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COOL Or Not-So-COOL: Overview and Discussion of Country of Origin Labeling
November 14, 2013


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Presenters

- **J. Dudley Butler**, Farm and Ranch Law Group, former Administrator, USDA Grain Inspection, Packers and Stockyards Administration
- **John Dillard**, Olsson Frank Weeda Terman Matz P.C., Author on *Ag In The Courtroom* on Agweb.com




Outline of Today's Presentation

- "COOL 101"
- Opening Statements
 - Dudley Butler
 - John Dillard
- First Amendment issues
- Congressional intent vis-à-vis Final Rule
- COOL & the World Trade Organization
- COOL & the 2013 Farm Bill
- Questions and Answers

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- ### Country of Origin Labeling: Background
- In general, products imported into the U.S. are required to indicate products' country of origin
 - Dates back to 1930's
 - Many agricultural products exempted
 - Matter of debate for many years
 - Culminated in Country of Origin Labeling requirements under federal law
 - Debate continued in each branch of government and the WTO

- ### Country of Origin Labeling: Background
- COOL requires that "a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity" (7 U.S.C. § 1638a(a)(1))
 - Establishes labeling requirements, specifically including for muscle cut meats triggered by the animal's geographic history
 - Muscle cuts of beef, pork, lamb, chicken & goat

COOL: Labeling Requirements

- Animal with U.S. country of origin
- Animal with multiple countries of origin
- Animal imported into the U.S. for "immediate slaughter"
- Animal with a foreign country of origin

Current Rule on Ground Beef

- All actual or reasonably possible countries of origin must be listed on the origin declaration, in any order.
 - In determining what is considered reasonable, when a raw material from a specific origin is not in the processor's inventory for more than 60 days, that country shall no longer be included as a possible country of origin.
- (7 U.S.C. § 1638a(2)(E))

COOL: Exemptions

- Exempts items if they are ingredients in a processed food
- Exempts “food service establishments”
 - Restaurants, cafeterias, bars, and other facilities that prepare and sell food to the public
- Covers retailers that annually purchase at least \$230,000 of perishable agricultural commodities annually

COOL: Legislative Background

- Farm Security and Rural Investment Act of 2002 (a/k/a the “2002 Farm Bill”)
 - Required retailers of “covered commodities” to inform consumers of the country of origin of those commodities as of September 30, 2004
 - Applied to fresh fruits and vegetables, beef, pork, lamb, seafood, peanuts
- Food, Conservation and Energy Act of 2008 (a/k/a the “2008 Farm Bill”)
 - Required COOL to take effect September 30, 2008
 - Added as “covered commodities” goat meat, chicken, macadamia nuts, pecans, and ginseng

COOL: Rulemaking

- USDA Agricultural Marketing Service issued an interim final rule in **August 2008**
- Final rule on **January 15, 2009** (“2009 Final Rule”)
 - Effective March 16, 2009
- 2009 Final Rule challenged by Canada and Mexico at WTO
- Proposed and final rules were issued in 2013 in the wake of the WTO outcome (2013 Final Rule)

COOL: Rulemaking

- 2013 Final Rule requires labels to specify where the animal was born, raised, and slaughtered
 - Unless it is imported from a foreign country
 - ✦ i.e., “Born, Raised, and Slaughtered in the United States”
 - ✦ i.e., “Born in Mexico, Raised and Slaughtered in the United States”
- 2013 Final Rule eliminated allowance for commingling of muscle cut covered commodities of different origins (78 Fed. Reg. 31,369)
 - Provided 6 month grace period, recognizing difficulty in achieving compliance

COOL: Federal District Court

- *American Meat Institute, et al. v. United States Dep’t of Agriculture, et al.*, No. 13-CV-1033, 2013 WL 4830778, --- F.Supp.2d --- (Sept. 11, 2013)
- Meat industry associations challenged 2013 Final Rule, seeking preliminary injunction

COOL: Key Legal Arguments

- **Count I:** The 2013 Final Rule “violates Plaintiffs’ First Amendment rights by compelling them to speak when they would rather not.”
- **Count II:** The 2013 Final Rule “contravenes the will of Congress” because:
 - Exceeds authority granted to USDA AMS because the rule requires retailers to specify where an animal was “born, raised, and slaughtered”
 - Impermissibly prohibits commingling
- **Count III:** 2013 Final Rule violates the APA as “arbitrary and capricious”

COOL: World Trade Organization

- Canada and Mexico initiated WTO challenge process following issuance of 2009 Final Rule
 - Asserted that COOL had trade-distorting impact by negatively impacting number and value of cattle and hogs imported into U.S.
- **November 2011:** WTO Dispute Panel (DP) ruled in favor of Canada and Mexico (and against COOL)
 - Treats imported livestock less favorably
 - COOL failed to meet goal of providing complete information to consumers regarding country of origin (of meat products)

COOL: World Trade Organization

- March 2012: WTO Appellate Body (AB) upheld DP ruling that imports were treated less favorably, **BUT** reversed ruling that COOL did not reach its objective of providing consumers with country of origin information
 - WTO Dispute Settlement Body adopted the DP and AB Reports in July of 2012
- WTO Arbitrator set March 23, 2013 deadline for U.S. to comply via requiring labels showing where animal was born, raised, and slaughtered and banning commingling of meats from different origins
- 2013 Final Rule was issued, with Canada and Mexico requesting WTO compliance panel



Opening Statements

- First, Dudley Butler
- Followed by John Dillard who will segue into First Amendment issues

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A Political Solution for a Problem that Never Existed

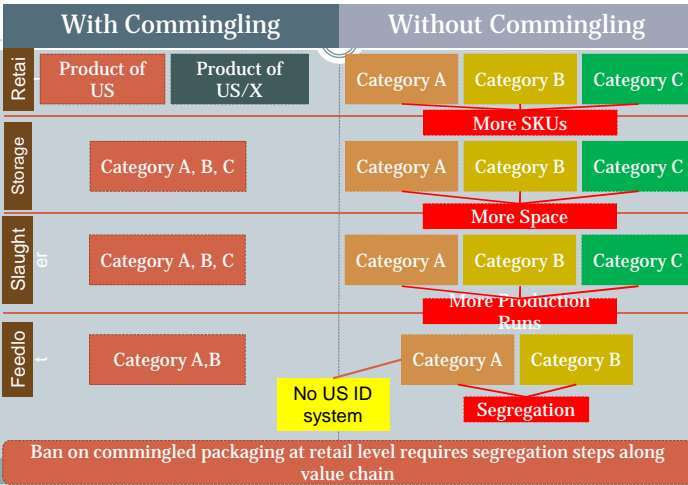
- Labeling regime is already wreaking havoc in meat industry
 - Bans “commingling”
 - Will increase consumer costs in time of falling beef demand
- Violation of First Amendment rights
- 2013 Rule goes beyond what Congress intended
- Threatens ag sector with substantial retaliatory tariffs

Snapshot of North American Beef and Pork Trade

IMPORTS			EXPORTS		
Beef & veal (1000 lbs)			Beef & veal (1000 lbs)		
	Canada	472,231	Canada		504,128
	Mexico	260,414	Mexico		336,111
	Rest of world	1,440,474	Rest of world		1,666,509
	Total	2,173,119	Total		2,506,748
Live Cattle (head)			Live Cattle (head)		
	Canada	985,660	Canada		55,121
	Mexico	985,660	Mexico		-----
	Rest of world	9,608	Rest of world		128,654
	Total	1,980,928	Total		183,775
Pork (1000 lbs)			Pork (1000 lbs)		
	Canada	977,471	Canada		597,201
	Mexico	1,010,402	Mexico		1,179,124
	Rest of world	153,444	Rest of world		3,298,039
	Total	1,987,873	Total		5,074,364
Hogs (head)			Hogs (head)		
	Canada	5,303,643	Canada		-----
	Mexico	-----	Mexico		19,053
	Rest of world	-----	Rest of world		21,627
	Total	-----	Total		40,680

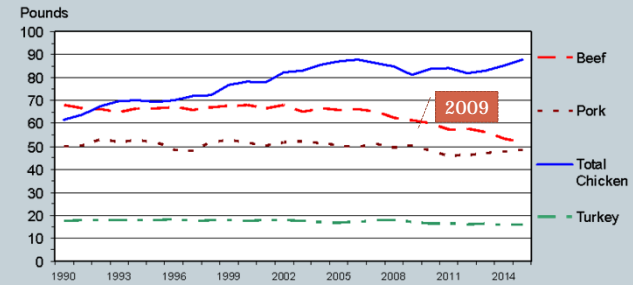
Meat & Livestock Trade (September 2012 to August 2013), USDA ERS

“a small tail wagging a very big dog”



mCOOL's Poor Timing

U S RED MEAT & POULTRY CONSUMPTION Per Capita, Retail Weight, Annual



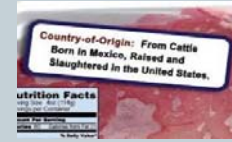
Livestock Marketing Information Center
Data Source: USDA-NASS, Compiled & Analysis by LMIC

Protectionism Gone Awry

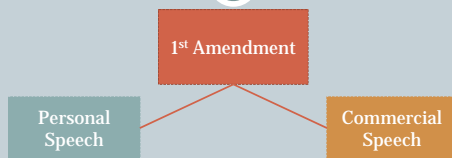
- Provides clear incentive to avoid purchases of Mexican, Canadian livestock
 - Facilities near borders are at competitive disadvantage
- Sharp departure from general country of origin labeling scheme for consumer products
- Not related to food safety
- Consumers base purchasing decisions on quality, appearance
- Relative lack of voluntary labels indicates market does not demand labeling by origin

The time has come for mCOOL to be put out of its misery

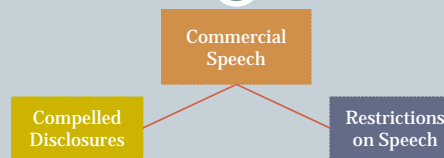
COOL and the First Amendment

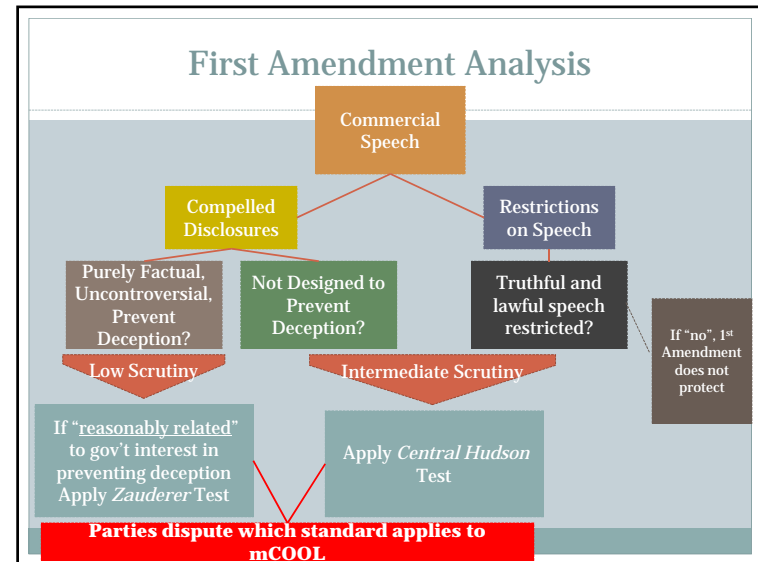
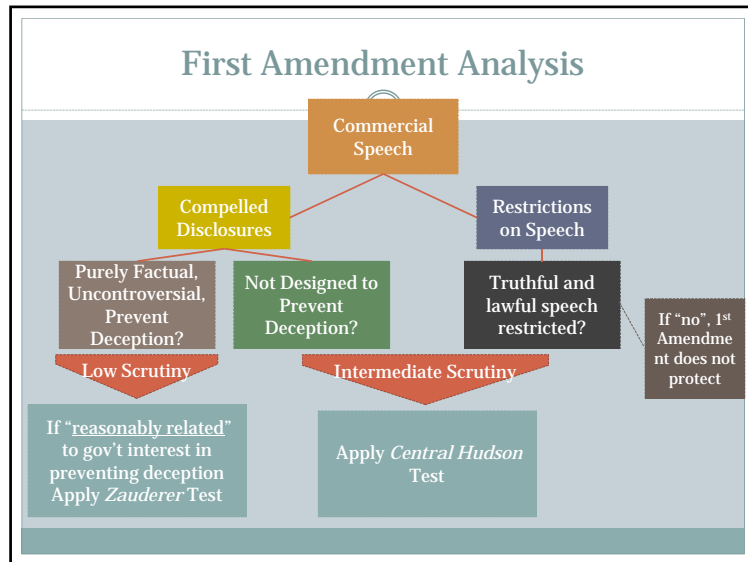
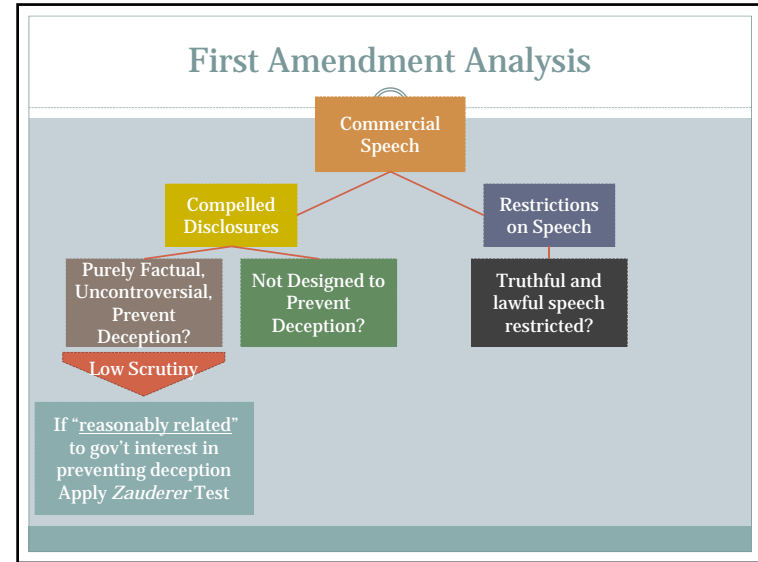
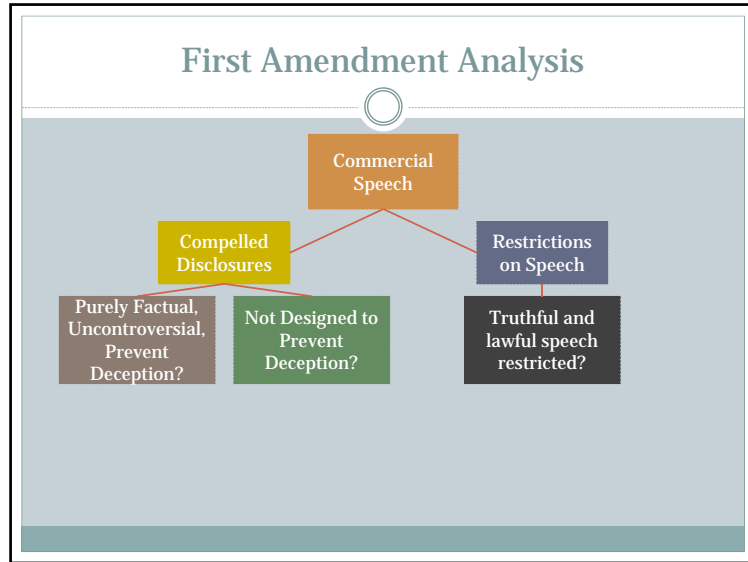


First Amendment Analysis



First Amendment Analysis





Central Hudson, 447 U.S. 557 (1980)

- **Background**
 - NY agency completely banned advertising by utilities that “promoted the use of electricity”
 - Justifications:
 - ✦ To support conservation of energy (substantial)
 - ✦ Electricity rates should be fair and efficient (substantial)
- **Holding**
 - Commercial advertising falls under 1st Amendment umbrella
 - Advertising ban directly advances state interest in conservation, not equity of electricity rates
 - Total advertising ban was much more excessive than necessary to achieve energy use reduction goals
 - ✦ Ban prevented utility from promoting energy efficient technologies
 - Ban overturned on 1st and 14th Amendment grounds

Central Hudson Takeaways

- Commercial speech is protected by the First Amendment so long as the speech is not misleading or unlawful (but to a lesser extent than personal expression or political speech)
- If commercial speech is not misleading or related to unlawful activity, the government can only restrict speech if it has a **substantial interest in doing so**
 - Examined with “intermediate scrutiny” – same as gender, age discrimination
 - Government has burden to prove its substantial interest
- Commercial speech restrictions must **directly advance** the government’s substantial interest
- Restriction **cannot be more extensive than is necessary** to serve the government’s substantial interest

These parameters inform the 4-part *Central Hudson* test

R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012)

- **Background**
 - Congress directed FDA to require new graphic warnings on cigarette packages
 - Contained images designed to discourage smoking
 - FDA studies did not provide statistical proof that warnings were effective at smoking prevention, cessation
- **Holding**
 - *Central Hudson*, not *Zauderer* applied because existing warning labels already put smokers on notice of dangers (smokers were not misled by existing warnings)
 - FDA could not prove that labels would directly advance its substantial interest in smoking prevention & cessation
 - ✦ Studies did not prove graphic labels were effective
 - FDA’s interest in “effectively communicating” information about the health effects of smoking is not substantial

Int’l Dairy Foods Assoc. v. Amestoy, 92 F.3d 67 (2nd Cir. 1996)

- **Background**
 - Vermont law required retail milk products to display label if cows received rBST (growth hormone)
 - Justification: “strong consumer interest” & “public’s right to know”
- **Holding**
 - FDA could not identify safety difference between rBST, non-rBST dairy products – not safety related
 - “[C]onsumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement . . .”

“Were consumer interest alone sufficient, there is no end to the information that states could require manufacturers to disclose about their production methods”

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)

- **Background**

- OH bar disciplined attorney whose newspaper ad failed to disclose potential costs in contingent fee cases – “If there is no recovery, no legal fees are owed by our clients”

- **Holding**

- Warnings or disclaimers can be required in commercial speech to dissipate the possibility of consumer deception
- Unjustified or unduly burdensome disclosure requirements are unlawful
- Disclosure requirements must be reasonably related to the State’s interest in preventing consumer deception

Spirit Airlines, Inc. v. U.S. DOT, 687 F.3d 403 (D.C. Cir. 2012)

- **Background**

- Airline challenged DOT rule that required airlines to include taxes in fare price (1st Amend. grounds)
- Justification: prevent consumer deception

- **Holding**

- DOT rule targeted misleading speech
- Requiring disclosure of full price is “reasonably related” to government’s interest in preventing deception

- **Questions at this point?**

Issues

- First Amendment issues
- **Congressional intent vis-à-vis Final Rule**
- COOL & the World Trade Organization
- COOL & the 2013 Farm Bill
- Questions and Answers

Congress did not intend 2013 Rule

- **Commingling ban not authorized in COOL statutory language**
 - Limited to labeling products for retail sale
 - Does not authorize AMS to wade into production practices
 - Ex. 2008 Interim Rule Preamble:
 - “[T]he statutory language makes clear that the purpose of the COOL law is to provide for a retail labeling program for covered commodities – not to impose economic inefficiencies and disrupt the orderly production, processing, and retailing of covered commodities.” 73 Fed. Reg. 45,106, 45,118
- **AMS is not in the business of regulating production practices**

Issues

- **First Amendment issues**
- **Congressional intent vis-à-vis Final Rule**
- **COOL & the World Trade Organization**
- **COOL & the 2013 Farm Bill**
- **Questions and Answers**

mCOOL does not comply with WTO Obligations

- **2009 Rule violated US WTO obligations**
 - Technical barrier to trade
 - WTO’s Dispute Settlement Board (DSB) ordered US to re-write rule
- **Canada and Mexico sought a WTO DSB compliance panel to examine 2013 Rule in August 2013**
- **WTO DSB referred 2013 Rule to same panel that reviewed 2009 Rule (Sept. 2013)**
- **Lengthy process**

Canada’s Proposed Retaliation List

- | | |
|--------------------|----------------|
| • Cattle & beef | • Steel |
| • Swine & pork | • Candies |
| • Cheese | • Swivel seats |
| • Apples | • Wine |
| • Cherries | • Orange Juice |
| • Corn | |
| • Wheat & pasta | |
| • Jewelry | |
| • Wooden furniture | |

Canada's Proposed Retaliation List

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Issues

- First Amendment issues
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- **COOL & the 2013 Farm Bill**
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Legislative mCOOL fix/repeal?

- Would be quickest solution to mCOOL problem
- One of many topics under discussion and consideration
- Efforts underway by opponents and proponents of mCOOL



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