

Regulation of American Wine Labeling: In Vino Veritas?

ROBERT W. BENSON*

I. INTRODUCTION

In Cervantes' DON QUIXOTE there comes a time when Sancho Panza is led to believe he has been made governor of a small country. He soon dedicates himself to promulgating laws for the good governance of his nation. One of his official acts is to decree: "Anyone may import wine from anywhere, provided they declare its place of origin so the wine may be priced in accordance with its esteem, quality and fame, and whoever adds water to it or changes its name shall lose his life."¹ As Sancho knew, the price and marketability of a wine are peculiarly dependent upon the information on the bottle's label. Because of that, wine is particularly susceptible to fraud. This was true long before Sancho enacted his statute. It has remained true long after.

Evidence that wine fraud² made its appearance early in western civilization is found in the Talmudic law provision: "If his [the vendor's] wine was diluted with water he must not sell it in his shop unless he informs him [the customer], nor to a merchant, even if he informs him because [the latter buys it] only in order to cheat therewith."³ Evidence that wine fraud continues to this day is as fresh as 1976, when the large California Growers Winery was charged with seventy-three violations of federal law. The charges included allegations of the watering of over four million gallons of wine, false labeling, use of an unapproved addi-

* A.B. Columbia College; J.D. University of California at Berkeley; Professor of Law, Loyola Law School, Los Angeles. The author has frequently participated as a consumer advocate in federal wine labeling proceedings. This disclosure is made so the reader will know "through what spectacles his adviser is viewing the problem." Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 230 (1965).

1. M. DE CERVANTES SAAVEDRA, SEGUNDA PARTE DEL INGENIOSO HIDALGO DON QUIJOTE DE LA MANCHA 914-15 (1615).

2. "Wine fraud," of course, is not a legal term of art. The phrase is used in this article to describe a broad category of illegal practices relating to wine.

3. 10 THE BABYLONIAN TALMUD 365 (Baba Mezia 60a, Soncio trans. 1935). My colleague Leslie S. Rothenberg kindly brought this to my attention.

tive, deliberate destruction of records, and other lesser offenses. An attorney for the winery signed a stipulation that the changes "are conceded, admitted and considered as proved and the taking of evidence is waived."⁴ Between the Talmud and the California Growers case, wine fraud has had a rich history in virtually every country that makes or imports substantial amounts of wine.⁵

Modern legal systems attempt to curb wine fraud in various ways.

4. *Is California Wine Case a Sign of New Ferment?*, Los Angeles Times, Aug. 15, 1976, § 6, at 1, col. 4.

5. See, e.g., the following reports of wine fraud at different times and places: Thomas Jefferson's description of French wine which Jefferson was sending to John Jay and President Washington:

I have bought all of these from the Vignerons who made them The vigneron never adulterates his wine But when once a wine has been into a merchant's hands, it never comes out unmixed. This being the basis of their trade, no degree of honesty, of personal friendship or of kindred prevents it.

Letter from Thomas Jefferson to John Jay (Sept. 17, 1789), reprinted in 15 THE PAPERS OF THOMAS JEFFERSON 437 (J.P. Boyd ed. 1958); C.K. WARNER, THE WINEGROWERS OF FRANCE AND THE GOVERNMENT SINCE 1875 (1960) (see pages indexed under "Fraud"), a study of the French wine industry which indicates fraud has also plagued French wine in this century; ANON., WINE AND SPIRIT ADULTERATORS UNMASKED (1837). The work is described on the title page as:

a treatise setting forth the manner employed, and the various ingredients which constitute the adulterations and impositions effected with the different wines and spirits offered to the public, through the medium of cheap prices, by many of the advertising and placarding wholesale wine and spirit merchants, and gin-shop keepers, of the present day. Also shewing the method by which the notice of the excise is evaded, and affording a variety of other valuable information on the subject. Pro Bono Publico. By one of the old school.

Id.; Robert Louis Stevenson's report on his travels in the California wine country in 1880:

"You want to know why California wine is not drunk in the states?" a San Francisco wine merchant said to me, after he had shown me through his premises. "Well, here's the reason." And opening a large cupboard, fitted with many little drawers, he proceeded to shower me all over with a great variety of gorgeously tinted labels, blue, red or yellow, stamped with crown or coronet, and hailing from such a profusion of *clos* and *chateaux*, that a single department [of France] could scarce have furnished forth the names.

R.L. STEVENSON, SILVERADO SQUATTERS 30, 31 (1952); Press accounts of present day wine fraud, e.g., California: *Two Fraud Cases Show That In Vino There Isn't Always Veritas*, Santa Monica Evening Outlook, Feb. 20, 1974, at 41, col. 1 (Almaden Vineyards paid \$250,000 in compromise of liability under federal law, for mislabeling about 35,000 gallons of varietal wines, most of which were consumed by airline passengers); France: "Winegate" *Sentences Light-French Image In the Dregs*, Los Angeles Times, Dec. 19, 1974, at 1, col. 1 (prominent Bordeaux wine shippers convicted of mixing and falsely labeling undetermined amount of inferior wine to sell at higher price); Germany: Kreck, *A Critic Views German Wine Law*, WINES & VINES, May 1977, at 54-55 (Association of Consumers in Bonn charges German vintners of illegally adding sugar to top quality wines); Italy: Grippenwaldt, *What's Happened to Italian Wines*, WINE WORLD MAGAZINE, Sept./Oct. 1974, at 31 (synthetic wines manufactured, though new government controls are helping to protect public); Portugal: *Note for the Press*, Portuguese Government Trade Office, Los Angeles, California, Feb. 27, 1975 (alcohol of synthetic origin apparently used to fortify Porto and Madeira Wines); Spain: *El Vino Adulterado Cuesta 25 Pesetas Menos*, CIUDADANO, REVISTA DE INFORMACION AL CONSUMIDOR (June, 1974 at 50 (synthetic wine manufactured in Tarragona).

The common law tort of unfair competition has been used,⁶ as have trademark infringement actions.⁷ Penal statutes prohibiting unfair, false or misleading trade descriptions,⁸ and general statutes on adulteration and mislabeling of food⁹ have also been used. Additionally, there are important international treaties designed, in part, to curb fraudulent or misleading wine practices.¹⁰

The rise of sophisticated regulatory schemes devoted exclusively to wine, however, has relegated such general laws to a secondary role in combating wine fraud. In their complexity, these regulatory schemes bear more resemblance to securities regulations than they bear to Sancho's succinct decree or the civil and penal laws just noted. Although such wine laws have ancient roots, they did not fully flower until the economic disruptions of the 1930s led winemakers to seek government intervention in the wine market; government economic intervention came inextricably linked with expanded controls on grape growing, the winemaking process, labeling and advertising. Thus, new, compre-

6. *Bollinger v. Costa Brava Wine Co.* [1960] R.P.C. 16 (sale of "Spanish Champagne" by London merchant suppressed by the suit of French producers from Champagne district). *But see* *Vine Products, Ltd. v. MacKenzie and Co., Ltd.* [1969] R.P.C. 1 ("British Sherry," may be sold in England, over objections of importers of Sherry from the Jerez (Sherry) district of Spain).

7. *Société Vinicole de Champagne v. Mumm Champagne & Importation Co.*, 10 F. Supp. 289 (S.D.N.Y. 1935), 13 F. Supp. 575 (S.D.N.Y. 1935) (secondary meaning acquired by "Mumm"); *Otard, Inc. v. Italian Swiss Colony*, 141 F.2d 706 (C.C.P.A. 1944) (appeal from trademark opposition proceeding; "Cognac" may not be registered because of confusing similarity with "Cognac"); *Chandon Champagne Corp. v. San Marino Wine Co.*, 222 F. Supp. 396 (E.D.N.Y. 1963) (no confusing similarity between "Dom Perignon" and "Pierre Perignon").

8. *E.g.*, Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914) was applied in *Roma Wine Co., Inc.*, 22 F.T.C. 404 (1936) to force a California winery to stop selling its wine under the name "Chateau Yquem;" British law countries have penal "Merchandise Marks Acts" covering false descriptions of products and their origins—interestingly, a criminal prosecution in the "Spanish Champagne" case under Britain's Act had resulted in acquittal prior to the successful civil action in *Bollinger v. Costa Brava Wine Co.*, [1960] R.P.C. 16, LADAS, PATENTS, TRADEMARKS AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION 1612 (1975); the French law of July 28, 1824 imposing criminal sanctions for false indication of origin or manufacturer was until 1919 a principal means of combating mislabeling of wine in France, Lenzen, *Bacchus in the Hinterlands: A Study of Denominations of Origin in French and American Wine-Labeling Laws*, 58 T.M. Rep. 145 (erratum, 746) (1968).

9. *See* *Schraubstadter v. United States*, 199 F. 586 (9th Cir. 1912), an action brought under the federal Pure Food and Drug Act, ch. 3915, § 2, 34 Stat. 768 (1906) to suppress labeling of California wine that misled consumers into the belief that the wine was French Champagne.

10. *See* especially, Paris Convention for the Protection of Industrial Property, March 20, 1883, 25 Stat. 1372, 14 Recueil de Traités 203, Br. and For. State Papers 44; Madrid Arrangement for the Repression of False or Deceptive Indications of Source on Goods, as revised at Lisbon in 1958; Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, as revised at Stockholm in 1967. English texts in LADAS, *supra* note 8, Appendices 1, 2, 4 and 7 (the United States is party to the Paris Convention but not the Madrid or Lisbon Arrangements). *See also* Benson, *Toward a New Treaty for Protection of Geographical Indications* [1978] INDUS. PROP. 127.

hensive wine laws appeared in Germany in 1930,¹¹ Italy in 1930,¹² Portugal in 1931,¹³ Spain in 1932¹⁴ and France in 1935.¹⁵ In the United States in 1933, it was the repeal of Prohibition more than the economic depression, that gave sudden birth to a comprehensive wine law.¹⁶ The laws of the 1930s were essentially labeling laws. They set down the conditions that had to be met for wines to bear certain labels; the conditions, however, extended back to the winemaking process and even to the vineyard. These laws—or in some cases their even more elaborate successors—are the principal basis for legal control of wine fraud today in the United States and the major winegrowing countries of western Europe.

The American regulatory scheme for wine labeling has always been fundamentally different from the European schemes. The latter have all built their regulations primarily upon the idea that the precise geographical origin of a wine, and the winemaking methods customary to that geographical area, are mainly responsible for determining wine quality. According to the European view, these factors are largely responsible for wine price, and hence they are susceptible to fraud. As we have seen, even Sancho Panza hit upon this idea several centuries ago. For this reason, the primary objective of government control of labeling in Europe has been the authentication of geographical origin and winemaking methods which are seen as indicia of quality.¹⁷ The American scheme, in contrast, has avoided fine geographical distinctions between winegrowing areas. It has regulated winemaking methods mostly

11. Predecessor wine laws had been promulgated in Germany in 1879, 1901 and 1909. STABILISIERUNGSFOND FÜR WEIN, GERMAN WINE ATLAS AND VINEYARD REGISTER 2 (1977).

12. SACCONI & SPEED LTD., A SHORT GUIDE TO THE COMMON MARKET WINE LAWS AND THE CARE OF WINE (undated pamphlet, copy on file at Loyola Law School Library, Los Angeles, California).

13. OFFICE INTERNATIONAL DE LA VIGNE ET DU VIN, MÉMENTO DE L'O.I.V. 777 (1970).

14. *Id.* at 348.

15. L'Institut National des Appellations d'Origine was created in 1935, though comprehensive wine regulation had been growing since 1908. The story is recounted in Lenzen, *supra* note 8 at 175-182. For a vivid account of the economic troubles causing the growth of regulation, including the Champagne riots of 1911, see FORBES, CHAMPAGNE: THE WINE, THE LAND AND THE PEOPLE (1967) 171-176.

16. Russell, *Controls Over Labeling and Advertising of Alcoholic Beverages*, 7 LAW & CONTEMP. PROB., 645, 646 (1940).

17. These are not indicia of "quality" in an absolute sense. One person's Malaga (a simple, sweet red wine) is another's Musigny (a complex, dry red wine). Rather, they are indicia of characteristics of the wine. Since the marketplace causes some wine characteristics to bring a higher price than others, some are popularly thought of as having higher "quality" than others. Moreover, even when indicia of all the most desirable characteristics are present on a wine label, there is no guarantee the wine will actually possess the expected attributes because bad weather, faulty cooperage, poor storage or dozens of other factors may have intervened. The most that can be said is that the wine will *probably* have certain characteristics. The problem of predicting wine quality from label information has been compared to handicapping thoroughbred horses.

to assure that wine sold is sanitary and merchantable. It has controlled labeling with the objective of preventing false and deceptive statements rather than authenticating origin or winemaking methods.

Now, suddenly, there has been an upheaval: the American regulations are undergoing major changes that move clearly in the direction of the European systems. There appear to be three forces at work bringing about these changes. The first is a dramatic increase in wine consumption in the United States which began a decade ago.¹⁸ This sudden increase in wine volume alone has fomented change in labeling regulation.¹⁹ Moreover, the quantitative increase has been accompanied by a quality breakthrough, particularly in California wines.²⁰ Many wine critics, European and American, now agree that certain California wines are comparable in quality to some of the best European wines, and this new excellence is a second force for reform because the top vintners are demanding changes in labeling terminology to reflect the new quality.²¹ Finally, stimulated by the growth of wine consumption and leap in quality, consumers have begun to press for wine labeling reform; undoubtedly, the general increase in consumer activism in recent years has also contributed to new demands by wine consumers.²² They have charged, among other things, that existing labeling regulations permit "a continuing fraud even on knowledgeable and well informed consumers,"²³ that some of the rules constitute a "national wine scandal,"²⁴ that loopholes in the laws permit "truthblending,"²⁵ and

18. In 1976, 85% more wine was sold in this country than in 1967. In California, which produces 85% of American wine, nearly 100 new wineries opened in that decade. In the first four years of the 1970's, when the marketing revolution had become clear, nearly 130,000 acres were planted to wine grapes. Extrapolated from data published in *WINE & VINES*, May, 1977, at 28, 32, April, 1974, at 48.

19. See text accompanying notes 335-337 *infra*

20. The historic watershed marking the quality breakthrough can plausibly be pinpointed at a widely publicized blind tasting in Paris, France, May 1976; nine French wine experts were unable to distinguish California Chardonnays from French white Burgundies, or California Cabernet Sauvignons from red Bordeaux. See Prial, *California Labels Outdo French in Blind Test*, *N.Y. Times*, June 9, 1976, at 23, col. 3; Benson, *The Paris Tasting: Evidence, Jury and Verdict*, 62 *A.B.A.J.* 1640 (1976).

21. See text accompanying note 356 *infra*

22. The first consumer advocate to press for label changes may have been Michael Jacobson of the Center for Science in the Public Interest in Washington, D.C. who argued for ingredient labeling of alcoholic beverages. *BUSINESS WEEK*, December 8, 1975, at 24. JACOBSON & ANDERSON, *THE CHEMICAL ADDITIVES IN BOOZE*(1972). The latter publication set in motion the ingredient labeling events recounted *infra*, part III(B).

23. Petition of Frederic Fisher, attorney for H. Donald Harris, Jr., "to initiate rulemaking proceeding to revise 27 CFR § 4.23—varietal wine identification," submitted to Bureau of Alcohol, Tobacco & Firearms, United States Treasury Department, March 15, 1976.

24. Testimony of Edward J. Wawszkiewicz, Associate Professor of Microbiology, University of Illinois, before the Bureau of Alcohol, Tobacco & Firearms, In the Matter of Proposed Rules in 41 Fed. Reg. 50004 (November 12, 1976), Washington, D.C., February 24-25 (1977).

25. Fegan, *Revolutionizing America's Wine Laws: A New Movement of Growing Intensity*, *THE FRIENDS OF WINE MAGAZINE*, May/June 1976, at 12, 14.

that wine today is "perhaps the most deceptively labeled product in America."²⁶

It seems, then, this is a propitious time to examine regulation of American wine labeling. Part II of this article briefly describes the two major European wine labeling schemes, those of France and Germany, for the occasional instructive comparisons they may offer. In Part III, the American wine labeling scheme is examined. The limited role of state law under the twenty-first amendment is first discussed, then the dominant federal law, particularly that of the Department of the Treasury, is scrutinized. Both substance and procedure of Treasury Department regulation are found inadequate to protect either consumers or vintners; indeed, many of the regulations are found to be of questionable legality. A brief conclusion in Part IV recommends removal of labeling authority from the Treasury Department to the Food and Drug Administration and Federal Trade Commission whose existing rules are superior in every way.

II. REGULATION OF WINE LABELING IN EUROPE

The concept of an administrative appellation of origin²⁷ is the common foundation of the wine labeling systems of France, Germany, Italy, Portugal and Spain. As developed in these systems, the administrative appellation of origin is a geographical name reserved exclusively for use on certain products whose geographical origin and mode of manufacture comply with standards laid down by statute or regulation. The standards and the exclusive use of the name are enforceable by a public administrative agency as well as by a public prosecutor and producers within the geographical area.

The legitimacy of attaching such legal protection to the geographical name on a product's label rests primarily on the observation that some products owe significant characteristics to their place of geographical origin. Characteristics attributable to geographical origin may be due to climate and soil, or to local materials or modes of production that are unique; thus, the definition of "appellation of origin" in the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration is generally acknowledged to be apposite: "In this Agreement, 'appellation of origin' means the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due ex-

26. Benson, *As Off Into the Sunset Rides the B.A.T.F.*, 63 A.B.A.J. 432 (1977).

27. For an informative, modern discussion of the appellation of origin concept, see Devlétian, *La Protection des Appellations d'Origine et des Indications de Provenance*, 1956 PROPRIÉTÉ INDUSTRIELLE 225, 250; 1957 PROPRIÉTÉ INDUSTRIELLE 17, 35, 58 (serialization). See also Benson, *Toward a New Treaty for Protection of Geographical Indications*, *supra* note 10.

clusively or essentially to the geographical environment, including natural and human factors."²⁸

Considerable international debate²⁹ has centered on the question whether all geographical indications of source, including those which only indicate the place of origin (e.g., "Spanish" in "Spanish sardines"), should be entitled to the same legal protection as true appellations of origin which, in addition to origin, also connote characteristics due to that origin (e.g., "Roquefort" in "Roquefort cheese"). Emerging European policy seems to extend legal protection to all geographical indications in the interest of preventing deception and unfair competition. At the same time, it sets down special criteria for those geographical indications which claim to connote product characteristics. It is the establishment and enforcement of these criteria which make an administrative agency virtually indispensable.

The administrative appellation of origin should not be confused with a judicial appellation of origin. Statutes in some countries set forth general criteria for appellations of origin. The courts then determine case by case whether certain products from certain regions should be judicially awarded a protected appellation. Under such a statute the French courts, for example, have minutely examined the origins and production of such products as Camembert cheese, Dijon mustard and Champagne—festive cases for the judges no doubt, but apparently beyond their competence with respect to wine. The Champagne decision was soon overturned by the legislature and a few years later an administrative appellation of origin system for the important wines was created excluding the courts.³⁰

In addition, certain other legal relatives of the administrative appellation of origin should be distinguished in order to appreciate why the winegrowing countries of western Europe find the administrative appellation of origin the most useful basis for wine regulation. The first is the

28. Article 2 (1), Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, as revised at Stockholm in 1967. English text in LADAS, *supra* note 8, at App. 7. The International Bureau of the World Intellectual Property Organization, Geneva, has prepared a "Draft Treaty on the Protection of Geographical Indications," August 25, 1975, in which appellation of origin is similarly defined but which emphasizes that the product's qualities may be "due exclusively or essentially to the geographical environment, including natural factors, or both natural and human factors." *Id.* at 9. The Bureau's comment explains: ". . . it is not necessary that both natural and human factors should be involved at the same time. It seems quite possible in fact that an appellation of origin could designate industrial products, whose characteristic qualities may be due to purely human factors." *Id.* at 8.

29. See LADAS, *supra* note 8, at 1574-77. Benson, *Toward a New Treaty for Protection of Geographical Indications*, *supra* note 10.

30. Lenzen, *supra* note 8, at 178-81. Both Lenzen and QUITTANSON & VANHOUTTE, LA PROTECTION DES APPELLATIONS D'ORIGINE ET LE COMMERCE DES VINS ET EAUX-DE-VIE (1963) 120, conclude that the judicial determination of appellations of origin for wine prior to 1935 worked poorly.

penal statute for misrepresentation of geographical origin. Its shortcoming is that it is usually just a terse prohibition enforceable by the public prosecutor, which fails to define precise geographical borders. It is usually silent as to modes of manufacture. The second is a doctrine of unfair competition law. This doctrine ensures producers in a certain geographical area a common right to the exclusive use of the area's name on their products. Under this principle, for example, Spanish sparkling wine has been prevented from being passed off as "Champagne."³¹ Under unfair competition law, however, such protection can usually be sought only by those with the right to use the geographical name, not by the public. Further, an unfair competition action delegates the task of determining geographical boundaries and modes of manufacture to the judiciary rather than to an administrative agency.

A final confusing relative of the administrative appellation of origin is the certification mark. A certification mark is a mark registered and protected generally in the same manner as a trademark. Unlike a trademark, however, a certification mark "certifies regional origin or material, mode of manufacture, quality or other characteristics of the goods."³² When a certification mark is publicly owned (for example, by a municipality) and the mark guarantees geographical origin and mode of manufacture of a product, it is virtually indistinguishable from an administrative appellation of origin.³³ The mark "Roquefort" for certain cheese from Roquefort, France, for instance, is a certification mark under United States law³⁴ but is an appellation of origin under a French statute setting down the origin and mode of manufacture for Roquefort cheese.³⁵ However, unlike an administrative appellation of origin, a certification mark can also be privately promulgated by associations of merchants to protect whatever geographical boundaries and modes of

31. *Bollinger v. Costa Brava Wine Co.*, [1960] R.P.C. 16, Lenzen, *supra* note 8, at 146-54 describes the development of this doctrine at common law. Krieger, *Revision of the Lisbon Agreement for the Protection of Appellations of Origin*, [1974] INDUS. PROP. 387, 390, states that the Federal Republic of Germany protects geographical indications of source and appellations of origin, except for wine, solely under an unfair competition statute.

32. LADAS, *supra* note 8, at 1290. Compare Lanham Act Provision, 15 U.S.C. § 1054 (1976). See also 3 CALLMAN, UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 68.3 1950.

33. Most countries allow registration of such marks by states, provinces, municipalities or state institutions. Inconsistent technical requirements may inhibit the wider use of these marks as appellations of origin. For example, a mark consisting only of a geographical name is refused protection in many countries as not distinctive; the Paris Convention permits such refusal. Also, the United States and Britain refuse a certification mark to an organization which produces or sells goods itself, though other countries impose no such restriction.

34. *Community of Roquefort v. William Faehndrich, Inc.*, 303 F. 2d 494 (2d Cir. 1962). See also Pollack, "Roquefort"—An Example of Multiple Protection for a Designation of Regional Origin Under the Lanham Act, 52 T.M. Rep. 755 (1962).

35. Law of July 26, 1925, text reprinted in QUINTANSON & VANHOUTTE, *supra* note 30, at 586.

manufacture they choose; thus, there is little public assurance that the mark is more than a private marketing device.

In summary, the administrative appellation of origin combines features of several related legal concepts. It surpasses them, however, in its capacity to set informed standards for geographical origin and mode of manufacture, as well as in its ability—through public adoption and public enforcement—to protect consumer and other public interests.

No product is more suited to the administrative appellation of origin than wine. The truism that geographical origin of a wine significantly affects its character has been known since the days of King Tutankhamun.³⁶ It has been confirmed by such diverse authorities as the Roman poet Horace,³⁷ wine connoisseur Thomas Jefferson,³⁸ and many modern oenologists.³⁹ This fact is reflected in the market. Consumers are willing to pay dearly for labels bearing certain geographical origins. It is not uncommon for two wines produced just miles apart to have a price differential of several hundred percent. Even consumers who are indifferent to the intricacies of wine origin and character are affected, for the market price is largely set for them by the price knowledgeable consumers are willing to pay. Because this price sensitivity to even small differences in geographical origin invites fraud,⁴⁰ the European wine regulation schemes go to great lengths to protect the integrity of minutely subdivided wine regions. Because geographical origin often connotes a wine character owed to human as well as natural factors, the regulatory schemes also attempt to protect the integrity of viticultural practices and winemaking methods associated with a region. The technical complexity of these tasks, as well as distrust between producers,⁴¹ and between producers and consumers, have made the administrative appellation of origin the legal instrument of choice for wine regulation in Europe.

The following is a summary of the two most important wine regulation systems of Europe, those of France and Germany. The French system has been especially influential. Not only are the Italian, Portuguese and Spanish systems modeled after it, but the important emerging regu-

36. LESKO, KING TUT'S WINE CELLAR 22-23 (1977).

37. Horace, 65-68 B.C., preferred wine from the town of Caecubum. Gould, *Horace on Wine*, WINE WORLD MAGAZINE Sept./Oct., 1974, at 10.

38. VINIFERA WINE GROWERS ASSOCIATION, JEFFERSON AND WINE 74-80, 107-20 (1976).

39. See, e.g., Amerine and Winkler, *Composition and Quality of Musts and Wines of California Grapes*, 15 HILGARDIA 493-675 (1944); Haeseler, *Vine Performance and Wine Quality for Four Red Wine Grape Cultivars Grown in Erie County, Pennsylvania, for Three Growing Seasons* (paper submitted to Conference of Eastern Section of American Society of Enologists, August 5-6, 1977) summary printed in WINES AND VINES, Sept., 1977, at 68.

40. See note 5 *supra*

41. C.K. WARNER, *THE WINEGROWERS OF FRANCE AND THE GOVERNMENT SINCE 1875 passim* (1960).

lations of the European Economic Community⁴² are essentially French in character.

A. France

All French wine is subject to general laws against fraud⁴³ and false advertising⁴⁴. In addition, general provisions in the Code du Vin set minimal standards of merchantability and production practices. Of the latter, the legalized addition of sugar⁴⁵ is by far the most important provision, for it somewhat undermines nearly all the other laws designed to promote wine quality.

The vast sea of French common wine is subject only to these and related general statutes. But three categories of wine are subject to additional controls. Each is under a separate administrative appellation of origin system: 1) wines carrying an "appellation d'origine contrôlée," *i.e.*, controlled appellation of origin wines, 2) "vins délimités de qualité supérieure," *i.e.*, wines of superior quality, commonly called V.D.Q.S. wines; and 3) "vins de pays," *i.e.*, country wines. Descriptions of the main features of these systems follow.

1) Controlled appellations of origin are used exclusively by wines meeting conditions established by the Institut National des Appellations d'Origine des Vins et Eaux-de-vie (I.N.A.O.).⁴⁶ I.N.A.O., a quasi-public agency, is charged with promotional duties that potentially conflict with its function of protecting wine quality on behalf of consumers.⁴⁷ Its

42. The body of EEC wine labeling regulations is found in: Reg. 816/70, 13 O.J. EUR. COMM. (No. L99) 1 (1970), as amended; Reg. 817/70, 13 O.J. Eur. Comm. (No. 199) 20 (1970), as amended; Reg. 2133/74, 17 O.J. EUR. COMM. (No. L227) 1 (1974), as amended. These regulations may be the most important regulatory scheme in the years ahead. They have already had a dramatic impact upon member countries' wine laws. Unfortunately, however, the concern of the EEC is pre-eminently the promotion of trade, and hardly at all the protection of consumers. Nowhere is this more evident than in the outright consumer deception authorized by rules permitting only 85% truthfulness in the labeling of geographical origin, grape variety and vintage year. *See* EEC Reg. 2133/74, *supra* as amended. It is to be hoped these are transitory provisions which will be replaced by 100% requirements or label disclosure of actual percentages.

43. Law of August 1, 1905.

44. Law of July 2, 1963.

45. Code du Vin, Art. 126-146. Records of addition of sugar are available to the public (Art. 144), but unfortunately there is no way to tell from a wine label whether sugar has been added. Even some of the "greatest" French wines, particularly Burgundies, are frequently sugared to compensate for unripe grapes. Quality suffers, however, when sugar is added. *See* Chroman, *The Search for an Honest Burgundy*, Los Angeles Times, May 23, 1974, § 6 at 6, Col. 1.

46. Code du Vin, Art. 42. The controlled appellation of origin system was created by Decree-law of July 30, 1935. It has since been amended and codified in various articles of the Code du Vin. The appellation "Champagne," it should be noted, is largely regulated separately from the general I.N.A.O. systems by virtue of specific "Champagne" laws. *See* Code du Vin, Art. 152-165; QUITTANSON & VANHOUTTE, LA PROTECTION DES APPELLATIONS D'ORIGINE ET LE COMMERCE DES VINS ET EAUX-DE-VIE 385-400 (1963).

47. I.N.A.O. is charged with publicity in favor of appellation of origin wines and, since

composition is heavily weighted by industry interests which are not counterbalanced by any consumer representatives except government officials.⁴⁸ Despite these structural weaknesses, I.N.A.O. has devised some of the strictest regulations in the world for wine production, regulations which are, apparently, widely obeyed.⁴⁹ I.N.A.O. regulations are approved by the Minister of Agriculture, then issued as decrees by the Prime Minister.⁵⁰ For each controlled appellation, the regulations lay down requirements as to:

- a) the precise area of geographical origin,
- b) viticultural practices,
- c) permissible grape varieties,
- d) maximum yield per hectare,
- e) necessary degree of alcohol before any addition of sugar, and
- f) winemaking methods.

In addition, formerly some, and now all, controlled appellation wines must pass both analytic and taste tests conducted under I.N.A.O. auspices.⁵¹ The analytic test examines acidity, volatile acidity, alcohol and related characteristics, while the taste test extends to color, clarity, sediment, smell and flavor.⁵²

Case law has upheld the exercise of very broad discretion by I.N.A.O. in determining the standards for each appellation.⁵³ I.N.A.O. may not alter judicial decisions rendered under earlier laws⁵⁴ defining geograph-

1967, with studying and making recommendations concerning "regularization of the wine market." AUBY & PLAISANT, *LE DROIT DES APPELLATIONS D'ORIGINE* 22-23 (1974).

48. According to AUBY & PLAISANT, *supra* note 47, at 21-35, I.N.A.O. is a quasi-public agency governed by a national committee whose members are wine producers and traders chosen by regional committees, along with officials from the Ministry of Agriculture, Ministry of Economy and Finance and certain other departments. An executive committee is chosen from among the national committee. There are eleven regional advisory committees, each composed of a rural engineer, local agricultural, tax and fraud officials, a local official of the Institut des Vins de Consommation Courante, a local I.N.A.O. technical consultant, and wine producers and traders. There also exist numerous local "interprofessional" committees, with diverse authority and membership. Generally, their authority is only advisory, and their membership is mostly composed of wine producers and traders. As of 1974, an effort was in progress to merge the interprofessional committees into the I.N.A.O. regional committees.

49. Periodically, a wine scandal erupts in France, as elsewhere, revealing major violations of the law. It is hard to generalize what the extent of regular violation of the law might be, though it is probably great. A systematic study is needed of the many cases prosecuted each year, along with interviews of persons in the wine trade, to reassure the public these laws are effective.

50. AUBY & PLAISANT, *supra* note 47, at 21.

51. Decree of October 19, 1974, 1974 J.O. 10795, will be fully effective as of October 22, 1979. Tasting commissions are established in each appellation area, and are composed of local wine producers, shippers, brokers, and professional viticulturalists and oenologists who are nominated by the local trade organizations and appointed by I.N.A.O. Arrête of November 20, 1974, 1974 J.O. 11712.

52. Arrête of November 20, 1974, *supra* note 51.

53. AUBY & PLAISANT, *supra* note 47, at 79.

54. Law of May 6, 1919; Law of July 22, 1927. The Law of May 6, 1919 formerly allowed

ical boundaries, permissible varieties, and winemaking methods,⁵⁵ but it may make those previous standards more restrictive. It is otherwise not bound by the earlier statutory formula that standards be those traditionally prevailing in "local, good faith and constant use."⁵⁶ With respect to the various standards normally established by regulations for controlled appellations, the following general comments apply:

a) Geographical boundaries are usually based upon many centuries of local custom. These very frequently are congruent with the soil, topographical and micro-climatic features that make one area's wine different from others. Sometimes, however, the geographical boundaries reflect mere economic or political interests, thus undermining the legitimacy of the appellation.

b) Viticultural practices are heavily controlled, down to the pruning of the vines and harvest practices.

c) Restrictions on grapes permit only *Vitis vinifera* varieties,⁵⁷ and normally allow only those few varieties in each appellation area which customarily are believed to produce the wine character for which the area is famed. Frequently, the regulations provide for a phasing out of impermissible varieties over many years.

d) Restrictions on maximum yield per hectare are critical, for quality will quickly plunge if a vineyard is forced to overproduce.⁵⁸ Though such restriction is a key element in the success of the French system, unfortunately, in the past it frequently has been subordinated to economic interests. Permissible yield may be changed from year to year by

any producer in an area to attach the area's name to his product, and to bring actions restraining use of the name by outsiders. Thus, it was like an unfair competition, or "passing off" statute. This allowed undesirably liberal use of geographical names without regard to tradition or quality. Therefore, the law of July 22, 1927 added that, for wines, an appellation of origin must be justified on the basis of "local, good faith and constant" usages with respect to the geographical boundaries and grape varieties permitted. Still, however, determinations of the right to use appellations were left to the judiciary. Dissatisfaction with the system is what led to the Decree-Law of July 30, 1935 creating I.N.A.O. and the "controlled appellation of origin" system for certain wines. The "simple appellation" system persisted for other products and some wines but was modified over the years. Now, for all wines, the "simple appellation of origin" has been abolished because of conflict with rules of the European Economic Community requiring delimitation of geographical boundaries and of grape varieties for any wine bearing a specific geographical indication. Regulation 816/70, Art. 30(2), 13 O.J. EUR. COMM. (No. L99) 1 (1970); Regulation 817/70 13 O.J. EUR. COMM. (No. L99) 20 (1970). French wines with specific geographical indications are now limited to controlled appellation of origin wines, V.D.Q.S. wines, and "vins de pays." See Law of December 12, 1973, 1973 J.O. 13,203, and AUBY & PLAISANT, *supra* note 47, at 403-05.

55. Code du Vin, Art. 42.

56. AUBY & PLAISANT, *supra* note 47, at 79.

57. *Vitis vinifera*, the species native to Europe, produces the world's most celebrated wines. See WINKLER, COOK, KLIOWER & LIDER, GENERAL VITICULTURE 16-18 (1974).

58. The French grape grower captures the essence of this practice by referring to it as "getting the vines to piss." Lenzen, *Learning from French Wine Labels*, 63 A.B.A.J. 1650 (1977).

decision of the Minister of Agriculture according to the quantity and quality of the harvest.⁵⁹In addition, until 1974 the restrictions on yield were not restrictions on what was produced in the vineyard, but on how much of the wine produced was entitled to carry the appellation. Thus, yield restrictions were mere price support devices rather than quality controls. A reporter aptly summed up the situation a few years ago:

To take an example from the Burgundy region, a grower with a plot in the Chambertin vineyard—which produces a very expensive *grand cru*—is entitled to make only 30 hectoliters of wine a hectare. But the permissible yield for Gevrey-Chambertin, the lesser communal appellation to which such a grower is also entitled, is 35 hectoliters to the hectare, while that for “Burgundy,” a name to which the same grower also has the right, is 45 hectoliters to the hectare. Thus if such a grower produces 70 hectoliters to the hectare, the first 30 can be called Chambertin, the next five Gevrey-Chambertin, another 10 Burgundy, and the final 25, *vin ordinaire*.⁶⁰

Presently, under pressure from the 1972 Bordeaux scandal⁶¹ and from new European Economic Community rules, France has significantly tightened the yield laws. A new decree⁶² allows all wines produced from any given area to carry only one controlled appellation of origin. In addition, annual limits are set on yield, though wines somewhat in excess of the limits may still be sold under the appellation if they pass a taste test by the local tasting commission. But if they exceed an absolute ceiling on yields, they lose the right to any controlled appellation. There may be exceptions to this rule in individual cases when the wine passes a taste test and the producer agrees to sell the excess beyond the ceiling for use as industrial alcohol, vinegar, or grape juice. Thus, the financial incentive to overproduce is practically eliminated.

e) Regulations also establish the necessary degree of alcohol obtainable in the wine prior to any addition of sugar. The higher the required degree of natural alcohol, the less sugar will be needed to raise alcohol content. Thus, this is really a control on sugaring.

f) Winemaking methods are normally restricted to those traditional to the area, though (except for Champagne) the methods are often vague. Certainly, the restrictions have allowed introduction of new techniques and equipment. In fact, there has been a marked decrease in quality of Burgundy and Bordeaux in recent years because of new techniques designed to meet the American market demand for wines ready to drink without aging.

59. Decree of October 19, 1974, 1974 J.O. 10795. According to the decree, increases in yield are to be granted only in “exceptional years when quality and quantity appear simultaneously.”

60. Winroth, *French Vineyards Under Fire*, International Herald Tribune, July 4, 1974 at 7, col. 5.

61. See note 5 *supra*

62. Decree of October 19, 1974, *supra* note 59.

Beyond the I.N.A.O. regulations, controlled appellation of origin wines are subject to statutory provisions on labeling. The lengthy provisions require, among other things, labeling of the name and address of the producer or shipper.⁶³ They also prohibit misrepresentations of the trade status or place of operation;⁶⁴ use of the appellation in connection with wines not entitled to it;⁶⁵ and words, symbols, etc. on labels, advertising or other articles used in connection with wine that may lead to confusion regarding the nature, origin, substantial qualities, composition or amount of the wine.⁶⁶ The latter provision lists specific prohibitions of words such as "premier cru," "cru classé," "clos," "château," "domaine," "mont," "côte," "cru," etc., unless such words correspond to reality. Trade or brand names that include geographical terms are prohibited if they may confuse as to origin.⁶⁷ Vintage dates must be 100 percent honest; unindicated blending of years is fraud.⁶⁸

2) The category V.D.Q.S. was created after World War II to help promote wines entitled to "simple" but not "controlled" appellations, by giving them an authoritative label.⁶⁹ Within a few years, new laws were passed requiring V.D.Q.S. wines to meet certain conditions beyond those for simple appellations. Today, the V.D.Q.S. system is a shadow of the controlled appellation system. The applicable laws⁷⁰ call for the Minister of Agriculture to set standards upon proposal of I.N.A.O. and with the advice of the Institut des Vins de Consommation Courante. Standards relate to a) geographical boundaries, b) grape varieties, c) minimum alcohol, and d) "eventually," viticultural and winemaking practices. Laboratory analyses and taste tests are required. Limits on yield are set. In each instance, however, the standards are weaker than those for controlled appellation wines. It is understood that V.D.Q.S. wines are aspiring to be as renowned as their "controlled" brethren. As a V.D.Q.S. wine achieves fame, standards are tightened until I.N.A.O. determines the wine may officially "ascend" into the controlled appellation category.

3) Vins de pays formerly were rather unimportant wines carrying the names of departments (provinces) or large viticultural zones.⁷¹ However, these wines gained importance in 1973 when the government fo-

63. Code du Vin, Art. 283. [AUBY & PLAISSANT, *supra* note 47, at 117, report this as Art. 305 *ter*].

64. *Id.*, Art. 282.

65. *Id.*, Art. 283.

66. *Id.*, Art. 284.

67. QUITTANSON & VANHOUTTE, *supra* note 46, at 213-19.

68. *Id.* at 201, Lenzen, *supra* note 58.

69. AUBY & PLAISANT, *supra* note 47, at 86-87. See explanation of "simple appellations" note 54 *supra*.

70. Code du Vin, Art. 305 *bis* (codification of the Laws of December 18, 1949 and May 24, 1951, and Decrees of May 20, 1955, November 30, 1960, March 26, 1964).

71. AUBY & PLAISANT, *supra* note 47, at 90-91.

cused on the vins de pays category to salvage the use of regional names in danger of being prohibited by the European Economic Community.⁷² Confronted by news from the EEC that regional and local geographical names would be prohibited on wines unless the areas and grape varieties were delimited, French winemakers began claiming "simple appellations" for their wines in record numbers.⁷³ But simple appellations did not necessarily meet the EEC criteria. After spirited political debate, the matter was settled by establishment⁷⁴ of the following system: Simple appellations may no longer be used for wines. In addition to controlled appellation and V.D.Q.S. wines, vins de pays may employ geographical indications, but only pursuant to regulations which relate to a) geographical boundaries and names (some contiguous with the political departments of France, others consisting of various smaller zones like "coteaux" and "vals"),⁷⁵ b) grape varieties, c) minimum alcohol, d) required laboratory analysis and e) taste tests by local commissions.⁷⁶ In short, if V.D.Q.S. wines are shadows of controlled appellations wines, then vins de pays are shadows of V.D.Q.S. wines.

B. Germany

The German wine labeling system, completely revised in 1971⁷⁷ largely in response to EEC requirements, is similar to the French in its fundamental emphasis on geography. It goes beyond the French system, however, in its emphasis on natural sugar content of the grapes—an important factor in a cold country where the grapes often fail to ripen.

General provisions common to all wines establish, among other things, minimum acceptable production practices, methods of analysis, and label terms that may and may not be used. Most significant, and most unfortunate, among the label usages permitted are:

- (1) the mention of a vintage year even though as little as 85 percent of the wine derives from the year claimed;
- (2) the mention of a grape variety, even though as little as 85 percent derives from that variety; and

72. See note 54 *supra*

73. Claims of simple appellations jumped from 81 in 1971 to 438 in 1972; many of the names claimed were somewhat fictional. AUBY & PLAISANT, *supra* note 47, at 403, quoting a French Senate report.

74. Law of December 12, 1973, 1973 J.O. 13,203; Decree of November 29, 1973, 1973 J.O. 12,759, based on earlier decrees codified as Code du Vin, Art. 305A.

75. Arrêtes of January 29, 1974, 1974 J.O. 1293. "Coteaux" means "slopes," "vals" means "valleys". All geographical names, however, must be preceded by "vin de pay."

76. *Id.*

77. Wine Law, July 14, 1971, BGBI. I, No. 63; July 16, 1971, 803. Provisions of the Wine Law relating to the terms "Sekt," "Weinbrand," and "Prädikatssekt" were modified by the European Court of Justice in *Comm. of the European Comm. v. Fed. Rep. of Germany*, [1975] E. Comm. Ct. J. Rep. 181, COMM. MKT. REP. (CCH) § 8293.

(3) (with some exceptions) mention of an appellation of origin even though as little as 85 percent derives from the area declared.⁷⁸

Few things affect quality and price more than these three items of information. Even if blending of years, varieties and areas is sometimes necessary to produce good wine, there is no reason the actual percentages of the years, varieties and areas could not be disclosed to consumers on the labels. There is no justification for the government to legalize the passing off of 15 percent of German wine under false labels. Apparently German vintners, in cooperation with American importers, have been passing at least part of this deception onto American consumers, even though United States law prohibits it.⁷⁹

Beyond the requirements common to all wines, the 1971 Wine Law classifies all German wine into one of three categories. They are: 1) Qualitätswein mit Prädikat (Quality wine with special attributes), 2) Qualitätswein (Quality wine), and 3) Tafelwein (Table Wine). Each is described here briefly.

1) Wines labeled Qualitätswein mit Prädikat are those of the very finest category. The category in turn, is subdivided into six categories labeled as "Kabinett," "Spätlese" (late harvest), "Auslese" (selective harvest), "Beerenauslese" (selected berries), "Trockenbeerenauslese" (dry, selected berries), and "Eiswein" (made from grapes frozen in the vineyard). The first five subcategories are distinguished essentially by increasing requirements of natural sugar content and the condition and selection of the berries at harvest. Trockenbeerenauslese is at the pinnacle, possessing the greatest sugar content and infection by the desirable *Botrytis cinerea* mold.⁸⁰ Common to all Qualitätswein mit Prädikat wines are the following quality controls:

a) Geographical boundaries are defined for all winegrowing areas, partially by the states and partially by the federal government. In addition to community and other place names, geographical names are restricted to vineyard sites, Districts and Regions. With a few exceptions, the smallest vineyard sites ("Einzellage") permitted to be named on labels are those of at least five hectares. No upper limit is set on an Einzellage, and combinations of such sites into larger "Grosslage" is

78. *Id.*, as amended. The 1971 Wine Law set each of these levels at 75%, but the law was subsequently amended to conform to the 85% honesty levels of the European Economic Community.

79. 27 C.F.R. §§ 4.10(h), 4.39(b) (1976). In public testimony before the federal Bureau of Alcohol, Tobacco & Firearms, on November 2, 1977, in the matter of rules proposed in 42 Fed. Reg. 30517 (June 15, 1977), a major importer of German wines protested the government's requirement that 95% of a wine be of the vintage year stated. When reminded by a federal official that this was a long standing regulation, not a new proposal, he replied, to the mirth of some in the room, that everyone knew the rule was never enforced.

80. See Benson, *Botrytis Cinerea: The Noble Rot*, 63 A.B.A.J. 867 (1977).

permitted, facts which have led to wide criticism.⁸¹ Districts ("Ber-eiche") constitute the next largest geographical areas. Above them, the country has been divided into eleven Regions ("Anbaugebiete") for quality wine. Although some injustices seem to have resulted from the new geographical boundaries, generally the 1971 Wine Law has achieved impressive results by reducing the number of site names from over 30,000 prior to 1971 to about 2,600, and by developing boundaries based on similarity of growing conditions and wine character. The 85 percent origin loophole referred to above does not apply fully to this category; 100 percent of the grapes must be harvested in the Region and District stated, though only 85 percent must come from the vineyard stated. This loophole, however, is expanded for Beerenauslese and Trockenbeerenauslese wines which may name the vineyard from which only 51 percent of the grapes was harvested.

b) Viticultural practices are extensively controlled by local authorities, down to the timing of the harvest.

c) Varieties of grapes are restricted to specific types required for each wine area. The Riesling is the noblest grape of Germany, but it is a shy producer and the temptation is to permit other, prolific varieties to be blended with Riesling grapes. Varieties are not always stated on labels, and when they are, as already noted, a loophole allows the statement to be only 85 percent truthful.

d) Restrictions are imposed on yield per hectare. In addition, regulation of viticultural practices and the necessity of achieving high natural sugar in the grapes indirectly help keep yields down.

e) Sugar may not be added to any Qualitätswein mit prädiat; indeed this is the primary distinctive feature of these wines. There has been at least one report, however, of widespread violation of the sugar prohibition.⁸²

f) Winemaking methods are generally not regulated beyond requirements of good commercial practices, though ingredients are controlled and analytic standards must be met. Laboratory analysis and tasting is conducted for wines of this category, and a control number which must appear on the label, is given for each batch of wine.

2) Qualitätswein is wine of the second category. The significant difference between it and the top category is that sugar may be added. It must, however, naturally contain enough sugar to produce at least 8.5 percent alcohol before sugaring. Also, the 100 percent appellation of origin rule applies only to the Region of the wine of this second category, not to the District as with wines of the top category. Otherwise, everything applicable to the top category, including testing and control

81. Lenzen, *Learning from German Wine Labels*, 64 A.B.A.J. 266 (1978).

82. Kreck, *supra* note 5.

numbers, also applies to Qualitätswein. The exception, of course, is that the subcategories (Spätlese" etc.) of Qualitätswein mit Prädikat do not exist in this category for they depend, by definition, on the existence of various high natural sugar levels.

3) Tafelwein is the lowest category wine. It need not have any particular natural sugar level at harvest; sugar is always added. It need not come from any specified list of grapes. It may use the geographical area names from which 85 percent of the grapes were harvested. It may not use vineyard names. It is not subject to testing or control numbers.

Putting the three categories together, it is apparent that wine from a given vineyard may be sold as Tafelwein in a bad year when the grapes fail to ripen; it may be sold as Qualitätswein in a fair year when the grapes reach a potential alcohol level of 8.5 percent; and it may be sold as Qualitätswein mit Prädikat in a good year when no sugar need be added. In great years, the same vineyard may produce wines ranging from Auslese to Trockenbeerenauslese and, when the frost hits, Eiswein.

In sum, the German system is impressive for its effort to define geographical areas with precision, and for the information it provides the consumer on the overriding quality factor of grape sugar. It is equally *unimpressive* for its loopholes relating to label statements of vintage year, origin and grape variety.

III. REGULATION OF WINE LABELING IN THE UNITED STATES

A. The limited law of the states

The Supreme Court has often held that the states have extensive power under the twenty-first amendment to regulate liquor in disregard of the federal government. The states have never been shy of exercising that power to promote taxation and temperance, yet they have almost completely deferred to the federal government in matters of wine labeling.

This deference is surely not due to a belief among the states that they lack the authority to regulate wine labeling inconsistently with federal law (though that question is explored below and found open to considerable doubt). Rather, it is probably due to an attitude that the extensive federal regulations are adequate and there is little reason to commit state resources to the subject beyond taxation and temperance. Ironically, this lack of state interest seems fortunate for consumers. If states had different standards, wine labels would not only be more confusing than they are now, but it is likely health and quality standards would rise and fall as states competed to give local producers marketplace advantages through stiff labeling rules for out-of-state wines and weak ones for local wines. Additionally, the economic burdens on wine producers selling in interstate commerce would be multiplied.

Fortunately, the regulations of California (which produces 85 percent of American wine)⁸³ and New York (which produces nearly 10 percent)⁸⁴ reflect an attitude of nearly complete deference to the federal government. These states' regulations are examined below. But one state with a budding wine industry, Oregon, has recently adopted labeling regulations that depart radically from federal standards. In this instance, the regulations are beneficial to consumers because they set much stricter standards than federal regulations; however, the act of departure from a uniform national labeling system is a worrisome harbinger of labeling chaos. The Oregon regulations are also discussed below.

1) The Twenty-First Amendment

The twenty-first amendment⁸⁵ has been thoroughly analyzed elsewhere,⁸⁶ but its effect on wine labeling remains clouded. Does it permit states to set labeling requirements that conflict with federal laws adopted under the commerce clause⁸⁷ of the Constitution? For example, could the states exempt wines sold within their boundaries from ingredient labeling which may someday be required under the Federal Alcohol Administration Act?⁸⁸ May they permit label statements prohibited under that same Act, or permit label terms to have meanings that undermine the federal regulations? May the states allow additives in wines that are prohibited under Federal Food, Drug and Cosmetic Act?⁸⁹ May they authorize wine advertising that has been found false under the Federal Trade Commission Act?⁹⁰ A reasonable reading of the twenty-first amendment and the Supreme Court cases construing it leads to the conclusion that the states could do none of these things; yet that conclusion is far from certain.

83. WINES AND VINES, May 1977, at 31.

84. *Id.*

85. U.S. CONST. amend. XXI:

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

86. See Note, *The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578 (1975); Note, *State Power to Regulate Liquor: Section Two of the Twenty-first Amendment, Reconsidered*, 24 SYRACUSE L. REV. 1131 (1973).

87. U.S. CONST. art. I, § 8, cl. 3.

88. 27 U.S.C. §§ 201-212 (1970).

89. 21 U.S.C. §§ 301-392 (1976).

90. 15 U.S.C. § 44-58 (1976).

Rejecting the view that section two of the amendment was intended only to permit states to remain "dry," and to leave intact federal regulation of interstate liquor commerce, the early "Brandeis decisions"⁹¹ of the Supreme Court established the twenty-first amendment as an absolute source of liquor regulation within state boundaries. The amendment prevailed over the commerce clause and other constitutional provisions, including the fourteenth amendment. The cases sanctioned prohibition, discrimination, even retaliation against liquor entering the state in interstate commerce. "Since the Twenty-first Amendment . . .", Brandeis wrote, "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause; and . . . discrimination between domestic and imported intoxicating liquors or between imported intoxicating liquors, is not prohibited by the equal protection clause."⁹²

This view of the amendment was strongly criticized.⁹³ Although the view won the early allegiance of Mr. Justice Frankfurter,⁹⁴ the various majorities of the Supreme Court in subsequent years have never seemed comfortable with it. Even in two cases contemporary with the Brandeis decisions, the Court backed away from the extreme position. In *William Jameson & Co. v. Morgenthau*,⁹⁵ the Court refused a decision on the merits, dismissing the action for alleged failure to present a substantial constitutional issue. In a curt statement that would later be used to dilute the effect of the Brandeis decisions, the per curiam opinion rejected a claim that the twenty-first amendment gave the states exclusive control over commerce in liquor and therefore that the Federal Alcohol Administration Act was illegal. "We see no substance in this contention," declared the Court.⁹⁶ In the second contemporary case, the Court refused to concede that the amendment gave the states regulatory power over importation of liquor to federal territorial enclaves within the states.⁹⁷

A few years later, the Court sustained a state statute imposing a permit requirement on liquor shipments through the state, although it did so without support from the twenty-first amendment. The Court's opinion emphasized the lack of conflict between the state's exercise of its

91. *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59 (1936), *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938), *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939).

92. *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939).

93. See De Ganahl, *The Scope of Federal Power Over Alcoholic Beverages Since the Twenty-first Amendment*, 8 GEO. WASH. L. REV. 819, 875 (1940); Note, *The Twenty-first Amendment versus the Interstate Commerce Clause*, 55 YALE L.J. 815 (1946). But see Lee, *Adulteration and Misbranding of Alcoholic Beverages*, 3 FOOD, DRUG, COSMETIC L.Q. 82, 91 (1948).

94. *Carter v. Virginia*, 321 U.S. 131, 139 (1944) (concurring opinion).

95. 307 U.S. 171 (1939).

96. *Id.* at 173.

97. *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938).

police power and Congress' power under the commerce clause.⁹⁸ Shortly thereafter, the Court again used the police power/commerce clause analysis to uphold a scheme regulating liquor transportation through a state.⁹⁹ Emphasizing the *through* nature of the shipment, the Court suggested the twenty-first amendment was not applicable, and in any event the court thought it "need not consider"¹⁰⁰ the amendment because the issue was resolvable under the commerce clause. The state's regulations were found sustainable, at least "in the absence of contrary federal legislation."¹⁰¹ Mr. Justice Black, concurring, thought that while the twenty-first amendment had left "some amount of power" in Congress to regulate liquor under the commerce clause, the precise amount was uncertain; he opined that the commerce clause ought never be used to invalidate state liquor statutes, "except where they conflict with valid federal statutes."¹⁰²

During the next term, the Court again appeared to acknowledge that the twenty-first amendment might not shield a state law in conflict with federal statutes based on the commerce clause. In *United States v. Frankfort Distilleries*,¹⁰³ the court upheld a federal Sherman Act prosecution against Colorado liquor wholesalers. Colorado law was neither in conflict with nor duplicative of federal law, but the twenty-first amendment was nevertheless raised as a bar to prosecution. Though Mr. Justice Frankfurter, concurring, would have accepted that defense had Colorado chosen to exercise its twenty-first amendment powers, the Court's opinion seemed to think that was an open question: "We therefore do not have here a case in which the Sherman Act is applied to defeat the policy of the state. That would raise questions of moment which need not be decided until they are presented."¹⁰⁴

The question was eventually presented in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*¹⁰⁵ In its decision, the Court came down on the side of the federal, not state, government. Mr. Justice Stewart's opinion invalidated a New York law that would have prohibited sale of liquor to departing international travelers at an airport "duty-free" shop. The Federal Bureau of Customs approved the delivery and sale of the liquor under the Tariff Act of 1930, based on the commerce clause. In rejecting New York's assertion that the twenty-first amendment gave the state power to regulate the liquor, the Court first observed that its early decisions had made clear that "a State is totally unconfined by traditional

98. *Duckworth v. Arkansas*, 314 U.S. 390 (1941).

99. *Carter v. Virginia*, 321 U.S. 131 (1944).

100. *Id.* at 137.

101. *Id.*

102. *Id.* at 138.

103. 324 U.S. 293 (1945).

104. *Id.* at 299.

105. 377 U.S. 324 (1964).

Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution or consumption within its borders." However, it then announced the restoration of the commerce clause as if it had never been gone:

To draw a conclusion from this line of [early] decisions that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* "repealed", then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect. In *Jameson & Co. v. Morgenthau*, 307 U.S. 171, "the Federal Alcohol Administration Act was attacked upon the ground that the Twenty-first Amendment to the Federal Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause, and hence that Congress has no longer authority to control the importation of these commodities into the United States." The Court's response to this theory was a blunt one: "We see no substance in this contention." *Id.*, at 172-173. See also *United States v. Frankfort Distilleries*, 324 U.S. 293. (Sherman Act.)

Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.¹⁰⁶

Commentators were afraid to take this clear language at face value. One theory was that Mr. Justice Stewart did not really mean what he said, and that *Idlewild* was to be read narrowly—along with *Collins*,¹⁰⁷ *Duckworth*¹⁰⁸ and *Carter*¹⁰⁹—all as cases holding *through* liquor shipments not subject to the twenty-first amendment as are shipments *into* the state.¹¹⁰ Unless *Idlewild* was just another "through" case, one commentator observed, it would imply that all state regulations based on the amendment must satisfy some test of reasonableness when coming into conflict with other provisions of the constitution. Noting that this approach had been urged by a 1946 law review writer, and that it "would bring into question" the discriminatory and retaliatory state laws approved by the Brandeis decisions, the commentator concluded that *Idlewild* must be a "through" case despite Mr. Justice Stewart's "balancing of interests" language.¹¹¹

106. *Id.* at 331-32.

107. See note 97 *supra*

108. See note 98 *supra*

109. See note 99 *supra*

110. Note, *The Evolving Scope of State Power under the Twenty-first Amendment: The 1964 Liquor Cases*, 19 RUTGERS L. REV. 759 (1965); Note, 75 COLUM. L. REV. *supra*, note 86 at 1594.

111. Note, 19 RUTGERS L. REV. *supra* note 110, at 772-773.

The next term, Mr. Justice Stewart slipped from the clear expression of *Idlewild* into a bit of classic judicial doublespeak. Writing for the Court in *Seagram & Sons v. Hostetter*,¹¹² he was faced with a New York statute requiring liquor brand owners to file monthly price schedules with state authorities and affirm that the prices were no higher than the lowest price for the liquor anywhere in the United States during the preceding month. After emphasizing that the liquor in *Idlewild* was delivered and used abroad (apparently, that is, it had characteristics of a “through” shipment), the Justice observed:

Unlike *Idlewild*, the present case concerns liquor destined for use, distribution, or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude for regulation by the State. We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause.¹¹³

Was Stewart retreating from his “balancing of interests” approach, and reopening the question whether the twenty-first amendment had “left Congress with no regulatory power over interstate . . . commerce in intoxicating liquor”—an idea he previously found “patently bizarre” and “demonstrably incorrect”?¹¹⁴ Though he gives contradictory signals, he apparently was doing no such thing. Footnote 13 seemed to answer the question just as soon as it had been raised: citing *Frankfort Distilleries* (as he had in *Idlewild*) he pointed out that the Court had there found the amendment “has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries.”¹¹⁵ Moreover, in the same footnote he also cited the very 1946 law review article,¹¹⁶ whose thesis another commentator¹¹⁷ had suggested was rejected in *Idlewild*. If these are not clear enough signals of the Justice's intention to follow a “balancing of interests” approach, the remainder of the opinion demonstrates that was in fact his approach. He went on to find the New York scheme not unduly burdensome on interstate commerce, nor in conflict with federal antitrust laws; he did so using traditional commerce clause and supremacy clause precedents. At the end of his discussion of the claimed conflict between New York law and federal antitrust laws, he again seemed to answer the root question that was left open at the beginning of the opinion: whether the twenty-first amendment is a bar to Con-

112. 384 U.S. 35 (1966).

113. *Id.* at 42-43.

114. *Hostetter v. Idlewild, Bon Voyage Liquor Corp.* 377 U.S., at 332.

115. *Seagram & Sons v. Hostetter*, 384 U.S. at 43 n.13.

116. Note, *The Twenty-first Amendment versus the Interstate Commerce Clause*, 55 *YALE L.J.* 815 (1946).

117. Note, 19 *RUTGERS L. REV.* *supra* note 110 at 772.

gress' exercise of its commerce clause powers over liquor. Alluding to a possible conspiracy to fix prices in New York and elsewhere in the country, Stewart wrote: "Nothing in the Twenty-first Amendment, of course, would prevent enforcement of the Sherman Act against such a conspiracy. *United States v. Frankfort Distilleries*."¹¹⁸

The Court has discussed this root question in only one more recent case. While the Brandeis view of the twenty-first amendment gained an adherent in Mr. Justice Blackmun, the rest of the Court seemed to doubt the proposition that the amendment authorizes a state to override federal statutes based on the commerce clause. In *Heublein, Inc. v. South Carolina Tax Commission*,¹¹⁹ the state's taxation and regulation of liquor distributors doing business in the state allegedly conflicted with a federal statute defining the permissible reach of state taxation of income derived within the state from interstate commerce. The Court, speaking through Mr. Justice Marshall, found that the laws did not actually conflict. It found no violation of the commerce clause. If it had found a conflict, it made clear that the federal law would have prevailed: "If we were persuaded that South Carolina has evaded the intent of the [federal] statute we would, of course, be reluctant to uphold its actions."¹²⁰

In a footnote reply to Mr. Justice Blackmun's concurring opinion, the Court uttered perhaps the most candid assessment of the Court's case law in over thirty years: "[T]hrough the relation between the Twenty-first Amendment and the force of the Commerce Clause in the absence of congressional action has occasionally been explored by this Court, we have never squarely determined how that Amendment affects Congress' power under the Commerce Clause."¹²¹ Surprisingly, less than a year later the Court affirmed, without opinion,¹²² a decision of a federal district court ruling that Kansas could prevent sale of liquor on interstate Amtrak trains passing through the state.¹²³ The district court judge held that the federal Rail Passenger Service Act provision exempting the trains from state laws pertaining to railroad "rates, routes, or service,"¹²⁴ would violate the twenty-first amendment if construed to be in conflict with state laws.¹²⁵ Since this seems at odds with what all but one justice had expressed only months earlier in *Heublein*, the Court's per curiam affirmation should probably be viewed as approval of the result, rather than the reasoning, of the district court decision.¹²⁶

118. *Seagram & Sons v. Hostetter*, 394 U.S. at 46.

119. 409 U.S. 275 (1972).

120. *Id.* at 279.

121. *Id.* at 282 n.9.

122. 414 U.S. 948 (1973).

123. *National R.R. Passenger Corp. v. Miller*, 358 F. Supp. 1321 (1973).

124. 45 U.S.C. § 546(c) (1970).

125. *National R.R. Passenger Corp. v. Miller*, 358 F. Supp. 1321, 1329 (1973).

126. It is quite possible that the Court focused on the fact that the decision below specifi-

Heublein remains, then, the latest discussion. Mr. Justice Marshall's footnote statement is extremely refreshing for its lack of pretense in recognizing that the Court has never spoken clearly on these issues. Yet are we to be left despairing that the only certainty is the Court has "occasionally explored" some of the questions and "never squarely determined" others? Unless we are resigned to accept that the Court has only been deciding cases, and not establishing principles all these years, it is imperative to develop a coherent theory of the relationship of the twenty-first amendment and the commerce clause. A theory is needed which can be derived from a reasonable reading of the Court's own decisions. Interestingly enough, Mr. Justice Marshall may have sown the seeds for such a theory in his footnote admission of the Court's lack of clarity. The seeds lie in his distinction between the effect of the twenty-first amendment on the commerce clause in the absence of Congressional action, and its effect when Congress has acted.

The theory might arise from the proposition that the court ought to and indeed has rejected the two extreme views of the twenty-first amendment. The extreme view that the amendment merely empowers dry states to remain dry but otherwise leaves intact the federal commerce clause power, has only inconclusive support in the legislative history of the amendment,¹²⁷ and no support at all in the Supreme Court's cases. The opposite extreme, expressed in the Brandeis decisions, has not withstood the tests of repeated judicial scrutiny. Contrary to the reasoning of the Brandeis decisions, subsequent cases have salvaged the equal protection clause,¹²⁸ due process clause¹²⁹ and export-import clause¹³⁰ from banishment by the twenty-first amendment. The commerce clause has also been salvaged: the Supreme Court has taken some sort of a middle route between the two extremes in *Jameson*,¹³¹ *Duckworth*,¹³² *Carter*,¹³³ *Frankfort Distilleries*,¹³⁴ *Idlewild*,¹³⁵ *Seagram*,¹³⁶ and *Heublein*,¹³⁷ the problem lies in describing that route

cally found the federal statute not to conflict with Kansas law. The lower court found that, in exempting train "service" from state laws, Congress had not intended to exempt liquor service. *Id.* Though the district judge added that, had the laws been in conflict, the federal law would have fallen, the Supreme Court may have found the lack of any actual conflict to be consistent with its *Heublein* and other cases.

127. Note, 75 COLUM. L. REV., *supra* note 86, at 1580.

128. *Goesaert v. Cleary*, 335 U.S. 464 (1948).

129. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

130. *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (decided the same day as *Idlewild*).

131. See note 95 *supra*.

132. See note 98 *supra*.

133. See note 99 *supra*.

134. See note 103 *supra*.

135. See note 105 *supra*.

136. See note 109 *supra*.

137. See note 116 *supra*.

and in straightening out its tortuous curves.

The route can, and ought to, be described this way: The court must balance the conflicting interests of the twenty-first amendment and the commerce clause against each other in light of what is at stake in any concrete case, just as Mr. Justice Stewart stated in *Idlewild*. The initial attempt of the court is always to reconcile alleged conflicts, so that both constitutional interests may peacefully coexist. Failing reconciliation, a distinction is made between cases in which Congress has not exercised its commerce clause powers and those in which it has. When it has not acted, the conflict is one between the amorphous, inherent force of the commerce clause pushing toward a nationwide economic market unfettered by trade barriers, and the force of the twenty-first amendment. In such a conflict, the amendment outweighs the naked, unspecific commerce clause interest. As a result, interstate commerce may be burdened in ways that would be impermissible but for the amendment. It is in this sense that "a State is totally unconfined by traditional Commerce Clause limitations"¹³⁸ when regulating liquor. When, however, Congress has legislated under the commerce clause, the balance tips the other way. The commerce clause interest, strengthened by the specific assertion of the representatives of all the states, prevails over the conflicting interest of a single state.

Thus, despite the Court's intemperate language in the Brandeis decisions, each of those cases can, from the vantage point of 40 years, be seen as a case involving possible conflict between the unexercised commerce clause power and the stronger twenty-first amendment interest. The same can be said of *Duckworth* and *Carter*. (Recall the emphasis in *Carter's* majority and concurring opinions that no contrary federal statutes were present.) In the four Brandeis decisions, the conflicts were irreconcilable, while in *Duckworth* and *Carter* the conflicts were reconciled. The twenty-first amendment interest prevailed in the Brandeis decisions. It was able to peacefully coexist with the commerce clause in *Duckworth* and *Carter*.

Congress had implemented the commerce clause power, however, in *Jameson* (Federal Alcohol Administration Act), and *Idlewild* (Tariff Act of 1930), so that interest prevailed over the twenty-first amendment. In three similar situations, the Court strove to find no actual conflict between the federal and state laws—*Frankfort Distilleries* (Sherman Act), *Seagram* (Sherman Act) and *Heublein* (state taxation of interstate commerce)—though it did so in each case amidst rumblings that the state laws would have fallen had reconciliation not been possible. *Miller*¹³⁹ is in the same group.¹⁴⁰

138. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. at 330.

139. See note 123 *supra*.

If this theory of the case law is accepted, none of the cases need be rejected; even the Brandeis decisions are reaffirmed, if not some of their sweeping language. The theory acknowledges the Court's repeated emphasis that the presence of a conflicting federal statute invalidates state regulation. The casuistic "through/into" theory advanced by some ignores this repeated emphasis.¹⁴¹ At the same time, clearer guidance is given for the resolution of future cases: if there is no federal statute, the state's twenty-first amendment interest will be upheld; if there is a federal statute, that statute will prevail if it cannot be reconciled with the state law.

Relying on this reasoning, federal wine labeling and advertising regulations based on the Federal Alcohol Administration Act, the Federal Food, Drug, and Cosmetic Act, or the Federal Trade Commission Act should prevail¹⁴² over conflicting state laws such as those rhetorically posed at the outset of this section. A recent lower court case is in accord with this view.¹⁴³ Warding off a direct twenty-first amendment challenge to regulations issued under the Federal Alcohol Administration Act, the court was able to reconcile the alleged state-federal conflict. It remarked further that if there were a conflict "state regulation must bow to the Commerce Clause."¹⁴⁴ The decision should point the direction of future cases.

2) California Law

Mislabeling and adulteration of wine have been serious problems in California since the earliest days of statehood.¹⁴⁵ Laws designed to com-

140. See note 126 *supra*.

141. Note, 19 RUTGERS L. Rev., *supra* note 110.

142. A federal law prohibiting discriminatory taxation and regulation of wine should also prevail, though such a law would be a more dramatic reversal of practices authorized by the Brandeis decisions. The wine industry has succeeded in having such legislation introduced in Congress. See discussion in Hunter, *Wine Industry Regulation in Oregon: The Romanticist and the Political Thicket*, 4 ENV'T L. 185, at 209-14 (1974).

143. *Castlewood Int'l Corp. v. Simon*, 404 F. Supp. 88 (S.D. Fla. 1975). Other cases upholding the Federal Alcohol Administration Act against twenty-first amendment challenges, which do not involve direct state-federal conflicts, are *Arrow Distilleries, Inc. v. Alexander*, 109 F.2d 397 (7th Cir. 1940), and *Hanf v. United States*, 235 F.2d 710 (8th Cir. 1956). See also *Washington Brewers Inst. v. United States*, 137 F.2d 964 (9th Cir. 1943) and cases cited therein at 967 n.7.

144. *Castlewood*, *supra* note 61, at 92.

145. The history of the state's wine labeling and adulteration laws began in 1860 with a statute prohibiting addition of poisonous or other unhealthy substances to wine. 1860 Cal. Stats. 186, repealed by 1935 Cal. Stats. 1123. The problem was larger than poisonous adulteration, however, for the State Agricultural Society complained in the mid-1860's that most of the wine entries at the State Fair had been doctored with brandy and syrup to disguise defects. One of the Fair's premium winners alleged that many of the sparkling wines had been concocted with oil of vitriol and marble dust. B. MCCARTHY, EXHIBIT NOTES, HISTORY OF CALIFORNIA WINES 2, Los Angeles County Law Library Exhibit, (June 1975). In 1865, the Legislature passed a concurrent resolution urging Congress to enact penal laws against "fraud-

bat these problems have been either weak or poorly enforced, and laws to affirmatively establish quality standards have essentially been reiterations of federal law.

Today, authority to regulate wine labeling exists in state constitutional provisions on alcoholic beverages which date from the post-prohibition period,¹⁴⁶ in the Alcoholic Beverage Control Act¹⁴⁷ which originated in the same era, and in the Sherman Food, Drug, and Cosmetic Law¹⁴⁸ which evolved from the pure food law of 1907.¹⁴⁹ In addition, the standards set for grapes under the Food and Agriculture Code indirectly affect wine quality and labeling.

Article 20, § 22 of the Constitution provides, in part:

The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and exportation from the State, of alcoholic beverages.

Thus, the Constitution itself subordinates the state's power to certain federal laws. This could settle at least some of the potential state-federal conflicts described earlier.¹⁵⁰

Utilizing only portions of this constitutional power, the Legislature

ulent initiations and adulterations of wine," that were hurting legitimate wine producers in California. Con. Res. 66, 1865-66 Cal. Stats. 908. Californians lobbied unsuccessfully for many years for such a federal "pure wine law," because of their concern over eastern wines being "stretched" with sugar and water, and concern over California wines carrying false European labels. See CAROSSO, *THE CALIFORNIA WINE INDUSTRY: A STUDY OF THE FORMATIVE YEARS (1830-1895)* 152-59 (1951). Finally, in 1887, a tough "pure wine" law was adopted. 1887 Cal. Stats. 46. Its enforcement provisions were quickly vitiated by an interpretation of the California Supreme Court in a case involving a noted San Francisco wine merchant. *Ex parte Kohler*, 74 Cal. 38 (1887). The statute was repealed in 1911. 1911 Cal. Stats. 1110. (The colorful background of the *Kohler* case is discussed in CAROSSO, *supra*) Congress eventually quieted the issue by passing the Pure Food and Drug Act of 1906, Ch. 3915, 34 Stats. 768 (1906), which the legislature followed a year later with a California pure food law prohibiting adulteration and mislabeling of food, including liquor. 1907 Cal. Stats. 208. Turning its attention particularly to wine, the legislature enacted in the same year one of the most outlandish schemes ever to slip through the legislative process. The statute, in part, provided:

A uniform wine nomenclature is hereby adopted for pure wines manufactured in this state from the juice of the grape. Such wine nomenclature shall consist in the use of the prefix "Cal" or "Cala" to be the name of any [*sic*] example: "Cal-claret", "Calburgundy", "Calariesling", etc.

1907 Cal. Stats. 127. Though the statute was not repealed until 1935, 1935 Cal. Stats. 1123, it was apparently ignored by the state's winemakers. Today's wine labeling and adulteration laws have evolved from the 1907 pure food law and the alcoholic beverage control laws of the post-prohibition period, as discussed in the text.

146. CAL. CONST. art. 20, § 22.

147. CAL. BUS. & PROF. CODE § 23000-§ 25762 (West 1964 & 1977 Cum. Supp.)

148. CAL. HEALTH & SAFETY CODE § 26000-§ 26851 (West Cum. Supp. 1977).

149. See note 145 *supra*.

150. See subsection 1 of this section *supra*.

has enacted the Alcoholic Beverage Control Act.¹⁵¹ The Act limits regulation almost entirely to matters of licensing, taxation, fair trade, and tied-house restrictions. It contains but a single wine labeling matter, in §§ 25236-26238. Those sections, added in 1939, prohibit labeling or representation of wine as "California central coast counties dry wine" unless the wine is produced entirely from grapes grown in certain counties.¹⁵² Since no winery uses the appellation "central coast counties" anymore, the sections are presently meaningless; and because the federal government is unlikely to recognize the definition of "central coast counties", a winery could probably not use the appellation without facing litigation. The administrative regulations issued by the Department of Alcoholic Beverage Control under the Act are barren of wine labeling provisions.¹⁵³

In contrast, the Sherman Food, Drug, and Cosmetic Law¹⁵⁴ gives the State Department of Health broad and explicit authority to set quality and labeling standards for wine:

§ 26515

The department may, by regulation, establish definitions and standards of identity, and quality of wine. Such definitions and standards may incorporate in whole or in part the regulations adopted by the Secretary of the Treasury pursuant to the Federal Alcohol Administration Act, pertaining to the standards of identity and quality for wine. Standards of identity and quality for wine adopted pursuant to this section may differ from or be inconsistent with the standards promulgated by the Secretary of the Treasury pursuant to the Federal Alcohol Administration Act. No standard of size, type, or fill of container for any wine which is subject to the provisions of the Alcoholic Beverage Control Act, Division 9 (commencing with Section 23000) of the Business and Professions Code, shall be adopted, but containers of wine sold in this State shall conform to the then current standards for such containers, including standards of fill, established by the Secretary of the Treasury pursuant to the Federal Alcohol Administration Act.¹⁵⁵

Note that § 26515 defers to the federal government yet reserves the right to be inconsistent. A state attorney general's opinion¹⁵⁶ on the predecessor of this section declares that the Department of Health is not limited by federal law, at least not with respect to wine *production* in

151. See note 147 *supra*.

152. Counties of Sonoma, Napa, Mendocino, Lake, Santa Clara, Santa Cruz, Alameda, San Benito, Solano, San Luis Obispo, Contra Costa, Monterey, and Marin. Some of these counties are today included in the appellation of origin "north coast" appearing on some California wines; "north coast", however, is not defined in either state or federal law. See Benson, *American Appellations of Origin*, 62 A.B.A.J. 791, 792 (1976).

153. CAL. ADMIN. CODE tit. 4, §§ 1-145.

154. CAL. HEALTH & SAFETY CODE § 26000-§ 26851 (West Cum. Supp. 1977).

155. *Id.* § 26515. This text is operative January 1, 1979. The text in effect until then is insignificantly different.

156. 44 OP. CAL. ATTY. GEN. 122 (1964).

California. The analysis, which seems applicable to § 26515, takes a traditional and extreme view of the twenty-first amendment, at odds with the approach urged above.¹⁵⁷ Interestingly, however, the conflict which occasioned the attorney general's opinion was soon resolved when the Department of Health revised its regulations to conform with federal law. In fact, the Department has nearly always followed federal law with respect to wine; indeed, its brief regulations are essentially limited to incorporations of federal law by reference.¹⁵⁸

The state regulations do differ from federal law in one important and several minor respects. Of some importance is the prohibition on use of sugar or water in production or cellar treatment of grape wine.¹⁵⁹ Though good wines are sometimes made with the addition of sugar, and in fact many French and German wines are sugared, the practice is widely considered undesirable by those who are seeking the highest quality wines.¹⁶⁰ Because of the generally warm climate, California grapes nearly always have sufficient natural sugar. There is no commercial need to add more to produce a palatable wine as there is in New York and other states. However, in California, sugar levels may be adjusted with grape concentrate, which is also considered undesirable.¹⁶¹ Acid may be (and frequently is) added because the warm climate often results in acid-deficient grapes. Since these other adjustments may be made, it is apparent that prohibitions on sugar and water are derived from the grape growers' economic interest in maintaining the market for mature grapes, rather than from any concern for keeping wine a natural product.

Of somewhat less importance, the California regulations further differ from the federal by establishing minimum alcohol and acid levels and, for dessert wines, ranges of sweetness.¹⁶² Though significant because they affect quality and taste of wine, these regulations generally reflect only minimal commercial standards. The minimum alcohol standards (10.5 percent for red table wine, 10 percent for white or rosé) were set higher than the seven percent federal minimum¹⁶³ putatively to assure wine stability in the bottle (low alcohol wines spoil more easily). Another reason for the high alcohol percentages may have been to cut into the grape glut that occurred after Prohibition, presumably by eliminat-

157. See subsection 1 of this section *supra*. In addition, the attorney general's opinion failed to mention the state constitution's subordination, in article 20, § 22, of state power to the federal internal revenue laws—an issue which was distinctly relevant to the question at hand.

158. CAL. ADMIN. CODE tit. 17, §§ 17000-17116.

159. *Id.* § 17010.

160. See Chroman, *supra* note 45.

161. See statements generally unfavorable to the practice by winemakers quoted in BENSON, GREAT WINEMAKERS OF CALIFORNIA at pages indexed under "concentrate" (1977).

162. CAL. ADMIN. CODE, tit. 17, § 17010(b), (c), (d).

163. 27 C.F.R. § 2.6 (1976).

ing low-sugar (and therefore low alcohol) grapes from the market. The alcohol standards are now, properly, under attack for inhibiting new wine styles and preventing development of a new market for low alcohol wine.¹⁶⁴ Moreover, because of technological changes, low alcohol wines do not spoil as easily today as in the 1930's, so there may be no practical justification for the 10 percent level.

Finally, the California regulations differ from federal law by prohibiting use of the appellation of origin "California" or one of its geographical subdivisions unless 100% of the wine was grown, fermented and finished in California.¹⁶⁵ The provision is stricter than federal law only in preventing nonvintage-dated wines with California appellations from containing up to 25% non-California wine. Salutory as that is for honesty, the rule's motivation appears to have been to protect the market for California wine by excluding out-of-state wine.

More important than any of these regulations is the attitude of the Department of Health in enforcing them. State Senate hearings held late in 1973 revealed that the Department is understaffed, gives very low priority to winery inspection, and relies almost entirely on industry self-regulation or federal inspections.¹⁶⁶ Thus, these California regulations

164. *Wines and Vines*, September 1977 at 4.

165. CAL. ADMIN. CODE tit. 17 § 17015.

166. CALIFORNIA SENATE SELECT COMMITTEE ON LAWS RELATING TO ALCOHOLIC BEVERAGES, III REPORT TO THE LEGISLATURE, TESTIMONY RECEIVED AT PUBLIC HEARINGS, DECEMBER 1973 (1974). The testimony, in part, went as follows:

Mr. Buell [of Department of Health]: Yes, if you average it out, you would say that our inspection frequency is one every four years.

I would like to point out, however, that we do have contact with this industry through fellow agencies [*sic*] that do have authority and have enforcement responsibility.

As Mr. Crawford [of E. & J. Gallo winery] pointed out we do have a fine working relationship with the Wine Institute and at our insistence here, some twenty odd years ago, to develop a self-certification program in which they do hire their own sanitarians, we do keep close contact.

Under the AFT [federal] requirements, the winery is required to maintain records of all these transfers. You heard testimony this morning where a crew of ten people will show up at the winery and maybe spend six to nine months going through this type of exercise of checking the flow of wine in a given winery.

This would take a tremendous amount of manpower which we do not have available to do this. Nor in our opinion is it necessarily good government to duplicate the efforts of an agency that's already carrying out this type of function.

Mr. Montgomery [committee consultant]: You mean that although it's a State law, State rule, that you don't feel that the public people of the State of California are entitled to the full benefit of your services?

Mr. Buell: We don't have that kind of services available in manpower, is what I'm saying. And it has been—

Senator Short: May I interrupt. I don't think that was the testimony, that they spent months. You might have a full crew going into Gallo, stop the operation,

may amount to even less than meets the eye.

The state Department of Food and Agriculture also indirectly affects wine quality and labeling. Pursuant to the Food and Agriculture Code,¹⁶⁷ the Department has set basic quality and maturity standards for grapes. It has laid down rules to prevent misbranding of grape varieties in containers being shipped to market.¹⁶⁸ Other provisions of the code require official testing and certification of the soluble solids in wine grapes when the percentage of soluble solids (in effect, the sugar con-

and go through the inventory, check the tanks and so forth, and then they might come back six months later. They're not spending six months or nine months. You don't mean that, do you?

Mr. Buell: They are there a considerable length of time. Maybe I misheard what he was saying, but it was also repeated by—

Senator Short: I'm surprised you don't know what they do.

Mr. Buell: I do know what they do.

Senator Short: Well, we'll check it out again.

Mr. Buell: They do spend considerable time in manpower.

Senator Short: I'm surprised you don't do more yourself.

Mr. Montgomery: Have any of your men ever started at the vineyard and followed it all the way through to the finished product, Mr. Buell?

Mr. Buell: There's been instances, I believe, when that has been done, yes.

Mr. Montgomery: Could we have a report of those—

Mr. Buell: I can't recall—

Mr. Montgomery: —inspections.

Mr. Buell: —recall an inspection instances in recent years.

Mr. Montgomery: In other words, you don't know if you have or not?

Mr. Buell: I can only tell you history and I imagine we haven't done it in recent years.

Mr. Montgomery: Have you ever checked the weighmaster to see if the weight slips are accurate?

Mr. Bryson [of Department of Health]: Might I answer that, please.

As part of a routine inspection, the very things that you are asking us, Mr. Montgomery, are checked. We do check to determine the types of grapes that have been purchased, the type of production that is going on in the plant, that is the types of wine.

Now, this—granted, this is not as routine or in depth as that that is performed by the representatives of the [federal] Treasury Department unless we have some reason for suspicion that all is not right where we are at the time. Then, if there is such a suspicion, I assure you, then we go into this in depth. This has been done, but to my knowledge, we have never encountered a similar situation where the condition actually came about as it did with Almaden Vineyards.

Mr. Montgomery: Will you make these records available to the committee as to exactly what wineries and when and where you did this?

Mr. Bryson: If they're still in our files, certainly, sir, yes, sir.

Mr. Montgomery: How long do you keep your records?

Mr. Bryson: Ten years.

Mr. Montgomery: In other words, if you don't have any, you haven't done this for ten years?

Mr. Bryson: This would be a likelihood, yes, sir.

Id. at 138-41.

167. CAL. FOOD & AGRIC. CODE § 42684 (West Supp. 1977).

168. CAL. ADMIN. CODE, tit. 3, §§ 1434-1436.43.

tent) is the basis for the purchase price.¹⁶⁹ Advisory committees assist in the operation of this testing process.¹⁷⁰ All of these provisions would be of great significance to consumers if they were vigorously enforced to catch misrepresentations of grape variety, and if they were expanded to require certification of grape characteristics in addition to sugar content, such as geographical origin, yield per acre represented by the grapes, and degree of desirable "noble rot"¹⁷¹ present in the bunches. State government can play an effective role at this level of inspection and certification of quality information without conflicting with federal labeling laws. Such ideas, however, are not likely to take hold in the Department of Food and Agriculture. One public member sits on the Department's grape growers' advisory committee;¹⁷² none sit on the wine producers' advisory committee.¹⁷³ The Legislature recently exempted members of the latter committee from conflict-of-interest laws by finding that the members represent a particular agricultural industry which "is tantamount to, and constitutes, the public generally"¹⁷⁴

The latter statute is evidence of something that is more important in understanding California wine regulation than any of the statutes or administrative regulations discussed: the political and economic power of the wine industry. The Wine Institute is a trade association representing 92 percent¹⁷⁵ of the state's commercial wineries. Its directors are elected by votes weighted in accordance with winery size and district.¹⁷⁶ The Institute lobbies heavily in Sacramento and other state capitals, as well as in Washington, to consistently protect the economic self-interest of the industry. Until a few years ago, the Institute was aided by the Wine Advisory Board, a state agency organized in 1938 under the California Marketing Act of 1937.¹⁷⁷ The Board was voted out of existence in 1975 by the state's wineries upon learning that the governor demanded changes in its budget, voting structure and activities.¹⁷⁸

169. CAL. FOOD & AGRIC. CODE §§ 41161-41163 (West 1968 & 1977 Cum. Supp.). Regulations under this authority are in CAL. ADMIN. CODE tit. 3, §§ 1488-1494. See also §§ 41191-41195, relating to other official certifications of soluble solids and of rot.

170. CAL. FOOD & AGRIC. CODE §§ 41201-41203, 41251-41254 (West Supp. 1977).

171. See Benson, *Botrytis Cinerea: The Noble Rot*, *supra* note 80.

172. CAL. FOOD & AGRIC. CODE §§ 41251-41254 (West Supp. 1977).

173. *Id.* §§ 41201-41203.

174. *Id.* § 42101.1.

175. WINES AND VINES, January 1978, at 30.

176. WINE INSTITUTE BULLETIN No. 1828 (May 23, 1975).

177. CAL. FOOD & AGRIC. CODE § 58601-§ 59293 (West. Cum. Supp. 1977).

178. WINES AND VINES, June 1975, at 18. Under the Marketing Act, the Director of Agriculture would issue a marketing order, upon a vote of the wineries, establishing the Board and authorizing taxation of wineries by gallonage. The monies raised (\$2.5 million in 1975) were then used to fight trade barriers and to promote wine through advertising and research programs. At its termination, the Board was passing about 80% of its budget through contracts to the Wine Institute. CALIFORNIA SENATE SELECT COMMITTEE REPORT, *supra* note 166, at App. 3-2. The State Director of Food and Agriculture observed in 1973 that "some people are skep-

3) New York Law

New York's regulation of wine labeling and quality is even more limited than California's. Standards of quality for grapes, established under the Agriculture and Markets Law,¹⁷⁹ have no significant impact on wine quality or labeling. The New York Alcoholic Beverage Control Law declares it "necessary to regulate and control the manufacture, sale and distribution . . . of alcoholic beverages for the purpose of fostering and promoting temperance . . ." ¹⁸⁰ Indeed, the statute reflects little interest in any other purposes. With respect to wine manufacture, the act authorizes, in its definition of wine, "the usual cellar treatment and necessary conditions to correct defects due to climatic, saccharine and seasonal conditions . . ." ¹⁸¹ This, of course, is a reference to the common practice in New York of adding sugar to the wine to raise alcohol content and water to reduce acidity level. The statute sets a maximum alcoholic content of 24 percent.¹⁸² It also authorizes blending of out-of-state wines.¹⁸³ (The authorization to blend, read in conjunction with federal law, permits non-vintage wines labeled "New York State" actually to contain up to 25% foreign wine.)

With respect to labeling, the State Liquor Authority is authorized to promulgate alcoholic beverage labeling regulations "calculated to prohibit deception of the consumer; to afford him adequate information as to quality and identity; and to achieve national uniformity in this field so far as possible."¹⁸⁴ To enforce the regulations, the statute establishes a system of label registration, requiring state approval of each new label prior to sale.¹⁸⁵ The Liquor Authority's regulations under the statute simply require label conformity "with the appropriate Federal Alcohol Administration Act regulations."¹⁸⁶ They tailor the New York label approval system to the requirements of the federal label approval process.¹⁸⁷ The regulations seem mainly concerned with collection of the tax incident to each new label registration.

Thus, New York law adheres to the federal regulations in all ways. It would be wrong to conclude, however, that federal law dominates New

tical of a procedure which allows for the mandatory collection of assessments under a marketing order with the subsequent expenditure of those funds by an industry organization such as Wine Institute." *Id.* at 183.

179. N.Y. AGRIC. & MKTS. LAW §§ 160-h.-160-k. (McKinney 1972), 1 N.Y. CODES, RULES & REGULATIONS §§ 195.1-196.4.

180. N.Y. ALCO. BEV. CONT. LAW § 2 (McKinney 1970).

181. *Id.* § 3.36.

182. *Id.*

183. *Id.* § 77.1.

184. *Id.* § 107-a.2 (emphasis added).

185. *Id.* § 107-a.

186. 9 N.Y. CODES, RULES & REGULATIONS § 84.1(a).

187. *Id.* § 84.4.

York and other eastern vintners. In fact, the reverse may be true, at least with respect to certain matters of economic importance. The historical evidence shows that the eastern vintners have lobbied particularly effectively for the freedom to blend out-of-state wines with their own, to heavily sugar and water their wines, and to be able to withhold disclosure of these practices from consumers.¹⁸⁸

4) Oregon Law

Despite the tiny size of its wine industry,¹⁸⁹ Oregon's wine quality and labeling regulations are much more extensive, and more significant, than California's or New York's. The nature of the Oregon wine industry and its control by the state have recently been discussed elsewhere.¹⁹⁰ It suffices to note here that there is only one state agency with both the interest and legal authority to affect wine quality and labeling in important ways: the Oregon Liquor Control Commission, operating under the Liquor Control Act.¹⁹¹ The Commission's wine regulations would have required no comment had it not been for 1977 amendments which radically differ from federal standards. The focus here will be on those amendments.

Acting pursuant to broad statutory authority,¹⁹² the Commission has promulgated regulations on the cellar treatment and labeling of wine.¹⁹³ The regulations applicable to wines sold in the state but not produced or bottled in Oregon are, except for minor inconsistencies, simply restatements of federal standards.¹⁹⁴ The same is true of the regulations applicable to sparkling and dessert wines, wines produced or bottled in Oregon but made from fruit other than grapes, or wines made from grape species other than *Vitis vinifera* or its hybrids.¹⁹⁵ However, since 1977, still (non-sparkling) wines produced or bottled in Oregon from *Vitis vinifera* grapes or its hybrids have been subject to very different

188. See CAROSSO, *supra* note 145, at 150-55; ADAMS, THE WINES OF AMERICA 22-23 (1973).

189. Oregon had 17 commercial wineries as of 1976, compared with California's 345 and New York's 37. WINES AND VINES, May 1977, at 28.

190. Hunter, *supra* note 142.

191. OR. REV. STAT. §§ 471.005-471.990. Under Oregon's new "sunset law," the Commission has been abolished effective July 1, 1980, unless (as seems likely) the Legislature reenacts its statutory authority. 1977 Or. Laws Ch. 842 (1977).

192. OR. REV. STAT. §§ 471.040, 471.345, 471.730.

193. VI OR. AD. RULES §§ 845-10-280 to 845-10-315.

194. Compare *id.* §§ 845-10-280 to 845-10-290, with federal rules at 27 C.F.R. §§ 4.20-4.25 (1976).

195. See note 45 *supra* for an explanation of *Vitis vinifera*. The various native American species, such as *Vitis labrusca*, produce grapes (like the Concord) with strong flavors which are sometimes condemned by those accustomed to *Vitis vinifera*. The Oregon regulation which applies to "*Vitis vinifera* or its hybrid grapes," VI OR. AD. RULES § 845-10-292, is unfortunately ambiguous: does it refer to hybrids of species, or hybrids of varieties within the *Vitis vinifera* species?

rules.¹⁹⁶ The rules break with federal law in five major areas: use of semi-generic names, grape content of varietal wines, geographical origin of wines, use of the term "estate bottled," and addition of water and sugar.

The most dramatic change is the prohibition of semi-generic wine names of geographical significance. Federal rules have long permitted use of such names, to the consternation of European winemakers, and to the confusion and probable deception of American consumers.¹⁹⁷ Now, no Oregon still table wine may carry names such as Burgundy, Claret, Chablis, Chianti, Marsala, Moselle, Rhine Wine, Sauternes or haut Sauternes.¹⁹⁸ (The names listed are indicative, not exclusive.) Unfortunately, continued use of the very famous geographical indications of Champagne, Sherry and Port is permitted, because these are not still table wines. For the same reason, a "Sparkling Burgundy," for example, may be produced in Oregon. Nevertheless, the exclusion of most semi-generic names from Oregon wine labels is of considerable symbolic importance. The fact that this and the other 1977 amendments were initiated by winemakers¹⁹⁹ is of even greater significance. It is a signal that some American vintners at last find it competitively advantageous to renounce the old European names and promote their own geographical nomenclature.

The second change wrought by the 1977 amendments is the increase in the percentage of a single grape variety that a wine must contain in order to carry that grape's name as its type designation. "Chardonnay," for example, is the name of a grape variety. Consumers would reasonably expect that a wine labeled "Chardonnay" would be made solely from the Chardonnay variety. Yet the federal rules permit such "varietal labeling" when the wine contains as little as 51 percent of the grape variety named on the label.²⁰⁰ The amended Oregon rules require 90 percent for such labeling.²⁰¹ While this is a considerable improvement on the federal regulations, the fact that the standard still allows the blending of 10 percent undisclosed grapes reveals that the Oregon wine-growers who wrote the rules, and the Commission which promulgated them, do not understand the legitimate function of varietal labeling: to properly identify the product. To allow 10 percent undisclosed grapes in a bottle of wine sold by the name of another grape variety is to deceive consumers as to 10 percent of the grapes. Indeed, under Oregon law, if

196. *Id.* §§ 845-10-292 to 845-10-294.

197. *See* text accompanying notes 351-353 *infra*.

198. VI OR. AD. RULES §§ 845-10-292(2)(b), (5).

199. Testimony of David B. Adelsheim, Wine Growers Council of Oregon, before the Bureau of Alcohol, Tobacco and Firearms, in the Matter of Proposed Rules in 41 Fed. Reg. 50004 (November 12, 1976), San Francisco, Cal. (February 8, 1977).

200. *See* text accompanying notes 360-374 *infra*.

201. VI OR. AD. RULES § 845-10-292.

the grapes were sold in the supermarket under a varietal name and contained 10 percent other varieties, they could be seized for false and deceptive labeling.²⁰² It must be admitted that, in wine, a small margin of tolerance should be allowed to account for "field blends"—scattered mixtures of grape varieties in older vineyards—and other practical problems. If the growers were held to two or three percent, such a tolerance would involve *de minimus* consumer deception and would not justify concern. The 10 percent standard in Oregon, however, so far exceeds the margin needed for error that economic reasons may be suspected as its basis. There is profit to be had when, in a wine labeled with a varietal grape costing \$500 per ton, you may, without disclosure to consumers, blend in 10 percent grapes costing only \$75 per ton.²⁰³

The special Oregon rule for wines labeled "Cabernet Sauvignon" engenders some confusion. Instead of 90 percent, only 75 percent of the volume need come from Cabernet Sauvignon grapes when the only other varieties blended in are Cabernet Franc, Merlot, Malbec or Petit Verdot.²⁰⁴ Commendably, a complete list of all the grapes used in the wine must appear on the label, in descending order of predominance.²⁰⁵ Cabernet Sauvignon and the other grapes listed as permissible for blending happen to be the grapes permitted in red wines of the Bordeaux region of France.²⁰⁶ Cabernet Sauvignon is often dominant in Bordeaux wines, though no arbitrary minimum of any one grape is set. In fact, the Merlot grape is usually dominant in the Pomerol and St. Emilion Bordeaux districts.²⁰⁷ The Oregon winemakers have done an extraordinary thing: they have imported the Bordeaux regulations to Oregon, and added an arbitrary formula for good wine, fixing the dominance of Cabernet Sauvignon at a 75 percent minimum in every blend. Clearly, the intention is grand—to make wines after the style of red Bordeaux—but the restriction on the creative freedom of the winemaker is unprecedented. What of the poor vintner who believes his blend of 65 percent Cabernet Sauvignon and 35 percent Merlot, or 70 percent Cabernet Sauvignon and 30 percent Zinfandel, is superior? He must sacrifice his creative judgment, or else allow his competitors to have a mo-

202. OR. REV. STAT. §§ 632.450-632.490.

203. The price spread between fine wine varieties and common grape varieties is often this great, at least in California. See California Farm Bureau Federation, Wine Grape Growers Newsletter, Summer 1976, at 4.

204. VI OR. AD. RULES § 845-10-292(4)(a).

205. *Id.* The regulation is slightly ambiguous, however, as it requires listing of the grapes "as provided by subsection (3)(b)," and (3)(b) applies only to wines other than varietally labeled ones. Since (4)(a) clearly states the requirement of a complete listing though, its reference to (3)(b) should apparently be understood to mean "in the manner required by (3)(b) for other wines."

206. In addition, the minor grape *Carmenère* is permitted. QUITTANSON & VANHOUTTE *supra* note 30, at 690.

207. JOHNSON, THE WORLD ATLAS OF WINE 90 (1971).

nopoly on wines labeled "Cabernet Sauvignon"—which is the red wine label that customarily brings the highest price. It would seem fairer to vintners, and less confusing to consumers, to have no special rule for Cabernet Sauvignon wines. For those vintners who wish to market a 75 percent Cabernet Sauvignon blended with 25 percent Merlot, for example, let the label read "Cabernet Sauvignon-Merlot," followed by the actual percentages of these grapes in smaller type size. If the blend is a complex one of several grapes whose listing by type designation would be too cumbersome, the wine might simply be called "X Winery Red Table Wine," followed by the percentages of each variety in the blend. In this way, winemakers' creative freedom to blend is unrestricted, and there is little opportunity to mislead consumers about the style and price differences which are based on grape varieties. A number of California wineries already adhere to these policies. Moreover, the policies suggested would be but a slight modification of the new Oregon rule, applicable to non-varietally labeled wines, which prohibits labels from implying a wine derives from certain grape varieties unless all the varieties are listed, in descending order of pre-dominance.²⁰⁸

The new Oregon rules also specially address the widespread abuse of the grape name "White Riesling." Only "White Riesling" and "Riesling," as synonyms, are permitted on labels, except that wineries using "Johannisberg Riesling" (a name of German geographical significance) prior to 1977 may continue to do so. Other words modifying "Riesling" that signify other grape varieties, or geographical places, are prohibited.²⁰⁹ If this rule were applied in California, many so-called "Rieslings" would disappear from the market.²¹⁰

The third change introduced in 1977 is in the definition of appellations of origin. The drafters of the regulations have made a brave attempt to improve on the vague existing federal law, but they seem again to have lost sight of their objective and wound up with confusion. The objective of an appellation of origin on a wine label is simply to tell consumers where the grapes were grown that went into the wine. Origin implies probable quality characteristics and influences price. The federal rules are wholly inadequate to achieve this simple purpose,²¹¹ and

208. VI OR. AD. RULES § 845-10-292(3)(b).

209. *Id.* § 845-10-292(4)(b).

210. The abuse of the term "Riesling" may have begun innocently in the confusing nature of the names of the Grey Riesling variety and the Franken Riesling (also called Sylvaner) variety. Neither possesses the celebrated character of the White Riesling (also called Johannisberg Riesling) variety. Can there be any justification, however, for a label like Mirassou Vineyards' "Monterey Riesling," whose back label states: "Monterey Riesling is made from the Riesling grapes that have made Germany and Alsace famous"? Mirassou's winemaker has stated the wine is made mostly from Sylvaner grapes. BENSON, GREAT WINEMAKERS, *supra* note 161, at 92.

211. See text accompanying notes 323-351 *infra*.

the Oregon rules are little better. First, the Oregon rules permit political boundaries of counties to serve as appellation of origin areas, and groups of counties to encompass the three recognized "viticultural regions" of "Willamette Valley," "Umpqua Valley" and "Rogue Valley."²¹² Since political boundaries rarely follow the geological and climatic patterns that determine grape characteristics, these appellations of origin will fail to convey very meaningful inferences about wine characteristics or quality. They are, in the words of a distinction made earlier,²¹³ mere "indications of source" rather than appellations of origin. While state boundaries ("Oregon," "California") can never be more than indications of source, the boundaries of relatively small viticultural regions can be more carefully defined on the basis of grape growing characteristics. American vintners set their sights too low if they fail to establish such meaningful appellations of origin.²¹⁴

The new rules make a baffling distinction between appellations of origin stated on the label with the word "Appellation" and those stated without the word.²¹⁵ Those without the word apparently may fail to disclose the origin of up to 25 percent of the grapes, as permitted by federal law for non-vintage (undated) wines. Those with the word must disclose 100 percent of "the true origin" of the grapes and must give the name of the state (if not Oregon) plus the name of the town nearest to the vineyard of origin. However, another provision²¹⁶ requires 100 percent of the grapes to originate in any appellation of origin stated. There are further complexities, which are best left undiscussed.²¹⁷ The confusion, especially when read in conjunction with the complex federal regulations, is overwhelming.

The fourth change initiated in 1977 is the restriction of the term "estate bottled" to wine produced and bottled entirely from grapes grown within five miles of, and on property owned or controlled by the winery.²¹⁸ This standard for the overused "estate bottled" term is stricter than existing federal standards; though the federal government has now proposed further tightening, or abolition of the term altogether. Consumer deception associated with the term is discussed below in relation to the new federal proposals.²¹⁹ If a new federal standard is different

212. VI OR. AD. RULES § 845-10-292(6).

213. See text accompanying note 29 *supra*.

214. A student of the Oregon wine scene has also urged that appellation areas be based on growing characteristics. Hunter, *supra* note 142 at 217-19.

215. VI OR. AD. RULES § 845-10-292(6)(b).

216. *Id.* § 845-10-292(6)(c).

217. The state of origin must be named, or a viticultural region or county within Oregon; in addition, the name of the city or town nearest each vineyard where the grapes were grown must appear on the label.

218. *Id.* § 845-10-292(4)(c).

219. See text accompanying notes 409-410 *infra*.

from Oregon's, a significant state-federal conflict may arise.

The last change of the 1977 rules is the prohibition on adding water,²²⁰ and the restriction on additions of sugar.²²¹ The prohibition on water is a welcome break with the federal rules which allow an astounding stretching of wine volume.²²² The Oregon restrictions on sugar and concentrate, which become more severe in 1982,²²³ are also moves for better wines. Unfortunately, a loophole in the regulations allows the Commission to waive the limits at any time.²²⁴ Therefore, the sugar and concentrate limitation will surely mean nothing in a cool year when Oregon grapes fail to mature properly, and it may mean nothing in normal years.

In summary, the new Oregon rules are a mixed blessing for consumers. The Oregon vintners have boldly asserted leadership lacking elsewhere in the nation's wine industry. In doing so, they have not only improved their wine labels, but they have introduced new elements of confusion for the consumer and unfairness for the trade. The prohibitions on semi-generic names and on addition of water to wines will promote both wine quality and honest labels. These prohibitions portend no conflict or confusion with federal laws since federal regulations merely permit but do not require the practices. The new Oregon rules, however, on varietal content, appellations of origin, "estate bottled," and addition of sugar or concentrate, though moving in the right direction, fall short and create unfortunate complexities along the way. If other states were to follow Oregon's example, such complexities could mushroom into labeling chaos for the wine consumer. The better solution, in a nation where every region's wines are purchased by consumers throughout the country, is to encourage a strong federal system of wine labeling rules.

B) The Limited Law of the Federal Trade Commission and the Food and Drug Administration.

1) The Federal Trade Commission (FTC)

The FTC has authority to promulgate regulations with the force of law defining "unfair or deceptive acts or practices in or affecting com-

220. VI OR. AD. RULES § 845-10-294(3).

221. *Id.* § 845-10-294(4).

222. See text accompanying note 383 *infra*.

223. Until December 31, 1981, sweetening agents may be added in the amount that will raise soluble solids of unfermented juice by five degrees on the Brix scale; wines may have their reducing sugars raised up to five percent. After that date, the first limit decreases to two degrees Brix, the second to two percent, except that concentrate or juice may be added to wines in excess of these limits. OR. AD. RULES § 845-10-294(4)(a) and (b).

224. *Id.* § 845-10-294(4)(c).

merce.”²²⁵ It may issue cease and desist orders against persons engaging in such acts or practices or in any “unfair method of competition.”²²⁶ It is in the Commission’s discretion to suppress deceptive labeling or advertising, including food labeling or advertising, either as an “unfair or deceptive act,” or as an “unfair method of competition,” or both.²²⁷ In addition, the Commission has further authority to suppress “false advertisement” (other than labeling) of food or drink.²²⁸

Immediately after repeal of Prohibition, the FTC actively asserted its authority against various labeling and advertising practices in the liquor industry, including misrepresentations of geographical origin, of the nature of the product, of its method of production, of the producer, or of the producer’s trade status.²²⁹ Of particular interest, in light of subsequent history, is the FTC’s action against use of geographical words in corporate or trade names. The FTC prohibited the California Vineyards Co., a corporation which neither owned vineyards nor dealt in vineyard products in California or elsewhere from using the words “California Vineyards,” or either word alone.²³⁰ And a corporation doing business as “Escondido Vintage Co.” was prohibited from any use of that name or the word “Escondido” in connection with wines not produced in the Escondido district of California.²³¹ The tacit assumption in both cases appears to have been that 100 percent of the products must originate in the geographical area implied by any trade name, brand name or other term used in connection with sale of the products. The FTC was not shy of challenging some of the biggest names in the wine industry: Beaulieu Vineyard,²³² Almaden Vineyards,²³³ Rome Wine Company²³⁴ and, apparently, Wente Brothers²³⁵ were all forced to stop labeling wine as “Chateau Yquem,” which is the name of a famous wine produced on one estate in Sauternes, France.

225. 15 U.S.C. § 57a. (a) (1976).

226. *Id.* § 45 (b).

227. *Fresh Grown Preserve Corp. v. F.T.C.*, 125 F.2d 917 (2d Cir. 1942).

228. 15 U.S.C. §§ 52, 55(a) (2), (b) (1976). This separate authority over advertising of food, drink and certain other things, providing for temporary injunctive relief (§ 53(a)) and criminal penalties (§ 54(a)), has become less important since passage of 1975 amendments allowing temporary injunctive relief for violation of any law enforced by the FTC (§ 53(b)) and providing stiff civil penalties (§ 45(1), (m)).

229. Russell, *supra* note 16, at 656-57 n.55-n.58.

230. Stipulation 1472, 21 FTC 782 (1935).

231. Stipulation 1422, 21 F.T.C. 755 (1935).

232. Stipulation 1428, 21 F.T.C. 758 (1935).

233. Stipulation 1589, 21 F.T.C. 848 (1935).

234. *In the Matter of Roma Wine Co., Inc.*, 22 F.T.C. 404 (1936).

235. Order of January 23, 1937, 24 F.T.C. 1384. The order dismissed the case without prejudice because it appeared to the Commission that the matter was taken care of by regulations issued under the Federal Alcohol Administration Act of 1935. Lenzen, *supra* note 8, at 163, n.76, indicates the *Wente Case* involved “Chateau Yquem,” though this does not appear on the face of the order of dismissal.

Following the passage of the Federal Alcohol Administration (FAA) Act of 1935²³⁶ and the promulgation of labeling regulations under the Act by the Treasury Department, however, the FTC began dismissing its liquor cases "without prejudice." The FTC reasoned that the Treasury regulations prohibiting the labeling practices in questions provided sufficient control.²³⁷ The FTC generally continues today to defer to the Treasury Department regarding liquor labeling and advertising, though it does so only as an act of administrative coordination. There has never been any doubt that the FTC has concurrent jurisdiction over such matters.²³⁸

2) The Food and Drug Administration (FDA)

The Federal Food, Drug, and Cosmetic Act²³⁹ defines "food", in part, as "articles used for food or drink for man"²⁴⁰ Therefore, alcoholic beverages are covered by the Act's prohibitions of "adulteration or misbranding of any food,"²⁴¹ as well as its provisions for standards of identity for food.²⁴² The FDA, the agency charged with the Act's enforcement,²⁴³ may promulgate regulations having the force of law,²⁴⁴ and for most violations, it may seek injunctions,²⁴⁵ and criminal penalties,²⁴⁶ and it may have goods seized.²⁴⁷ Although the FDA vigorously

236. 49 Stat. 977 (1935).

237. See Orders of January 23, 1937, in cases of International Champagne Corp., Wente Brothers and Shewan-Jones, Inc., 24 F.T.C. 1384, 1384-85.

238. See CALLMAN, UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 94.3(d) (1970); ATTY. GEN. COMM'N ON ADM. PROC., THE FEDERAL TRADE COMMISSION, SEN. DOC. No. 186, 76th Cong., 3d Sess. pt. 6, n.22 (1940); Russell, *supra* note 16, at 657-58; Gaguine, *The Federal Alcohol Control Administration*, 7 GEO. WASH. L. REV. 844, 949, 964 n.129 (1939); O'Neill, *Federal Activity in Alcoholic Beverage Control*, 7 LAW & CONTEMP. PROB. 570, 583-84 (1940). Indeed, the F.T.C. promulgated a "trade practice rule" for the wine industry on June 29, 1939 which was in effect until 1976. Like the other old trade practice rules and "industry guides" of the F.T.C., it laid down broad rules of good industry conduct relating to unfair competition and advertising. See 16 C.F.R. Part 139 (1974), now rescinded. The F.T.C. rescinded most of the trade practice rules, which were interpretative rules only, when it acquired legislative rulemaking authority in 1975. The old interpretive rules were deemed obsolete. 41 Fed. Reg. 2382 (January 16, 1976). In 1977 the Wine Institute trade association announced a voluntary code of fair advertising for its members (discussed *infra* text accompanying note 414) and obtained F.T.C. approval in an advisory opinion on antitrust aspects. Wine Institute Press Release, April 7, 1978.

239. 21 U.S.C. §§ 301-392 (1976).

240. *Id.* § 321(f).

241. *Id.* § 331(b). See also *id.* §§ 342-43.

242. *Id.* § 341.

243. The Secretary of Health, Education & Welfare has delegated the authority vested in him by the Act to an Assistant Secretary, who has redelegate to the Commissioner of FDA. 21 C.F.R. § 5.1 (1977).

244. 21 U.S.C. § 371(a), (e) (1976). *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973).

245. 21 U.S.C. § 332 (1976).

246. *Id.* § 333.

247. *Id.* § 334.

employs its authority to prevent adulteration of alcoholic beverages, it has generally deferred to the Treasury Department in matters of misbranding. One decision, discussed below, has held that the FDA lacks jurisdiction over such labeling.

Early in this century, the FDA actively controlled both misbranding and adulteration of alcoholic beverages under the original Food and Drug Act of 1906.²⁴⁸ When that act was replaced in 1938 by the Federal Food, Drug, and Cosmetic Act²⁴⁹ (which is the act in force today, though it has been since amended in ways not relevant here), attention was focused on its effect upon the Federal Alcohol Administration Act of 1935. The 1938 Act listed various statutes as not affected, modified, repealed or superseded by it, but the FAA Act was not among them.²⁵⁰ The maxim of construction *expressio unius est exclusio alterius*, plus the rule that later enacted statutes prevail over earlier ones, would suggest therefore that the FAA Act had been impliedly repealed. No one concerned with implementation of either act, however, drew this conclusion. Nor did anyone conclude the opposite, that alcohol beverages were intended to be exempt from the 1938 Act's coverage because they were already under control of the Treasury Department pursuant to the FAA Act. The assumption of the FDA and the Treasury administrators who worked contemporaneously with these legislative changes, was that both acts applied to liquor and the intention of Congress was that the Acts would complement one another. This was the opinion of no fewer than four attorneys for the agency administering the FAA Act, including the former general counsel, who each wrote separately in law reviews on the question.²⁵¹

It was also the opinion of the FDA, which announced in 1940 that although its laws were applicable, it would defer to the Treasury Department to avoid duplicating that agency's work.²⁵² After several years of experience under both acts, the commissioner of Food and Drugs described the complementary functioning of the statutes in practice:

Since the passage of the Federal Alcohol Administration Act, we have avoided wherever possible, overlapping and duplication of work by this agency and the Bureau of Internal Revenue. This is particularly true of misbranding since the F.A.A. Act deals more specifically with the labeling of alcoholic beverages than does the F.F.D. and C. Act. For example, under the former act a system of

248. 34 Stat. 768 (1906). See Gaguine, *supra* note 238, at 956 n.96, and Russell, *supra* note 16, at 658 n.64.

249. 52 Stat. 1040 (1938).

250. *Id.* § 902 (1938).

251. Gaguine, *supra* note 238, at 956-58; O'Neill, *supra* note 238, at 584; Russell, *supra* note 16, at 659-60; Lee, *Adulteration and Misbranding of Alcoholic Beverages* 3 FOOD, DRUG COSMETIC L.J. 82, 87-89 (1948).

252. FDA Trade Correspondence No. 224, April 11, 1940, cited in 40 Fed. Reg. 54455 (November 24, 1975).

label approval has been set up. Under our Act, we have no authority to "approve" labels. Under the circumstances it has been our practice to initiate regulatory action against misbranded alcoholic beverages only on request from the Bureau of Internal Revenue, or when it is obvious that a higher degree of control can be exercised over some particular type of misbranding than under the F.A.A. Act.²⁵³

The two agencies continued to cooperate in this way and to publicly reaffirm the policy over the years. In 1962, the Treasury Department reminded the liquor industry that both its and the FDA's requirements must be met.²⁵⁴

In 1974, however, an issue arose that was to split the agencies apart. That year, the FDA and the Bureau of Alcohol, Tobacco and Firearms (the latest Treasury Department agency administering the FAA Act), entered into a memorandum of understanding which acknowledged joint jurisdiction and announced with respect to "ingredient labeling" of alcoholic beverages that "[i]n the interest of accuracy and efficiency" the Bureau would have primary responsibility but that Bureau regulations would be consistent with FDA law.²⁵⁵ The Bureau proposed regulations requiring ingredient labeling of malt beverages,²⁵⁶ distilled spirits,²⁵⁷ and wine.²⁵⁸ Informal rulemaking proceedings were held, which resulted in fierce opposition from the industry. Ultimately, the Bureau withdrew its proposals, concluding that "the public interest would not be served" by their adoption.²⁵⁹ The FDA reacted speedily: within days it revoked its 1974 memorandum of understanding with the Bureau, as well as its 1940 Trade Correspondence opinion,²⁶⁰ and announced its immediate intention to require ingredient labeling under the Food Drug, and Cosmetic Act.²⁶¹

Although beer brewers were prepared to abide by FDA requirements,²⁶² distillers and vintners moved to block the FDA. They lobbied for, and attained, an exemption from ingredient labeling in a pending Senate Bill,²⁶³ though the bill never passed the House. At the same time, they filed an action for declaratory and injunctive relief in the conven-

253. Letter to Frederic P. Lee, (November 7, 1947), *quoted in Lee, supra* note 251, at 88.

254. Alcohol & Tobacco Tax Division Industry Circular 62-33 (October 26, 1962), *cited in* 40 Fed. Reg. 54455 (November 24, 1975).

255. 39 Fed. Reg. 36127 (October 8, 1974).

256. 39 Fed. Reg. 27812 (August 1, 1974).

257. 40 Fed. Reg. 6354 (February 11, 1975).

258. *Id.* at 6349.

259. 40 Fed. Reg. 52613 (November 11, 1975).

260. 40 Fed. Reg. 54456 (November 24, 1975).

261. *Id.* at 54455.

262. United States Attorney, Memorandum in support of defendant's motion to dismiss, in litigation of Brown-Forman Distillers Corp. v. Mathews, 435 F. Supp. 5 (W.D. Ky. 1976).

263. See amendments to S.641, 94th Cong., 2d. Sess., Cong. Rec. March 18, 1976, § 3849.

ient forum of federal district court in Owensboro, Kentucky, the heart of America's whiskey industry. There they succeeded.

In *Brown-Forman Distillers v. Mathews*,²⁶⁴ the court concluded something that no one who had been involved with or thought about the issue in over 40 years had ever concluded: that jurisdiction over alcoholic beverage labeling lies exclusively in the Treasury Department under the FAA Act. The opinion rests almost entirely on one ambiguous sentence spoken by a congressman from Kentucky in hearings on what eventually became the Federal Food, Drug and Cosmetic Act of 1938.²⁶⁵ In an aside explaining that it was not ignoring the plain meaning of the statutes in relying on this legislative history, the court turned what was once an academic joke²⁶⁶ into reality: "Legislative history is only one tool by which the Court can uncover congressional intention. Another device is to review the statutory language itself."²⁶⁷ But the court made no concession to the statutory language itself. Agreeing that the "plain meaning" of the 1938 Act included alcoholic beverages as "food," agreeing that such beverages were not explicitly exempted from the Act as were some products, and even agreeing that the *adulteration* provisions of the Act apply to alcoholic beverages, the court nevertheless found that "Congress *impliedly* excepted alcoholic beverages from the *misbranding* provisions of the 1938 Act."²⁶⁸ The statement by the Kentucky congressman was the key element in support of this conclusion, supplemented by the rule of construction that a specific statute will prevail over a general one when the two conflict. The opinion goes on to

264. See note 262 *supra*.

265. The sentence was a question from Representative Virgil Chapman of Kentucky to a witness: "Doctor, what would be your opinion, if I might ask, of an amendment which I expect to have, or attempt to have written into this bill which would extend its provisions so as to include whiskey and require adequate labeling that would disclose the various ingredients contained in a bottle that is labeled as 'whiskey', so as to show what proportion of it is whiskey and what proportion of it is water" *Hearings on S.5, H.R. 6906, 8805 and 8941 before Subcomm. of House Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess. 106 (1935)*. The question is ambiguous, reflecting either that Chapman thought the bills did not cover whiskey, or that he thought they covered whiskey but nevertheless needed a specific requirement mandating disclosure of water blending. The court recognized that Chapman's statement was made in connection with his battle on behalf of "straight whiskey" producers against the "blended whiskey" producers. See *Brown-Forman Distillers Corp. v. Mathews*, 435 F. Supp. 5, 10-11 (W.D. Ky. 1976). The court itself also recognized that the remark, coupled with another congressman's statement in the hearings' "can be read to indicate that neither congressman considered 'alcoholic beverages' to be food, as that term was then defined in the draft." *Id.* at 13, n.7. The court fails to note at this point in the opinion that the definition of food was ultimately written to clearly include alcoholic beverages, as they had been included under the original 1906 Act. "The definition of food is simply a clarification of the definition in the Food and Drugs Act of June 30, 1906." H.R. REP. NO. 2139, 75th Cong., 3d Sess. 817 (1938). This fact had been recited earlier in the opinion, so the court was aware of it.

266. Corry, *The Use of Legislative History in the Interpretation of Statutes*, 32 CAN. BAR REV. 624, 636 (1954).

267. *Brown-Forman Distillers Corp. v. Mathews*, 435 F. Supp. 5, 11 (W.D. Ky. 1976).

268. *Id.* at 12 (emphasis in original).

list "conflicts" between the statutes (such as the FAA Act's requirement that alcoholic content appear on labels, and the silence of the 1938 Act on this topic) and between the regulations (such as Treasury's decision not to promulgate ingredient labeling regulations, and the FDA's decision to do so).²⁶⁹ The fact that the FDA had deferred to the Treasury Department on liquor labeling for almost 40 years was, to the court, only further support of the contention that FDA had no jurisdiction. The fact that the FDA had asserted as early as 1940 it had concurrent jurisdiction was, stated the court, "of no particular importance"²⁷⁰ Though FDA was able to point to at least one litigated enforcement action in a labeling case, the court thought the case was "to a large extent distinguishable from this case, and to the extent it is indistinguishable we choose not to follow it."²⁷¹

The *Brown-Forman* opinion is bad law and bad government. The court tossed aside, as minor obstacles in the path to a desired result, rudimentary principles of administrative and statutory law. The "plain meaning" of the statutes was examined only secondarily, and then accorded a weight of zero, although it was absolutely unambiguous. In a brash act of judicial legerdemain, a thin shard of legislative history from an exchange at hearings was given nearly 100 percent weight, while explicit, contrary legislative history²⁷² was simply ignored. The rule giving deference to contemporaneous administrative construction²⁷³ was sacri-

269. The only other statutory "conflict" mentioned by the court was that the FAA Act requires prohibition of misleading statements even if the statements are not false, whereas the 1938 Act requires ingredient labeling that may be misleading. The court did not mention that the 1938 Act also prohibits "false or misleading" labeling. 21 U.S.C. § 343 (a) (1976) (emphasis added). All of the "conflicts" in the regulations of the two agencies found by the court were actually reconciled by administrative coordination over nearly 40 years; failing such coordination, as in the ingredient labeling matter, the court could easily have reconciled administrative differences by reference to the obvious, strong congressional purpose in both acts of protecting health and economic interests of the public in the fullest way possible.

270. *Brown-Forman Distillers Corp. v. Mathews*, 435 F. Supp. 5, 17 (W.D. Ky. 1976).

271. *Id.* at 12 n.6. The case in question was *United States v. 1,800.2625 Wine Gallons of Distilled Spirits*, 121 F. Supp. 735 (W.D. Mo. 1954).

272. Key legislative history from passage of the FAA Act was not mentioned. See note 298 *infra*. Mentioned, then ignored, by the court was an early provision in S.5, 75th Cong., which ultimately became the 1938 Act:

For purposes of enforcement of this Act, records kept by the Treasury Department in accordance with laws, and regulations thereunder, relating to alcoholic beverages and medicinal liquors, shall be open to inspection by any official of the Department of Agriculture [where FDA was then located] duly authorized by the Secretary of Agriculture to make such inspections.

In the final statute the provision was consolidated with another section relating to Post Office records. As enacted, it mandates access to the records of "any department or independent establishment in the executive branch of the Government. . . ." 21 U.S.C. § 372(c) (1976). See *Brown-Forman Distillers Corp. v. Mathews*, 435 F. Supp. 5, 7-8 (W.D. Ky. 1976). This evolution of § 372(c) is unambiguous, overwhelming evidence of the congressional intent to provide concurrent jurisdiction over alcoholic beverages in the two agencies.

273. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 49 (1972).

ficed. Nearly 40 years of administrative coordination and deference by the FDA was treated as an admission of lack of jurisdiction, despite consistent public announcements to the contrary. The fact that the Treasury Department itself had always agreed that the FDA had concurrent jurisdiction, and had reaffirmed that view in the very memorandum of understanding on ingredient labeling signed in 1974, was not even mentioned by the court. The decision thus teaches administrative agencies never to coordinate mutual jurisdiction, but to duplicate and overlap the work of one another lest jurisdiction be judicially declared lost through disuse. Finally, the opinion disregards the rule of construction that statutes *in pari materia* are to be construed to avoid conflicts, as a harmonious legislative scheme, whenever possible.²⁷⁴ Certainly, harmony was possible here. The conflicts the court found were imagined, not real. All could have been reconciled by acknowledgement of the congressional intent that was most clearly signaled by the legislative history of both the FAA Act and the Food, Drug, and Cosmetic Act: the general intent that public health and economic interests be fully protected, and that the two acts complement one another, each providing stronger public protection when a gap appeared in the other.

Unfortunately, for political reasons the government decided not to appeal the *Brown-Forman* decision.²⁷⁵ This does not mean the FDA has

274. *Id.* § 51.

275. A letter from FDA Commissioner Donald Kennedy to the writer, dated September 29, 1977, states, in part:

The Food and Drug Administration recommended to the Department of Justice that the *Brown-Forman* decision be appealed. The Bureau of Alcohol, Tobacco and Firearms of the Department of Treasury, however, recommended that the decision not be appealed. Thereafter, the Department of Justice referred the matter to the Office of Management and Budget (OMB). By letter dated July 20, 1977, Mr. Dennis O. Green, Associate Director for Economics and Government, Office of Management and Budget, advised me that OMB had determined that there should be no appeal of the *Brown-Forman* decision."

The Green letter stated, in part:

There appears to be general agreement that the Bureau of Alcohol, Tobacco and Firearms (ATF) currently has the power to require ingredient labeling and could most efficiently and effectively administer new regulations for the alcoholic beverage industry. Therefore, we do not believe appeal of *Brown-Forman Distillers Corporation v. Califano* [Califano succeeded Mathews as Secretary of HEW] is necessary. If the executive branch wishes to require ingredient labeling, ATF currently possesses the authority and is the most appropriate regulator.

There remains the more important, substantive issue: Should ingredient labeling be required? We share your strong concerns about the right of consumers to be informed about the ingredients in food and beverages, particularly hidden and potentially harmful ingredients. We also are concerned about the excessive cost and administrative burden that more traditional forms of complete ingredient labeling might place on small wineries because of the nature of the manufacturing process. Unfortunately, neither FDA nor ATF has adequately explored alternatives to complete labeling, in terms of both cost and ultimate benefit to consumers.

no jurisdiction over liquor labeling, except in the western judicial district of Kentucky. In one other judicial district it has been decided the FDA clearly does have jurisdiction,²⁷⁶ and as the government pointed out in its *Brown-Forman* pleadings, the Food, Drug, Cosmetic Act can be enforced independently by any United States attorney.²⁷⁷ It is only the temporary political policy of the Carter administration that is preventing such enforcement at present.

C) The Dominant Law of the Bureau of Alcohol, Tobacco and Firearms (BATF).

1) The statutory mandate

BATF is the current successor of several Treasury Department agencies which have administered the principal federal wine labeling laws over the last four decades. The early history of these agencies has been detailed elsewhere.²⁷⁸ As the name of BATF implies, it is something of

We are therefore requesting ATF to develop a proposed partial labeling requirement jointly with FDA. Special focus should be placed on assuring that consumers are made aware of hidden and potentially harmful ingredients (such as preservatives, colors, and clarifiers) and on reducing the economic burden of manufacturers (and ultimately consumers) of providing such data.

We anticipate that the affected agencies will move quickly to publish and seek comment on a new proposed rule. We remain available to assist you if problems develop.

Documents supplied to the writer in response to Freedom of Information Act requests to OMB show that one day before the Green letter was written, representatives of the California Wine Institute met in Washington with OMB Director Bert Lance and other OMB officials. Two letters of John A. De Luca, President of the Wine Institute, to Lance, dated July 26, 1977, refer to the discussions of July 19, 1977 and renew the special plea for wine. A response from Lance to De Luca, dated August 23, 1977, substantially agreed with De Luca, referred to the possibility of "some form of special (partial) ingredient labeling requirement for alcoholic beverages," and remarked that rulemaking proceedings "may very well result in a determination that no labeling is necessary or the exclusion from labeling requirements of certain segments of the alcoholic beverage industry." To date, no rulemaking proceedings have begun. Copies of documents cited are on file at Loyola Law School Library, Los Angeles, California.

276. *United States v. 1,800.2625 Wine Gallons of Distilled Spirits*, 121 F. Supp. 735 (W.D. Mo. 1954).

277. 21 U.S.C. §§ 332-337 (1976).

278. O'Neill, *supra* note 238; Russell, *supra* note 16; and Gaguine, *supra* note 238. The essential facts are that Congress was not in session at the time Prohibition was repealed in 1933 by state ratification of the twenty-first amendment. Therefore, President Roosevelt acted by executive order under the National Recovery Act to create a Federal Alcohol Control Administration. Exec. Order No. 6474, December 4, 1933. After the National Recovery Act was declared unconstitutional by the Supreme Court in *Schechter Bros. Poultry Corp. v. U.S.*, 295 U.S. 495 (1935), Congress passed the Federal Alcohol Administration Act, 49 Stat. 977 (1935), creating a Federal Alcohol Administration in the Treasury Department. A year later, the Liquor Tax Administration Act was passed, 49 Stat. 1965 (1936), amending the FAA Act and making the Administration an independent agency. But the Act was to take effect only upon appointment of agency members, and the President never made the appointments. In 1940, the Administration was abolished and its functions were transferred to the Secretary of Treasury

an administrative catchall. The agency has disparate duties whose only common denominator is the regulation of products subject to federal excise taxes.²⁷⁹ This fragmentation of the Bureau's responsibilities may be one reason the agency has not developed a full expertise in wine labeling matters. The Bureau has admitted its lack of wine expertise;²⁸⁰ indeed, when describing its organization and functions in the Federal Register, the Bureau omitted to mention wine at all in the statement of its "mission."²⁸¹

BATF administers two laws which directly affect wine labeling: the first, Chapter 51 of the Internal Revenue Code²⁸² is an excise tax statute which has come to be used as a convenient vehicle for regulation of cellar treatment of wine; the second is the more important Federal Alcohol Administration Act of 1935.²⁸³

The FAA Act is based not only on the interstate and foreign commerce power but also upon the need to "enforce the twenty-first amendment, and to protect the revenue and enforce the postal laws."²⁸⁴ It requires importers and wholesalers of distilled spirits, wine or malt beverages, and producers of distilled spirits or wine, to obtain a "basic permit" to operate from the Secretary of the Treasury.²⁸⁵ Reacting to evils that appeared during Prohibition, the statute manifests particular concern that permits be kept out of the hands of persons previously convicted of violations of law, or those whose businesses are unstable.

pursuant to Reorganization Plan No. III, § 2, effective June 30, 1940. After many years as an alcohol, tobacco and firearms unit in the Internal Revenue Service of the Department, BATF was created and given Bureau status in 1972; the Bureau director was delegated, *inter alia*, all authority possessed by the Secretary of Treasury under the FAA Act, except for final approval of regulations. 37 Fed. Reg. 11696 (June 10, 1972). For pre-1933 history of federal alcohol law, see Byse, *Alcoholic Beverage Control Before Repeal*, 7 LAW & CONTEMP. PROBS. 544 (1940).

279. Excise taxes are imposed on alcoholic beverages under 26 U.S.C. §§ 5001-5691 (1970), on tobacco products under §§ 5701-5763, and on firearms under §§ 5801-5872.

280. BATF once proposed turning definitions of appellation of origin boundaries over to the states, admitting that "[T]he Bureau does not have sufficient facts on wine growing areas within each and every state to make an informed decision. . . ." 40 Fed. Reg. 30117 (July 17, 1975). It eventually abandoned this proposal, but in subsequent hearings on multiple labeling issues, the Bureau Director, Rex D. Davis, candidly denied the Bureau had any significant wine expertise. Response of Director Davis to testimony of R. Frederick Fisher, in the matter of proposed rules in 41 Fed. Reg. 50004 (November 12, 1976), San Francisco, Cal. (February 8, 1977).

281. 39 Fed. Reg. 41267 (November 26, 1974). Paragraph 2 of the statement includes as part of the agency's mission, "consumer deception and other improper trade practices in the distilled spirits industry," but fails to mention the similar responsibility in the wine industry. This surprising omission is somewhat rectified by later descriptions of the work of various Bureau offices which mention the FAA Act and "alcoholic beverages" generally. (The statement includes interesting history of the roots of the laws administered by the Bureau. Note, however, its reference to the "Revenue Act of March 3, 1771," should be corrected to 1791.)

282. 26 U.S.C. §§ 5001-5691 (1970).

283. 27 U.S.C. §§ 201-211 (1970). See note 278 *supra*.

284. 27 U.S.C. § 203 (1970).

285. *Id.*

Hearing and appeal procedures are established for denial, revocation, suspension or annulment of a permit. All permits are conditioned on compliance with federal and state laws relating to alcoholic beverages, and specifically with § 205 of the FAA Act itself.

While the FAA Act contains separate sections aimed at “bulk sales” and “interlocking directorates” in the distilled spirits industry, the heart of the Act is § 205. Typical of New Deal legislation, that section makes unlawful certain economic practices in restraint of trade (exclusive outlets, “tied houses,” commercial bribery, consignment sales).²⁸⁶ It then goes on to provide what at the time was (and, on paper, still is) one of the strictest consumer protection laws ever adopted by the Congress. Under § 205(e), it is unlawful to sell, ship or receive in interstate commerce any distilled spirits or wine

Unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding and labeling and size and fill of container (1) as will prohibit deception of the consumer with respect to such products or the quantity thereof and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guarantees, and scientific or irrelevant matters 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, the alcoholic content thereof . . . ; (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

To enforce these provisions, the section goes on to require a “certificate of label approval” to be obtained from the Secretary prior to sale of shipment of the alcoholic beverages in interstate commerce.

Advertising of the same beverages is declared unlawful by § 205(f) unless it meets regulations that accomplish the identical objectives established by § 205(e) (1)-(4) for labeling and that “prevent statements inconsistent with any statement on the labeling of the products advertised.” Unlike labeling, advertising is not subject to prior approval by the Secretary.

286. See Annot., *Construction and Application of Unfair Competition Provisions of § 5 of Federal Alcohol Administration Act*, 2 L. Ed. 2d 1565 (1958).

The legislative history shows that § 205(e)'s provisions were drafted by the Federal Alcohol Control Administration, based on regulations originally promulgated under the National Recovery Act. The Director of the Administration, a Roosevelt appointee, Joseph Choate, Jr., explained the labeling provisions in testimony before the House of Representatives:

Those regulations were intended to insure that the purchaser should get what he thought he was getting, that representations both in labels and in advertising should be honest and straightforward and truthful. They should not be confined, as the pure-food regulations have been confined, to prohibitions of falsity, but they should also provide for the information of the consumer, that he should be told what was in the bottle, and all the important factors which were of interest to him about what was in the bottle.²⁸⁷

Reporting the bill out, the House Ways and Means Committee commented on the labeling sections:

Under existing Federal law . . . the consumer cannot be protected from deceptive labeling practices Even if the present Federal law were adequate to prevent the criminal from entering the liquor field, there would still remain the problem of control of the unethical minority in the business, the activities of which are beyond State power and require regulation in the public interest. The internal revenue, Federal trade, and food and drug laws are insufficient for this purpose.²⁸⁸

Explaining this last sentence, Lee²⁸⁹ remarks: "Congress had in mind the lack under the Federal Food and Drug Act of 1906 of a permit system and of definitions and standards for alcoholic beverages having the force and effect of law" ²⁹⁰ The committee report went on to add that the labeling and advertising sections contemplate:

regulations, with the force and effect of law, prescribed by the Administrator. Definite standards are laid down for these regulations. The regulations are not only *required to prohibit* labeling and advertising that is *false [or] misleading*. . . but *must* also provide for the *prevention of deception* of the consumer with respect to the product or its quality . . . and *must* make provision for *informing the consumer adequately* as to the *identity and quality* of the product²⁹¹

The floor debate²⁹² on the bill was heated, but nearly all the heat was

287. *Hearings before the Committee on Ways and Means on H.R. 8539*, 74th Cong., 1st Sess. 10 (1935).

288. H. R. REP. NO. 1542, 74th Cong., 1st Sess. 3 (1935).

289. Lee, *supra* note 251, at 84.

290. A few years later, however, the FDA was given the authority to set definitions and standards for alcoholic beverages having the force and effect of law. *See* text accompanying notes 239-247 *supra*.

291. H.R. REP. NO. 1542, *supra* note 288, at 12 (emphasis added).

292. 79 CONG. REC. 11272, 11360, 11712-38, 11786-99, 11816, 12768, 12896, 12923, 12941, 12947, 13079, 13140, 14474-79, 14564-72 (1935).

directed to two issues: the exemption from most of the bill's provisions that the beer brewers had obtained for themselves; and the accusation that the "Whiskey Trust," financially interlocked with the glass bottle manufacturers, had pushed through the bill's prohibition on "bulk" (*i.e.* greater than one gallon) sales, to the detriment of barrel makers.²⁹³ References to the bill's labeling provisions were made only briefly, but each reference did reaffirm that the requirements were intended to be meaningful consumer protections. In explaining the bill to the House, the chairman of the committee which had considered it, Representative Thomas H. Cullen (Dem., N.Y.) stated: "Further, we must do something to prevent the unfair trade activities of those in the industry who chisel and take advantage of the ignorance of the consumer by dishonest labeling and advertising" ²⁹⁴ Representative Emanuel Celler (Dem., N.Y.) supported the bill, but criticized its strictness: "The bill should have left to regulation much more than it does. The bill seeks to control, for example, advertising, labeling, branding, seals, tied houses, packaging, and goes into the minutest detail Little or no discretion is left to the administrator" ²⁹⁵ Yet the bill was enacted with this strict detail intact. The detail was deliberate. Congress wanted to avoid another Supreme Court decision like *Schechter Poultry*.²⁹⁶ Representative Cullen explained: "[W]herever power is granted by the bill to put into effect a policy contemplated by the bill, discriminating language has been used, so that the bill, if enacted, will not suffer from the

293. In that debate, the influence of the whiskey industry on alcohol control officials was underscored. *See, e.g.*, this statement:

Mr. [Claude A.] FULLER [Dem., Ark.]:

That is right. Let me show what kind of predicament we have got into with this whisky crowd that now wants to dominate the situation and say we have got to use bottles only.

Dr. Doran for almost 30 years was in the Treasury Department. During all the time of prohibition he administered it, and when he went out and there was a code to be drawn he was appointed by the President of the United States on an interdepartmental board, and he drew these rules and regulations that are being forced on the American people providing that we cannot use barrels and that we can only use glass bottles. Then when he got that through he quit, and where is he today? He is the director of the Distillers Institute, drawing \$36,000 a year and at the same time was supervisor of code authority for distillers' industry. He is the very man that the distillers, who have a monopoly of the whisky business, wanted, and the very man who gave them their permits to operate in the old prohibition days, and I guess he is getting well paid for his services. During his service in the Treasury Department as commissioner of industrial alcohol he named practically all now in that Department, and it is generally known he still controls that service while still serving the Whisky Trust as director of the Distillers Spirits Institute. R.E. Joyce, one of his subordinates, and who issued permits under the Federal Alcohol Control Administration to the favored few, is now Washington manager for National Distillers.

294. 79 CONG. REC. 11714 (1935).

295. *Id.* at 11723.

296. *See* note 278 *supra*

infirmary of invalid delegation of legislative power."²⁹⁷

The wine industry had exerted influence during the committee drafting of the bill, and it was apparently happy with the outcome. In response to an inquiry whether permits under the act would be restricted, Representative Fuller remarked: "I may say to the gentleman from California that Mr. [Frank H.] Buck [Dem., Calif.], his colleague, is on this committee. Mr. Buck is quite an authority on the wine industry in California. He got practically everything he wanted in this bill, and it was worked out satisfactorily to take care of the wine people of California."²⁹⁸

Thus, the promise of 1935 was for "regulations, *to be prescribed . . . as will prohibit deception of the consumer . . . as will provide the consumer with adequate information as to the identity and quality . . . as will prohibit statements on the label that are . . . false [or] misleading . . .*"²⁹⁹ Moreover the statute was intended to "insure that the purchaser should get what he thought he was getting, that . . . labels and in advertising should be *honest and straightforward and truthful . . . the consumer . . . should be told what was in the bottle, and all the important factors which were of interest to him about what was in the bottle.*"³⁰⁰ The legislation was designed to go *beyond* the food and drug and federal trade laws.³⁰¹ It was drawn with great specificity to carefully direct the agency's actions.³⁰² The regulations were "required to prohibit false [or] misleading statements . . . [and] *must* also provide for the *prevention* of deception . . ." ³⁰³ In short, the FAA Act was a strict consumer protection law. "It might well have been drafted by Ralph Nader."³⁰⁴

How, then, could the statutory mandate have been betrayed? How could the Treasury Department regulations have permitted "truthblend-

297. 79 CONG. REC. 11714 (1935).

298. *Id.* at 11717 (1935). Representative Buck later offered an amendment to subject all outdoor advertising to the act which was existing as of the date the bill had been introduced. In defending the amendment, he noted that "the liquor industry, including the wine and brewing industry, has always been subject to federal jurisdiction . . . We have never placed it upon them before in this form, but the Food and Drug Act forbids false or misleading labeling or advertising." *Id.* at 11795. This statement by a committee member clearly reflects that Congress had no intention of exempting alcoholic beverages from the food and drug laws by passage of the FAA Act, but rather intended the two statutes to be complementary. This was entirely overlooked in the *Brown-Forman* litigation, see text accompanying notes 265-274 *supra*.

299. 27 U.S.C. § 205(e) (1970) (emphasis added).

300. Testimony of Director Choate, *supra* note 287 (emphasis added).

301. See text accompanying note 288 *supra*.

302. See text accompanying notes 295-297 *supra*.

303. See text accompanying note 291 *supra* (emphasis added).

304. Testimony of R. Frederick Fisher in the matter of proposed rules in 41 Fed. Reg. 8188 (February 25, 1976), San Francisco, Cal. (April 13, 1976).

ing,"³⁰⁵ and "a continuing fraud even on the most knowledgeable and well informed consumers"?³⁰⁶ How could wine have become "perhaps the most deceptively labeled product in America"?³⁰⁷ Before reviewing the substance of the regulations to see whether those charges are merited, it is useful to observe that there have been no amendments to § 205 of the FAA Act since its passage, and virtually no congressional oversight of its implementation. Congress apparently thought its work was done once the law was enacted. Meanwhile, the wine industry developed the familiar "comfortable relationship" with the agency regulating it; indeed, many of the agency's wine regulations were initially drafted in the offices of the California Wine Institute.³⁰⁸ (This reliance on the industry may be one reason that, despite four decades of involvement, the government failed to develop its own independent wine expertise.)³⁰⁹

Nor has the judiciary often been given the occasion to scrutinize meaningfully the Treasury Department regulations. The labeling regulations have only been challenged in court a handful of times.³¹⁰ The plaintiffs have always been members of the alcoholic beverage industry. No consumers have challenged the regulations on the ground that they are arbitrary, or that they cause consumer deception and are therefore irreconcilable with the statute. The decisions that have touched on deception have reaffirmed, however, that the plain statutory language and legislative history mean what they say: "In general, the authority of the Administrator is limited to such regulatory action, with respect to labeling, as will protect consumers from false, misleading or inaccurate representations" ³¹¹ "The [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

305. See note 25 *supra*.

306. See note 23 *supra*.

307. See note 26 *supra*.

308. Leon D. Adams, author of *THE WINES OF AMERICA*, *supra* note 188, and a founder and officer of the Wine Institute for many years, has stated to the writer that he drafted a number of the regulations originally. See also his statement that he originated a provision of 27 C.F.R. § 4.38 in Adams, *A Senior Wine Student on ATF's Proposals*, *WINES & VINES*, Sept. 1977, at 28.

309. See note 280 *supra*.

310. *William Jameson & Co. v. Morgenthau*, 25 F. Supp. 771 (D.D.C. 1938), *vacated on other grounds* 308 U.S. 171; *Arrow Distilleries v. Alexander*, 109 F.2d 397 (7th Cir. 1940), *cert. denied*, 310 U.S. 646 (1940), *motion granted* 311 U.S. 613 (1940); *Speert v. Morgenthau*, 116 F.2d 301 (D.C. Cir. 1940); *Gibson Wine Co. v. Snyder*, 95 F. Supp. 145 (D.D.C. 1950), 194 F.2d 329 (D.C. Cir. 1952); *Continental Distilling v. Humphrey*, 220 F.2d 367 (D.C. Cir. 1954); *Continental Distilling v. Humphrey*, 247 F.2d 796 (D.C. Cir. 1957); *Joseph Seagram & Sons v. Dillon*, 344 F.2d 497 (D.C. Cir. 1965); *Continental Distilling v. Schultz*, 472 F.2d 1367 (D.C. Cir. 1972); See also *Abernathy v. Schenley Indus.*, 420 F. Supp. 1 (W.D.N.C. 1976), *aff'd* 556 F.2d 243 (1977).

311. *Arrow Distillers v. Alexander*, 109 F.2d 297, 402 (7th Cir. 1940), *cert. denied* 310 U.S. 646 (1940).

really is.”³¹² In one case, a whiskey distiller claimed the regulations discriminated against it, by requiring a label statement that its whiskey had been stored in reused cooperage when no such statement was required of Canadian whiskey similarly stored. Overturning an order of dismissal, the appellate court said:

Should such discrimination exist, furthermore, it would lead to consumer deception rather than to its avoidance as sought by the statute. And one part of the trade would be disadvantaged in comparison with others on a basis not justified by a reasonable relation of the different treatment to the purposes of the statute. This would place the ruling or regulation outside the statute upon which it purports to rest.³¹³

Thus, the statute, the legislative history and the judicial decisions make clear that BATF's wine labeling regulations are unlawful if they cause consumer deception rather than prevent it. In any future challenge of such regulations, the normal deference accorded to “administrative expertise” should not apply because BATF has recently denied possessing expertise with respect to wine.³¹⁴ Even if deference were accorded, however, no regulation which, in fact, authorizes false statements or leads to deception could pass muster under any applicable scope of judicial review.

Regulations promulgated under the FAA Act are legislative regulations issued pursuant to the “informal” rulemaking procedures of the Administrative Procedure Act.³¹⁵ Under 5 U.S.C. § 706 (2)(a) such regulations will be held unlawful if “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” Under the “arbitrary and capricious” standard, the judicial inquiry is for “reasonableness” of the rules. Federal courts making that inquiry today are “very much concerned with the factual component of rulemaking. Courts are now requiring facts in the rulemaking record to support each facet of the rules.”³¹⁶ Even without such intense review of the factual basis, however, it should be impossible for any court to find “reasonable” a regulation allowing patently false statements to be represented as true, or allowing demonstrably misleading statements to be represented as not misleading.

Under 5 U.S.C. § 706(C), the regulations will also be struck down if “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” The courts are theoretically free to substitute their judgment for the agency's in interpreting how a statute applies to

312. *Gibson Wine Co. v. Snyder*, 95 F. Supp. 145, 146 (D.D.C. 1950).

313. *Continental Distilling v. Humphrey*, 220 F.2d 367, 372 (D.C. Cir. 1954). *See also* the other two *Continental Distilling* cases, cited at note 310 *supra*.

314. *See* note 280 *supra*.

315. 5 U.S.C. § 553 (1976).

316. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 209 (1977 Supp.).

given situations. Often, however, they will not substitute judgment but will uphold the agency's view of the statute as long as it is rationally based.³¹⁷ Even if the "rational basis" test is used in review of BATF's wine regulations, it should be impossible for any court to find that a regulation authorizing falseness or deception is rationally related to a statute directing the regulations to prohibit those very things. Even when the statutory mandate is broad and vague, permitting many rational policy choices within the agency's discretion, agency regulations are often found not to be rationally related to the statute.³¹⁸ *A fortiori*, when the statutory mandate is specific, as the FAA Act is, agency action contrary to the specific mandate is to be set aside. Case law under the FAA Act and analogous consumer deception statutes makes plain that the courts do just this in such cases.³¹⁹

To the extent that such challenges to BATF regulations depend upon the factual questions of whether a label is in fact false, or in fact misleading, the same case law shows that the courts consistently draw their own conclusions, regardless of how much deference they say they are according to the agency. This has been particularly true in deceptive food labeling cases, at least since the Supreme Court's decision in *United States v. 95 Barrels of Vinegar*.³²⁰ And it is well settled in the law

317. *Id.* § 30 (1976).

318. *See, e.g., Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

319. *See* FAA Act cases *cited* notes 311-313 *supra* in which regulations were upheld only after close scrutiny for rational basis in the statute; *Willapoint Oysters v. Ewing* 174 F.2d 676, 697 (9th Cir. 1949), *cert. denied*, 338 U.S. 860, *reh. denied* 339 U.S. 945 (standard of identity regulation under Food, Drug and Cosmetic Act set aside because it misled purchasers as to nature of "Pacific Oysters," resulting in unfairness to one portion of the industry not related to statutory purpose of protecting consumers); *Armour & Co. v. Freeman*, 304 F.2d 404 (D.C. Cir. 1962) (regulation requiring "imitation" label on hams to which 10% moisture was added was on its face invalid and a preliminary injunction should have been granted; the regulation "forced violation" of the false and deceptive name provisions of the Meat Inspection Act on which it was based); *Federation of Homemakers v. Butz*, 466 F.2d 404 (D.C. Cir. 1972) (regulation issued under Meat Inspection Act invalidated as misleading and deceptive because it allowed 85% meat frankfurters to be labeled "all meat"); *National Petroleum Refiners Ass'n v. F.T.C.*, 482 F.2d 672, 693 (D.C. Cir. 1973) ("The [Federal Trade] Commission is hardly free to write its own law of consumer protection and antitrust since the statutory standard which the rules may define with greater particularity is a legal standard. Although the Commission's conclusions as to the standard's reach are ordinarily shown deference [citations omitted], the standard must 'get [its] final meaning from judicial construction.' *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374 . . . (1965).")

320. 265 U.S. 438 (1924). This was a case brought under the Food and Drugs Act of 1906, an act prohibiting "misbranding", which was defined to include, *inter alia*, "any statement, design, or device regarding [food] or the ingredients or substances contained therein which shall be false or misleading in any particular . . . [and any food] labeled or branded so as to deceive or mislead the purchaser. . . ." Defendant had manufactured vinegar from evaporated rather than fresh apples, and had labeled it "Excelsior Brand Apple Cider Vinegar made from selected Apples." The Court observed (at 442-445): "The statute is plain and direct. Its comprehensive terms condemn every statement, design and device which may mislead or deceive. Deception may result from the use of statements not technically false or which may be

of deceptive practices that the appropriate factual standard for deception is a very low one. It is the average consumer whose possible deception is relevant. The "law was not 'made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous.'"³²¹ Moreover, capacity to deceive, not actual deception, is the applicable criterion.³²²

2) The labeling regulations

BATF's labeling regulations can be analyzed by examining their effect upon a) representations of geographical origin, b) viticultural practices, c) permissible grape varieties, d) yield of grapes per acre, e) vintage dating, f) winemaking methods, g) representations of quality and safety.

a) *Geographical origin*: The regulations for wines without vintage dates permit labels to represent a specific geographical area as the origin even though as little as 75 percent of the wine actually came from the area claimed.³²³ The rule allows producers to blend up to 25 percent of wine from less desirable viticultural areas into better wine and pass it off as being from a prestigious area. For example, grapes from California's hot San Joaquin Valley, which may sell for \$88.00 per ton, may be blended into prestigious Napa Valley grapes of the same variety selling

literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false. It is not difficult to choose statements, designs and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act. The statute applies to food, and the ingredients and substances contained therein. It was enacted to enable purchasers to buy food for what it really is. [Citation omitted.] . . . If an article is not the identical thing that the brand indicates it to be, it is misbranded. The vinegar in question was not the identical thing that the statement 'Excelsior Brand Apple Cider Vinegar made from selected apples,' indicated it to be. These words are to be considered in view of the admitted facts and others of which the court may take judicial notice. The words 'Excelsior Brand,' calculated to give the impression of superiority, may be put to one side as not liable to mislead. But the words 'apple cider vinegar made from selected apples' are misleading. Apple cider vinegar is made from apple cider. Cider is the expressed juice of apples and is so popularly and generally known. [Citation omitted.] . . . The words 'made from selected apples' indicate that the apples used were chosen with special regard to their fitness for the purpose of making apple cider vinegar. They give no hint that the vinegar was made from dried apples, or that the larger part of the moisture content of the apples was eliminated and water substituted therefor. As used on the label, they aid the misrepresentation made by the words 'apple cider vinegar' . . . The label was misleading as to the vinegar, its substance and ingredients. The facts admitted sustain the charge of misbranding." The *95 Barrels of Vinegar* case was recently quoted with approval in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1975).

321. *Charles of the Ritz v. F.T.C.*, 143 F.2d 676, 679 (2d. Cir. 1944), quoting *Florence Mfg. Co. v. J.C. Dowd & Co.*, 178 F. 73, 75 (2d Cir. 1910).

322. *Goodman v. F.T.C.*, 244 F.2d 584, 604 (9th Cir. 1957).

323. 27 C.F.R. § 4.25(a) (1976). The regulation further requires the wine to be "fully manufactured and finished" in the state where the appellation area is located. It must also conform to the wine laws of that state.

for \$398.00 per ton.³²⁴The resulting wine may be presented to the consumer as "Napa Valley" wine. As such, it will command a much higher price than a wine truthfully labeled "California," or "75 percent Napa Valley, 25 percent San Joaquin Valley." The hidden 25 percent affects quality and character, as well as price. Thus, the rule, whose only justification is industry profit, authorizes both false and deceptive labels. In accordance with the legal principles discussed above³²⁵the rule is patently violative of the FAA Act. It is worth noting that, had this practice come under scrutiny by the FDA, it surely would have been suppressed as false and misleading³²⁶ or as an act of economic adulteration.³²⁷ It is equally clear the FTC would have banned it as an unfair and deceptive trade practice.³²⁸

The 75 percent origin rule applies only to wines without vintage dates. Vintage dated wines must be 95 percent from the appellation of origin claimed on the label.³²⁹ BATF reasons that a vintage date is only meaningful if nearly all of the wine³³⁰ comes from a single growing re-

324. These were the average prices for Chardonnay grapes grown in the San Joaquin Valley and the North Coastal Region, respectively, in 1975. Wine Grape Growers Newsletter, September, 1976, at 4.

325. See subsection 1 of this section, *supra*.

326. 21 U.S.C. § 343(a)(1) (1976). 21 C.F.R. § 101.18(c) (1976) states: "Among representations in the labeling of a food which render such food misbranded is any representation that expresses or implies a geographical origin of the food or any ingredient of the food except when such representation is . . . (1) A truthful representation of geographical origin. . . ." See decisions annotated in FOOD DRUG COS. L. REP. (CCH) ¶ 50,130, *e.g.*, Trade Correspondence 138, March 7, 1940, holding "It is not proper to refer to a mint tea as "Kentucky" mint unless the mint originated in Kentucky. Mint originating in nearby states would not be entitled to be designated "Kentucky mint." *Id.* at .65, and *Mitchell v. United States* 229 F. 357 (2d Cir. 1916), upholding a conviction of misbranding for selling Caracas coffee as "Bogota coffee."

327. Under 21 U.S.C. § 342(b) (1976), a food is adulterated "(1) if any valuable constituent has been in whole or in part omitted or abstracted therefrom; or (2) if any substance has been substituted wholly or in part therefor, or (3) if damage or inferiority has been concealed in any manner; or (4) if any substance has been added thereto or mixed . . . so as to . . . reduce its quality or strength or make it appear better or of greater value than it is." See also FOOD DRUG COS. L. REP. (CCH) ¶ 50,071-50,074.

328. See text accompanying notes 225-238 *supra*. See also TRADE REG. REP. [CCH] ¶ 7775, listing hundreds of FTC prohibitions of misrepresentations of geographical origin. See especially annotation .33 commenting that several cases involving wine were closed because the FTC believed the subject "was covered by regulations promulgated under the Federal Alcohol Administration Act. . .," and many annotations at .82 indicating statement of a single geographical origin is deceptive when even a small portion of the product is not of that origin: Bearings—since bearings not made *in their entirety* in the United States, improper to stamp them "Made in U.S.A.," Computers—23% of the cost attributable to foreign parts; Craft kits—20% of the parts were foreign; Lamps—20% foreign parts; Miscellaneous—"some" British components prevents labeling as made in United States; Tool kits—16% of value made in Japan. Such misrepresentation of origin is not only deceptive to consumers, but also an unfair trade practice to competitors who possess the exclusive legal right to the geographical name. See *F.T.C. v. Walker's New River Mining Co.*, 79 F.2d 457 (4th Cir. 1935), and note 31 *supra*.

329. 27 C.F.R. §§ 4.10(h), 4.39(b) (1976).

330. The 95% level is the closest that BATF regulations ever come to 100% honesty. The five percent margin is defended as a necessity for vintners whose wines evaporate to that extent during barrel aging, and which must be "topped" with more wine. Given the fact of wine

gion, for the weather in various regions may differ in a given year. The consumer, knowing the Napa Valley had fine weather one year, for example, would be deceived as to quality if grapes from a region which suffered bad weather that year could be blended.³³¹ While this reasoning is perfectly sound for vintage wines, it does not follow that non-vintage wines need not be honestly labeled. Whether or not a wine is made from a single year's harvest, geographical origin affects quality and price, and any representation of origin must be honest. To make the vintage date on a label serve as a secret indication of honest geographical origin, seems calculated to confuse any consumer who walks into the wineshop without a copy of the Code of Federal Regulations in his pocket.

Another problem with the regulation of geographical names on wine labels is that no one has ever defined the boundaries of any of the areas whose names attract consumers. No one knows for certain where "Napa Valley" or "Carneros," or "Finger Lakes," for example, actually begin or end on a map. Although the importance of defining boundaries of geographical names used in the wine trade had been known for centuries,³³² had been acknowledged in detailed French and German laws for decades,³³³ and had long been recognized in common law and F.T.C. unfair competition doctrine,³³⁴ the Treasury Department seemed not to realize it until 1975. At that time, it proposed to turn the job of defining boundaries over to the states,³³⁵ because the sudden growth of the wine industry³³⁶ had resulted in scores of applications for approval of labels with geographical names that were exotic to BATF officials in Washington, D.C. However, they ultimately abandoned the idea of letting the states define the boundaries,³³⁷ but they had now recognized the necessity of definite boundaries. BATF next proposed to define each geographical area through rulemaking proceedings, using "geographical features (stream valleys, mountain peaks, and the like)" as the guiding criterion, except for those areas that were defined by county, state, or national political boundaries.³³⁸ Fortunately, this narrow proposal was

evaporation, however, it is a *non sequitur* to conclude that a vintner who does not use barrel aging should also have the right to blend five percent, or indeed that any vintner should have the right to top the barrels with five percent of a *different* wine. The better vintners nearly always top their barrels with the same wine. Probably, this five percent cheating factor is at the outer limit of *de minimus* and would not justify judicial intervention. BATF, however, should raise the level to 99 or 100%.

331. See BATF explanation in proposed rules, 41 Fed. Reg. 50004 (November 12, 1976).

332. See text accompanying notes 36-40 *supra*.

333. See sections II(A) and (B) of this article *supra*.

334. See notes 31 and 328 *supra*.

335. 40 Fed. Reg. 30117 (July 17, 1975), 41 Fed. Reg. 8188 (February 25, 1976).

336. See note 18 *supra*.

337. 41 Fed. Reg. 50004 (November 12, 1976).

338. *Id.*

revised to make the relevant criteria "the geographical features (climate, soil, elevation, physical features, etc.) which distinguish the viticultural features of the proposed area from surrounding areas" ³³⁹ These criteria would be the basis of defining viticultural areas except individual vineyard sites (which, unfortunately could be automatically registered, regardless of minimum or maximum size) and areas already defined by county, state or national political boundaries. The criteria of climate, soil, elevation, etc. relate closely to grape growing conditions, and thus to wine character. They are consistent with, though not identical to, the internationally understood basis of classic "appellations of origin." Indeed, BATF proposed to call areas delimited on the basis of these criteria "controlled appellations." Individual named vineyards would also be called "controlled appellations." ³⁴⁰

These and related proposals were awaiting final adoption, modification or rejection as of this writing in the spring of 1978. The proposals mark an historic shift of American wine labeling toward the European appellation of origin system. Though they fall woefully short of minimal European requirements, and even short of honesty, ³⁴¹ they seem to accept the essential theory of the European administrative appellation of origin and may well develop further in that direction in the years ahead.

No further meaningful development can take place, however, unless the unrestrained use of geographical terms *other* than appellations of origin is brought to a halt. Present regulations neither define "appellation of origin" nor list the ones that have been approved. However, one regulation requires that an appellation of origin "appear in direct conjunction with and in lettering substantially as conspicuous as the class and type designation" if the type designation is a grape (*eg.* "French Colombard") or semi-generic name (*eg.* "Chablis") of geographical significance, or "if the label bears any statement, design, device or representation which indicates or infers an origin other than the true place of

339. 42 Fed. Reg. 30516, 30520 (June 15, 1977).

340. *See* text accompanying note 28 *supra* BATF may have attempted to "re-invent the wheel" rather than to simply utilize the years of experience and thought represented in the Lisbon Agreement, note 28 *supra*. An earlier BATF proposal to place a "BATF seal" on wines meeting certain criteria was a very crude version of the controlled appellation of origin idea. 41 Fed. Reg. 50004 (November 12, 1976). The "seal" proposal was dropped.

341. As proposed, the only thing "controlled" about a "controlled appellation" is not viticultural conditions, but relative degrees of dishonesty. Only 85% of the grapes in a non-vintage wine must originate in an appellation area which is a viticultural region, and 95% in an appellation which is an individual vineyard. The existing 95% origin requirement for vintage dated wines would remain unaffected. The result is a percentage game in which geographical indications on labels represent either 75%, 85% or 95% of the truth, and even those relative levels of truth would be discernable only by extraordinarily sophisticated consumers. The system appears to violate the FAA Act for the same reasons, stated earlier, that the 75% rule for origin of non-vintage wines violates the Act.

origin of the wine."³⁴²Incredibly, many wineries appear to construe this last clause as a license to make false representations of origin on front and back labels as long as the true appellation of origin is given "in direct conjunction" with the wine type. BATF may even have agreed with that construction in the past, for it approved hundreds of labels with "California" appellations in direct conjunction with the wine type, but with phrases elsewhere on the label indicating narrower geographical origins, such as "grown in Mountain Vineyards at Paicines, California,"³⁴³ or "this grape grows particularly well in the warm sunshine and gravelly soil of our vineyards in California's Livermore Valley."³⁴⁴

It is unlikely that the wines in the examples cited met the 75 percent (non-vintage) or 95 percent (vintage) origin requirements for any of the geographical sources represented except "California." Had they met the requirements for the narrower geographical areas mentioned, those areas rather than "California" probably would have been used as the appellation in direct conjunction with the wine type. The trade understanding appears to have been that other representations of origin could be made in disregard of the 75 percent and 95 percent requirements.

Now, BATF has finally proposed a rule prohibiting any representations that imply origins other than the true origin, and permitting "specific" geographical names to be used only if they are appellations of origin, brand, trade or corporate names.³⁴⁵ Even before this proposal, in apparent response to consumer criticism,³⁴⁶ BATF may have tightened up on the use of geographical terms, though it did so with no public notice.³⁴⁷

342. 27 C.F.R. § 4.34(b) (1976).

343. Almaden non-vintage "California Mountain Chenin Blanc." Almaden advertisements have expanded on this; *see, e.g.*, advertisement in app. G of Petition of Frederic Fisher, *supra* note 23: "For one thing, no other rose is born and raised in our Paicines mountain vineyards, near San Juan Bautista, where the Franciscan friars made their wine over 100 years ago. It's the cooling Pacific breeze that makes Paicines an ideal setting for growing the Grenache in California." These statements appeared in the mid-1970's. As of 1978, it appears Almaden labels have been revised to refer merely to "vineyards of northern California," and "North coast counties" vineyards.

344. Wentz Bros. 1972 California Dry Semillon. As of 1978, Wentz labels appear to have been revised to delete such phrases, though a reference to Livermore Valley remains as an indication of the place of the winery's founding.

345. 42 Fed. Reg. 30517 (June 15, 1977).

346. Testimony of Robert Benson, in the matter of proposed rules in 41 Fed. Reg. 8188 (February 25, 1976), San Francisco, Cal. (April 14, 1976).

347. In denying approval of a label which mentioned two growing areas as "primarily" the origin of the grapes, BATF said: "References to some growing areas without mentioning them all would be considered misleading to the consumer. In addition, if the growing areas are to be enumerated, each growing area mentioned must [have] contributed substantially equal portions to the volume of the wine." Record obtained under the Freedom of Information Act: BATF, Notice of Denial of Label Certificate Application Under the Federal Alcohol Administration Act (Form 1651), Ridge Vineyards 1975 Coast Range Zinfandel, January 21, 1977.

In addition to loose use of geographical representations on labels, wineries have long put geographical words into their corporate, trade and brand names. "The Monterey Vineyard," to select one example from among dozens, is a winery whose name implies a specific geographical origin of its wine, both because of the word "Monterey," and the word "Vineyard." Likewise, a non-vintage wine branded "Napa Rosé," made by Christian Brothers winery in the Napa Valley, implies prestigious geographical origin. If these wineries produce their wines from other origins, the consumer is misled. In the case of the "Napa Rosé," its maker has confessed that the wine does not meet the geographical origin standards for "Napa."³⁴⁸ The FTC had curbed these practices in the wine industry as long ago as 1935,³⁴⁹ and they would not exist today if the Commission had not deferred to the Treasury Department in the mistaken belief that Treasury would be better able to control the wine industry. In fact, BATF has long had a regulation prohibiting "any brand name, which, standing alone, or in association with other printed or geographic matter, creates any impression or inference as to the age, origin, identity, or other characteristics . . . unless the Director finds that [it] . . . conveys no erroneous impressions"³⁵⁰ At least as to inferences of origin, it seems BATF forgot about this regulation for decades. Now, BATF has proposed to stop creation of any new such corporate, trade or brand names; but it would permanently "grandfather" existing ones, with certain qualifying devices. To the extent the proposal permanently grandfathers deceptive terms, however, it constitutes yet another violation of the FAA Act.³⁵¹

The final problem with geographical terms on labels is the use of foreign geographical names, most of them quite famous appellations of origin for European wines. The regulations, calling these "semi-generic"

This winery, which has led the way in accurate, full disclosure of vineyard origin information on its labels, would have had no way to anticipate that its statement would be considered by BATF as misleading, especially in light of past BATF label approvals. Since this action was taken through denial of an individual label application, and not announced elsewhere, there is no way to know whether or not this is a new policy of general applicability. The revision of the Almaden labels, note 343 *supra* and Wente labels, note 344 *supra* may be a result of the same new policy, but there is no way to be certain without requesting various records of label denials under the Freedom of Information Act.

348. At least, this appears to be the reason Christian Brothers requested "grandfathering" of its best-selling Napa Rosé label. Testimony of Brother Timothy, in the matter of rules proposed in 41 Fed. Reg. 50004 (November 12, 1976), San Francisco, Cal. (February 8, 1977).

349. See text accompanying notes 230-31 *supra*

350. 27 C.F.R. § 4.33 (1976).

351. 42 Fed. Reg. 30517 (June 15, 1977). Corporate or trade names of geographical significance could be used if appearing on a label approved prior to November 12, 1976; brand names could be used if appearing on a label approved prior to the same date and if qualified by "brand," "TM," or "(R)." A private survey conducted in Chicago in 1977, however, showed that 60 to 90% of 50 wine shop customers were deceived by labels already conforming to these proposals. Testimony of Dr. Edward J. Wawszkiewicz, in the matter of proposed rules in 42 Fed. Reg. 30517 (June 15, 1977), San Francisco, Cal. (November 2, 1977).

names, freely permit use on American labels of the following European appellations: Burgundy, Chablis, Champagne, Chianti, Malaga, Marsala, Madeira, Moselle, Port, Rhine Wine, Sauterne, Haut Sauterne, Sherry and Tokay.³⁵² Whether some of these terms have become generic in America and thereby have lost their geographical significance and their secondary meaning referring to wines of European regions, is problematical. Some terms are probably deceptive to consumers, others certainly confusing, and use of any is surely an act of unfair competition *vis a vis* the European winemakers. Many better American winemakers in the 1970's are giving up the "semi-generic" names in favor of varietal names or simple descriptive terms like "Red Table Wine." American Vintners using the "semi-generic" terms in the years ahead risk having their wines perceived as cheap imitations.³⁵³ Moreover, American vintners have only recently begun seeking international markets for their wines. Europeans would be foolish not to demand that the United States prohibit the use of European appellations and join international treaties for the protection of geographical names, in exchange for dropping entry barriers to the European market and in exchange for protection of American wine names abroad.³⁵⁴

b) *Viticultural practices*: In great contrast to French and German wine regulations, there are no BATF regulations or viticultural practices. Wineries do make representations on labels and in advertising, however, about the quality of their viticultural practices. These representations, some of which are questionable,³⁵⁵ are apparently not often scrutinized by BATF.

352. 27 C.F.R. § 4.24(b)(2) (1976).

353. Compare the new Oregon law described in text accompanying notes 197-199 *supra*.

354. For a general discussion of these issues see Benson, *The Generic Problem* 62 A.B.A.J. 129 (1976). On "Champagne," see Lenzen, *supra* note 9. For a spirited defense of Americans' use of European wine names, see the positions taken by Joseph Heitz and Brother Timothy, in BENSON, GREAT WINEMAKERS OF CALIFORNIA 185-86, 221-22 (1977). On the international issues, see Benson, *Toward a New Treaty for Protection of Geographical Indications*, *supra* note 10.

355. See, e.g., a series of long advertisements by "Gallo Vineyards" detailing viticultural practices in "our vineyards." One ad talks of records maintained for 30 years on the results of fertilizing "down to problem areas only a few yards square and even individual vines." NEWSWEEK, November 21, 1977, at 8 special wine advertising wine section). Another states: "In the Gallo vineyards . . . we probably do more cultivating than normal simply because we prefer not to use herbicides when we can avoid them. That same policy applies to the use of insecticides. We prefer natural controls." The ad goes on to recount that "in one of our vineyards" Gallo planted wild blackberry bushes nearby to encourage wasp colonies which inhibit leaf hoppers. WINE WORLD, Jan./Feb. 1978, at 5. Assuming these statements to be true, the ad may be misleading because the massive Gallo winery, largest in the country, is said to obtain only a small portion of its grapes from its own vineyards. Many of the vineyards from which it buys grapes are not controlled the way Gallo says its own vineyards are. In addition, Gallo's claimed preference for "natural controls" instead of herbicides and insecticides should be publicly substantiated by facts showing natural controls to play a more significant role than chemical controls in Gallo vineyards.

One important viticultural practice unique to fine winemaking has recently caused BATF to develop a viticultural policy for the first time. The practice involves harvesting grapes at various stages of overripeness for the purpose of making unusual (normally dessert) wines. Beginning in the late 1960's, fine winemakers wanted to label these wines "late harvest," "essence," "Botrytis,"³⁵⁶ "Trockenbeerenauslese," "Auslese," "Spätlese," and so forth to describe the styles, and they applied for label approvals. There was no regulation affecting the use of such terms. For a few years, BATF approved labels carrying such terms, then around 1976 it began disapproving labels using any of the German words. A query to the Bureau elicited the response that "[f]ollowing enactment of the new German wine law . . . the Bureau determined administratively that the use of the German . . . names on domestic wines would cause consumer confusion and should rightly be reserved for German wines only. In addition, we recognized that our inspection procedures would not afford the controls necessary in the harvesting and selecting of grapes which, as you know, are the basis to the appropriate use of the names."³⁵⁷ Several months later, BATF proposed a regulation which would proscribe the same terms proscribed by this "administrative determination," and go beyond it by also banning any foreign terms denoting quality, such as "Grand Cru" or "Kabinett."³⁵⁸ At the same time, the Bureau issued an "ATF Ruling" approving the use of "Late Harvest" and synonymous terms only if the label also discloses the sugar content of the grapes at harvest and residual sugar in the wine; "Botrytis Infected" and its synonyms (even in foreign languages) may be used if sugar content is stated as for "Late Harvest" wines and if the Botrytis mold actually infected the grapes.³⁵⁹

This first viticultural policy of BATF may be an aberration. However, it may be the first building block of a fuller viticultural policy which will unfold in the future in response to the needs of vintners and consumers.

c) *Grape varieties*: Many American wines are sold under "varietal" names, that is, the name of the wine is the name of a grape variety. The four "noble" grape varieties—Cabernet Sauvignon, Pinot Noir, Chardonnay and White Riesling—as well as a few others, can make

356. See Benson, *Botrytis Cinerea: The Noble Rot*, *supra* note 80.

357. Letter to the writer from George F. Bonifant, Chief, Trade and Consumer Affairs Division, BATF, dated September 27, 1976. (Copy on file Loyola Law School Library).

358. 42 Fed. Reg. 30517 (June 15, 1977). No final action has been taken on the proposed rule as of this writing in the spring of 1978.

359. ATF Rul. 77-6, BATF Bulletin No. 1977-4, at 15 (April 1977). Note the obvious inconsistency in allowing foreign synonyms for Botrytis—"Pourriture Noble," "Edelfaule"—on American wines, but not permitting foreign synonyms for "Late Harvest," etc. on American wines. Any use of foreign terms on American wines falsely suggests a relationship to foreign quality standards, whether those standards are explicitly defined in foreign law or not. All foreign terms should be prohibited on our domestic labels.

exceptionally fine wine of distinctive character. Wines carrying those varietal names are generally the most expensive. Yet Treasury Department regulations for over four decades have permitted a wine to be named after a grape variety when as little as 51 percent derives from the variety named.³⁶⁰ It is understandably attractive to the industry to be able to hide 49 percent of a wine's grapes which cost as little as \$75 per ton, under a label naming only the prestigious grape costing \$500 per ton.³⁶¹ About half to two-thirds of California's grape crush every year consists of cheap table and raisin grapes known to make poor wine, none of which ever appears on varietal labels.³⁶²

The 51 percent rule is probably unsurpassed as an example of officially approved consumer fraud and unfair trade practice. Consumers are deceived as to economic value, quality and style characteristics when faced with two wines, both labeled, for example, "Chardonnay," both selling for the same price, yet one of which is truthfully labeled and the other of which is 51 percent Chardonnay blended with 49 percent bland Thompson Seedless table grapes. Moreover, the winery whose Chardonnay is truthfully labeled, containing 100 percent Chardonnay, suffers from the false label of its competitor.

Some wineries partially protect themselves from this unfair competition, and at the same time honestly inform consumers, by stating on the label the actual percentage of the varietal grape, and others blended with it, if any. But many wineries choose to exploit the 51 percent rule by implying the wine is made entirely from the varietal grape named when, in fact, it is not. Labels routinely include such phrases as "rare varietal wine . . . the perfect environment for low maturing of the shy bearing Pinot Noir grape . . . one of the great Pinot Noirs"³⁶³ or "elegant wine from the premier white wine grape of the world."³⁶⁴ Advertisements play on the prestige of certain varieties: ". . . America has only one true Riesling grape. Johannisberg Riesling. This magnificent thoroughbred . . . incomparable grape . . . quality that only one variety of white wine grape in a hundred is likely to possess . . . Only a

360. 27 C.F.R. § 4.23 (1976). The regulation also requires that the wine derive "its predominant taste, aroma and characteristics" from the variety named, but that part of the rule has never been enforced, nor could it be without official tastings. Even if it were enforced, the regulation would be deceptive because it allows labels to convey false impressions that only one variety is in the wine, or that wines with identical names and similar predominant characteristics will be otherwise similar in quality and economic value.

361. See note 203 *supra*

362. See ten year table of grape crush in California, *WINES & VINES*, May 1976, at 32. Even accounting for the portion of the crush that goes into brandy and non-varietally labeled wines, the amount of table and raisin grapes used for varietal wines is enormous.

363. Non-vintage Paul Masson Pinot Noir.

364. Non-vintage Weibel Pinot Chardonnay.

fine grape can produce a fine wine."³⁶⁵ Whether the wines from the examples cited contained 100 percent of the grape variety each claimed cannot be known for certain. But from a taste and quality evaluation, they do not seem to be made entirely from the purported varieties.

The 51 percent rule is a gross violation of the FAA Act. As a result of consumer pressure threatening a lawsuit,³⁶⁶ BATF finally dropped its traditional defense of the industry's position and proposed raising the required varietal level to 85 percent. This figure was chosen largely on the basis that 85 percent is the level required under European Economic Community rules.³⁶⁷ The industry, which for years had fiercely defended the 51 percent rule, now decided a better strategy would be to negotiate percentage levels. It countered with an offer of 75 percent, disingenuously claiming credit for the move to "stricter standards."³⁶⁸ The next BATF proposal accepted the 75 percent level, but added that the actual percentage of the principal variety must be indicated on the label.³⁶⁹ Neither the industry nor BATF bothered to measure the various proposals by the statutory test of § 205(e) of the FAA Act, *viz.*, whether the proposed rules would "prohibit deception of the consumer . . . and . . . give the consumer adequate information about the identity and quality of the product . . ." Had they done so, none of the proposals could pass the statutory test.³⁷⁰ Instead, both treated the percentage level as if it were a bargaining chip in contract negotiations, the industry calculating how much truth it could afford on labels, the government calculating the political risks of offending consumers or business in various degrees. Still pending in the spring of 1978, the final rule was likely

365. Advertisement for Almaden Johannisberg Riesling, Appendix C of Petition of Frederic Fisher, *supra* note 23.

366. Until the Fisher petition, *supra* note 23, cited the "all meat frankfurter" case, *Federation of Homemakers v. Butz*, 466 F.2d 404 (D.C. Cir. 1972), and threatened legal action over the 51% rule, BATF backed the industry's desire to keep the rule.

367. 42 Fed. Reg. 50004 (November 12, 1976). At the same time, BATF proposed closing a loophole which allows as little as 26% of a varietal wine to come from the varietal grape grown in the appellation of origin stated. See Benson, *Pinot Who?*, 62 A.B.A.J. 243 (1976). This proposal has been maintained in subsequent, revised proposals.

368. Wine Institute Press Release, February 8, 1977. The Institute failed to mention this was a lowering of BATF's 85%. Also, it did not call attention to its request that the geographical origin requirement for vintage wines be *lowered* from 95 to 75%. That proposal is buried in the Press Release, three pages after the statement that the "Institute recommended several additional higher standards." Unfortunately, this is characteristic of the trade association's public relations machine.

369. 42 Fed. Reg. 30517 (June 15, 1977).

370. The proposal to require 75% and a statement of the actual percentage of the grape is still misleading. The other 25% may be cheap table grapes or expensive wine grapes, one worsening and the other improving the blend. The consumer is still faced with two bottles side by side on the shelf, both identically labeled, for example, "Chardonnay 75 percent," yet quite different in value, quality and character. Even informed consumers, if not misled because they are alert to the subtleties of C.F.R., have no way to compare price value, quality or character. As to them, the rule violates § 205(e)(2) of the FAA Act, requiring such regulations "as will provide the consumer with adequate information as to the identity and quality."

to perpetuate government's blessing of significant consumer fraud. The only non-deceptive rule would be one requiring 100 percent of the wine to be made from the variety claimed as the wine's name. If the wine were blended, the rule would allow the varietal name to be used if that grape predominated, and if the other grapes blended appeared conspicuously on the label by name and percentage. Many wineries already so label their wines.³⁷¹

A further fact complicates American varietal labeling. The government has never developed an official list of grape names (ampelography) so that the same grape varieties can be known by the same names. The industry sometimes uses several names for one variety, and the same name for different varieties. This leads to consumer confusion, and to arbitrary treatment of winemakers. For example, BATF recently refused approval to a label giving the grape variety as "Sonoma Fumé," on the ground that "the actual name of this variety is "Fume," on the ground that "the actual name of this variety is "Fumé Blanc."³⁷² BATF apparently forgot it had approved Christian Brothers' "Napa Fumé"³⁷³ some years before. Also, the more proper name of the grape is actually Sauvignon Blanc.³⁷⁴

d) *Yield of grapes per acre*: Again in marked contrast with French and German rules, BATF regulations place no restrictions on the yield per acre that may be produced by a wine carrying an appellation of origin. American vintners privately complain of frequent "overcropping" and irrigation by competitors. Many boast of low yields in their advertising and on labels. Neither the complaints nor the boasts interest BATF. In light of the drastic effect on quality and character that results from "getting the vines to piss,"³⁷⁵ some regulation of yield is warranted. However, it would probably be a mistake to copy the European method of setting maximum yields and permitting variances in special circumstances. Maximums tend to become minimums, and variances tend to become standard procedures. It may be far wiser to set no maxi-

371. The industry's main line of defense of the 51% (now 75%) level, is the Leonardo's palette" position, that is, that the government should not dictate what blend the wine artist is to use in making a great wine. Assuming *arguendo* the view is put forth in good faith, it reveals an abysmal lack of familiarity with elementary logic. Though the premise that vintners should have total freedom to blend is true, the conclusion that they should therefore be able to deceptively represent their blends as non-blended varietals is a *non-sequitur*. Simple, truthful varietal labeling, disclosing all grapes blended, allows total artistic freedom and offers honesty as well.

372. Record obtained under Freedom of Information Act: Notice of Denial of Label Certificate Application Under the Federal Alcohol Administration Act, Foppiano Vineyards Sonoma Fumé, January 3, 1977.

373. An excellent wine, still sold as "Napa Fumé" at the time of Foppiano's denial.

374. Sauvignon Blanc was the variety in the Foppiano wine, as indicated elsewhere on the label. The Sauvignon Blanc grape may be the "Blanc Fumé" of Pouilly Fumé wines in France, though there is some dispute about that. See JOHNSON, THE WORLD ATLAS OF WINE 23 (1971).

375. See note 58 *supra*.

imum, but require label disclosure of yield, at least for wines claiming specific, narrow appellations of origin which lead consumers to expect wine of a certain character. A disclosure rule would allow maximum freedom of vineyard practices. It would entail no government involvement in viticultural judgments and it would allow consumers to compare values, quality and character of wines coming from vines that produce varying yields.

e) *Vintage dating*: A vintage dated wine must derive at least 95 percent of its volume "from grapes gathered in the same calendar year, grown in the same viticultural area, and fermented in the State in which this viticultural area is located."³⁷⁶ The rule is a good one, which could be improved by increasing the required percentage to 100.³⁷⁷ It applies to imported as well as domestic wines,³⁷⁸ though it has been disregarded with impunity by some importers.³⁷⁹ The Wine Institute has petitioned BATF to lower the requirement so that only 75 percent must derive from the same viticultural area; BATF has properly rejected the request.³⁸⁰

f) *Winemaking methods*: Regulation of production techniques focuses almost entirely on ensuring safe and commercially acceptable wine, to the exclusion of any concern for techniques affecting wine quality. This focus seems quite proper, for few want to entrust the government with judgments about quality techniques in winemaking. However, BATF has erected a "standard of identity" system which permits those techniques to be hidden so that consumers themselves are prevented from making judgments about them. The techniques can be hidden from the consumer even when they affect the consumer's pocket-book or health.

Standards of identity are established for nine classes of wine: grape, sparkling, carbonated, citrus, fruit, agricultural products, aperitif, imitation and retsina wine.³⁸¹ Each of these classes has its own standards for alcohol levels, acidity, ingredients and other characteristics. Cellar treatment is allowed in accordance with the wine excise tax statutes, which permit any treatment used in "customary commercial practice" unless restricted by regulation.³⁸² The statutes specifically authorize, among other things, the use of grape juice concentrate, use of acids, addition of "volatile fruit—flavor concentrate," routine use of water to reduce juice to 22 degrees on the Brix scale, and beyond that an astonishing stretch-

376. 27 C.F.R. § 4.10(h) (1976).

377. See note 300 *supra*.

378. 27 C.F.R. § 4.39(b) (1976).

379. See note 79 *supra*.

380. See note 331 *supra* and accompanying text.

381. 27 C.F.R. §§ 4.20-4.22 (1976).

382. 26 U.S.C. § 5382(a) (1970).

ing of wine volume by up to 35 percent with addition of water, sugar, or both.³⁸³ Regulations implementing the statutory provisions are liberal in permitting commercial practices.³⁸⁴ Materials authorized for treatment of wine are numerous; all are either on the Food and Drug Administration's "Generally Recognized As Safe" list, otherwise subject to FDA restrictions on use, or individually approved by BATF.³⁸⁵

Thus, while wine is commonly perceived as a "natural" product,³⁸⁶ and wine advertising heavily emphasizes nature,³⁸⁷ much wine contains preservatives and is made from sugar and water, concentrate, volatile fruit flavorings, oak chips, and other ingredients in addition to grapes. Use of such ingredients affects a wine's economic value, quality and character, and may affect certain consumer's health. Yet because BATF has opted for a standard of identity system, in which only a wine's class or type need be designated on the label,³⁸⁸ none of the ingredients is ever disclosed to consumers.

By using the standard of identity system BATF is clinging to a concept of the 1930's. The system has been discredited in recent years. The FDA has abandoned it to the extent its legal authority permits, in favor

383. *Id.* §§ 5382(b), 5383. These sections apply to "natural" wines; analogous provisions apply to fruit and other special wines. §§ 5384-5386.

384. 27 C.F.R. §§ 240.350-240.550 (1976).

385. 27 C.F.R. §§ 240.1051-240.1052 (1976). Since other materials may be approved, the following list is not exclusive, but these materials are automatically approved, subject to FDA and BATF limitations (27 C.F.R. § 240.1051 (1976)): Acetic acid, Actiferm (Roviferm), Activated carbon, Afferin, AMA special gelatine solution, Antifoam "A", Antifoam Af emulsion, Antifoam C, Ascorbic acid, Isoascorbic acid (Erythorbic acid), Atmos 300, Bentonite (Wyoming Clay), Bentonite compound (Bentonite, activated carbon, copper sulfate), Bentonite slurry, Bone charcoal, Calcium carbonate, Calcium sulphate (Gypsum), Carbon, Carbon dioxide (CO₂), Casein, Citric acid, Combustion product gas, Compressed air, Copper sulfate, Cufex, Defoaming agents (polyoxyethylene-40-monostearate and silicon dioxide) (sorbic acid, carboxy methyl cellulose, dimethyl polysiloxane, polyoxyethylene (40) monostearate, and sorbitan monostearate), Eggs (albumen or yolks), Freon C-318 (octafluorocyclobutane), Fulgur (aluminum silicate and albumin), Fumaric acid, Gelatin, Granular cork, Gum arabic, Gypsum, Hydrogen peroxide, Ion exchange resins, Isinglass, Lactic acid, Malic acid, Mineral oil, Nitrogen gas, Oak chips (charred), Oak chips (uncharred and untreated), Oak chip sawdust (uncharred and untreated), Oxygen, Pectolytic enzymes, Phosphates, Polyvinylpyrrolidone (PVPP), Polyvinylpyrrolidone (PVP), Potassium metabisulphite, Potassium salt of sorbic acid, Promine-D, Protovac PV-7916, Roviferm, Sodium bisulfite, Sodium carbonate, Sodium caseinate, Sodium metabisulphite, Sodium salt of sorbic acid, Sorbic acid, Sparkaloid No. 1, Sparkaloid No. 2, Sulphur dioxide, Sulphuric acid, Takamine cellulase 4,000, Tannin, Tansul clays Nos. 7, 710, and 711, Tartaric acid, Uni-Loid Type 43B (pure U.S.P. agar agar and standard supercel), Urea, Ventol (maltol), Wine clarifier (containing pure U.S.P. agar agar and standard supercel), Wine clarifier (Clari-Vine B) (containing locust bean gum, carrageen, alginate, bentonite, agar agar, and diatomaceous earth), Yeastex, and Yeastex 61.

386. "[T]he New York Times says wine and wine drinks are on a par with spirits in popularity. It says it's because of dieting, a desire to be chic, to avoid a hangover, and—among organic-food freaks—because wine is considered to be 'natural.'" WINES & VINES, April 1975, at 16.

387. See, e.g., Taylor Wine Co. advertisement, NEWSWEEK, November 21, 1977, at 4-5 (a special wine advertising section).

388. 27 C.F.R. § 4.34(a) (1976). Rev. Rul. 60-369, I.R.S. Cum. Bul. 1960-2.

of label disclosure systems.³⁸⁹ As recounted earlier,³⁹⁰ the FDA attempted to require ingredient labeling of all alcoholic beverages in 1975, but it was judicially, then politically blocked; the Office of Management and Budget has directed BATF to propose some kind of ingredient labeling rules, but the agency has been slow in acting.

g) *Representations of who produced the wine.* A label may state "produced by X winery," when X winery only produced 75 percent of the wine.³⁹¹ A label may state the wine was "made by X winery" when X winery made none of it, and may have only "treated" the wine by doing something as insignificant as filtering it or storing it.³⁹² The phrases "perfected by," "selected by," and other similar phrases have no definition in law, and may or may not have their customary English meanings when used on wine labels.

These rules permit mere distributors to masquerade as producers, and real producers to blend up to 25 percent of someone else's wine into their own without informing the consumer. As every winemaker is fond of pointing out, the winery name is the single most important indicator of wine value, quality and character on the label; but that is only true if the named winery really made the wine.

Compounding the masquerade, some wineries use various trade names for their products; their several different labels give the appearance of products from several different wineries. Although "the true identity . . . of companies authorized to use trade names is available" from BATF under the Freedom of Information Act,³⁹³ consumers should obviously have the information at the point of purchase, on the label itself, and not be forced to request government documents to discover whose wine they are about to drink. Aside from transgressing the consumer deception strictures of the FAA Act, these BATF rules also fail to give as much protection as either the FDA³⁹⁴ or the FTC³⁹⁵ would demand.

389. 21 C.F.R. §§ 101.4, 101.6, 102.5 (1976).

390. See text accompanying notes 255-277 *supra*.

391. 27 C.F.R. § 4.35(a)(1) (1976).

392. *Id.* § 4.35(a)(2). The statement repeated by many wine writers that "made by" means the winery made at least 10%, has no basis in public law. Since it is so often repeated, one wonders if it has some basis in secret law of BATF and, if so, why such an absurd rule would ever have been issued. The statement in the text that "treatment" may mean as little as filtering or storing is conjecture. There is no public law on what "treatment" means.

393. 27 C.F.R. § 71.26(e), *as amended in* 43 Fed. Reg. 10694 (March 15, 1978).

394. 21 C.F.R. § 101.5 (1977). This FDA rule, however, also fails to require the manufacturer always to be stated, which, though not so important for a can of peas, is crucial information for a wine.

395. 16 C.F.R. §§ 500.5, 503.3 (1977). The same limitation noted with respect to the FDA rule, *id.*, applies to these otherwise excellent FTC rules. While these regulations were issued under the Fair Packaging and Labeling Act, which does not cover wine, there is no reason to suppose the FTC would require any less under the FTC Act itself.

Apparently persuaded of these inadequacies, the Bureau has proposed changes in its regulations, though the proposals are themselves also inadequate to simply inform consumers who made which wine.³⁹⁶

h) *Miscellaneous representations of quality and safety.* BATF has issued less than a dozen regulations defining specific label representations that would violate the FAA Act. These relate to statements that a wine is "fortified" or not,³⁹⁷ coined names simulating wine types,³⁹⁸ names simulating cocktails,³⁹⁹ vintage years,⁴⁰⁰ references to aging processes,⁴⁰¹ bottling dates,⁴⁰² use of the word "old,"⁴⁰³ other dates,⁴⁰⁴ simulations of government stamps,⁴⁰⁵ the word "importer,"⁴⁰⁶ and curative or therapeutic effects of wine.⁴⁰⁷ Another series of regulatory provisions merely tracks § 205(e) of the FAA Act by prohibiting "[a]ny statement that is false or untrue," "[a]ny statement . . . that the Director finds to be likely to mislead the consumer," etc. without making the statutory language any more specific than as written by the Congress.⁴⁰⁸

Many celebrated phrases that commonly adorn wine labels, such as "estate bottled," "mountain," and "premium," are not defined in the regulations. BATF has permitted their use with absolutely no regard for their implications to consumers, or even for their truth or falsity. Because of consumer outcry when BATF tried to expand the notion of "estate" to any vineyard controlled by a winery located in the same state,⁴⁰⁹ BATF reversed itself and proposed abolition of the term altogether.⁴¹⁰ The industry and some others, however, have urged retention of the term under tightened standards for its use. Other words purporting to denote distinctive portions of a winery's production, such as "private reserve," "special cask," etc., appear to be increasingly used in the wake of the bad publicity given to "estate bottled;" it appears these terms are completely uncontrolled by BATF.

396. 42 Fed. Reg. 30517 (June 15, 1977). The proposals would bring the 75% rule for use of "produced by" up to 95%. They would eliminate "made by," but substitute other confusing terms. They would also require the registry number of the bottler to appear on the label so as to "disclose the true name of the bottler." This Orwellian idea seems to miss the point about adequate identity of the producer.

397. 27 C.F.R. § 4.39(a)(7) (1976).

398. *Id.* § 4.39(a)(8).

399. *Id.* § 4.39(a)(a).

400. *Id.* § 4.39(b)(1)-(3).

401. *Id.* § 4.39(b)(4).

402. *Id.* § 4.39(c).

403. *Id.* § 4.39(d).

404. *Id.* § 4.39(e).

405. *Id.* § 4.39(f).

406. *Id.* § 4.39(g).

407. *Id.* § 4.39(i).

408. *Id.* § 4.39(a)(1)-(6).

409. 42 Fed. Reg. 50004 (November 12, 1976).

410. 42 Fed. Reg. 30517 (June 15, 1977).

Although no wine label may falsely represent the wine has curative or therapeutic powers,⁴¹¹ and none do, a question arose in late 1977 for the first time with respect to the need for a positive label warning of health risks from consumption of wine and other alcoholic beverages. The FDA Commissioner asked BATF to require labels warning pregnant women of "fetal alcohol syndrome" which may cause physical and mental abnormalities in their babies.⁴¹² BATF responded by issuing an advance notice of proposed rulemaking inviting public comment on the idea of a warning label.⁴¹³ The medical evidence cited in the notice appears to compel the conclusion that the risk to the fetus is very great, even in non-alcoholic mothers, though the effects of very moderate alcohol consumption are not known. Further action by BATF is expected.

Recently, the Wine Institute adopted a voluntary "Code of Advertising Standards" which places restrictions on various advertising themes about which BATF has been silent. The Code generally discourages promotion of wine through emphasis on intoxication or social status, and disapproves of directing advertising to young people, and of exploitation of "the human form."⁴¹⁴ The code is clearly desirable. The drawback of such voluntary codes, however, is that they are often puffed up by industry as "proof" that self-regulation is strict, when in fact, as with this one, they are limited in scope and cannot take the place of any government regulation.

3) Administrative Procedures:

a) *Adjudication*: The FAA Act establishes classic adjudicatory hearing procedures for refusal, revocation, suspension or annulment of the "basic permit" which every wine producer must possess. After a hearing, appeal may be taken from an order of the Secretary of the Treasury directly to the United States Court of Appeals.⁴¹⁵ The most important thing about this procedure is its unimportance. The index of Treasury Department suspensions or annulments (apparently no revocations) of basic permits under the FAA Act, lists only 17 such actions that have ever been taken⁴¹⁶ out of several hundred wineries and many

411. 27 C.F.R. § 39(i) (1976).

412. FOOD DRUG. COS. L. REP. (CCH) ¶ 42,117.

413. 43 Fed. Reg. 2186 (January 16, 1978).

414. Wine Institute Press Release, April 7, 1978. These are the general themes. There are three pages of specific guidelines.

415. 27 U.S.C. § 203-204 (1970). The Administrative Procedure Act later added detail to such procedures. 5 U.S.C. §§ 554, 558 (1970).

416. BATF, Index of Materials Required by the Freedom of Information Act, ATF P 1200.3, revised March 1978, at 4. Only one winery appears on the list, Rex Wine Co. *See* Rex Wine Co. v. Dugan, 224 F.2d 93 (2d Cir. 1955). At least one other is known to have been involved in such proceedings, however; its absence from the list is unexplained. Sunny Valley Winery v. Berkshire, 159 F.2d 637 (2d Cir. 1947). *See also* Roumanian Am. Winery v. Morganthau, 152 F.2d 452 (2d Cir. 1945).

thousands of distillers, distributors, importers and wholesalers which hold these permits. Though the list of 17 actions is somewhat incomplete,⁴¹⁷ even if it were multiplied many times the statistics would still show the insignificance of the permit suspension procedure as an enforcement tool. Certainly the procedure must remain available to be used when needed, but it is obvious that BATF prefers other enforcement mechanisms to this one.

One of those other mechanisms, of somewhat greater importance, is BATF's informal settlement of charges against permittees without going to a hearing. The Bureau accepts "offers in compromise" as it is authorized to do under the FAA Act,⁴¹⁸ and compelled to do under the Administrative Procedure Act.⁴¹⁹ Informal settlement is a salutary practice because of its speed and economy. Its dangers are that it is often secretive and evidence of statutory violations is not fully aired for public consideration. The attendant lack of publicity creates a potential for abuse of governmental power. Those officials settling for the government may treat some alleged offenders harshly and others lightly. Or, they may treat nearly all lightly, secure in the knowledge that there will be little public complaint because of the low visibility of the procedure. An examination⁴²⁰ of BATF abstracts of offers in compromise accepted from wineries leads to the conclusion that this latter course is the one taken by BATF: the agency has treated most winery violators lightly.

First, in the nearly 10 year period examined,⁴²¹ only 65 offers in compromise involving wineries were negotiated. Thus, of approximately 400 wineries,⁴²² only seven of them each year, on the average, were involved in accusations of serious violations. This fact is consistent with one of three hypotheses: that there were few serious violations to discover; that more serious violations were discovered but were settled by verbal warnings of inspectors; or that BATF field inspections were not adequate to discover many serious violations.⁴²³

Most of the offers in compromise alleged record-keeping and excise

417. A BATF note dated March 23, 1978, attached to the list and directed to the writer, indicated the pages in question do not yet include "newer listings," presumably those of the last few years.

418. 27 U.S.C. § 207 (1970). See also 27 C.F.R. §§ 200.35-200.138 (1976), on informal settlement.

419. 5 U.S.C. §§ 554(c), 558(c) (1976).

420. BATF possesses no complete records dated earlier than 1965. The records from 1965 to July, 1975 were examined.

421. See note 420 *supra*.

422. There were 438 permits issued to wine producers and blenders as of June 30, 1974, though some producers may hold more than one permit. BATF, Alcohol, Tobacco & Firearms Summary Statistics, ATF. P. 1323.1, April 1975, at 3.

423. In 1974, BATF conducted 1,076 field inspections relating to "trade practices and consumer protection," but these included firearms and explosives, distilled spirits, and others, in addition to winery inspections. BATF, 1974 Annual Report, ATF. P. 1200.2, January 1975, at 18.

tax violations; some alleged significant consumer fraud.⁴²⁴ The monetary offers accepted appear to be small, except in one instance. For example, C. Mondavi & Sons paid \$1,000 for alleged misleading advertising,⁴²⁵ Bisceglia Bros. Wine Co. paid \$5,000 for alleged repeated record-keeping violations, use of excess water, and other charges,⁴²⁶ Bargetto's Santa Cruz Winery paid \$5,000 for alleged false labeling of varietal content, vintage dates, using an unauthorized chemical, and other charges.⁴²⁷ On the other hand, Almaden Vineyards paid \$250,000 in 1973 in response to charges that it had put varietal labels on 28,000 gallons of wine containing less than 51 percent of the varietal grape.⁴²⁸ In contrast, the huge California Growers Winery—charged a few years later with watering over four million gallons of wine, false labeling, use of an unapproved additive, deliberate and fraudulent destruction of records, and other offenses—did not pay a penny. Instead, its permit

424. The list, provided by BATF under the Freedom of Information Act, is in apparent chronological order, starting in 1965: International Wine Company, Kenilworth, New Jersey; Franzia Brothers Winery, Ripon California; Regina Grape Products Company, Etiwanda, California; Tinner Brothers, Inc., Patrick, South Carolina; C. Mondavi & Sons, St. Helena, California; John Bardinheur's Wine Cellar, St. Louis, Missouri; Monarch Wine Company, Atlanta, Georgia; Stone Hill Wine Company, Hermann, Missouri; Jim Dandy Wine Company, Montgomery, Alabama; Cucamonga Winery, Cucamonga, California; Pacific Wine Company, Chicago, Illinois; Cohodas Vineyards, Inc., Giniva, Ohio; Cucamonga Vineyards, Inc., Cucamonga, California; Mont La Salle Vineyards, Reedley, California; Tiburon Vintners Company, Tiburon, California; J.E. Digardi Winery, Modesto, California; E. & J. Gallo Winery, Modesto, California; San Martin Vineyard Company, San Martin, California; Monterey Wine Company, Inc., New York, New York; Monterey Wine Company, Inc., New York, New York; Italian Swiss Colony, Clovis, California; John Christ, Avon Lake, Ohio; Beaulieu Vineyard, Rutherford, California; Seghesio Wineries, Inc., Healdsburg, California; Mogen David Wine Corp., Chicago, Illinois; Galleano Winery, Inc., Mira Loma, California; Romano Winery, Cucamonga, California; Thompson Winery, Monnee, Illinois; Fredonia Products Co., Inc., Fredonia, New York; Delano Grower's Cooperative Winery, Delano, California; San Martin Vineyards, San Martin, California; Cucamonga Vineyards, Cucamonga, California; California Wine Association, Burlingame, California; Mogen David Wine Corp., Chicago, Illinois; Mogen David Wine Corp., Westfield, New York; Pedrizzetti Winery, Morgan Hill, California; The Brotherhood Corporation, Washingtonville, New York; Cucamonga Vintners, Cucamonga, California; Mogen David Wine Corp., Westfield, New York; Widmer's Wine Cellars, Inc., Naples, New York; Monarch Wine Company, Brooklyn, New York; Nave Pierson Winery, Los Angeles, California; The Brotherhood Corporation, Washingtonville, New York; Niagara Falls Wine Cellar Inc., Lewiston, New York; Gibson Wine Company, Elk Grove, California; Almaden Vineyards, Inc., San Francisco, California; Frei Brothers, Healdsburg, California; Bear Mountain Winery, La Monte, California; Villa Armando Winery, Pleasanton, California; Fredonia Product Co., Inc., Dunkirk, New York; Bronte Champagne and Wines, Co., Inc., Hartford, Michigan; Villa D'Ingianni, Dundee, New York; Vie-Del Co., Fresno and Kingsburg, California; Sebastiani Vineyards, Inc., Sonoma, California; Warner Wineyards, Inc., Detroit, Michigan; Dixie Wine Co., Richmond, Virginia; Bargetto's Santa Cruz Winery, Soquel, California; Canandaigua Wine Co., Canandaigua, New York; Pedrizzetti Winery, Morgan Hill, California; Penn Yan Wine Cellar, Penn Yan, New York; Bisceglia Bros., Madera, California.

425. The abstract, dated May 19, 1967, states the winery misleadingly alluded to alcoholic strength and the winning of prizes in advertisements.

426. Abstract dated May 29, 1974.

427. Abstract dated January 30, 1974.

428. Abstract dated August 14, 1973.

was merely suspended for two weeks.⁴²⁹

Another odd case is that of E. & J. Gallo winery. In 1968 it paid only \$12,500 in compromise of liability for allegedly reimbursing a Chicago distributor some \$834,284 which the distributor allegedly used to pay retailers to promote Gallo products. The abstract of the offer noted three prior Gallo offers in compromise: \$200 in 1962 for alleged violation of the advertising section of the FAA Act, \$25,000 in 1964 for alleged mislabeling of wines, and \$50,000 in 1964 for allegedly adding spirits to ineligible wine and conducting cellar treatment "in a manner other than contemplated by law."⁴³⁰ Yet, in 1978, after firm prodding by the Securities and Exchange Commission, BATF fined Anheuser-Busch brewery \$750,000 under the same law for allegedly making about \$500,000 in cash rebates and other payments to retailers between 1971 and 1975.⁴³¹

These startling discrepancies of treatment, and the overall lenient penalties, are probably symptoms that the informal settlement process has gone badly awry. A good antidote is to open the process up to public scrutiny. The FTC does just this, by publishing its proposed consent orders in the Federal Register for public comment for 60 days.⁴³²

BATF does just the opposite: it makes it difficult to learn about the offers. Despite statements in 1976 that it would issue press releases as an enforcement tool when accepting offers in compromise,⁴³³ such press releases are rare. Despite the fact that the Bureau developed a mailing list of interested consumers in 1976, no news about offers in compromise is released through that channel, nor apparently is any such news directed to trade or consumer magazines. BATF does publish short summaries of offers in compromise in the BATF monthly Bulletin. The Bulletin goes only to subscribers and its news is normally two or more months old when issues are received. Until 1976, the publications in the Bulletin automatically deleted the identities of the offenders involved in the offers,⁴³⁴ despite the fact that since 1967 the Freedom of Information Act has made offer in compromise records available to any person upon request; the Information Act permits deletion of identifying de-

429. A stipulation, rather than an "offer in compromise," was made in which the charges were "conceded, admitted and considered as proved. . . ." *Is California Wine Case A Sign of New Ferment?*, Los Angeles Times, *supra* note 4.

430. Abstract dated April 2, 1968. Under "Recommendation of Assistant Regional Commissioner," it states, in part: "It is felt that acceptance of the offer would be more effective in ensuring future compliance with the requirements of the FAA Act than would action to suspend or revoke the basic permits."

431. *Anheuser-Busch Fined for Making Payoffs*, Los Angeles Times, April 1, 1978, § 1, at 7, col. 1.

432. 16 C.F.R. § 2.34 (43 Fed. Reg. 3089 (January 23, 1978)).

433. *Is California Wine Case A Sign of New Ferment?* Los Angeles Times, *supra* note 4.

434. BATF Announcement 77-6 (not currently indexed and not currently published by the Bureau) marked a change in this policy.

tails only if individually justified in writing as necessary to prevent an unwarranted invasion of personal privacy.⁴³⁵ Currently, the summaries of offers in compromise do appear in the Bulletin with identifying details. The monthly issues of the Bulletin must be retained by subscribers wishing to have a record of these settlements, for the summaries are deleted from the annual "cumulative" BATF Bulletin and do not appear in the annual index. If past monthly issues are not available to a winemaker or a consumer interested in comparing past Bureau actions as a guide to agency precedents, their only recourse is to request copies of the records from the agency. BATF regulations implementing the Freedom of Information Act state that the abstract and statement of offers in compromise "shall be kept available for a period of 1 year from the date of acceptance," in the regional offices where the offer was accepted.⁴³⁶ This implies that the records are not publicly available after that time, but the implication is not true. The problem, however, is to know which offers in compromise to request. In flagrant violation of the Freedom of Information Act, the Bureau does not publish an index of its offers in compromise to facilitate access to the desired records.⁴³⁷

Another mechanism preferred by BATF for enforcement, and for development of policy, is the label approval system. In fact, this is the agency's principal administrative technique, yet it is shrouded in secrecy.

Subsection 205(e) of the FAA Act established the system of prior approval of alcoholic beverage labels "[i]n order to prevent the sale or shipment or other introduction of [alcoholic beverages] in interstate or foreign commerce if bottled, packaged, or labeled in violation of the requirements of this subsection" The federal district courts are given jurisdiction to enjoin any final action by the agency on applications for label approval.⁴³⁸

In consequence, BATF devotes considerable resources to the inspection of labels submitted for approval. In one recent year, it acted upon 57,290 label applications; 35,110 were wine labels, 1,056 of which were

435. 5 U.S.C. § 552(a)(2) (1976). That section requires each agency to make available its "orders, made in the adjudication of cases." Section 551(6) defines "order" as "the whole or part of a final disposition . . . of an agency in a matter other than rulemaking but including licensing." There is no question that BATF's offers in compromise are final dispositions.

436. 27 C.F.R. § 71.26 (43 Fed. Reg. 10694 (March 15, 1978)).

437. 5 U.S.C. § 552(a)(2) not only requires these "orders" to be made public as shown in note 435 *supra*, but also requires them to be indexed and the indexes to be published or otherwise made available. See *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 158-159 (1975), *DAVIS, ADMINISTRATIVE LAW TREATISE* §§ 3A.8-3A.9 (1970 Supp.).

438. 27 U.S.C. § 205(e) (1970). The subsection also contemplates applications for exemption from the agency upon a showing that the products are to be introduced only in intrastate commerce.

disapproved.⁴³⁹ So, in a year when probably no winery permits were suspended,⁴⁴⁰ when only seven offers in compromise may have been accepted from wineries,⁴⁴¹ and when perhaps less than 100 winery inspections were made,⁴⁴² the Bureau examined many thousands of wine labels. Clearly, this is BATF's most important procedure.

It is a strange procedure, with the flavor of a primitive era in administrative law. Unlike the suspension of a winery's permit under the Act,⁴⁴³ unlike the suppression of misbranding under the Federal Food, Drug, Cosmetic Act,⁴⁴⁴ and unlike the entry of cease and desist orders against deceptive labeling under the Federal Trade Commission Act,⁴⁴⁵ there is no provision for an evidentiary hearing when a label is disapproved, either at the agency level or in court.

The only time the procedure has been closely examined by the judiciary was in 1965 in *Joseph Seagram & Sons v. Dillon*.⁴⁴⁶ The court noted the label approval process is within the Administrative Procedure Act's (APA) definition of "licensing," and therefore issuance or denial of a certificate of label approval is an "order," and formulation of an "order" under the APA is "adjudication." However, the court observed, the FAA Act does not require this adjudication to be determined on the record of an evidentiary hearing.⁴⁴⁷ Seagram, whose label application had been denied, applied to the district court to compel approval and proffered evidence to support its claim that its label did not violate the Act. The district court rejected the evidence and dismissed Seagram's complaint. The court of appeals affirmed that action on the ground that administrative remedies had not been exhausted by presentation of Seagram's evidence to the agency. Surprisingly, it so held despite its recognition that "[n]either the statute nor the Regulations expressly provide for a hearing . . . so Seagram had no established procedural remedy available in the agency."⁴⁴⁸ The court therefore found it "must fashion procedural steps to meet the requirements of justice and basic principles." So it grafted onto the agency's procedures a right to proffer "evidence material to an issue posed by an application for a label, such proffer being with the original application or with a petition for reconsideration . . ." Then it authorized a *de novo* hearing in court: "Of

439. BATF, Alcohol, Tobacco & Firearms Summary Statistics, ATF. P. 1323.1, April 1975, at 69. Figures are for fiscal year 1974.

440. See text accompanying notes 416-417 *supra*.

441. See text accompanying notes 421-422 *supra*.

442. See note 423 *supra*.

443. See note 415 and accompanying text *supra*.

444. 21 U.S.C. § 332-334 (1976).

445. 15 U.S.C. § 45(b) (1976).

446. See note 310 *supra*.

447. *Id.*

448. *Id.*

course a bare proffer, without more, would not produce what is normally called a 'record.' But such a proffer would supply the basic need of the Secretary to know what is being alleged, and an ensuing civil action in court—a so-called '*de novo*' proceeding—would furnish opportunity for proof or disproof of the factual allegations and meet the requirements for a fair and just disposition of the claims and counter-claims."⁴⁴⁹

Whether *Seagram* is still the law, in light of *Camp v. Pitts*⁴⁵⁰ is debatable, but the question is academic. How many alcoholic beverage producers will spend several thousand dollars litigating their right to use any particular label? The fact that only a handful of cases have ever been brought⁴⁵¹ answers that question. If the burden were on the agency to initiate some evidentiary proceeding against the winery to prove the label violates the Act before the label can be suppressed, as it is in FDA and FTC cases, the winemakers would at least be in a fairer negotiating position. As it is now, the agency has all the chips⁴⁵² and can coerce a vintner to abandon any label, even if the vintner feels strongly that it is not in violation of the Act and even if BATF's reasons for denial are arbitrary, weak, or unstated. It is simply too expensive to challenge the agency in court, and the agency has no incentive to negotiate with the vintner for its objective has been fully achieved once it has denied label approval.

This procedural unfairness, however, is not even the greatest evil of the label approval system. Far more pernicious is the Bureau's use of the process to formulate substantive policy of general applicability. A few examples will make the point. When a winery submitted a back label for approval with the phrase "predominantly Sauvignon Blanc, with Semillon playing a lesser role," BATF wrote back: "Not less than 51% of the volume of the wine must be derived from Sauvignon Blanc grapes and not less than 40% of the wine must be derived from Semillon grapes."⁴⁵³ The 40 percent requirement was brand new law, completely unfounded in any regulations. Several weeks later the Bureau rescinded its 40 percent requirement in another letter to the winery,⁴⁵⁴ but in the meantime the winery had deleted any reference to Semillon from the

449. *Id.* [citations omitted].

450. 411 U.S. 138 (1972). The Comptroller's certificates to organize new national banks, which seem analogous to BATF's label certificates, were held deniable upon a sparse administrative record, and *de novo* hearings in court were held improper.

451. *See supra* note 310.

452. Observe that the text carefully avoids punning "the agency has the winemaker over a barrel."

453. Records obtained under the Freedom of Information Act: correspondence between the Monterey Vineyard, Inc. and Alan B. Graham, Chief, Commodity Classification Branch, BATF, dated September 14 and 29, 1976.

454. *Id.*, letter of November 4, 1976.

label and it was sold without this information which would have been of considerable interest to some consumers. Another new policy of the Bureau is that if growing areas are enumerated on labels, "each growing area must [have] contributed substantially equal portions to the volume of the wine."⁴⁵⁵ A better policy would be to permit the percentage of each area's contribution to be stated on the label, but neither consumers nor winemakers could comment on the policy before made because it emerged only in individual label approvals. When the Bureau decided to prohibit German words designating grape conditions at harvest (Auslese, Spätlese, etc.)⁴⁵⁶ after allowing them for a few years, it began to deny label approvals. The word spread among vintners that the terms were no longer allowed, but no one knew why, and no one knew whether the prohibition extended to all German words, all foreign words, or other words. Consumer telephone queries to regional and headquarters offices of the Bureau turned up not a single person who knew a thing about it. It was secret law, even at BATF! A letter to the agency finally elicited a response, after a long delay, that the German words had been prohibited "administratively."⁴⁵⁷

The problem of using label approvals to make policy extends beyond formulation of new policy. It includes the destruction of established policy, even when fixed by regulation.⁴⁵⁸ And it includes arbitrariness and denial of equal protection when the Bureau approves one winery's label but denies another's though they are materially the same. Recall the denial of a "Sonoma Fumé" label though a "Napa Fumé" label had long been approved.⁴⁵⁹

As operated by BATF, the label approval system is in open violation of the FAA Act, the Administrative Procedure Act and the Freedom of Information Act. Section 205(e) of the FAA Act *directs* the Secretary of the Treasury to prescribe "*regulations*" to "prohibit deception of the consumer" etc. Congress did not give the Secretary any power to define consumer deception on a case by case basis, as the FDA and FTC possessed; this explains the lack of an evidentiary hearing requirement in the label approval process. Label approvals were clearly intended merely as inspections "in order to prevent the sale or shipment or other introduction of [alcoholic beverages] in interstate or foreign commerce if . . . labeled in violation of the requirements of this subsection," that is, subsection 205(e) under which *regulations* were required to be prescribed.

455. See *supra* note 347.

456. See notes 356-359 and accompanying text *supra*.

457. See note 357 *supra*.

458. For example, the use of trade names falsely inferring geographical origins was prohibited by regulations, but approved in practice. See text accompanying note 350 *supra*.

459. See notes 372-373 and accompanying text *supra*.

BATF's chief counsel attempts to defend the agency's making of rules through label approvals by grounding the approvals in those regulations which merely reiterate the statutory language, such as the prohibition on any statements "the Secretary finds to be likely to mislead the consumer."⁴⁶⁰ The chief counsel states: "This prohibition is necessarily broad, because it would be virtually impossible for this agency to promulgate regulations which could cover every item of information which may be proposed for use on a wine label."⁴⁶¹ The statement amounts to a confession that the agency is violating the law. Because it would have been virtually impossible for Congress to define all the label practices likely to mislead, it gave the job to an agency and directed the agency to fill in the definition of misleading practices by regulation, not through case by case adjudication. Now the agency confesses it finds the job "virtually impossible," and fails to do it. The agency has issued less than a dozen labeling regulations defining misleading statements⁴⁶² and accomplishes all else with unfettered discretion in *ad hoc* label approvals. The "necessarily broad" regulation cited by the chief counsel is no regulation at all. It is a partial reiteration of the statute. But the statute says that "regulations" are "to be prescribed (1) as will prohibit . . . such statements . . . as the Secretary of the Treasury finds to be likely to mislead the consumer." It does not say that the Secretary may prohibit such statements as he finds likely to mislead on a case by case basis.

The last sentence of § 205 emphasizes the Congressional concern that the standards of § 205(e) be filled in by rulemaking: "The Secretary of the Treasury shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing regulations to carry out the provisions of this section." The Administrative Procedure Act, passed in 1946, underscored and added to this requirement.⁴⁶³ The Bureau violates both statutes by ignoring their open public rulemaking procedures. Winemakers and consumers suffer because of the closed process used.⁴⁶⁴

460. 27 U.S.C. § 205(e)(1) (1970). *Cf.* regulations tracking the statutory language at 27 C.F.R. § 4.39(a).

461. Letter to the writer from Marvin J. Dessler, Chief Counsel, dated December 9, 1976 (copy on file Loyola Law School Library). The letter was in response to a complaint that the prohibition on German terms should have been issued through rulemaking proceedings. It argued that C.F.R. § 4.39(a)(4) already covers the German word issue because it authorizes the Director to act when he finds a statement "likely to mislead."

462. *See* notes 397-407 *supra*.

463. 5 U.S.C. § 553 (1976).

464. This is not a situation where Congress has granted the agency both rulemaking and adjudicatory functions and the agency is exercising its discretion to develop policy through either process, as was the case in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). Although BATF has adjudicatory authority to revoke permits, *see* note 415 *supra*, it makes little policy through that process. It announces policy, instead, through *ad hoc* label adjudications, intended by Congress merely to be inspections to ascertain conformity with the regulations. The legislative history reflecting Congressional intent that specific regulations be promulgated to

Moreover, BATF insists on violating the Freedom of Information Act in order to keep its label approvals inaccessible. Many of the label actions, (for example, the "equal contribution from enumerated vineyards" rule⁴⁶⁵) are "substantive rules of general applicability," or "statements of general policy or interpretations of general applicability formulated and adopted by the agency" and as such must be published in the Federal Register.⁴⁶⁶ They are never published there. Nor are they published in the BATF Bulletin unless they are elevated to the status of "ATF Rulings," few are.⁴⁶⁷ At very least, all label approvals or denials are "orders, made in the adjudication of cases;" indeed, they have been expressly held to be in the *Seagram* case.⁴⁶⁸ As such, they must be made available to the public under the Freedom of Information Act *and must also be indexed*.⁴⁶⁹ BATF does make them available upon request, but fails to index them.

b) *Rulemaking*: BATF makes infrequent use of its rulemaking authority, because of its preference for developing rules in the *ad hoc* label approval process. Occasionally, it will issue an "ATF Ruling" which is "an official interpretation by the Bureau that has been published in the Bulletin for the guidance of taxpayers, Bureau officials and others concerned."⁴⁷⁰ Rulings "do not have the force and effect of Department of Treasury Regulations . . . but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon

define deceptive and misleading labels, is overwhelming. See notes 291-297 and accompanying text *supra*. This is plainly one of those "situations where the [agency's] reliance on adjudication would amount to an abuse of discretion or a violation of the Act. . . ." *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 794 (1974).

465. See note 347 *supra*.

466. 5 U.S.C. § 552(a)(1)(D) (1976). BATF chief counsel Dessler simply states "we do not agree" with this view (at least as to the German words rule). See note 461 *supra*. He gives no reasons. If some label approvals are "substantive rules of general applicability" they must, under the FAA Act and APA, be issued pursuant to public rulemaking procedures as argued in the text accompanying notes 460-464 *supra*. If they are not so issued they are invalid. But are the label approvals possibly "interpretations of general applicability formulated and adopted by the agency," that is, interpretative rules? They are functionally close to what the Bureau calls its "Rulings," and "Rulings" are clearly interpretative rules. See notes 470-473 *infra*. If this is the nature of the label approvals then, like "Rulings," those that have a "substantial impact" upon the rights and duties of broad classes of people (such as vintners and consumers), should be required to be issued pursuant to notice and public comment procedure even if § 553 of the APA does not technically apply. *Id.*

467. BATF regulations expressly exclude them from the Bulletin. 27 C.F.R. § 71.41(d)(2)(i)(E) (43 Fed. Reg. 10696 (March 15, 1978)).

468. See notes 446-47 *supra*.

469. 5 U.S.C. § 552(a)(2) (1976). Though these label approvals are precedential in nature, the indexing requirement does not depend upon the use of the documents as precedent. See authorities cited in note 437 *supra*. Even if these label approvals were not "orders" many would be "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register" and would also have to be indexed under § 552(a)(2).

470. 27 C.F.R. § 71.41(d)(2)(i)(A) (43 Fed. Reg. 10696 (March 15, 1978)).

for that purpose.”⁴⁷¹ In other words, Rulings are the Bureau’s interpretative regulations, in contrast to its legislative regulations. They are indexed, as required by the Freedom of Information Act.

Interpretative regulations are exempt from the public rulemaking procedures of the APA.⁴⁷² According to one important view, a regulation is interpretative whenever an agency with the power to make either legislative rules or interpretative rules says it is making the latter and not the former.⁴⁷³ What if the agency issues what it calls an “interpretative rule” which departs sharply from past understanding, twists a legislative regulation from its plain meaning, and affects many people? Has the agency “interpreted” a legislative regulation, or has it amended it? In the *Gibson* case,⁴⁷⁴ two judges out of three said the Treasury Department only interpreted an existing regulation when it first said in a Ruling that wine made from boysen blackberries could not be called “blackberry wine,” then said it could, then said it could not; therefore the Rulings were properly issued without public rulemaking procedure. The third judge dissented: “. . . a ruling which changes the unmistakable meaning of a regulation is not a mere interpretation thereof, but is a modification or amendment.”⁴⁷⁵ BATF should not be permitted to shelter its Rulings under the umbrella of the majority opinion in *Gibson* much longer, however, for even if interpretative rulings are technically exempt from the APA’s required procedures, powerful modern authority favors the view that they should be issued pursuant to notice and public comment procedures whenever they have a “substantial impact” on private rights and duties.⁴⁷⁶ The recent BATF Ruling on the use of “Late Harvest” and similar terms on wine labels⁴⁷⁷ would be an example of a ruling with such substantial impact. A progressive agency would itself favor the issuance of such Rulings through notice and comment procedure for the benefits are great and have to do with fairness and democracy, while the disadvantages are few and have to do with expediency and laziness.

BATF’s procedure for adoption of legislative regulations is the normal notice and public comment procedure of the APA⁴⁷⁸ backed by the underlying requirement of the FAA Act.⁴⁷⁹ At one time there was a question whether the latter statute required formal, “on-the-record”

471. *Id.* § 71.41(d)(2)(iii)(B).

472. 5 U.S.C. § 553(b)(A) (1976).

473. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 5.03 (1976).

474. *Gibson Wine Co. v. Synder*, 194 F.2d 145 (D.D.C. 1950).

475. *Id.* at 335.

476. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 6.01-7 to 6.01-9 (1976).

477. *See* note 359 *supra*.

478. 5 U.S.C. § 553 (1970).

479. 27 U.S.C. § 205 (last sentence) (1970).

rulemaking,⁴⁸⁰ but that question is clearly answered in the negative by recent cases.⁴⁸¹

Much could be done to improve the informal rulemaking conducted by BATF. The District of Columbia federal district court has been of enormous help in improving the process by forcing the Bureau to conduct its rulemaking publicly rather than in private.⁴⁸² To the Bureau's credit, it recently began holding hearings outside of Washington, D.C. to facilitate public participation. Also, it has held evening sessions for the convenience of consumers. But this is as far as its imagination has gone.⁴⁸³ As the Bureau confronts increasingly complex issues in which disputes of fact, rather than policy, are dominant,⁴⁸⁴ it should have procedural tools available to deal competently with such issues. Such tools have been developed at the FTC⁴⁸⁵ and FDA,⁴⁸⁶ and others can be invented.⁴⁸⁷ There is no evidence, however, that BATF is even thinking about the problem.

IV. CONCLUSION

Federal regulations have made wine the most deceptively labeled consumer product in America.⁴⁸⁸ The fault lies with BATF, whose laws and procedures for many decades have worked systematically to undo what Congress has done in the FAA Act, the Administrative Procedure Act and the Freedom of Information Act. As of 1978, BATF was considering proposed changes in its regulations, but the proposals were palliatives, not reform. They would still leave consumers and vintners naked of the protections they would have if the FDA and FTC controlled wine labeling.

Several possible alternative remedies appear. In order of their desirability, they are:

480. Lee, *supra* note 251.

481. *United States v. Florida E. Coast R.R. Co.*, 410 U.S. 224 (1973), *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972).

482. *Food Chem. News v. Davis*, 378 F. Supp. 1048 (D.D.C. 1974).

483. See Murphy & Hoffman, *Current Models for Improving Public Representation in the Administrative Process*, 28 AD. L. REV. 391 (1976).

484. The fetal alcohol syndrome matter, see note 413 *supra*, is one such issue.

485. 16 C.F.R. §§ 1.7-1.20 (1977).

486. 21 C.F.R. §§ 10.40, 10.50, 13.1-16.120.

487. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking* 60 CALIF. L. REV. 1276 (1972).

488. Obviously, this generalization does not apply to every wine on the market. Many wineries do not take advantage of the opportunities for deception offered by the regulations. Moreover, a number of fine wineries are even moving beyond honest labeling into fully informative labeling. Their labels supply full information about vineyard origin, harvesting, grape content, and winemaking methods. See, e.g., the labels of Beaulieu Vineyard, Callaway Vineyard & Winery, Fetzer Vineyards, Kenwood Vineyards, Ridge Vineyards, or others which offer some or all of such information. This trend should be encouraged by the government.

a) BATF's labeling and advertising functions under the FAA Act can be transferred to the FDA through an executive reorganization plan of the President.

b) Congress can repeal the labeling and advertising provisions of the FAA Act and replace them with a statement that alcoholic beverage labeling and advertising shall conform to the laws of the FDA and FTC. The label approval system, whose very existence encourages the making of *ad hoc*, secret law, would be scrapped. The FDA and FTC can exert adequate control over food labeling without need for prior approval of labels. BATF would retain its permit authority under the FAA Act, in order to facilitate collection of the excise taxes and to keep the criminal element out of the industry.

c) The FDA and FTC can stop deferring to BATF's labeling authority, as their authority is equal to the Bureau's. In fact, by failing to assert their jurisdiction in the face of BATF's abdication of its responsibility to prevent deceptive labeling, they are defeating Congressional intent that consumers be fully protected by at least *one* of the three agencies with overlapping authority.

d) BATF can amend its regulations on the basis of a "principle of non-obstruction of consumer protection;" that is, BATF would guarantee that its regulations would never obstruct protection that consumers would otherwise enjoy under rules of the FDA and FTC. This principle is most consonant with the clear Congressional purpose that each of the overlapping agencies should provide consumers with at least as much protection as the others provide, not less. BATF could accomplish this in a single rulemaking proceeding in which it would incorporate FDA and FTC regulations by reference and repeal its own inconsistent regulations.

If the FDA and FTC were to assume control of wine labeling, they would have to be sensitive to the problems unique to wine, such as the importance of carefully defined appellations of origin. Those agencies already possess the procedural tools necessary to regulate technically complex subjects, while BATF has not yet developed them. In any event, such unique problems are few. The main task of wine labeling regulation that must be faced now is as simple as Sancho Panza's was: to make the wines as honest as they are good.

ADDENDUM

After this article was completed BATF announced final new labeling regulations.⁴⁸⁹ Although the new rules do establish a sensible system to define geographical boundaries of appellations of origin, they also per-

489. 43 Fed. Reg. 37673 (August 23, 1978).

petuate most of the labeling deceptions pointed out in the article; they even add a new deception. The principal deceptions endorsed by the government are: 1) A wine may carry a varietal name without informing consumers that other grapes are blended in; the portion of other grapes that may be blended, however, has been lowered from 49 to 25 percent. (Different rules apply to *Vitis Labrusca* varieties.) 2) A wine may carry an appellation of origin that is only 75 or 85 percent truthful, depending on the nature of the appellation; this is true even of vintage-dated wines whose appellations were 95 percent truthful under the former rules. 3) Words falsely implying geographical origin, including the word "vineyard," may be used in corporate or trade names and in some brand names. 4) A winery may represent it "produced" the wine though it actually produced only 75 percent; it may represent it "made" or "vinted" the wine though it purchased the wine elsewhere and merely "treated" it in some undefined way. These regulations confirm the article's conclusions that BATF has violated its statutory duty and has failed to provide as much protection for consumers as the FDA and FTC. Control of wine labeling and advertising should be removed from the agency as soon as possible.

