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THE USDA'S MEANINGLESS ORGANIC LABEL

The courts could end this deceptive marketing program.

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Organic farming has been booming in recent years. Total sales of organic products—food, bed linens, pillows, clothes, even tobacco—in the United States increased 83 percent between 2007 and 2012, despite their higher prices and unclear benefits as compared to conventional products. So why the popularity?

A primary driver of the marketing success of organic products is the U.S. Department of Agriculture's regulated use of the word "organic" and the "USDA Organic" label. Consumers interpret these symbols as indicating that the products are better for the environment and consumer health. But that is not what the label actually means, nor is it true.

The organic food production movement began in the early 1900s to curb wasteful farming practices. So-called "humus farming" sought to conserve and regenerate the soil by feeding it primarily organic waste such as manure and crop residues instead of relying on synthetic chemical fertilizers. Renamed "organic farming" in the early 1940s, it remained controversial because it conflicted with prevalent commercial agricultural practices.

The environmental movement's concerns about the environmental and health effects of synthetic fertilizers and pesticides led to greatly expanded organic food production and resulted in a confusing profusion of public and private "organic" food labels based on different standards. In order to achieve unifor-

mity, industry pressured Congress in the late 1980s to establish a national label to preempt differing state laws.

What resulted was a major government-regulated agricultural marketing program, instituted under the 1990 "National Organic Food Production Act." It directed the USDA to establish:

- a national organic production certification program
- a label for organically produced and handled agricultural products
- a national list of approved and prohibited substances to be included in the organic production standards
- an accreditation program for certifying agents

The USDA's use of the word "organic" was muddled from the beginning and became more obscure 10 years after passage of the 1990 Act and following the review of a quarter-million comments on proposed USDA organic regulations. At the release of the final national organic standards, then-Secretary of Agriculture Dan Glickman declared, "Those who want to buy organic can do so with the confidence of knowing exactly what it is that they're buying." But a few sentences later in the same speech he emphasized its meaninglessness:

Let me be clear about one thing: the organic label is a marketing tool. It is not a statement about food safety. Nor is "organic" a value judgment about nutrition or quality.

We shouldn't be surprised by Glickman's candor. If industry did claim specific benefits for safety, nutrition, or quality, it would have had to provide evidence to prove those claims to consumers and regulatory authorities.

So, simply for marketing purposes, the USDA allows the use of the word "organic" only by USDA-authorized producers. The label confers a valuable stamp of approval on products made with

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government-sanctioned processes and procedures that are in no way related to safety, nutrition, or quality.

Moreover, no longer was the organic movement focused solely on conserving or regenerating the soil; animal welfare and the exclusion of certain modern technologies were added to the paradigm. In response to public comments, for example, the USDA excluded foods from the organic definition if they were irradiated to eliminate insects and pathogenic microorganisms, a process popular in the spice industry. Also excluded were crops such as corn, cotton, canola, and soybeans crafted with the most precise and predictable techniques of genetic engineering.

Environmental effects / An unanswered question was how the new USDA-regulated and -promoted organic food process would affect the environment. This was important, given that the original intention of organic agriculture was to effect dramatic changes in American farming practices. Such government interventions are just the type of “major federal action” that the National Environmental Policy Act (NEPA) requires undergo an Environmental Impact Statement (EIS) analysis. Yet, such an analysis has never been performed because the USDA located the National Organic Program in its Agricultural Marketing Service (AMS). The organization’s mission is to promote U.S. agriculture,

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and the USDA has “categorically exempted” the AMS from the EIS requirement because, supposedly, “AMS programs and activities have been found to have no individual or cumulative effect on the human environment.”

Thus, employing a peculiar kind of circular reasoning, the environmental effects of the Organic Food Production Act—which was ostensibly designed to improve food production practices in order to benefit the environment—were not assessed because the USDA believed the program would not have a significant effect on the environment. Had the USDA performed the rigorous NEPA review, regulators, legislators, and the public would have had much more realistic expectations about the positive and negative effects of the program.

For example, there is ample evidence that organic agriculture can actually be harmful to the environment. Its substantially lower yields in real-world settings—typically 20–60 percent less than conventional agriculture—impose various stresses on farmland and increase water consumption substantially. According to a 2012 British meta-analysis, ammonia emissions, nitrogen leaching, and nitrous-oxide emissions per unit of output were higher in organic systems than in conventional agriculture, as were land use and the potential for eutrophication (adverse ecosystem responses to the addition of fertilizers and wastes) and acidification.

Although synthetic chemical pesticides are generally prohibited from “organic” farming, exceptions are allowed on the basis of “need.” Of course, most “natural” pesticides are permitted. However, “organic” pesticides can be toxic. As evolutionary biologist Christie Wilcox explained in a 2012 *Scientific American* web article:

There is nothing safe about the chemicals used in organic agriculture. Period. This shouldn't be that shocking—after all, a pesticide is a pesticide.

Healthfulness / Are organic foods more healthful? A study published in 2012 in the *Annals of Internal Medicine* by researchers at Stanford University's Center for Health Policy aggregated and analyzed data from 237 studies to determine whether organic foods are safer or healthier than non-organic foods. They concluded that fruits and vegetables that met the criteria for “organic” were on average no more nutritious than their far cheaper conventional counterparts, nor were those foods less likely to be contaminated by pathogenic bacteria like *E. coli* or *Salmonella*.

And speaking of contamination, recalls of organic foods jumped to 7 percent of all food units recalled in the first half of 2015 (compared to 2 percent in 2014). Some 87 percent of organic recalls since 2012 were for bacterial contamination, like *Salmonella* and *listeria*, according to studies reported in the *New York Times*.

The results of a USDA-funded study by the University of California, Davis showed that although pesticide residues and nitrates are lower in organic foods, natural toxin levels in organics may be higher. According to the study,

Overall, while organic and conventional foods do have differences with respect to chemical and biological contamination, there is no significant evidence that demonstrates that either production method is superior to the other with respect to human health.

We do know, however, that organic grains are particularly susceptible to toxins from fungi. In 2003, the United Kingdom's Food Safety Agency tested six organic corn meal products and 20 conventional (non-organic) corn meal products for contamina-

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tion with the toxin fumonisin. (Fumonisin and some other fungal toxins are highly toxic, causing fatal diseases in livestock that eat infected corn and esophageal cancer in humans. Fumonisin also interferes with the cellular uptake of folic acid, a vitamin that is known to reduce the risk of neural tube defects in developing fetuses.) All six organic corn meals had elevated levels—from nine to 40 times more than the recommended levels for human health—and they were voluntarily withdrawn from grocery stores. By contrast, the 20 conventional (i.e., non-organic) products averaged about a quarter of the recommended maximum levels.

Questions also arise regarding claims of enhanced animal welfare. For example, chicken eggs are deemed organic if the hen houses merely have attached porches, yet the living conditions barely differ for chickens lacking an outdoor porch. The resulting organic eggs are not perceptibly different from other eggs, but organic eggs command a premium price. Also, organically raised, free-range animals may be exposed to more parasites such as *Toxoplasma gondii* (the etiologic agent of toxoplasmosis), which is more frequent in some organic meats and transmitted to consumers who eat those meats undercooked.

Consumers increasingly opt for organic, notwithstanding the absence of compelling scientific evidence of its superior benefits. Those questionable choices are encouraged by organics proponents like *Consumer Reports*, which misleadingly claim that the consumption of organic foods avoids exposure to chemical pesticide residues, supports family farming methods for plants

and animals that are healthier in the long run for the earth's soils and water supply, and provides nutritional benefits.

Academics Review, an organization that tests popular claims against peer-reviewed science, in 2014 performed an extensive analysis of more than 100 published academic and market studies and concluded that “food safety and health concerns are the primary drivers of consumer organic purchasing” and that “other factors, such as sustainability, environmental claims, and even organic certification, do not motivate ... in the absence of health risk claims.” Moreover, “the use of the USDA Organic seal is critical to conveying confidence in organic labeling claims, which the majority of consumers mistakenly believe to mean healthier and safer food products.” And finally, “As a result, the American taxpayer-funded national organic program is playing an ongoing role in misleading consumers into spending billions of dollars in organic purchasing decisions based on false and misleading health, safety, and quality claims.”

In the absence of significant consumer or environmental benefits, the USDA and the organic food industry are the only beneficiaries of the organic agriculture deception. The USDA's concept of organic agriculture has morphed from humus farming for soil conservation, to a marketing tool, and now into a massive, public/private, domestic/international regulatory bureaucracy in which the original intent has been obscured.

Indeed, current Secretary of Agriculture Tom Vilsack's “vision” of the organics program, revealed in 2013 to the Organic Trade Association, contained not a single word about improving farming practices or the quality of food. His entire focus was on the program's financial benefits to farmers, as captured in this statement: “Organic agriculture is one of the fastest growing segments of American agriculture and helps farmers receive a higher price for their product as they strive to meet growing consumer demand.”

Every link in the organic production chain benefits—at the expense of consumers, the environment, and taxpayers. Mandatory federal spending on organic agriculture mushroomed from \$20 million in the 2002 Farm Act to just over \$100 million in the 2008 Farm Act, and now \$160 million-plus in the 2014 Farm Act.

While larger organic producers gain a disproportionate government-sanctioned competitive advantage, the high cost of compliance—to say nothing of being deprived of new advances in agricultural chemicals and plant and animals genetics—places the small, local producer and innovator at a distinct disadvantage.

The compliance requirements should not be taken lightly. Anyone who violates the USDA's labeling regulations is subject to a civil penalty of up to \$100,000 and imprisonment of up to five years. If anyone makes a false certification, the punishment increases to as much as eight years. Moreover, the act authorizes any citizen to commence a civil action against someone alleged to be in violation of the act.

The courts / There is some good news. The “USDA Organic” label and the regulated use of the word “organic” upon which

the National Organic Program is built may be its Achilles heel. A 2015 U.S. Supreme Court case, *Reed v. Town of Gilbert*, has eased the path for small producers and others to challenge the use of the label.

The decision changed the legal landscape dramatically, further calling into question the constitutionality of special labeling to identify foods produced by a particular process unrelated to the healthfulness or safety of the protected product. Information that is required on labels is considered to be “commercial speech” and must therefore conform to the speech requirements of the First Amendment. The essence of *Reed* is the expansion of the range of regulations subject to “strict scrutiny”—the most rigorous standard of review for constitutionality—to include special labeling laws.

As lawyer and *New York Times* Supreme Court correspondent Adam Liptak observed, *Reed v. Town of Gilbert* “marks an important shift toward treating countless laws that regulate speech with exceptional skepticism.” He quotes First Amendment expert Floyd Abrams who said, “When a court applies strict scrutiny in determining whether a law is consistent with the First Amendment, only the rarest statute survives the examination.” Thus, a law that regulates a product label that contains specific information about a food production process that is unrelated to a health or environmental outcome would be extremely unlikely to survive strict scrutiny.

The *Reed* majority opinion broadens the range of regulations that are now considered “content based” to include those that single out a particular manifestation of speech—such as the labeling required by the Organic Food Production Act. If USDA Organic labeling were challenged using the reasoning of the *Reed* decision, it would be reviewed by the courts under “strict scrutiny,” which requires both that the government surmount the high hurdles of proving that the labeling furthers a “compelling interest” and that the requirement is “narrowly tailored” to that interest.

The USDA organic label, which is based only on food production processes and procedures unrelated to quality, health, or safety considerations and is no more than a marketing tool, would appear to fail strict scrutiny. A successful challenge to the USDA organic label would stimulate the diffusion of advances in agriculture and provide real benefits to consumers in the form of innovations, lower prices, greater transparency in the marketplace, and enhanced protection of the natural environment. R

READINGS

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