ORGANIC FARMING, DRIFT, AND THE LAW:
ADDRESSING THE LEGAL MECHANISMS ENABLING PESTICIDE AND GMO DRIFT IN AMERICAN AGRICULTURE

A White Paper from the University of Oregon Environmental and Natural Resources Law Center’s Food Resiliency Project

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About this Paper
This white paper was produced through the University of Oregon Environmental and Natural Resources Law (ENR) Center’s Food Resiliency Project, an interdisciplinary research project that focuses on probing key law and policy issues to ensure resilient, sustainable food systems.

About the Authors
The authors of this white paper are ENR Bowerman Fellows Zachariah Baker and Elizabeth Berg and ENR Research Associate Jared Margolis. At the time this paper was published, Zachariah and Elizabeth had recently graduated from the University of Oregon School of Law in May 2014.

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About the ENR Center
As part of the ENR Center’s mission of "engaging the law to support sustainability on earth," the ENR Center administers seven theme-based, interdisciplinary research projects that team law student enthusiasm with faculty expertise in an effort to bring intellectual energy to bear on some of the most challenging and cutting-edge environmental issues of our day. The seven interdisciplinary research projects include the Conservation Trust Project; the Energy Law and Policy Project; the Food Resiliency Project; the Global Environmental Democracy Project; the Native Environmental Sovereignty Project; the Oceans Coasts and Watersheds Project; and the Sustainable Land Use Project. Each academic year, the Center awards one-year fellowships to a select group of University of Oregon School of Law students to work with ENR faculty members on specific research projects within each of the theme-based, interdisciplinary research projects.

About the Food Resiliency Project
The Food Resiliency Project is one of seven theme-based, interdisciplinary research projects administered by the University of Oregon ENR Center. The Project is led by faculty leaders Mary Christina Wood and Michael Fakhri. The mission of the Food Resiliency Project is to probe key law and policy issues to ensure resilient, sustainable food systems. Through student and faculty led research, the Project addresses key environmental and policy issues relating to all stages of the food system, including production, transportation, packaging, and consumption. These issues are examined through both a local and a transnational perspective. Important issues the Project has recently explored include patents related to modified seeds, land use reform to promote urban and household food production, use of public parks and spaces as “foodscapes,” use of conservation easements to secure urban farms, impacts from genetic modification of food and genetic pollution, transition from pesticides and herbicides, legal incentives to promote carbon sequestration in farming practices, global food trade, and international frameworks to ensure food sovereignty, security, and justice, among others.
Abstract
Organic agriculture has become an increasingly important component of efforts to promote a healthy and sustainable food system. Consumer demand for food that is not laced with toxic pesticides has risen dramatically, with many growers benefitting from the premium that comes with an organic label; however, organic farmers face the continuing threat of drifting genetically modified organisms (GMOs) and pesticides contaminating their production. Efforts to protect organic farming practices are ongoing. This paper provides policymakers and organic advocates with a broad overview of the current legal and policy framework surrounding the protection of organic agriculture from drift and also seeks to offer proposals for how to strengthen legal protection for organic farmers.

Our research indicates that the current legal framework leaves organic farmers without much protection from pesticide and GMO drift. Furthermore, the current framework leaves organic farmers without a meaningful way to redress harms caused by drift. Federal laws do not currently protect organic farmers from drift. In fact, those laws exacerbate the problem by failing to limit, and effectively encouraging, the use of pesticides and GMOs, ensuring that drift will be an inevitable consequence of the U.S. agriculture industry. State laws likewise do not provide sufficient protections for organic agriculture, and in some cases prevent drift from being addressed by preempting local efforts to limit pesticide and GMO use. Some local communities have passed bans on GMOs and restrictions on pesticide use that provide protections from drift, but those bans, if challenged, may be deemed invalid for conflicting with state or federal laws.

In order to protect organic agriculture, advocates should focus on policy initiatives at various levels of government to promote and protect the rights of organic farmers to be free from pesticide and GMO drift. At the federal level, more stringent regulations regarding pesticide approval and application would help to reduce the risk of pesticide drift. Likewise, policymakers should be encouraged to amend federal laws to discourage drift-producing agricultural practices and allow for more local control over pesticide and GMO use. Statutory amendments would be most effective if the law requires more meaningful environmental risk analysis that considers existing research and requires ongoing environmental monitoring. At the state level, existing right-to-farm laws should be amended to allow organic farmers to seek redress for drift contamination of their crops. Such an amendment should explicitly permit farmer-to-farmer lawsuits and establish generally accepted agricultural practices that prevent drift from occurring in the first place.

It is our hope that the information contained in this paper will help organic advocates develop strategies to enact new laws that will protect organic farming into the future.
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Organic farming has exploded in popularity in recent years. Consumer demand for food that is not laced with toxic pesticides has risen dramatically, with many growers benefitting from the premium that comes with an organic label; however, organic farmers and consumers face the continuing threat of drift from genetically modified organisms (GMOs) and pesticides that contaminate their organic products. This paper sets out to assess the current legal and policy framework surrounding the protection of organic agriculture from drift and to offer proposals for how to strengthen protections for organic farmers.

Part I provides an introduction to organic agriculture. Part II discusses the threats that drift poses to organic farmers. Part III discusses the current legal and policy framework surrounding drift. Part IV discusses possible initiatives to create and strengthen drift protections for organic farmers. Part V discusses local policies that promote or hinder GMO drift. And Part VI provides a summary of our suggested initiatives for increasing protection from GMO drift.

I. What is Organic Agriculture?

“Organic” agriculture may be understood and practiced in different ways by different people. In simple terms, organic growing occurs when the farming practices are aimed at “feeding the soil, not the plant.” The United States Department of Agriculture (USDA) describes organic agriculture as food production methods that preserve the environment avoid most synthetic materials, such as pesticides.

Both commercial and non-commercial operations may produce food using organic practices.

In 1990, Congress passed the Organic Foods Production Act, which paved the way for national standards for organic production and an accompanying certification program. USDA’s National Organic Program (NOP) was fully operational by 2002. For purposes of USDA organic certification, organic agriculture is defined as “a production system that is managed in accordance with the [Organic Foods Production Act and National Organic Program regulations] to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity.” Because products produced using organic methods can earn a premium in the market, many commercial operations pursue USDA’s organic certification.

To receive certification under the NOP regulations, a producer must grow crops according to certain standards related to soil fertility, seed stock, crop rotation, and pest management. A producer must also adhere to a national list of approved synthetic and prohibited non-synthetic substances for organic production. No prohibited substances can be applied to the land from which crops will be raised to sell organic produce for a period of three years immediately preceding harvest. These production requirements are verified by an independent state or private organization accredited by the USDA.
producer who has $5,000 or less in gross annual income from organic sales is exempt from certification, but still must follow the NOP production requirements if the producer wants to sell its products as “organic.” As of 2008, there were over 13,600 certified and exempt organic crop operations, accounting for more than 2.2 million acres of cropland. Crop sales from these operations totaled almost $2 billion. At the same time, more than 1,500 operations were in the process of transitioning cropland to organic production, constituting another 130,000 acres.

Other commercial farms have decided not to pursue organic certification because of economic or philosophical considerations, but still use systems or practices consistent with organic agriculture. These farms may pursue alternative certifications to convey their organic practices to the consumer. One example of an alternative certification is Certified Naturally Grown, which is based on the organic standards, and like the organic certification prohibits the use of synthetic pesticides or GMOs. Another example is the Demeter Biodynamic Farm and Processing Standards. Other farms just make assurances that their product is “pesticide-free” or “spray-free” to communicate to consumers that their produce is “organic.”

In addition, many people grow food using organic practices for their personal consumption, rather than for commercial sale. The National Gardening Association estimates that about 36 million households (31% of all U.S. households) participated in food gardening in 2008. An estimated one million of these households were growing food at a community garden. Although no specific data is available, it is likely that many of these households use practices consistent with organic agriculture, including minimizing or avoiding pesticide use entirely.

Collectively, these organic farmers—certified organic, other for-profit farms implementing organic practices, and backyard farmers—are all the beneficiaries of policies that aim to protect organic farming. However, whether those producers can benefit from “pro-organic” initiatives may depend on the size and scope of their farm. As such, the different degrees and types of organic farms need to be considered when crafting effective organic policies.

One critical issue for organic farms is how they can protect themselves from pesticide and GMO drift caused by nearby industrial farms. As such, the discussion that follows focuses on drift threats, the inadequacy of the current legal framework to effectively protect organic farmers from drift impacts, and possible ways to strengthen protections for organic farmers from drift.

II. Conflicting Farm Production Methods: How Pesticide & GMO Drift Impact Organic Farming

Organic production generally disfavors the use of pesticides and genetically modified organisms (GMOs). In fact, the national organic standards specifically prohibit the use of most pesticides and all GMOs in certified organic production. In addition to a number of economic and environmental impacts from drift, if certified organic crops are contaminated with pesticides or GMO pollen, the farm risks losing its organic certification. As a result, pesticide and GMO drift poses a significant threat to organic production.
A. Pesticide Drift

Pesticides, especially synthetic ones, are minimized or wholly avoided in organic production. For certified organic production, most pesticides—including those used commonly in conventional agriculture—are prohibited substances under the organic regulations and cannot be used. Concerns over the health effects of pesticides, both for the producer and consumer, and the effects on the environment have driven the minimization of pesticides in organic production. But despite the best efforts of organic farmers, unwanted pesticides can still reach their production systems through drift.

Consequences of pesticide drift for organic farmers include: 1) exposure to potential adverse health effects from coming in contact with pesticides and/or consuming them; 2) potential disruption of the organic system, including killing beneficial insects and harming the soil biology; 3) time and costs associated with remediation; and 4) loss of crops; and loss of economic potential.

Certified organic farmers may experience additional consequences, such as: 1) expenses related to implementing precautionary measures; 2) inconvenience associated with reporting and recordkeeping; 3) costs of testing before and after contamination; and 4) serious economic consequences including the loss of the organic premium when selling contaminated crops; and potential loss of the organic certification altogether.

Certified organic producers are required to ensure that their fields have distinct boundaries and buffer zones to prevent “unintended application” of prohibited pesticides, the contamination of which could cause the farm to lose its organic certification. Specifically, a producer must “[i]mediately notify the certifying agent concerning any: [a]pplication, including drift, of a prohibited substance to any field . . . that is part of an [organic] operation.” Because pesticide drift may not always be obvious, producers may conduct periodic residue testing to determine whether their crops have been affected by pesticide drift. Certifiers are required to conduct periodic residue testing of products from the operations it certifies.

In addition, certification providers, such as the USDA and state organic programs, can require pre-harvest or post-harvest testing of organic crops. Those providers may test any agricultural input used in production or agricultural product to be sold, labeled, or represented as organic, when there is reason to believe that the agricultural input or product has come into contact with a prohibited pesticide. If a positive result is found from these tests, an investigation will be conducted, and producers may be required to prove that they did not apply the prohibited pesticide. “When residue testing detects prohibited substances at levels that are greater than five percent of the Environmental Protection Agency’s tolerance for the specific residue detected . . . the agricultural product must not be sold, labeled, or represented as organically produced.”

Furthermore, loss of certification as a result of drift is a possibility, but the organic regulations suggest that loss of certification may be avoided. The organic regulations prohibit organic farmers from applying prohibited substances to their crop land for a period of three years immediately preceding harvest. As a result, some producers worry that they will lose their organic certification and have to re-transition their land for a period of three years after drift hits. However, according to the National Organic Program (NOP) regulations, drift should not result in an operation losing certification. “[O]rganic standards are process based . . . As long as an organic operation has not used excluded
methods and takes reasonable steps to avoid contact with the products of excluded methods . . . [the] presence of the products or excluded methods should not affect the status of an organic product or operation."

Pesticide drift is costly and problematic for organic farmers, regardless of whether those farmers ultimately lose their certification. GMO drift is similarly problematic and costly for organic farmers.

B. GMO Drift

Organic farmers also try to avoid the use of GMO seeds and crops. For certified organic producers, the use of GMOs is prohibited. GMOs were prohibited from certified organic production on the principal basis that they are inconsistent with how organic agriculture functions. Organic agriculture functions by using natural ecosystems while GMOs rely on technological changes that are not possible under natural conditions. Concerns over GMOs’ potential negative health effects, environmental ramifications, and social, cultural, and philosophical conflicts they pose also play a role in organic farmers avoiding their use. Nonetheless, organic products are vulnerable to GMO contamination because of the wide-spread use of GMOs by many industrial agricultural operations throughout the U.S.

GMO contamination of organic crops can occur when GMO seeds or pollen from GMO crops drift onto an organic field–usually from nearby farms or during the transport of GMOs. GMO seeds may turn into GMO crops in an organic field and ultimately cross pollinate with the organic crops. GMO pollen drift may also result in cross pollination of organic crops. The Supreme Court recently recognized that there is a risk of “gene flow” from genetically modified crops. At least one court has suggested that this type of contamination is “inevitable.”

Similar to the consequences of pesticide drift, the consequences of GMO drift for organic farmers include: 1) exposure to unknown, adverse health effects from consuming GMO crops; 2) potential disruption of the organic system–including harming the soil biology; and 3) time and costs associated with remediation.

In addition, like pesticide drift, GMO drift poses additional issues for certified organic farmers, including: 1) expenses related to precautionary measures; 2) inconvenience associated with reporting and recordkeeping; 3) costs of testing before and after contamination; 4) loss of the organic premium when selling contaminated crops; and 5) risk of losing organic certification.

As with pesticide drift, certified organic farmers are charged with taking precautionary measures to prevent GMO drift. Certified organic farmers also may voluntarily test their crops for GMO contamination, like some do for pesticide drift. In addition, certifiers must conduct periodic residue testing for GMOs like they do for pesticides. The USDA, state organic programs, and certifiers can also require pre-harvest or post-harvest testing of any agricultural input used or agricultural product to be sold, labeled, or represented as organic, when there is reason to believe that the agricultural input or product has come into contact with a GMO. Positive test results will trigger an investigation.

As in the context of pesticide drift, a farmer whose product is contaminated with GMO pollen may not be able to market and sell their products as certified organic. But, unlike pesticide drift, no threshold contamination level has been set for when a GMO-contaminated crop cannot be sold as organic.
However, the national organic regulations make it clear that there is not a zero tolerance standard.  

Like with pesticide drift, the national organic regulations suggest that loss of certification would not occur from contamination due to GMO drift. In fact, the NOP explicitly provides that “[a]s with other substances not approved [sic] for use in organic production systems . . . [t]he presence of a detectable residue alone does not necessarily indicate use of a product of excluded methods that would constitute a violation of the standards.” But, at least one court has not been willing to foreclose the possibility that certified organic farmers could lose their certification as a result of GMO contamination.

Furthermore, organic farmers not only stand to suffer the consequences of genetic drift discussed above, but they also could be liable for patent infringement. Many GMOs are patented and require licenses to use the seeds. As a result, inadvertent growth of crops with patented traits due to drift, may expose an organic farmer to liability for patent infringement. One company producing GMOs—Monsanto—has promised not to sue organic farmers for “trace amounts” of contamination; however, there aren’t similar court-backed guarantees from other companies. In addition, organic farmers risk being contaminated in amounts much greater than “trace amounts.”

Similar to pesticide drift, organic farmers may find it difficult to protect themselves from GMO contamination. As a result, organic farmers not only risk losing their organic certification, but may also be liable for patent infringement for using an unlicensed patented seed.

An organic farmer does not have any control over a nearby industrial farm’s use of pesticides or GMOs, which makes it difficult for the organic farmer to prevent contamination. Even proactive efforts to protect their farms from drift leave organic farmers vulnerable to serious economic and environmental consequences. As a result, the risks associated with both pesticide and GMO drift must be addressed through federal, state, and local policies to protect organic farmers. Without stronger policies and legal protections for organic farmers, those farmers may find it more and more difficult to continue engaging in organic production.

III. Introduction to Legal Framework

Agricultural policies at all levels of government influence the long-term viability of organic agriculture. In the context of pesticide and GMO use, a number of federal statutes provide guidelines for farm practices that effectively serve to increase the risks to organic farmers from drift. Organic farmers who are impacted by drift may look to redress that harm in state courts through nuisance or trespass suits; however, state right to farm laws make judicial recourse difficult to pursue. In response, local citizens are organizing grass roots efforts to preserve their ability to have access to organic produce and to protect the character of their communities.

The interplay of federal, state, and local policies has shaped the legal framework impacting agriculture throughout the United States. To better appreciate how to protect organic farming, a general understanding of that framework is required. This section introduces some of the laws that influence agricultural policy and the long-term viability of organic farming. Specifically, the laws addressed are those laws that promote or hinder organic farms ability to protect themselves from pesticide and GMO drift.
A. Federal Laws that Promote or Hinder Drift

Federal laws are a key part of the legal framework surrounding drift. In addition to the Organic Foods Production Act and National Organic Program regulations discussed in Part II, a number of other federal laws are relevant to pesticide and GMO drift. Some of these laws specifically deal with pesticides or GMOs, while others deal with agriculture generally. Unfortunately, “as a whole, federal policies work against environmentally benign practices and the adoption of alternative agricultural systems, particularly those involving crop rotations, certain soil conservation practices, reductions in pesticide use, and increased use of biological and cultural means of pest control.”52 A very brief discussion of the most significant of these laws is provided below.

B. Pesticide Specific Policy

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) is the key federal law governing pesticides. FIFRA establishes a licensing program for pesticides, requiring pre-market review of all pesticides to be sold, distributed, or used in the U.S.53 When making its determinations to license a pesticide, the U.S. Environmental Protection Agency (EPA) must consider the risks pesticide exposure poses to humans and the environment, as well as the economic and social implications of using the pesticide.54 Unfortunately, FIFRA suffers from a number of flaws that exacerbate the threat of drift.

Most obviously, FIFRA facilitates the use of pesticides. “FIFRA, by its very nature, is designed to approve the use of pesticides, which are, by definition, designed to be released into the environment to kill, harm, or disrupt living organisms.”55 In addition, data upon which the EPA relies in making its determination to register a pesticide does not properly account for the costs/benefits of the pesticide.56 But, even more important, EPA’s ability to regulate use of the registered pesticide under FIFRA is limited.57 No EPA approval is required prior to using a pesticide; applicators are just required to follow the directions on the label.58 Over one-half of registered agricultural pesticides can only be applied by certified applicators; however, applicators are not trained to address local ecological issues and many may not even be on site when the pesticide is applied.59

C. GMO Specific Policy

The law surrounding patents provides the foundation for the proliferation of GMOs. In 1980, the U.S. Supreme Court ruled that living organisms could be patented.60 This decision led to the U.S. Patent and Trademark Office decision that sexually reproducing plants were patentable under the Patent Act, providing greater protections and incentives to seed companies than the 1970 Plant Variety Protection Act.61 In 2001, the Supreme Court extended general utility patent protection to plants, providing even greater protections and incentives for genetically-modified seed.

Given the proliferation of GMOs, “as many as 12 statutes, a myriad of regulations, and five different agencies and services [now] play a role in governing GMO products.”62 The overarching regulatory regime is the Coordinated Framework for Regulation of Biotechnology (Coordinated Framework) promulgated by the White House Office of Science and Technology Policy in 1986. Under the Coordinated Framework, USDA, EPA, and FDA share responsibility for overseeing GMO products. “USDA oversees the interstate movement, import, field testing, and release of GMO plants and generally ensures that they are safe to grow.”63 EPA regulates genetically modified plants that have genetic traits introduced to resist insects and
also has authority over pesticide residue in food, including those from pest-protected GMO plants under the Federal Food, Drug, and Cosmetics Act. FDA has responsibility for food safety. Due to this complex regulatory overlay, rules governing GMO plants have been developed in a piecemeal, haphazard manner, which has led to regulatory overlaps, gaps, and other problems.

D. The Farm Bill
The Farm Bill sets the agricultural policy for the nation. Although the Farm Bill provides some support for organic production, most of the support provided through the Farm Bill has the effect of promoting large-scale, industrial monoculture production. This type of production promotes pesticide and GMO use.

E. Conclusion
Federal laws do not offer much consolation for organic farmers. The regulations promulgated under federal statutes tend to promote, or favor, large intensive agricultural operations, and those policies, in turn, lead to increased risk of pesticide and GMO drift. Additionally, the political dynamics surrounding federal agricultural policy favor large industrial agriculture operations, therefore, making it unlikely that organic farmers can rely on much change at the federal level. As such, it is necessary to look to state and local laws that promote or hinder drift, and consider actions at those levels of government to protect organic farming from pesticide and GMO drift.

IV. State Laws that Promote or Hinder Drift
Organic farmers who are harmed by pesticide and GMO drift may be able to seek redress in the courts by bringing nuisance suits, or other similar common law claims. However, state right-to-farm laws often provide agricultural operations with immunity from such lawsuits. The effect of those laws is to leave organic farmers that have been harmed by drift with no meaningful recourse through the courts.

To provide context for this discussion, this section will briefly discuss the elements of some common law claims and the application of those claims in drift-related disputes. Next, this section will provide an overview of state right-to-farm laws and how those laws effect farmer-to-farmer litigation.

A. Common Law: Seeking Protection for Organic Farms in the Courts
State common law has traditionally been relied on to address the contamination of property by neighboring uses; however, these laws have been inconsistently applied in the context of pesticide drift and are untested in the context of GMO drift. Throughout the twentieth century, liability for agricultural pesticide drift has been governed by “an amalgamation of ambiguous and confusing tort principles.” Due to the overlapping nature of common law tort claims, it is often “difficult to detect what theory the court was following.” Liability for the drift of pesticides has been found under theories of negligence, strict liability, trespass, and nuisance. Each of these is discussed in turn below.

1. Negligence
Generally, a landowner who negligently permits injurious matter to pass from their land onto that of an adjoining landowner is liable for the resulting damage. To establish a prima facie case in a private action for negligence in the use of pesticides, the plaintiff must plead and prove: (1) a duty owed by the defendant to the plaintiff regarding the pesticides which may arise under either the common law or a statute; (2)
breach of that duty; (3) injury or damage to the plaintiff or the plaintiff’s property, and; (4) a direct causal relationship between the damage or injury and the defendant’s actions with regard to the pesticides.\textsuperscript{72}

Courts have recognized that someone who applies chemical dusts or sprays to crops may be liable for damages caused to another, based on assorted variations of negligence.\textsuperscript{73} In addition, a consensus of courts that have dealt with the issue, have found the hirer (usually a farmer) vicariously liable for the sprayer’s negligence.\textsuperscript{74}

2. Strict liability
An action for strict liability holds someone accountable regardless of fault or intent.\textsuperscript{75} A strict liability action requires proof of: (1) an ultrahazardous or abnormally dangerous activity,\textsuperscript{76} and (2) injury to person or property, despite the exercise of care by the defendant.\textsuperscript{77} Because of the dangers created by pesticide drift, arguments have been advanced that strict liability is a particularly appropriate basis upon which to impose liability for damages caused by drift, particularly when aerial application of pesticides is involved.\textsuperscript{78}

Prior to the 1970’s, few court opinions applied the theory of strict liability to hold pesticide sprayers liable for drift-related damages.\textsuperscript{79} In 1977, the Supreme Court of Washington issued what was believed to be a watershed opinion, finding an aerial pesticide applicator strictly liable for damage to organic crops; however, the case “has not spurred a significant increase of strict liability holdings against Pesticide Driftmakers and has captured only lukewarm precedential interest in other courts.”\textsuperscript{80} Only “a smattering” of other appellate opinions since the 1970’s have addressed the question of drift liability under the theory of strict liability for harm to crops, livestock or personal injuries.\textsuperscript{81} Some of these decisions have imposed liability for pesticide drift under a theory of strict liability while others have declined to impose strict liability.\textsuperscript{82} It therefore remains unclear whether strict liability will be applied to pesticide and GMO drift in future cases.

3. Trespass
Because drift can result in intrusion of pesticides onto land possessed by another, trespass is a possible cause of action. Trespass to land involves interference with the exclusive right of possession of another.\textsuperscript{83} Generally, a trespass action requires a showing of intent to enter the property and a tangible intrusion on the property in possession of another.\textsuperscript{84} Prior to 1970, courts in “a handful of cases,” recognized the potential validity of claims by neighbors against pesticide sprayers predicated on variations of the intentional tort of trespass.\textsuperscript{85}

Between 1970 and 1995, courts continued to be reluctant to impose classical intentional tort theories to pesticide drift cases. “While one might suspect, on a theoretical level, that ‘classical trespass law would be strongly accounted for … [since] the instrument of damage, after all, is an unwelcome and direct invasion by toxic aerosols,’ case law [between 1970 and 1995] yields few reported examples of this sort.”\textsuperscript{86} This reluctance continues today.\textsuperscript{87}

4. Nuisance
“Nuisance is a well-recognized form of action, which courts should be comfortable applying to situations such as pesticide migration or drift onto neighboring properties.”\textsuperscript{88} A private nuisance is an activity that interferes with the use and enjoyment of someone’s land.\textsuperscript{89} Some courts have found liability for pesticide drift based on nuisance.\textsuperscript{90} “However, the cause of action for nuisance is somewhat limiting in
that its primary recourse is to seek abatement of the nuisance, rather than necessarily to award damages. Additionally, it is inapplicable to situations that do not involve an ongoing pattern of pesticide application. Further, public nuisance requires more broad-based harm to the public and may not result in the redress of individual injuries.91

5. Conclusion

One commentator sums up the last century of pesticide drift law as follows:

The preexisting liability paradigm for Pesticide Driftmakers is at war with itself, causing considerable uncertainties and transaction costs, without providing sufficient incentives to prevent unnecessary pesticide use by farmers. On the one hand, a line of cases assumes that pesticides can be applied safely and without cross-boundary spillover effects to neighbors’ crops, livestock and persons. On the other hand, a different set of cases presupposes that pesticide drift from application of agricultural poisons cannot be safely applied, despite the exercise of due care, because of uncontrollable factors such as wind gusts, weather changes, and the physical characteristics of pesticide droplets or aerosols.

Further uncertainties attend pesticide drift liability rules due to ambiguities in the language and interpretation of the abnormally dangerous activity provisions of sections 519 and 520 of the Restatement (Second) of Torts. In addition, the judiciary has used expansive, but vague, negligence principles in formulating the duty of care for Pesticide Driftmakers. There are also emerging differences in the willingness of courts to find causation. In crop or livestock damage cases causation is freely inferred. However, courts have been hesitant to find causation in recent pesticide exposure toxic tort actions involving personal injury. Moreover, state liability regimes addressing damages caused by Pesticide Driftmakers are clouded by an interlocking set of federal regulatory rules, practices and programs which serve to directly encourage unsustainable agricultural pesticide use, while indirectly discouraging alternative agricultural practices which seek to minimize pesticide usage.92

Given the uncertain case law regarding pesticide drift discussed above, it is likely that common law liability cases regarding GMO drift would run into the same confusion in the courts. As with pesticides, there may be division in the courts over whether GMO use is an abnormally dangerous activity. Furthermore, in terms of personal injury cases, it may be even harder to show a connection between GMOs and human health than between pesticides and human health.93

As a result, for farmers concerned with pesticide and GMO drift, state common law liability may not be the most reliable method for protecting their interests. In addition to the uncertain court application of common law on the matter outlined above, common law actions may be limited by statute as discussed in the next section. Furthermore, these causes of action, if they are even available, only provide a retroactive remedy and do not avoid
conflict by preventing drift in the first instance.

B. Right-to-Farm Laws: Immunity for Agricultural Nuisances

Right-to-Farm laws provide qualifying agricultural activities with immunity from nuisance suits. All fifty states have some form of a right-to-farm law, which are intended to protect farmers from nuisance suits that may arise as urban sprawl expands to touch existing farming lands. Those laws essentially codify the common law doctrine of “coming to the nuisance,” which provides that a landowner cannot complain that their neighbor is causing a nuisance if the neighbor’s agricultural activity predated the complaining landowner’s use of his or her property.

As such, most of the litigation arising out of right-to-farm laws is between non-farming residents and commercial farming operations. For example, homeowners who just purchased a new home in a suburb that is close to a feedlot may claim that the odor, flies, and dust from the feedlot are a nuisance. Right-to-farm laws operate to bar such claims and protect the existing farming activity. However, as agricultural innovations like GMO crops and petroleum-based pesticides spread to dominate most farming in the United States, right-to-farm laws may operate to bar claims between two competing agricultural operations—an industrial farm and an organic farm.

This section will focus on how right to farm laws may protect or not protect defendant farm operations from nuisance or trespass claims when the plaintiff is a fellow farmer. More specifically, it will discuss Oregon’s right-to-farm law and whether organic farmers may bring claims against commercial farming operations that infringe on the organic farmer’s ability to maintain organic production due to pesticide drift and GMO drift.

First, this section will provide a brief overview of the most common provisions of a right-to-farm law. Second, we provide a brief discussion of whether farmer-to-farmer lawsuits are permitted under the Oregon statute, and how attorney fee provisions may deter plaintiffs from bringing meritorious nuisance claims. Using Oregon as a case study, this section will address how farmer-to-farmer litigation would play out in a jurisdiction with a right-to-farm law similar to Oregon’s statute.

The right-to-farm law discussion will demonstrate that these laws may preclude organic farmers from bringing a nuisance suit against industrial farmers, despite the fact that these statutes were not designed to preclude those suits; rather, these statutes were designed to protect farmers from claims arising out of urban sprawl. Nonetheless, right-to-farm laws may have unintended consequences for organic farmers.


Right-to-farm laws vary significantly from state-to-state; however, as a general matter, these laws essentially provide protection from suit by neighboring landowners for agricultural activities that predate the surrounding development. Farms that seek protection from right-to-farm laws are generally required to be in existence for a specific amount of time before the farm may invoke right to farm immunity. Right-to-farm laws may also require that the farm operate according to accepted farming practices or was not considered a nuisance prior to the state’s adoption of a right-to-farm law.
Right-to-farm laws provide farm operations with significant legal protections, but these laws are not designed to protect the farmer if they pollute, engage in bad practices, or operate the farm in a negligent or unreasonable manner. The scope of protections afforded agricultural operations generally depends on the statute’s provisions related to: (1) purpose; (2) definition of agriculture; (3) presumptions of reasonableness; (4) date of operation; (5) “substantial change” of farming operations; and (6) prohibitions on local regulation.

Some of the variations and scope of those provisions will be discussed below.

i. Definition of Agriculture

The definition of agriculture is critical to the scope of protection afforded farmers under right-to-farm laws. Legislators can carefully draft this definition to assure that valued agricultural activities are protected. The definition tends to be all encompassing. For example, the Tennessee right to farm law, which protects farms and farm operations, defines “farms” as “the land, buildings, and machinery used in the commercial production of farm products and nursery stock . . . .” It goes on to define “farm operations” as:

. . . a condition or activity that occurs on a farm in connection with commercial production or farm products . . . and includes, but is not limited to: marketed produce at roadside stands or farm markets; noise, odor; dust; fumes; operation of machinery and irrigation pumps; ground and aerial seeding and spraying; the application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides, and the employment and use of labor . . .

Such an expansive definition effectively includes every commercial farm activity. Tennessee also requires that those activities conform to generally accepted agricultural practices to be shielded from nuisance liability under the statute. Other statutes simply list the types of agriculture that are shielded under the law such as horticulture, silviculture, aquaculture, wildlife management, and others.

The definition of agriculture may also be drafted to include language that limits the scope of coverage. For example, Oregon’s definition of “farming practice” explicitly provides that the activity be a “reasonable and prudent method for the operation of the farm to obtain a profit in money.” Similarly, Pennsylvania provides immunity protection only for “normal agricultural operation[s]” that are on ten acres or more of contiguous land or on less than ten acres of land with an anticipated yearly income of $10,000 or more.

Because the definition of agriculture is generally expansive, organic farmers can be confident that organic farm operations will be included within the scope of right-to-farm laws, thereby receiving immunity for nuisance suits brought against them. However, as these laws are currently structured, the definition of agriculture does not protect organic farms from harm caused by neighboring industrial farms. For a solution to these problems, please refer to Part IV.

ii. Presumptions of Reasonableness

Many statutes expressly provide that right-to-farm nuisance immunity functions as a rebuttable presumption that the activity is not a nuisance, rather than to provide absolute protection for farming activities. Often, this presumption is framed around the assumption that the farm is operated in accordance with
generally accepted agricultural management practices.\textsuperscript{116} However, other statutes also provide that a farm activity is presumed to be reasonable, and not a nuisance, if the activity does not have a substantial effect on public health and safety.\textsuperscript{117}

Washington’s right to farm statute exemplifies both presumptions. Washington provides immunity for:

\begin{quote}
[A]gricultural activities conducted on farmland and forest practices, if consistent with good agricultural and forest practices and established prior to surrounding nonagricultural and nonforestry activities, are presumed to be reasonable and shall not be found to constitute a nuisance unless the activity or practice has a substantial adverse effect on public health and safety.
\end{quote}

If those agricultural activities and forest practices are undertaken in conformity with all applicable laws and rules, they are presumed to be good agricultural and forest practices not adversely affecting the public health and safety . . . .\textsuperscript{118}

Some statutes also provide for liability protection that is somewhere in between a rebuttable presumption and absolute protection. For example, some statutes provide that operations located within an agricultural district are afforded liability protection.\textsuperscript{119} Ohio provides that: “[i]n a civil action for nuisances involving agricultural activities, it is a complete defense if . . . the agricultural activities were conducted within an agricultural district” and conducted “in accordance with generally accepted agriculture practices.”\textsuperscript{120} This assures greater protection for farms located in those districts, because their location confers an added layer of legitimacy to the farmer’s activities. Iowa’s language takes this protection a step further, shielding farm operations from liability if the operation is “located in an agricultural area . . . regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation.”\textsuperscript{121}

In farmer-to-farmer lawsuits, an organic farmer may be able to overcome an industrial farmer’s immunity by demonstrating that the farm is not operating in accordance with generally accepted agriculture practices.\textsuperscript{122} For example, if a neighboring farm is spraying pesticides when the wind speed is too high, a plaintiff-farmer may be able to remove the defendant farmer’s immunity shield. However, it may be difficult to demonstrate that a farm is not adhering to those practices without some form of factual investigation that can be complex and costly. In which case, a plaintiff-farmer that has a hunch that a neighboring farmer is not operating according to those practices may be discouraged from bringing the lawsuit in the first instance.

\begin{itemize}
\item[iii.] \textbf{Date of Operation}\textsuperscript{123}
\end{itemize}

A farm may be shielded from nuisance liability if it has been in existence for a set amount of time.\textsuperscript{124} Most statutes provide that the farm must have been in existence for one, two, or three years to be shielded from liability, regardless of changes in the surrounding neighborhood.\textsuperscript{125} Date of operation may be treated as a complete defense to a nuisance claim.

For example, Mississippi provides an “absolute defense” against nuisance suits for agricultural operations that exist for more than one year, “if the operation is in compliance with all applicable state and federal permits.”\textsuperscript{126} This suggests that the clock can be reset if the operation has a lapse in
compliance with state and federal permits. Similarly, Georgia provides that once an operation has been in existence for more than one year, the operation will not be considered a nuisance as a result of changed conditions. Georgia’s statute also provides that changed circumstances will not include a change in the use of land in an agricultural area, or an increase in magnitude, land improvements, or construction “in and around the locality of an agricultural area.”

Because date of operation provisions act as a complete bar to nuisance suits, statutes that provide this kind of language may make it difficult for organic farmers to challenge long-standing, neighboring industrial farm operations that are harming organic farm operations. Additionally, if an organic farmer doesn’t experience or know of the harmful effects of a nearby industrial farm until after the establishment time has passed, a nuisance suit will be barred.

iv. Substantial Change in Farming Operations

Often times, the date of operation is inextricably linked with whether the farming operation, or the surrounding area, has undergone a substantial change. If the operation has undergone a “substantial change,” then the farm’s date of operation will be reset, allowing local residents an opportunity to sue for nuisance. Pennsylvania’s statute provides typical language:

No nuisance action shall be brought against an agricultural operation which has been in operation for one year . . . where the conditions or circumstances complained of . . . have existed substantially unchanged since the established date of operation . . . .

Unlike Pennsylvania’s statute, Indiana provides some examples of what activities will not constitute a substantial change in operation. Indiana provides that as long as the operation has been in existence for more than one year, there will be no “significant change in the type of agricultural operation” when one type of agricultural operation is converted into another, there is a change in ownership or size of the agricultural operation, or the operation is enrolled in or withdraws from a government program.

Without guidance in the statute about what changes in operation will be considered a “substantial change,” many courts have had to interpret this provision. A Texas court held that there was no “substantial change” where a feedlot remained vacant for several months during a change of ownership. The court made clear that an argument based on substantial changes of the operation should be based on “whether any substantial changes have occurred in the conditions allegedly creating the nuisance (i.e., the flies, dust, and smell).” Following similar logic, a Florida court found that it was reasonable to determine that a chicken farm had become a “more excessive” operation when it changed its manure spreading method from dry manure to wet manure, which was more odorous.

Creating an opening for a nuisance suit by identifying a substantial change in a neighboring farm operation may be difficult for an organic farmer; however, this will vary greatly from jurisdiction to jurisdiction. For example, if an organic farm changes its practices to become a modern or industrialized farm, such a change in intensity of farming practices may or may not be sufficient to establish changed circumstances. In order for an organic farmer to be successful in demonstrating changed circumstances, the plaintiff-farmer may want to emphasize that
the change has led to a new or significantly increased nuisance condition. If a jurisdiction applies the “Texas analysis,” a plaintiff may be successful if he or she demonstrates that prior to the change in conditions, the plaintiff’s farm was not harmed by pesticide drift, but after the change was harmed by drift. Likewise, it may be feasible to argue that a farm’s increased use of GMO crops has caused significant impacts to a neighboring organic farm’s crops, which was not an issue before. However, the success of that approach is dependent on the severity of the neighboring farmer’s operational changes.

v. Prohibitions on Local Regulation

Most right-to-farm laws provide an express prohibition against local governments adopting ordinances that infringe on agricultural operations by making certain agricultural activities nuisances. As such, city or county zoning ordinances that affect agricultural operations may be preempted by the state’s right-to-farm law. Arkansas’s preemption clause is typical of many right-to-farm laws. It provides that:

Any and all ordinances adopted by any municipality or county in which an agricultural operation is located making or having the effect of making the agricultural operation or any agricultural facility or its appurtenances a nuisance or providing for an abatement of the agricultural operation or the agricultural facility or its appurtenances as a nuisance in the circumstances set forth in this chapter are void and shall have no effect.

Rhode Island also has an expansive preemption clause, which states that “no city or town ordinance adopted . . . shall be enforced against any agricultural operation.” In applying this provision, the Supreme Court of Rhode Island found that a city could not prohibit a turf farm from digging an irrigation pond, even though it was located in a zone that prohibited earth removal.

Other preemption clauses may be more lenient. New York’s preemption clause gives local governments some leeway, providing that local governments “shall not unreasonably restrict or regulate farm operations within agricultural districts . . . unless it can be shown that the public health or safety is threatened.” Likewise, Michigan only preempts those ordinances that “purport[] to extend or revise in any manner the provisions of [the] act or generally accepted agricultural and management practices (GAAMPs) . . . .” Under that provision, a county ordinance that required a special use permit to operate a game bird preserve was invalid because the raising, breeding, and selling of bird’s for commercial use came within the statute’s definition of “farm.” The court also rejected the argument that the lack of GAAMPs pertaining to game bird’s implicitly permitted the county to regulate the activity.

Moreover, preemption provisions may make it difficult for special interest groups that promote organic farming to pass local ordinances aimed at discouraging or prohibiting certain industrial farming practices in a given locale. For example, a county ordinance that prohibits the use of GMO seeds would likely be preempted by a right-to-farm law that prohibits local regulation. However, in a jurisdiction like New York or Michigan, such grass roots efforts might be more successful if linked to public health concerns. Interest groups should be aware, however, that a successful challenge to a proposed local regulation could set bad precedent for pro-organic organizations’ future legislative efforts; furthermore, other states could follow
the lead of a jurisdiction affirmatively prohibiting pro-organic efforts.

2. Farmer-to-Farmer Litigation under Right-to-Farm Statutes

Even where an organic farmer may have a meritorious lawsuit against a neighboring farm for pesticide or GMO drift, he or she may be discouraged from bringing suit due to the risk of being required to pay attorney’s fees if the suit does not succeed. The risk that a plaintiff assumes by suing a defendant agricultural operation that may be protected by a right-to-farm law is dependent on the law’s provision related to attorney’s fees. In some jurisdictions, a losing plaintiff is required to pay the defendant’s attorney fees if the judge deems such payment “reasonable,” or if the action is “frivolous.” These provisions may deter plaintiffs from bringing suit against agricultural operations that benefit from a presumption of legitimacy conferred by statute. As such, attorney fees provisions are a relevant aspect of plaintiff strategy and may inform whether a right-to-farm law may deter plaintiffs from bringing the action in the first instance.

This consideration is particularly relevant in the context of farmer-to-farmer litigation, where it is unclear if one farmer could claim immunity against another. If a defendant-farmer was immune from suit by a plaintiff-farmer, the plaintiff farmer would be required to pay attorney’s fees associated with bringing the claim. The reason that outcome is particularly risky in farmer-to-farmer litigation is because most jurisdictions have not determined if right-to-farm laws protect farmers against other farmers, or if the laws only protect farmers against non-competing agricultural uses.

Three jurisdictions that have considered this question are California, Washington, and Vermont. In all of those cases, the courts’ analysis turned on the laws’ “purpose” statement. In California, the Court of Appeals held that the right-to-farm law applies in farmer-to-farmer litigation, and that litigation over water intrusion from one farmer’s property to another was precluded by statute. In Souza, the plaintiff argued that the statute “was only intended to bar claims by non-agricultural uses coming to the nuisance,” and encouraged the court to review legislative history to that effect. The court disagreed and found that the statute unambiguously protected any agricultural activity that was established for three years, was not a nuisance when it began, and was not affected by “changed conditions.”

In contrast, both Washington and Vermont determined that the right-to-farm laws in those states only provide immunity when urbanization encroaches on rural farming areas. In Buchanan v. Simplot Feeders LTD, the Washington Supreme Court held that based on “ambiguous language . . . [and] the Legislature’s finding and purpose . . . the nuisance immunity should be allowed just in those cases where the nuisance suit arises because of urban encroachment into an established agricultural area.” Similarly, in Trickett v. Ochs, the Vermont Supreme Court found that Vermont’s right to farm law was not intended to provide immunity where urban encroachment was not at issue. Trickett involved a non-farmer plaintiff that sued a neighboring apple orchard for noise associated with trucking apples in the early morning hours. However, because the plaintiff’s farmhouse was located in a rural area, the court found that there was no issue of “urban encroachment” or changed circumstances that would immunize the defendant from farm-related nuisances.

The discussion that follows will focus on how Oregon’s right-to-farm law may hinder or
allow litigation between farmers (as opposed to the litigation norm of non-farmer plaintiff and defendant farmer). The discussion will begin with a brief overview of Oregon’s right-to-farm law and will be followed by an analysis of how those provisions may influence farmer-to-farmer litigation.

3. Overview of Oregon’s Right-to-Farm Law

Oregon’s right-to-farm law includes many of the typical provisions found in other right-to-farm laws, but also provides immunity for forest practices. Oregon’s statute preempts all local ordinances that make a farm or forest practice a nuisance, provides that a farm or forest will be protected if it adheres to “generally accepted, reasonable and prudent” practices, is located on land zoned for farming or forestry, and provides full immunity for those operations regardless of changed circumstances. In Oregon, an unsuccessful plaintiff may be required to pay the prevailing parties “reasonable attorney fees and costs incurred at trial and on appeal.” Oregon’s right-to-farm law explicitly protects only those farm operations that are intended to “obtain a profit in money.” Interestingly, the statute does not confer immunity on operations that damage agricultural products.

Also important to Oregon’s right-to-farm law is the purpose underlying the statute. At its core, the Oregon right-to-farm law is designed to protect farming practices on lands zoned for farm use, because those practices are critical to the economic welfare of the state. By protecting farming practices, the Oregon legislature anticipated that “full use of the [State’s] resource base” would not be limited by local ordinances and that the use of farmlands would be consistent statewide. To protect that resource basis, the Legislative Assembly made it the State’s policy that “[p]ersons who locate on or near an area zoned for farm or forest use must accept the conditions commonly associated with living in that particular setting.”

Oregon is one of the many jurisdictions that has not directly addressed whether the statute precludes farmer-to-farmer litigation. To illustrate how farmer-to-farmer lawsuits may unfold in similar jurisdictions, an analysis of whether farmer-to-farmer litigation would be successful in Oregon is provided below.


A commercial farmer is likely not afforded immunity against a nuisance or trespass suit brought by an organic commercial farmer.

Oregon’s statute provides that there is no immunity for “damage to commercial agricultural products.” This language suggests that an organic farmer could bring a suit against a modern, industrial farm for damage caused by pesticide drift or GMO contamination of the organic farmer’s commercial crops. Assuming that the presumption of immunity is overcome in this context, a court would first apply a traditional nuisance or trespass analysis to determine if the practice at issue constitutes a nuisance or a trespass. As a result, the lawsuit would not be confined to the law as prescribed by the right-to-farm statute; however, the statute’s purpose may be instructive to an Oregon court. As such, the organic farmer would have the policies stated in the right-to-farm law working against it, since the statute states that people located in farm zones “must accept” conditions common to farming localities. Although a commercial organic farmer may be able to effectively bring a nuisance suit against an industrial farmer, there may be a number of
other considerations that go into the decision to pursue that course of action.

A potential plaintiff may be hesitant to bring a nuisance suit if the likelihood of success is minimal. Under the traditional nuisance balancing test, harm alone is insufficient to find a nuisance. Rather, a traditional nuisance test balances the competing interests and utility of certain land uses. As such, an Oregon court would assess whether the utility of industrial farming practices, such as GMO production or pesticide use, outweighs the harm caused to organic farm products. If a challenged industrial farming practice was a generally accepted farming practice or prudent method to obtain a profit in money, the court may find that no nuisance occurred, regardless of harm to an organic farmer.

Conversely, a court may find that a nuisance did occur and can imply the value placed on certain farming practices through its remedy— injunction or damages. If the court finds a nuisance occurred, and imposes an injunction, then the industrial farmer must discontinue the nuisance causing practice. Such an outcome would be the gold standard for organic farmers, as they could be assured that their organic farms future viability would be protected. Alternatively, the court may require the defendant to pay damages to the plaintiff, but permit the continued implementation of the defendant’s nuisance causing practices. That remedy is better than none at all, but would likely prevent the plaintiff-organic-farmer from engaging in organic farming on his or her property in the future.

Strategically, a potential plaintiff should consider how the political climate surrounding farming practices may impact their likelihood of success at trial. Under current circumstances, it is likely that an Oregon court would not find a nuisance—essentially determining that the utility of industrial farming outweighs the harm caused to organic farming. Assuming Oregon court decisions generally reflect the state’s legislative policies, the purpose behind Oregon’s right-to-farm law may be instructive as to what activities may be prioritized when a nuisance balancing test is applied by the court.

First, Oregon’s right-to-farm law makes clear that the state has an interest in protecting “farming practices on lands zoned for farm use,” and that “farming . . . practices are critical to the economic welfare” of Oregon. Second, farming practices that are in conformance with a “reasonable and prudent method,” are legitimate under Oregon’s right to farm law. Third, the legislature declared that people who “locate on or near an area zoned for farm or forest use must accept the conditions commonly associated with living in that particular setting.” Fourth, pesticide drift may not be considered a nuisance because Oregon’s right to farm law explicitly provides that pesticide use that is “customarily utilized in conjunction with farm use” or a “reasonable and prudent method” to operate a farm for profit or complies with applicable laws, is a valid farm practice. Collectively, those state policies imply that political inertia would be working against an organic farmer in most nuisance suits against an industrial farmer.

With Oregon policy working against the organic farmer, the farmer may be discouraged from bringing a nuisance claim against an industrial farmer, especially because the losing party may be required to pay the winning party’s attorney’s fees. In Hale v. Klemp, the Court of Appeals awarded a defendant attorney’s fees even after the plaintiffs voluntarily dismissed their claims. The plaintiffs, owners of an organic tree farm, sued their neighbors, owners of a commercial forest operation, for use of herbicides that drifted onto plaintiffs’ farm and tainted their organic product. After the defendant asserted
immunity under the right-to-farm law, the plaintiffs dismissed their claim and the trial court awarded the full amount of attorney’s fees requested by the defendant. The court in Hale did not rule on the substantive issue of whether the herbicide use was a protected farming practice.

Hale exemplifies the risk associated with farmer-to-farmer litigation. The fact that the plaintiffs voluntarily dismissed their claim suggests that the difficulty of overcoming the presumption of immunity was daunting and not worth the financial risk. Even though they withdrew their claim, the plaintiffs were still obligated to pay attorney’s fees. Such an outcome discourages litigation even where the plaintiffs have a legitimate claim.

### ii. Farmer v. Farmer Litigation in Oregon: Backyard Farmer v. Industrial Commercial Farmer

A commercial farmer may be afforded immunity against a nuisance or trespass suit brought by a backyard farmer.

Unlike the certified organic farmer, a backyard farmer may not invoke the “damage to commercial crops” exemption. As between a backyard farmer and a commercial farmer, the commercial farm would likely retain immunity. Oregon’s statute only confers immunity on those farming and forest operations that are located in areas zoned for those uses. It follows, then, that in a nuisance arising out of a dispute between landowners not located in those zones, the backyard farmer may be able to bring a successful nuisance suit. However, that outcome is unlikely in Oregon, given the state’s comprehensive zoning plan, which effectively prevents controversies between urban backyard farmers and commercial farms.

However, the backyard farmer may not need to rely on the commercial crops exemption if an Oregon court were to determine that immunity doesn’t apply in farmer-to-farmer litigation. Looking to other jurisdictions that have addressed this issue, there does not appear to be a consistent resolution to this question. As discussed in the previous section, California farmers are afforded immunity regardless of whether the nuisance arises out of urban encroachment or competing agricultural uses. In contrast, Washington and Vermont farmers may only invoke the immunity when the nuisance arises out of urban encroachment.

Oregon does not have language that truly mirrors the statutory purpose language underlying Washington and Vermont’s Right-to-Farm law, and it would appear on first glance that the Oregon statute is more akin to the California statute. However, Oregon’s right-to-farm law’s legislative findings provide that “[t]he expansion of residential and urban uses on and near lands zoned or used for agriculture production . . . may give rise to conflicts between resource and nonresource activities.” That finding suggests that between two resource activities—organic and commercial farming—immunity may not be available to a defendant farmer. On the other hand, the law also provides that farming practices on lands zoned for farm use “must be protected.” If a farming practice falls within the definition of “farming practice,” a court may uphold immunity based on the plain language of the statute.

Organic farmers may be discouraged from pursuing nuisance suits for harm caused by neighboring industrial farmers for a number of reasons. First, assuming that litigation is not barred, the likelihood of succeeding at trial is limited. Legislative policies weigh against a nuisance finding if a farm is adhering to
accepted industrial farming methods, as reflected in Oregon’s right-to-farm statute. Presumably, Oregon courts would consider those policies in determining whether a farming practice is in fact causing a nuisance. Second, even if an organic-farmer-plaintiff does succeed, damages would be the likely remedy, rather than an injunction. That is due to the state’s economic interests in promoting and protecting farming, as set forth in the legislative policy included in Oregon’s right-to-farm statute. Third, an unsuccessful party is required to pay the prevailing party’s attorney’s fees, which may be a risk an organic farmer in a precarious position may not be willing to make. Finally, because Oregon has not addressed whether farmer-to-farmer litigation is effectively precluded by the statute, the risk of novel farmer-to-farmer suits is heightened, further discouraging nuisance claims between organic farmers and industrial farmers.

4. Conclusion
State law may hinder organic farmers’ ability to redress harms caused by pesticide & GMO drift

Although common law claims are available to organic farmers that are harmed by drift, state right-to-farm laws may serve to block those claims. As a result, organic farmers likely do not have any meaningful way to redress those harms through the courts. However, right-to-farm laws could be amended or redrafted to serve their intended purpose—to preserve agricultural lands by protecting farmers from lawsuits from urban encroachment—while providing organic farmers with a remedy for economic damage suffered as a result of drift. Section IV provides options for amending right-to-farm laws to better serve organic agricultural producers.

C. Right-to-Farm State Constitutional Amendments

Recently, some state legislators have attempted to make a “right to farm” a state constitutional right. North Dakota passed a constitutional right to farm in November 2012, and Oklahoma, Indiana, and Missouri are in the process of proposing similar amendments to their citizens. These amendments are designed to protect farmers’ right to engage in industrial or modern agricultural practices. A “right to farm” will severely disadvantage organic farmers. These amendments threaten organic agriculture by preventing organic farmers or their proponents from passing local or state legislation that could be seen as abridging the rights of farmers engaged in “modern agricultural practices.”

Proponents of these amendments argue that a constitutional right is necessary to protect farming economies from “attack” by animal rights groups and other special interest groups that want to “destroy [family farmers’] way of life.” However, opponents fear that these amendments are overly broad and will shield large industrial dairy or feedlot operations from complying with regulations that protect environmental quality, animal welfare, and food safety. Kim Ferraro, an attorney with the Hoosier Environmental Council, adamantly opposes the amendment and has warned that, “All the safeguards that we already have would be subject to constitutional challenge . . . . You can’t limit an activity if it’s a fundamental right.”

This section will provide an overview of right to farm amendments that are pending or codified in a state constitution and provide suggestions for amendment language that would be more “organic-friendly.” Right to farm amendments seriously threaten to undermine efforts to preserve and promote organic farming. Although efforts should be taken to combat pro-modern farming right to
farm amendments, the “organic-friendly” suggestions provided in this section are not an endorsement for constitutional amendments. Rather, those suggestions are designed to provide one possible option for thwarting constitutional amendments that will compromise organic farming.


Of the four states that have considered a right to farm amendment, North Dakota is the only state that successfully amended its constitution to provide a right to engage in modern farming practices. In 2012, North Dakota’s “right to farm” amendment was approved by 66% of voters. Consequently, North Dakota’s constitution was amended to include the following provision:

The right of farmers and ranchers to engage in modern farming and ranching practices shall be forever guaranteed in this state. No law shall be enacted which abridges the right of farmers and ranchers to employ agricultural technology, modern livestock production, and ranching practices.

The full scope of the amendment remains unclear since it has not yet been interpreted by a North Dakota court, but the plain language of the amendment suggests that important local ordinances, such as those related to animal safety or water quality, would be preempted. Boasting about the recent achievement, North Dakota Representative Wes Belter stated:

Farmers are not protected in the Constitution from groups who have been attacking them on safe scientifically sound farming practices. It will stop bans on the use of genetically modified [GMO] seeds . . . . It would prevent statutes . . . . requiring the labeling of food made from plants or animals with genetic material changed in specific ways . . . . [W]e need to provide reasonable protections to our producers.”

Indiana, Oklahoma, and Missouri are following in North Dakota’s footsteps. Missouri voters will decide to adopt a right to farm amendment in November 2014. If passed, the amendment will provide:

That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri’s economy. To protect this vital sector of Missouri’s economy, the right for farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.

Missouri supposedly dropped the “modern farming practices” language present in an earlier version of the bill so that the amendment will not favor industrial farmers. Oklahoma also intends to include a ballot measure concerning a right to farm amendment on the November ballot.
Oklahoma voters will vote on the following amendment language:

To protect agriculture as a vital sector of Oklahoma’s economy, which provides food, energy, health benefits, and security and is the foundation and stabilizing force of Oklahoma’s economy, the rights of farmers and ranchers to engage in modern farming and ranching practices shall be forever guaranteed in this state. The Legislature shall pass no law which abridges the right of farmers and ranchers to employ agricultural technology and modern livestock production and ranching practices.

Nothing in this section shall be construed to modify any provision of common law or statutes relating to trespass, eminent domain, or any other property rights.

Unlike Oklahoma, North Dakota, or Missouri, Indiana’s “right to farm” amendment would also encompass a right to hunt and fish. However, Indiana’s bill died in committee and will not be on the 2014 ballot. Nonetheless, proponents of the bill are continuing to push for the amendment. Indiana’s amendment in its current form reads:

The people have a right to hunt, fish, harvest game, or engage in agricultural or commercial production of meat, fish, poultry, or dairy products, which is a valued part of our heritage and shall be forever preserved for the public good, subject only to laws prescribed by the General Assembly and rules prescribed by virtue of the General Assembly. Hunting and fishing shall be the preferred means of managing and controlling wildlife. This section shall not be construed to limit the application of any provision of law relating to trespass or property rights.

In lieu of a constitutional right to farm, Indiana’s senate put forth a bill that, if passed, would implement many of the same policies behind the constitution to “protect the rights of farmers to choose among all generally accepted farming and livestock production practices including the use of ever changing technology.”

This emerging trend is bad news for organic farming. If it continues to expand and other states jump on the right to farm bandwagon, organic farming will be in jeopardy. These constitutional amendments will impede local efforts to protect organic and backyard farming and effectively preclude organic farmers from protecting themselves through nuisance suits against industrial farmers. Important efforts aimed at protecting small-scale farming will be compromised. For example, North Dakota Representative Belter was excited to announce that the amendment will “stop bans on the use of genetically modified [GMO] seeds.”

Proponents of organic and small-scale agriculture can combat these amendments in two ways: lobby to prevent these amendments from being
voted in or propose their own counter amendment. Either approach may be effective. The following section addresses the latter possibility—proposing “organic-friendly” right to farm amendments.

V. Local Policies that Promote or Hinder Drift

A handful of local communities have passed ordinances to protect organic farmers from pesticide and GMO drift. Unfortunately, the validity of these ordinances, and future efforts may be readily challenged as local government authority is generally thought to be limited with regards to regulation of agricultural practices.

A. GMO Bans and Other Regulatory Approaches

Local communities have attempted to address drift by banning the cultivation of GMOs in their communities. In 2004, Mendocino County, California became the first local government in the nation to ban the cultivation of GMOs. Between 2004 and 2008, Trinity, Marin, Santa Cruz, and Lake County in California banned cultivation of GMOs as did the California cities of Arcata, Point Arenas, and Santa Cruz. In 2008, Montville, Maine became the first local government outside of California to ban the cultivation of GMOs. In 2012, voters in San Juan County, Washington approved a GMO ban. In 2013, Hawaii County in Hawaii passed a GMO ban. And, most recently, in May 2014, voters in Jackson County, Oregon and Josephine County, Oregon passed GMO bans. In addition, although not binding, more than 80 towns in Vermont have passed resolutions declaring themselves GMO free zones.

Outside of outright bans, local governments have taken a variety of other regulatory approaches to address drift. Most of those efforts are focused on pesticide use. The island of Kauai in Hawaii has taken a hybrid approach. Kauai voters passed an ordinance that regulates both GMOs and pesticide use.

A number of local governments have Integrated Pest Management policies that require use of alternatives to pesticides and smarter use of pesticides on local government property. Some of these policies establish pesticide-free zones where no spray will occur (e.g. within “x” number of feet of a community garden). Some also include notification requirements if a pesticide is going to be used.

Taking efforts further than local government property, the island of Kauai recently passed a law regulating use of GMOs and pesticides by commercial agricultural entities.

When it goes into effect in August 2014, the law will require heavy users of restricted use pesticides, primarily the biotech companies, to disclose what pesticides they are spraying, where and in what quantities. The law also requires farmers to report to the county any genetically altered crops that they are growing, and it creates buffer zones between fields sprayed with pesticides and schools, parks, medical facilities and private residences. The county will also be required to study whether pesticides are harming the environment or the health of residents.

These efforts are encouraging and demonstrate that the public values organic agriculture and wants to preserve their right as consumers to have access to organic foods. This strategy
has been gaining momentum. Although local citizens are energized and mobilizing around this issue, local governments in many locations may be preempted from regulating agricultural activities in their cities and counties.

B. Local Government Power May Be Limited

Although some local laws are helping to protect against drift, federal or state law may prevent local governments from taking action to address drift.

“Federal law and, to a greater extent, state law restrain the legislative powers of local governments. . . . Beginning with federal law, the first type of restraint on local action is preemption. Federal preemption has a variety of forms, but at its essence, it means that an ordinance may not contradict federal law either explicitly or implicitly. The second form of federal restraint on local authority is the Dormant Commerce Clause, which essentially bars states [and local governments] from discriminating against interstate commerce . . .

But the powers of the federal government are not the only limitations on local authority. Even if an ordinance survives the rigors of federalism, it must also fall within the powers granted by the state in which it is incorporated. Like federal preemption, states can also preempt local governments from acting. At least one commentator has described state preemption as the “primary threat” to ordinances.215

1. Federal Restraints on Local Lawmaking

Federal preemption, which provides that any law inconsistent with federal law is invalid, may lead to challenges to municipal laws that are inconsistent with federal law.216

“Municipal regulations are preempted (1) when Congress expressly preempts the regulation; (2) when Congress implicitly preempts a local regulation by regulating a certain area in a comprehensive fashion; and (3) when a local regulation conflicts with federal law, thus frustrating the purpose of the federal legislation.”217 At least one commentator suggests that a ban on the planting of GMOs could withstand a federal preemption challenge because it would not raise any of these conflicts.218 No bans have been challenged yet, so this analysis has not been tested. However, when it comes to pesticides, the U.S. Supreme Court has held that FIFRA does not preempt local regulation of pesticide use.219

In addition to preemption, local regulation needs to be defensible under the Dormant Commerce Clause, which prohibits economic protectionism when dealing with interstate commerce.220 According to one commentator, “if done correctly, GMO restrictions should not violate the dormant commerce clause.221 But, until a statute is challenged on the basis that it violates the dormant commerce clause [the legal outcome] is speculative at best.”222

2. State Restraints on Local Lawmaking

Local governments may be limited by the state in their authority to enact certain laws. “The powers of municipal corporations are derived solely through the state legislature, except when the home-rule provisions of the state
constitution vest local governmental bodies with some degree of local sovereignty." As a result, in states where authority must be delegated, local governments can regulate GMOs or pesticides only if authority to do so was delegated by the state. In addition, the state has the power to withdraw delegated authority at any point. Local governments in home rule states, where local governments are given relative freedom to enact local law, may have the authority to regulate GMOs or pesticides, but the amount of authority bestowed upon local governments varies widely.

Additionally, state preemption of local regulation can be express or implied. Many states have passed laws that expressly preempt local regulation of GMO crops. Similarly, all but eleven states have passed laws preempting local regulation of pesticides. In addition, right-to-farm laws may preempt local regulation of GMOs and pesticides by prohibiting regulation of farm practices.

Recent events in Oregon offer a great example of the power of state preemption vis-a-vis local government action. In 2013, the Legislature passed an act relating to preemption of the local regulation of agriculture. At the time, citizens in Jackson County had qualified a ballot initiative that would ban the cultivation of GMOs in that county. Citizens in Benton County and Lane County were also in the process of advancing GMO-related ballot initiatives. Despite those jurisdictions being home-rule counties, the Oregon Legislature declared that:

The economic benefits resulting from agricultural seed, flower seed, nursery seed and vegetable seed and seed product industries in [Oregon] make the protection, preservation and promotion of those industries a matter of statewide interest that warrants reserving exclusive regulatory power over agricultural seed, flower seed, nursery seed and vegetable seed and products of agricultural seed, flower seed, nursery seed and vegetable seed to the state; [and] the agricultural seed, flower seed, nursery seed and vegetable seed and seed product industries in [Oregon] will be adversely affected if those industries are subject to a patchwork of local regulations.

As a result, the Oregon Legislature instituted the following restriction on local governments:

[A] local government may not enact or enforce a local law or measure, including but not limited to an ordinance, regulation, control area or quarantine, to inhibit or prevent the production or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed. The prohibition imposed by this subsection includes, but is not limited to, any local laws or measures for regulating the display, distribution, growing, harvesting, labeling, marketing, mixing, notification of use, planting, possession, processing, registration, storage, transportation or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed.

The Legislature created an exception for ballot initiatives that qualified prior to January 31, 2013 to allow for the Jackson County ballot
initiative, but did not create an exception for the Benton and Lane County ordinances that were under development.\textsuperscript{234} The Legislature declared the legislation an emergency, putting it into immediate effect.\textsuperscript{235}

Therefore, although some local ordinances have been proposed or passed to protect organic farming from pesticide and GMO drift, many of these laws may be preempted by state law.

VI. SUMMARY OF SUGGESTED INITIATIVES

A. Initiatives to Strengthen Protection From Drift

The current legal framework leaves organic farmers without much protection from pesticide and GMO drift; furthermore, the current framework leaves organic farmers without a meaningful way to redress harms caused by drift. To ensure the long-term viability of organic farming, it is critical that the legal framework provides opportunities for organic agriculture to thrive.

Possibilities to better protect organic farmers from drift exist at the federal, state, and local levels. At the federal level, USDA should monitor GMO seed use more actively as a means to develop regulations that better contain GMO pollen, thus reducing the risk of GMO drift and contamination of organic produce. Likewise, more stringent regulations regarding pesticide approval and application would help to reduce the risk of pesticide drift.

At the state level, efforts should be made to amend right-to-farm laws. Amendments should explicitly allow for nuisance claims between farmers, assuring organic farmers that they have legal recourse for harm caused to their organic produce as a result of nearby industrial farming practices. Additionally, efforts should be made to prevent right-to-farm constitutional amendments that protect industrial farming practices from being adopted. To the extent those efforts would be fruitless, pro-organic interest groups can devise their own “organic-friendly” right to farm amendments.

Local grassroots efforts designed to protect organic farmers from pesticide and GMO drift may be the strongest path forward, since the politics surrounding big agriculture may make it difficult to achieve meaningful change at the federal and state level. Local citizens have a stronger voice and should make that voice heard. Unfortunately, federal or state law may preempt local ordinances so those ordinances should be drafted carefully to better insulate those laws from challenge.

Given the analysis of the existing legal framework surrounding agricultural production discussed in previous sections, these policy initiatives suggested above may be the most effective way to protect organic farmers from the adverse impacts of drift. Each of the suggested initiatives is further discussed in turn below.

1. Federal Policies

As discussed in Part III.A, federal law is not helping the cause for organic farmers when it comes to drift. Proposals to tackle the overarching commodity system enshrined in the Farm Bill are beyond this paper, but a number of proposals have been put forward to make the Farm Bill more sustainable.\textsuperscript{236} Commentators have also offered specific ideas to improve federal pesticide and GMO regulation.

Noting that “the consideration of local factors in making the determination of whether or how to use a specific pesticide in a specific location is of particular import,” one
commentator has proposed a variety of local level interventions to address the weaknesses of FIFRA. The commentator’s proposals include encouraging local government regulation of pesticide use; providing better training to certified applicators and agricultural extensions agents; and/or empowering local government officials to make case-by-case or season-by-season decisions on the actual use of pesticides. Under FIFRA section 24(c), states can also limit uses to meet special local needs. Unfortunately, instead of encouraging local government efforts to address pesticide use, all but eleven states have passed laws preempting local regulation of pesticides.

Some commentators have also offered solutions that would likely help address GMO drift. One solution focuses on gaining a better understanding of the environmental costs and benefits of GMO use. Another includes developing a regulatory framework “that specifically addresses [GMOs], which would include as a key feature, a meaningful environmental risk analysis that considers existing research and requires ongoing environmental monitoring.” Given USDA’s role in regulating GMOs, one commentator has focused on the failures of USDA’s oversight and offered initiatives to improve that oversight. Those suggestions include placing restrictions after commercialization, which should entail monitoring of GMO use, geographic restrictions on GMO use, and isolation distances from nontransgenic varieties to protect against contamination. That commentator argues that the Plant Protection Act of 2000 provides USDA with the authority to more aggressively regulate GMOs; however, “USDA has thus far self-limited its own review, providing no post-market monitoring or restrictions on planting.”

2. State Policies

i. Rethinking Right to Farm Laws

As most right-to-farm laws are currently written and implemented, they infringe on a farmer’s ability to redress competing farm activities in the courts. This is in part because these statutes were enacted to address issues that arose from the suburbanization of traditionally rural areas. Additionally, legislators could not foresee the issues that are currently impacting the agricultural industry, like GMO and pesticide drift. Furthermore, the “organic movement” is a relatively recent development, and USDA organic certification was not even available until 2002. In light of these contemporary issues, right-to-farm laws could be amended to better provide a “right to farm” for organic agricultural operations.

Right-to-farm laws can be updated in a number of different ways to remove barriers in farmer-to-farmer disputes. Although there are numerous ways to update these laws, only a few options are addressed here.

a. Prohibiting immunity in farmer-to-farmer litigation

Right-to-farm laws can be amended to explicitly not provide immunity for agricultural operations when the nuisance complained of arises out of competing agricultural uses. Ohio has language that affectively serves this purpose. In Ohio, a defendant may only claim immunity when “the plaintiff was not involved in agricultural production.” That provision explicitly permits farmer-to-farmer disputes. However, in order for such language to effectively provide protection for organic farmers, the definition of “agriculture” under the statute would have to include organic farming. Additionally, lawmakers may want to amend the definition further to include non-
commercial farmers, such as subsistence farmers or urban homesteaders.

b. Prohibiting immunity for damage to commercial crops

Right-to-farm laws can be amended to remove immunity when agricultural activities cause damage to another operation’s commercial crops. Oregon’s statute provides that there is no immunity when there is “damage to commercial agricultural products.” “Commercial agricultural products” is not further defined in the statute. In order for this type of provision to be most effective, those products should be defined in the statute to expressly include those products that are produced in accordance with USDA organic certification requirements. Additionally, that definition could include products grown for sale at farm stands, thereby encompassing backyard agriculture or other products grown at locations that are not certified organic. Although this approach would benefit commercial organic operations, it would not provide protection for backyard farmers that are affected by pesticide or GMO drift.

c. Generally Accepted Agricultural Management Practices to Prevent GMO and Pesticide Drift

For those statutes that provide immunity for agricultural operations that adhere to generally accepted agricultural management practices (GAAMPS), states could adopt regulations that prevent GMO and pesticide drift by specifying stricter standards for aerial spraying or other agricultural practices that cause drift. More thoughtful and protective GAAMPS can minimize the risk of drift and better protect neighboring organic farms.

This option for removing immunity in farmer-to-farmer disputes remedies the problem at the regulatory level, not at the statutory level. The problem with this approach is that as long as an operation adheres to the state’s regulations, the operation would still have immunity, regardless of whether GMO drift or pesticide drift occurred, unless such a provision was combined with removing immunity when agricultural activities cause damage to another operation’s commercial crops. As such, this remedy would serve as a proactive measure, designed to prevent litigation altogether, rather than a retroactive measure designed to allow courts to resolve these disputes, absent other protections for organic farmers.

d. Restarting the clock for the “date of operation”

As a means to both remove immunity in farmer-to-farmer disputes and promote organic or less intensive agriculture, right-to-farm laws could stipulate circumstances under which the farms date of operation would restart. Depending on the language of the statute, the statute could provide a definition of “substantial change” or “changed circumstances” in the agricultural operation that would set a new date of operation more frequently. As a result, the window to sue for nuisance would reopen for a period of time.

One approach may be to explicitly provide that a farm will receive a new date of operation when: (1) A farm transitions from organic to industrial agriculture; or (2) when a farm goes from a less intensive to a more intensive form of agriculture, or adopts more intensive methods of pesticide use (i.e. aerial spraying). For option two, the statute or the regulations should provide guidelines for what may be considered “more intensive.” More intensive agriculture could be measured by the amount of acreage used for cropland or by setting threshold limits on chicken houses, heads of cattle, or amount and method of pesticide applications.
The drawback to restarting the clock for date of operation is that it opens up a brief window to allow for nuisance claims arising out of any competing use, agricultural or otherwise. Therefore, this may not be a particularly attractive option for lawmakers. However, lawmakers could tailor this revision by explicitly providing that the clock is only reset with respect to farmer-to-farmer conflicts. Likewise, this may not be a particularly attractive option for potential plaintiffs whose nuisance suit arises after the window for a nuisance suit closes, such as when pesticide or GMO contamination is only evident after several years.

### e. Creating an immunity hierarchy for competing agricultural practices

Right-to-farm laws could be amended to provide a more nuanced approach to nuisance immunity for agricultural operations by creating a hierarchy of farming practices or categories of practices that may be entitled to immunity under certain circumstances. Such a nuanced approach would allow for more precision in conferring immunity and remedy some of the undesirable outcomes caused by the current blanket immunity approach. Such a statute could be designed with varying degrees of complexity to best serve the policies and needs of the state.

The hierarchy of immunity could be created by first defining classes of agriculture activities, and second, by creating categories of immunity protection based on those classes. By coupling those two provisions, the statute would effectively create a matrix designed to govern competing agricultural operations. In its simplest form, the statute could define classes of agriculture, such as: (1) agricultural practices that are in accordance with USDA organic certification; (2) agricultural practices involving livestock, poultry, or other commodity animals; and (3) agricultural practices related to intensive crop production such as monocropping, aerial pesticide spraying, or GMO production. The immunity provision of the statute could then provide a special section stating that between claims of class 1 and class 2 or 3 agricultural practices, neither party shall be immune from a private right of action based on a claim of trespass or nuisance.

The hierarchy could likewise include provisions related to attorney’s fees to reduce the exposure of organic farmers to the expenses associated with bringing a valid claim for harm caused by pesticide or GMO drift. It could provide that attorney’s fees in farmer-to-farmer litigation (or more specifically between claims of class 1 and class 2 or 3 agricultural practices) would only be available if a court determined that the suit was meritless, rather than automatically awarding such fees to the prevailing party.

This approach could be viewed as cumbersome or administratively difficult to implement; however, this solution would likely best serve the competing interests associated with agricultural production. Likewise, lawmakers may be able to utilize such an approach to satisfy a wide variety of constituents; thus, the hierarchy approach could be seen as politically favorable.

### ii. Constitutional Amendments

Constitutional rights are the most powerful way to protect interests. An organic-friendly constitutional amendment could secure the ability of local governments to pass ordinances to protect organic farming from pesticide or GMO drift and prevent state legislatures from passing preemptive laws primarily based on corporate influence to protect the profits of large industrial agriculture.
A constitutional amendment designed to protect organic farming may not be necessary; however, to the extent that the political landscape surrounding industrial agriculture requires drastic action, a counter-amendment to protect organic may be a realistic way to address this threat. In addition, “right-to-farm” constitutional amendments (enshrining right-to-farm statute protections in State constitutions) are gaining popularity. As a result, proponents of organic agriculture must seriously consider the possibilities and limits that constitutional amendments may offer.

The draft language provided below is designed to work within the current political framework that currently shrouds the agriculture industry in the United States. Given the political framework, the authors assume that organic advocates would be trying to soften the blow of “right-to-farm” type amendments on organic farming as opposed to proactively advancing constitutional amendments to protect organic farming. As a result, the suggestions that follow focus on making a “right-to-farm” type amendment aimed at protecting industrial agriculture, also work for organic agriculture, thereby providing protections for organic farming that could equal or surpass those protections provided for industrial agriculture.

Using the language provided in the Oklahoma amendment (a representative right-to-farm constitutional amendment protecting industrial agriculture), an organic-friendly amendment may provide:

The rights of farmers and ranchers to engage in modern farming and ranching practices shall be forever guaranteed in this state. That guarantee does not abridge the right of any farmer, rancher, or subsistence homesteader to engage in organic farming practices, either recognized as traditional “organic” farming practices or as permitted by USDA certification.

A right to farm amendment may also be strengthened by providing an explicit recognition of the importance of biodiversity. One of the most pressing issues associated with organic farming is the problem of GMO drift, which threatens to dilute the gene pool of wild seeds.

To protect against that threat, Oklahoma’s amendment could be modified as follows:

In order to assure that agriculture remains a vital sector of the economy, the rights of farmers and ranchers to engage in modern farming and ranching practices shall be forever guaranteed in this state, as a means to protect the State’s long-term interests in food security, energy, human health and the environment, biodiversity, and national security.

A biodiversity clause, however, may not adequately protect against pesticide drift, which can contaminate organic crops and cause an organic farmer to lose USDA certification and profits. Protection from pesticide drift could be provided in one of two ways: including language to protect agriculture for profit and/or language guaranteeing a right to engage in modern farming techniques on one’s own property. Returning to Oklahoma’s language, a provision focused on protection from economic harm could state:

To protect agriculture as a vital sector of [State] economy, which provides food, energy, health benefits, and security and is the foundation and stabilizing force of [State] economy, the rights of farmers and ranchers to engage in
modern farming and ranching practices shall be forever
guaranteed in this state insofar as those practices do not cause
economic harm to neighboring agricultural practices.

A “bubble” provision designed to only
guarantee a right to engage in modern farming
techniques on one’s own property could be
drafted to provide:

The rights of farmers and ranchers
to engage in modern farming and
ranching practices on land in which
a person has a property interest shall
be forever guaranteed in this state
insofar as the implementation of
those practices do not inhibit
another person’s ability to engage in
the same.

The issue with a “for-profit” or “bubble”
provision is that they create reciprocal rights,
which could potentially put an organic farmer
in equal position with an industrial farmer. As
such, the application of those provisions could
create a lose-lose situation for both farmers.
However, if state agriculture regulations are
enforced under the spirit of those provisions,
organic farmers may be better positioned to
protect their right to organic farming. An
amendment that protects biodiversity or
assures a person’s right to organic production
would create a more fortified right.

3. Local Initiatives and Regaining
Control Over Local Food Systems

Local communities are continuing to put
forward outright bans on GMOs as described
in Part III.C.1 above. Although recent, local
GMO bans have not been legally challenged,
these types of bans remain vulnerable to legal
challenge and could be struck down by the
courts because of federal or state preemption.

In addition, the authority to put forward these
ordinances (assuming at least some
communities actually have the authority) could
be preempted by the state at any time.
Recognizing these issues, some communities
are turning to ordinances inspired by the
Community Environmental Legal Defense
Fund (CELF).

In Oregon, citizens in Benton County, Lane
County, and Josephine County are working
with CELDF to put forward community rights
ordinances that assert the right to local self-
governance in matters addressing the health,
safety, and welfare of their communities.
Benton and Lane County are focusing on the
food system (including banning GMOs) while
Josephine County is banning the application of
pesticides by entities holding applicator licenses. Like other bans discussed in Part
III.C, they are outright bans, but there is much
more to the ordinances.

The ordinances recognize that preemption can
occur and include provisions to attempt to
insulate the ordinance from federal or state
preemption. First, the ordinances establish
rights including the right to self-
government. For example, after establishing a right to a
local food system, the Local Food System
 Ordinance of Benton County states:

All residents of Benton County
possess the right to a form of
governance where they live
which recognizes that all power
is inherent in the people and
that all free governments are
founded on the people’s
consent, to the extent necessary
to further the creation and
protection of Benton County’s
local food system. Use of the
“Benton County” municipal
corporation by the people of
Benton County shall not be
deemed, by any authority, to eliminate or reduce that self-governing authority.256

The ordinances then include provisions aimed at preventing government preemption of the ordinance. For example, the Josephine County Freedom From Pesticides Bill of Rights states:

All laws adopted by the legislature of the State of Oregon, and rules adopted by any State agency, laws adopted by the United States Congress, rules adopted by any federal agency, or rulings by any international entity or tribunal shall be the law of the Josephine County only to the extent that they do not violate the rights or prohibitions of this Ordinance.257

The ordinances go on to limit the ability of government entities or agents to annul, preempt, amend, or repeal the ordinance without public votes or hearings.258

In addition to provisions aimed at preventing government preemption, the ordinances also include provisions to prevent corporations from invoking preemption as a basis for overturning the law in court. For example, The Local Food System Ordinance of Benton County states:

Corporations which violate this Ordinance shall not be deemed to be “persons,” nor possess any other legal rights, privileges, powers, or protections which would interfere with the enforcement of rights or prohibitions enumerated by this Ordinance. Such powers shall include the authority to assert state or federal preemptive laws in an attempt to overturn this Ordinance, and the authority to assert that the people of the County lack the authority to adopt this Ordinance.259

Finally, these ordinances also include unique ideas not found in the existing bans including removing liability for persons or businesses whose crops are inadvertently infected by GMOs,260 and requiring GMO patent owners to be strictly liable for costs associated with contamination of seeds.261 In addition, the ordinances authorize damages to be sought on behalf of natural communities to repair the natural communities that may be harmed by the GMOs or pesticides.262

Only a few of the CELDF ordinances that are currently on the books have been challenged, but none of those challenges have fully made their way through the courts. As a result, it is unclear if the language attempting to insulate the ordinances from preemption will be effective. For now, the ordinances are standing and protecting communities from the environmental harms that were the subject of the ordinances.

VII. CONCLUSION
Organic farming is worthy of protection for economic, environmental, and societal reasons. This paper provides an overview of the existing legal structure surrounding agriculture in order to educate and assist individuals and organizations seeking to protect organic agriculture from the harm caused by pesticide and GMO drift. Federal laws do not currently protect organic farmers from drift. In fact, federal laws exacerbate the problem by failing to limit the use of pesticides and GMOs that drift and by encouraging the industrial agriculture that
relies on these products. Likewise, state laws do not provide sufficient protections for organic agriculture, and in some cases, prevent drift from being addressed by preempting local efforts to limit pesticide and GMO use. Some local communities have passed bans on GMOs and restrictions on pesticide use that provide protections from drift; however, it is unclear whether those laws would withstand a preemption challenge in the courts.

Based on the deficiencies in the current legal framework surrounding drift, this paper suggests a number of initiatives for modifying the existing legal framework at the federal, state, and local levels. By modifying the existing legal framework as suggested, policymakers and public interest groups can provide assurances for organic farmers that they will be protected from the adverse impacts of drift and be afforded redress in the courts. These assurances, coupled with other progressive agricultural policies can help protect organic farming into the future.
END NOTES

4 See infra Part I.
6 USDA organic certification is also available for livestock operations and products, but this paper focuses on crop certification because drift is primarily a concern for crop operations.
7 7 C.F.R. § 205.400, 205.203-06. There are also specific production standards related to livestock production and handling in the NOP regulations.
8 7 C.F.R. § 205.
9 7 C.F.R. § 205.202(b).
10 7 U.S.C. § 6503(d); 7 C.F.R. § 205.100, 205.102.
12 In 2008, the National Agricultural Statistics Service (NASS) collected in-depth data about organic agriculture in the U.S. as a follow up to the 2007 agricultural census and compiled it in the 2008 Organic Survey. The 2008 Organic Survey allowed the authors of this paper to report data specific to organic crop operations – the operations of particular interest for this paper. At the time of this paper’s publication, NASS planned to release a new organic-specific analysis in September 2014 based on 2012 agricultural census data.
14 Id.
15 Id.
19 Id. at 19.
20 Id.
21 The Pesticide Free Zone project, although not specific to only food gardens, provides at least some support for this assertion. In Washington, nearly 10,000 signs are displayed in lawns of people promising not to use toxic chemicals. See WELCOME TO THE Pesticide Free Zone, PESTICIDE FREE ZONE, http://www.pesticidefreezone.org/ (last updated Mar. 28, 2013).
23 The organic regulations define drift as “the physical movement of prohibited substances from the intended target site onto an organic operation or portion thereof.” 7 C.F.R. § 205.2.
The organic regulations refer to GMOs under the term “excluded methods,” which constitute “a variety of methods used to genetically modify organisms or influence their growth and development by means that are not possible under natural conditions or processes and are not considered compatible with organic production.” § 205.2.  

32 National Organic Program, 65 Fed. Reg. 80,547, 80,633 (Dec. 21, 2000) (“[In] drift cases…the organic status of future crop years are not affected.”); see also 65 Fed. Reg. at 80,556 (“When we are considering drift issues, it is particularly important to remember that organic standards are process based.”).  

33 65 Fed. Reg. at 80,556; see also S. REP. NO. 101-357, at 277 (1990), reprinted in 1990 U.S.C.C.A.N. 4656, 4953-54 (stating that the term “organic” is a “production claim and not a residue-free content claim” and while organic producers may produce organic products that have been affected by “drift from a neighboring farm,” the OFPA “does not intend to prohibit minimal residue contamination that does not result from farm practices used by the organic farming operation.”).  

34 7 C.F.R. § 205.105(e) (prohibiting the use of “excluded methods”). The organic regulations refer to GMOs under the term “excluded methods,” which constitute “a variety of methods used to genetically modify organisms or influence their growth and development by means that are not possible under natural conditions or processes and are not considered compatible with organic production.” § 205.2.  


36 Id.  


39 7 C.F.R. § 205.202(c).  

40 See Petition for Writ of Certiorari at 3, Organic Seed Growers and Trade Association v. Monsanto, 2012 WL 607560 (Sept. 5, 2013) (No. 11-cv-2163-NRB). Since organic farmers’ seed and Monsanto’s seed, and the plants they produce, are indistinguishable to the human eye, the only way organic farmers can proactively know if they are contaminated is to perform expensive genetic testing. See Id.  

41 7 C.F.R. § 205.670(c-e).  

42 7 C.F.R. § 205.670(b).  


44 Even though a regulation does not clearly identify a threshold amount of GMO contamination, the operation of the market seems to suggest a low tolerance for GMO-contaminated crops being sold as organic. See, e.g., Eric Mortenson, Genetically modified wheat: No answers yet, federal investigators say, OREGONLIVE.COM (June 10, 2013), http://www.oregonlive.com/business/index.ssf/2013/06/genetically_modified_wheat_no.html (describing the response of buyers to reports of conventional alfalfa contamination with GMO alfalfa). USDA has also suggested that addressing GMO contamination is best left to the marketplace. Carey Gillam, USDA will not take action in case of GMO alfalfa contamination, REUTERS (Sept. 17, 2013), http://www.reuters.com/article/2013/09/17/us-alfalfa-gmo-idUSL2N0HD1SQ20130917.  

46 See discussion of loss of organic certification from pesticide drift infra Part II.A.  

47 65 Fed. Reg. at 80,632.  


50 See Id. at 16-17 (concluding that Monsanto’s representations that it would not sue inadvertent infringers with “trace amounts” of contamination, has binding effect). The court determined “trace amounts” means contamination constituting up to 1% of patented traits.  

51 Petition for Writ of Certiorari at i, 20, Organic Seed Growers and Trade Association v.
Monsanto, 2012 WL 607560 (Sept. 5, 2013) (No. 11-cv-2163-NRB); Id. at 3 (citing a study that found that over one tenth of incidents of undesired contamination had levels that exceeded 2%).


53 MARY JANE ANGELO ET AL., FOOD, AGRICULTURE, AND ENVIRONMENTAL LAW 130 (2013). FIFRA defines “pesticide” as “(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer.” 7 U.S.C. § 136(u).

54 ANGELO ET AL., supra note 51, at 131.

55 Id. at 138.

56 Id. at 131-32, 138-39.

57 Id. at 140.

58 Id. at 132-33.

59 Id. at 133.


61 ANGELO ET AL., supra note 51, at 282.

62 Id. at 99.

63 Id. at 99-100.

64 Id. at 100.

65 Id.

66 Id. at 30.


69 EDWARD K. ESPING & JOHN KIMPLEN, CORPUS JURIS SECUNDUM § 127 (2013); Purver, supra note 66, at 37; Bloomquist, supra note 65.

70 KARL OAKES, CORPUS JURIS SECUNDUM § 37 (2014).

71 Generally, one has a duty to foreseeable plaintiffs to exercise reasonable care with regard to foreseeable risks of harm arising from one’s conduct. DOMINICK VETRI ET AL., TORT LAW AND PRACTICE 63 (Lexis Nexis, 4th ed. 2011).


73 Bloomquist, supra note 65, at 400-01.

74 When cropdusting is involved, a consensus of courts have also found the hirer (usually a farmer) vicariously liable for the sprayer’s negligence on the basis that cropdusting is an inherently dangerous or intrinsically dangerous activity. Id. at 397. This constitutes an exception to the general rule of nonliability of a hirer for the torts of an independent contractor. Id. at 397-98.

75 VETRI, supra note 69, at 768.

76 In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes. RESTATEMENT (SECOND) OF TORTS § 520.

77 Anne Payne, Causes of Action for Damage from Pesticides, 39 Causes of Action 2d 579 (2014) at Section 15.

78 Purva, supra note 66, at 833; Bloomquist, supra note 65, at n.34.

79 Bloomquist, supra note 65, at 402.

80 Id. at 403-05.

81 Id. at 406-07.

82 Id. at 407-08.

83 VETRI, supra note 69, at 737.

84 Id. at 741.

85 Bloomquist, supra note 65, at 399.

86 Id. at 402 (internal quotations omitted).

87 See Johnson v. Paynesville Farmers Union Cooperative Oil Co., 817 N.W.2d 693, 714 (Minn. 2012) (not allowing a trespass claim brought by an organic farmer for pesticide drift because trespass by particulate matter is not recognized by Minnesota courts); Id. at 714-16 (Page, J. dissenting) (arguing that particulate matter could cause a trespass under some circumstances).
that requires the use of synthetic fertilizers and which is dominated by monocropping, a practice farmland is dominated by industrial agriculture (C.U.S.); genetically modified crops are grown in the Global Market for GM Seeds, Texas’s right to farm law). neighbor’s nuisance claims were barred under substantially unchanged since the 1960s, the that where the fa 132 S.W. 3d 544, 546 (Tex. App. 2004) (finding 98 97 a nuisance. See generally Ferdinand S. Tinio, “coming to nuisance” as a defense or estoppel, 42 Am. Law Rep. 3d 344 (1972) (discussing the application of the doctrine in different jurisdictions). In most jurisdictions “coming to the nuisance” may serve as a partial defense or only be a factor in determining if the defendant is liable for creating a nuisance. Id. See generally Pitman, supra note 93 (compilation of right to farm litigation nationwide). See, e.g., Barrera v. Hondo Creek Cattle Co, 132 S.W. 3d 544, 546 (Tex. App. 2004) (finding that where the farm operations had remained substantially unchanged since the 1960s, the neighbor’s nuisance claims were barred under Texas’s right to farm law). See, e.g., U.S. and Monsonato Dominate Global Market for GM Seeds, ORGANIC CONSUMERS ASSOC. (Aug. 7, 2013), http://www.organicconsumers.org/articles/article_28059.cfm (stating that 40% of the word’s genetically modified crops are grown in the U.S.); Industrial Agriculture, UNION OF CONCERNED SCIENTISTS (last revised Aug. 30, 2012) (stating that the majority of American farmland is dominated by industrial agriculture which is dominated by monocropping, a practice that requires the use of synthetic fertilizers and pesticides); Genetic Engineering, GRACE COMMUNICATIONS FOUNDATION, http://www.sustainetable.org/264/genetic-engineering (last visited Apr. 14, 2014) (“In the United States, [genetically engineered] soybean, corn, and cotton make up 93%, 88% and 94% of the total acreage of the respective crops.”) (citing USDA ECONOMIC RESEARCH SERVICE, ADOPTION OF GENETICALLY ENGINEERED CROPS IN THE U.S.: EXTENT OF ADOPTION (2012)). See Rusty Rumley, A Comparison of the General Provisions Found in Right-to-Farm Statutes, 12 VT. J. ENVTL. L. 327, 328 (2011). Id. at 334-35. Neil D. Hamilton, Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective, 3 Drake J. Agric. L. 103 (1998); Tiffany Dowell, Daddy Won’t Sell the Farm: Drafting Right to Farm Statutes to Protect Small Family Producers, 18 SAN JOAQUIN AGRIC. L. REV. 127, 133 (2009). See generally, Dowell, supra note 101, at 133-52; Rumley, supra 98, at 3. Although right-to-farm laws use a variety of terms to describe the protections afforded to agricultural activities, the general term “agriculture” will be used to describe these definitions for the sake of simplicity. Terms may include farming practices, farm operations, farm products, ranch operations, and others. See, e.g., OR. REV. STAT. § 30.930 (“farming practice”); IOWA CODE § 352.2 (“agricultural area”); TENN. CODE ANN. § 43-26-102(2) (“farm operation”). Rumley, supra note 98, at 327, 331. See, e.g., TENN. CODE ANN. § 43-26-102(2) (“‘Farm Operation’ means a condition or activity that occurs on a farm in connection with the commercial production of farm products or nursery stock . . . and includes, but is not limited to: marketed produce at roadside stands or farm markets; noise; odors; dust; fumes; operation of machinery and irrigation pumps; ground and aerial seeding and spraying; the application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides; and the employment and use of labor[,]”); IOWA CODE 352.2(6) (providing similar coverage for Iowa farm operations). TENN. CODE ANN. § 43-26-102(1).
Lagriculture practices include.

agency that determ

the plaintiff’s activities and the plaintiff is not

established with the agricultural district prior to

demonstrate that agricultural act

mentioned above, a defendant must also

(providing four elements that a defendant must

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production, or “not in conflict with federal, state,

reasonably associated” methods of agricultural

“good agricultural pra

“generally accepted agricultural practices, such as

good agricultural practice,” “commonly or

related” agricultural practices, such as

operation does not divest the agricultural

operation of a previously established date of

operation.”).

Rumley, supra note 98, at 335.

See, e.g., Wash. Rev. Code


Code Ann. § 2-4-107(b)(1); Ohio Rev. Code

Ann. § 3767.13(D). Like the definition of

agricultural, the various right to farm statutes use

different phrases to express the same concept of

“generally accepted agricultural practices, such as

“good agricultural practice,” “commonly or

reasonably associated” methods of agricultural

production, or “not in conflict with federal, state,

and local laws.”

See, Id.


See, e.g., Iowa Code § 352.11(1); Ohio Rev.


(providing four elements that a defendant must

meet to be afforded a complete defense to a

nuisance suit). In addition to the two elements

mentioned above, a defendant must also

demonstrate that agricultural activities were

established with the agricultural district prior to

the plaintiff’s activities and the plaintiff is not

involved in agricultural production. Id.

Iowa Code § 352.11(1) (2010).

Those practices may be set by a regulatory

agency that determines what acceptable

agriculture practices include. See Mich. Comp.

Laws. § 286.472(d).

These provisions are also known as statutes of

repose.

Rumley, supra note 98, at 336;

Id.; see N.C. Gen. Stat., § 106-701(1) (one

year); Okla. Stat. Tit. 50 § 1.1.C (two years);


Miss. Code Ann. § 95-3-29(1).


Many statutes also refer to “changed

conditions” rather than a substantial change, but

both create a similar requirement. See Souza v.


1997) (finding that a farm operation that switched

from growing rice to row crops was not a

“changed condition”).

See, e.g., Barrera v. Hondo Creek Cattle Co.,

132 S.W.3d 544, 546 (Tex. App. 2004); Souza,

59 Cal. App. 4th at 868; S.C. Code Ann. § 46-45-50 (“If the physical facilities of the

agricultural operation are expanded subsequently

or new technology adopted, the established date

of operation for each change is not a separately

and independently established date of operation

and the commencement of the expanded

operation does not divest the agricultural

operation of a previously established date of

operation.”).

Rumley, supra note 98, at 339.

Pa. Const. Stat. § 954(a) (providing that if

agricultural facilities have been substantially

expanded or altered that those facilities will not

constitute a nuisance if they have been addressed

in a nutrient management plan).

Ind. Code § 32-30-6-9(d).

Barrera, 132 S.W.3d at 549.

Id. at 550.

Pasco Co. v. Tampa Farm Service, Inc., 573

So.2d 909, 912 (Fla. App. 1990) (remanding to

reconsider whether there had been a substantial

change in odor such that the operation was

considered “excessive,” which would subject the

operation to local regulation).

See, e.g., N.Y. AGRIC. & MKTS. § 305-a(1)(a);


See discussion infra section 5.0.


Town of North Kingstown v. Albert, 767 A.2d


N.Y. AGRIC. & MKTS. § 305-a(1)(a).


Id. at *6.

Hamilton, supra note 101.

Rumley, supra note 98, at 347.
148 Souza v. Lauppe, 59 Cal. App. 4th 865, 868 (3d Dist. 1997). The right to farm act in question stated that, “[n]o agricultural activity . . . conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards . . . shall be or become a nuisance . . . due to any changed condition . . . after it has been in operation for more than three years if it was not a nuisance at the time it began.” CAL. CIV. CODE § 3482.5. In Souza, both plaintiffs and the defendants initially grew rice, but the plaintiffs switched to row crops. 59 Cal. App. 4th, at 869. The court rejected the plaintiff’s argument that the defendant’s rice growing was a “nuisance at the time it began,” but that damage did not occur until later. Id. at 874.

149 Id. at 873.
150 Id. at 873-74.
151 134 Wn.2d 673, 680 (Wash. 1998). The legislative policy at issue in Buchanan, explicitly stated a concern about protecting farms “in urbanizing areas.” Id.


153 Id. at 91.
154 Id. at 101.
155 OR. REV. STAT. § 30.936(1).
156 OR. REV. STAT. § 30.935.
157 OR. REV. STAT. § 30.930(2)(b), (4) (defining “farming practice” and “forest practice” in substantially similar terms); OR. REV. STAT. § 30.939 (providing that pesticide use is a legitimate farming and/or forest practice if used as a reasonable and prudent method to obtain a profit in money); § 30.937(1) (providing immunity for operations not located in farm or forest zoning but that are established nonconforming uses).

158 OR. REV. STAT. § 30.936(3).
159 OR. REV. STAT. § 30.935.
160 OR. REV. STAT. § 30.939
162 OR. REV. STAT. §30.933(1)(a), 30.933(2)(a).
163 See OR. REV. STAT. § 30.933(2)(d).
164 OR. REV. STAT. § 30.933(2)(c).
165 OR. REV. STAT. § 30.936.
166 See discussion infra Part III.B.iv.

See ORS § 30.933(2)(c)-(d).

167 See discussion infra Part III.B.iv.
168 See ORS § 30.933(1)(a), 30.933(2)(a).
169 See ORS § 30.930(2)(c).
170 OR. REV. STAT. § 30.933(2)(c).
171 OR. REV. STAT. § 30.939(1).
173 Id. at 117.
174 Id. at 30-31.
175 OR. REV. STAT. § 30.936.
176 OR. REV. STAT. § 30.930.
177 Compare Souza v. Lauppe, 59 Cal. App. 4th 865, 868 (3d Dist. 1997) (holding that California’s right to farm act provides immunity for agricultural practices, regardless of whether the dispute arose from competing farm uses or nearby urbanization); with Buchanan v. Simplot Feeders LTD, 134 Wn.2d 673, 680 (Wash. 1998) (holding that right to farm immunity only applies when urbanization of surrounding property gives rise to the conflict); Trickett v. Ochs, 2003 Vt. 91, 101 (2003) (same).

178 See discussion infra Part III.B.2.ii.
179 Id.
180 OR. REV. STAT. § 30.933(1)(b).
181 OR. REV. STAT. § 30.933(2)(a).
182 Although commonly referred to as “right to farm” amendments, these amendments should not be confused with Right to Farm Acts. Right to farm acts provide that agricultural operations are immune from nuisance and trespass suits arising from their agricultural activities, whereas so-called “right to farm” constitutional amendments provide certain farm operations with a broad, unbridgeable right to engage in certain farming practices (generally, “modern agricultural practices”). A right to farm constitutional amendment provides broader protections than the immunity granted in a right-to-farm statute.

184 Bloomberg article.
185 Id.; see also North Dakota Constitution, Art XI Section 29 (protecting farmers’ right to engage in “modern farming practices”).

186
Eugene will not use any product that contains neonicotinoids on any City property.


Id. at 738.

Id. at 727.

Initiative, GMO FREE SAN JUAN,

Sophia Cocke, Big Island Mayor Signs Biotech, GMO Ban Into Law (Dec. 5, 2013, 10:21 PM).
http://www.huffingtonpost.com/2013/12/05/big-island-biotech-ban_n_4395521.html. The ban does not apply to GMO papaya. Id.


Bussell, supra note 179, at 739 n.106 & n.13.


See, e.g., Id. at 68 (creating “No Pesticide Zones;” No pesticides will be applied inside the gardens or within 25 feet of the outside perimeter of Community Garden sites.).

Id. at 69.


Sophie Cocke, Kauai’s GMO and Pesticide Bill is Set to Become Law After Veto Override, CIVIL BEAT (Nov. 16, 2013),

The authors are not aware of a local government that has banned the use of pesticides. At least one local government has banned the use of certain pesticides on city property. EUGENE, OR., COUNCIL RES. 5101 § 4 (“[T]he City of
http://www.civilbeat.com/articles/2013/11/16/204

Bussell, supra note 179, at 729-30. For a
length discussion of federal and state preemption
see id. at 733-44.


Id.; Preemption of power by federal law.

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Bussell, supra note 179, at 743 (asserting that
the Montville, Maine ordinance would survive a
federal challenge).

Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 614-16 (1991) (“As we have made plain, the
statute does not expressly or impliedly preclude regulatory action by political subdivisions with
regard to local use. To the contrary, FIFRA
implies a regulatory partnership between federal,
state, and local governments.”).

DAVID R. MOELLER, FARMERS’ LEGAL
ACTION GROUP, INC., STATE GMO
RESTRICTIONS AND THE DORMANT COMMERCE
CLAUSE (2001), available at
http://www.flaginc.org/wp-
content/uploads/2013/03/GMOrestrict.pdf; see
also, C & A Carbone, Inc. v. Town of
Clarkstown, 511 U.S. 383, 401-02 (1994)
(explaining that the dormant commerce clause
applies to states and their subdivisions and
finding that a local waste flow control ordinance
violated the commerce clause).

MOELLER, supra note 195, at 1.

Id. at 5.

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February 2014 Municipal Corporations, Counties,
and Other Political Subdivisions George Blum, J.D.

Bussell, supra note 179, at 735-36.

Id. at 739-40.

Id. at 730, 739 (As of 2007, fifteen states
expressly preempted local governments from
regulating GMOs.).

ANGELO ET AL., supra note 51, at 141.

Bussell, supra note 179, at 740.

(Or. 2013).

See JACKSON COUNTY, OREGON, MEASURE
15-119, available at
http://gmofreejacksonco.blogspot.com/p/the-
initiative.html (last visited Apr. 12, 2014).

See Benton County Court Ruling January 31,
2014, BENTON COUNTY COMMUNITY RIGHTS
COALITION (Feb. 3, 2014), http://bentonccrc.org/;
SUPPORT LOCAL FOOD RIGHTS,
http://www.localfoodrights.com/ (last visited
Apr. 12, 2014).

§ 2 (Or. 2013).

Id. § 3.

Id. § 4.

Id. § 5.

See ANGELO ET AL., supra note 51, at 263-79;
National Sustainable Agriculture Coalition; Wes
Jackson’s 50-year Farm Bill.

ANGELO ET AL., supra note 51, at 138-41.

Id. at 140.

Id. at 134.

Id. at 141.

Id. at 111.

Id.

Id. at 296.

Id. at 281; see also id. at 290-92.

See Organic Policy, USDA ECONOMIC
RESEARCH SERVICE,
http://www.ers.usda.gov/topics/natural-resources-
environment/organic-agriculture/organic-
policy.aspx#.UyZeb15je4 (last updated Mar. 12,
2014).

OHIO REV. CODE ANN. § 929.04 (2010).

§ 929.04(C).

ORS § 30.936(2)(a); see also § 30.036(1)
(providing immunity only for farm and forest
practices on land zoned for those uses).

Biodiversity, GMO-COMPASS (Dec. 11, 2006),
available at http://www.gmo-
compass.org/eng/safety/environmental_safety/16
6.biodiversity_threatened_genetically_modifed
plants.html.

See also SHAKA MOVEMENT,
http://www.shakamovement.org/ (last visited
Apr. 12, 2014) (providing information about the
effort to qualify an anti-GMO ballot initiative for
the November 2014 ballot in Maui County,
Hawaii).
Community Rights, COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND, http://www.celdf.org/section.php?id=423 (last visited Apr. 14, 2014). CELDF’s efforts are aimed at addressing the “structure of state and federal law [(some of which was briefly discussed in Section III above)] . . . that pre-empts local decision making, and that forces harmful activities such as fracking and factory farming into communities – despite community opposition and harm to the public health and environment.” Id. “CELDF has assisted more than 150 communities across the country to establish Community Rights ordinances that today are protecting communities from a range of harmful practices, from shale gas drilling and fracking to the land application of sewage sludge.” Id.


See, e.g., Local Food System Ordinance of Benton County, BENTON COUNTY, http://bentonccrc.org/the-initiative/ (last visited Apr. 14, 2014) (“We the people of Benton County understand that any attempt to prohibit the privatization and use of patented seed may run afoul of claimed corporate “rights” to engage in those practices, as well as State or federal laws. We understand that failure to legislatively challenge those “rights” and laws guarantees that a local food system will never exist.”).

Id.

Id.