PANEL REMARKS ON REGULATING GENETICALLY MODIFIED FOODS: IS MANDATORY LABELING THE RIGHT ANSWER?

Moderated by: Michael Rodemeyer*
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Mr. Michael Rodemeyer: {1} Thank you to all of our speakers. I can assure everybody in the audience that you will not be specialists on this topic after today, since we can easily spend a whole afternoon on this topic. Let me ask Jean first of all, do you want to respond to anything you've heard from the speakers after you?

Ms. Jean Halloran: {2} Yes. In particular, in terms of Mr. Conko's remarks on why should we label genetically engineered foods and that isn't it just enough to have organic choices or non-engineered, I say that consumers didn't ask for genetic engineering of foods.

{3} The question arises as to where the burden of labeling should fall. Should it fall on the entity that introduces the technology? Should they be able to just go ahead and then pass the burden of labeling, or the cost of labeling, on all the people who are producing foods in the same ways that they have for decades or hundreds of years? We think the burden should fall on those that are introducing the new technology that consumers have the right to know about.

{4} In terms of constitutional issues raised, those are interesting issues, and my organization has a lot of doubts as to whether corporations should have the same free speech rights, political free speech right and commercial free speech rights, but in terms of the Vermont case that you were mentioning, that was a decision of a three-judge panel where there was one dissenting judge and two in favor of the ruling, so that wasn't exactly a slam dunk legal decision. It seems as though the argument could be equally applied to Country of Origin labeling. This is not a health related issue; I'd be interested to hear any comments on that.

{5} Finally, you know, isn't this like crosses? It's a matter of opinion, but in our view, moving bacterial genes and viral genes from whole different families is not the same as a wide cross between two members of a related family, and surely fish genes into strawberries is something quite different.

Mr. Michael Rodemeyer: {6} Mr. Conko, we'll move to you. Would you like to respond to Ms. Halloran, or are there any remarks that you would like to discuss to at this point?

Mr. Gregory Conko: {7} I think I'll just restrict my comments to what Jean just said. Consumers didn't ask for genetically engineered foods. Fair enough. What food breeding technique in the last hundred years did they ask for? And why is Consumers Union not opposed to mutation breeding, wide crosses, embryo rescue, chromosome doubling –

Ms. Jean Halloran: {8} We're not opposed to genetic engineering – we just want to label it.

Mr. Gregory Conko: {9} Okay, so why not label every one of these?

Ms. Jean Halloran: {10} We don't think there's a significant difference.

Mr. Gregory Conko: {11} I see. And why A crosses between, say, a toxic tomato and food grade tomato is unimportant and doesn't need to be labeled, whereas transferring a single non-toxic gene from say an animal or a fish into a strawberry would be, I don't understand. Genes are genes, and they create proteins, or they create other gene products, which individually can be tested for safety, and which apart from their host organism and apart for their parent organism have no identity.

{12} Genetically, human beings are ninety-eight and one-half percent (98.5%) chimpanzees. So, would the addition of a single chimp gene into my body make me a chimpanzee? We share at least forty percent (40%) of our genes with a plant called Arabidopsis thaliana. If I have one Arabidopsis thaliana gene put into my body, does that make me a wild mustard plant? The question is not what is the source of the gene, the question is what does a gene do and are the gene and the gene product safe?

Ms. Jean Halloran: {13} There are two profoundly different ways of looking at this. One is to just say, "We're all just made of genes and there's one giant gene pool and it doesn't matter if we differentiate." The other one is to say, "There are differences between a chimpanzee and a human, and it does matter if you're moving from one to the other." I think this is ultimately a value decision and one where democracy ought to have a chance to prevail in terms of what most people think.

Mr. Michael Rodemeyer: {14} Let me ask one question and then let's take one question from the audience. Greg, you mentioned the issue about information in a voluntary labeling scheme, that if people truly want this product, then people would be able to label and to respond to labeling on GM foods. I wondered if you would comment on the issue that the FDA right now is actually very restrictive on the ability of companies to say that their products do not contain genetically modified organisms.

{15} The reason for the restrictive policy is that there is a question about

whether or not that label would be misleading in part because of the problem that I think David Hoover mentioned earlier, which is that there's a very low level of genetically modified foods throughout the conventional food supply, and even organic producers now find it difficult to avoid having some level of genetically modified ingredients in their products. So if you claim that it is free of those GM substances, in fact in most cases it isn't, so FDA's been tough on that. Also we should address the issue about FDA wanting to require an additional disclosure, as they did with the recombinant DNA growth hormone, that says that there's no difference between GM and non-GM products. So it makes it difficult for people to voluntarily label non-GMO's.

Mr. Gregory Conko:

{16} I think generally the approach and the concern the FDA has laid out with a generic non-genetically modified label, or "No GMO's" is a valid one, in that genetic modification is a term that for most of the twentieth century meant to scientists something very different than what it means today. So it's a term that means one thing to one group of people and means an entirely different thing to another group of people. To the extent that a food producer would like to be specific, bioengineering is a term that was invented specifically for the purpose of talking about the techniques of recombinant DNA engineering.

{17} I think if a food producer was to label this product non-bioengineered or from ingredients that are non-bioengineered, I think that would clear that misconception.

{18} Now as for the residual trace amounts, that raises another issue. I think that could be taken care of with a tolerance level, as we have for things like hair and rat feces in soybeans and corn and other things now companies aren't necessarily labeling on their products. Well, this is corn but it has soybeans in it, which may be factually incorrect if there does happen to be a soybean. I think it's a question that we can work through, and I think that a reasonable policy would be allowed to set tolerances at another level.

{19} As for the disclaimer, the last issue, regarding Ben & Jerry's, I think FDA reached the wrong conclusion in that regard. It was one thing for the FDA to require Ben & Jerry's not simply to say that there's no RBST in it's dairy products, but to be specific and say, it's from the dairy products are from cows that haven't been treated with RBST and to also make an explicit disclaimer by saying that the FDA has found no difference between RBST treated cows and non-RBST treated cows, I think was a step over the line in FDA's part.

{20} I think producers have every right to label accurately and in that regard I don't believe that it would have presented a serious misrepresentation to consumers. Just to make the particularly especially valid claim that dairy products come from cows that have been treated with RBST.

Mr. Michael Rodemeyer: {21} Let me take one question from the audience. Yes sir.

Audience: {22} When I look at all the various lists associated with various agricultural processes and technologies, part of me wonders why so many people are concerned about the labeling of genetic engineering. It doesn't say anything about requiring labeling of foods that have been treated with conventional pesticides, I don't see in the produce section when foods are treated with organic phosphates or antibiotics. The residues are in our food. I mean that's seems to be a risk that's probably more so than to genetically modified foods so far.

Mr. Michael Rodemeyer: {23} Jean.

Ms. Jean Halloran: {24} Personally speaking, I would also like to see mandatory labeling of pesticides treated and antibiotics used in feed of animals, and I think maybe my organization would, too. It hasn't arisen as a political issue because it's been with us for a long time. The rareness and the problems with these substances has kind of gradually come upon us, whereas genetic engineering has suddenly appeared on the scene. I think a lot of people who are activists feel as though with this technology we have a chance to do what we should have done and failed to do and realized what the problems were with pesticides. Had we known the problems with pesticides, a lot of folks might have objected to them and might have had controls over them a lot earlier on.

Mr. Gregory Conko: {25} I think you're misreading the history a little bit Jean. In fact, there were attempts in the late 1950's and through the early 1960's to mandate pesticide application information, and require labeling on food products. With that, there was another case in which a labeling law was struck down by courts as being unconstitutional -- although I'll acknowledge that I don't believe that case made it to the level of the Supreme Court either. So, this isn't an entirely new thing here either.

{26} A lot of these questions and concerns go back even before Rachel Carson. The Delaney Clause in the Food, Drug, and Cosmetic Act, which was in 1956 or 1958, marked probably the high water mark of America's first chemical scare, and there's nothing new under the sun so to speak. These are all issues that, I think, conceptually deal with different but similar technologies.

Prof. Jonathan Adler: {27} Responding to Jean's earlier remarks, first on the issue of commercial speech, it does not have the same level of protection as political speech, and that is a distinction that most of the Justices in the court hold to, but there are some that think the distinction is invalid. More importantly, commercial speech, while it does not get the full level of protection as political speech, still does get significant protection.

{28} With regard to labels, what's interesting here (and for those of you in agricultural law), we see this distinction made in the various marketing order cases. There's a difference between an isolated label

requirement, as would be mandated for GMOs, and a disclosure requirement that is part of a larger regulatory apparatus that needs that information disclosure for the apparatus to work. This distinction is illustrated by the cases involving marketing orders for various types of produce. The Supreme Court held that when that compelled commercial speech is part of the broader regulatory scheme, then it might be okay, because the regulatory scheme may be okay. When the disclosure requirement is by itself, on the other hand -- which occurred in a recent case, *United States v. United Foods*, just two years ago, the court said you cannot compel. It is hard to see how a GMO label would be an integral part of a broader regulatory scheme. In the case of Country of Origin labels, however, there are regulations concerning safety standards, tariffs, and the like, which may require information about where things came from.

Mr. Michael Rodemeyer: {29} Thank you all for your participation today.

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* Michael Rodemeyer is the Executive Director of the Pew Initiative on Food and Biotechnology, an independent and objective source of credible information on agricultural biotechnology for the public, media and policymakers. From 1998-1999, Mr. Rodemeyer served as the Assistant Director for Environment in the Office of Science and Technology Policy in the Executive Office of the President, where he worked on a wide range of environmental science issues, including climate change, risk assessment, and ecosystem management. Prior to that appointment, Mr. Rodemeyer served for fifteen years on the staff of the House Committee on Science, including positions as Chief Counsel and Staff Director and Counsel of the Subcommittee on Natural Resources, Agriculture Research and Environment. From 1976 through 1984, Mr. Rodemeyer was a staff attorney with the Federal Trade Commission. Mr. Rodemeyer graduated with honors from Harvard Law School and received his undergraduate degree with honors from Princeton University.