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The Manic Organic Panic: First Amendment Freedoms and Farming or the Attack of the Agricultural Appropriations Rider

by

Christopher T. Jones

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The Manic Organic Panic: First Amendment Freedoms and Farming or the Attack of the Agriculture Appropriations Rider

Christopher T. Jones[*]

I. INTRODUCTION

> Again, behind closed doors, without a single vote or debate, the Organic Foods Production Act was amended at the behest of large food processors without the benefit of the organic community reaching a compromise. To rush provisions into the law that have not been properly vetted, that fail to close loopholes, and that do not reflect a consensus, only undermines the integrity of the National Organic Program.[1]

On October 25, 2005, Congress attached a rider to the 2006 Agriculture Appropriations Bill that will degrade the current organic standards for foods if passed. This attachment was largely pushed by the USDA and large corporations to lower organic standards created by the Organic Food Production Act of 1990,[2] allow a broad list of synthetic ingredients and processes into organic certification, and reduce future public discussion and input into these standards. The deterioration of organic principles that comprise the standard puts a difficult burden on organic farmers, the environment, misinforms consumers of organic products, and places those with dietary and/or religious constraints at risk.

This paper will address the background and reasoning of the organic movement, the congressional intent of the Organic Food Production Act, the impact of the proposed standard degradation, and possible remedies for this rift in the public perception of the organic standard and current reality. This paper does not argue for or against the use of genetic modification, only that bioengineering or genetically modified foods may implicate consumers' freedom of religious exercise. This paper focuses on the American consumer; her expectations in purchasing and consumption decisions, and whether these expectations are protected or guaranteed.

II. BACKGROUND

"I'm all lost in the super market, I can no longer shop happily, I came in here for that special offer, Guaranteed Personally."[3] Going into a grocery store and

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[*] Junior Staff Member, *Journal of Land, Resources, & Environmental Law.*

[1] 151 Cong. Rec. 143, S12226 (daily ed. Nov. 2, 2005)(statement of Sen. Harkin).; see also http://www.beyondpesticides.org/organicfood/alerts/ltr_to_community.pdf, at 3–4 (Nov. 18, 2005). (comment by Senator Harkin (D-IA) on the Senate floor on November 2, 2005, addressing what organic advocates characterized as a "sneak attack" rider to the 2006 Agriculture Appropriations Bill, which will weaken the current organic standards).

[2] Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501–22 (2005).

[3] THE CLASH, *Lost in the Supermarket, on* LONDON CALLING (Epic Records1979).

finding food products that are not absolutely fat-laden or processed sugar and flour-packed, has not been easy. This is due in part to personal consumption choice and more importantly until recently, many grocery stores did not have much of a selection in natural, healthful products. Ten to fifteen years ago, shoppers had to go to the area's health food store to find organic products. Muted in color, vibrancy, and other hallmarks of marketability, these grocery stores sold "natural" products at a premium, which seemed awkwardly positioned and divorced from their shiny counterparts in the big name grocery stores. However, within the last ten years, American consumers have increased interest and thus, demand for "natural" or "organic" products. Consequently, mainstream supermarkets have placated shoppers by bringing brands and produce brandishing the USDA Certified Organic label into their stores and into the consumer's collective shopping baskets.

The demand for organic food has been very fast growing in recent years. Every year during this last decade saw American shopping baskets and carts with 20 percent more organic products in them than the year prior. Organic food and beverage sales in 2004 were estimated at $15 billion, up from $3.5 billion in 1997, and expected to double by 2009.[4] One dime of every dollar spent in American grocery stores is attributed to organic food sales.[5] Two thirds of American consumers bought organic food and beverages in 2005, up from 50 percent in 2004.[6] As a result, 73 percent of conventional grocery stores are stocking organic products,[7] and increasing shelf space for these products. To meet this demand, increasing acreage of land is being certified as organic farmland.[8] Organic products have come a long way from the meager market beginnings. This upsurge of consumer interest has happened for a sundry of reasons, many based on the following.

A. History of the Organic Movement

What is known as organic farming was brought to consciousness in the U.S. by a Pennsylvania farmer in 1942 named Jerome Rodale when he started the

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[4] Consumer Union, *Start the Year Right: When it Payes to Buy Organic*, 71 CONSUMER REPORTS 2, at 12–17.

[5] Organic Consumers Association, Laws & Politics, *Updated OCA Talking Points on Safeguarding Organic Standards*, (Nov. 8, 2005), http://www.foodconsumer.org/777/8/updated_OCA_talking_points_on_safeguarding_organic_standards.shtml.

[6] CAROLYN DIMITRI & CATHERINE GREENE, *U.S. DEP'T. OF AGRIC., RECENT GROWTH PATTERNS IN THE US ORGANIC FOODS MARKET*, *available at* http://www.ers.usda.gov/publications/aib777/aib777b.pdf (last visited Jan. 23, 2005).

[7] *Id.*

[8] Carmelo Ruiz-Marrero, *Clouds on the Organic Horizon: Is Organic Farming Becoming the Victim of its Own Success?* CorpWatch (Nov. 25, 2004), *at* http://corpwatch.org/print_article.php?id11712 (explaining that organic acreage by state continues increasing).

magazine *Organic Farming and Gardening.*[9] He integrated the ideas of the English botanist Sir Albert Howard, who had been using the practices in Britain since 1931, and documented the traditional growing of crops in India.[10] Howard and others reacted to the new industrialization of agriculture: advances in biochemistry resulting in nitrogen fertilizer; the indiscriminate use of ammonium-nitrate and petroleum-based pesticides after World War II; and the hybridization of plants.[11] Rodale, Howard and others thought that healthier plants, food, and soil could be maintained through composting rather than chemical fertilizers. Although the technology of the time was creating immediate and higher yields, they suggested that the organic practice was sustainable, depicted by indigenous populations performing these farming techniques for several centuries. In 1949, Aldo Leopold introduced his "land ethic;" a canon for preserving "the integrity, stability, and beauty of the biotic community" to American thinking.[12] These schools of thought were rooted in a long-view approach, based more on process than end product.

Although these concepts were noted, it was not until the publication of the book *Silent Spring*[13] in 1962, that the general American public was made aware of the possible harms of the new technologies and widespread use of DDT. "Although today's poisons are more dangerous than any known before, they have amazingly become something to be showered down indiscriminately from the skies."[14] The book was immediately slandered by the newly-emerged chemical lobby; the Monsanto chemical company parodied the book with a publication called *The Desolate Year.*[15] Even so, public awareness of ecological problems associated with chemical fertilizers and pesticides grew through the chemical cloud of Monsanto's new public relations tactic.[16] *Silent Spring* coupled with higher reported incidence of water pollution resulting from chemicals forced awareness of organic farming and produce as an alternative process and product. This awareness led to pesticide regulation, and in 1972 the Rodale Press established a voluntary standard and certification program for organic farming.[17]

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[9] Michelle T. Friedland, *You Call* That *Organic?—The USDA'S Misleading Food Regulations*, 13 N.Y.U. ENVTL. L.J. 379, 381 (2005).

[10] *Id.* (Sir Albert Howard recorded the traditional practices in An Agricultural Testament, published in 1940.)

[11] *See* Brian Baker, *Brief History of Organic Farming and the National Organic Program*, in ORGANIC FARMING COMPLIANCE HANDBOOK, *available at* http://www.sarep.ucdavis.edu/organic/complianceguide/intro2.pdf (last visited Apr. 11, 2006).

[12] ALDO LEOPOLD, A SAND COUNTY ALMANAC: WITH ESSAYS ON CONSERVATION FROM ROUND RIVER 262 (Oxford U. Press 1970).

[13] RACHEL CARSON, SILENT SPRING (New York: Houghton Mifflin 1962).

[14] *Id.* at 155–56.

[15] *See* JOHN C. STAUBER & SHELDON RAMPTON, TOXIC SLUDGE IS GOOD FOR YOU! LIES, DAMN LIES AND THE PUBLIC RELATIONS INDUSTRY, 123-24 (Common Courage Press: Monroe, Maine 1995).

[16] *Id.*

[17] *See* Baker, *supra* note 11 at 1.

Additionally, Rodale was instrumental in establishing the programs for California's Certified Organic Farmers and Oregon-Washington Tilth Organic Producers Association.[18] The 1970s saw increasing numbers of farmers marketing foods as organic, and a consumer base beginning to clamor for a fresh alternative.

This organic consumer base was assuaged by the 1971 opening of chef Alice Waters' restaurant, Chez Panisse in Berkeley, California. Waters insisted on using solely locally-grown, seasonal organic produce, and the restaurant was an instant hit among food critics and California residents alike.[19] Many states had consumers who were interested in sustainable and sound farming practices, and routinely purchased organic products. By 1990, twenty-two states had different and somewhat disparate standards for the moniker "organic," and as a result, ineffective regulation of the practice and products, with incidents of fraud pervasive. These factors threatened the meaning and value of an organic label. A coalition of organic farmers, consumers, animal welfare and environmental advocates urged Congress to pass the Organic Foods Production Act (OFPA) in 1990.[20]

In response to the expressed concerns, Congress stepped in to unify the disparate state standards, and in 1992, the USDA appointed a National Organic Standards Board (NOSB) and established the National Organic Program (NOP).[21]

B. Organic Food Production Act of 1990

The purpose of the Act is threefold: to establish national standards to govern the marketing of certain organic products; to assure consumers that organically produced products meet a consistent standard; and to facilitate interstate commerce in fresh and processed food that is organically produced.[22] Congress further required the Secretary of Agriculture to set a certification program and regulations, as well as a set list of approved and prohibited substances.[23] Congress then established the standards and an enforcement mechanism by which regulations were enforced by independent compliance agents.[24]

The Secretary of Agriculture proposed rules in 1997, which had more of the trappings of conventional-farming than consumers had hoped. This proposal included the use of sewer sludge fertilizer, irradiation of fruits and vegetables, and genetic engineering as allowed processes under the Certified Organic standard and

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[18] *Id.*

[19] *See* http://www.chezpanisse.com/pgalice.html. Alice Waters and Chez Panisse have garnered many awards over the years; for cuisine alone, for helping pioneer California cuisine, and for helping create a network of local organic farmers support and foundation. In 2001, Gourmet Magazine named Chez Panisse as the Best Restaurant in America, Best Chef in America by the James Beard Foundation among others.

[20] Baker, *supra* note 11 at 1.

[21] *Id.*

[22] 7 U.S.C. § 6501 (2000).

[23] 7 U.S.C. § 6503 (2000).

[24] 7 U.S.C. § 6516 (2000).

consequently, was almost universally opposed.[25] As a result of the lax standards, the proposal sparked more public comment than any other USDA regulation.[26] The Board went back and rewrote the rules addressing, and to some degree reflecting, the concerns brought up during the flood of public comments. These new rules were promulgated in 2000, and took effect in 2002. The rules explicitly state that the National Organic Program (NOP) controls the word "organic" in marketing and packaging; hence, to market as organic, a producer must abide by this program.[27]

III. ORGANIC CONSUMER MARKET

A. Consumer Reasoning for Purchasing Organic Products

There are several reasons for the recent upsurge in interest and demand for organic products. The reasons range from perceived physical benefits derived from an organic diet, to environmental concerns, to religious dietary constraints that limit intake of bioengineered foods. Many organic food consumers have several reasons for purchasing organic products. The list that follows is not meant to be exhaustive, but merely lists some of the primary reasons consumers voiced for purchasing organic food products.

1. Health-Based Concerns

Health is a primary reason cited among consumers of organic foods. Perceived risks from pesticides and chemical residue were initial motivators for buying organic products. One of the first large spikes in market demand occurred in 1989, immediately after a segment on the CBS show 60 Minutes about Alar on apples.[28] The segment revealed studies showing that the ripening agent was a carcinogen that could affect children.[29] The health risks associated with the various herbicides, pesticides, chemical fertilizers and other synthetic products have proved salient among many consumers. More recently, rBGH, (the hormone found in conventional dairy milk,) as well as Mad Cow Disease, and bioengineered or genetically modified material have raised health concerns. As a result, many people are looking to organic products for shelter from the risks associated with conventional sources.[30] With the advent and pervasiveness of

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[25] *See* National Organic Program, 62 Fed. Reg. 65,850 (proposed Dec. 16, 1997) (the USDA reported 275,603 comments almost all opposing genetic engineering, sewage sludge, and irradiation in organic production systems).

[26] *Id.*

[27] *See* National Organic Program, 65 Fed. Reg. 80,547 (Dec. 21, 2000) (codified at 7 C.F.R. 205).

[28] Baker, *supra* note 11.

[29] *See* http://www.ewg.org/reports/alar/alar.html.

[30] *See* Pamela R.D. Williams & James K. Hammitt, *Perceived Risks of Conventional and Organic Produce: Pesticides, Pathogens, and Natural Toxins*, 21 RISK ANALYSIS 319, 323-25 (2001).

genetically-modified foods, people are concerned with the ramifications of ingesting "Frankenfoods" generally, and specifically the possibility of new and violent allergic reactions.[31]

2. Environmental Reasons

Another reason for buying organic is that many people are concerned with the environmental effects of conventional farming. To wit, the amounts of pesticides and synthetic fertilizers that are used and then runoff into surface water sources, seep into groundwater, or permeate the soil is significant.[32] In many areas of the country, this is the biggest source of non-point water pollution.[33] Soil blanching and erosion are also common results of conventional farming practices, and consumers may not want to add to the robbing of the soil of this country. Concerns also exist that herbicides and pesticides may create an extremely resistant species of weed or insect that could spread easily, extending with it disastrous consequences. Similar concerns exist regarding the pollen of genetically-modified plants, which could compromise that all-important biodiversity.[34] The pesticides and herbicides may affect many non-target animals as well. Many pesticides are indiscriminate, and not designed to negatively affect solely a specific insect. For example, some studies have reported that Monarch Butterfly populations have seen precipitous population declines resulting from corn genetically modified with bt.[35] Similarly, many farmers have seen big declines of honey bees and other pollinators crucial for crop propagation, and have to replenish hives seasonally.[36]

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[31] Julie Teel, *Rapporteur's Summary of the Deliberative Forum: Have NGOs Distorted or Illuminated the Benefits and Hazards of Genetically Modified Organisms?* 13 COJIELP 137, 141 (2002). (Depicting an infamous example of the allergenicity threat of GMO's; the StarLink scare of 2000. Food containing genetically modified corn, deemed safe only for animal consumption and ethanol, were found on supermarket shelves in the form of taco shells. Several people were sent to the hospital as a result of reactions to the corn. Consequently, over 300 products were recalled by Kraft and others from as far as Japan and Korea and depressed the US corn markets and highlighted the inability of transgenic regulation.

[32] J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 282 (2000) (providing the yearly dosage for crops in America is more than 750 million pounds of pesticides).

[33] *Id.*

[34] Teel, *supra* note 31, at 142, (report of studies showing corn that is genetically modified with bt, a biological pesticide, has polluted milkweed with the bt pollen. Milkweed is the primary food and host for Monarch Butterfly larvae, which may result in higher decline in butterfly populations.)

[35] *Id.*

[36] *Id.*

Another concern that has been highlighted recently, with the cost of crude oil ever-increasing, is food miles of a product.[37] That is, the environmental effects of the energy expended to process and transport a product and the pollution emitted as a result. The emphasis on local organic and seasonal products has been argued to cut down on the fuel miles considerably.[38] Environmental effects of conventional farming are legion, and some consumers, loath to contribute to the possible environmental threats and harms, choose organic products as a result.

3. Family and Sustainable Farming

Still other organic consumers are purchasing organic products to help support family farms or farms they perceive practice sustainable farming. Some people are simply nostalgic for family farms of yesteryear, and want to help insure their continuation. Also, people seeking more individualized care of food feel they can find it in small-scale organic farming; whether it is milk from a handful of pastured cows, eggs from hens that can walk and are exposed to sunlight, or vine-ripened watermelons, tomatoes and other produce picked at the peek of ripeness. Similarly, many people believe the flavor of foods benefits from organic and sustainable farming.

Many people are concerned with sustaining the nutrients and ecological soundness of the soil from which food is grown.[39] Large operations that use synthetic fertilizers, or that forego crop rotation will eventually leach the soil of vital minerals and nutrients for future growth. It is often more feasible for smaller farms to practice sustainable farming.[40] For reasons such as these, some organic consumers believe that organic farm practices and typically smaller acreage lend to these concerns and sentiments.

4. Philosophical and Political Concerns

Similarly, philosophical and political reasons play a role for some organic purchasers. Some consumers do not want to contribute to huge agribusiness in general, as they are disenchanted with the political power this lobby wields. Some consumers may assert this disfavor solely because of the gigantic farm subsidies paid out by taxes from citizens.[41] Other consumers are concerned with the practice and effect of behemoth agribusiness companies dumping their produce in third-

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[37] See BBC NEWS, Science/Nature, *Local Food 'Greener Than Organic'* (Mar. 2, 2005) *at* http://news.bbc.co.uk/2/hi/science/nature/4312591.stm.

[38] *Id.*

[39] Ruiz-Marrero, *supra* note 8, ("after a certain size, the operation cannot be ecologically sound anymore" and "conserving soil on a huge farm scale is not possible").

[40] *Id.*

[41] *Id.*

world markets.[42] This practice can effectively drive the local and national farmers of these markets out of business, because of American farming subsidies. These subsidies pay for the crops on one end, enabling agribusiness to sell for less than the production cost, driving prices down, so farmers in these countries may not profit.[43] Some consumers have political aversions to these practices and the results, and choose organically farmed products to avoid conscious support of these practices.

Alternatively, many consumers are concerned with the treatment of animals. Consumers site the seemingly callous practices reported on factory farms in this reasoning. Primarily, concerns surfaced about the conditions in which these animals live; the lack of space and range of motion seen on some large poultry farms, and beef cattle feedlots. Some are concerned with fetid sanitary conditions, the practice of feeding cattle blood and slaughterhouse waste, and poultry beak mutilation as well.[44] As a result, some people find solace in organic farming, as an alternative to animal treatment and conditions they find reprehensible.

5. Religious and Spiritual Concerns

Finally, many consumers choose organic products because of their religious, dietary, or spiritual beliefs and constraints. Because genetically modified produce has permeated the conventional market, to escape consumption, some people turn to organic products for reprieve. Since genetic modification does not have to be reported on labeling, it goes undetected. As a result, many food sources that might be prohibited by religious strictures may go undetected as well.

Genetic modification, or bio-engineering, is the artificial introduction of the genetic makeup of one organism with another organism to create an organism with genetic makeup of both organisms. Commonly, animal genes are introduced to plant genes to create positive traits, such as heat or cold tolerance, for agriculture production. Some vegetarians do not want to ingest something that has animal genes. The Jewish and Muslim religions have dietary constraints that do not allow the ingestion of pork products. More saliently, Buddhism, in which many sects call for vegetarianism, does not allow the ingestion of animal products at all. Genetically modified products may contain genetic material from animals, in contradiction to tenets of the Buddhist faith. Moreover, the Dharma Realm Buddhist Association has explicitly denounced the ingestion of genetically-modified foods, as directly contrary to the religion of Buddhism.[45]

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[42] Global Policy Forum, *Stop the Dumping! How EU Agriculture Subsidies are Damaging Livelihoods in the Developing World, at* http://www.globalpolicy.org/socecon/trade/subsidies/2002/10stopdumping.pdf.

[43] *Id.*

[44] Organic Consumers Association, *supra* note 5.

[45] Ron Epstein, *Buddhism and Measure H: Banning the Growing and Raising of Genetically Modified Organisms in Mendocino County -A talk given at the City of Ten Thousand Buddhas on February 14, 2004.* 34 VAJRA BODHI SEA: A MONTHLY JOURNAL

Many people of Christian faiths also disfavor the practice of genetic engineering. The Pew Initiative on Food and Biotechnology conducted a nationwide poll in 2001 which found that 57 percent of Protestants (62 percent of evangelicals) and 52 percent of Catholics oppose agricultural biotechnology, specifically the "moving genes from one species or organism to put into another".[46] Similarly, the Ecumenical Consultative Working Group on Genetic Engineering in Agriculture wrote to Christians imploring that genetic food engineering be considered an important ethical issue. The group wrote, "It has yet to be demonstrated that agricultural genetic engineering, as it exists in the current system, safeguards the common good, human dignity, the sacredness of life and stewardship."[47] This report listed representatives from the Catholic, Episcopal, Evangelical Lutheran, Mennonite, Presbyterian and United Methodist churches.[48] Moreover, the Church of Jesus Christ of Latter Day Saints, in which some dietary constraints are promulgated through a text called the "Word of Wisdom," has been paralleled to kosher and halal dietary constraints.[49] Potentially, this doctrine and the prohibition against coffee and tea could come into tension with genetically modified organisms that include genetic material from coffee or tea plants with a host plant. Consequently, many religions in the United States are potentially at conflict with the genetic modification of foods almost solely available in our grocery stores.

In sum, many people have strident concerns about the foods they purchase and consume. These concerns are legion and multifaceted, ranging from how the food affects the individual, to how it affects others in this nation, other nations, and the earth as a whole. USDA Certified Organic foods could be a safe haven for many of these concerns, if only there was more transparency in the standards, and standards were not degraded by the amendments to the Organic Standard as put through the 2006 Agriculture Appropriations Bill.

B. Consumer Demographics and Demand

For whatever reasons Americans are choosing to purchase and consume organic foods and drinks, they make the choice despite higher costs generally associated with organic products. Much of the higher cost is assumed to be the result of smaller, less cost-efficient farming and production. The flipside is the assumption of more care, quality control, and support of local and/or family farms

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OF ORTHODOX BUDDHISM, 82 39–43 (2004), *available at* http://online.sfsu.edu/~rone/GEessays/BuddhismH.htm.

[46] Pew Initiative on Food and Biotechnology, *Genetically Modifying Food: Playing God or Doing God's Work?* (2001), *at* http://pewagbiotech.oorg/research/survey7-01.pdf.

[47] *See generally* http://www.religionlink.org/tip_040503c.php (collaboration of religious thought on the subject of diet, food, agriculture, and religious freedoms. *See also* http://environment.harvard.edu/religion/disciplines/policy/trends/technology.html.

[48] *Id.*

[49] Stephen F. Rosenthal, *Food For Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 GEO. WASH. L. REV. 951, 966 (1997).

and businesses. The less frequently cited reason is that the government does not generally subsidize organic farming. Larger and conventional agribusinesses reap the fruits of farm subsidies, of which all consumers pay. It is argued that the real price of food is not seen, nor is it accounted in the grocery bill, and that organic food reflects the actual price of food.

Even at a higher cost, many consumers are willing to pay for organic products, regardless of their socio-economic status. In 1999, a survey found that thirty one percent of heavy organic customers had less than $15,000 in household income per year. Another fifty two percent of heavy organic purchasers made less than $30,000 per year.[50] Tellingly, consumers are making a conscious decision to purchase organic products regardless of the food cost or the person's income level. Consequently, this conscious decision making begs the question: What do consumers expect from products they purchase to which the "USDA Certified Organic" label is affixed?

C. Consumer Expectations

American consumers in general do not expect to find synthetic substances on a product labeled "organic", especially when the product has the certified organic seal.[51] A 2005 Consumer Union survey established that 85 percent of consumers "expect to find few or no synthetic products in organic products."[52] The absence of pesticides and a guarantee that foods do not contain genetically modifies organisms are equally important to consumers.[53] This expectation is assumed to apply to certified organic products, and consumers are not alone in this perception. News reports, agencies, and comments from Congress, all assume that certified organic products are free from synthetic chemicals, pesticides, and genetically modified organisms.[54] This assumption, though well-founded, is incorrect; certified organic products do not guarantee freedom from these synthetic chemicals and bioengineered material.[55]

Thus, American consumers whose religious dietary constraints are implicated are unable to guarantee obedience to those constraints. Also, consumers paying premium prices to purchase organic food are not guaranteed the product, or the

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[50] *See* Friedland, *supra* note 9, at 381; *see also* Jack Whelan, *Wellness Myth #2: the Organic Consumer is Limited to a Specific Well-Defined Demographic,* 4 NAT. SENSIBILITY July 16, 2002, *available at* http://www.hartman-group.com/products/natsens/issueIV-10.html (in which heavy organic purchasers were defined as "consumers who bought at least twenty eight organic items a week").

[51] *See* Consumer Union, *When it Pays to Buy Organic, supra* note 4.

[52] *Id.*

[53] *Id.*

[54] *See, e.g.*, Friedland, *supra* note 9, at 403, n. 122 (statement from Rep. Gary Condit, Member, House Comm. on Agric., during the Proposed Organic Certification Program: Joint Hearing Before the Subcomm. on Domestic Mktg., Consumer Relations, and Nutrition. 101st Cong. 12 (1990)).

[55] *See* Consumer Union, *supra* note 4.

process behind the product, the reason that propels the purchase of the product in the first place. Both of these facts are in tension with protected First Amendment freedoms; the Free Exercise Clause and consumer and commercial speech freedoms. These tensions are addressed as possible remedies to the Agriculture Appropriations Rider—the bill that milks the vagueness of the OFPA for all it's worth, and allows more synthetic and genetic materials to be used in organic foods.

Farming, milk, and agriculture have had a long-standing relationship with the constitutional jurisprudence of this nation. Commerce Clause jurisprudence ruminated on a few cattle cases.[56] Constitutional law will guide the issue at hand and continue to shepherd agriculture law in the future as well. . While consumer knowledge and choice are implicated by the basic statutory principles of the Organic Foods Production Act, consumer knowledge is a working tenet of the Lanham Act, and also consumer's claim to the right of free exercise of religion.

IV. ANALYSIS

A. Free Exercise Claim

Recently, the free exercise of religion guarantee of the First Amendment has been implicated by the Board of Directors of the Realm Buddhist Association (DRBA) and other religious organizations opposed to genetic modification in organisms.[57] Since the USDA organic label cannot guarantee the absence of GM, with the strong possibility of genetic pollution or pollen drift, religious groups have targeted the Organic Act as the best way to insure this absence.

The DRBA formally stated that:

> genetic engineering of food is not in accord with the teachings of Buddhism. Buddhism considers genetic engineering of foods to be unwarranted tampering with the natural patterns of our world at the most basic and dangerous levels. DRBA believes that the lack of labeling of genetically engineered food is a de facto violation of religious freedom. Without labeling, Buddhists have no way to avoid purchasing foods that violate their basic religious beliefs and principles. And Buddhist vegetarians have no way to avoid purchasing foods that contain genes from non-vegetarian sources.[58]

As mentioned, vegetarianism is a tenet of many Buddhist sects, and the introduction of non-vegetarian sources would be a violation of this religious tenet. Many other religious organizations have expressed concerns as many have

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[56] *See* Dean Milk Co. v. Madison, 340 U.S. 349 (1951); H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949).

[57] *See* Epstein, *supra* note 32.

[58] *Id.*

religiously assigned dietary constraints. Most prevalent has been the Orthodox Jewish population's requirement for kosher foods, and Muslim population's requirement for halal food. Although much of both sets of religious law deal with the process of food preparation, both religions prohibit the ingestion of certain types of animals, chiefly pork. The concern is that in an effort to create positive traits for certain foods, genes from some of these prohibited animals will be introduced to modify the genetic makeup of the host food or ingredient to food. For example, some genetically modified tomatoes have shellfish genes in them, and shellfish are not considered kosher.[59] This can happen under the current EPA, FDA, and USDA regimes without consumer knowledge. To be sure, under the current regime, believers are either barred from the use of store bought foods, as genetically modification is so pervasive, or risk violating their religious beliefs. Consequently, to allow GM material into organic-labeled food, or not label GMO-laden products effectively, burdens the exercise of religion.

Although resisted by some constitutional scholars, vegetarianism has been cited as a secular belief on par with religion for purposes of evaluation of the Free Exercise Clause.[60] Whether the moniker of quasi or secular religion sticks, a faction of American consumers have similar concerns with genetically modified material included in ingredients and foods without means of detection. Similarly, people concerned with the long-term effects of genetic modification, and sundry objectors to scientists playing with the "natural order of things," have also raised claims to the non-guarantee of organic labeling. A Christian ecumenical organization stated, "It has yet to be demonstrated that agricultural genetic engineering, as it exists in the current system, safeguards the common good, human dignity, the sacredness of life and stewardship."[61] The document lists representatives from the Catholic, Episcopal, Evangelical Lutheran, Mennonite, Presbyterian and United Methodist churches. Lastly, a 2003 poll by ABCNews.com found that a "huge majority" of Americans favored GMO labeling, and a majority of Christians opposed moving genes from one species or organism to put into another.

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[59] *See* Natural Life, *Shop to Avoid Genetically Engineered Food, at* http://www.life.ca/nl/60/avoidbiotech.html. (Recounting the bio-engineered material currently in many tomatoes: Genetically engineered with bacteria-derived kanamycin resistance genes, Antisense backwards DNA, antibiotic marker genes, viruses, and DNA of flounder and North Atlantic shellfish. Shellfish is not kosher; meaning it is not allowed in the diets of Jewish adherents.)

[60] Patrick Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 33, (January 2005).

[61] Ecumenical Consultative Working Group on Genetic Engineering in Agriculture, http://www.ncrlc.com/ge-ag-webpages/ge-ag-forum-statement.html.

Several factions came together in *Alliance for Bio-Integrity v. Shalala*,[62] a claim against the Food and Drug Administration (FDA) demanding injunctive and declaratory relief from an FDA statement saying GMO foods had no health differences from non-GMO foods.[63] Specifically, the FDA had stated that genetically altered foods were to be generally recognized as safe (GRAS), and as such, not subject to regulation as food additives.[64] The Alliance for Bio-Integrity (Alliance) first claimed the FDA policy statement should have been subject to the requirements of a notice-and-comment period mandated by the Administrative Procedure Act (APA). Second, Alliance claimed the FDA's determination that the statement was not a major federal action, and thus did not require an Environmental Assessment, was arbitrary and capricious.[65] Third, Alliance claimed the failure to promulgate a labeling requirement for genetically engineered foods was arbitrary and capricious because there was widespread consumer interest in GM additions. Finally, the Alliance claimed the statement violated the free exercise of religion and the Religious Freedom Restoration Act (RFRA) when it did not require the listing of genetically modified material.[66] Although the plaintiff's contentions were founded on both scientific fears and religious assertions, they were summarily dismissed.[67]

The APA and NEPA claims are interesting and debatable, but current court jurisprudence of agency deference makes these decisions virtually unassailable even if standing is granted. The Free Exercise and RFRA claim could have gone the other way, and in light of current market pervasiveness of bioengineered material in food, a court should rule that the non-labeling burdens the free exercise of religion. To wit, even though the FDA's decision not to label GMO products is a seemingly "neutral law of general applicability,"[68] it may be argued that the decision is a substantial burden on the free exercise of religion. As a result, if challenged under RFRA now that GMO products are ubiquitous in the grocery store, a court may deem the non-labeling decision unconstitutional.

The court in *Alliance* evaluated the free exercise claim under the Supreme Court's decision in *Employment Division v. Smith*.[69] The court adopted Scalia's wording, stating that "neutral laws of general applicability do not violate the Free Exercise Clause, even if the laws incidentally burden religion."[70] Because the plaintiffs did not contend that the Statement of Policy was not neutral or generally

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[62] 116 F. Supp. 2d. 166 (D.D. C. 2000), (stating several parties, mostly scientists with a litany of different beliefs came together as parties against FDA's policy to not label genetically modified food).

[63] *Id.* at 170.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* at 181.

[68] *Id.* at 179.

[69] Employment Division v. Smith, 494 U.S. 872 (1990).

[70] *Alliance*, 116 F.Supp.2d. at 179.

applicable, the court rejected the claim.[71] Although this test is the current standard, it stands as an anomaly in the High Court's free exercise jurisprudence.[72] In *Smith*, the Court infamously employed the neutrality test to free exercise claims, and terminated the government's duty to establish a compelling interest for burdening religion.[73] As a result of the *Smith* decision,[74] Congress reacted by enacting RFRA.[75]

Congress reacted to the *Smith* decision out of concern that the Court did not afford enough protection to citizens against governmental burdens on religion. Under RFRA, courts are to insure that the government does not "substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability [unless the rule is] (1) in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest."[76] The Act explicitly states that the *Smith* decision must be ameliorated by bringing back the compelling interest element to governmental responsibility.[77] Congress cited the *Sherbert v. Verner*[78] and the *Wisconsin v. Yoder*[79] decisions as the correct approach to securing an "unalienable right."[80] Although the Supreme Court invalidated the use of the Act against state governments, the *Alliance* court recognized RFRA validity in federal courts. Given that the *Alliance* court evaluated the RFRA claim, it recognized validity in the Act. This test is not understood to be stricter than before the *Smith* decision.[81] In *Alliance*, the court noted the FDA conceded RFRA applicability, then assumed arguendo, that the plaintiffs' met the RFRA requirements of "sincerely held belief" and could demonstrate "honest conviction" in the desire to avoid genetically engineered products.[82] Under the statute, Alliance was required to prove that the FDA had substantially burdened plaintiffs' religion. Hearkening back to the Supreme Court decision of *Bowen v. Roy*,[83] the court stated that this is not proved merely by a showing that "the government refuses to conduct its own affairs in ways that comport with religious beliefs of particular citizens."[84] If the government were to comport with religious beliefs by conducting its affairs accordingly, the court thought that the government would be pushing the other

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[71] *Id.* at 179, 180.

[72] Garry, *supra* note 60, at 9, 10.

[73] *Id.*

[74] *Alliance*, 116 F. Supp. 2d. at 180.

[75] 42 U.S.C. § 2000bb (1993).

[76] *Alliance*, 116 F. Supp. 2d. at 180 (quoting RFRA, 42 U.S.C. § 2000bb-1(a–b) (1993)).

[77] 42 U.S.C. § 2000bb(b) (1993).

[78] 374 U.S. 398 (1963).

[79] 406 U.S. 205 (1972).

[80] 42 U.S.C. § 2000bb-1(a)(1)(1993).

[81] *Id.*; H.R Rep. No. 103-88, at 7 (1993).

[82] *Alliance*, 116 F. Supp. 2d. at 180.

[83] 476 U.S. 693, 699 (1986).

[84] *Alliance*, 116 F. Supp. 2d. at 180.

side, threatening the Establishment Clause.[85] The court then dismissed the cases cited by plaintiffs establishing precedent that the government had some obligation to facilitate the practice of religion.[86] The cases cited were dismissed because they involved prison inmate cases, and the court distinguished the cases because the plaintiffs were not captive and their "liberty is not restricted."[87]

As a result, the court rejected the RFRA claim, stating that FDA's decision to not label GMO products did not equate to a substantial burden to religious belief, nor did it cause the abandonment of religious beliefs or practices. Instead the court characterized the status of not knowing whether any store-bought food, drink, or body care product went against the tenets of ones religion as a "potential inconvenience."[88] The court denied the relief requested under RFRA, stating "the Policy Statement does not place "substantial pressure" on any of the plaintiffs, nor does it force them to abandon their religious beliefs or practices."[89] It is this "substantial burden", "substantial pressure" or concept of liberty not being restricted that must be assessed. A new evaluation is warranted because the market place has changed in the last six years, and the organic standards no longer offer refuge for religious exercise of the type in question.

The *Alliance* court's evaluation of the effect of the FDA ruling not to list genetically modified material in foods and products on religious exercise is likely outmoded. The court's decision may simply reflect a restricted temporal look at the known market share of products containing genetically modified organisms at that time, since the face and options of the supermarket have changed dramatically in the last decade in this field.

In order for a RFRA claim to succeed, a court must find first that a substantial burden has been placed on the free exercise of religion. As the *Alliance* court noted, the *Sherbert* and *Yoder* decisions are illustrative in this area. Once a substantial burden is established through the placement of "substantial pressure" or otherwise, the government action can still be excused if it has a compelling reason for the burden, and a less restrictive means to this compelling interest does not exist.[90]

As indicated, genetically modified organisms now permeate almost every aspect of the American consumer's experience. To illustrate the exponential growth, it has been reported that genetically engineered plants were grown on over one hundred and three million acres of American farmland in 2003, up from a mere six million acres in 1996.[91] Moreover, the percentage of acreage devoted to

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[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* at 181.

[89] *Id.*

[90] *Sherbert*, 374 U.S. 398 (1963).

[91] Gregory N. Mandel, *Gaps, Inexperience, Inconsistencies, and Overlaps: Crisis in the Regulation of Genetically Modified Plants and Animals* 45 WM AND MARY L. REV. 2167, 2178 (2004). *See also* PEW INITIATIVE ON FOOD AND BIOTECHNOLOGY, FACTSHEET:

genetically engineered crops is rapidly increasing each year, with worldwide acreage devoted to GM crops increasing forty fold over the last eight years. Similarly, in 2004, 85 percent of soybeans, 45 percent of corn, and 76 percent of cotton grown in the United States were grown from genetically modified seeds.[92] Furthermore, in 2004, the Grocery Manufacturers of America estimated that seventy percent of food on grocery store shelves contain ingredients from genetically modified crops, more recent studies have put this number near eighty percent, with the likelihood to go higher each year.[93] These facts beg the questions: Are the religious *Alliance* plaintiffs not captive and confined to certain activities, and can a court still say that "liberty is not restricted"?

For example, the Buddhist consumer, who must avoid genetically modified products because of religious concerns, is forced into a religious roulette of sorts if she buys food and products from a store. This congregation's other option, if it can be considered as such, is to not purchase food from the supermarket or grocery store at all. Religious adherents would have to grow their own fruit and vegetables, raise their own animals, or buy from similarly-minded growers, and resolve to exclusive consumption from the source. Even so, the latter alternative might not ensure that the religious requirements are met, as exemplified with the proliferation of kosher fraud and early organic fraud. Moreover, many people in urban areas and people that do not own landed property, do not have access to land in which food can be grown. Even if people did own or have access to land, rarely do people have enough land to sustain oneself or family, nor the time, resources or training. In sum, it is highly unlikely to go to the supermarket and find a conventional product without genetically modified ingredients. Since even certified organic products cannot guarantee freedom from this bioengineering pollution, a religious adherent must find another alternative. The alternatives are not available ornot feasible to many that desire to obey the tenets of their religion.

The *Alliance* court looked to the Supreme Court's decision in *Thomas v. Review Bd. of Ind. Employment*[94] to define substantial pressure, which could determine a RCRA violation. In *Thomas*, a religious adherent chose not to work making military armaments and was consequently fired and denied unemployment compensation benefits because of the decision to adhere to a religious belief. The Supreme Court found that when a state puts substantial pressure on an adherent to modify her behavior and violate her beliefs, a burden exists. Furthermore, even though the "compulsion is indirect, the infringement upon free exercise is nevertheless substantial."[95] Additionally, the *Sherbert* court explained that even if the conferred burden is not a right but only a privilege, a burden may still exist. This burden is apparent when a decision must be made to either follow a religious

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Genetically Modified Crops in the United States, *available at* http://pewagbiotech.org/resources/factsheets/display.php3?FactsheetID=2 (Aug. 2004).

[92] *Id.*

[93] Mandel, *supra* note 89 n.19, (more recent studies have estimated 80 percent of grocery products).

[94] 450 U.S. 707, 718 (1981).

[95] *Id.*

precept and forfeit benefits, or abandon a precept of the religion to receive the benefit.[96] Buddhists, and other religious observers cited earlier, must make a decision as to whether they will find a source of authentic organic food (whether by producing their own or locating an independent distributor) in order to consume a GMO-free diet, or whether they will abandon this attempt, for the benefit of being able to purchase food from a supermarket. Consequently, a court with the knowledge of the ubiquity of genetically engineered products would likely admit that this creates a "substantial pressure on an adherent to modify his behavior and to violate his beliefs."[97] Hence, FDA's decision to not label genetically modified products, coupled with USDA's decision not to protect consumers from GMO's presence in certified organic products amounts to more than the "potential inconvenience" designated by the *Alliance* court.[98] The two decisions amount to a substantial burden on the free exercise of religion.

Once a substantial burden has been determined, the next step the court must look to under RFRA is to determine whether a compelling governmental interest exists. In *Alliance*, the court did not reach this question, and did not mention what interests, if any, the FDA proffered. In *Yoder*, the High Court stated that the "essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."[99] In order to forego postulation, an assumption that the FDA met this burden, although specious, will be assumed.

Lastly, under RFRA, the regulation must also be narrowly-tailored; that is, the least restrictive means of regulation.[100] The simple task of making the information about genetically modified ingredients available on a website rather than the printing on the packaging of the product is a possible remedy. Another less-restrictive remedy would be to impose this less-than-onerous responsibility of publishing genetically-modified ingredients onto food manufacturers. Again, a website so that the information is innocuous, and the religious adherent would have to take affirmative action to receive the information should suffice for the presumed compelling government interests.[101] As this is a less restrictive alternative to a religious adherent, the last prong of the RFRA analysis fails, and a court should find the FDA in violation. Thus, if another claim is brought that is similar to the Alliance's RFRA claim of burdening religious adherents by

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[96] Sherbert v. Verner, 374 U.S. 398, 404 (1963).

[97] *Id.*

[98] *See generally*, Matthew Rich, *The Debate Over Genetically Modified Crops in the United States: Reassessment of Notions of Harm, Difference, and Choice*, 54 CASE W. RES. 889, 907 (2004).

[99] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[100] 42 U.S.C. § 2000bb (1993).

[101] The FDA requires an affirmative statement when milk that comes from cows not treated with rbST, and displays this fact on packaging, has the additional burden of stating the disclaimer that "no significant difference has been shown between milk derived from rbST treated and non-treated cows". A similar statement could be mandated if the FDA allowed for products to proclaim "GMO-free" on packaging.

nondisclosure of religiously-prohibited ingredients, with pervasiveness of said ingredients at this time, a court should rule under RFRA that a violation of a primary freedom has occurred.

Although the *Alliance* court did not distinguish this case, the High Court has made distinctions in ruling on the "form of governmental restraint on religious practice, rather than its effect."[102] This distinction in form fails to carry the day over the substance in the instant dietary constraint case. First, the instructive case, *Lyng v. Northwest Indian Cemetery*,[103] can be distinguished as a federal land-use decision, altogether different from a mere agency designation. Also, as Justice Brennan mentioned in the dissent, the effect of the governmental burden on religion should be where the analysis occurs, not the arbitrary distinction of forms.[104] Lastly, the Court has been reticent to apply RFRA analysis to beliefs that are somewhat amorphous. The Dharma Realm Buddhists, and others have concrete, well-established religious tenets that are substantially burdened by agency acquiescence to the biotech and agribusiness lobby.

In *Lyng*, an Indian tribe brought an action seeking protection of their religious exercises, when the government attempted to put a road and logging procedure through a sacred area used by the tribe for spiritual practices requiring isolation.[105] Justice O'Connor categorizes for the Court in *Lyng* that the case is one of exaction, somehow different from other burdens on religious practices. She referred to a remark mentioned in the Douglas concurrence in *Sherbert*; that the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.[106] Although stated, the reasoning is betrayed by the focus on the land-use issue, the visible reasoning for the denial of religious protection. Justice O'Connor colors this argument when she stated, "such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property," more than "17,000 acres of public land."[107] O'Connor then candidly quoted her concurring and dissenting opinion in another exaction case; "Whatever rights the Indians have to use of the area, however, those rights do not divest the government to use *what is, after all, its land.*"[108]

In *Bowen v. Roy*, the Supreme Court case to which Justice O'Connor referred, Indian parents that wanted to receive welfare benefits, did not want a Social Security number assigned to their daughter, Little Bird of the Snow, as they believed the number would rob the child's spirit.[109] Even though Bowen and a case that asks the government not to burden the practice of religion by simply

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[102] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 467 (1988) (Brennan dissent).

[103] 485 U.S. 439 (1988).

[104] *Id.* at 467.

[105] *Id.* at 442.

[106] *Id.* at 451.

[107] *Id.* at 453.

[108] *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 724-727 (1986) (emphasis added)).

[109] Bowen v. Roy, 476 U.S. 693, (1986).

following the normal labeling mandates of food products, (e.g. "not from concentrate", percentage of fruit or juice, or "may contain peanuts"), can be grouped together, Bowen is much different from a dietary constraint case. In *Bowen*, plaintiffs asked for an exception from an established government program that is used to create verification and benefits for citizens. In a religious dietary constraint case as mentioned above, plaintiffs ask to not be an exception from a program normally used for just the purpose the plaintiffs seek. As a result, Bowen-type analysis, as unfounded as it is,[110] still does not apply.

1. Protection of Commercial Speech

Finally, although a religious claim for free exercise protection should survive, it might be balanced against the First Amendment rights of a company or manufacturer in it's right to commercial speech. This analysis took place when the state of Vermont promulgated a statute requiring milk products to label the presence of rGBH.[111] As a result of the statute, dairies filed suits claiming it was unconstitutional, since the statute compelled them to speak against their will. Although the state asserted a strong interest in consumer and public right to know, the court struck it down, ruling the interest was insufficient to justify compromising the protected constitutional rights. Although this is a balance to keep in mind, other courts have dismissed other dairy claims of the same nature possibly in light of consumer dissatisfaction of synthetic additives in foods. Moreover, if the government required only that a listing be made somewhere, be it cyberspace or a register somewhere, and not explicitly printed on a label, a valid claim for commercial speech abridgement could likely not occur.

B. Consumer Protection through the Lanham Act

What consumers of certified organic products expect and what they are guaranteed may sometimes diverge, even on fundamental issues such as genetic modification, and treatment of animals in milk and egg production. The Lanham Act is certainly in tension with the current consumer perception of organic labeling. As mentioned previously, most American consumers think that USDA Organic certification and bioengineered or genetically modified products are mutually exclusive. This is simply not the case with the any of the USDA organic classifications. The first reason is that the current organic standards are strictly process-based, regulated only by how the food is grown, not by the final result. Although contemplated by legislature, routine testing of the final product is not required for the Organic certification. Because the previously mentioned pervasiveness of genetically modified crops threatens to pollute organic products through pollen drift, and since no testing takes place on the end result, bioengineered pollution may exist in crops passed to the consumer without

[110] *Lyng*, 485 U.S. at 467.

[111] *See* Int'l. Dairy Foods Assn. v. Amestoy, 92 F.3d. 67 (2d Cir. 1996).

detection. This is also true for pesticide and herbicide drift as well. While the chemicals may collect in smaller percentages than conventional produce, nonetheless, because many synthetic chemicals do not break down quickly and persist in groundwater and soil, chemicals may still exist on organic produce.

Secondly, even were pollen and pesticide drift not pervasive, the little-known fact that even the USDA certified organic allows for five percent artificial and synthetic materials in products coupled with the permissive amendment riding on the 2006 agriculture appropriations bill, creates a scenario much different from that perceived by the organic consumer. Consequently, the Lanham Act is implicated, and injunction of the organic label could result.

The Lanham Act[112] provides that any person who uses in commerce any false or misleading representation of fact may be subject to civil liability.[113] This Act has been interpreted to impose liability in instances where labeling on a product is not literally false, but proves to be misleading or confusing to consumers.[114] To prove liability through the Lanham Act, one must employ consumer surveys that show the substantial misperception.[115] A court will look at every action on a case by case basis, but many Lanham Act claims have been proved by showing that merely 15 to 25 percent of the consumers polled were confused.[116] Consequently, the producer could be enjoined from using the term causing the confusion. Claimants may also be entitled to recover the defendant's profits, any damages sustained by the plaintiff, and the costs of the action. The evaluative process entails first establishing that there has been a Lanham Act violation, then, a claimant must prove the existence of actual damages, and a causal link between those damages and the violation.[117]

The USDA Certified Organic label is certainly misleading, as was inferentially recognized in *Harvey v. Veneman*,[118] the court decision that launched a thousand briefs from big agribusiness and led ultimately to the Agriculture Appropriation rider. In *Harvey*, an organic blueberry farmer in Maine challenged 28 of the 38 uses in the OFPA.[119] Harvey further challenged the USDA Secretary decisions in making regulations outside the scope of its authority. Moreover, Harvey challenged the recent allowance of organic dairy cattle milk to be marketed as organic after only three months of organic feed, whereas the OFPA clearly stated herds must be fed for twelve months to be marketed as organic milk.[120] Harvey stated that he began his lawsuit because the "USDA was moving

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[112] 15 U.S.C. § 1125 (2006).

[113] *Id.*

[114] *Id.*; *see also* Thomas W. Edman, *Lies, Damn Lies, and Misleading Advertising: The Role of Consumer Surveys in the Wake of* Mead Johnson v. Abbott Labs, 43 WM. & MARY L. REV. 417, 429–30 (2001).

[115] *Id.*

[116] *Id.*

[117] 15 U.S.C. §§ 1117, 1125 (1998).

[118] 396 F.3d 28, (C.A.1, 2005).

[119] *Id.* at 35. *See also* 7 CFR §§ 205.600(b), 205.605(b).

[120] *Id.* at 42. *See also* 7 USC § 6509(e)(2).

steadily away from organic integrity as envisioned by people who got Congress to approve OFPA in 1990."[121] Harvey convinced the court that organic integrity was being undermined by policy decisions of the Secretary, and the court held several claims in his favor. In response, the OTA tried to find a Senator to sponsor their amendment to OFPA that would eliminate the ban of synthetic ingredients.[122] Although no Senator would sponsor that amendment, the Senate added a requirement to the ag appropriation bill to assess the effect of the court order on the industry. This proposed rider reverses the ruling in *Harvey* to ban the use of synthetic substances, and it allows the Secretary to approve new synthetic ingredients if none are available. All this can be done without the review of the National Organic Standards Board advisory group.[123] This means that over 500 of the chemically-derived synthetic substances that the industry has proposed could be added to products under the USDA Organic label, without any public discourse. Hence, the sneak attack on the Organic Food Production Act.[124]

Furthermore, a 2005 survey found in Consumer Reports magazine, conducted by the Consumer's Union, found that 85 percent of consumers expect to find few or no synthetic substances in organic products.[125] Currently, even USDA's highest organic standard cannot guarantee this perception, and certainly not when the 2006 rider allows over 500 more synthetic products as ingredients into USDA Certified Organic products. Hence, a court could likely deem the current situation fulfills the first requirement of a Lanham Act violation, as a higher percentage of consumer confusion exists than many other successful claims.[126]

To succeed with a Lanham Act claim, the plaintiff bears the burden of proving a causal connection between its harms and the defendant's profits required by the second prong of Lanham Act evaluation.[127] If consumers were allowed standing under the Lanham Act, a consumer could prove causality by showing the difference in prices of organic products purchased in reliance on the absence of synthetic or GM ingredients and standard products, and the sum of the difference in money spent over time. Unfortunately, although the language of the Act says anyone, no Lanham Act jurisprudence has allowed consumers by

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[121] *See* Arthur Harvey, CorpWatch, *Organic Farmer Arthur Harvey Speaks Out on the Threat to Organic Standards*, Sept. 23, 2005, *at* http://www.organicconsumers.org/SOS/arthurharvey092505.cfm.

[122] *Id.*

[123] *See* 7 U.S.C. §§ 6510(a)(1), 6517(c)(1)(B) (2004).

[124] *Id.*

[125] Carolyn Dimitri & Catherine Greene, *U.S. Dept. of Agric., Recent Growth Patterns in the US Organic Foods Market, available at* http://www.ers.usda.gov/publications/aib777/aib777b.pdf (last visited Mar. 3, 2006.)

[126] Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co., 290 F.3d 578, 594 (3d Cir. 2002) (survey evidence demonstrating that 15percent of the respondents were misled was sufficient to establish the "actual deception or at least a tendency to deceive a substantial portion of the intended audience," necessary to establish a Lanham Act claim for false or misleading advertising.

[127] *See* 15 U.S.C. § 1125 (2006).

themselves, or accompanied by the state, to have standing for a false advertising claim. The Lanham Act protects consumers peripherally, through competitor actions. As a result, to guarantee standing and ability to prove harm, a competitor of the defendant must bring the action. Actual damages must be proven to assert a claim.[128] To show causal connection between a competitor's harms and a defendant company's profit, a similar claim to Harvey would suffice. The plaintiff for these purposes must be involved in the organic industry and Harvey was an organic blueberry farmer. Secondly, the plaintiff must assert that because of the public misperception, the defendant enjoys more profits from the sale of the same product, but at the lower organic standard, to the detriment or loss of market share of the plaintiff. That is, a blueberry farmer who uses completely organic processes, and ensures a completely organic product, free from any GM material, can prove that there would be a higher demand for plaintiff's blueberries, but for the defendant's enjoyment of public's incorrect assumptions.

This can be readily envisioned where organic family-farm dairies trying to compete with the mammoth Horizon Milk, (which occupies 70 percent of the market and profits under the shadow of imprecision of the organic standard).[129] Organic dairies require pasture-fed cattle, Horizon passes this requirement by putting the cattle in open-air feed lots much of the time, and periodically revolving small portions of cattle out to "pasture" to graze. Organic cattle may only be fed organic feed free from synthetic chemicals, hormones, or antibiotics. Organic dairy cattle may not be fed genetically modified grain or animal byproducts. Conversely,conventional farming weans calves on blood to bulk them up quickly and inexpensively. The process of feeding cattle animal byproducts also exposes the risk of transmitting mad cow disease.[130] Many consumers buy organic milk to avoid these exact risks and practices. If Horizon, chooses to compromise consumer expectations with a colorable claim of conformity to OFPA, it may be subject to a Lanham Act action. Any organic dairy farmer may be considered a competitor and thus have standing for the suit. The plaintiff must show that the defendant practices are misleading to the public, the harm and causality. A court could take its pick as to reports on consumer perceptions of cattle treatment and diet from organic dairies and would likely find the requisite substantial confusion. The plaintiff would only have to assert damages. To factor damages, a plaintiff could sum the difference in cost of leasing pasture for each head of cattle, and the

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[128] *See* Xoom, Inc. v. Imageline, Inc., 323 F.3d 279, 286 (4th Cir. 2003) (describing the requirements for obtaining damages under the Lanham Act as "plaintiff may not recover if he fails to prove that the defendant's actions caused the claimed harm," and alleged damages are "loss of goodwill, diminution in the value of artwork and graphic image library, and loss of income, contains no evidence that Imageline suffered actual damages.").

[129] Carmelo Ruiz-Marrero, *Clouds on the Organic Horizon: Is Organic Farming Becoming the Victim of its Own Success?* CorpWatch (Nov. 25, 2004) (explaining that Horizon controls 70 percent of the organic dairy market and was acquired by Dean Foods in 2003, and some fear is moving in the direction of industrial feedlot factory farms), *available at* http://corpwatch.org/print_article.php?id11712.

[130] *Id.*

lessened cost of defendant's cost per head of cattle for the revolving feed lot. A quantified loss of consumer goodwill may bolster this causal connection as well. As shown, it is likely that a plaintiff could satisfy its burden and therefore carry a sustainable claim under the Lanham Act. In order to protect consumers' expectations and guarantee the perceptions we have of organic products, regardless of the reasons for endorsement of organic products, at least the threat of the Lanham Act should be introduced.

V. RECOMMENDATIONS

When grocery shopping, most consumers make many decisions. It behooves our nation and our citizens to be as informed as possible about the consequences of the decisions we make. Informed decision-making is a lofty goal that is threatened when we cannot be guaranteed the results for which we have paid. People purchase organic products for many reasons; for health, environment, nature, taste, conscience, support, nostalgia, philosophy, creed, spirituality, and religion as a start. When purchasing for religious reasons, ones spiritual well-being lies in securing these specific expectations. The current Organic Foods Production Act, coupled with the revelation by conventional agribusiness that money can be made in this market and the amending rider of 2006 frustrate the purpose of this guarantee.

Small-scale organic farmers have been put in the thorny position of either making noise when standards have been compromised, at the risk of declining consumer confidence in organic products, or continuing to watch as standards slip. As a result, tort liability actions have been difficult to pursue and prevail in when pesticides or genetic pollution drifts to organic crops. To do so could divulge how little consumer confidence may be warranted. For obvious reasons, the same is true for consumer education programs or even general bad press about the newly hatched bad actors. Likewise, political campaigns are risky as they require people to know less favorable facts in order to create an impetus for change. Because of this, the two recommendations are seemingly single-seated vehicles for solitary actors.

The Lanham Act will work to tighten the organic standard, for organic industry farmers, producers, and suppliers, but only peripherally for consumers themselves. The Free Exercise claim is a possible remedy for a segment of consumers, which, although narrow, is important. The *Harvey* case arrested the slippage of the organic standards, but put into motion the agenda of larger interests. As the market continues to grow, so will the stakes, and a larger array of mechanisms will be needed to guarantee consumers' expectations. Hopefully, the expanding market share will foster an awareness of the issues and consequences of consumption patterns and practices. As Aldo Leopold posited, a spiritual danger exists in supposing that "breakfast comes from the grocery store."[131]

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[131] ALDO LEOPOLD, A SAND COUNTY ALMANAC: WITH ESSAYS ON CONSERVATION FROM ROUND RIVER 6 (Oxford University Press, 1970).