Trade Protectionism of Wine Brand Names at the Expense of American Viticultural Areas: Arbitrary Protection of "Big Liquor" at the Expense of Small Vineyards

by

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TRADE PROTECTIONISM OF WINE BRAND NAMES AT THE EXPENSE OF AMERICAN VITICULTURAL AREAS: ARBITRARY PROTECTION OF "BIG LIQUOR" AT THE EXPENSE OF SMALL VINEYARDS

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I. INTRODUCTION

Wine consumption by American consumers has been on a steady rise for the past five decades. In 1953, 141 million gallons of wine were consumed in the United States.[1] By 2002, the total rate of consumption rose to 595 gallons of wine and the per capita rate of consumption had nearly doubled.[2] While California is by far the largest wine producing state,[3] American grapes grown in other states are beginning to receive attention as being capable of producing wines of quality and distinction.[4] Perhaps best demonstrating the new American renaissance in wine is the fact that there is at least one winery in every state, including North Dakota and Alaska.[5] In some states, small family wineries are now being used to supplement flagging farm incomes that have failed to produce a profit through the growing of traditional staple crops such as corn and wheat.[6]

Wine grapes are among a very limited group of agricultural products that are recognized for taking on unique flavor characteristics resultant of the climate and soil typology of the areas in which they are grown.[7] Not unlike varietal coffee beans, wine grapes grown in certain favored microclimates are recognized as

1. *See* WINE INSTITUTE, KEY FACTS: WINE CONSUMPTION IN THE U.S. 1934-2002, *at* http://www.wineinstitute.org/communications/statistics/consumption1934_99.html (last visited Apr. 10, 2004).

2. *Id.*

3. *See* M.L. Lyke, *Walla Walla: Grape A; Washington Wineries Rival Napa's, Without the Crowds*, WASH. POST, Oct. 27, 2002, at E01.

4. *See* Kathy Hedburg, *Grape Growers Toast WSU Horticulturist*, LEWISTON MORNING TRIBUNE, Feb. 10, 2003, at 7B. (commenting that presently, Washington is second only to California in the production of wine and wine grapes. Currently, Washington has over 330 grape growers with twenty-eight thousand acres planted to wine grapes; the industry has a $2.4 billion impact on the state).

5. Thomas P. Skeen, *One Nation, Into Wine*, SEATTLE TIMES, Jan. 22, 2003, at C4.

6. *See* Jerry Nelson, *A Vine Grows on the Prairie*, FARM J. (Jan. 2002), *available at* http://www.agweb.com/news_show_news_article.asp?articleID=83605&newsca=GN (stating that in South Dakota, small domestic wineries have been looked to as a possible salvation for the financially strapped family farm, and that while grapes are not traditionally grown in South Dakota and the plains states, hybrids of American and French grapes have been developed in "climate challenged" states that are more winter hardy than French and Mediterranean varieties).

7. *See* Michael Maher, Comment, *On* Vino Veritas*? Clarifying the Use of Geographic References on American Wine Labels*, 89 CAL. L. REV. 1881, 1884 (2001).

producing superior wine as opposed to wine made from lesser grapes.[8] Wine growing areas are referred to as appellations.[9] Designated appellations exist within nearly all major wine producing nations and nearly all nations have strict requirements relating to the labeling of appellation of origin.[10]

There are many ways that American winemakers may label their wine to designate appellation of origin. One way is to label origin by state or county.[11] Another way is to label the wine as being from an American Viticultural Area ("AVA").[12] AVAs are appellations that are viticulturally distinguishable from surrounding areas as a result of their unique geography and climate.[13] AVA designation is favored because it allows winemakers to advertise or to use labeling stating that the grapes used to ferment the finished product were grown in a particular microclimate recognized as producing superior wines by consumers.[14]

Strict labeling requirements exist which prevent winemakers from using brand names that have viticultural significance in common with an AVA name.[15] The reason for this restriction on wine labeling is it protects consumers from misleading brand names which confuse or create a false impression of appellation of origin.[16] This restriction is not without exception. Brand names of viticultural significance which were registered before July 7, 1986, may be used as long as, among other things, the wine is also labeled with an area of origin.[17] This exception is referred to by most wine lawyers as the "grandfather clause."[18]

It is the contention of the author that the grandfather clause is a thinly-veiled trade protectionism that benefits large established wineries at the expense of small boutique producers who wish to use specific AVA grapes. To that end, this article will discuss the grandfather clause and potential challenges which may be raised at law by those seeking its elimination. Part II will discuss the origins of wine labeling law and the restrictions that exist to producers who wish to use AVA labeling for wine grapes grown in designated appellations. Part III

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8. *See* Ronnette King, *Pouring It On; Coffee Convention Warms to Next Wave: Luring the True Believer*, TIMES-PACAYUNE, April 20, 1997, at F1.

9. *See* 27 C.F.R. § 4.25(a)(1) (2004).

10. *See id.*

11. *See* Maher, *supra* note 7, at 1891.

12. *See id.* at 1892.

13. *See id.*

14. *See id.*

15. *See* Appellations of Origin, 27 C.F.R. §§ 4.25(e)(1)(i) (2004); 4.39(i)(2)(iii).

16. *See* 27 C.F.R. §§ 4.25(e)(1)(i);.4.39(i)(2)(iii).

17. *See id.* § 4.39(i)(2).

18. Bronco Wine Co. v. Espinoza, 128 Cal. Rptr. 2d 320, 330 (Cal. Ct. App. 2002).

will discuss *Bronco Wine Company v. Espinoza*, a failed attempt by the State of California to legislate against the "loophole" provided by the ATF regulations. Finally, Part IV will discuss strategies that may be used to invalidate the grandfather clause through the *Chevron* administrative deference doctrine.

II. American Viticultural Areas, Wine Labeling and the ATF: What's in a Name, Anyway?

Most consumers face some level of difficulty in deciphering the meaning of a wine label.[19] This stems as much from a basic lack of knowledge about wine as it does from the confusing and sometimes overwhelming amount of information contained on a wine label.[20] Whereas a certain fancifully lettered brand name may evoke images of arbor-misted vineyards, brand names used to market wine say nothing about the origins of the product contained within the bottle. Contrary to what most consumers realize, by looking past the brand name, it is possible to use other information contained on a wine label to determine the heritage of the grapes contained therein. What follows is an examination of the laws and regulations that control the labeling of wine as it is produced in the United States.

A. *The Federal Alcohol Administration Act: Regulation and Control of Wine Labeling to Protect the Consumer*

The Federal Alcohol Administration Act ("FAAA") controls the packaging, bottling, and labeling of wine and other alcoholic beverages.[21] The FAAA was passed shortly after the repeal of prohibition in 1935, "as a comprehensive statute to deal with practices within the alcohol beverage industry that Congress had judged to be unfair and deceptive, resulting in harm to both competitors and consumers."[22] Section 205(e) of the FAAA governs labeling practices for domestic and foreign wine and prohibits the introduction or receipt of wine into interstate or foreign commerce, "unless such [wine is] bottled, packaged, and labeled in conformity with such regulations . . . prescribed by the Secretary of the

19. *See* Maher, *supra* note 7, at 1906.
20. *See id.*
21. *See* 27 U.S.C. §§ 201- 219 (2000).
22. Adolph Coors Co. v. Brady, 944 F.2d 1543, 1547 (10th Cir. 1991).

Treasury."[23] In pertinent part, the FAAA allows the Secretary of the Treasury to prescribe labeling regulations:

> (1) as will prohibit deception of the consumer . . . and as will prohibit, irrespective of falsity, such statements . . . as the Secretary of the Treasury finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products . . . and the manufacturer or bottler or importer of the product . . . (4) as will prohibit statements on the label that are disparaging of a competitor's products or are false, misleading, obscene, or indecent; and (5) as will prevent deception of the consumer by use of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, or is a name that is in simulation or is an abbreviation thereof, and as will prevent the use of a graphic, pictorial, or emblematic representation of any such individual or organization, if the use of such name or representation is likely falsely to lead the consumer to believe that the product has been indorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, such individual or organization.[24]

A similar provision exists within the FAAA that prohibits consumer deception through false or misleading advertising relating to age, manufacturing processes and statements that are inconsistent with alcohol labeling.[25]

Although the Secretary of the Treasury has ultimate authority to control wine labeling under the FAAA, the statute gives the Secretary authority to "utilize the services of any department or other agency of the Government to the extent necessary to carry out his powers and duties under this chapter and authorize officers and employees thereof to act as his agents."[26] The Secretary of the Treasury has assigned exclusive authorization to the Bureau of Alcohol, Tobacco and Firearms ("ATF") to administer and promulgate administrative regulations to express the intent of the FAAA.[27]

In line with the FAAA, the ATF regulations prohibit the use of labeling containing "[a]ny statement that is false or untrue in any particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading

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23. 27 U.S.C. § 205(e).

24. *Id.*

25. *Id.* § 205(f) (allowing advertising to be regulated "as will prevent deception of the consumer with respect to the products advertised and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guaranties, and scientific or *irrelevant matters as the Secretary of the Treasury finds to be likely to mislead the consumer").*

26. *Id.*

27. *See Adolph Coors Co.*, 944 F.2d at 1546.

impression."[28] Also, American winemakers must include the name and address of the facility where the wine was produced and may, if the bottler or packer is the same person who made seventy-five percent of the wine, include the terms "produced and bottled by" or "produced and packed by" on the label.[29] A wine label must also include the brand name of the wine, the alcohol content of the wine, the type or class of the wine and the Surgeon General's warning.[30] As a matter of discretion, the label may also include information relating to the vintage of the wine, so long as such information conforms with the regulations.[31]

B. *Appellations and American Viticultural Areas: Putting a Place to a Name*

Although they are not required to do so, American wineries may voluntarily choose to include appellation of origin information on the wine label.[32] If a winery chooses to label by appellation of origin, the wine must be:

> (i) At least 75 percent . . . derived [by volume] from fruit or agricultural products grown in the appellation area indicated; (ii) . . . fully finished . . . within the State in which the labeled county is located; and (iii) [in conformance] to the laws and regulations of the named appellation area governing the composition, method of manufacture, and designation of wines made in such place.[33]

An appellation may variously be defined as "[1] the United States; [2] a State; [3] two or no more than three states which are all contiguous; [4] a county . . . [5] two or no more than three counties in the same states; or [6] a viticultural area."[34]

The term *viticultural area* is defined as "a delimited grape growing region distinguishable by geographical features, the boundaries of which have been recognized and defined in part 9 [of chapter 27]."[35] Viticultural areas within the United States are commonly referred to as "American Viticultural Areas"

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28. 27 C.F.R. § 4.39(a)(1) (2004).
29. *Id.* § 4.35(a)(1)-(2).
30. *See id.* § 4.32.
31. *See id.* § 4.27.
32. *See id.* § 4.25(a).
33. *Id.* § 4.25(b)(1)(i)-(iii).
34. *See id.* § 4.25(a)(1).
35. *Id.* § 4.25(e)(1)(i).

("AVA").[36] Examples of well known AVAs are Napa Valley, Sonoma Valley, the Russian River Valley and the Walla Walla Valley.[37]

In order to establish an AVA, an applicant goes through an informal notice and comment period of rule making, wherein a written petition/application is submitted to the Director of the ATF demonstrating

> (1) Evidence that the name of the viticultural area is locally and/or nationally known as referring to the area specified in the application; (2) Historical or current evidence that the boundaries of the viticultural area are as specified in the application; (3) Evidence relating to the geographical features (climate, soil, elevation, physical features, etc.) which distinguish the viticultural features of the proposed area from surrounding areas; [and] (4) The specific boundaries of the viticultural area.[38]

Winemakers who wish to label their wines with an AVA designation of origin are required to meet all of the appellation origin requirements listed above,

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36. *See id.* § 4.25(e)(2).

37. *Id.* §§ 9.23, 9.29, 9.66; *see also id.* § 9.91 (providing an example of the Walla Walla Valley AVA listing).

(a) *Name.* The name of the viticultural area described in this section is 'Walla Walla Valley.' (b) *Approved maps.* The appropriate maps for determining the boundaries of the Walla Walla Valley viticultural area are two U.S.G.S. maps, in the scale 1:100,000. They are entitled: (1) 'Walla Walla,' Washington-Oregon, 1980 (2) 'Pendleton,' Oregon-Washington, 1983. (c) *Boundaries.* The Walla Walla Valley viticultural area is located within Walla Walla County in Washington and Umatilla County in Oregon. It is entirely within the Columbia Valley viticultural area. The boundaries are as follows: (1) The beginning point is on the Walla Walla quadrangle map, in T8N/37E, at the point where the 2,000 foot contour line intersects with an unnamed light duty road approximately 250 feet east of U.S. Highway 12 in Minnick, Washington (on maps measured in metric units, this elevation is between the 600 and 650 meter contour lines), (2) Then the boundary goes northwest in a straight line for 7 kilometers (km), until it intersects with a power line that runs between T8N and T9N, (3) Then the boundary follows the power line west for 8 km, where it diverges from the power line and goes west-southwest in a straight line for approximately 33 km to the intersection of 2 unnamed light duty roads in the area marked Ninemile Canyon in the southwest corner of T8N/R33E, (4) Then the boundary goes south-southwest in a straight line approximately 8 km, until it reaches U.S. Highway 12, about 2.5 km east of Reese, Washington, (5) Then the boundary goes south in a straight line for approximately 8 km, crossing the Washington-Oregon state line and moving onto the Pendleton U.S.G.S. map, where it meets the 450 m contour line in T6N/R32E, near an unnamed peak with an elevation of 461 m, (6) Then the boundary follows the 450 m contour line in a generally southeasterly direction until it intersects Dry Creek in T4N/R35E, (7) Then the boundary goes southeast along Dry Creek (Oregon) until it reaches the 2000 foot contour line, (8) Then the boundary follows the 2000 foot contour line in a generally northeasterly direction, crossing the Oregon-Washington state line and returning to the Walla Walla U.S.G.S. map, until it reaches the point of beginning.

Id.

38. 27 C.F.R. § 9.3(b).

but AVA labeled wines must be at least eighty-five percent derived "from grapes grown within the boundaries of the viticultural area."[39] Although it has been argued by some that anything less than a one hundred percent origin standard "deceives consumers who might expect that all of a wine labeled with an AVA originates in that AVA,"[40] this is stricter than the seventy-five percent appellation of origin requirement for state or county labeled appellations.

C. *How the ATF Regulates Brand Names and Why this is Significant to AVA Winemakers*

The ATF requires that all wine sold in interstate commerce receive a certificate of label approval ("COLA").[41] To that end, "[a]n applicant for a certificate of label approval, certificate of exemption from label approval, or distinctive liquor bottle approval, must send or deliver signed duplicate copies of ATF Form 5100.31, 'Application For And Certification/Exemption Of Label/Bottle Approval.'"[42] Within ninety days of receiving the application, the ATF must approve or deny the application.[43] If the ATF does not file for an extension of approval, deny the application, or approve the application under certain qualifications, the applicant may file an appeal.[44]

In order to receive a COLA, a label must contain only statements that are in compliance with existing laws or regulations,[45] which necessarily excludes statements that are false or misleading. Also, the label cannot use a misleading brand name or a brand name that is in violation of the ATF regulations.[46]

Once a COLA is issued, it may not be revoked unless "[it is found] that the label or bottle at issue is not in compliance with . . . applicable laws or regulations."[47] Because COLAs may be issued for a potentially unlimited period of

39. *Id.* § 4.25(e)(3)(ii).

40. Maher, *supra* note 7, at 1917 (stating the eighty-five percent grape of origin requirement favors large wine manufacturers that are "capable of simultaneously sourcing wine from both a high value-added, high grape-cost AVA and a low cost region," the consequence of which is that large producers can lower their costs by diluting wine with cheaper grapes and yet still take advantage of consumer recognition of an AVA name associated with greater cost and quality).

41. *See* 27 C.F.R. § 4.50.

42. *Id.* § 13.21(a).

43. *See id.* § 13.21(b).

44. *See id.*

45. *See id.* § 13.21.

46. *See id.* § 13.41.

47. *Id.*

time, and because COLAs have been held to be property interests that are essential to livelihood, they cannot be revoked by the ATF without regard to procedural due process.[48]

With the exception of certain grandfathered brand names, the regulations prohibit usage of brand names of viticultural significance "unless the wine meets the appellation of origin requirements for the geographic area named."[49] That is to say, a winery in Grand Junction, Colorado, or San Diego, California, would not receive a COLA to use a brand name such as "Napa Heights" that confuses the origin of the product with grapes grown in the AVA of Napa Valley, California. Essentially, the ban on names of viticultural significance prevents wineries from capitalizing on consumer ignorance to market wines with "similar to AVA names" made from grapes that were grown somewhere outside of the AVA alluded to in the brand name.

D. *The Bureau of Alcohol, Tobacco and Firearms and the Grandfather Clause: Consumer Deception in Action*

An exception to the prohibition on using brand names of viticultural significance exists in the regulations which provides that regulations prohibiting usage of names of viticultural significance do not apply to brand names that were approved and in usage prior to July 7, 1986.[50] This section of the ATF regulations is informally referred to as the "grandfather clause."[51] The grandfather clause marks something of a departure in the historical regulations concerning wine labeling, and therefore, a brief discussion of its origins are in order.

The FAAA was enacted by Congress in 1935.[52] At that time, ATF regulations required that at least seventy-five percent of the grapes must be sourced from the area of origin indicated by the brand name.[53] This regulation could be circumvented if the word "brand" was placed in direct conjunction with the geographic brand name in a size that was at least one half of the brand name.[54] Us-

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48. Bronco Wine Co. v. United States Dep't of Treasury, 997 F. Supp. 1309, 1316 (E.D. Cal. 1996).

49. 27 C.F.R. § 4.39(i)(1).

50. *Id.* § 4.39(i)(2).

51. *See* Bronco Wine Co. v. Espinoza, 128 Cal. Rptr. 2d 320, 330 (Cal. Ct. App. 2002).

52. *See* Act of Aug. 29, 1935, ch. 814, Stat. 977 (codified as amended at 27 U.S.C. §§ 201-212).

53. *Espinoza*, 128 Cal. Rptr. 2d at 336.

54. *See id.*

ing our previous example, wine made from Colorado grapes could be sold under the "Napa Heights" brand name as long as the label read "Napa Heights Brand."

In 1938, the concept of "Appellation of Origin" was created and the 1935 regulations were amended.[55] The seventy-five percent of origin requirement was retained, but unless the ATF found the brand name to be misleading, geographical brand names were permitted.[56] If the ATF found that the brand name was misleading, the word "brand" was required to appear in conjunction with the brand name.[57] This differed only minimally from the 1935 regulations in that the ATF was awarded greater discretion to determine whether the labeling of origin was misleading. If the ATF determined that the brand name was misleading, the remedy remained the same as recorded in the 1935 regulations.

These regulations remained unchanged until 1978 when the regulations were amended to reflect that, if a name of geographic significance were to be used on a wine label, either (1) the wine sold must reflect the seventy-five percent of origin requirement; or (2) the brand name must conspicuously bear the word "brand" in the same size type as the brand name.[58] The 1978 regulation mirrored the 1935 regulation, with the exception that the word "brand" was required to appear in a larger font.

For various reasons, the 1978 regulations were not immediately implemented because "winemakers argued that the word 'brand' was not aesthetic and would not preclude misleading impressions conveyed by a geographic brand name."[59] As such, the ATF delayed the effective date of the 1978 regulation until January 1, 1987.[60] Ultimately, for the reasons listed below, the delayed effective date of 1987 was never made effective.[61]

In response to concerns of winemakers over the 1978 regulations, the ATF proposed four additional alternatives in 1984.[62] Alternative one left the 1978 regulations unaltered.[63] Alternative two, in essence, reinstated the 1938 regulations.[64] Alternative three reinstated the 1935 brand name in half-size type

55. *Id.* (citing 27 C.F.R. § 4.25 (1938)).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *See id.*
63. *Id.*
64. *Id.* at 336-37.

regulation.[65] Alternative four prohibited the use brand names of viticultural significance unless:

> (a) a correct appellation of origin was used and the wine was bottled in that appellation, or (b) the brand name was qualified by the word "brand" in the same size of type and as conspicuous as the brand name itself, or (c) the wine was labeled with an appellation of origin as specified, or (d) the label [contained] a statement found by the [ATF] to dispel any misconception about the appellation of origin.[66]

After a somewhat lengthy period of notice and comment hearings, each of the four alternatives listed above were scrapped in favor of the current grandfather clause regulation which is codified in Section 4.39(i)(2).[67] This section states, in pertinent part:

> For brand names used in existing certificates of label approval issued prior to July 7, 1986, (i) The wine shall meet the appellation of origin requirements for the geographic area named; or (ii) The wine shall be labeled with an appellation of origin in accordance with § 4.34(b) as to location and size of type of either: (A) A county or viticultural area, if the brand name bears the name of a geographic area smaller than a state, or; (B) A state, county or a viticultural area, if the brand name bears a state name; or (iii) The wine shall be labeled with some other statement which the appropriate ATF officer finds to be sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine. (3) A name has viticultural significance when it is the name of a state or county . . . when approved as a viticultural area . . . or when found to have viticultural significance by the appropriate ATF officer.[68]

In some aspects, Section 4.39 is much stricter than the 1935, 1938, 1978 and proposed 1984 regulations because it forbids any usage of a brand name of viticultural significance that was not registered prior to July 7, 1986. In part, this is because the ATF reached the conclusion that the word "brand" failed to dispel any misleading impressions about wine sold to consumers that failed to meet appellation of origin requirements.[69] The problem with this line of reasoning, however, is that consumer confusion remains a problem in the case of brand names that were registered prior to July 7, 1986.

Essentially, the grandfather clause provides owners of pre-registered brand names a way around the prohibition on names of viticultural significance.

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65. *Id.* at 337.
66. *Id.*
67. *Id.* at 330.
68. 27 C.F.R. § 4.39(i)(2)-(3)(2004).
69. *Espinoza*, 128 Cal. Rptr. 2d at 337.

The net effect of the grandfather clause is that a wine may be labeled with a brand name that has viticultural significance, but is not derived from grapes grown within an AVA, just so long as (1) the wine is also labeled with an appellation of origin; or (2) the wine is labeled with some other statement the ATF finds appropriate to dispel the impression that the wine is made from grapes grown in the viticultural area suggested by the brand name.[70]

Because COLAs have a potentially unlimited lifespan, the consequence of the grandfather clause is that any brand name of viticultural significance registered prior to July 7, 1986, may be purchased or sold to wineries or wine bottlers inside or outside of the AVA resembling the brand name. This allows owners of grandfathered names to market their product under a veiled suggestion that their finished product shares something in common with wine made from AVA grapes. In particular, AVAs that have a longstanding reputation for excellence suffer most from the grandfather clause.

In California alone, dozens of brand names exist which have some viticultural significance and which were registered prior to July 7, 1986.[71] With the recent emergence of Washington and Oregon as wine growing states of some note, one can assume that the harm visited by the grandfather clause will begin to spread from the confines of Napa Valley.

One scholar summarized the potential impact of the grandfather clause on wine grape growers wishing to capitalize on consumer demand for wine from a particular AVA in the following manner:

> As wine regions have developed, American wine producers have begun promoting their wines based on regional identity. Many regions have become well-known to wine consumers, who often seek out products from particular origins. Even when consumers know that certain wines are not from the regions identified on their labels, such labeling practices can make it more difficult to distinguish those wines that are accurately labeled with regional identifiers. In trademark law, this injury is known as "dilution" . . . . A consumer thus is likely to associate a geographic term in a brand name with the wine-producing region of the same or similar name rather than with the producer of the brand. For example, a consumer is more likely to associate a wine displaying the Napa Ridge brand name with the Napa Valley than with the company that owns the Napa Ridge mark. Consequently, the "goods/place association" of many geographic brand names with wine may be more an association with the wine region indicated by the brand than an association with the producer of the wine brand itself. For this reason, the users of such brand names can be

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70. *See id.*

71. *See* Maher, *supra* note 7, at 1899.

considered to be trading on the goodwill and renown of the better-known geographic place names.[72]

Because consumers are willing to pay higher prices for wines from specific AVAs which are known for higher quality,[73] the grandfather clause injures winemakers who are able to produce wine more cheaply in less popular appellations and then associate the brand with a popular AVA by purchasing a brand name of viticultural significance that was registered prior to July 7, 1986.

In 2000, the State of California attempted to close the loophole provided by the grandfather clause by passing a state law which forbade the usage of brand names of viticultural significance.[74] Not long after passage, however, the law was challenged and ruled preempted by the ATF regulations;[75] the next section of this article will discuss this case.

III. *BRONCO WINE COMPANY V. ESPINOZA*: CALIFORNIA'S FAILED ATTEMPT TO CORRECT THE GRANDFATHERING LOOPHOLE

A. *The California Court of Appeals Rules that State Regulations Limiting Brand Names of Vitcultural Significance are Preempted by the Grandfather Clause*

In 2000, Bronco Wine Company ("Bronco") purchased the "Napa Ridge" brand name from Beringer Wine Estates ("Beringer") for just under forty million dollars.[76] Prior to Bronco's purchase, Beringer used the brand name to market wines made from grapes grown in California, but largely outside of Napa Valley.[77] In addition to the "Napa Ridge" brand, Bronco also purchased and marketed wines sold under the brand names "Rutherford Vintners" and "Napa Creek Winery."[78] Bronco's total year 2000 annual sales of wine under the three labels collectively amounted to approximately seventeen million dollars and three-hundred thousand cases of wine.[79] On or slightly before Bronco purchased the right to the "Napa Ridge" brand name, it commenced construction on a mas-

72. *Id.* at 1908-09.
73. *See id.* at 1910.
74. *See* CAL. BUS. & PROF. CODE § 25241 (West Supp. 2004).
75. *See Espinoza*, 128 Cal. Rptr. 2d at 341.
76. Maher, *supra* note 7, at 1901.
77. *Espinoza*, 128 Cal. Rptr. 2d at 325 (stating that Beringer, in fact, used the "Napa Ridge" brand name to market wines from grapes grown in the Central Coast, North Coast, Lodi and also in Napa Valley).
78. *See id.*
79. *See id.*

sive bottling facility in southern Napa County.[80] The facility was completed in 2001 and has an annual bottling capacity of 17,840,000 cases of wine; this more than doubles current total annual production potential of Napa County.[81]

Responding to the fear that the large quantity of wine anticipated to be bottled by Bronco would unnecessarily confuse consumers and dilute the brand recognition of wines grown in the Napa AVA, the Napa Valley Vintners Association successfully lobbied for the passage of state legislation designed to close the loophole contained in the grandfather clause.[82] The legislation, Section 25241 ("Section 25241") of the California Business and Professions Code states, in pertinent part that:

> (b) No wine produced, bottled, labeled, offered for sale or sold in California shall use, in a brand name or otherwise, on any label, packaging material, or advertising, any of the names of viticultural significance listed in subdivision (c), unless that wine qualifies under ... [ATF Regulations] ... for the appellation of origin Napa County and includes on the label, packaging material, and advertising that appellation or a viticultural area appellation of origin that is located entirely within Napa county .... (c) The following are names of viticultural significance for purposes of this section: (1) Napa[;]. (2) Any viticultural area appellation of origin established pursuant to Part 9 ... of Title 27 of the Code of Federal Regulations that is located entirely within Napa County[; or] (3) Any similar name to those in paragraph (1) or (2) that is likely to cause confusion as to the origin of the wine.[83]

On December 1, 2000, the California Department of Alcoholic Beverage Control ("DABC") sent a letter to Bronco, advising that it intended to enforce Section 25241 and would potentially revoke Bronco's license if it intended to use its various Napa Valley brand names in contravention of the section.[84] On December 22, 2000, Bronco and Barrel Ten Quarter Circle, Inc. ("Barrel Ten"),[85] filed a writ of mandate prohibiting the DABC and its interim director, Manuel R. Espinoza, from enforcing Section 25421 with respect to Bronco's usage of the brand names "Napa Ridge, Rutherford Vinters, and Napa Creek Winery."[86] The

80. *See* Corrie Brown, *Hard Times at the Winery?: Not for Everyone*, L.A. TIMES, Feb. 26, 2003, at F1.

81. *See id.*

82. *See* Maher, *supra* note 7, at 1902.

83. CAL. BUS. & PROF. CODE § 25241 (West Supp. 2004).

84. *See Espinoza*, 128 Cal. Rptr. 2d at 336.

85. *See id.* at 324-25 (discussing that Bronco is a winery specializing in premium wines at affordable prices; Barrel Ten is apparently a separate company from Bronco, although ownership and management of both companies overlap).

86. *See id.* at 323.

Napa Valley Vintners Association intervened as a party in interest in support of the DABC.[87]

Bronco argued that Section 25241 violated the First Amendment and Commerce and Takings Clauses of the United States Constitution.[88] Bronco also argued that Section 25241 was "preempted by federal law because it conflict[ed] with federal regulations and federal certificates of label approval and . . . [stood] as a complete obstacle to the accomplishment of the federal statutory and regulatory scheme."[89] Because the court resolved the case on grounds of preemption, it declined to rule on the plaintiff's constitutional claims and framed the issue solely as "whether California may bar the use of labels on bottled wine destined for export into interstate and foreign commerce, when those labels have been granted [COLAs] pursuant to regulations that authorize what state law prohibits."[90]

In consideration of the issue, the California Court of Appeals first took note of the general principle that "[u]nder the Supremacy Clause . . . federal statutes and regulations preempt conflicting state law."[91] The DABC and the Napa Valley Vintners Association argued that the general rule favoring preemption did not apply because prevention of consumer deception is an area that is traditionally occupied by the state.[92] The California Court of Appeals struck down the DABC's argument, holding that Congress' power to regulate the sale of wine extended from the Commerce Clause and the State's effort to prohibit the sale and shipment of bottled wine destined for interstate and foreign commerce, by regulating the manner in which those bottles are labeled, is preempted where that manner directly conflicts with federal law, which fully regulates the manner in which wine shipped in interstate and foreign commerce is labeled.[93]

The California Court of Appeals also noted that the issue in *Bronco* was factually similar to that considered by the United States Supreme Court in *McDermott v. Wisconsin*.[94] In *McDermott*, the Court considered whether a Wisconsin statute prohibiting the sale of refiners' syrup, unless it met certain labeling and content requirements, was valid when the syrup met the labeling require-

87. *See id.*

88. *See id.* at n.3 (mentioning constitutional claims were brought by Bronco, but never elaborating on any of the specifics of these arguments).

89. *Id.* at 326.

90. *Id.* at 332.

91. *Id.* (citing U.S. CONST., art. VI, cl.2).

92. *Id.* at 323-24.

93. *Id.* at 333 (citing McDermott v. Wisconsin, 228 U.S. 115 (1913)).

94. *Id.* at 334 (citing *McDermott*, 228 U.S. at 115).

ments established by federal law.[95] The Court held that while the state is permitted to regulate with consumer protection in mind, it may not exercise its police power by discriminating against interstate commerce and "if it does, to the extent that the state law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the constitution."[96] Because the Wisconsin statute was more stringent than what was required by federal law, the Court ruled that the Wisconsin labeling statute was preempted.[97]

In *Bronco*, the California Court of Appeals stated that because wine labeling is comprehensively regulated, and because "brand names are exclusively governed by . . . federal regulation[,]" no room for dual state and federal regulations exists.[98] To that end, the court concluded that "[t]here is no grammatical room in [the grandfather clause] for the claim the state may impose an additional requirement on Bronco not contained in the federal law."[99] On that basis, the court ruled that Section 25241 was preempted by the grandfather clause.[100]

The California Court of Appeals also dismissed a secondary argument asserted by the DABC that because "the grandfather provision is based upon a compromise of consumer protection in favor of market factors[,]" the grandfather clause exceeded the "congressional purpose" granted to the Secretary of the Treasury to label wine under the FAAA.[101] The DABC confusingly posed this argument with the proviso that they were not making a direct challenge to the validity of the ATF's regulations.[102]

In evaluating the DABC's argument, the court stated that the rule-making history behind the adoption of the grandfather clause clearly indicated that the ATF "considered several alternative means of protecting consumers while also attempting to protect the competing interests of fair competition and existing economic interests."[103] The court then concluded that the grandfather clause was not in conflict with the consumer protection purpose behind the

95. *See McDermott*, 228 U.S. at 116.
96. *Espinoza*, 128 Cal. Rptr. 2d at 333 (citing *McDermott*, 228 U.S. at 131-32).
97. *Id.*
98. *Id.* at 334-35.
99. *Id.* at 335.
100. *See id.*
101. *Id.* at 337.
102. *See id.*
103. *Id.*

FAAA because "[d]efining unfair competition and business practices necessarily includes considerations of market factors."[104]

B. Continental Distilleries v. Schultz: *A Deconstruction of the Market Factors Approach of* Bronco Wine Company v. Espinoza

In support of its "consideration of market factors approach," the court cited two cases without further analysis.[105] In the first case, *Arrow Distilleries v. Alexander*, the issue was whether the FAAA was constitutional.[106] The court in *Arrow* held that the FAAA regulations controlling labeling were valid exercises of congressional power through the Commerce Clause and the Twenty-First Amendment to the United States Constitution.[107] The court in *Arrow* did not address the issue of whether a regulation promulgated by the ATF that exceeded the scope of the FAAA would preempt a state law that shared the consumer protection purpose of the FAAA.[108] Similarly, the court did not address the issue of whether and to what extent the FAAA is tempered by balancing consumer protection provisions versus existing economic interests.[109]

The second case cited, *Continental Distilling Corp. v. Schulz*, also failed to support the California Court of Appeals' contention that the consumer protection requirements of the FAAA are limited by a consideration of market factors.[110] In *Continental*, the court held that a denial of label approval was proper in order to preserve fair competition between manufacturers.[111] When the relevant facts in *Continental* are closely evaluated, it becomes apparent that the grandfather clause exceeds the scope of the regulatory power granted to the Secretary of the Treasury under the FAAA and that the grandfather clause should be invalidated.[112]

In *Continental*, the plaintiffs challenged a denial of label approval.[113] Prior to 1972, whisky aged in reused cooperage was required to state so on the

104. *Id.* at 338.
105. *See id.* at 338 (citing Arrow Distilleries v. Alexander, 109 F.2d 397, 402 (7th Cir. 194); Cont'l Distilling Corp. v. Shultz, 472 F.2d 1367, 1369 (D.C. Cir. 1972)).
106. *See Arrow Distilleries*, 109 F.2d at 402.
107. *See id.* at 400-01.
108. *See generally id.*
109. *See generally id.*
110. *See generally Cont'l Distilling Corp.*, 472 F.2d at 1367.
111. *See id.* at 1370-71.
112. *See id.*
113. *See id.* at 1369.

label.[114] The ATF promulgated new regulations that whisky distilled on or after January 26, 1968, and aged at least four years, could be labeled as "light whisky" without reference to the term "reused cooperage" on the label.[115] The plaintiffs wished to market whisky distilled prior to 1968 as "light whisky."[116] In denial of their application for label approval, the ATF stated that to allow label approval would place the plaintiffs on unequal competitive footing and allow the plaintiffs to engage in unfair competition with the rest of the whisky industry who, as a whole, were not prepared to market whisky distilled prior to 1968.[117]

The plaintiffs argued that the ATF exceeded its authority to deny label approval because Section 205 did not specifically address the issue of fair competition.[118] The court noted that although the consumer protection provisions of Section 205 of the FAAA do not explicitly mention the term "fair competition," "a natural affinity exists between considerations of fair competition and consumer protection [and that] [i]mplementation of one often includes consideration of the other, and regulations for one often bear consequences for the other."[119] To that end, the court ruled that the consumer protection provisions of Section 205 extended to both consumers and competitors.[120]

Although the court's ruling in *Continental* was written pre-*Chevron* and did not consider the limits of the ATF to promulgate regulations, the impact of the court's reasoning on the unfair competition provisions of the FAAA are immediately apparent. In *Continental*, the plaintiffs were not allowed to label their pre-1968 whisky as "light whisky" because other whisky distilleries who could not do so would have been placed at an unfair disadvantage.[121] The court did not hold in dicta or otherwise that market factors are to be taken into consideration as a limitation on consumer protection; rather, the court essentially held that consumer protection may be used as a limitation on market factors.[122]

One need only extend the line of reasoning used in *Continental* to realize that the grandfather clause places wineries who are able to use grandfathered brand names on a different competitive level than their AVA counterparts. Wines marketed under grandfathered brand names are allowed to manufacture

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114. *See id.* at 1368.
115. *Id.* at 1369.
116. *Id.*
117. *See id.* at 1371.
118. *See id.* at 1369.
119. *Id.* at 1370.
120. *See id.* at 1371.
121. *See id.* at 1367.
122. *See id.* at 1370.

their product using grapes from any appellation of origin. Wineries not able to purchase or obtain grandfathered brand names of viticultural significance must conform to the eighty-five percent grape of origin standard for AVA wine. The net effect of allowing non-Napa growers to sell wines using brand names of "Napa-like" geographic origin is that consumers are confused as to the origins of the wine and grandfathered brand names are allowed to unfairly capitalize on Napa's reputation of producing wines of great quality.

Interestingly, the defendants in *Bronco* never raised the issue of how the grandfather clause creates a system of dual regulation that directly results in unfair competition of the sort deemed impermissible under *Continental*.[123] Similarly, the DABC posed the argument that the grandfather clause failed to fall within the spirit of the consumer protection provisions of the FAAA, but did not directly challenge the grandfather clause as an impermissible interpretation of the FAAA.[124] To that end, the remainder of this article will discuss (1) direct challenges brought against the grandfather clause relating to regulatory construction; (2) how the grandfather clause stands up under the administrative deference doctrine immortalized in *Chevron U.S.A., Inc. v. National Resources Development Council, Inc.*;[125] and (3) whether AVA wineries have standing to challenge the COLA approval of grandfathered brand names under the Federal Administrative Procedures Act.

IV. EVALUATING THE GRANDFATHER CLAUSE THROUGH *CHEVRON*

On March 4, 2003, the Napa Valley Vintner's Association started a private labeling program to combat the perceived damage and consumer deception resulting from the grandfathered brand names that were being marketed by Bronco.[126] An additional label is placed on the wine that designates the product as being produced one hundred percent from Napa grapes.[127] Aside from a small

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123. *Compare Cont'l Distilling Corp.*, 472 F.2d at 1370-71, *with* Bronco Wine Co. v. Espinoza, 128 Cal. Rptr. 2d 320, 328 (Cal. Ct. App. 2002).

124. *Espinoza*, 128 Cal. Rptr. 2d at 333.

125. Chevron U.S.A., Inc. v. Nat'l Res. Dev. Council, Inc., 467 U.S. 837 (1984).

126. *See* Press Release, Napa Valley Vintners, Napa Valley Vintner's Ass'n Inaugurates "100% Napa Valley" Certification Mark (Mar. 4, 2003), *available at* http://www.napavalleyvintners.org/news/certmark.html.

127. *See id.* (stating that Robert Mondavi Winery, Joseph Phelps Vineyards, Duckhorn Vineyards, Lang & Reed Wine Company, Robert Pecota Winery, Dyer Vineyard, Swanson Vineyards & Winery, Schramsberg Vineyards, and Lail Vineyards had all applied for the 100% Napa Certification Mark).

maintenance fee, the program is entirely voluntary.[128] Obviously, the recent implementation of the program makes it impossible to tell whether it will be successful at educating consumers as to discriminate between Napa AVA wines and Napa brand name wines.

Many alternatives have been suggested to fix the situation created by the grandfather clause; among those are the usage of additional disclaimers, a rolling grandfathering date, prohibiting the expansion on geographic brand names, a phase-out with a reasonable amortization period, and various other state regulations similar to Section 25241 that "close the gap."[129] Unfortunately, most of these suggestions face similar preemption problems as *Bronco*, or would require a lengthy period of notice and comment rulemaking before they could be implemented.[130]

Although the field is ripe, only a paucity of suits have been brought challenging the grandfather clause as an invalid interpretation of the FAAA. Both suits, which are discussed below, were brought for different reasons than fundamental economic unfairness.

A. Bronco Wine Company v. ATF I and II

In *Bronco Wine Company v. United States Department of the Treasury, The Bureau of Alcohol, Tobacco and Firearms ("Bronco v. ATF I")*, the plaintiff, Bronco Wine Company, had purchased the brand name "Rutherford Vineyards."[131] In 1994, the plaintiff's bottler received a COLA to sell wine under that brand name, using "California" as the appellation of origin.[132] In 1993, Rutherford had been designated as an AVA.[133] "Rutherford Vineyards" was not registered or used as a brand name prior to 1986.[134] In 1996, the ATF seized and then released thirty-two thousand cases of wine labeled under the "Rutherford Vineyards" label.[135] After releasing the wine, the ATF released a decision that any further usage of the "Rutherford Vineyards" label would be regarded as a willful violation of the grandfather clause's prohibition on sales of wine containing

128. *See id.*

129. *See* Maher, *supra* note 7, at 1911-19.

130. *See generally Espinoza*, 128 Cal. Rptr. 2d at 320.

131. *See* Bronco Wine Co. v. United States Dep't of the Treasury, ATF I, 997 F. Supp. 1309, 1310 (E.D. Cal. 1996).

132. *Id.*

133. *Id.* at 1311.

134. *Id.* at 1312.

135. *Id.* at 1310.

brand names of viticultural significance.[136] The plaintiff then moved for a temporary restraining order to dismiss the ATF from restricting the sale of wine labeled under the brand name "Rutherford Vineyards."[137]

In its petition to quash the restraining order, the plaintiff alleged that the grandfather clause was violative of the Administrative Procedures Act ("APA") because it was arbitrary and capricious.[138] The plaintiff argued that no rational basis existed by which the ATF could have chosen to grandfather brand names existing prior to July 7, 1986, while not grandfathering other names which existed prior to the designation of other AVAs which were created after June 7, 1986.[139]

In response, the ATF acknowledged that the July 7, 1986 grandfather date was arbitrarily chosen.[140] The ATF noted, however, that although the "Rutherford Vineyards" trademark was purchased prior to Rutherford receiving AVA designation, "neither [p]laintiff nor any other winery ever used the 'Rutherford Vineyards' brand name *in a COLA* until September 1994, a short time *after* Rutherford became an approved viticultural area."[141] Therefore, the ATF argued that the issue of arbitrariness had no bearing on the plaintiff's case, because the plaintiff would not have benefited from a rule extending grandfathering of brand names to COLAs that existed prior to the date of AVA designation.[142] The court agreed with the ATF's reasoning and dismissed the plaintiff's motion for a temporary restraining order.[143]

After the denial of their motion for a temporary restraining order, the case was resolved one year later in *Bronco Wine Company v. United States Department of the Treasury, The Bureau of Alcohol, Tobacco and Firearms II ("Bronco v. ATF II").*[144] Again, Bronco argued that the ATF's decision to prohibit the sale of "Rutherford Vineyards" brand wine was violative of the APA.[145] In their second appearance before the court, the plaintiffs did not challenge the arbitrariness of the grandfathering date, but instead argued that the ATF's prohi-

136. *See id.* at 1310-11.
137. *Id.* at 1310.
138. *Id.* at 1314-15.
139. *Id.* at 1315.
140. *See id.* at 1315-16.
141. *Id.*
142. *Id.*
143. *See id.* at 1316.
144. *See* Bronco Wine Co. v. United States Dep't of the Treasure, ATF II, 997 F. Supp. 1318, 1318 (E.D. Cal. 1997).
145. *Id.* at 1322.

bition on the sale of "Rutherford Vineyards" wine was arbitrary and capricious because the FAAA did not grant the ATF authority to regulate brand names.[146] Properly, and without much consideration, the court rejected this argument, noting that Section 205(e)(1) gives authority not only to prohibit consumer deception, but to provide consumers information *via labeling* relating to the identity and quality of wines.[147]

The reasoning behind the decisions in *Bronco v. ATF I* and *Bronco v. ATF II* are of limited value to small wineries attempting to question the economic fairness of the grandfather clause. Each case represented a situation in which a large, market-dominant winery attempted to invalidate the grandfather clause for reasons that ultimately had nothing to do with the underlying policy reasons behind the FAAA. To that end, any attempts made by large wineries to expand the number and kind of grandfathered brand names on the market by invalidating ATF regulations will likely fail. If there is any chance of invalidating the grandfather clause, it will likely originate from a wine grape producer or winery within an AVA that has been harmed by the usage of a brand name of viticultural significance.

B. *Is the Grandfather Clause a Permissible Interpretation of the Labeling Scheme Contained within the Federal Alcohol Administration Act?*

The law is clear that the FAAA gives the ATF great discretion to establish a regulatory scheme designed to prevent consumer confusion relating to the sale of alcoholic beverages.[148] In spite of the broad range of authority granted to the ATF, however, it is important to note that an agency does not have authority to create law; rather, agencies are granted "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."[149] This begs the question as to whether the grandfather clause, as an administrative regulation, exceeds the authority granted under the FAAA by allowing wineries to label their product with potentially confusing pre-1986 brand names.

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146. *Id.* at 1323.

147. *Id.* at 1320.

148. *See* 27 U.S.C. § 205(e) (2000); Taylor Wine Co. v. Dep't of Treasury, 509 F.Supp. 792, 794 (D.C. Cir. 1981).

149. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976) (citing Dixon v. United States, 381 U.S. 68, 74 (1965) (quoting Manhattan Gen. Equip. Co. v. Comm'r, 297 U.S. 129, 134 (1936))).

Various levels of deference exist in relation to agency interpretation of federal statutes.[150] If an agency has authority to promulgate regulations, and the regulations are created through proper notice-and-comment rulemaking, the regulations are typically awarded *Chevron* deference.[151] The administrative history behind the grandfather clause makes it clear that the language contained therein was adopted only after a rather-extended period of public notice-and-comment making. The result of this is that a court interpreting the grandfather clause would likely evaluate it through the language of *Chevron*.[152]

The oft-quoted rule of *Chevron* is that

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question is whether the agency's answer is based on a permissible construction of the statute.[153]

The United States Supreme Court further stated in *Chevron* that:

> [I]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by

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150. Christensen v. Harris County, 529 U.S. 576, 586-87 (2000) (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984)) (stating

> [I]n *Chevron*, we held that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute. Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those . . . contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference.) (internal citations omitted).

151. *Id.* at 576.

152. *See* United States v. Mead Corp., 533 U.S. 218, 226-227 (2001) (holding that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority").

153. *Chevron U.S.A., Inc.*, 467 U.S. at 842-43 (internal citations omitted).

> regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.[154]

This is supported by *K Mart Corp. v. Cartier, Inc.*, where the United States Supreme Court stated that "if the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute."[155]

Therefore, in order to determine the ultimate deference that is to be awarded to the grandfather clause, the first question that must be asked under a *Chevron* analysis is whether Congress has spoken precisely to the question at issue.[156] The plaintiffs in *Bronco v. ATF II* met with failure when they attempted to frame the question as one of whether the ATF had authority to regulate wine labeling in general, which it clearly did.[157] The issue for winemakers marketing wine made from AVA grapes is different, however. The issue for these potential plaintiffs is more appropriately addressed as whether the FAAA speaks only to consumer protection and restriction of unfair competitive practices, or, if the FAAA gives some broader authority to the ATF to regulate wine labeling for other reasons, such as balancing consumer protection with industry and market concerns.

If the FAAA speaks only to the issue of consumer protection and unfair competitive practices, the grandfather clause fails to meet the first test of *Chevron*, because it attempts to balance preexisting market concerns in the form of pre-1986 brand names against the consumer protection provisions of the FAAA. That is to say, if Congress expressly limited the labeling of wine for reasons of consumer protection and the prevention of unfair competitive practices, no ambiguity exists for the ATF to regulate. On the other hand, if an ambiguity exists within the FAAA that suggests wine may be labeled for more reasons than those listed above, the grandfather clause would have to be evaluated through the second step of the *Chevron* analysis.[158] Almost always, if a claim makes it to the

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154. *Id.* at 843-44 (citing United States v. Morton, 467 U.S. 822, 834 (1984)).

155. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 292 (1988) (citing United States v. Boyle, 469 U.S. 241, 246 n.4 (1985)).

156. *See Chevron U.S.A., Inc.*, 467 U.S. at 842-43.

157. *See generally* 997 F. Supp. 1318 (E.D. Cal. 1997).

158. See *Chevron U.S.A., Inc.*, 467 U.S. at 843.

second prong of *Chevron*, agency action will be upheld as a permissible construction of the statute in question.[159]

In order to determine the scope of regulatory authority granted under the FAAA, an examination of the labeling provisions contained within the statute is in order.[160] Section 205 is headed "unfair competition and unlawful practices."[161] As previously noted, the court in *Continental* ruled that unfair labeling practices that place competitors on unequal footing constitute unfair competition and are subject to regulation.[162]

Section 205(e), which controls labeling, and is referenced *infra*, contains five different subsections giving the Secretary of the Treasury authority to require specific labeling of distilled spirits, wine, or malt beverages in order to prevent consumer deception, and to give the consumer adequate information about the identity of the product purchased.[163] Within these five subsections, no authority is given to the Secretary of Treasury to regulate labeling for any reason except for the prevention of consumer deception, the dissemination of accurate information to consumers, or the prevention of false or misleading statements between market competitors.[164]

Section 205(e) also contains two exclusions that limit the scope of the Secretary of the Treasury to engage in labeling regulation. The first exclusion allows the use of brand names that duplicate the names of individuals of public prominence or private or public organizations that were used prior to August 19, 1935.[165] The second exclusion states that:

> [N]othing herein nor any decision, ruling, or regulation of any Department of the Government shall deny the right of any person to use any trade name or brand of foreign origin not presently effectively registered in the United States Patent and Trademark Office which has been used by such person or predecessors in the United States for a period of at least five years last past, if the use of such name or brand is qualified by the name of the locality in the United States in which the product is

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159. *See* Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1261-62 (1997) (discussing the general consensus in the administrative law community that if an agency survives step one of *Chevron*, it will easily pass the second step).
160. *See* 27 U.S.C. § 205(e) (2000).
161. *Id.*
162. *See* Cont'l Distilling Corp. v. Schulz, 472 F.2d 1367, 1371 (D.C. Cir. 1972).
163. 27 U.S.C. § 205(e).
164. *See id.*
165. *Id.*

> produced, and, in the case of the use of such name or brand on any label or in any advertisement, if such qualification is as conspicuous as such name or brand.[166]

A careful examination of the first exclusion demonstrates that Congress did, in fact, consider the issue of grandfathering of liquor brand names, but limited the exclusion to brand names of persons and organizations of prominence that were used prior to 1935. The second examination grants a similar narrow exclusion to foreign brand names that were in use for five years prior to the FAAA's original date of passage in 1935.

In ascertaining the plain meaning of a statute, the court must look not only to the particular statutory language, but to the design and meaning of the statute as a whole.[167] After examining the plain language and intent of the statute along with the two listed exclusions, Congress did not intend to extend any grandfathering provisions past 1935. As such, the only gap concerning labeling that Congress intended the Secretary of the Treasury fill were the ambiguities left in the statute concerning the prevention of deceptive labeling and the prevention of unfair competition.

The plain language of the statute notwithstanding, no other case except *Bronco v. Espinoza* has held that the statutory authority of the FAAA extends to anything except consumer protection or the prevention of unfair competition through inequitable labeling practices. The holding in *Continental* balanced market concerns solely through the lens of whether labeling statements would have resulted in unfair competitive practices between distillers. Similarly, in *Cabo Distributing Co. v. Brady*, the court held that "[t]he authority to revoke the right to use a label only extends to the possibility to consumer deception as to *what is contained within the bottle itself*', and the ATF does not have the authority to extend its authority to prevent consumer deception to control the marketing of distasteful liquor brand names.[168] Finally, the D.C. District Court, in *Gibson Wine Co. v. Snyder*, very succinctly summarized the public policy reasons behind the FAAA's wine labeling laws as such:

> The Federal Alcohol Administration Act and the Regulations relating to labeling and advertising of wine are clearly for the protection of the consumer. Their purpose is to enable purchasers to buy wine for what it really is. The Act charges the Deputy Commissioner with the enforcement of the labeling regulations so as to prevent "deception of the consumer" and to prevent statements "likely to mislead the con-

166. *Id.*

167. *See* Bethesda Hosp. Ass'n v. Bowen, 485 U.S. 399, 403-05 (1988).

168. No. C-92-2591-DLJ, 1993 WL 313112, at *4 (N.D. Cal. Aug. 3, 1993) (arguing whether the ATF had the authority to revoke label approval for "Black Death Vodka").

sumer" as well as to "provide the consumer with adequate information as to the identity and quality" of wine.[169]

The grandfather clause, as written, fails the first prong of the *Chevron* test, because by balancing market factors with consumer protection, it is in conflict with the plain language of the statute.[170] With the exception of two very explicit 1935 grandfathering provisions, the plain language of the FAAA enables the Secretary of Treasury to establish wine labeling provisions only for consumer protection, consumer access to information, and to prohibit unfair competitive practices.[171]

Essentially, the grandfather clause establishes two different standards for the labeling of wine.[172] The first standard, for wine labels registered after 1986, provides a labeling scheme that allows winemakers to inform consumers that the wine they have purchased is made from grapes of a certain origin.[173] This standard is based entirely on a consumer's right to know about the lineage of a given bottle of wine-type theory.[174]

The second standard, which allows grandfathering of wine, allows wineries to confuse the nature of origin of the product contained within the bottle by using brand names which are similar to established AVAs.[175] This standard fails for two reasons. First, it is based on marketing and market protectionism as opposed to the consumer protection basis behind the FAAA. Additionally, it gives wineries that own grandfathered names an unfair competitive advantage because they may produce wines with "AVA-like" brand names, but use cheaper grapes without a specific place of origin. As such, the grandfather clause fails to fall within the very specific rubric of regulations that are delineated in the FAAA concerning the labeling of wine.[176]

Congress has specifically spoken to the precise question at issue, namely consumer and market protection, through the labeling provisions of the FAAA. The ATF has expanded the statutory intent of *Chevron* to something more which

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169. *See* Gibson Wine Co. v. Snyder, 95 F. Supp. 145, 146 (D.C. 1950) (citing 27 U.S.C. § 205(f)) (holding that wine made from boysenberries could not be labeled as blackberry wine).

170. *Cf.* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

171. *See* 27 U.S.C. §§ 201-219(a) (2000).

172. 27 C.F.R. § 4.39(i) (2004).

173. *Id.* § 4.39 (i)(2).

174. *See id.* § 4.64 (g).

175. *See* Bronco Wine Co. v. Espinoza, 128 Cal. Rptr. 2d 320, 333-34 (Cal. Ct. App. 2002).

176. *See* 27 U.S.C. § 205(e).

tempers consumer protection with market considerations. The result of this is that the grandfather clause fails *Chevron* and should be struck down.

V. CONCLUSION

Even though the Napa Valley AVA is among the most expensive vineyard acreage in the United States,[177] wineries holding grandfathered brand names can take advantage of consumer confusion to market a product which does not account for the high cost and quality associated with the production of Napa AVA grapes. This does a great disservice to Napa Valley AVA grape growers who rely on higher premiums for their crops than wine grapes grown outside of the Napa Valley. Also, it dilutes the consumer attachment to Napa Valley, because non-Napa AVA wines sold under grandfathered brand names will undoubtedly confuse consumers with regard to their origins and the lesser quality will eventually become associated with Napa Valley. Because the wine industry is rapidly expanding throughout the United States, the problem encountered in *Bronco* will undoubtedly repeat itself as long as the grandfather clause is in effect.

The grandfather clause has gutted the ability of the FAAA to fulfill its triune function; the prevention of consumer deception on wine labels, the dissemination of information to wine purchasers and the prevention of unfair competition between winemakers. To date, no one has challenged the grandfather clause by alleging that it is in excess of the authority granted under the FAAA. Not only does the grandfather clause pander to market considerations before consumer protection, but it also places wineries on uneven competitive footing. Wineries that are able to pay high premiums to grow grapes on certain AVA cropland stand at great risk of having their investment crushed by larger market forces that are able to pay the premiums to purchase pre-1986 brand names of viticultural significance. The time is ripe for the American wine industry to stand up against the ATF grandfather regulations, for unlike a young Cabernet Sauvignon, the issue of the grandfather clause will not improve with the passage of time.

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177. *See* Teresa Gubbins, *Vintage Hall; Kathryn and Craig Hall Have Turned Their Perfectionists' Zeal to Growing Grapes and Bottling Wine in Napa Valley*, DALLAS MORNING NEWS, Apr. 6, 2003, at 1E (stating that vineyard property is difficult to obtain and Napa Valley real estate is extraordinarily expensive with purchases averaging $43,000 per acre).