Supreme Court grants landowners further protection against environmental regulation

The Supreme Court has granted further protection to landowners who maintain that environmental regulations have diminished the value of their property. Issued on June 28, 2001, the Court's ruling in *Palazzolo v. Rhode Island* concerned situations in which a landowner purchases land with the knowledge that it is subject to regulation such as restrictions on developing wetland areas. 2001 U.S. Lexis 4910 (June 28, 2001). In a split decision[1], five justices concluded that even when land use restrictions are in place before a landowner takes title to the property, they can still amount to a taking of property without compensation in violation of the Takings Clause of the Fifth Amendment.

Background

Petitioner Anthony Palazzolo owned a waterfront parcel of land in the town of Westerly, Rhode Island. In order to acquire the land at issue, Palazzolo and several associates formed a corporation in 1959. *Id.* at 14-15. In the first decade of owning the property, the company subdivided the parcel into eighty lots. *Id.* at 15. After engaging in several transactions, the company was left with seventy-four lots, which together encompassed approximately twenty acres. *Id.* Most of the property was a salt marsh that was subject to tidal flooding and would have required considerable fill before any form of structure could be built upon it. *Id.*

During the 1960s, the company submitted several applications seeking to fill the property for various development uses. *Id.* at 16. None of the applications were granted, partially because of the potential for adverse environmental impacts. *Id.* The corporation failed to contest any of the rulings. *Id.*

For nearly a decade, no further attempts to develop the property were made. *Id.* However, two events important to the issues presented occurred. First, in 1971, a newly created Rhode Island Coastal Resources Management Council ("Council") promulgated regulations that designated salt marshes like those at issue as protected "coastal wetlands" and greatly limited their development potential. *Id.*

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U.S, Canada face biotech wheat showdown

The United States and Canada appear to be headed toward a showdown in the biotechnology arena. With global wheat markets at stake, the decision by one of these trade competitors to adopt biotech wheat will be critical to the decision of the other. Both the US and Canada produce spring wheat and compete for the same markets.

Biotech wheat won't be commercially available in either country until around 2003, at the earliest, when Monsanto will have Roundup Ready wheat ready for release in both countries. The wheat will be genetically modified to be resistant to glyphosate, which kills both grass and broadleaf weeds. More than likely, the US will have the opportunity to decide before Canada whether to adopt biotech wheat. Whether that decision is the right one, however, will depend on what Canada will do.

Bill Wilson, Professor of Agricultural Economics at North Dakota University (NDSU) in Fargo, has developed a model to evaluate the strategic moves of both countries in adopting biotech wheat. His conclusions:

- If neither country adopts biotech wheat when it becomes commercially available, neither will have a payoff or net benefit.

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IN FUTURE ISSUES

Second, in 1978, the company's corporate charter was revoked for failure to pay corporate income taxes. *Id.* at 17. As a result, title to the property passed by operation of law to Palazzolo as the corporation's sole shareholder. *Id.*

Starting in 1983, Palazzolo renewed his efforts to develop the property. *Id.* When two applications were denied on the basis that the proposed alterations would conflict with the Council's Coastal Resources Management Plan, Palazzolo filed an inverse condemnation action in Rhode Island Superior Court asserting that application of the Council's wetlands regulations to his land constituted a taking of his property without compensation in violation of the Fifth and Fourteenth Amendments. *Id.* at 18-19. The suit alleged that the regulations deprived Palazzolo of "all economically beneficial use" of his property, which required compensation under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *Id.* at 19. He sought $3.15 million in damages, which was the appraised value of a 74-lot subdivision. *Id.*

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The trial court ruled against Palazzolo. *Id.* On appeal, the Rhode Island Supreme Court affirmed, reciting several grounds for rejecting Palazzolo's claim. *Id.* First, the court held that Palazzolo's suit was not ripe. *Id.* Second, it concluded that Palazzolo had no right to challenge any regulations that were enacted before 1978, when he took title to the property. *Id.* Third, the court held that Palazzolo's allegation of deprivation of all economically beneficial use was contradicted by undisputed evidence that he had $200,000 in development value remaining on an upland parcel of the property. *Id.* at 20. In addition, it concluded that beyond the question of denial of all economic use, Palazzolo also could not assert a takings claim under the more general test of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Specifically, the court held that Palazzolo could have no "reasonable investment-backed expectations" that were affected by this regulation because it predated his ownership of the property. *Id.*

Upon review of the state court decision, the United States Supreme Court reversed on the question of ripeness as well as the issue of whether Palazzolo's takings claim was barred by regulations predating his acquisition of the property affected. *Id.* However, it affirmed the state supreme court's conclusion that Palazzolo was not deprived of all economic use of his property because the value of the upland parcel was significant. *Id.* It then remanded the case for further consideration under the principles set forth in *Penn Central*. *Id.*

Analysis

Ripeness

In addressing whether Palazzolo's claim was ripe for review, Justice Kennedy, writing for the majority, began with the general principle that a takings claim that challenges the application of a land use regulation is not ripe unless the agency charged with implementing the regulations has reached a final decision regarding application of the regulations to the property at issue. *Id.* at 23 (citing *Williamson County Reg'l Planning Comm'n v. Hamilton County Bank of Johnson City*, 473 U.S. 172 (1985)). A final decision occurs only when the responsible agency determines the extent of permitted development on the land. 2001 Lexis U.S. 4910, at *24 (citing *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986)).

Here, the Court concluded that Palazzolo obtained such a final decision when the Council denied his 1983 and 1985 applications for development. 2001 U.S. Lexis 4910, at *24. It held that the state supreme court erred in ruling that, even after those denials, doubt remained as to the extent of development the Council would allow because Palazzolo had failed to explore the possibility of other uses for the property that would involve filling substantially less wetlands. *Id.* Both of the Council's decisions made plain that it interpreted the regulations to bar Palazzolo from engaging in any filling or development on the wetlands. *Id.* at 28. Because there was no doubt that the Council would have denied him the right to fill the land for any ordinary land use, no further permit applications were necessary to establish this point. *Id.* at 29.

In holding that Palazzolo's claim was ripe, the Court rejected an argument that Palazzolo's suit was premature by virture of his failure to seek permission to develop only the upland portion of his property, which did not contain wetlands. *Id.* at 32-33. It concluded that no further efforts by Palazzolo were necessary since there was no genuine ambiguity in the record as to the extent of permitted development on the upland parcel. *Id.* In addition, the Court dismissed a contention that the case was not ripe because Palazzolo had never filed an application to build a 74-home subdivision on the basis that such an effort would have been futile in light of the Council's continual rejection of his applications to fill the land. *Id.* at 36-37.

Justice Ginsburg filed a dissenting opinion, joined by Justices Breyer and Souter, reasoning that Palazzolo had not obtained a final decision for review because there was undisputed evidence in the record that it would have been possible to build at least one single-family home on the existing upland area.

Land use regulation predating acquisition of property

Having determined that Palazzolo's action was ripe for review, the Court then rejected the notion that a purchaser or successive title holder like Palazzolo is deemed to have notice of an earlier-enacted restriction and is therefore barred from claiming that application of the regulation effects a taking. In analyzing this question, the Court framed the state's argument as follows: "Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation." *Id.* at 38.

The Court rejected this logic for several reasons. First, the Court noted that while a landowner's right to improve property is subject to the reasonable exercise of state authority, including the enforcement of valid land use restrictions, the Takings Clause allows a landowner in certain circumstances to assert

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that a particular exercise of the state's regulatory power is so onerous as to compel compensation. *Id.* at 39. And, an unreasonable enactment does not become less burdensome simply through the passage of time or title. *Id.* The Court explained that if it were to accept the state's argument, the state would in effect be allowed to put an expiration date on the Takings Clause. *Id.* "That ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Id.*

Second, the Court reasoned that the state's rule would critically alter the nature of the property because a newly regulated landowner would be stripped of the ability to transfer the interest that was possessed prior to the regulation. *Id.* at 40. It also would prejudice any landowner who at the time of enactment of the regulation attempted to challenge the regulation but did not ripen his or her claim because compensation could not be asserted by an heir or successor and, therefore, could not be asserted at all. *Id.*

Finally, the Court held that the proposed rule was capricious in its effect because an owner with the resources to hold onto a piece of property would be in a significantly different position than an owner with a need to sell. *Id.* In so doing, it explained: "The Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *Id.*

Reversing the state supreme court's ruling on this question, the Court stated that its decision in *Nollan v. California Coastal Comm'n*, 438 U.S. 825 (1987) was controlling precedent for its conclusion. *Id.* at 42. There, one of the questions presented was whether it was consistent with the Takings Clause for a state regulatory agency to require oceanfront landowners to provide lateral beach access to the public as a condition for a development permit. Justice Brennan dissented observing that it was a policy of the California Coastal Commission to require the condition and that the Nollans, who purchased their home after the policy went into effect, were on notice of such restriction. However, a majority of the Court rejected the proposition stating: "So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.* (quoting *Nollan*, 438 U.S. at 834).

Several members of the Court filed separate opinions on this issue. In her concurring opinion, Justice O'Connor argued that the majority's opinion does not mean that the timing of the regulation's enactment is wholly immaterial to the analysis of whether a taking occurred. 2001 U.S. Lexis 4910, at *49. The Takings Clause requires careful examination and weighing of all relevant circumstances in a particular case. *Id.* at 50 (citing *Penn Central*, 438 U.S. at 124). However, the state supreme court erred when it elevated the question of whether Palazzolo's investment-backed expectations were reasonable in light of the regulation's enactment date to dispositive status. *Id.* at 51. In reaching this conclusion, Justice O'Connor reasoned that evaluation of the degree of interference with investment-backed expectations is but one factor to be considered in answering the question of whether application of a particular regulation to a particular piece of property "goes too far." *Id.* at 52. If investment-backed expectations were given exclusive significance in the analysis and existing regulations were to dictate the reasonableness of those expectations in every instance, the state would wield too much power to redefine property rights upon passage of title. *Id.* at 52-53. At the same time, however, Justice O'Connor further noted that if existing regulations do nothing to inform the analysis, then some property owners might receive a windfall. *Id.* at 53. Thus, the temptation to adopt a per se rule in either direction must be resisted. *Id.*

In a separate concurrence, Justice Scalia responded to O'Connor, stating that the fact that a restriction existed at the time the purchaser took title should have no bearing upon the determination of whether the regulation is so substantial as to constitute a taking. *Id.* at 57. Dismissing O'Connor's concern for a windfall to landowners under a per se rule, Scalia explained that the investment-backed expectations that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. *Id.*

Lastly, Justice Stevens filed a dissenting opinion in which he argued that while a succeeding owner has the right to challenge unreasonable limitations on the use and value of his land, it by no means follows that he may obtain compensation for a taking of property from his predecessor in interest. *Id.* at 76. "A taking is a discrete event," he explained, "a governmental acquisition of private property for which the state is required to provide just compensation. Like other transfers of property, it occurs at a particular time, that time being the moment when the relevant property interest is alienated from its owner." *Id.* With this in mind, it is the person who owned the property at the time of the taking who is entitled to recovery. *Id.* at 77. In this case, Stevens concluded that Palazzolo was without standing to recover compensation for the value of the property taken because it was owned by the corporation at the time the regulation was enacted. *Id.* at 80.

Deprivation of all economic use

Although a majority of the Court held that Palazzolo was not barred from bringing a takings claim by the regulation predating his acquisition of the property, the Court then affirmed the state supreme court's ruling that all economically beneficial use was not deprived because the uplands portion of the property could still be improved. *Id.* at 45. In so doing, it rejected Palazzolo's contention that even though the upland parcel retained $200,000 in development value, he suffered a total taking and was entitled to compensation under *Lucas*. *Id.* The Court acknowledged that under *Lucas* the Council cannot sidestep compensation "by the simple expedient of leaving a landowner a few crumbs of value." *Id.* (quoting *Lucas*, 505 U.S. at 1019). However, unlike *Lucas*, this was not a situation where the landowner was left with a token interest. 2001 U.S. Lexis 4910, at *46. To the contrary, application of the Council's regulation would permit Palazzolo to build a substantial residence on an 18-acre parcel. Such restriction does not leave the property "economically idle." *Id.*

Having rejected Palazzolo's takings claim under *Lucas*, the Court remanded his suit for consideration by the lower court under the more general takings principles set forth in *Penn Central.*

Impact on agricultural landowners

This ruling was not a clear-cut victory for property owners in that the Court concluded that Palazzolo had not succeeded in demonstrating that he was deprived of all economic use of his waterfront property. Nevertheless, the decision is a potential bright spot for farmers and ranchers seeking to curtail government encroachment on environmentally sensitive, privately held land in two ways. First, farm and ranch properties are often owned and worked by the same family for generations. As such, there are numerous transfers of property among individuals, family corporations, and family partnerships. The Court's decision in *Palazzolo* provides that producers who take title to property that is affected by land use regulation predating their acquisition are not automatically barred from compensation under the Takings Clause.

Second, relative to most members of the development community, agricultural producers generally lack the financial resources to engage in extended administrative proceedings to challenge regula-

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U.S. farm policy: are new approaches needed?

By Dr. M. C. Hallberg

Current farm legislation enacted in 1996 is slated to expire in 2002. Legislators and the Administration are already at work preparing for the debates that will lead to a new Farm Bill. Issues to be faced include what level of support should be provided farmers, which farmers (large, small, limited-resource, grain, livestock, etc.) should be supported, should strong supply control measures be implemented, should preserving the rural landscape and the rural community be a consideration, should a market-oriented approach be pursued, what role should the environment play in the upcoming decisions, and should global free trade in agriculture be supported or discouraged?

The majority opinion of the 21st Century Commission on Production Agriculture (authorized by the 1996 Farm Act) called for a continuation of traditional income support programs. Recommendations included legislative approaches in the areas of assuring an income safety net for producers, enhancing risk management options, supporting conservation and environmentally beneficial practices, improving agricultural trade opportunities, revising individual commodity policies, and assisting small and limited-resource farms. The Commission endorsed the idea of counter-cyclical payments to producers to counter-balance the unpredictable economic cycles in farming by providing more government support when farm prices and/or incomes decline, and less support when they improve

Other interest groups favor adoption of supply control programs with which to manage agricultural surpluses and maintain high farm prices in preference to traditional income support measures. Still others advocate elimination of traditional income support and supply control mechanisms altogether (as the 1996 legislation promised) in favor of market-oriented policies that do not distort market prices. The latter groups would provide income support only to those farmers who satisfy a needs test.

Crafting new policy for agriculture is a complex and difficult process. A first step should be to articulate the aims that this policy is to achieve. This is itself a difficult task given the competing potential goals, and given the various interest groups with a legitimate stake in agricultural policy. Political considerations are important, but so are economic and technical realities. To provide some perspective on economic and technical realities in agriculture, I review several trends in U. S. agriculture over the past 50 years, and consider the potential for a continuation of these trends into the future. I also review the extent to which traditional farm income support programs satisfy felt needs in the sector. Finally, in an effort to help us understand some non-traditional options being considered as well as their potential for assisting farmers, I provide a brief discussion of three possibilities in this area – contracting, farm buyout programs, and rural development/job retraining programs.

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American agriculture has changed dramatically in the last half century[1]

Today there are 64 percent fewer farms and 81 percent fewer farm people than in 1950. Since 1950, average farm size has doubled as measured by both acres per farm and real gross sales per farm. Seventy-four percent of our smallest two million farms have annual sales of less than $50,000 per year, and collectively they generate only 10 percent of our total agricultural output. On the other hand, 7 percent of our largest two million farms have annual sales of $250,000 or more per year, and collectively they generate over 60 percent of our total agricultural output.

In the 1950s, most of our farms were diversified, having multiple crop and multiple livestock enterprises and raising most of their own livestock feed. Today, U.S. farms are highly specialized. Most grain farms raise few if any animals and sell practically all of their produce off farm, while most livestock farms concentrate on a single livestock enterprise and purchase the majority of their feed inputs from other farmers or from commercial sources. In addition, there are specialized fruit and vegetable farms.

The farm population now makes up less that one percent of the total U.S. population. The rural population, however, has stabilized at about 25 percent of the total U.S. population.

U.S. farmers produce the basic foodstuffs to feed nearly twice as many Americans as existed in 1950. Yet U.S. farmers export 8 times more real value of farm produce to foreign nations than they did in 1950. Furthermore, U.S. consumers spent 26 percent of their disposable income on food in 1950, but spend less than 14 percent of their disposable income on food today. U.S. farmers have accomplished all this with 22 percent fewer acres and with 74 percent fewer farm workers.

Incomes of most farm families are now more nearly in line with incomes of nonfarm families than in years past. Many of the larger farms have family incomes well above that of their nonfarm counterparts. For a strong majority of farm families with incomes at or near that of nonfarm families, this income equality is attributable to substantial off-farm earnings of farm operators and/or farm operator spouses. The majority of our farm families no longer depend primarily on farming or on government payments for their livelihood.

There have been other notable changes in U.S. agriculture over this period. As the use of farm labor has decreased, the use of capital has increased, as has the use of machinery, chemicals, feed additives, and other nonfarm inputs. Interestingly, there has been little change of significance in the mix of crops harvested or in the percentage of total cash receipts derived from the different farm enterprises. Farm debt has increased so that farmers are now much more vulnerable to high interest rates and short-term erosion of asset values.

Real prices received by U.S. farmers have declined steadily and significantly since 1950, and for all farm commodities. Technological advance in agriculture has been the primary cause, as explained in a recent report[2] – not "middlemen" exploiting farmers. Real prices paid by farmers, however, have changed very little since 1950. Hence the per-unit profit margin farmers receive is now considerably lower than it was in the 1950s. Farmers have been able to survive this situation fairly well given the tremendous increases in productivity brought about by the greater use of nonlabor inputs. Nevertheless, herein lies the motive for increasing farm sizes as also explained in the report just cited.

Significant changes have occurred in the food choices of the nation's consumers as the population has become more diet conscious and as the age distribution, family worker status, and ethnic composition of the population has changed. The farmer's share of the consumer's food dollar has diminished since 1950, and particularly since the mid-1970s. This, in large part, is in response to consumers' demand for more nonfood services as part of their food purchases—again not to "middlemen" exploiting farmers.

Past trends are likely to continue

Forecasting the future structure and character of the U.S. agricultural sector is subject to considerable speculation. A key factor in such forecasting is the likely continued increases in agricultural productivity. As indicated, this factor drives most of the farm level trends noted previously. Over the past fifty years, total agricultural productivity increased at the rate of about 2.5 percent per year. We may not be willing to project this rate of productivity growth into the next 50 years, but there is little reason to suspect other than positive productivity gains into the foreseeable future. As in the past, this growth will bring about continued decreases in real farm prices and farm profit margins, and thus continued decreases in farm numbers and increases in farm sizes.

Even though many of our farms today are quite large and many farm families find it advantageous to form a family partnership or family corporation, the predominant farm can still be considered a family farm as opposed to what we often think of as a business corporation or landed estate. We can expect our family farms to continue to grow in size as new technological breakthroughs continue to occur, but they are not likely to become the large estates feared by our forefathers. Certainly none are large enough now nor are they likely to become large enough in the near future to, by themselves, significantly and negatively influence the market. Further, it does not appear that diseconomies of scale are yet evident in agriculture, although this is a subject that needs continuous monitoring.

Traditional price and income support does not always work

Subsidizing farm incomes with direct government payments (price supports or deficiency payments, for example) or disaster payments, and thus providing farmers a "safety net," is the option legislators chose for most of the period since the Great Depression. When most farms were quite small and highly diversified, this was a good option since it gave almost all farms needed support regardless of the fact that this support was tied to field crops and dairy rather than to livestock, poultry, fruits, or vegetables. But as we have seen, the structure of farming is quite different today. Since agricultural production is now highly specialized, support of some commodities but not others is problematic. And since direct payments are typically based on the volume of production, most such payments go to the largest farmers who have little need for such subsidies. Further, government payments, while presently at record high levels, do little if anything toward bringing the incomes of low-income farm families up to the level of that of nonfarm families. While it is possible to devise a program of targeting subsidies to farm families with incomes at or below the poverty level, this is not likely to be an acceptable policy option.

Price supports or direct payments to farmers tend to encourage smaller, uneconomic farm units to remain in production longer than is justified. In addition to causing significant budget exposure, this option is likely to lead to overproduction and has in the past led to significant government purchases of excess supplies of farm commodities. Further, this option leads to retention of some producing units that are not economically sustainable in the longer term, thus perpetuating the need for such subsidies into the indefinite future. Finally, this option may encourage some smaller farmers to delay the decision to liquidate their operation, even to the point of losing all of the financial equity they have accumulated over the years.

In view of these considerations, various groups have sought alternative approaches to traditional price and income support for farmers. These alternative approaches are quite varied but focus on ensuring that competitive forces prevail in the market place with minimal price and resource allocation distortions.

A market-oriented option relating to contracting

Although most agricultural produce is still in an open market, contracting by large corporations with farmers has in recent years been a significant and growing part of the production and marketing of broilers, turkeys, eggs, hogs, and milk. Most sugar beets and sugarcane, as well as many fruits and vegetables for processing, are also produced under contract. Marketing contracts are verbal or written agreements between a contractor and a grower setting a price and establishing an outlet for the commodity before harvest. Production contracts specify in detail the production inputs supplied by the contractor, the quality and quantity of the commodity, and the type of compensation the grower will receive for services rendered. Economic Research Service of USDA estimates that about one-third of the value of all crops and livestock in the United States is now produced or marketed under contract.

While there are substantial benefits to farmers from such contractual relations, they also present potential problems to growers as well as to consumers. A critical need at present is to ensure that farmers are not severely disadvantaged, that consumers are not negatively impacted, and that the normal processes of competitive markets are not at risk because of contracting. A detailed study of contracting aimed at recommendations for improvements would be of benefit to a significant number of all farmers, regardless of size, location, or enterprise, as well as to consumers.

A market-oriented option targeted toward farmer buyouts

An alternative to direct income support to all farmers regardless of need would be to institute a farmer buyout program under which the farm operator could recover some or all of his investment in return for permanently curtailing agricultural production. We have had limited experience with this type of program, but it could be implemented on a bid basis as was the milk production termination program authorized by the 1985 Farm Bill. It could also conceivably incorporate a job retraining and/or relocation grant that would provide an opportunity and incentive for the farm operator to seek alternative employment. Here farmers would self-select for government support subject only to final approval by the administrative agency in charge of the program. Farmers desiring to take advantage of this program would submit to the agency in charge a bid for the amount of compensation needed to curtail agricultural production on their farms.

Under this program, windfalls in the form of direct payments to farmers or in the form of benefits capitalized into land values would no longer exist. Farmers could opt out of farming under this program with no further loss of equity. Further, farmers making a successful bid under this program could be provided with the resources to become more productive members of society. Limited-resource farmers who prefer to stay in farming, say as part-time farmers, but with no price or income support would be free to do so.

A market-oriented option involving rural development and job retraining

A more general option might be to direct additional public funds to rural development efforts and job retraining programs that provide farm operators and farm operator spouses access to part-

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Farm policy/C*ont. from p. 5*
time or full-time work off the farm or otherwise enable farm families to adjust to new economic realities. This is likely to be a more positive alternative than directing efforts at preventing output-increasing and cost-reducing technological developments in farm and food production or keeping agricultural commodity prices (and thus also consumer prices of food) artificially high via price supports that discourage consumption both at home and abroad. This option is also likely to be less costly to taxpayers than is a direct income subsidy option. Further, it would be viewed as a public investment with long-term payoff in terms of helping to preserve the rural community and in helping to employ farm workers in more productive activities.

The devil is in the details

Clearly the new Farm Bill will be crafted in the political arena. Several public hearings have already been held. More are to come. Congress will take this input along with input from the Administration to craft a new Farm Bill to replace current legislation slated to expire in 2002. It is to be hoped that politicians will be guided by (a) considerations of the character of the agricultural sector today, (b) equity as well as efficiency criteria, and (c) the true needs of farm families and of society as a whole. Providing traditional price and income support for producers of existing program commodities has, as we have seen, serious limitations. Providing support in the form of programs discussed in this report and/or others including risk management, trade expansion, and crop insurance coupled with an automatic disaster payment have more promise. But a variety of other issues — for example, export promotion, conservation, environmental quality, preservation of rural landscapes, food safety, and food aid — are also important.

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[1]The trends identified here are discussed in detail in Milton C. Hallberg. *Economic Trends in U.S. Agriculture and Food Systems Since World War II*. Iowa State University Press. Ames, Iowa. 2001, and in various past issues of Farm Economics.

[2]See Hallberg, M. C. "Loss of Farms in Pennsylvania: Why? And What Does It Mean?" *Farm Economics*. The Pennsylvania State University Cooperative Extension Service. May/June 1999.

Supreme Court/C*ont. from p. 3*
tion. *Palazzolo* improves the standard that must be met in order for a claim to be considered ripe for review by holding that a landowner need not apply for every possible use where a previous ruling makes plain the agency's interpretation of its regulations.

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[1] Kennedy, J., delivered the opinion of the Court, in which Rehnquist, C.J., and O'Connor, Scalia and Thomas, JJ., joined, and in which Stevens, J., joined as to Part II-A. O'Connor, J., and Scalia, J., filed concurring opinions. Stevens, J., filed an opinion concurring in part and dissenting in part. Ginsburg, J., filed a dissenting opinion, in which Souter and Breyer, JJ., joined. Breyer, J., filed a dissenting opinion.

— Anne Hazlett, attorney with the House Agriculture Committee, Washington, DC

Wheat/C*ont. from p. 1*
- If both countries adopt biotech wheat at the same time, both countries will likely gain by first-tier payoffs or benefits (such as higher grain yields, less herbicide use, and better crop management) and through prospective second-tier benefits, such as better milling wheat or better quality bakery products.
- If Canada adopts biotech wheat and the US doesn't, the U.S. would likely gain marketshare.
- If the US adopts biotech wheat and Canada does not, then Canada would likely benefit.

"I suspect there's nothing that the Canadians would like more than for us to liberally adopt genetically modified wheats without the ability to segregate them in the marketplace," says Wilson. He suspects the Canadians would raise immediately the price of their non-biotech wheat to export to countries wary of biotechnology. Thus, if Canada chooses not to adopt biotech wheat, the best alternative for the US is not to adopt it either. But if Canada does adopt biotech wheat, the US is better off to follow suit.

The decision is pretty simple on the export side—it all depends on what Canada does. "There would be serious market implications if the US adopts [biotech wheat with] the current state of buyer views toward GM wheats, without a system to reliably segregate wheats. We're seeing this already in corn. Rival countries are now selling non-GM corn to Japan at fairly substantial premiums as a result of the problems in the US," says Wilson.

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Mixed market signals

Biotech wheat faces different challenges than biotech corn or soybeans, says Wilson. For one, wheat is more dependent on exports. About half of the US wheat crop is exported each year, compared to about 20% of the corn crop and about 35% of the soybean crop. Wheat is also used more widely for human consumption and has more grain export competitors to contend with, including Canada.

"The US wheat industry is getting mixed messages about biotechnology," says Wilson, "from a domestic industry that is generally more receptive or not as averse and an export market that is mostly intolerant of it." The US uses about half of the wheat it produces each year and exports the rest. Unlike consumers in Europe, US consumers and food industry leaders are generally confident in the safety of biotechnology and the government's ability to regulate it. Wilson also points out that second-tier biotech products that benefit consumers may boost consumption of wheat-based products in the US, a market that on the whole has been flat in recent years. "If a food company can differentiate its products, it can increase demand," he says.

While biotech emphasis is initially concentrating on first-tier benefits to producers such as herbicide resistance, little attention has been paid to the tremendous advantages of second wave benefits of biotech wheat—stronger flour, enhanced nutrition, the ability to replace additives, improved product quality characteristics such as food taste and texture, production of industrial products, and increased storability. Wilson says one study points out that bread products with a longer shelf life could reduce bakery costs by 12%. "That's a huge number," he says.

A NDSU survey indicated that domestic millers and bakers are indifferent toward purchasing wheat that is genetically modified to enhance farm production. However, they would expect to pay less for biotech traits with only on-farm benefits, such as improved crop yields and herbicide resistance. Conversely, most are willing to pay more for attributes enhanced by biotechnology that would increase revenue or decrease their production costs, including functional traits, and enhanced processing and end-

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Colorado Farmers Markets

With summer here, Farmers Markets have opened in various places throughout Colorado and other States. They are a delightful experience and excellent places to purchase foodstuffs and for agriculture to meet the city. Care needs to be taken, however, by both the providers and the consumer at the markets.

Although various Farmers Markets are organized differently, they usually share similar structures. There is an overseer of the market, commonly called a "market master." This person arranges for the location and organization of the particular market. Individual producers of flowers, vegetables and other products rent spaces through the market master from which they will sell their wares.

Generally, farmers who sell products at a Farmers Market take care to provide quality wholesome products. Customers should, however, take case to assure themselves that they are patronizing a clean and well kept purveyor. Unprocessed foodstuffs can be a source of disease, bacteria or other cause of illness. Customers should utilize common sense in consuming any raw agricultural product.

If a customer becomes ill from consuming something purchased at a Farmers Market, there may be no recourse because of the difficulty of proving the source of the illness. Thus, a customer may have a very hard time obtaining recompense if the illness is serious.

From the standpoint of the farmer and the market master, the fact that a consumer may have a fairly hard time proving where an illness came from should not be a cause for carelessness. The market master especially may be liable as responsible for whatever occurs at the Farmers Market. Both farmers and market masters are well advised to review their liability insurance on a current basis.

If an illness can be traced to a particular farmer, it is quite possible that the farmer would be held liable for damages resulting from the illness. Perhaps more significantly, there is a possibility that if the cause of an illness can be traced to the farmer, the farmer's farming operations or a particular crop could be quarantined.

Because of their belief in the values of Farmers Markets, the Colorado Departments of Agriculture and of Public Health and Environment have established standards and guidelines to be followed by farmers at the Markets. The effort is to assure both the farmers and members of the public that food products at Farmers Markets are safe if properly handled.

—James B. Dean, Dean & Stern, P.C., Denver, CO

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use factors.

While domestic wheat users are more accepting of biotechnology, overseas wheat users are not. Seven out of 10 of the leading US hard red spring (HRS) wheat importers in the 1998-99 marketing year are currently averse or opposed to genetically modified foods. In total, about 85% of the global customer base for U.S. HRS wheat now oppose the development of biotech wheat, compared to only 30% of Canada's overseas customers who oppose the technology, says Wilson. China is a key reason for the disparity in the opposition among the customer bases of the US and Canada, which compete aggressively for the world's spring wheat export market. China thus far has been neutral in its views toward biotech wheat, and while the Chinese have imported little to no HRS wheat from the US in recent years, China is Canada's largest customer for spring wheat.

Canada: inherent advantages

Canada has inherent quality control mechanisms to manage the adoption of biotechnology within its grain marketing system through the Canadian Grain Commission and the Canadian Wheat Board, which has the sole authority to market grain in Canada. The CWB has the authority to regulate wheat varieties—and deny release of varieties for marketing reasons—while no such authority exists in the US. Also, there are fewer spring wheat varieties released and grown in Canada compared to the US, and varietal quality performance is more uniform across growing regions in Canada compared to the US. Canadian varieties must also be visually distinguishable from varieties of a different class. Thus, Canadian wheat can be segregated more easily. According to Wilson, "It allows their market system to easily distinguish wheats that should be placed in different classifications. We don't have that."

Wilson says that it is quite possible Canada could create a separate classification for biotech wheat. "Of course they won't call it genetically modified. But when Prairie Spring and other wheat categories were developed, it was because of new production technologies. We don't do that and it's a dilemma we have." Last year, Wilson conducted a survey of spring wheat users that estimated that the cost of segregating grain in the US may vary between $0.25 and $0.50 per bushel. Another survey of grain elevator managers earlier this year put the estimate at $0.15. It's not surprising that the estimated costs of segregating grain vary by each survey and study. "It's difficult to project, because you're asking somebody the cost to do something they've never done before," says Wilson.

It would not be unexpected to see political officials from Canada, the US, and other wheat export countries be passive promoters of biotech wheat, says Wilson. Otherwise, it could be damaging to market share in today's political climate to acknowledge supporting the development of biotech products when countries such as Japan oppose them. Then, if and when acceptance occurs, they'll move forward with the technology.

— Tracy Sayler, Journalist, Fargo, ND. Reprinted with permission from the June, 2001 ISB News Report.

Conference Calendar

Protecting Farmland at the Fringe: Do Regulations work?

September 5-7, 2001.

Baltimore, Maryland, Holiday Inn-Inner Harbor.

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