control under the 10th Amendment over the intrastate sale of food to protect the health and safety of their residents, all 50 states chose to adopt the federal guidance provided by the FDA Food Code into their own state statutes.⁴² The following excerpt identifies the source of the home kitchen prohibition:

The FDA Food Code, and therefore most state food codes, designates all locations where food is produced for sale or sold as ‘food establishments.’ Entities designated as ‘food

³² WYO. STAT. § 11-49-103 (2017).

³³ *Id.*

³⁴ *Id.*; see also N.D. CENT. CODE, *supra* note 24; 2017 Me. Laws, *supra* note 26; and 2018 Utah Laws, *supra* note 27.

³⁵ *Id.*

³⁶ Food Law and Policy Clinic, *Cottage Food Laws in the United States*, HARVARD LAW SCHOOL 1, 2 (2018), https://www.chlpi.org/wp-content/uploads/2013/12/FLPC_Cottage-Foods-Report_August-2018.pdf, archived at <https://perma.cc/AY3Y-4MPH> [hereinafter *Cottage Food Laws*].

³⁷ *Cottage Foods Map and Chart: State-by-State* Review of Cottage Food Laws*, FARM-TO-CONSUMER LEGAL DEF. FUND (May 27, 2018), <https://www.farmtoconsumer.org/cottage-foods-map/>, archived at <https://perma.cc/9KLY-XZEJ>.

³⁸ TEX. HEALTH & SAFETY CODE § 437.0191 (2018).

³⁹ Cottage Food Laws, *supra* note 36.

⁴⁰ *Id.*

⁴¹ *Id.* See also: U.S. FOOD & DRUG ADMIN., FOOD CODE (2017),

<https://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM595140.pdf>.

⁴² *Id.*

establishments' must generally meet the regulatory requirements in the Food Code, such as obtaining relevant licenses, training, and permits; being subject to inspection; and utilizing certain equipment and building materials, for example, multi-compartment sinks, floors and walls made out of non-absorbent materials, and specific ventilation systems. Under the language included in the FDA Food Code and most states, a home kitchen cannot be licensed as a food establishment.⁴³

However, the FDA Food Code grants exemptions for cottage food operations handling non-potentially hazardous foods.⁴⁴ Potentially hazardous foods are

foods that may develop pathogenic microorganisms if they are kept out of the correct temperature range for too long. Meat, poultry, dairy, and shellfish are all examples of TCS [time/temperature control required for safety] foods. However, less obvious foods such as low-sugar jams, *cooked vegetables*, and low-acidity pickles and salsa are also in this class because they can support viral or bacterial growth if not properly stored.⁴⁵

But limiting home kitchen businesses to the use of only non-potentially hazardous foods, which excludes cooked vegetables—a broadly consumed item regardless of dietary lifestyle—severely constrains the level of service such enterprises can offer to their communities and maintains that community's reliance upon commercial sources when eating away from home. Plus, are consumers any safer selecting from commercial food options?

In 2018, there was the highest incidence of food-borne illness on record.⁴⁶ In addition to outbreaks linked to romaine lettuce, contaminated eggs, and raw beef, many pre-packaged, processed foods were recalled, from Kellogg's Honey Smacks cereal to Utz tortilla chips.⁴⁷ While some argue that the increase in recalls is the result of "better testing for pathogens and improved detection of outbreaks,"⁴⁸ the high figure stands in stark contrast to the amount of food-borne illnesses linked to home-kitchen meals sold in the four Food Freedom states since those laws were passed: zero.⁴⁹ Let's not forget that home cooks typically eat their own food; if the cook is careless with food storage or preparation, he or she will get sick as well—a strong incentive for self-imposed vigilance. To further support food safety, California's new law requires that the food sold from home kitchens be prepared the same day.⁵⁰

Yet an even better example of the low safety risk associated with home kitchen businesses is found in a country that allowed an enterprise much like Josephine to thrive: Greece. In 2013, entrepreneur Michalis Gkontas launched an online platform that allowed Athens residents to order homemade take-out from their neighbors.⁵¹ He called it Cookisto, and it skyrocketed.⁵² Within a year, it had expanded to London: "We had 40,000+ users, a few thousand cooks and more than 16,000 portions delivered, each paying us a modest cut."⁵³ There isn't one recorded instance of food-borne illness during that time. The

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* (emphasis added).

⁴⁶ Nikita Richardson, *This Is a Record Year for Foodborne Illnesses*, N. Y. MAGAZINE (Nov. 21, 2018),

<http://www.grubstreet.com/2018/11/this-is-a-record-year-for-foodborne-illnesses.html>, archived at <https://perma.cc/UBN3-2TCQ> ("According to CNN, the CDC has conducted more investigations in 2018 than in any of the last ten years.")

⁴⁷ *Id.*

⁴⁸ Fakheera Stevens, *NPR The Salt: Food Safety Scares Are Up In 2018. Here's Why You Shouldn't Freak Out*, CONSUMERS' RESEARCH, 26, 2018), <http://consumersresearch.org/podcast-food-safety-scares-are-up-in-2018-heres-why-you-shouldnt-freak-out-npr-the-salt/>, archived at <https://perma.cc/ZJ4R-BFKS>.

⁴⁹ *Save North Dakota Food Freedom Law*, WESTON A. PRICE FOUND. (Feb. 5, 2019), <https://www.westonaprice.org/save-north-dakota-food-freedom-law/>, archived at <https://perma.cc/74NR-2LFG>.

⁵⁰ Assemb. B. 626, 2018 Leg., Reg. Sess. (Cal. 2018).

⁵¹ Michalis Gkontas, *We're F*cked, It's Over. Or Is It?*, MEDIUM (Sept. 5, 2016), <https://medium.com/the-mission/were-f-cked-it-s-over-or-is-it-5abe1432471d>, archived at <https://perma.cc/4LAQ-FW6T>.

⁵² *Id.*

⁵³ *Id.*

business closed not because of food safety but because of convenience issues created by inconsistent delivery times (his home-cook employees delivered their meals personally).⁵⁴

According to the CDC, each year approximately 48 million Americans get sick; 128,000 are hospitalized; and 3,000 die of food-borne diseases.⁵⁵ Nationally, one in six people get a food-borne illness each year.⁵⁶ According to one food policy analyst, “The question is not so much whether food illness is a serious issue, but whether our current system of restricting public food preparation to commercial kitchens is any more effective at preventing it than would be legal guidelines for operating a cooking business at home.”⁵⁷ Proponents of existing food law regulations argue that the strict requirements are essential to protect public safety,⁵⁸ but empirical proof for this claim is lacking—particularly the assertion that requirements must be “strict” (multi-compartment sinks, floors and walls made out of non-absorbent materials, and specific ventilation systems, for example) rather than simply reasonable, such as the basic license and training requirements mandated by AB-626.

III. Public Policy: Grassroots Economic Empowerment to Fuel Public Health

The demand for fast-food options in America is easily demonstrated by both the enormity of the fast-food industry and its continued dramatic growth: the industry is worth approximately \$198.9 billion and is forecast to exceed \$223 billion by 2020.⁵⁹ In fact, in 2016, 44% of American households ate at a fast-food restaurant as least once a week.⁶⁰ Americans frequent these establishments despite the fact that fast food has been linked to obesity and Type 2 diabetes, among other chronic illnesses.⁶¹ In one fifteen-year study, participants who ate at fast-food restaurants twice a week or more gained ten pounds and doubled their insulin resistance.⁶² The threat of fast food to public health is so profound that some communities have passed legislation to limit the availability of fast food restaurants in their neighborhoods, such as South Los Angeles.⁶³ When defending the regulation, City Councilwoman Jan Perry noted, “If people don’t have better choices or don’t have the time or knowledge or curiosity, they are going to take what’s there.”⁶⁴ In other words, because the need for fast food continues to grow even though it threatens physical health, the need for *healthy* fast food is a substantial one, so that the market forces demanding convenient meals can provide them without harming public health in the process. A strong food-sharing economy would provide this much-needed option.

Fortunately, public demand for healthy food options is also skyrocketing, alongside the proliferation of fast-food restaurants.⁶⁵ This trend toward healthy eating is likely due, at least in part, to the many published research studies linking nutrition and health.⁶⁶ The public has also been made more aware of the increased incidence of chronic diseases caused by poor eating habits because these incidences are so

⁵⁴ *Id.*

⁵⁵ Kessler, *supra* note 1, at 5 (citing *Estimates of Foodborne Illness in the United States*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Nov. 5, 2018), <https://www.cdc.gov/foodborneburden/index.html>), archived at <https://perma.cc/9DBV-4NPW>.

⁵⁶ *Estimates of Foodborne Illness in the United States*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Nov. 5, 2018) <https://www.cdc.gov/foodborneburden/index.html>, archived at <https://perma.cc/9DBV-4NPW>.

⁵⁷ *Id.*

⁵⁸ Miller, *supra* note 20, at 1.

⁵⁹ S. Lock, *Fast Food Industry – Statistics & Facts*, STATISTA (Aug. 15, 2019), <https://www.statista.com/topics/863/fast-food/> archived at <https://perma.cc/PUD8-AAAV>.

⁶⁰ *Id.*

⁶¹ Kate Wong, *Fast Food Linked to Obesity, Diabetes*, SCI. AM. (Jan. 3, 2005), <https://www.scientificamerican.com/article/fast-food-linked-to-obesi>, archived at <https://perma.cc/8S7U-6UGC>.

⁶² *Id.*

⁶³ Jennifer Medina, *In South Los Angeles, New Fast-Food Spots Get a ‘No, Thanks’*, N.Y. TIMES (Jan. 15, 2011), <https://www.nytimes.com/2011/01/16/us/16fastfood.html>, archived at <https://perma.cc/NH5Q-5GBK>.

⁶⁴ *Id.*

⁶⁵ Dow: *Consumer Demand for Healthier Food Solutions Continues to Skyrocket*, NUTRITION INSIGHT (Nov. 3, 2017), <https://www.nutritioninsight.com/news/Dow-Consumer-demand-for-healthier-food-solutions-continues-to-skyrocket.html>, archived at <https://perma.cc/46Q2-4L3X>.

⁶⁶ See, e.g., *2015-2020 Dietary Guidelines*, U.S. DEP’T HEALTH & HUM. SERVS. <https://health.gov/dietaryguidelines/2015/guidelines/introduction/nutrition-and-health-are-closely-related/>, archived at <https://perma.cc/C76B-ZZ8H>.

widespread: “About half of American adults—117 million individuals—have one or more preventable chronic diseases, many of which are related to poor quality eating patterns.”⁶⁷ With such a prevalence of food-related illnesses, presumably the average American either has one or knows someone who does—hence, the increasing demand for healthier food choices. Noticing this trend, Dow Food Solutions’s marketing manager advised, “As more emphasis is placed on the availability of healthy alternative food options, new strategies must be adopted to reach the growing needs of today’s consumers.”⁶⁸ Given that nearly half of all food spending is on food away from the home,⁶⁹ healthy options in the community for a person on the go are essential. A robust food-sharing economy offers one such strategy.

Food-sharing is also advantageous because, while demand for healthy food is increasing, the time to prepare it is decreasing due to the shift in American culture toward two-working-parent families who lack the time required to shop, chop, cook, serve, and clean up dinner at the end of a long workday.⁷⁰ Because preparing healthy meals takes the time that busy adults lack, overburdened workers and parents may turn to fast food even against their better judgment because a better option is not available. It would likely be a dream-come-true for such families to be able to purchase a healthy, homecooked meal from a neighbor in lieu of the regretful trip to McDonald’s. Furthermore, if food-sharing were legal, and could thereby combat the ever-spreading incidence of food-based illnesses and promote public health, it would in turn lower medical costs, a worthy public policy goal as well.

But the economic gain of lower overall medical costs is only the tip of the iceberg as far as the far-reaching economic consequences that a robust food-sharing economy would offer. By providing jobs and income opportunities to low- and fixed-income families, it would support grassroots economic empowerment. For example, in 2014, when Texas briefly experimented with easing restrictions on home-based food businesses, it created over one thousand local businesses as a result.⁷¹ In addition to launching food start-ups, a food-sharing economy provides supplemental income to retirees, home-bound individuals on disability, and stay-at-home moms. It would provide recent immigrants with an immediate income stream and supplement workers between jobs who are struggling to survive on unemployment. And because, like Uber, a food-sharing economy can operate in any and all neighborhoods, it is naturally an equal-opportunity employer open to a wide swath of potential laborers, boosting the economy in a myriad of neighborhoods, including urban areas struggling with economic development. Because cooking at home does not require even a high school diploma, it creates opportunity for those who may lack access to other income due to lack of formal education. In this way, it could help combat poverty.

But the public policy impact doesn’t stop there. A legalized food-sharing economy would help women, who disproportionately carry the burden of domestic labor, including cooking.⁷² Women worldwide spend an average of 4.5 hours each day on unpaid work — cooking, cleaning, feeding the baby, etc., (whether they work outside the home or not).⁷³ Men devote less than half that much time.⁷⁴ In the United States, women now financially support 40% of homes and tend to take on more domestic chores; they typically spend 2 hours and 12 minutes on daily housework, while men invest about 1 hour and 21 minutes into the home.⁷⁵ In the span of a single day, time spent on food preparation can capture a significant

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Access to Affordable and Nutritious Food: Measuring and Understanding Food Deserts and Their Consequences* U. S. DEP’T OF AGRIC., (Jun. 2009), https://www.ers.usda.gov/webdocs/publications/42711/12701_ap036b_1_.pdf?v=0, archived at <https://perma.cc/66CR-M5UH>. In fact, nearly half of all food spending is on food away from home (Martinez and Kaufman, 2008).

⁷⁰ *Raising Kids and Running a Household: How Working Parents Share the Load*, PEW RESEARCH CTR. (Nov. 4, 2015), <https://www.pewsocialtrends.org/2015/11/04/raising-kids-and-running-a-household-how-working-parents-share-the-load/>, archived at <https://perma.cc/4U25-ZN23>. (Both parents work full-time in nearly half of U.S. homes as of 2015.)

⁷¹ Nick Sibilla, *Texans Created Over A Thousand Local Businesses After Texas Eased Restrictions On Selling Food Made At Home*, FORBES (Sept. 22, 2014, 4:49 PM), <https://www.forbes.com/sites/instituteofjustice/2014/09/22/texans-created-over-a-thousand-local-businesses-after-texas-eased-restrictions-on-selling-food-made-at-home/#9817a626406a>, archived at <https://perma.cc/N6CR-6GZZ>.

⁷² Danielle Paquette, *Men say they work more than women. Here's the truth.: Women aren't born with an innate desire to take on more housework.*, WASH. POST (June 29, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/06/29/men-say-they-work-more-than-women-heres-the-truth/?utm_term=.f28f8a1970e6, archived at <https://perma.cc/NCS7-3VDV>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

chunk of time—whether it is making a grocery list; driving to the store, purchasing food, loading it in the car, returning home, and unpacking it; cooking meals; preparing the table; serving; packaging leftovers; or doing the dishes and putting them away. Given the expense of “regular” restaurants with healthier options, it is no wonder that frugal families short on time will revert to fast food.

Although the feminist revolution intended, among other goals, to free women from being chained to the stove and allow them to pursue professional opportunities previously out of reach,⁷⁶ data have demonstrated that working outside the home has not liberated women from domestic work.⁷⁷ In fact, the 1970’s advertised “feminist” figure of “Charlie,” who sang, “I can bring home the bacon, fry it up in a pan, too...” became an unfortunate reminder of the “Superwoman” expectations placed on women in the 1980s and beyond.⁷⁸ A “McNeighbor” option for a working woman—particularly single working mothers, who are now at the highest number in American history⁷⁹—would allow this group to have affordable ways to provide healthy meals to their families that would also buy them the precious and elusive commodity of time. The quality of life for this important sector of the American public—and, in turn, for their children—would improve dramatically with a legal food-sharing economy as a viable alternative.

The public policy impacts are not purely speculative; Josephine’s founder stated that their cooks were mostly stay-at-home moms and immigrants, and that empowering marginalized communities was one of the company’s goals.⁸⁰ When Josephine was in the process of expanding to Seattle and Portland, the mayor of Portland wrote a public letter of support for the company’s mission: “My request is for the State to work with the City of Portland to align public health protections in order to *support this innovative food model, which will spur economic development and improve food access to highly vulnerable communities.*”⁸¹ Blighted communities, which are referred to by some analysts as “food deserts,” would especially benefit from a home-based food industry, which would add local, healthy, fast, and affordable options for residents, while generating revenue for their neighbors, rather than fast-food franchisees, who rarely live locally.

IV. Strategy—How did Uber and Airbnb Defy Regulatory Constraint?

There was a time when the idea of getting a ride from a complete stranger—with no greater driving qualifications than the average person—would have seemed preposterous; in those days, paying to sleep in the home of a complete stranger seemed even more reckless and incomprehensible. Yet public health and safety regulations did not interfere with either of these innovative shared-economy models rapidly reaching the public. In fact, hundreds of thousands of tourists sleep in Airbnb rentals every night, even though many of these accommodations are illegal under local regulations.⁸² Where was the public or government outcry when these innovative models began to take hold? Surely, getting into a car with a barely-regulated driver

⁷⁶ See generally, BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

⁷⁷ Julia Carpenter, *Millennial women are working more. But they're still doing most of the housework*, CNN BUS. (Dec. 26, 2018, 8:51 AM), <https://www.cnn.com/2018/12/26/success/millennial-women-income/index.html>, archived at <https://perma.cc/KC5E-TAXB> (“Working more at work, but not working any less at home.”)

⁷⁸ Jennifer Ludden, *Can Working Moms 'Have It All'? Ha!*, NPR (Mar. 14, 2010, 12:30 AM),

<https://www.npr.org/templates/story/story.php?storyId=124616719>, archived at <https://perma.cc/6XV3-7PWZ>.

⁷⁹ A.W. Geiger, Gretchen Livingston, & Kristen Bialik, *6 facts about U.S. moms*, PEW RES. CTR. (May 8, 2019),

<https://www.pewresearch.org/fact-tank/2018/05/10/facts-about-u-s-mothers/>, archived at <https://perma.cc/59DL-FFAK> (31% of American parents are single parents (24% of mothers are single and 7% of fathers), the highest rate of single parenthood in the world); Emily Badger, *The unbelievable rise of single motherhood in America over the last 50 years*, WASH. POST (Dec. 18, 2014),

https://www.washingtonpost.com/news/wonk/wp/2014/12/18/the-unbelievable-rise-of-single-motherhood-in-america-over-the-last-50-years/?utm_term=.e88316172f0d, archived at <https://perma.cc/G89B-C46N> (“Single motherhood has grown so common in America that demographers now believe half of all children will live with a single mom at some point before the age of 18.”)

⁸⁰ Kessler, *supra* note 1.

⁸¹ Simone Stolzoff, *Should startups ask for permission or beg for forgiveness?*, QUARTZ AT WORK (Sept. 6, 2018),

<https://qz.com/work/1379900/a-california-food-sharing-bill-came-too-late-for-a-startup-that-championed-it/>, archived at <https://perma.cc/CAB8-93ZR> (emphasis added).

⁸² Daniel Guttentag, *Regulating Innovation in the Collaborative Economy: An Examination of Airbnb’s Early Legal Issues*, https://www.researchgate.net/publication/318136111_Regulating_Innovation_in_the_Collaborative_Economy_An_Examination_of_Airbnb's_Early_Legal_Issues, archived at <https://perma.cc/7SAM-TFQR>.

—when there are more than 37,000 deaths by car each year in the U.S.⁸³—is far more dangerous than eating a meal produced in a non-commercial kitchen. But, unlike Josephine, Uber and Airbnb did not try to work with existing regulation; they ignored it.⁸⁴ In the words of one innovation expert on how shared-economy start-ups successfully navigate the system:

For a long time, the advice was, just keep your head down, build the kind of network you need to be viable, and then once you have viability, nobody is going to be able to shut you down . . . If Uber had gone to the regulators first, the entrenched interests would have crushed them in seconds.⁸⁵

Uber even went so far as to create a “dummy app” to deceive local law enforcement officers.⁸⁶ Similarly, “Airbnb’s plan clearly was to establish itself as firmly as possible before confronting its regulatory concerns, and simply wait for policymakers to catch up . . . emerg[ing] by simply ignoring the existing regulatory regime that would have otherwise suffocated it.”⁸⁷

But by the time regulators began to intervene, it was too late to restrict growth: public demand and financial resources overcame attempts to limit expansion. For example, when NYC Mayor DeBlasio tried to restrict Uber’s expansion in the city, Uber—which was already worth \$62.5 billion—launched a media campaign that forced the Mayor to back down.⁸⁸ Similarly, when San Francisco tried to add to the ballot a measure restricting short-term rentals, Airbnb spent \$8 million lobbying against it—and won.⁸⁹ Although both companies are currently embroiled in regulatory battles across the globe,⁹⁰ these challenges did not destroy their growth in the early years. Even now, due to the massive size of these companies, enforcement of local regulations is exceedingly difficult, which continues to work in their favor: in San Francisco, enforcement of short-term rental regulations, which would hamper Airbnb, was deemed impossible by the very department charged with enforcing them.⁹¹

This “grow now, ask permission later” approach that Uber and Airbnb employed stands in stark contrast to the path that Josephine’s leadership chose: collaboration. But this very collaboration spelled their demise:

The bill [AB-626] sitting on governor Brown’s desk [in November 2018] is the result of more than three years of community organizing, town-hall meetings, and writing and rewriting legislation. But as an early Josephine employee, I saw how this approach also led to the company’s undoing. The time and resources required to work on a legislature’s schedule do not mix well with venture capitalists’ expectations for hockey-stick growth.⁹²

Josephine’s leadership did not choose to “keep their heads down” as Uber had, because they saw their business as a form of activism, a bold step forward in the food movement:

[W]e were proud to take on food laws that we believed had been written to support an industrial model. From your neighborhood tamale lady to the local firehouse’s pancake breakfast, many informal food operations were illegal in the eyes of the law. And we

⁸³ *U.S. DOT Announces 2017 Roadway Fatalities Down*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN. (Oct. 3, 2018), <https://www.nhtsa.gov/press-releases/us-dot-announces-2017-roadway-fatalities-down>, archived at <https://perma.cc/APY9-XLBH>.

⁸⁴ Kessler, *supra* note 1.

⁸⁵ *Id.*

⁸⁶ Stolzoff, *supra* note 81.

⁸⁷ Guttentag, *supra* note 82 at 99, 101.

⁸⁸ Kessler, *supra* note 1.

⁸⁹ *Id.*

⁹⁰ Guttentag, *supra* note 82 at 98.

⁹¹ *Id.* at 110.

⁹² Stolzoff, *supra* note 81.

wanted the world to know. The problem was that our loud activism put us on the radar of local health regulators.⁹³

Once their “loud activism” alerted regulators to their presence, Josephine had to choose whether to pursue the Uber approach (outgrow or outrun regulation) or to work through traditional bureaucratic channels to change the system. They chose the latter:

After that initial confrontation with the authorities, we got a lot more tactical about what it meant to work with regulators and government officials. In California, we began co-drafting legislation with the California Conference of Directors of Environmental Health, the group responsible for regulating all food facilities in the state. In Seattle and Portland, our first new markets outside of California, we built relationships with elected officials and local nonprofits.⁹⁴

Still, for home-based food entrepreneurs aspiring to attain an AB-626 law for their own state, it is important to note that this cooperative model does not support financial solvency or investors’ expectations; according to California’s model and Josephine’s demise, changing the law should precede launching a “home restaurant,” because achieving financial success while simultaneously working with the legislature is unrealistic. In the words of Josephine’s CEO, “It may have been the result of naive idealism, but we thought we could empower marginalized communities, build a business, and change the law by collaborating with policymakers—all before raising series A funding.”⁹⁵ Thanks to AB-626, a strong framework already exists from which other state legislators can borrow to get the ball rolling. In addition, the Institute for Justice, a non-profit litigation and research center focused on public policy issues,⁹⁶ drafted a “Model Food Freedom Act” in November 2018 as a template for future state legislation.⁹⁷

State food law activists would also be wise to note that AB-626 was not simply an expansion or modification of existing cottage food law but actually exists in a distinct category. The original law that compelled Josephine’s demise was part of the California Retail Food Code (a subsection of the Health and Safety Code), which subjected private home kitchens to the same regulations as commercial kitchens by classifying both as “food facilities” by definition.⁹⁸ The new law has amended the Code, redefining home kitchens as “microenterprise home kitchens” that are “restricted food facilities” and thereby exempt from commercial kitchen regulations, although the law adds substantial new regulations for this category.⁹⁹ It leaves cottage food operations as a separate category, subject to the standard regulations consistent with federal guidelines.¹⁰⁰

In contrast, Colorado passed a so-called “Food Freedom” law that was merely a moderate expansion of the existing cottage food law.¹⁰¹ Because the law only included non-hazardous food items but still prohibited cooked poultry, meat, eggs, and vegetables, calling it a Food Freedom law was misleading. Furthermore, some states are so restrictive that simply passing standard cottage food laws is perceived as a giant step toward food freedom, such as for Rhode Island, which not only has no cottage food laws but also only permits farmers to sell food produced at home.¹⁰²

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *About Us*, INST. FOR JUSTICE, (last visited Mar. 21, 2020), <https://ij.org/about-us/>, archived at <https://perma.cc/E4H5-PM8M>.

⁹⁷ *Model Food Freedom Act*, INST. FOR JUSTICE, (Nov. 14, 2018), <https://ij.org/wp-content/uploads/2018/11/Model-Food-Freedom-Bill-11-14-2018.pdf>, archived at <https://perma.cc/6UT7-XW3V>.

⁹⁸ CAL. HEALTH & SAFETY CODE § 113789 (Deering 2016).

⁹⁹ CAL. HEALTH & SAFETY CODE § 114367.1 (Deering 2020).

¹⁰⁰ *Id.*

¹⁰¹ COLO. REV. STAT. § 25-4-1614 (2016).

¹⁰² *R.I. Cottage Food Law*, FORRAGER.COM, (last visited Mar. 21, 2020), <https://forrager.com/law/rhode-island/>, archived at <https://perma.cc/NU47-GREU>.

Notably, Food Freedom laws have enjoyed bipartisan support at the state level.¹⁰³ Still, there is resistance, and advocates of more restrictive food safety laws issue ominous warnings; in Wyoming, leaders opposed to the Food Freedom Act stated that it would “put Wyomingites’ health—and even their lives—at risk.”¹⁰⁴ Such resistance would explain why, even though Food Freedom bills were introduced in seven states in the 2017 legislative session, only North Dakota’s passed.¹⁰⁵

A food law activist would also be wise to remain mindful of the role of red meat in any proposed legislation, as Maine learned the hard way after passing a Food Freedom law that was immediately challenged by the USDA based on the claim of inadequate meat oversight.¹⁰⁶ In turn, Maine quickly amended its law to comply with the USDA’s mandate.¹⁰⁷

How California will deal with the USDA regulation against the sale of unregulated meat remains an open question, as California is the first and only state to pass legislation that runs counter to the USDA’s federal mandate. Perhaps the unfolding will echo the legislative path of marijuana legalization: while marijuana possession and use are still illegal based on federal law, some states have passed legislation legalizing it (for medical use and/or recreational, depending on the state), and the federal government has not formally intervened.¹⁰⁸

Alternatively, there was a federal bill, originally proposed during the 2016-17 session, that would allow meat to be processed locally by removing the federal ban on the sale of meat from custom slaughterhouses, which are typically closer than a federal or state-inspected facility.¹⁰⁹ Referred to as the PRIME (Processing Revival and Intrastate Meat Exemption) Act, the bill enjoys bipartisan support but faces stiff opposition from the beef industry.¹¹⁰ According to U.S. Rep. Thomas Massie (R-KY), “Bloomberg reported in May [2017] just four companies control approximately 85 percent of U.S. beef sales, with pork and chicken markets also dominated by large corporations that want to keep it that way.”¹¹¹ The PRIME Act died in the Agriculture subcommittee¹¹² but was reintroduced in 2019; as of June 2019, it remains stalled in the same subcommittee.¹¹³ If PRIME were to pass, states with food freedom laws that allow home-based mini-restaurant businesses would further grant their citizens the right to incorporate meat into their home-cooked meals, and thereby fully serve their communities’ dietary preferences.

V. Conclusion

“Control oil and you control nations; control food and you control the people” is an ominous proverb often attributed to Henry Kissinger.¹¹⁴ While many “food freedom” activists may be fueled by the fight against the government control he describes/portends, this argument has become far more than an ideological one, as it finally has empirical support. Now that four states with Food Freedom legislation have

¹⁰³ Baylen Linnekin, *Food Freedom Movement Spreads to North Dakota*, REASON (Apr. 15, 2017), <https://reason.com/2017/04/15/food-freedom-spreads-awew/>, archived at <https://perma.cc/Y4AU-KACZ>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Jesse Hirsch, *The federal government has threatened to quash Maine’s historic food sovereignty law*, THE COUNTER (Sept. 12, 2017), <https://thecounter.org/government-threatens-main-food-sovereignty/>, archived at <https://perma.cc/UMH6-7M6C>.

¹⁰⁷ Doug Farquhar, *Maine Clarifies its Food Sovereignty Law*, NAT’L CONF. ST. LEGISLATURES (Nov. 6, 2019), <https://www.ncsl.org/blog/2017/11/06/maine-clarifies-its-food-sovereignty-law.aspx>, archived at <https://perma.cc/U25U-KSC5>.

¹⁰⁸ Robert A. Mikos, *Marijuana Localism*, 65 CASE W. RES. L. REV., 719 (2015), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1046&context=caselrev>, archived at <https://perma.cc/P9YY-HHR4> (“Though the federal government has not yet formally repealed its own marijuana prohibition, it has largely ceded control of the issue to the states.”)

¹⁰⁹ PRIME Act of 2017, H.R. 2657, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/house-bill/2657>, archived at <https://perma.cc/UM4X-Y9JU>.

¹¹⁰ Deena Shanker, *There Aren’t Enough Slaughterhouses to Support the Farm-to-Table Economy*, BLOOMBERG (May 23, 2017), <https://www.bloomberg.com/news/articles/2017-05-23/there-aren-t-enough-slaughterhouses-to-support-the-farm-to-table-economy>, archived at <https://perma.cc/M6TW-KGKL>.

¹¹¹ Kathy Hoekstra, *Maine Enacts Nation’s First ‘Food Sovereignty’ Law*, THE HEARTLAND INST. (Aug. 3, 2017), <https://www.heartland.org/news-opinion/news/maine-enacts-nations-first-food-sovereignty-law>, archived at <https://perma.cc/2SLN-AAMV>.

¹¹² PRIME Act, *supra* note 109.

¹¹³ PRIME Act of 2019, H.R. 2859, 116th Cong. (2019). <https://www.congress.gov/bill/116th-congress/house-bill/2859/text?r=5&s=1>, archived at <https://perma.cc/KC4Y-K6GW>.

¹¹⁴ Akopiantz, *supra* note 23.

reported zero incidence of food-borne illness, the food safety mantra at the heart of the government's (and possibly the public's) case against home-based food production has lost its legs. Considering the many commercial food scares of 2018, food purchased from one's neighbor may actually prove safer than the heavily regulated retail options. Furthermore, the market requires that home-based food businesses maximize safety, as a single incidence of food poisoning will effectively shut down a mom-and-pop enterprise (and contain the impact). If federal and state governments want home-based food entrepreneurs to work within the regulatory system, rather than using the Scorched Earth model employed by many innovative companies such as Uber and Airbnb, legislation like California's Homemade Food Act is both necessary and urgent. While national adoption would mark a food revolution that would disrupt several methods of traditional commercial food supply, the economic benefits for low- and fixed-income households—and especially for women—would be monumental, and likely paired with equivalent improvements in public health. If the law allowed American consumers to choose McNeighbor rather than McDonald's at mealtime, the body politic would be far more vital for it.