

2016

Act vs. Amendment: Schultz Family Farms, Legislative Exceptions, and the Future of Right-To-Farm

Jennifer Bennett

Follow this and additional works at: <https://scholarship.law.missouri.edu/jesl>



Part of the [Environmental Law Commons](#)

Recommended Citation

Jennifer Bennett, *Act vs. Amendment: Schultz Family Farms, Legislative Exceptions, and the Future of Right-To-Farm*, 23 J. Envtl. & Sustainability L. 2 (2016)

Available at: <https://scholarship.law.missouri.edu/jesl/vol23/iss1/4>

This Comment is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

THE JOURNAL OF ENVIRONMENTAL AND SUSTAINABILITY LAW

A Publication of the University of Missouri School of Law



Act vs. Amendment: *Schultz Family Farms*, Legislative Exceptions, and the Future of Right-To-Farm

Jennifer Bennett

Act vs. Amendment: Schultz Family Farms, Legislative Exceptions, and the Future of Right-To-Farm

I. INTRODUCTION

America was built on family farms, and in the last several decades many states have moved to protect those farms. All fifty states have a right-to-farm act of some sort that protects the right of citizens to farm their land. Recently, some states have gone further and added right-to-farm amendments to their state constitutions. As shown in *Schultz Family Farms LLC v. Jackson Cty.*, right-to-farm acts allow states to make exceptions where necessary. Because right-to-farm amendments are so new, it is too soon to tell exactly what effect they will have. However, based on the effects of other constitutional amendments, it is likely that it will prove much harder for states to add necessary exceptions to right-to-farm amendments.

II. FACTS AND HOLDING

The Schultz Family Farms LLC, James Frink and Marilyn Frink, and Frink Family Trust (collectively “Plaintiffs”) are Jackson County commercial farmers who grow and have currently planted Roundup

Ready™ Alfalfa grown from genetically engineered seeds.¹ Plaintiffs are challenging Proposed Jackson County Ordinance 635 (hereinafter “the Ordinance” or “Ordinance 635”), which would ban the growth of genetically engineered crops Jackson County, Oregon.² The Ordinance was passed as a ballot measure by Jackson County voters on May 20, 2014, and was intended to go into effect on June 1, 2015.³

Plaintiffs alleged that Ordinance 635 conflicts with Oregon's Right to Farm Act (“the Act”) and would force them to destroy already-planted crops without just compensation.⁴ They sought injunctive and declaratory relief to “permanently enjoin enforcement of the ordinance,” or, in the alternative, damages for the ordinance's forced destruction of their crops.⁵ Defendant alleges that Ordinance 635 is in compliance with the Act and meets an exception under Senate Bill 863.⁶

The Act provides that “[a]ny local government . . . ordinance . . . that makes a farm practice a nuisance or trespass...is invalid with respect

¹ Schultz Family Farms LLC v. Jackson Cty. (hereafter “*Schultz*”), No. 1:14-CV-01975, 2015 WL 3448069, at *1 (D. Or. May 29, 2015).

² *Id.*

³ *Id.*

⁴ *Id.*; see also OR. REV. STAT. §§ 30.930-947 (2015).

⁵ *Schultz*, 2015 WL 3448069, at *1.

⁶ *Id.*

to that farm practice.”⁷ A farm practice includes modes of operation used on farms of a similar nature and generally accepted, reasonable, or prudent methods by which a farm can make a profit.⁸ A nuisance or trespass includes actions based on “noise, vibration, odors, smoke, dust, mist from irrigation, use of pesticides and use of crop production substances.”⁹

The text and context of Oregon's Right to Farm Act show that the legislature meant to protect farms and farming practices from urban encroachment.¹⁰ The Act contains an exception allowing claims or ordinances “based on farming practices that cause 'damage to commercial agricultur[e].”¹¹ The Act prevents urban and suburban interference with farming, but still allows commercial farmers recourse in the form of suit when their crops are being damaged by other farmers.¹²

Jackson County Ordinance 635 makes it illegal “for any person or entity to propagate, cultivate, raise, or grow genetically engineered plants within Jackson County.”¹³ Genetic engineering means any “modification

⁷ *Id.* at *3; *see also* OR. REV. STAT. § 30.935 (2015).

⁸ *Schultz*, 2015 WL 3448069, at *3; *see also* OR. REV. STAT. § 30.930(2) (2015).

⁹ *Id.* (quoting OR. REV. STAT. § 30.932 (2015)).

¹⁰ *Id.* at *4.

¹¹ *Id.* (quoting OR. REV. STAT. §§ 30.936(2)(a), 30.937(2)(a) (2015)).

¹² *Id.*

¹³ *Id.* (quoting JACKSON CTY., OR., CODE § 635.04).

of living plants and organisms by genetic engineering, altering or amending DNA using recombinant DNA technology such as gene deletion, gene doubling, introducing a foreign gene, or changing the position of genes, and includes cell fusion.”¹⁴ The purpose of the Ordinance is “to protect local farmers from 'significant economic harm to organic farmers and to other farmers who choose to grow non-genetically engineered crops' that can be caused by 'genetic drift' from [genetically engineered] crops.”¹⁵ Protecting local farmers fits within the commercial crop damage exception to Oregon’s Right to Farm Act.¹⁶

Oregon Senate Bill 863 made it illegal for local governments “to inhibit or prevent the production or use of agricultural seed.”¹⁷ However, the bill contained an exception for local measures “[p]roposed by initiative petition and, on or before January 21, 2013, qualified for placement on the ballot in a county; and... [a]pproved by the electors of the county at an election held on May 20, 2014.”¹⁸ The legislative history shows that this exception was created specifically to allow Ordinance

¹⁴ *Id.* (quoting JACKSON CTY., OR., CODE § 635.03).

¹⁵ *Id.* (quoting JACKSON CTY., OR., CODE § 635.02(c)).

¹⁶ *Id.* at *5.

¹⁷ *Id.* (quoting Act of 2013, Or. Laws 1st Spec. Sess. 1, 2 (2013)); *see also* OR. REV. STAT. § 637.738(2) (2015).

¹⁸ *Id.* (quoting S.B. 863 § 4, 77th Leg. Assemb., 1st Spec. Sess. (Or. 2013)).

The United States District Court for the District of Oregon held that Jackson County Ordinance 635 is valid under the Right to Farm Act and specifically authorized by Oregon law.²⁰

III. LEGAL BACKGROUND

A. *Right-to-Farm Acts: Oregon*

Right-to-farm acts such as the one at issue in *Schultz* are not new.²¹

All fifty states have enacted some form of right-to-farm act, and most right-to-farm acts contain similar provisions.²² These provisions generally

¹⁹ *Id.* at *6; for more discussion of the legislative history at issue in *Schultz*, see *infra* LEGAL BACKGROUND.

²⁰ *Id.*

²¹ Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 119 (1983). One of the first right-to-farm statutes was enacted in North Carolina in 1979. *Id.*

²² Rusty Rumley, *A Comparison of the General Provisions Found in Right-to-Farm Statutes*, 12 VT. J. ENVTL. L. 327, 328-29 (2011); see also ALA. CODE § 6-5-127 (2015); ALASKA STAT. § 09.45.235 (2015); ARIZ. REV. STAT. §§ 3-111, 3-112 (2015); ARK. CODE ANN. §§ 2-4-101-2-4-108 (2015); CAL. CIV. CODE § 3482.5 (2015); COLO. REV. STAT. §§ 35-3.5-101-35-3.5-103 (2015); CONN. GEN. STAT. § 19a-341 (2015); DEL. CODE ANN. tit. 3, § 1401 (2015); FLA. STAT. § 823.14 (2015); GA. CODE ANN. § 41-1-7 (2015); HAW. REV. STAT. §§ 165-1-165-6 (2015); IDAHO CODE §§ 22-4501-22-4504 (2015); 740 ILL. COMP. STAT. 70/0.01-70/5 (2015); IND. CODE §§ 32-30-6-1-32-30-6-1.5, 32-30-6-9, 32-30-6-11 (2015); IOWA CODE §§ 352.1-352.12 (2015); KAN. STAT. ANN. §§ 2-3201-2-3205 (2015); KY. REV. STAT. ANN. § 413.072 (2015); LA. REV. STAT. ANN. §§ 3:3601-3:3624 (2015); ME. REV. STAT. ANN. tit. 7 §§ 151-161 (2015); MD. CODE ANN., CTS. & JUD. PROC. § 5-403 (2015); MASS. GEN. LAWS ch. 243, § 6, ch. 128, § 1A (2015); MICH. COMP. LAWS § 286.471-286.474 (2015); MINN. STAT. § 561.19 (2015); MISS. CODE ANN. § 95-3-29 (2015); MO. REV. STAT. § 537.295 (2000); MONT. CODE ANN. §§ 27-30-101, 45-8-11 (2015); NEB. REV. STAT. §§ 2-4401-2-4404 (2015); NEV. REV. STAT.

include policy statements, definition sections, limits on protected actions, and prohibitions against local government restrictions, among other things.²³

Schultz is the first Oregon case to address whether local restrictions on agricultural practices violate the state’s right-to-farm laws.²⁴ Under Oregon law, courts must look to legislative intent in interpreting a statute, including pertinent legislative history.²⁵ In deciding *Schultz* and the fate of Ordinance 635, the U.S. District Court for the District of Oregon looked primarily to the legislative history surrounding the laws in question: Oregon’s Right to Farm Act and Senate Bill 863.²⁶

§ 40-140 (2015); N.H. REV. STAT. ANN. §§ 432:32-432:35 (2015); N.J. STAT. ANN. §§ 4:1C-1-4:1C-10.4 (2015); N.M. STAT. ANN. §§ 47-9-1-47-9-7 (2015); N.Y. AGRIC. & MKTS. §§ 300-310 (2015); N.C. GEN. STAT. §§ 106-700-106-701 (2015); N.D. CENT. CODE §§ 42-04-01-42-04-05 (2015); OHIO REV. CODE ANN. §§ 929.01-929.05, 3767.13 (2015); OKLA. STAT. tit. 50, §§ 1-1.1 (2015); OR. REV. STAT. §§ 30.930-30.947 (2015); 3 PA. CONS. STAT. §§ 951-955 (2015); R.I. GEN. LAWS §§ 2-23-1-2-23-7 (2015); S.C. CODE ANN. §§ 46-45-10-46-45-80 (2015); S.D. CODIFIED LAWS §§ 21-10-25.1-21-10-25.6 (2015); TENN. CODE ANN. §§ 43-26-101-43-26-104 (2015); TEX. AGRIC. CODE ANN. §§ 251.001-251.006 (2015); UTAH CODE ANN. §§ 17-41-401-17-41-403 (2015); VT. STAT. ANN. tit. 12, §§ 5751-5754 (2015); VA. CODE ANN. §§ 3.2-300-3.2-302 (2015); WASH. REV. CODE §§ 7.48.300-7.48.320 (2015); W. VA. CODE §§ 19-19-1-19-19-6 (2015); WIS. STAT. § 823.08 (2015); WYO. STAT. ANN. §§ 11-44-101-11-44-103 (2015).

²³ Rumley, *supra* note 22, at 329.

²⁴ Based on the number of citations to OR. REV. STAT. §§ 30.930-30.947 (2015) (specifically OR. REV. STAT. § 30.935 (2015)).

²⁵ *Schultz*, 2015 WL 3448069, at *3.

²⁶ *Id.* at *3-6; for more discussion of the legislative history at issue in *Schultz*, see *infra* INSTANT DECISION.

Oregon has a long history of protecting its environmental resources – farmland included.²⁷ The state first codified its agricultural policy in 1973.²⁸ According to Oregon law, the preservation of agricultural land is important, not just because of agriculture’s role in the state’s economy, but also because it is a practical way to preserve natural resources.²⁹ “The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state”³⁰ The codified policy also states that protecting agricultural land is “an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state.”³¹ The 1973 policy statement also sought to protect agricultural land from encroachment by those who would use it for nonagricultural purposes: “[e]xpansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, *conflicts*

²⁷ Owen J. Furuseth, *The Oregon Agricultural Protection Program: A Review and Assessment*, 20 NAT. RESOURCES J. 603, 603 (1980).

²⁸ OR. REV. STAT. § 215.243 (2015).

²⁹ *Id.*

³⁰ § 215.243(2).

³¹ § 215.243(1).

between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.”³²

The Act was first passed in 1993.³³ In part, it echoes the earlier codification of agricultural policy.³⁴ Among other things, the Act states that

[f]arming and forest practices are critical to the economic welfare of this state... [t]he expansion of residential and urban uses on and near lands zoned or used for agriculture or production of forest products may give rise to conflicts between resource and nonresource activities... [f]arming practices on lands zoned for farm use must be protected... [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.³⁵

Like the 1973 policy codification, the Act protects agricultural land use and protects agricultural land from complaints by nonagricultural neighbors.³⁶ Oregon updated the Act in 1995 and again in 2001.³⁷

The Act ultimately prohibits nuisance or trespass claims against any “farming... practice on lands zoned for farm . . . use”³⁸ The Act

³² § 215.243(3) (emphasis added).

³³ Oregon. Department of Agriculture, *Oregon’s Right to Farm Law*, (May 2014), <http://www.oregon.gov/ODA/shared/Documents/Publications/NaturalResources/RightToFarm.pdf>.

³⁴ OR. REV. STAT. §§ 30.930-30.947 (2015).

³⁵ §§ 30.933(1)(a)-(b), (2)(a), (2)(c).

³⁶ §§ 215.243, 30.933, 30.936.

³⁷ *Oregon’s Right to Farm Law*, *supra* note 33, at 1.

also prohibits nuisance or trespass claims against any “farming . . . practice allowed as a preexisting nonconforming use”³⁹ Further, the Act invalidates “[a]ny local government or special district ordinance or regulation now in effect or subsequently adopted that makes a farm practice a nuisance or trespass or provides for its abatement as a nuisance or trespass”⁴⁰ “Nuisance or trespass” includes “claims based on noise, vibration, odors, smoke, dust, mist from irrigation, use of pesticides and use of crop production substances.”⁴¹ However, there are some narrow exceptions to these protections.⁴²

The Act defines a “farm” as “any facility, including the land, buildings, watercourses and appurtenances thereto, used in the commercial production of crops, nursery stock, livestock, poultry, livestock products, poultry products, vermiculture products or the propagation and raising of nursery stock.”⁴³ The Act defines a “farming practice” as

a mode of operation on a farm that... [i]s or may be used on a farm of a similar nature . . . [i]s a generally accepted, reasonable and prudent method for the operation of the

³⁸ OR. REV. STAT. § 30.936(1) (2015).

³⁹ § 30.937(1).

⁴⁰ § 30.935.

⁴¹ § 30.932.

⁴² §§ 30.936(2), 30.937(2).

⁴³ § 30.930(1).

farm to obtain a profit in money . . . [i]s or may become a generally accepted, reasonable and prudent method in conjunction with farm use . . . [c]omplies with applicable laws; and . . . [i]s done in a reasonable and prudent manner.⁴⁴

The Act also considers “the transport or movement of any equipment, device or vehicle used in conjunction with a farming practice . . . on a public road or movement of livestock on a public road” to be a farming practice.⁴⁵ Additionally, the Act considers pesticide use to be a farming practice, so long as the pesticide:

[i]s or may be used on a farm of a similar nature . . . [i]s a reasonable and prudent method for the operation of the farm to obtain a profit in money . . . [i]s or may become customarily utilized in conjunction with farm use . . . [c]omplies with applicable laws; and . . . [i]s done in a reasonable and prudent manner.⁴⁶

As noted above, there are some narrow exceptions to the Act.⁴⁷

It does not apply to claims for “[d]eath or serious physical injury”⁴⁸ More relevant to *Schultz*, it does not apply to claims for “[d]amage to commercial agricultural products.”⁴⁹

⁴⁴ § 30.930(2).

⁴⁵ § 30.931.

⁴⁶ § 30.939(1).

⁴⁷ §§ 30.936(2), 30.937(2).

⁴⁸ §§ 30.936(2)(b), 30.937(2)(b).

⁴⁹ §§ 30.936(2)(a), 30.937(2)(a).

Few prior Oregon courts have had reason to interpret the Act.⁵⁰ In one case, a court held that the Act's protection of farming practices extends to barking dogs.⁵¹ The defendant in that case owned a herd of goats and used the dog in question to guard her livestock.⁵² One of the ways in which the dog guarded the livestock was by barking at predators to scare the predators away or to summon a farmer.⁵³ Because there was evidence that this was a reasonable farming practice, the court held the Act applied and the dog's barking was protected.⁵⁴ Some states have gone even further in creating legal protections for farmers and added right-to-farm amendments to their state constitutions.⁵⁵ However, to date, Oregon has made no attempt to pass such an amendment.

⁵⁰ Based on the number of citations to OR. REV. STAT. §§ 30.930-30.947 (2015). Only six other cases have referenced the relevant sections of Oregon's Right to Farm Act; *see* Ream v. Keen, 838 P.2d 1073 (Or. 1992); Linn v. Pitts, 858 P.2d 1352 (Or. Ct. App. 1993); Mark v. State Dept. of Fish and Wildlife, 974 P.2d 716 (Or. Ct. App. 1999); Hood River Cty. v. Mazzara, 89 P.3d 1195 (Or. Ct. App. 2004); Hale v. State, 314 P.3d 345 (Or. Ct. App. 2013); Schoenheit v. Rosenblum, 345 P.3d 436 (Or. 2015).

⁵¹ *Hood River*, 89 P.3d at 1196.

⁵² *Id.* at 1197.

⁵³ *Id.*

⁵⁴ *Id.* at 1199.

⁵⁵ Brandon Kiley, *Missouri Voters Pass 'Right to Farm' Amendment by Slim Margin*, KBIA, (Aug. 6, 2014), <http://kbia.org/post/missouri-voters-pass-right-farm-amendment-slim-margin>; *see also* MO. CONST. art. I, § 35; N.D. CONST. art. XI, § 29.

B. Right-to-Farm Amendments: Missouri and North Dakota

Some states have not been content with right-to-farm acts and have recently amended their constitutions to protect their respective citizens' right to farm.⁵⁶ In 2012, North Dakota was the first state to move beyond right-to-farm statutes and create a constitutional right to farm.⁵⁷ Missouri voters approved a similar constitutional amendment in 2014.⁵⁸ Both Indiana and Oklahoma have considered, but not passed, their own right-to-farm amendments.⁵⁹

North Dakota's right-to-farm amendment ensures that "[t]he 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

⁵⁶ Brooke Jarvis, *A Constitutional Right to Industrial Farming?*, BLOOMBERGBUSINESSWEEK (Jan. 9, 2014), <http://www.bloomberg.com/bw/articles/2014-01-09/industrial-farming-state-constitutional-amendments-may-give-legal-shield>.

⁵⁷ *Id.*; see also N.D. CONST. art. XI, § 29.

⁵⁸ Kiley, *supra* note 55; see also MO. CONST. art. I, § 35.

⁵⁹ Jarvis, *supra* note 56; see also S.J. Res. 12, 118th Gen. Assemb., 2d Reg. Sess. (Ind. 2015) (right-to-farm amendment ultimately rejected) and H.J. Res. 1012, 55th Leg., 1st Sess. (Ok. 2015) (right-to-farm amendment passed and awaiting approval or rejection by a vote of the people of Oklahoma).

technology, modern livestock production, and ranching practices.”⁶⁰ This amendment does not include any specific exceptions.⁶¹

North Dakota’s earlier right-to-farm act, enacted in 1981, prevented individuals from bringing nuisance suits against farms (described in the act as “agricultural operations”) for “any changed conditions in or about the locality of such operation after it has been in operation for more than one year, if such operation was not a nuisance at the time the operation began”⁶² The act also contained several exceptions, including an exception for nuisances “result[ing] from the negligent or improper operation” of a farm.⁶³ Under North Dakota’s act, individuals could still bring nuisance suits to “recover damages for any injury or damage sustained by the person on account of any pollution of or change in the condition of the waters of any stream or on account of any overflow of lands of any such person.”⁶⁴ Like the Oregon right-to-farm act at issue in *Schultz*, the North Dakota act voided all local government

⁶⁰ N.D. CONST. art. XI, § 29.

⁶¹ *Id.*

⁶² N.D. CENT. CODE § 42-04-02 (2015).

⁶³ *Id.*

⁶⁴ § 42-04-03.

ordinances that allowed nuisance suits against farms (unless the ordinances met the above exceptions).⁶⁵

Nearly 35 years after the statute's enactment, only a handful of reported cases have interpreted North Dakota's right-to-farm act.⁶⁶ One court held the act's plain language created an exception and allowed nuisance suits against farmers who negligently or improperly operated their farms.⁶⁷ Another court held the act's "agricultural operation" definition included corporations involved in preparing or marketing agricultural products.⁶⁸

Similarly, Missouri's right-to-farm amendment provides that the "right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state"⁶⁹ Missouri's amendment specifically protects "agriculture which provides food, energy, health

⁶⁵ § 42-04-04.

⁶⁶ Based on the number of citations to N.D. CENT. CODE §§ 42-04-01, 42-04-05 (2015). Only five North Dakota cases have referenced the right-to-farm act; *see* Jerry Harmon Motors, Inc. v. Farmers Union Grain Terminal Ass'n, 337 N.W.2d 427, 429 (N.D. 1983); Knoff v. Am. Crystal Sugar Co., 380 N.W.2d 313, 315-16 (N.D. 1986); Hebron Pub. Sch. Dist. No. 13 of Morton Cty. v. U.S. Gypsum Co., 475 N.W.2d 120, 126 (N.D. 1991); State v. Hafner, 587 N.W.2d 177, 183 (N.D. 1998); Tibert v. Slominski, 692 NW.2d 133, 136-37 (N.D. 2005).

⁶⁷ *Hafner*, 587 N.W.2d at 183.

⁶⁸ *Tibert*, 692 N.W.2d at 136-37.

⁶⁹ MO. CONST. art. I, § 35.

benefits, and security” because such agriculture is “the foundation and stabilizing force of Missouri’s economy.”⁷⁰ Missouri’s amendment does not include any specific exceptions.⁷¹

Missouri’s earlier right-to-farm act, enacted in 1982 and amended in 1990, provides that “[n]o agricultural operation . . . shall be deemed to be a nuisance, private or public, by any changed conditions in the locality thereof after the facility has been in operation for more than one year, when the facility was not a nuisance at the time the operation began.”⁷² Missouri’s act contained several exceptions, including a requirement that farming practices comply with “all county, state, and federal environmental codes, laws, or regulations” in order to be protected by the act.⁷³ Another exception protected reasonable farm expansion “provided the expansion does not create a substantially adverse effect upon the environment or creat[e] a hazard to public health and safety, or creat[e] a measurably significant difference in environmental pressures upon

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² MO. REV. STAT. § 537.295(1) (2000).

⁷³ *Id.*

existing and surrounding neighbors because of increased pollution.”⁷⁴ A specific exception for farms with poultry or livestock required that “waste handling capabilities and facilities meet or exceed minimum recommendations of the University of Missouri extension service for storage, processing, or removal of animal waste” in order for the farm to fall under the act’s protection.⁷⁵ Like North Dakota’s act, Missouri’s act allowed individuals “to recover damages for any injuries sustained . . . as a result of the pollution or other change in the quantity or quality of water used . . . or as a result of any overflow of land”⁷⁶ Finally, the Missouri act contained an exception for farms “located within the limits of any city, town or village.”⁷⁷ Nearly 35 years after the statute’s enactment, there are no reported cases interpreting Missouri’s right-to-farm act.⁷⁸

Because right-to-farm amendments are a relatively new phenomenon, their limitations are still being tested in court. As of 2015, no reported cases have challenged the North Dakota amendment. In

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ § 537.295(3).

⁷⁷ § 537.295(4).

⁷⁸ Based on the number of citations to MO. REV. STAT. § 537.295 (2015). Only one Missouri case has referenced the right-to-farm act; *see Perryville v. Brewer*, 376 S.W. 3d 691 (Mo. Ct. App. 2012).

Missouri, one recent lawsuit claimed the right-to-farm amendment protects citizens' right to farm marijuana.⁷⁹ Lisa Loesch was charged with felony manufacturing or distributing of a controlled substance in 2013 after Missouri authorities found marijuana plants in her basement.⁸⁰ Loesch's attorney argued that she was protected by Missouri's new right-to-farm amendment because the amendment prohibited legislators from telling farmers what they can and cannot grow.⁸¹ The court ultimately rejected this argument, with the judge reportedly saying only "traditional farming and ranching" practices were protected by the amendment.⁸²

IV. INSTANT DECISION

The United States District Court for the District of Oregon ultimately held that Jackson County Ordinance 635 did not violate Oregon's Right to Farm Act.⁸³ When interpreting Oregon law, federal

⁷⁹ Associated Press, *Judge: Missouri Right-to-Farm Doesn't Cover Growing Weed*, KOMU (Sept. 2, 2015), <https://www.komu.com/news/judge-missouri-right-to-farm-doesn-t-cover-growing-weed/> (because Missouri trial courts do not publish their opinions, no case citation is available).

⁸⁰ Joel Currier, *Does Missouri's 'Right-to-Farm' Amendment Mean You Can Grow Marijuana in Your Basement?*, ST. LOUIS POST-DISPATCH (May 5, 2015), http://www.stltoday.com/news/local/crime-and-courts/does-missouri-s-right-to-farm-amendment-mean-you-can/article_2eeb3cd3-f881-50d2-a6a8-8f65d8575f57.html.

⁸¹ *Id.*

⁸² Associated Press, *supra* note 79.

⁸³ *Schultz Family Farms LLC v. Jackson Cty.*, No. 1:14-cv-01975, 2015 WL 3448069, at *2 (D. Or. May 29, 2015).

courts ought to interpret the law in the same manner as would the Oregon state courts.⁸⁴ In Oregon, statutory interpretation looks to the legislature’s intent in enacting a statute.⁸⁵ To determine legislative intent, the court looks first to the text and context of the statute, second to statements of statutory policy, third to pertinent legislative history, and last to general maxims of statutory construction.⁸⁶ Statutory context includes both the immediate context within the statute itself and the broader context of other related statutes.⁸⁷

Oregon’s Right to Farm Act states local governmental units’ current and future regulations and ordinances that “mak[e] a farm practice a nuisance or trespass . . . [are] invalid with respect to that farm practice for which no action or claim is allowed” under other Oregon statutes.⁸⁸ Other Oregon statutes disallow nuisance and trespass claims for “farming or forest practice(s) on lands zoned for farm or forest” and “farming or forest practice(s) allowed as a preexisting nonconforming use.”⁸⁹ Both of these statutes create exceptions for “damage to commercial agricultural

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at *3.

⁸⁷ *Id.* at *2 (quoting *State v. Stamper*, 197 Or.App. 413, 417–18 (Or. Ct. App. 2005)).

⁸⁸ *Id.* at 3 (quoting OR. REV. STAT. § 30.935 (2015)).

⁸⁹ *Id.* (quoting OR. REV. STAT. §§ 30.936, 30.937 (2015)).

products.”⁹⁰ Nuisance and trespass include claims based on “use of crop production substances.”⁹¹

Included within the Act is a statement as to the legislative intent behind its enactment.⁹² Part of the intent was to protect farming practices and prevent urban sprawl from being detrimental to farmland.⁹³ The Oregon legislature wanted to protect farming practices from new and unfriendly suburban neighbors.⁹⁴ One intention was that “farming . . . practices must be protected from legal actions that may be intended to limit, or have the effect of limiting, farming . . . practices.”⁹⁵ The legislature also said that anyone who lives on or near land zoned for farming purposes “must accept the conditions commonly associated with living in that particular setting.”⁹⁶ Another intent was to limit the ability of private individuals to sue for and of local governments to declare certain farming practices nuisances or trespasses; such suits and declarations “must be limited because [they] are inconsistent with land

⁹⁰ *Id.* (quoting OR. REV. STAT. §§ 30.936(2)(a), 30.937(2)(a) (2015)).

⁹¹ *Id.* (quoting OR. REV. STAT. § 30.932 (2015)).

⁹² *Id.* at *3-4; codified at OR. REV. STAT. § 30.933 (2015).

⁹³ *Id.* at *4.

⁹⁴ *Id.*

⁹⁵ *Id.* at *3 (quoting OR. REV. STAT. § 30.933(2)(d) (2015)).

⁹⁶ *Id.* at *4 (quoting OR. REV. STAT. § 30.033(2)(c) (2015)).

use policies . . . and have adverse effects on the continuation of farming . . . practices.”⁹⁷

Based on these intentions, the court said the purpose of the Act was to “protect farms and farming practices from urban encroachment.”⁹⁸ Essentially, the court said urban and suburban sprawl create the so-called nuisance; when the farms were there first, the farms win.⁹⁹

The Act also included an exception the court found persuasive.¹⁰⁰ The exception allowed private suits and local government ordinances prohibiting farming practices that “cause ‘damage to commercial agriculture.’”¹⁰¹ Not all farming practices are protected – only those that are most likely to cause tension with non-farming neighbors are within the purview of the Act.¹⁰² Because of this commercial agricultural damage exception, the court said the Act did not give farmers free reign to use any and all farming practices they desired.¹⁰³

⁹⁷ *Id.* (quoting OR. REV. STAT. § 30.933(2)(d) (2015)).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (quoting OR. REV. STAT. §§ 30.936(2)(a), 30.937(2)(a) (2015)).

¹⁰² *Id.* Non-protected practices include any that damage a neighboring farmer’s crops. *Id.*

¹⁰³ *Id.*

Jackson County Ordinance 635 makes it illegal for “any person or entity to propagate, cultivate, raise, or grow genetically engineered plants within Jackson County.”¹⁰⁴ According to the language of the ordinance, its purpose is to protect local organic farmers whose crops might be contaminated by genetic drift from genetically engineered crops (such as genetically engineered seeds or pollen).¹⁰⁵ Because this purpose – protecting organic farmers’ crops from damage caused by other farmers – fits within the commercial agricultural damage exception to the Oregon Right to Farm Act, the United States District Court for the District of Oregon held the ordinance was valid on its face.¹⁰⁶

Plaintiffs argue there must be a showing of actionable damage in order to meet the exception, so because the ordinance is preventative in nature, it should not qualify.¹⁰⁷ The court rejects this argument because the text and context of the Right to Farm Act do not suggest such a requirement.¹⁰⁸

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at *5.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at *4.

The court also looked to the legislative history behind Senate Bill 863 and determined the bill’s purpose was to prevent local governmental units from passing laws or ordinances that would make the production or use of certain types of seeds illegal.¹⁰⁹ A portion of the bill stated that local government could not “inhibit or prevent the production or use of agricultural seed.”¹¹⁰ However, in an uncodified section of the bill, the legislature said the bill did not apply to local government ordinances “[p]roposed by initiative petition and, on or before January 21, 2013, qualified for placement on the ballot in a county; and . . . [a]pproved by the electors of the county at an election held on May 20, 2014.”¹¹¹ This uncodified exception exactly matches the circumstances surrounding the passing of Jackson County Ordinance 635.¹¹² The legislative history contains testimony from Oregon state senators and representatives stating that Jackson County – the county where Schultz Family Farms is located – has a unique geography that makes genetic drift a real threat to organic

¹⁰⁹ *Id.* at *5.

¹¹⁰ *Id.* (quoting OR. REV. STAT. § 633.738(2) (2015)).

¹¹¹ *Id.* (quoting S.B. 863 § 4, 77th Leg. Assemb., 1st Spec. Sess. (Or. 2013)).

¹¹² *Id.*

farmers in the area.¹¹³ Oregon’s governor at the time, John Kitzhaber, also testified that the bill’s purpose was to prevent local bans on genetically modified seeds with the exception of the already-on-the-ballot Ordinance 635.¹¹⁴ Because this exception clearly applied to the ordinance, the bill did not preempt the ordinance.¹¹⁵

V. COMMENT

Right-to-farm acts are the best way to protect farms and farmers. Right-to-farm amendments are unnecessary and may even be detrimental. Right-to-farm acts allow for necessary exceptions; right-to-farm amendments will likely make such exceptions much harder to come by. Additionally, there are concerns about who will benefit the most from such amendments: small, local family farms or large, impersonal factory “farms.”

Schultz demonstrates the adaptability of right-to-farm acts.¹¹⁶ Oregon’s Right to Farm Act prohibits “[a]ny local government . . . ordinance . . . that makes a farm practice a nuisance or trespass” and

¹¹³ *Id.* at *6.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at *5.

makes such an ordinance “invalid with respect to that farm practice.”¹¹⁷ However, the Act is not without exception: farming practices that result in “damage to commercial agricultur[e]” are not protected by the Act.¹¹⁸ In *Schultz*, this exception allowed for a legislative carve-out in a bill that would have otherwise prevented local governments from regulating the types of seeds that farmers could and could not use.¹¹⁹ This carve-out – made possible by the expansive nature of the Act – gave local governments in Oregon the flexibility to protect organic farmers from cross-contamination by genetically modified seeds.¹²⁰ Because the organic farms were commercial agricultural operations, the Act’s exception protected them from the harmful practices of other farmers.

Exceptions to constitutional amendments are much harder to come by. For the most part, states cannot legislate their way around constitutional amendments; when an amendment clashes with an act, the amendment generally wins. *Schultz* demonstrates the necessity of certain exceptions to right-to-farm acts. Jackson County is home to two groups of

¹¹⁷ OR. REV. STAT. § 30.935 (2015).

¹¹⁸ §§ 30.936(2)(a), 30.937(2)(a).

¹¹⁹ *Schultz*, 2015 WL 3448069 at *5-6; see also OR. REV. STAT. § 637.738(2) (2015) and S.B. 863 § 4, 77th Leg. Assemb., 1st Spec. Sess. (Or. 2013).

¹²⁰ *Schultz*, 2015 WL 3448069, at *4.

farmers: organic farmers and farmers who utilize genetically engineered (also called genetically modified) seeds.¹²¹ Genetically engineered crops pose a risk, through cross-pollination, to organic farmers.¹²² The cross-pollination of genetically engineered and organic crops would leave organic farmers unable to receive the necessary certifications from the U.S. Dept. of Ag. to label their crops as organic.¹²³ Here, the two groups of farmers utilized competing farming practices, both of which were otherwise legal.¹²⁴ Without Jackson County Ordinance 635 and the Oregon Right to Farm Act exceptions that made it possible, the organic farmers would have no protection from the danger of cross-pollination posed by genetically engineered crops.¹²⁵

One farmer's rights cannot always be exercised in harmony with those of a neighboring farmer.¹²⁶ Legislatures must have the ability to create exceptions to protect farmers from each other, as well as from urban

¹²¹ *Id.* at *1.

¹²² *Id.* (citing JACKSON CTY., OR., CODE § 635.02(c)).

¹²³ U.S. Department of Agriculture, *Can GMOs Be Used in Organic Products?*, NAT'L ORGANIC PROGRAM1 (May 2013),

<http://www.ams.usda.gov/sites/default/files/media/Can%20GMOs%20be%20Used.pdf>.

¹²⁴ *Schultz*, 2015 WL 3448069, at *1 (if either set of farming practices had been illegal, defendants would have had to bring a different type of suit).

¹²⁵ *Id.* at *6.

¹²⁶ *See* OR. REV. STAT. §§ 30.936(2)(a), 30.937(2)(a) (2015).

and suburban sprawl. Further, legislatures need to be able to create other exceptions as needed by the communities they represent. The Oregon, North Dakota, and Missouri acts each contain exceptions tailored to the needs of each state.¹²⁷ These legislative exceptions are easier to enact when farming rights are protected by legislative act rather than constitutional amendment.

Activists have criticized right-to-farm acts because, in addition to their rigid construction, they primarily benefit large, corporate factory farms.¹²⁸ North Dakota’s Right-To-Farm amendment, enacted in 2014, specifically prohibits the enactment of laws that “abridg[e] the right of farmers and ranchers to employ agricultural technology, modern livestock production, and ranching practices.”¹²⁹ “Agricultural technology” and “modern livestock production” might seem innocuous. The phrases could simply protect the right of farmers to use modern tractors and fertility drugs – but they could easily be read to protect concentrated animal feeding operations (“CAFO”) and the complex drug regimens necessary to

¹²⁷ See §§ 30.936(2), 30.937(2); N.D. CENT. CODE §§ 42-04-02-42-04-03 (2015); MO. REV. STAT. § 537.295(1), (3), (4) (2000).

¹²⁸ Jarvis, *supra* note 56.

¹²⁹ N.D. CONST. art. XI, § 29.

keep CAFO livestock healthy. Without judicial interpretation of the new North Dakota amendment, it is impossible to know exactly what the amendment protects.¹³⁰

Similarly, Missouri’s Right-To-Farm amendment states that the “right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state.”¹³¹ The Missouri amendment does not specify *how* that right will be guaranteed.¹³² The amendment is so vague as to be almost meaningless. What are “farming and ranching practices”? How exactly will Missouri protect them? Additionally, while Missouri’s right-to-farm act included at least five exceptions of varying specificity, Missouri’s right-to-farm amendment does not include any.¹³³ Is there no longer a need for the exceptions listed in the act? While it is possible that the amendment will be interpreted using Missouri’s right-to-farm statute as a guideline, without judicial interpretation – which could

¹³⁰ As of this writing, no reported cases have even cited to N.D. CONST. art. XI, § 29, let alone interpreted it.

¹³¹ MO. CONST. art. I, § 35.

¹³² *Id.*

¹³³ See MO. REV. STAT. §§ 537.295(1), (3), (4) (2000); MO. CONST. art. I, § 35.

take years – it is nearly impossible to determine what effects the amendment will actually have on Missouri farmers.¹³⁴

One of the only right-to-farm amendment test cases to date has been the Loesch marijuana cultivation case.¹³⁵ A Missouri trial court said the amendment did not apply and dismissed Loesch’s case.¹³⁶ Missouri’s right-to-farm amendment refers to “agriculture which provides food, energy, health benefits, and security” and, as Missouri allows only extremely limited medical marijuana use, none of those applied to Loesch’s crop.¹³⁷

Oregon will likely have to address a similar issue and decide whether medical and recreational marijuana – both legal in the state – are protected by the Right to Farm Act.¹³⁸ In Jackson County, where *Schultz* upheld the ordinance aimed at protecting organic farmers from crop damage, many residents have complained about the smell associated with

¹³⁴ See MO. REV. STAT. § 537.295 (2000).

¹³⁵ Associated Press, *supra* note 79; based on the number of citations to MO. CONST. art. I, § 35 (only one reported case has cited to the amendment, and it dealt with the propriety of the ballot language prior to the amendment’s passing).

¹³⁶ *Id.*

¹³⁷ MO. CONST. art. I, § 35; Associated Press, *supra* note 79.

¹³⁸ Ted Shorack, *Conflicts Over Medical Marijuana Grow Sites*, THE BULLETIN (June 11, 2015, 5:53AM), <http://www.bendbulletin.com/localstate/3225310-151/medical-marijuana-grow-sites-have-struggled-to-fit#>.

marijuana growing operations.¹³⁹ However, “odors” are included in the Oregon Right to Farm Act’s definition of prohibited nuisance claims.¹⁴⁰ Another Oregon county has considered using zoning laws to prevent marijuana from being grown on land zoned for agricultural use.¹⁴¹ If marijuana production is protected under the Act, such zoning laws would likely run afoul of the Act’s prohibition on local ordinances that make farming practices nuisances.¹⁴²

When many people hear the word “farm,” they picture an idyllic red barn, a yard full of cows, pigs, and chickens, maybe a garden full of multi-colored vegetables – in short, a family farm straight out of the Old MacDonald nursery rhyme.¹⁴³ However, right-to-farm amendments protect *all* farms, not just the quaint ones.¹⁴⁴ Opponents of right-to-farm amendments worry that the amendments could interfere with

¹³⁹ Associated Press, *Officials: Pot Farmers Have “Right to Farm,”* THE BULLETIN (June 26, 2014, 12:01 AM), <http://www.bendbulletin.com/localstate/2191799-151/officials-pot-farmers-have-right-to-farm>.

¹⁴⁰ OR. REV. STAT. § 30.932 (2015).

¹⁴¹ Mateusz Perkowski, *County Mulls Marijuana Farm Zone Exclusion*, CAPITAL PRESS (Mar. 9, 2015 1:57 PM), <http://www.capitalpress.com/Oregon/20150309/county-mulls-marijuana-farm-zone-exclusion>.

¹⁴² OR. REV. STAT. § 30.935 (2015).

¹⁴³ Many companies take advantage of this assumption in their marketing materials; for example, Farmland’s bacon packaging features the above-mentioned red barn and impossibly blue skies over endless green pastures.

¹⁴⁴ Neither North Dakota’s nor Missouri’s amendment restricts farm size or imposes ownership requirements. *See* N.D. CONST. art. XI, § 29; MO. CONST. art. I, § 35.

environmental and animal welfare regulations, which mostly affect large factory farms.¹⁴⁵ The possibility that right-to-farm amendments like North Dakota and Missouri's might protect CAFOs is troubling. CAFOs may pose health hazards to humans, animals, and the environment.¹⁴⁶ With such dangerous potential, laws should equip the state government to put in place regulations to protect health, not prevent it from doing so.

Further, right-to-farm amendments are simply unnecessary. As shown in *Schultz*, right-to-farm acts are fully capable of protecting farmers' rights.¹⁴⁷ Oregon, North Dakota, and Missouri's right-to-farm acts allow for state-specific protections and exceptions.¹⁴⁸ The two right-to-farm amendments that have been enacted as of 2015 – in North Dakota and Missouri – are vague when compared to those same state's prior right-

¹⁴⁵ Julie Bosman, *Missouri Weighs Unusual Addition to Its Constitution: Right to Farm*, THE NEW YORK TIMES (Aug. 2, 2014), http://www.nytimes.com/2014/08/03/us/missouri-considers-adding-right-to-farm-to-state-constitution.html?_r=1.

¹⁴⁶ Amanda Belanger, *A Holistic Solution for Antibiotic Resistance: Phasing Out Factory Farms in Order to Protect Human Health*, 11 J. HEALTH & BIOMEDICAL L. 145, 145-46, 150-56 (2015) (describing living conditions of CAFO animals, the resulting need for antibiotic regimens, and the negative effect on human health of such regimens).

¹⁴⁷ *Schultz Family Farms LLC v. Jackson Cty.*, No. 1:14-CV-01975, 2015 WL 3448069, at *6 (D. Or. May 29, 2015).

¹⁴⁸ See OR. REV. STAT. §§ 30.936(2), 30.937(2) (2015); N.D. CENT. CODE §§ 42-04-02-42-04-03 (2015); MO. REV. STAT. §§ 537.295(1), (3), (4) (2000).

to-farm acts.¹⁴⁹ The amendments provide farmers with more confusion than protection.

Few reported cases deal with right-to-farm laws. Only seven reported cases, including *Schultz*, cite to the relevant provisions of Oregon's Right to Farm Act.¹⁵⁰ In North Dakota, only five reported cases include citations to the relevant provisions of the right-to-farm act;¹⁵¹ zero reported cases include citations to the right-to-farm amendment.¹⁵² In Missouri, only one reported case includes citations to the right-to-farm act;¹⁵³ only one reported case includes citations to the right-to-farm

¹⁴⁹ See N.D. CENT. CODE §§ 42-04-01-42-04-05 (2015); N.D. CONST. art. XI, § 29; MO. REV. STAT. § 537.295 (2000); MO. CONST. art. I, § 35.

¹⁵⁰ Based on the number of citations to OR. REV. STAT. §§ 30.930-30.947 (2015). Only six other cases have referenced the relevant sections of Oregon's Right to Farm Act; see *Ream v. Keen*, 838 P.2d 1073 (Or. 1992); *Linn v. Pitts*, 858 P.2d 1352 (Or. Ct. App. 1993); *Mark v. State Dept. of Fish and Wildlife*, 974 P.2d 716 (Or. Ct. App. 1999); *Hood River Cty. v. Mazzara*, 89 P.3d 1195 (Or. Ct. App. 2004); *Hale v. State*, 314 P.3d 345 (Or. Ct. App. 2013); *Schoenheit v. Rosenblum*, 345 P.3d 436 (Or. 2015).

¹⁵¹ See *Jerry Harmon Motors, Inc. v. Farmers Union Grain Terminal Ass'n*, 337 N.W.2d 427 (N.D. 1983); *Knoff v. Am. Crystal Sugar Co.*, 380 N.W. 2d 313 (N.D. 1986); *Hebron Pub. Sch. Dist. No. 13 of Morton Cty. v. U.S. Gypsum Co.*, 475 N.W. 2d 120 (N.D. 1991); *State v. Hafner*, 587 N.W.2d 177 (N.D. 1998); *Tibert v. Slominski*, 692 NW.2d 133 (N.D. 2005).

¹⁵² As of 2015, no reported cases have cited to N.D. CONST. art. XI, § 29.

¹⁵³ See *City of Perryville v. Brewer*, 376 S.W. 3d 691 (Mo. Ct. App. 2012) (did not interpret MO. REV. STAT. § 537.295 (2015)).

amendment.¹⁵⁴ If the right-to-farm acts were barely used and rarely litigated, why bother creating more expansive right-to-farm amendments?

Right-to-farm amendments are unnecessary, overly broad, and do not allow for necessary exceptions. Right-to-farm acts are more detailed and easier to adapt to the needs of a specific state. Although few farmers appear to have taken advantage of either, right-to-farm acts are superior to right-to-farm amendments in protecting farms and farmers.

VI. CONCLUSION

Schultz Family Farms, LLC v. Jackson City shows the necessity of legislative exceptions to right-to-farm laws. As demonstrated in *Schultz*, Oregon's Right to Farm Act made such an exception easy. The Act included a specific rationale for creating the *Schultz* exception; this rationale is also likely to work for other, similar exceptions that become necessary in the future. State right-to-farm acts have been around for decades, but the recent trend toward adding right-to-farm amendments to state constitutions will make it harder to create necessary exceptions.

¹⁵⁴ *Shoemyer v. Mo. Sec. of State*, 464 S.W.3d 171 (Mo. 2015) (did not interpret MO. CONST. art. I, § 35, but dealt with the propriety of the ballot language prior to the amendment's passing); *but see* *Currier*, *supra* note 80 (unreported case where judge dismissed marijuana grower's claim that she fell under the amendment's protection).

Additionally, right-to-farm amendments might protect large farmers at the expense of the small family farmers who helped make America what it is today. Because right-to-farm acts have worked so well for so long, states should not enact stricter, harder-to-adapt right-to-farm amendments.

JENNIFER BENNETT