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COOL Story: Country of Origin Labeling and the First Amendment

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Country of origin labeling (COOL) requirements have long been part of government regulation of commerce. While one might ordinarily think of mandatory COOL as part of trade policy—or even as a means of encouraging individual citizens to engage in country-specific buying that would be disallowed as protectionism if carried out by their governments¹—the most robust legal challenges to mandatory COOL now come from the First Amendment, not from free trade principles. This reliance on free speech claims offers a stark example of the charismatic force of the First Amendment. Objections having little to do with free speech at their heart are channeled into First Amendment challenges in U.S. law both because of the rhetorical force of free speech claims and because, relatedly, the First Amendment is much more likely to invalidate legislation than many other rights, from privacy to substantive due process (whether the right is abortion or economic freedom).²

Mandatory COOL is fundamentally economic policy, as is most commercial speech regulation. The modern administrative state depends on commercial speech regulation, not just in securities law and pharmaceutical regulation but pervasively. COOL asks us to confront the question of whether standardizing marketplace information is a sufficient rationale to require producers both to change their methods of production and to speak. Thus, the fate of COOL has significant implications for many other mandatory labeling and disclosure regimes. Government prescribes many similar disclosures, including miles per gallon for vehicles, milligrams of tar in cigarettes, risk information for prescription drugs, nutrition information for packaged food, and extensive economic details about publicly traded corporations.³

This short article considers a recent First Amendment challenge to new COOL requirements for meat, which mandate disclosure of the country in which each animal was born, raised, and slaughtered. Because large U.S. meat processors have routinely

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¹ See N. David Palmeter, *Rules of Origin or Rules of Restriction? A Commentary on a New Form of Protectionism*, 11 FORDHAM INT'L L.J. 1 (1987) (noting that, while some COOL rules serve useful consumer information functions, the application of others has been protectionist).

² See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004) (discussing the sources of the First Amendment's charisma).

³ See, e.g., NICHOLAS WOLFSON, CORPORATE FIRST AMENDMENT RIGHTS AND THE SEC 28–29 (1990) (discussing mandatory disclosures required by the Securities and Exchange Commission); Robert Post, *Compelled Commercial Speech* 19–21, 51–52 (Yale Law Sch., Pub. Law Research Paper No. 519, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504180 (describing a number of different regimes at federal and state levels where disclosure is meant to improve information rather than correct deception); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 630 n.1 (1979); Rebecca Tushnet, *It Depends on What the Meaning of "False" Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227 (2007); Felix T. Wu, *The Constitutionality of Consumer Privacy Regulation*, 2013 U. CHI. LEGAL F. 69, 77 (“Many laws and regulatory schemes—from mandatory ingredient lists on food and drug packaging to corporate disclosure laws—compel the disclosure of factual information without attracting First Amendment comment, much less First Amendment scrutiny.” (footnote omitted)).

commingled animals of differing national origin, they cannot comply with this version of COOL without substantially changing production practices. It is clear that industry's major objection to COOL requirements is their economic cost.⁴ Where a production stream is not segregated, collecting the information required for accurate disclosure can be quite expensive.

Because Congress can pretty much do anything it wants in terms of economic regulations in the post-*Lochner* era, however, meat producers translated their cost-based objections into free speech arguments in order to challenge the law in court. This proxy war is perhaps the clearest example of the way in which the First Amendment has become the new *Lochner*, used by profit-seeking actors to interfere with the regulatory state in a way that substantive due process no longer allows.⁵ Whether or not these requirements are good social policy, the First Amendment should not be used as a trump. Producers can legitimately be made to produce relevant information about their commercial endeavors as a cost of doing business.

The basic doctrinal fight, stripped of lots of parsing of the precise words of previous Supreme Court cases, is this: Under the Court's *Central Hudson* test, regulation of truthful, nonmisleading commercial speech is acceptable if it furthers a substantial government interest; directly advances that interest; and is not more extensive than is necessary to serve that interest (though this is not a least restrictive means test).⁶ By contrast to the stricter *Central Hudson* test, the *Zauderer v. Office of Disciplinary Counsel*⁷ standard for upholding a mandatory factual disclosure that corrects otherwise false or misleading commercial speech is more deferential, closer to rational basis review.⁸ A court will ask whether the government has a reasonable basis for imposing the

⁴ See, e.g., *Facts: Mandatory Country of Origin Labeling*, N. AM. MEAT INST., <http://www.meatinstitute.org/ht/a/GetDocumentAction/i/92518> (last visited Nov. 17, 2014) (industry fact sheet attacking the government's conclusions on costs and benefits of COOL; mentioning free speech in the context of summarizing the legal challenges to COOL in court); Derrell S. Peel, *Implementation of Country of Origin Labeling (COOL) in the Beef Industry*, 23 CHOICES, no. 4, 2008, at 1, 35 (emphasizing the costs of tracking animals to ensue COOL compliance); Jeremy Russell, *COOL Battle Intensifies*, THE NAT'L PROVISIONER, Oct. 2013, at 26 (emphasizing the costs for producers associated with COOL, though mentioning the First Amendment); Chuck Jolley, *MCOOL Goes Acourtin'*, DROVERS CATTLE NETWORK (July 10, 2013, 5:09 PM), [http://www.cattlenetwork.com/news/industry/jolley-mcool-goes-acourtin'](http://www.cattlenetwork.com/news/industry/jolley-mcool-goes-acourtin/) (quoting American Meat Institute position that the large costs of COOL, and the fact that it effectively eliminates commingling of muscle cuts, would impose disproportionate costs on the industry). But see Lucien J. Dhooze, *The First Amendment and Disclosure Regulations: Compelled Speech or Corporate Opportunism?*, 51 AM. BUS. L.J. 599 (2014) (arguing that the constitutional questions at issue are serious despite industry's economic self-interest).

⁵ See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2685 (2011) (Breyer, J., dissenting) (warning that invalidation of privacy law on First Amendment grounds "reawakens *Lochner*'s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue"); Susan Crawford, *First Amendment Common Sense*, 127 HARV. L. REV. 2343, 2345 (2014) ("[T]o apply a heightened First Amendment standard when a court is reviewing an ordinary economic regulatory program, merely because there may be some indirect effect on private speech caused by the challenged regulations, would return us to the *Lochner* era and sharply undermine congressional authority."); Michael P. Dooley, *The First Amendment and the SEC: A Comment*, 20 CONN. L. REV. 335, 352 (1988) (making the *Lochner* point in the context of First Amendment constraints on securities regulation); Kenneth D. Katkin, *First Amendment Lochnerism? Emerging Constitutional Limitations on Government Regulation of Non-Speech Economic Activity*, 33 N. KY. L. REV. 365 (2006); Jedediah Purdy, *The Roberts Court v. America*, DEMOCRACY, Winter 2012, at 46 (describing *Citizens United* as a modern *Lochner*); Tim Wu, *The Right to Evade Regulation*, NEW REPUBLIC (June 3, 2013), <http://www.newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation> (describing how corporations deploy First Amendment arguments to advance deregulation).

⁶ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

⁷ *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

⁸ See Post, *supra* note 3, at 19 (characterizing *Zauderer* as setting out a standard toward the deferential side, less exacting than intermediate scrutiny but not rational basis review).

disclosure and whether the disclosure is unduly burdensome. Given that in its absence the speech will be false or misleading, the answer is, unsurprisingly, almost always that the disclosure mandate is constitutional.⁹

But suppose the government wishes to mandate a truthful factual disclosure to accompany commercial speech about a particular topic, and there is no obvious falsity being corrected. Instead, the government is trying to add information that it believes consumers will find useful.¹⁰ Is the standard for evaluating the mandatory disclosure still the same, or must the government bear a higher burden to justify compelled commercial speech when it's trying to increase the amount of relevant information in the market or standardize meaning to facilitate comparisons rather than trying to correct an identified deception?

Most of the rationales the Supreme Court gave in the 1985 *Zauderer* case for allowing such relaxed scrutiny of compelled commercial speech apply equally whether the government's purpose is remedial or educational. But that was a long time ago; subsequent decisions have seemingly given commercial speakers greater protection. Specifically, the early commercial speech cases were decided based on the *audience's* interest in hearing truthful commercial messages.¹¹ However, more recently, the Court seems to think that the *commercial speaker* has speech interests of its own, regardless of the audience's interest.¹² If those speakers are of independent constitutional concern, compelled speech looks a lot more troubling, even when it's purely factual and useful to the audience (as, for example, compelling a child to recite the Pledge of Allegiance is not).¹³

⁹ *Zauderer*, 471 U.S. at 651. For an example of a rare finding that a restriction is unduly burdensome, see *International Dairy Foods Ass'n v. Boggs*, 622 F.3d 628 (6th Cir. 2010), where the Sixth Circuit held that a requirement that a mandatory disclosure be directly proximate to the triggering statement was too burdensome, given that the state did not offer any evidence that an asterisk directing consumers elsewhere on the package would be insufficient.

¹⁰ Though consumers may not. See generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014). But see Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 WASH. L. REV. 333 (2013) (explaining various ways to evaluate imperfect but useful disclosures); John Beshears et al., *Simplification and Saving*, 95 J. ECON. BEHAV. & ORG. 130 (2013) (finding that simple disclosures can improve saving behavior); Jeremy Telman, *Ben-Shahar & Schneider Symposium Part VI: Lauren Willis*, CONTRACTS PROF BLOG (Sept. 18, 2014), http://lawprofessors.typepad.com/contractsprof_blog/2014/09/ben-shahar-schneider-symposium-part-vi-lauren-willis.html (explaining that simple information offered at the point of purchase can assist consumers, especially when they facilitate comparisons across product offerings).

¹¹ See, e.g., *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising."); *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (commercial speech "is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information.'" (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976))).

¹² See, e.g., Post, *supra* note 3, at 60 ("That recent cases repeatedly return to the theme of the autonomous commercial speaker is deeply disturbing. It suggests that judicial hostility to compelled commercial speech may not actually reflect First Amendment concerns, but instead a fundamental suspicion of the modern administrative state and its regulation of commercial actors." (footnote omitted)); G. Edward White, *The Evolution of First Amendment Protection for Compelled Commercial Speech*, 29 J.L. & POL. 481, 497 (2014) (arguing that recent developments have abandoned the idea that the First Amendment rationale for protecting truthful commercial speech was society's interest in the free flow of information; instead, the Supreme Court now believes that commercial speakers have their own First Amendment interests).

¹³ See, e.g., *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 370–71 (D.C. Cir. 2014) (finding *Zauderer* "limited to cases in which disclosure requirements are 'reasonably related to the State's interest in preventing deception of consumers'" (citation omitted), *abrogated by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013) (striking down compelled commercial speech); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012) (striking

The D.C. Circuit recently split on the question in *American Meat Institute v. U.S. Department of Agriculture (AMI)*,¹⁴ with the majority concluding that mandatory factual disclosures applied to commercial speech should be judged by a uniform, and forgiving, standard. The concurrences couldn't agree on why this was so, and the dissenters would have applied a higher standard. The dispute, although in one sense narrowly doctrinal, goes to core questions about modern government regulation.

I. THE *AMI* EN BANC MAJORITY: ANSWERING ONE DOCTRINAL QUESTION AND DODGING ANOTHER

The *AMI* majority applied *Zauderer*, which had approved mandatory disclosures to correct attorney advertising that would otherwise be misleading,¹⁵ to non-deception-correcting disclosures. This is in one sense a broad holding, but at the same time the majority contended that *Zauderer* wasn't actually imposing a lower standard than *Central Hudson*'s. Instead, the majority suggested, *Zauderer* merely recognized the standard features of mandatory disclosures as a regulatory tool, and those standard features will regularly survive *Central Hudson* scrutiny. This section will explain the majority's analysis and suggest that matters are more complicated than that.

As *AMI* recounted, Congress has required COOL on many foods, including some meat products.¹⁶ For meat, it passed a law defining "country of origin" to be based on where the animal had been born, raised, and slaughtered—the three major production steps. After a WTO panel found the first implementing regulations to violate our international obligations,¹⁷ the Secretary of Agriculture promulgated a rule requiring more precise information on the location of each production step.¹⁸ The new rule also eliminated the flexibility allowed in labeling commingled animals, ensuring increased costs for certain operators. Thus, a labeling rule demanded changes in production practices so that producers would be able to identify the thing that needed to be labeled. Despite these non-speech-related effects, the regulation's required output is information, arguably creating a First Amendment problem.

AMI argued that *Zauderer* didn't apply when the government's interest was not deception-related. Given that *Zauderer* used broad language in explaining why mandatory disclosures were acceptable as applied to commercial speech, the majority concluded, it wasn't limited to deception: *Zauderer* identified "material differences between disclosure requirements and outright prohibitions on speech," making a commercial speaker's First Amendment interests "substantially weaker than those at stake when speech is actually suppressed."¹⁹ Indeed, under the audience-focused rationale for protecting commercial speech, "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [and

down certain tobacco-related regulations); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 637–39 (6th Cir. 2010); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996) (striking down mandatory blue dot on milk produced from cows given recombinant bovine growth hormone).

¹⁴ 760 F.3d 18 (D.C. Cir. 2014).

¹⁵ *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

¹⁶ *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 20 (D.C. Cir. 2014) (citing 7 U.S.C. §§ 1638, 1638a (2012)).

¹⁷ See *id.* at 20–21. The initial regulations allowed multiple countries to be listed, and further allowed commingling of meat from animals of different origins as long as the label listed all the countries from which the animals might have come. See *id.*

¹⁸ See *id.*; see also Ashley Peppler, Note, *Where Is My Food From? Developments in the WTO Dispute Over Country-of-Origin Labeling for Food in the United States*, 18 *DRAKE J. AGRIC. L.* 403 (2013).

¹⁹ *Am. Meat Inst.*, 760 F.3d at 22 (citing *Zauderer*, 471 U.S. at 650, 651 n.14).

therefore] appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal."²⁰ The majority found these reasons "inherently applicable beyond the problem of deception,"²¹ as long as the government's interest was substantial.

Thus, the en banc *AMI* majority turned to the question of substantiality. The opinion concluded that several factors combined to create a substantial government interest: "the context and long history of country-of-origin disclosures to enable consumers to choose American-made products; the demonstrated consumer interest in extending country-of-origin labeling to food products; and the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak."²²

While other courts have struck down disclosure requirements based only on "idle" consumer curiosity,²³ COOL mandates' extensive historical pedigree, dating back to 1890, took them out of the "idle curiosity" category.²⁴ "[T]he 'time-tested consensus' that consumers want to know the geographical origin of potential purchases has material weight in and of itself."²⁵ Indeed, the en banc majority thought that COOL was a matter of "common sense."²⁶ Surveys in the record indicated that over seventy percent of consumers would be willing to pay for COOL.²⁷ Though consumers tend to overstate their willingness to pay, these studies, plus the many favorable comments received during rulemaking, reinforced the historical basis for treating such information as valuable. Congress agreed, with members describing COOL's purpose as "enabling customers to make informed choices based on characteristics of the products they wished to purchase, including United States supervision of the entire production process for health and hygiene."²⁸

Some in Congress also believed that COOL would lead to consumers choosing to buy American. "Even though the production steps abroad for food imported into the United

²⁰ *Zauderer*, 471 U.S. at 651; see also Post, *supra* note 3, at 13 ("[I]n the context of commercial speech restrictions on speech and compulsions to speak are constitutionally asymmetrical. Regulations that force a speaker to disgorge *more* information to an audience do not contradict the constitutional purpose of commercial speech doctrine. They may even enhance it.").

²¹ *Am. Meat Inst.*, 760 F.3d at 22; see also Post, *supra* note 3, at 14–15 (endorsing this view).

²² *Am. Meat Inst.*, 760 F.3d at 23.

²³ *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 69 (2d Cir. 1996).

²⁴ *Am. Meat Inst.*, 760 F.3d at 23. Post questions the validity of the majority's distinction, noting that "consumer interest" is hard to distinguish from "idle curiosity." Post, *supra* note 3, at 27–28. He concludes that the majority is "groping toward" a distinction between idle curiosity and promotion of marketplace efficiency. *Id.* The idea would be that information that consumers really want to know (or perhaps would benefit from knowing) could enable them to better satisfy their preferences in a free market.

²⁵ *Am. Meat Inst.*, 760 F.3d at 24.

²⁶ See *id.*

²⁷ See *id.*; see also Katie L. Allen et al., *Out in the Cold About COOL: An Analysis of U.S. Consumers' Awareness of Mandatory Country-of-Origin Labels for Beef*, 1 J. AGRIC., FOOD SYS., & COMMUNITY DEV. 205 (2011) (finding general consumer preference for COOL but relatively low knowledge about it); David L. Dickinson & DeeVon Bailey, *Experimental Evidence on Willingness to Pay for Red Meat Traceability in the United States, Canada, the United Kingdom, and Japan*, 37 J. AGRIC. & APPLIED ECON. 537 (2005) (finding preference for mandatory COOL and willingness to pay for it); Maria L. Loureiro & Wendy J. Umberger, *Estimating Consumer Willingness to Pay for Country-of-Origin Labeling*, 28 J. AGRIC. & RESOURCE ECON. 287 (2003) (finding preference for COOL and willingness to pay more for U.S.-labeled beef); Alvin Schupp & Jeffrey Gillespie, *Consumer Attitudes Toward Potential Country-of-Origin Labeling of Fresh or Frozen Beef*, 32 J. FOOD DISTRIBUTION RES. 34 (2001) (similar to Dickinson & Bailey, *supra*); Press Release, Consumer Fed'n of Am., Large Majority of Americans Strongly Support Requiring More Information on Origin of Fresh Meat (May 15, 2013) (on file with author) (finding that 87% of consumers favored requiring COOL for countries in which animals were born, raised, and processed).

²⁸ *Am. Meat Inst.*, 760 F.3d at 24.

States are to a degree subject to U.S. government monitoring, it seems reasonable for Congress to anticipate that many consumers may prefer food that had been continuously under a particular government's direct scrutiny." Congresspeople also indicated that people "would have a special concern about the geographical origins of what they eat."²⁹

The issue of consumer desire to buy American is a tricky issue for the executive branch, since aiding that desire sounds a lot like protectionism on a retail basis, and protectionism violates our trade commitments. However, it's not clear if those commitments would bear on the First Amendment analysis. Presumably, Congress can decide to value other interests over free trade. Yet a number of possible means to get people to buy American, such as high tariffs, violate our trade commitments. Can an interest in buying American be substantial if it's inconsistent with our obligations to our trade partners (whether or not COOL violates a specific treaty), which we are otherwise upholding? Sometimes courts say that a commercial speech regulation is invalid under the First Amendment because the regulation *itself* is so shot through with exceptions,³⁰ but that still doesn't make the underlying interest insubstantial.³¹ To the extent that buying American could be considered consistent with public welfare—as politicians' speeches routinely suggest—it should probably be considered substantial despite its potential conflict with other important public policies. Perhaps because of the administration's disavowal of any protectionist impulse,³² the majority and the dissent didn't engage with this question.

Ultimately, the court considered consumers' desire to know the source of their meat a sufficient interest. Given an adequate interest, the remaining *Zauderer* question was whether the regulation sufficiently fit the interest, and here the majority borrowed its analysis from *Central Hudson*. The key requirement for disclosure purposes was an appropriate fit between the government's interests and the mandated disclosure.

As a predicate, a mandated disclosure "must relate to the good or service offered by the regulated party, a link that in *Zauderer* itself was inherent in the facts, as the disclosure mandate necessarily related to such goods or services."³³ So too for COOL. Though evidence of regulatory effectiveness is usually important in judging fit, here "such evidentiary parsing is hardly necessary when the government uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait."³⁴

²⁹ *Id.*

³⁰ *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 189–90 (1999); see also *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (stating that a regulation may be unconstitutional if it contains exceptions that "undermine and counteract" the government's asserted interest). But these cases may be based on the theory that unjustified exceptions to speech regulations discriminate against certain kinds of speakers, see *Greater New Orleans Broad. Ass'n, Inc.*, 527 U.S. at 193–94, an objection that would not apply to a disclosure regime that furthered a policy that was in tension with some other policy goals.

³¹ *Cf. Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511 (1981) (holding that underinclusiveness of speech restriction does not render state's interests insubstantial).

³² Nonetheless, the trade issue explains why the Department of Agriculture did not offer any justifications relating to food safety for promulgating its rule. The en banc majority determined that it could nonetheless rely on the legislative history because it didn't want to allow "perfectly adequate legislative interests properly stated by congressional proponents" to be "doomed by agency fumbling (whether deliberate or accidental)," because that rule would "allow the executive to torpedo otherwise valid legislation simply by failing to cite to the court the interests on which Congress relied," and allow the next President to reinstate a regulation by citing the right interests. *Am. Meat Inst.*, 760 F.3d at 25. "We do not think the constitutionality of a statute should bobble up and down at an administration's discretion." *Id.*

³³ *Id.* at 26.

³⁴ *Id.* Robert Post has persuasively argued that the *AMI* en banc majority wrongly conflated the *Zauderer* test with that of *Central Hudson*'s higher scrutiny. Post, *supra* note 3, at 23–24. *AMI* treats *Central Hudson* as imposing a means-ends fit requirement, which is "self-evidently satisfied when the government acts only through a reasonably crafted mandate to disclose 'purely factual and uncontroversial information' about

The government thus met its burden of showing that the disclosure advanced its interest in making truthful country of origin information accessible to consumers.

In assuming that COOL furthered the government's interest in providing consumers with information, the majority brushed aside a robust argument in the academic literature about disclosures' effectiveness.³⁵ A disclosure that most consumers overlook or misunderstand is arguably not doing very much to advance the government's interest, though it may not be doing any harm either. This deference to the legislature even when the legislature might be unduly hopeful about its ability to affect behavior is consistent with the treatment of economic regulation generally. As a rule, the government doesn't have to be right about its conclusions of which economic policies will enhance citizens' welfare for its acts to be constitutional. But such deference contrasts with the much higher standards to which courts hold legislative factfinding when it comes to noncommercial speech³⁶ or even suppression of truthful commercial speech.³⁷

In addition, the majority held, there was no undue burden on protected speech, since the information itself was easy to disclose—the majority didn't consider the expense of *producing* the information by changing production. This distinction helps to detach the First Amendment from its potential *Lochner*-like effects: the relevant burden for constitutional purposes is the burden on the commercial speaker with respect to making its own commercial speech. Thus, a five hundred-word required disclosure that would take up the entire surface of a meat package, displacing the producer's own desired messages, might be unduly burdensome. But a rule requiring a multimillion-dollar reconfiguration of meat packing plants was not. In this way, the majority kept mandatory disclosure doctrine from becoming generally anti-redistributive; the political branches retained the power to decide that certain economic actors should bear costs, including the costs of producing expensive information, and that others—here, consumers—should benefit.

attributes of the product or service being offered." *Id.* Yet, as Post points out, the government's purpose is never simply to disclose information, but to have at least some consumers do something with that information, and it's the connection between the disclosure and the consumers' response that ought to be scrutinized in a means-ends analysis. See Post, *supra*, at 24.

³⁵ See *Am. Meat Inst.*, 760 F.3d at 27; see also Adamantios Diamantopoulos et al., *The Relationship between Country-of-Origin Image and Brand Image as Drivers of Purchase Intentions: A Test of Alternate Perspectives*, 28 INT'L MARKETING REV. 508 (2011) (finding that brands incorporate country of origin images, which thus affect purchase intentions indirectly); Judith Cardona Forney et al., *Country of Origin and Evaluative Criteria: Influences on Women's Apparel Purchase Decisions*, 91 J. FAM. & CONSUMER SCI. 57 (1999) (finding that female university students didn't seem to care about country of origin of clothing); Fred Kuchler et al., *Do Consumers Respond to Country-of-Origin Labelling?*, 33 J. CONSUMER POL'Y 323 (2010) (finding that mandatory COOL for seafood didn't affect demand for foreign shrimp); Peter Magnusson et al., *"What? I Thought Samsung was Japanese": Accurate or Not, Perceived Country of Origin Matters*, 28 INT'L MARKETING REV. 454 (2011) (reviewing literature, conducting own study, and concluding that perceived country of origin does affect consumer behavior, though consumers are often poorly informed about true country of origin); Glynn T. Tonsor et al., *Mandatory Country of Origin Labeling: Consumer Demand Impact*, KAN. STATE U. DEPARTMENT AGRIC. ECON. (Nov. 2012), http://www.agmanager.info/livestock/policy/Tonsor_KSU_FactSheet_MCOOL_11-13-12.pdf (finding that mandatory COOL didn't affect demand for meat products and that typical U.S. residents are unaware of it).

³⁶ See, e.g., *Brown v. Entm't Merchants Ass'n.*, 131 S. Ct. 2729, 2738 (2011) (rejecting legislative conclusions about relationship between video game portrayals of violence and physical violence).

³⁷ See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) ("[The government's burden] is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.").

Finally, the COOL mandate for meat covered only “purely factual and uncontroversial information,” an independent prerequisite for constitutionality.³⁸ Nor was COOL controversial “in the sense that it communicates a message that is controversial for some reason other than dispute about simple factual accuracy.”³⁹ This claim of political uncontroversiality is in substantial tension with the idea that consumers could believe that foreign countries might provide dangerous food, which was a key reason the majority found COOL justified. After all, the government disavowed that factual predicate, which is at least controversial among our trading partners. The en banc majority didn’t address this tension. Rather, it noted that COOL doesn’t require corporations to carry messages biased against or expressly contrary to their views, even if it made country of origin more salient to consumers at the point of purchase.⁴⁰ Nor was the labeling requirement so detailed that it effectively ruled out ordinary advertising methods. As a result, the government’s interests were sufficient to sustain COOL under *Zauderer*.

II. CONCURRENCES AND DISSENTS: ARE DECEPTION OR DISCLOSURES OR BOTH SPECIAL CASES?

Judge Rogers concurred in part. She wrote to disassociate herself from the suggested collapse of *Central Hudson* and *Zauderer*. *Zauderer* “was not tracing a shortcut through *Central Hudson* but defining a category in which the interests at stake were less threatened.”⁴¹ Instead, she maintained that mandatory disclosure of beneficial consumer information is “‘consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.’”⁴² Truthful disclosure “furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the ‘marketplace of ideas.’” Because of the difference between disclosures and bans, Judge Rogers would have made clear that *Zauderer* scrutiny is less exacting than *Central Hudson* scrutiny regardless of the government interest asserted. *Zauderer* itself supports Judge Rogers’ conclusion: it considered but did not apply *Central Hudson* to mandatory disclosure rules after invalidating other speech restrictions under *Central Hudson*. Instead, the *Zauderer* Court reasoned that there were “material differences between disclosure requirements and outright prohibitions on speech.”⁴³

³⁸ *Am. Meat Inst.*, 760 F.3d at 27. AMI objected to being forced to use the word “slaughter” (part of the trio “born, raised, and slaughtered”) but the rule allows retailers to use “harvested” instead, and AMI didn’t object to that. *Id.* AMI also didn’t disagree with the truth of the facts to be disclosed. As for controversiality in general, I have elsewhere criticized the courts’ treatment of this requirement. See Rebecca Tushnet, *More Than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392 (2014).

³⁹ *Am. Meat Inst.*, 760 F.3d at 27. The AMI majority did indicate that some required factual disclosures could be so one-sided or incomplete that they wouldn’t qualify as “factual and uncontroversial.” *Id.* (citation and quotation marks omitted). For some reason, this rationale is never used to invalidate biased abortion disclosures. See Tushnet, *supra* note 38, at 2415.

⁴⁰ See Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525 (2004) (offering a detailed treatment of the implications of using information that consumers think is relevant even if experts don’t).

⁴¹ *Am. Meat Inst.*, 760 F.3d at 28 (Rogers, J., concurring in part).

⁴² *Am. Meat Inst.*, 760 F.3d at 29 (Rogers, J., concurring in part) (quoting 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (plurality opinion)).

⁴³ *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 650 (1985); see also *id.* at 651 n.14 (rejecting least restrictive means analysis used in *Central Hudson* as applied to mandatory disclosures; *Central Hudson* recommended disclosure requirements as an alternative to speech suppression, and, “[b]ecause the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such

By contrast, Judge Kavanaugh concurred, doing just what Judge Rogers didn't want: he explicitly applied *Central Hudson* analysis, but found that these particular COOL regulations passed.⁴⁴ While not all regulations mandating information disclosure would be constitutional, COOL was justified by the "historically rooted interest in supporting American manufacturers, farmers, and ranchers as they compete with foreign manufacturers, farmers, and ranchers."⁴⁵ Unlike the majority and the Justice Department defending the law, Judge Kavanaugh had no hesitation using protectionist language: Whether or not such rules are economically efficient, Congress has long sought to support U.S. industries against foreign competitors; that gives this interest a sufficient historical pedigree to be substantial. COOL serves the interest of American producers, he concluded, because it causes many American consumers to buy more American-made products.⁴⁶ Again, notably, Judge Kavanaugh did not rely on empirical evidence in his explanation, which is interesting given that the evidence that mandatory COOL affects purchases is not strong.⁴⁷ By contrast, cases applying *Central Hudson* generally require empirical evidence to support the claim that a speech restriction (not a disclosure) advances the government's interest in a material way.⁴⁸

Judge Kavanaugh nonetheless found that *Zauderer*'s requirements, while stringent, were met here: COOL was purely factual, not unduly burdensome, and reasonably related to the government's interest.⁴⁹ One thing strikingly missing from these "stringent" requirements compared to ordinary First Amendment analysis is any consideration of non-speech-restrictive alternatives. Here, one alternative would seem to be outright protectionism, if the interest is as Judge Kavanaugh described it: encouraging sales of American goods. By contrast, an interest in informing consumers so they can make their own choices—the interest invoked by the majority—isn't in itself satisfied by tariffs on foreign meat.

Judge Henderson dissented, believing that *Zauderer* should only apply to disclosures that corrected false or misleading commercial speech.⁵⁰

The main dissent came from Judge Brown, who concluded that the government's interest in preventing deceptive speech was completely different in kind from the requirements merely because other possible means by which the State might achieve its purposes can be hypothesized").

⁴⁴ *Am. Meat Inst.*, 760 F.3d at 30–31 (Kavanaugh, J., concurring in the judgment). Judge Kavanaugh read *Zauderer* to apply *Central Hudson* on the question of whether there was a sufficient fit between the disclosure requirement and the relevant government interest. Requiring mandatory disclosures to be "purely factual," "uncontroversial," not "unduly burdensome," and "reasonably related to" the government's interest was how *Central Hudson*'s narrow tailoring requirement was to be applied in the context of compelled commercial disclosures. *Id.* at 33. A compelled disclosure that satisfies those requirements is sufficiently tailored to be constitutional. *Cf.* Dhooze, *supra* note 4 (arguing that intermediate scrutiny is the appropriate standard for evaluating compelled commercial disclosures).

⁴⁵ *Am. Meat Inst.*, 760 F.3d at 32 (Kavanaugh, J., concurring in the judgment).

⁴⁶ *Id.* (stating that "it is widely understood" that COOL causes "many" American consumers to buy American).

⁴⁷ *Id.*

⁴⁸ "Courts have generally required the state to present tangible evidence that the commercial speech in question is misleading and harmful to consumers before they will find that restrictions on such speech satisfy [this] prong." *Borgner v. Brooks*, 284 F.3d 1204, 1211 (11th Cir. 2002). *See also* *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 147 (1994) (striking down a state regulation for failure to back up the concern that the speech at issue was misleading); *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 108–09 (1990) (rejecting the claim that speech was misleading for lack of empirical evidence); *cf.* *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (rejecting the state's asserted harm because the state had presented neither studies nor anecdotal evidence).

⁴⁹ *Am. Meat Inst.*, 760 F.3d at 33–34 (Kavanaugh, J., concurring in the judgment).

⁵⁰ *Id.* at 35 (Henderson, J., dissenting).

government's interest in ensuring that consumers had truthful information.⁵¹ Mandatory disclosures that didn't correct deception therefore imposed a forbidden orthodoxy.⁵²

On the doctrinal question, Judge Brown agreed with the majority that *Zauderer* was just a context-specific application of *Central Hudson*, in which preventing inherent or actual deception was always a substantial interest. A disclosure reasonably related to preventing deception will thus always directly advance that interest in a way no more restrictive than necessary.⁵³ However, Judge Brown derided the interest asserted here as incoherent and insubstantial—the government failed to explain why providing consumers with origin information was important; a long history of origin labeling mandates wasn't enough to justify an impingement on First Amendment rights.⁵⁴

For Judge Brown, even an outright embrace of protectionism would only justify coerced speech if “voluntary action and direct government speech were obviously inadequate.”⁵⁵ Further, the Department of Agriculture had disavowed protectionism, reasoning that COOL wouldn't necessarily change aggregate consumer demand for products of any given origin and pointing to lack of participation in voluntary labeling programs as evidence that consumers don't have a strong preference for COOL. Nor did the government assert health or safety interests. Indeed, it maintained that, though there was evidence that some consumers used COOL as a proxy for safety information, those consumers were mistaken.⁵⁶

⁵¹ *Id.* at 37 (Brown, J., dissenting).

⁵² *Id.* at 39. To Judge Brown, mandatory disclosure to correct deception wasn't an exception to the First Amendment's stringency, but rather an acknowledgement that sellers had no right to “wrongly deceive” consumers. *Id.* at 40. People have a natural right to freedom, but “no one ever had a natural right to do wrong.” *Id.* It is unclear why the classic case *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), allowing substantial falsity in political speech, is correct on this reasoning, unless it's not a natural wrong to deceive someone in a political context.

⁵³ The *Central Hudson* test's first part explicitly exempts false and misleading speech from the test set out in parts 2–4; such speech may simply be banned. To then run what Judge Brown says are the only acceptable compelled disclosures, those that fight false and misleading speech, through *Central Hudson* analysis seems odd. Judge Brown's reference to “inherent or actual” deception, *Am. Meat Inst.*, 760 F.3d at 45 (Brown, J., dissenting), is a red flag—this is language from cases that say that the government has to try disclosures first if the speech is only “potentially” misleading, whereas it can outright ban speech that is “inherently or actually” misleading. So in fact, Judge Brown has not applied *Central Hudson* to the key *Zauderer* class of “potentially misleading” speech—speech whose deceptiveness can be averted by additional disclosure. However, it is possible that she might accept that the prevention of “potentially” misleading speech is a substantial government interest.

Why not run all bans on commercial speech, including bans on false or misleading speech, through *Central Hudson* factors two through four? Being explicit about that would probably raise the question of how an outright ban could ever be a proper fit, since disclosure requirements would regularly be an alternative, but Judge Brown's analysis depends on outright bans being acceptable, since she deems disclosure to be a less restrictive alternative to the ban the government could have chosen. Navigating this tangle would have to depend on some very thick theories of when most consumers actually understand disclosures (which is, in reality, not very often). I question how accurate courts are compared to regulators at identifying when disclosures would be sufficient.

⁵⁴ *Am. Meat Inst.*, 760 F.3d at 47–48 (Brown, J., dissenting).

⁵⁵ *Id.* at 50. However, Judge Brown didn't explain why product bans and direct government speech were obviously inadequate to deal with false or misleading commercial speech.

⁵⁶ *Id.* at 51; see also Wendy A. Johncheck, *An Examination of Whether U.S. Country of Origin Labeling Legislation Plays a Role in Protecting Consumers from Contaminated Food*, 21 STAN. L. & POL'Y REV. 191 (2010) (concluding that COOL can only play a limited role in achieving safety objectives such as tracing a contaminated product to its source); Terence P. Stewart et al., *Trade and Cattle: How the System is Failing an Industry in Crisis*, 9 MINN. J. GLOBAL TRADE 449 (2000) (noting the tension between the Department of Agriculture's prior findings that COOL hadn't been shown to be beneficial with the Federal Trade Commission's findings that “Made in the USA” labels benefit consumers).

While I disagree with Judge Brown on the overall constitutionality of the regulation, it's true that the government's litigation position was so contorted as to be unbelievable. By asserting factual premises about food safety that contradicted consumer beliefs—those beliefs being that country of origin matters for various reasons, including safety risks—the government managed to be paternalistic in both directions. Its position could be paraphrased as: “this information should be disclosed to consumers, even though consumers don't know what they're doing and their preferences are based on false factual predicates.” More kindly, the government's position promoted a very particular version of consumer autonomy: because consumers say they want this information, even though they shouldn't and won't use it, they should get it.

Judge Brown then turned to the most *Lochnerian* part of her dissent. She concluded that “this is a case about seeking competitive advantage.”⁵⁷ The rule

benefits one group of American farmers and producers, while interfering with the *practices and profits* of other American businesses who rely on imported meat to serve their customers Such a disproportionate burden “stands in sharp conflict with the First Amendment's command that government regulation of speech must be measured in minimums, not maximums.”⁵⁸

There's a logical leap here: how did an economic burden on conditions of production (“practices and profits”) become a First Amendment harm? Money may be speech in campaign finance, but how is money spent to segregate animals by country of origin speech? The dissent's point could be that an interest in helping one group over another can't be “substantial.” But stated that way it's a very broad claim, and one the case law doesn't support; all laws benefit some groups at the expense of others, even libel laws and laws against commercial deception.⁵⁹

Judge Brown concluded that upholding mandatory disclosures for informational purposes facilitated rent-seeking. By accepting such flimsy, nebulous interests, the court allowed the government to “commandeer the speech of others” on any ground, including motives “in aid of any sort of crony capitalism or ideological arm-twisting.”⁶⁰ The government's alleged interest in providing information would result in higher prices because of the cost of monitoring the supply chain, taking away the price advantage currently enjoyed by some producers. “[T]he protections of the First Amendment should [not] be abrogated for some businesses in order to benefit other businesses.”⁶¹

Judge Brown evoked older critiques of “class legislation” from the *Lochner* period when she asked, “if this example of cronyism is okay, who will balk at any other economic or ideological discrimination?”⁶² The derogatory term “class legislation” denounced populism—the fear was of smaller producers or laborers overwhelming the

⁵⁷ *Am. Meat Inst.*, 760 F.3d at 52 (Brown, J., dissenting).

⁵⁸ *Id.* (citations omitted) (emphasis added).

⁵⁹ Judge Brown concluded that “[t]he First Amendment ought not be construed to allow the government to compel speech in the service of speculative or hypothetical interests for purely private benefits.” *Id.* at 53. But it's not clear what counts as a public benefit. In the libertarian/natural rights view, which Judge Brown seems to be endorsing, there's no such thing as society, and all benefits are private. In the alternative, we could say that improving utility is a public good, but then judicial invalidation of any given legislative determination that a rule improves utility would seem to depend on a conception of the appropriate decision-maker in weighing utility.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

more concentrated rich.⁶³ “Cronyism” suggests the opposite, even as the producers most affected by COOL are the large, wealthy ones. Judge Brown’s rhetoric cleverly positions her against the wealthiest entities with the most access to legislative ears, even as the substance of her argument is designed to preserve existing economic arrangements, including the comparative advantages of large producers who don’t want to bother sorting animals by origin.

The First Amendment analysis should not turn on which businesses are benefited by a regulation. There are good non-speech-related reasons we might want to limit big producers’ comparative advantage in the meat production process. True, the “crony capitalism” objection may well be valid, if not here then in other cases in which government regulation is at work, whether by mandatory disclosure or otherwise. But the courts are not the appropriate governmental body to resolve that objection, and the First Amendment is not the appropriate mechanism by which to do so. COOL regulation is fundamentally economic regulation; it will create winners and losers, as economic regulation tends to do.⁶⁴

Specifically, all mandatory disclosure implicitly signals that the disclosed information is important. It is highly plausible that, in the context of American society, COOL carries a “buy American” message.⁶⁵ But compared to Christian prayer at the beginning of a legislative session, or mandatory ultrasounds and “disclosures” that abortion is associated with suicide,⁶⁶ I find it hard to identify ideological coercion here. Nonetheless, Judge Brown’s dissent went on: “There can be no right *not* to speak when the government may compel its citizens to act as mouthpieces for whatever it deems factual and non-controversial and the determination of what is and what is not is left to the subjective and ad hoc whims of government bureaucrats or judges.”⁶⁷ Here, the dissent borrows from the fever pitch of American politics of late, and not to its benefit. If putting country of origin labeling on meat is tyranny, what do we call it when the government jails journalists for reporting, or collects all our private communications in case they might be useful later?

If, as Judge Brown wrote, we live “[i]n a world in which . . . what is claimed as fact may owe more to faith than science, and what is or is not controversial will lie in the eye of the beholder,” then the dissent’s implications are quite significant. As others have recognized, however, refusing to let the government find facts for purposes of commercial speech regulation would jeopardize a huge amount of existing regulation,

⁶³ See, e.g., Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 229–30 (1999) (describing the phenomenon).

⁶⁴ Alejandro Plastina et al., *Market and Welfare Effects of Mandatory Country-of-Origin Labeling in the U.S. Specialty Crops Sector: An Application to Fresh Market Apples*, 77 S. ECON. J. 1044 (2011) (concluding that mandatory COOL creates winners and losers among consumers, producers, and retailers; consumers benefit if they have very weak or very strong preferences for domestic products, while producers and retailers win or lose depending on the relationship between labeling costs and ability to get better prices or better segment consumer markets).

⁶⁵ Reflexive nationalism may lead Americans to attribute superior quality to U.S. products in a variety of ways. The legislative history mentioned safety, but a halo effect may exist for other qualities as well. See, e.g., Jung Ha-Brookshire & So-Hyang Yoon, *Country of Origin Factors Influencing US Consumers’ Perceived Price for Multinational Products*, 29 J. CONSUMER MARKETING 445 (2012) (finding that consumers tend to perceive products made in the U.S. as being made more sustainably).

⁶⁶ See Tushnet, *supra* note 38, at 2415.

⁶⁷ *Am. Meat Inst.*, 760 F.3d at 54 (Brown, J., dissenting). Consistent with Judge Brown’s dislike of commercial speech doctrine, note how commercial speakers have become unmodified “citizens,” as if the majority’s holding allowed disclosure mandates in noncommercial speech as well. See also *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (Cal. 2002) (Brown, J., dissenting) (setting forth a libertarian critique of commercial speech doctrine).

from securities law to FDA's regulation of drugs and far beyond.⁶⁸ On one reading of Judge Brown's claim, SEC disclosures, the FTC's consumer protection side, and most of what FDA does are equally unconstitutional, since only the speaker should decide for herself what facts are "true" and what disputes are controversial. On another reading, judges (and bureaucrats?) can decide some truths, but not this one—mandatory disclosures are acceptable if and only if they address real deception, however narrowly Judge Brown would define that. The objection to allowing the government to find "facts" is not essentially a First Amendment objection, but rather an argument—evoking *Lochner* again—that the government should not be allowed to regulate at all.

III. WHAT'S NEXT?

Compelled commercial disclosures are a form of regulation of information where deception may not be the regulator's primary concern. Instead, the concern is for the available mix of truthful information—a key part of the structure of a market, because well-functioning markets require lots of information.⁶⁹ If the most basic function of government is to keep order, protecting against force and fraud, it's not necessarily a huge step to add in a referee function, setting and enforcing other rules, and the line between preventing deception and mandating the provision of information can be thin indeed.⁷⁰ At the same time, information is never completely distinct from the other operations of a market: producing information changes what is on offer in the market.⁷¹ Nowhere is that more clear than with mandatory COOL for meat, where some producers will have to make extensive changes in their modes of production in order to label meat in compliance with the regulation.

Mandatory COOL thus offers a classic example of the mutual dependence of commercial speech regulation with other forms of economic regulation. The key question, which may soon reach the Supreme Court if it grants AMI's expected petition for certiorari, is whether mandatory disclosures should be treated with anything like the deference given to other forms of economic regulation, or whether more stringent standards of evidence both supporting the government's goal and validating its proposed mechanism for achieving that goal should be required. Given the implications of stricter scrutiny of commercial speech regulation for the overall functioning of the regulatory state, the *AMI* majority's approach is far sounder.

⁶⁸ See, e.g., WOLFSON, *supra* note 3, at 28–29.

⁶⁹ See George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970); cf. James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413 (1992) (discussing the constitutive relationship of information to market structure).

⁷⁰ See Tushnet, *supra* note 3, at 250.

⁷¹ See *id.* at 238, 244.

