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# The European Union TRIPS over the U.S. Constitution: Can The First Amendment Save the Bologna That Has a First Name?

Harry N. Niska\*

*Indeed your bologna has a first name – it’s O-S-C-A-R – but risks losing its most important name. Lunch meats called bologna or baloney get the name from mortadella bologna, the smooth, pink, steamed sausage made since the Renaissance in Bologna, Italy. Time for Oscar Mayer and others to cut it out, the EU says.*<sup>1</sup>

## INTRODUCTION

During the failed World Trade Organization (WTO) negotiations in Cancun in September 2003 the dispute between developed and developing countries regarding agriculture subsidies drew most of the big headlines. However, there was another major agricultural disagreement in Cancun. This one pitted the European Union (EU) against several other major developed countries, most prominently the United States.<sup>2</sup> One newspaper leading up to Cancun predicted “[a] food fight of global proportions” in which “[d]istinguished trade ministers from 146 nations will be hurling Parmesan, Bologna and Chablis at one an-

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\* J.D. Candidate, 2005, University of Minnesota Law School; B.A., 2002, Concordia College. I would like to dedicate this article to my parents, for their amazing support even as I pursue a profession that was probably their last choice for me. I would also like to thank Professor Chen for helping me choose the topic for this piece and all the editors and staff members at the Minnesota Journal of Global Trade who cleaned up after my mistakes. All remaining errors are my responsibility.

1. James Cox, *What's in a Name?*, USA TODAY, Sept. 9, 2003, at 1B.

2. See, e.g., Cox, *supra* note 1; Thomas Fuller, *California Chablis? No Such Thing, Europeans Say*, N.Y. TIMES, July 26, 2003, at C3; Carolyn Said, *The Label Police: Europeans are Getting Snippy About Foreigners Using Their Place Names for Food*, S.F. CHRON., Aug. 17, 2003, at 11; Daniel Schwammenthal & William Echikson, *Europe Asserts Right to Name of 41 Products*, WALL ST. J., Aug. 29, 2003, at A6; Katherine Skiba, *EU Proposal has U.S. Cheesed: State May be Barred from Calling Items Parmesan, Asiago*, MILWAUKEE J. SENTINEL, Aug. 3, 2003, at A3.

other.”<sup>3</sup> The EU made demands in the Cancun trade talks for stronger international protection of geographical indications (GIs) on several food products that they consider to be historically tied to specific regions of Europe.<sup>4</sup> Despite the lack of any progress on this front at Cancun,<sup>5</sup> the EU and Switzerland, another supporter of the EU proposals, have pledged to push forward with their demands in future talks.<sup>6</sup>

Much has been made about the generic nature of many of the names that the EU hopes to protect, such as bologna, champagne, chablis, mozzarella, and feta.<sup>7</sup> This has frequently been cited as a policy reason for U.S. opposition to the EU proposals.<sup>8</sup> However, the vitally important constitutional ramifications that would arise from the U.S. government complying with the proposals by prohibiting producers who do not reside in certain European regions from using certain non-misleading words to describe their products have been neglected.<sup>9</sup> This Note attempts to remedy that situation.

Part I of this Note will describe the situation as it exists today. Part I.A will explore the current protections of GIs and the proposals by the EU for stronger protections. Part I.B will lay out the U.S. constitutional doctrine regarding the limitations on the power of the U.S. government to make international agreements and the current state of the First Amendment jurisprudence as it relates to regulation of GIs. Part II will describe the legal implications of the EU proposals, and apply constitutional

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3. See Said, *supra* note 2.

4. See *supra* note 2.

5. See Carol Emert, *Politics, Body Parts, and Champagne*, S.F. CHRON., Sept. 25, 2003, at D2 (describing the breakdown of WTO talks over the generic use of geographic names).

6. *Fischer Signs Wines and Spirits Pact*, EUROPE AGRIC., Sept. 26, 2003; Dr. Franz Fischler, *From Cancun: The Road Ahead for the Trade and Agricultural Negotiations*, at <http://europe.eu.int/rapid/start> (Sept. 16, 2003); See Jason Stein, *Switzerland's Cheesemakers Try to Roll with Global Punches: One Company Combined Old World Methods with Cheaper American Milk*, WIS. ST. J., Sept. 21, 2003, at A1.

7. See *infra* notes 11-13, 27, 50-57, 66 and accompanying text.

8. See *infra* notes 11-13, 27, 50-57, 66 and accompanying text.

9. For example, the U.S. House Agriculture Committee held hearings to discuss the international negotiations regarding geographical indications on July 22, 2003. *The Status of the World Trade Organization Negotiations on Agriculture: Hearing Before the House Agricultural Committee*, 108th Cong. 301-68 (2003) [hereinafter *Status of the World Trade Organization*]. In the sixty-eight pages of documents published from those hearings, however, there is not one mention of the First Amendment problems with the EU proposals, even though the witnesses at the hearings were overwhelmingly opposed to those proposals. See *id.*

principles to determine whether the United States could agree without violating the U.S. Constitution. This Note concludes that such proposals would not withstand constitutional scrutiny when applied to labels that are no longer closely tied to geographical regions in the minds of U.S. consumers. It would be a mistake to overlook constitutional limitations on the regulation of GIs in international trade negotiations. If the international community accepted the EU proposals, either international trade or the U.S. Constitution would be threatened.

## I. THE INTERNATIONAL LANDSCAPE REGARDING PROTECTION OF GIS

### A. CURRENT PROTECTIONS OF GIS

Europeans and Americans have long had drastically different cultural views about whether certain food labels are connected to certain regions.<sup>10</sup> In the United States and many other countries populated by European immigrants, many food names that “Old World” Europeans consider tied to specific regions have been used for quite some time for food made in the “New World.”<sup>11</sup> Those labels are now often used to refer simply to styles of foods rather than the specific place of origin of that product.<sup>12</sup> Most U.S. consumers do not usually expect the name of the food to tell them where the food is from, and thus are not fooled by many labels that Europeans might consider misled-

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10. Compare Jim Chen, *A Sober Second Look at Appellations of Origin: How the United States Will Crash France's Wine and Cheese Party*, 5 MINN. J. GLOBAL TRADE 29 (1996), with Louis Lorvellec, *You've Got to Fight for Your Right to Party: A Response to Professor Chen*, 5 MINN. J. GLOBAL TRADE 65 (1996).

11. See *Status of the World Trade Organization*, *supra* note 9, at 345 (statement of Sarah F. Thorn, Director for International Trade at the Grocery Manufacturers of America); Lisa Carricaburu, *WTO Forum Deciding Fate of Tooele Feta*, SALT LAKE TRIB., Sept. 14, 2003, at E1 (discussing the example of feta cheese in the United States); Deborah Haynes, *WTO Panel to Study Dispute by U.S., Australia with EU over Home Grown Brands*, AGENCE FRANCE PRESSE, Oct. 2, 2003 (discussing similar views of feta cheese in Australia). Compare Jim Eagles, *It's Time to Fight Fire with Fire*, NEW ZEALAND HERALD, Aug. 19, 2003 (arguing that cheddar cheese is a generic label), with Said, *supra* note 2 (quoting a European official who considers cheddar to be tied to a region of Great Britain).

12. See *supra* note 11.

ing.<sup>13</sup> This cultural difference has not prevented Europeans from wanting to protect U.S. consumers from themselves.<sup>14</sup> After all, the pecuniary interests of European farmers are at stake. Because European countries have long made a conscious effort to avoid agricultural economies of scale that have recently characterized many other agricultural markets,<sup>15</sup> European governments claim that their farmers need either massive subsidies or stronger geographical indication protections to survive.<sup>16</sup> Franz Fischler, the EU's farm commissioner, asserts, "EU producers are losing billions a year because non-European producers are free-riding on the reputation of European quality products."<sup>17</sup>

GIs are not entirely unprotected in the status quo. Currently, there are no fewer than four international treaties that address the issue.<sup>18</sup> The most recent, and by far the most significant, of these treaties is the Agreement on Trade Related Aspects of Intellectual Property Rights of 1994 (TRIPS).<sup>19</sup> Three previous attempts to establish international geographical indications regimes prior to TRIPS were: The Paris Convention for the Protection of Industrial Property (1883),<sup>20</sup> the Madrid Agreement for the Repression of False or Deceptive Indications

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13. See Said, *supra* note 2 (discussing consumer attitudes regarding U.S. products called Parmesan cheese and Basmati rice); Jeffrey Sparshott, *EU's Name Game No Fun for U.S. Food Producers*, WASH. TIMES, Aug. 29, 2003, at A1.

14. Cf. Lorvellec, *supra* note 10, at 72-77 (characterizing the predominant U.S. attitude toward GIs as "the reign of the most ignorant consumers" and "the triumph of dishonest manufacturers").

15. See Stein, *supra* note 6.

16. See *Protecting Names*, ECONOMIST, Aug. 2, 2003, at 49; Stein, *supra* note 6; Bruce Stokes, *Protecting French Cheese and Italian Prosciutto*, NAT'L J., Aug. 9, 2003, at 2556; European Union, *Intellectual Property: Why do Geographical Indications Matter to Us?*, at [http://europa.eu.int/comm/trade/issues/sectoral/intell\\_property/argu\\_en.htm](http://europa.eu.int/comm/trade/issues/sectoral/intell_property/argu_en.htm) (July 30, 2003) [hereinafter *Geographical Indications*].

17. See Cox, *supra* note 1.

18. See Stacy D. Goldberg, Comment, *Who Will Raise the White Flag? The Battle Between the United States and the European Union over the Protection of Geographical Indications*, 22 U. PA. J. INT'L ECON. L. 107, 111-12 (2001).

19. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) (last visited Oct. 13, 2003) [hereinafter TRIPS].

20. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305, available at <http://clea.wipo.int/pdffiles/english/wo/wo020en.pdf> (last visited Oct. 13, 2003) [hereinafter Paris Convention].

of Source on Goods (1891),<sup>21</sup> and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1958).<sup>22</sup> All three of these earlier treaties were limited in their ability to achieve the goals currently expressed by the EU.<sup>23</sup> TRIPS is more promising as it is part of the comprehensive WTO system and, as such, includes all members of the WTO.<sup>24</sup>

The official WTO summary provides a concise explanation of the relevant provisions respecting GIs:

[T]he agreement lays down that all parties must provide means to prevent the use of any indication which misleads the consumer as to the origin of goods, and any use which would constitute an act of unfair competition. A higher level of protection is provided for geographical indications for wines and spirits, which are protected even where there is no danger of [misleading consumers] as to the true origin. Exceptions are allowed for . . . generic terms . . . . Furthermore, provision is made for further negotiations to establish a multilateral system of notification and registration of geographical indications for wines.<sup>25</sup>

The U.S. government considers the exception for non-

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21. Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods, Apr. 14, 1891, 828 U.N.T.S. 389, available at <http://www.wipo.int/clea/docs/en/wo/wo032en.htm> (last visited Oct. 13, 2003) [hereinafter Madrid Agreement].

22. Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Oct. 31, 1958, as last revised Sept. 28, 1979, 923 U.N.T.S. 205, available at <http://www.wipo.int/clea/docs/en/wo/wo012en.htm> (last visited Oct. 13, 2003) [hereinafter Lisbon Agreement].

23. The Paris Convention was limited in two ways: (1) it only applied to the importation of goods and (2) it was effectively limited to examples of serious fraud, not the use of arguably generic labels. See Goldberg, *supra* note 18, at 112-13. While the United States is a signatory to the Paris Convention, it does not require any regulation of domestic producers. See *id.* at 112. The Madrid Agreement created stronger protection of GIs, including measures to prevent wine names from becoming generic terms, but was limited by the small number of signatories. See *id.* at 113-14. Most notably, the United States has never signed the Madrid Agreement. *Id.* The Lisbon Agreement also sets high standards for protecting GIs, including prohibiting the use of indications with terms such as "like" or "style." See *id.* at 114-15. However, like the Madrid Convention, the Lisbon Agreement is also limited by the lack of United States membership. See *id.* at 114-15. Since the European Union is now expressing serious concern about the use of labels that are considered generic within the United States market, it is easy to see why none of these three treaties offers a solution satisfactory to the EU. See Fuller, *supra* note 2.

24. See Goldberg, *supra* note 18, at 116.

25. WTO, *A Summary of the Final Act of the Uruguay Round*, available at [http://www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm#nAgreement](http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#nAgreement) (last visited Oct. 13, 2003).

misleading labels (for all products other than wine and cheese)<sup>26</sup> and the exception for generic terms<sup>27</sup> to be of vital importance.<sup>28</sup> The EU is considerably less enthusiastic about these exceptions.<sup>29</sup> As a result, it has generated some proposals that aim to close these loopholes.

#### B. THE EU'S PROPOSALS FOR STRENGTHENED PROTECTION OF GIS

Going into the WTO talks in Cancun, the EU laid out three separate "objectives" for strengthening the international protection of GIS.<sup>30</sup> The first is the establishment of a "simple, cost-effective system of world-wide registration for geographical indications."<sup>31</sup> This is relatively uncontroversial because the TRIPS agreement already calls for WTO members to negotiate the establishment of a system of notification and registration for GIS for wines and spirits.<sup>32</sup> However, because the EU wants to expand this registry to food products beyond wine and spirits, this first proposal still faces a fair amount of opposition by itself.<sup>33</sup>

The second EU objective is to extend the amount of protection that TRIPS provides so that "cheeses, rice and teas can enjoy the benefit of not being copied by producers from other countries by simply indicating 'made in USA' or 'style of Roquefort.'"<sup>34</sup> The current TRIPS framework provides a different level of protection for wines and spirits than for other products.<sup>35</sup> Other products need to be protected only if consumers would be misled by use of a geographical label that suggests

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26. See *Status of the World Trade Organization*, *supra* note 9, at 349-50 (statement of Jon Dudas, Deputy Under Secretary of Commerce for Intellectual Property).

27. TRIPS, *supra* note 19, at 92; See *Status of the World Trade Organization*, *supra* note 9, at 349-50 (statement of Jon Dudas, Deputy Under Secretary of Commerce for Intellectual Property).

28. See *Status of the World Trade Organization*, *supra* note 9, at 349-50 (2003) (statement of Jon Dudas, Deputy Under Secretary of Commerce for Intellectual Property).

29. See *Geographical Indications*, *supra* note 16.

30. See *id.*

31. *Id.*

32. See TRIPS, *supra* note 19, at 92; *Status of the World Trade Organization*, *supra* note 9, at 360 (statement of James Clawson, International Trade Advisor, Wine Institute).

33. See *Status of the World Trade Organization*, *supra* note 9, at 357-59 (statement of Thomas Suber, President, U.S. Dairy Export Council).

34. *Geographical Indications*, *supra* note 16.

35. See *Status of the World Trade Organization*, *supra* note 9, at 357 (statement of Thomas Suber, President, U.S. Dairy Export Council).

that a product originated in a place other than its actual place of origin.<sup>36</sup> However, unless a particular label is “generic,” wines and spirits must be protected even if the actual place of origin is clearly marked, the geographical indication is used in translation, or if the indication is accompanied by a term like “type” or “style.”<sup>37</sup> Essentially, the EU wants to extend the absolute prohibition against even non-misleading use of GIs beyond wines and spirits to the entire sphere of products covered by TRIPS.<sup>38</sup>

The third EU objective is the most controversial. The first two proposals ask for changes to the TRIPS Agreement, which already deals with GIs. The third proposal pushes for amendments to the Agreement on Agriculture, a WTO treaty that does not currently include any provisions protecting GIs.<sup>39</sup> While the introduction of this proposal into the agriculture discussions is controversial in itself,<sup>40</sup> the controversy extends beyond the procedural tactics used by the EU. The substantive provisions of this proposal led three of the six witnesses at a recent congressional hearing on the subject to identify this provision as “the single most offensive element of the proposals.”<sup>41</sup>

This third proposal is called the “claw-back” proposal because it is intended to withdraw geographic labels that have become generic terms or have been trademarked in other countries.<sup>42</sup> The EU hopes to do this by adding two definitions to Article 1 of the Agreement on Agriculture.<sup>43</sup> “Geographical indication” would be defined as

an indication which identifies an agricultural good as originating in the territory of a Member, or a region or locality in that territory,

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36. *See id.*

37. *See id.*

38. *See id.* at 358 (“The general rule . . . requires protection against uses of geographic terms that are misleading or constitute an act of unfair competition. In other words, the European Union wants the exception to swallow the general rule.”).

39. Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/14-ag.pdf](http://www.wto.org/english/docs_e/legal_e/14-ag.pdf) (last visited Jan. 22, 2004) [hereinafter Agreement on Agriculture].

40. *See Status of the World Trade Organization*, *supra* note 9, at 309 (statement of Jon Dudas, Deputy Under Secretary of Commerce for Intellectual Property).

41. *See id.* at 332-33.

42. *See, e.g., id.* at 358 (statement of Thomas Suber, President, U.S. Dairy Export Council); *Phony Baloney*, CHRISTIAN SCI. MONITOR, Aug. 1, 2003, at 10.

43. *See* Commission Proposal for Modalities in the WTO Agriculture Negotiations, 9, at <http://europa.eu.int/comm/agriculture/external/wto/officdoc/mod.pdf> (Jan. 29, 2003).



where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin and which is protected in the laws and regulations of that Member.<sup>44</sup>

“Originating” would mean, “that an agricultural product is produced or processed within the territory, region or locality of the Member concerned.”<sup>45</sup>

The EU would also like to add the following language to Article 4 of the Agreement on Agriculture:

3. Members shall ensure protection of the geographical indications referred to in Annex W in accordance with the individual commitments undertaken and included therein.

The protected names are *exclusively reserved* to the agricultural products originating in the place indicated by the geographical indication in question *and can no longer be used after the phase out period*. Geographical indications not included in annex W will continue to benefit from the protection provided for in Articles 22 and 23 of the TRIPs Agreement.

*Any use* of indications protected by virtue of this Agreement for products originating in a geographical area other than the true place of origin *shall be prohibited, even when:*

*the true origin* of the product *is indicated;*

b) *the geographical indication is used in translation;*

c) *the indications are accompanied by expressions such as “kind”, “type”, “style”, “imitation”, “method”, or the like.*

Where indications protected by virtue of this Agreement are homonymous, protection shall be granted to each indication, provided it is traditionally and consistently used, its use for that purpose is regulated by the country of origin, it does not falsely represent to the public that the goods originate in another territory and consumers are not misled as to the true origin of the product.<sup>46</sup>

The EU proposal would then be completed with a list of specific terms that they would like protected in a new Annex of the Agreement on Agriculture.<sup>47</sup> On August 28, 2003, the EU re-

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44. *Id.*

45. *Id.*

46. *Id.* at 9-10 (emphasis added).

47. *Id.* at 16.

leased a list of forty-one specific terms that they were proposing should be included in this protected list.<sup>48</sup> This list<sup>49</sup> contains more than a few products that have raised loud protest from U.S. food producers.<sup>50</sup>

Among the products that have drawn the most outrage are champagne,<sup>51</sup> sherry,<sup>52</sup> asiago,<sup>53</sup> feta,<sup>54</sup> mozzarella,<sup>55</sup> parmesan,<sup>56</sup> and perhaps the most amazing inclusion, bologna.<sup>57</sup> While some of these names are not listed as such, the prohibition on using even translations of geographical terms<sup>58</sup> has the effect of banning the use of these terms.<sup>59</sup>

The monetary stakes of the negotiations over these EU proposals are extremely high. U.S. food producers, as well as other food producers that do not reside in the preferred regions of Europe, would be forced to re-brand their products and re-

48. See Cox, *supra* note 1; Schwammenthal & Echikson, *supra* note 2.

49. See Press Release, European Union, WTO Talks: EU Steps Up Bid for Better Protection of Regional Quality Products, 3 (Aug. 28, 2003), at <http://europa.eu.int/rapid/start> (last visited Jan. 20, 2003) [hereinafter *WTO Talks*]. The list includes the following wines and spirits: Beaujolais, Bordeaux, Bourgogne; Chablis; Champagne; Chianti; Cognac; Grappa di Barolo, del Piemonte, di Lombardia, del Trentino, del Friuli, del Veneto, dell'Alto Adige; Graves; Liebfrau(en)milch; Malaga; Marsala; Madeira; Médoc; Moselle; Ouzo; Porto; Rhin; Rioja; Saint-Emilion; Sauternes; and Jerez/Xerez. *Id.* The list also contains the following other products: Asiago, Azafrán de la Mancha, Comté, Feta, Fontina, Gorgonzola, Grana Padano, Jijona y Turrón de Alicante, Manchego, Mortadella Bologna, Mozzarella di Bufala Campana, Parmigiano Reggiano, Pecorino Romano, Prosciutto di Parma, Prosciutto di San Daniele, Prosciutto Toscano, Queijo São Jorge, Reblochon, and Roquefort. *Id.*

50. See Cox, *supra* note 1; Said, *supra* note 2; Schwammenthal & Echikson, *supra* note 2; Tom Webb, *Wisconsin, Europe Butt Cheeseheads over Names*, ST. PAUL PIONEER PRESS, Sept. 5, 2003, at A1.

51. Sparshott, *supra* note 13.

52. See *EU/WTO: EU Wants to Recover Exclusive Use of its Quality Product Names*, EUR. REP., Aug. 30, 2003.

53. Skiba, *supra* note 2.

54. See Carricaburu, *supra* note 11; Webb, *supra* note 50. The notion that feta is somehow uniquely a product of Greece is not unanimously accepted by EU member nations, as Germany and Denmark would like the right to use the label. See Cox, *supra* note 1; Charlotte Denny, *Feta Puts Brussels in a Pickle*, GUARDIAN (London), Aug. 23, 2003, at 26.

55. See Skiba, *supra* note 2; Sparshott, *supra* note 13.

56. See Carricaburu, *supra* note 11; Said, *supra* note 2; Skiba, *supra* note 2; Stokes, *supra* note 16; Webb, *supra* note 50.

57. See Cox, *supra* note 1.

58. See *supra* note 46 and accompanying text.

59. See Cox, *supra* note 1 (discussing bologna); Skiba, *supra* note 2 (discussing parmesan and mozzarella).

educate consumers at high costs.<sup>60</sup> Even after those producers incur the additional advertising costs, there is no guarantee that they will retain all of their consumers.<sup>61</sup> The effect on U.S. consumers will also be expensive. Not only will much of the cost to U.S. food producers be passed on to consumers, but the confusion of some consumers who still want to buy products with names they recognize might lead to those consumers to buying more expensive products because of the narrower options.<sup>62</sup>

In addition, the benefits to European farmers are not guaranteed to materialize. When Australian winemakers agreed not to use French region names in 1994, the plan backfired on the EU, with Australia gaining market position.<sup>63</sup> Similarly, it seems unlikely that U.S. wine and cheese consumers will switch to more expensive European products simply because of labeling restrictions placed on the U.S. products they are used to.<sup>64</sup>

The EU, however, still considers their proposals to be important to the future vitality of their agricultural sectors and does not seem likely to abandon the fight.<sup>65</sup> While the United States claims that many of these names have become generic and that geographical labels are best protected through a trademark system similar to the current U.S. system, the EU counters that stronger GI protection would also help some U.S. producers.<sup>66</sup> This argument has not softened the negotiating

60. See *Status of the World Trade Organization*, *supra* note 9, at 346 (statement of Sarah F. Thorn, Dir. of Int'l Trade, Grocery Manufacturers of America). This is particularly infuriating to many U.S. producers who have invested considerable time and energy into developing markets for product names that they might have to surrender. See, e.g., Webb, *supra* note 50. One U.S. cheese spokesperson asserted, "If anything, our cheese plants have built the United States feta market and [p]armesan market." *Id.* Rep. Bob Goodlatte, Chair of the House Agriculture Committee, argues that the popularity of parmesan cheese in the United States is "because [U.S.] dairy processors, led by Kraft, have spent tens of millions of dollars promoting this terminology so that the vast majority of Americans would put a can in their refrigerator." Cox, *supra* note 1.

61. See Cox, *supra* note 1.

62. See Sparshott, *supra* note 13.

63. See *Protecting Names*, *supra* note 16.

64. It is possible that some U.S. consumers will switch to European products as a result of the name change of the U.S. products that they had previously been purchasing. See *supra* note 62 and accompanying text. However, the substantial benefits that European producers apparently hope for are unlikely to materialize. See *Cheesy Dispute: Taste is More Important than a Name*, DALLAS MORNING NEWS, Sept. 21, 2003 ("At root, we eat a food because we like the taste, not the name. . . . If a product opts for a name change, we adapt."); *Protecting Names*, *supra* note 16.

65. See Stokes, *supra* note 16; *supra* notes 5-6 and accompanying text.

66. See Stokes, *supra* note 16. For example, Napa Valley wine is a term that

position of the United States,<sup>67</sup> although the U.S. government has indicated that they might be willing to entertain the restriction of generic wine names in exchange for compensation.<sup>68</sup>

## II. RELEVANT U.S. CONSTITUTIONAL LAW PRINCIPLES

### A. THE AUTHORITY OF THE U.S. CONSTITUTION TO LIMIT U.S. COMPLIANCE WITH WTO OBLIGATIONS

It is a settled constitutional principle that the federal treaty power,<sup>69</sup> while not limited by the enumerated powers doctrine,<sup>70</sup> is limited by express constitutional prohibitions on the federal government.<sup>71</sup> In the same way that the rest of the federal government's powers are limited by the express provisions of the Constitution, it follows that the treaty power would be no exception. As Justice Black, writing for a plurality of the Supreme Court put it, "[n]o agreement with a foreign nation can confer power on . . . any . . . branch of Government, which is free from the restraints in the Constitution."<sup>72</sup>

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some U.S. producers would probably like protected. *Id.* The Napa Valley label is already getting "ripped off" by a Beijing winery which is attempting to trademark a label that is suspiciously similar to "Napa Valley." See Carol Emert, *Chinese Use of 'Napa Valley' on Wine Draws protest in U.S.*, S.F. CHRON., Aug. 7, 2003, at D2.

67. See Said, *supra* note 2 ("American opposition is so vehement that it's unlikely negotiators will agree to the EU proposal.")

68. See *Status of the World Trade Organization*, *supra* note 9, at 350 (statement of Jon Dudas, Deputy Under Secretary of Commerce for Intellectual Property) ("[T]he U.S. government is working closely with our wine industry to reach a negotiated settlement that would adequately compensate U.S. wineries in return for voluntarily giving up the use of generic wine terms the EU claims as its own.")

69. See U.S. CONST. art. II, § 2.

70. See *Missouri v. Holland*, 252 U.S. 416 (1920).

71. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 276 (2d ed. 2002) ("Treaties, of course, cannot violate the supreme law which is the Constitution.")

72. *Reid v. Covert*, 354 U.S. 1, 16 (1957) (Black, J., plurality). Looking to the text of the Constitution, it is instructive to examine the Supremacy Clause, which reads:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. CONST. art. VI. As Justice Black suggested, it is difficult to understand how any treaty agreement, if it requires the United States government to do something

One prominent academic voice has recently written that international treaty obligations might trump competing U.S. Constitutional claims.<sup>73</sup> However, most academic commentators agree that Justice Black's proclamation in *Reid v. Covert* is the settled legal doctrine.<sup>74</sup> Thus it seems relatively clear as a matter of United States law that an express constitutional limitation on the power of the U.S. government, such as the First Amendment, would prevail against an obligation of the U.S. government under an international agreement.

#### B. FIRST AMENDMENT LIMITATIONS ON THE POWER OF THE UNITED STATES TO PREVENT NON-MISLEADING USE OF GENERIC GEOGRAPHIC LABELS

The First Amendment of the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."<sup>75</sup> These ten relatively straightforward words, however, have created some very complex legal rules, especially as regards any speech that the U.S. Supreme Court has determined to be "commercial speech."<sup>76</sup>

The Supreme Court has never heard a case that required it to define the free speech limitations on federal government regulation of GIs. The closest the Court has come to deciding this question was in the 1987 case *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*.<sup>77</sup> In that case, the Court decided whether a statutory provision that gave the U.S. Olympic Committee (USOC) the authority to prohibit unauthorized use of the term "Olympic" even if the USOC was not able to show that the unauthorized use was misleading.<sup>78</sup> The Court

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that is expressly outside the authority of the United States, could be considered to be "made . . . under the authority of the United States." *Covert*, 354 U.S. at 16.

73. See Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999 (2003) [hereinafter Spiro, *Treaties*]; Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002).

74. See CHEMERINSKY, *supra* note 71; Stanley E. Cox, "Could a Treaty Trump Supreme Court Jurisdictional Doctrine?": *Why Properly Construed Due Process Limits Must Always Trump Contrary Treaty Provisions*, 61 ALB. L. REV. 1177, 1177-78 (1998); Russell J. Weintraub, "Could a Treaty Trump Supreme Court Jurisdictional Doctrine?": *Negotiating the Tort Long-Arm Provisions of the Judgments Convention*, 61 ALB. L. REV. 1269, 1276-77 (1998).

75. U.S. CONST. amend. I.

76. See *infra* notes 87-104 and accompanying text.

77. 483 U.S. 522 (1987).

78. *Id.* at 527.

held that this statute did not violate the First Amendment.<sup>79</sup>

San Francisco Arts and Athletics, Inc. argued that because the term “Olympic” was a generic term, the First Amendment prevented Congress from extending a trademark on that term.<sup>80</sup> The Court, however, said that it did not have to reach the question whether the First Amendment ever allows Congress to grant exclusive use of a generic word, because there were unique reasons Congress could decide that “Olympic” was a word that should be reserved for the USOC.<sup>81</sup> “Congress reasonably could conclude that the commercial and promotional value of the word ‘Olympic’ was the product of the U.S.O.C.’s own talents and energy, the end result of much time, effort, and expense.”<sup>82</sup>

In dealing specifically with the First Amendment question, the Court then said that the statute is simply a restriction on the manner of expression, not on the content of expression, and as such should only be subject to an intermediate level of scrutiny.<sup>83</sup> Alternatively, the Court suggested in a footnote that the statute should be analyzed as a restriction on commercial speech, which the Court then acknowledged would require application of a nearly identical test.<sup>84</sup> The court then decided

79. *Id.* at 528.

80. *Id.* at 531-32.

81. *Id.* at 532.

82. *S.F. Arts & Athletics v. U.S. Olympic Committee*, 483 U.S. 522, 532-33 (1987).

This Court has recognized that words are not always fungible, and that the suppression of particular words “run[s] a substantial risk of suppressing ideas in the process.” The SFAA argues that this principle prohibits Congress from granting the USOC exclusive control of uses of the word “Olympic,” a word that the SFAA views as generic. Yet this recognition always has been balanced against the principle that when a word acquires value “as the result of organization and the expenditure of labor, skill, and money” by an entity, that entity constitutionally may obtain a limited property right in the word.

*Id.* at 532.

83. *Id.* at 536-37. “The restrictions on expressive speech properly are characterized as incidental to the primary congressional purpose of encouraging and rewarding the USOC’s activities. The appropriate inquiry is thus whether the incidental restrictions on First Amendment freedoms are greater than necessary to further a substantial governmental interest.” *Id.* (citing *U.S. v. O’Brien*, 391 U.S. 367, 377 (1968)).

84. 483 U.S. 522, 537 n.16 (1987).

A restriction on nonmisleading commercial speech may be justified if the government’s interest in the restriction is substantial, directly advances the government’s asserted interest, and is no more extensive than neces-

that Congress did have a substantial interest in promoting the interests of the USOC because of the public good that the USOC provides, and that the statute in question did not restrict First Amendment freedoms any more than needed to further those interests.<sup>85</sup>

While the Court did not define just how far the First Amendment protections extended in this case, it is clear that there are some First Amendment limits to the power of the federal government to grant exclusive use of a term to a specific group if use of that term by someone else would not be misleading. While *SFAA* dealt specifically with trademark regulation, there is no discernible Constitutional difference between the speech restrictions that are created by regulations of trademarks as opposed to GIs.

Since *SFAA*, more academic attention has been paid to the question of free speech limitations on intellectual property protections.<sup>86</sup> In addition, there has been considerable question about the continuing validity of the commercial speech doctrine that extends less protection to profit-seeking speech than to other types of speech.<sup>87</sup> In the 1980 case *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*<sup>88</sup> the Supreme Court articulated a four-part test to determine the constitutionality of commercial speech regulation. First, the court determines whether the speech concerns lawful activity and is non-misleading.<sup>89</sup> Second, the court must ask whether

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sary to serve the interest. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980). Both this test and the test for a time, place, or manner restriction under *O'Brien* require a balance between the governmental interest and the magnitude of the speech restriction. Because their application to these facts is substantially similar, they will be discussed together.

*Id.*

85. *Id.* at 537-39.

86. Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 690 (1993); See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 LIQUORMART, and Bartnicki, 40 HOUS. L. R. 697 (2003).

87. See Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser,"* 55 VAND. L. REV. 693, 701 (2002) ("[T]he prevailing view today . . . is that the Court's commercial speech jurisprudence is confused and unstable.")

88. 447 U.S. 557 (1980).

89. *Id.* at 564.

the government is asserting a substantial interest.<sup>90</sup> Third, the court determines whether the regulation directly advances that substantial governmental interest.<sup>91</sup> Finally, the court asks whether the regulation is any more extensive than necessary to serve that interest.<sup>92</sup>

This *Central Hudson* test remains more or less the doctrine of commercial speech. In 1989, the Supreme Court lowered the level of scrutiny by deciding that the least restrictive means test in the fourth prong created too high a burden for the state to meet.<sup>93</sup> Instead, the Court decided that the state regulation only needed to use “a means narrowly tailored to achieve the desired objective.”<sup>94</sup> In *44 Liquormart, Inc. v. Rhode Island*,<sup>95</sup> just seven years later, the Supreme Court appeared to move towards even greater protection of commercial speech than provided for in *Central Hudson*.<sup>96</sup> Justice Stevens, joined by Justices Kennedy and Ginsburg, suggested that when a state restricts truthful, non-misleading commercial speech, it should be subject to strict scrutiny.<sup>97</sup> Justice Thomas argued that such restrictions would be unconstitutional *per se*.<sup>98</sup> Justice Scalia, while not joining the Thomas opinion, indicated that he agreed with Justice Thomas’s analysis and had doubts about the *Central Hudson* test.<sup>99</sup> In addition, the Court seems to have determined that “a speech regulation passed with the purpose of keeping consumers ignorant is *per se* invalid, because it lacks a legitimate purpose, even if the government’s ultimate objective is to discourage or control activity that it concededly has the power to regulate.”<sup>100</sup>

More recently, in a 2001 case, the Court used the *Central*

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90. *Id.*

91. *Id.*

92. *Id.*

93. *See Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989).

94. *Id.* at 480.

95. 517 U.S. 484 (1996).

96. *See* SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, REGULATORY LAW AND POLICY: CASES AND MATERIALS 467 (3d ed. 2003).

97. *See 44 Liquormart*, 517 U.S. at 501 (Stevens, J., plurality); SHAPIRO & TOMAIN, *supra* note 96, at 467.

98. *See 44 Liquormart*, 517 U.S. at 518-20 (Thomas, J., concurring in part and concurring in the judgment); SHAPIRO & TOMAIN, *supra* note 96, at 467.

99. *See 44 Liquormart*, 517 U.S. at 518-20 (Scalia, J., concurring in part and concurring in the judgment); CHEMERINSKY, *supra* note 71, at 1052.

100. Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 328 (1997).



*Hudson* test to strike down laws in Massachusetts regulating tobacco advertising.<sup>101</sup> Although the Court was urged to subject the regulations to strict scrutiny, Justice O'Connor wrote for the Court that strict scrutiny was not necessary in this case because the regulations failed under the lower level of scrutiny provided under the *Central Hudson* analysis.<sup>102</sup> Justice O'Connor conceded, however, that several members of the Supreme Court had called the *Central Hudson* test into question.<sup>103</sup> One of those members, Justice Thomas, took this opportunity to once again call for the abandonment of *Central Hudson* in favor of strict scrutiny for restrictions of commercial speech.<sup>104</sup>

The Court, once again led by Justice O'Connor, similarly applied the *Central Hudson* test without determining whether a stricter standard of review was appropriate in a 2002 case in which the Court struck down prohibitions on advertising and promotion of certain compounded drugs.<sup>105</sup> Justice Thomas once again took the opportunity to concur separately and express his belief that *Central Hudson* did not go far enough in protecting non-misleading commercial speech.<sup>106</sup>

Thus, while it is not clear precisely which level of scrutiny federal regulation of GIs would have to satisfy, it is relatively clear that at a minimum, the regulation would have to satisfy the *Central Hudson* test as it was modified by *Fox*, meaning that the government regulation must be narrowly tailored and substantially related to achieving an important government purpose.<sup>107</sup> In addition, the Court has pointed out that "the party seeking to uphold a restriction on commercial speech carries the burden of justifying it."<sup>108</sup>

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101. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

102. *Id.* at 554-55.

103. *Id.* at 554.

104. *Id.* at 572 (Thomas, J., concurring in part and concurring in the judgment).

105. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002). The majority in this case inexplicably reverts back to the least restrictive means test that had been rejected in *Fox*. See *id.* at 367; *supra* notes 93-94 and accompanying text. Justice O'Connor herself wrote that the least restrictive means test had been abandoned in her majority opinion in *Lorillard* the previous year. See 533 U.S. 525, 556 (2001). It is unlikely that this means, however, that the Court has decided to revive the least restrictive means test. A more likely explanation is that the opinion writer simply quoted *Central Hudson* and overlooked the later cases modifying the test.

106. 535 U.S. at 377 (Thomas, J., concurring).

107. See *CHEMERINSKY*, *supra* note 71, at 1050.

108. *Western States*, 535 U.S. at 373 (2002).

### III. DETERMINING THE CONTOURS OF CONSTITUTIONAL PROTECTION OF “BOLOGNA,” “PARMESAN,” AND OTHER GENERIC TERMS

#### A. SUPREMACY OF THE U. S. CONSTITUTION OVER U.S. OBLIGATIONS UNDER WTO AGREEMENTS

As a general rule, the U.S. Constitution is the supreme law that no treaty obligations can trump.<sup>109</sup> There seems to be little question that U.S. courts would prevent the U.S. government from taking actions that are prohibited by the U.S. Constitution simply because international agreements tell the United States to do so.<sup>110</sup>

With respect to the specific context of the WTO agreements, this question becomes even clearer. The WTO agreements themselves seem to assert their own legal supremacy over conflicting national laws.<sup>111</sup> However, the statute passed by Congress that put the WTO agreements into legal force very clearly indicates that U.S. law prevails in any conflict with a provision of the WTO agreements.<sup>112</sup> Thus it is critical to ask prior to any

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109. See *supra* notes 69-74 and accompanying text.

110. However, U.S. courts might be tempted, as they have been in the past, to alter their constitutional analysis to take into account international attitudes. Justice Sandra Day O'Connor recently gave an address in which she explicitly endorsed a trend by the courts towards “rely[ing] increasingly on international and foreign law in resolving what now appear to be domestic issues.” Justice Sandra Day O'Connor, Remarks at the Southern Center for International Studies (Oct. 28, 2003) (transcript available at [http://www.southerncenter.org/OConnor\\_transcript.pdf](http://www.southerncenter.org/OConnor_transcript.pdf)) (last visited Nov. 14, 2003). The two examples Justice O'Connor points to, *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), are both instances in which individuals were protected against government power. *Id.* at 2. Of course, there is no reason to believe that such international considerations could not similarly be used to restrict individual rights and enlarge government power. See Spiro, *Treaties*, *supra* note 73, at 2007-10 (citing the historical examples of extradition agreements, foreign claims settlement agreements, and consular courts to demonstrate that historically courts have applied constitutional doctrines to limit individual rights when international considerations might be served by doing so). But if the courts were to rely on international law to resolve the constitutional dispute that would arise from the EU's proposals discussed here, it would seriously challenge the settled *Reid v. Covert* doctrine. See *infra* notes 143-47, 161-63 and accompanying text.

111. See Agreement Establishing the World Trade Organization, Apr. 15, 1994, Art. XVI, LEGAL INSTRUMENTS-RESULT OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 23 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf) (last visited Oct. 15, 2003).

112. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102 (a)(1), 108

amendments to the WTO agreements, whether those amendments would require the U.S. government to act in a way that would be in violation of the U.S. Constitution.

## B. FIRST AMENDMENT ANALYSIS OF THE EU PROPOSALS

### 1. *The Proper Standard of First Amendment Review*

All three of the EU proposals attempt, in some way, to prevent certain actors from speaking in certain ways.<sup>113</sup> In other words, they would require the U.S. government to engage in prior restraint of speech, which is ordinarily viewed as inherently suspect.<sup>114</sup> It would not be fair to characterize the regulations as “mere time, manner and place restrictions,” which are more likely to withstand constitutional scrutiny.<sup>115</sup> Unlike time, manner, or place restrictions, the EU proposals are designed to prevent any expression of the desired idea, at every time, in every manner, and in every place.<sup>116</sup> In addition, time, manner and place restrictions are by definition not content-based.<sup>117</sup> The prohibition of the use of certain words to describe certain products, however, must be regarded as content-based.

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Stat. 4809, 4815 (1994).

113. Although this observation seems obvious, the shocking absence of any discussion of First Amendment principles in the debate over these proposals suggests that at least some U.S. trade negotiators have overlooked this aspect of the problem. However, there is no reason to believe that the use of certain words on product labels is devoid of First Amendment protection. One federal district court, in striking down a Congressional statute, explicitly held that such labels are extended First Amendment protection. See *Hornell Brewing Co., Inc. v. Brady*, 819 F.Supp. 1227 (E.D.N.Y. 1993). There Congress prohibited the use of the term “Crazy Horse” on any label for an alcoholic product, and the court, in striking down the legislation, held, “The Crazy Horse Malt Liquor label is indisputably commercial speech.” *Id.* at 1233. Earlier, the Tenth Circuit had held, “Product labels, which are part of a firm’s marketing plan to provide certain information to the consumer . . . constitute commercial speech.” *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991). This decision was appealed to the U.S. Supreme Court and affirmed. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995). However, the specific question about whether labels constitute commercial speech was not even the subject of challenge at the Supreme Court, which suggests that this proposition is too settled for the Solicitor General’s office to waste its time with it. See *id.* at 481 (“Both parties agree that the information on beer labels constitutes commercial speech.”).

114. See Lemley & Volokh, *supra* note 86, at 222.

115. See Volokh, *supra* note 86, at 701-10.

116. See *id.* at 709-10; *supra* notes 34-46 and accompanying text.

117. See Volokh, *supra* note 86, at 701-03.

Ordinarily, strict scrutiny would be applied to content-based prior restraint of speech; however, this is where the commercial speech doctrine comes into play. Commercial speech has long been held to be a less protected type of speech.<sup>118</sup> Although there has been some question recently about what the precise definition of commercial speech is, it is difficult to conceive of a persuasive argument why a label to identify a food product that one is selling for commercial gain would not be commercial speech.

Of course, commercial speech is not entirely without constitutional protection. To the extent that commercial speech is non-misleading and not related to illegal activity, the Supreme Court has recognized that it is protected against unreasonable government regulation.<sup>119</sup> The precise extent of this protection is currently unclear, but at the minimum, regulation of non-misleading commercial speech must satisfy the test established in *Central Hudson* and its progeny to withstand First Amendment scrutiny.<sup>120</sup>

Whether a particular label is misleading would require a specific factual determination about each specific product. If a term that the EU considers to be a “geographical indication” does not actually conjure up notions of a particular geographic region in the minds of most U.S. consumers, then the use of that term for products that are not from that geographical region would not be misleading. For example, most U.S. consumers do not expect their Kraft Parmesan Cheese to be from the Parma region of Italy and they certainly do not think that the bologna with a first name gets “its most important name” because it is from Bologna, Italy.<sup>121</sup> Thus, if the U.S. government were to prohibit Kraft or Oscar Meyer from using these words to describe food that does not come from the preferred region of Italy it would be engaged in regulation of non-misleading commercial speech.

## 2. *Application of the Central Hudson Doctrine to the EU Proposals*

When the Supreme Court has recently applied the *Central*

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118. See *supra* notes 87-92 and accompanying text.

119. See *supra* notes 87-108 and accompanying text.

120. See *supra* notes 107-08 and accompanying text.

121. See *supra* notes 1, 10-13 and accompanying text.

*Hudson* test, they have declared that restrictions of non-misleading commercial speech must be narrowly tailored and substantially related to achieving an important government purpose.<sup>122</sup> Application of this test to the regulations needed to comply with the EU proposals on stronger GI protections requires us to posit possible government interests that the U.S. government could assert. Four possible interests are: (1) the interest in protecting consumers from being misled; (2) the interest in protecting European farmers who live in preferred regions (and potentially some U.S. farmers if acceptance of the EU proposal results in protection of U.S. GIs); (3) the interest in complying with international agreements; and (4) the interest in maintaining strong international relations with European allies. Each of these potential interests will be explored in depth.

a. Protecting Consumers as a Government Interest

The government could potentially argue that they have an interest in protecting consumers from buying lower quality goods without realizing it. This is part of the rationale forwarded by the EU for these new protections.<sup>123</sup> However, this interest would only be relevant to the extent that the label was a bona fide GI in the eyes of the average U.S. consumer. If the label in question is a generic label, use of that label to describe a product that was not from a particular region would not be misleading, and there would be no need to protect consumers. The Supreme Court in *Western States*<sup>124</sup> held that the government could not assert a substantial government interest in preventing consumer confusion if they were not able to establish that a particular advertisement was misleading.<sup>125</sup>

In addition, even if the courts were to accept an interest in consumer protection, the Supreme Court has dealt quite harshly with the argument that the government could ever have an interest in keeping consumers in the dark about truthful information.<sup>126</sup> It is also unclear whether the EU proposals would be

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122. See *supra* notes 107-08 and accompanying text.

123. See *supra* note 14 and accompanying text.

124. 535 U.S. 357 (2002).

125. See *id.* at 376.

126. See *id.* at 374 (“We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.”); *supra* note 100 and accompanying text.

“substantially related” and “narrowly tailored” to achieve the goal of consumer protection. Even if one were to concede the possibility of some consumer confusion, the prohibition of all use of certain words to describe all products that are not from certain areas is far from a narrowly tailored solution. Other much less burdensome means could be used to advance this interest, such as additional speech warning consumers about the difference between, for instance, Kraft Parmesan Cheese and Parmigiano Reggiano from Italy. Additionally, the government could serve this interest by requiring some clear indication of the true origin of the product, a solution specifically rejected by the EU proposals.<sup>127</sup> The Court stated in *Western States*, “If the First Amendment means anything, it means that regulating speech must be a last—not first—resort.”<sup>128</sup> With the presence of these other methods of serving the interest of preventing consumer confusion, it is unlikely that the EU proposals would survive First Amendment scrutiny on the strength of this interest.

b. Protecting European (or U.S.) Farmers as a Government Interest

The government could assert that they have a substantial interest in helping European agricultural producers compete in the global market. They could also assert that agreeing to the EU proposals would eventually help certain U.S. producers by allowing for some GI protection of U.S. geographic labels. This asserted interest, however, raises important questions about what constitutes a substantial government interest or even a legitimate interest. So far, the courts have failed to establish clear, comprehensive principles about what is and is not an acceptable governmental interest.<sup>129</sup> However, they have indicated that some governmental interests are never legitimate. There are three reasons to believe that this interest would not be regarded as a legitimate governmental interest. First, the government’s interest in keeping consumers ignorant of information about legal activity is never legitimate, even if it serves a legitimate secondary governmental purpose.<sup>130</sup> Second, the government can never assert an interest in censoring certain

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127. See *supra* notes 35-38, 46 and accompanying text.

128. 535 U.S. 357, 373 (2002).

129. See Bhagwat, *supra* note 100, at 299 (“[T]he Court has not tied its review of purpose to any firm set of principles.”).

130. See *supra* notes 100, 126 and accompanying text.

speech simply because a particular group, in this case European farmers, has a problem with the content of that speech.<sup>131</sup> Finally, the Court has suggested, in the equal protection context, that the legislative purpose of preferring one politically favored group to a politically disfavored group is not an acceptable purpose.<sup>132</sup>

Without another asserted interest besides the desire to favor some producers over others based simply on their geographical location, it is difficult to see how the regulations that the United States would have to implement would be able to pass First Amendment muster. The interest in favoring some producers over others, by itself, would likely be viewed by the Court as illegitimate. However, even if it was not, the Court has not found any legitimate purpose for the suppression of truthful information about lawful commercial activity simply because it might lead to consumers making choices that the government does not like.<sup>133</sup> In this case, U.S. courts faithfully following the precedent of the Supreme Court would have to determine that the government's interest in suppressing the use of non-misleading labels in order to prevent consumers from choosing to buy the products of producers from certain disfavored geographical regions is not a legitimate governmental interest, much less an important interest.

The government might attempt to characterize this interest in a way that escapes the problem of arbitrarily preferring one politically favored group to a less favored one. They could assert, for example, that they are protecting the investment that the European regions have made in establishing and promoting the particular labels.<sup>134</sup> This claim, however, requires acceptance of another claim: that the value of the labels in the United States is substantially related to some work that particular Europeans have done to promote those labels in the U.S. mar-

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131. See, e.g., *Hornell Brewing Co., Inc. v. Brady*, 819 F.Supp. 1227, 1234-35 (E.D.N.Y. 1993) (holding that the fact that the name "Crazy Horse Malt Liquor" was offensive to a substantial amount of Native Americans did not give rise to a substantial governmental interest in regulating that speech).

132. See Bhagwat, *supra* note 100 at 327. Bhagwat argues, "[T]he legitimacy of governmental purposes varies with the right at issue—meaning that a particular government purpose might be entirely legitimate when one right is being burdened, and yet illegitimate in another context." *Id.* at 331.

133. See *supra* note 126.

134. This is similar to the rationale used in *SFAA* to justify the reservation of the term "Olympic" to the USOC. See *supra* note 82 and accompanying text.

ket. This is a factual inquiry related to whether the label in question is a generic label<sup>135</sup> and the burden of proof is on “the party seeking to uphold [the] restriction on commercial speech.”<sup>136</sup> The broad factual study that would be needed to support this claim has not been attempted to this point, and it is at best questionable that such a study would determine that all of the labels that the EU would like protected<sup>137</sup> are in fact labels that have value in the U.S. marketplace as a substantial result of European marketing efforts.<sup>138</sup>

However, even if the courts were to accept this as not only a legitimate governmental interest, but also a substantial one, they would likely determine that the regulations in question were not narrowly tailored and did not directly promote the interest in question.<sup>139</sup> There are significant questions about whether GI restrictions would substantially help European farmers.<sup>140</sup> In addition, if the government were really interested in helping European agricultural producers, there could be other methods of helping them, such as preferential trade policies or U.S. government purchases of European products.<sup>141</sup> Because restrictions of commercial speech need to be “the last resort,”<sup>142</sup> it is unlikely that the EU proposals would satisfy any part of the *Central Hudson* test using this asserted governmental interest.

### c. WTO Agreement Compliance as a Government Interest

If these proposals became part of the WTO Agreements, the government could argue that they have a substantial interest in complying with the WTO Agreements, and that regulation to comply with the Agreements would be narrowly tailored and substantially related to achieving that purpose. If we assume that U.S. laws only went as far as the EU proposals require

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135. See *supra* note 121 and accompanying text. These inquiries are related because the association (or lack thereof) in the minds of the average U.S. consumer between a food label and the corresponding geographical region would serve as evidence for or against such an effort to promote the connection.

136. See *supra* note 108 and accompanying text.

137. See *WTO Talks*, *supra* note 49.

138. See *supra* note 60.

139. See *supra* note 107 and accompanying text.

140. See *supra* notes 63-64 and accompanying text.

141. See *supra* note 128 and accompanying text. Although these suggestions might seem to be a bit far-fetched, they become less so in light of the Court's First Amendment emphasis on finding solutions that do not burden speech.

142. See *supra* note 128 and accompanying text.



them to, it would be difficult to argue that the laws were not narrowly tailored and substantially related to the purpose of complying with the WTO Agreements.

The critical inquiry, then, must focus on whether the interest in complying with an international agreement can, by itself, be a substantial governmental interest that can overcome express constitutional limitations on government action.<sup>143</sup> This is a question that the courts have not directly addressed.<sup>144</sup> However, if the courts are to take seriously the principle that international agreements cannot trump constitutional guarantees,<sup>145</sup> there can only be one right answer to this question.<sup>146</sup> If the interest in compliance alone is a substantial governmental interest, this potentially creates an exception that swallows the *Reid v. Covert* rule.<sup>147</sup> This would create a situation in which the

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143. See Spiro, *Treaties*, *supra* note 73, at 2019-21.

144. While the Supreme Court has not directly addressed this issue, the Court has suggested, without deciding, that compliance with international law could be a compelling governmental interest. See *Boos v. Berry*, 485 U.S. 312, 324 (1988); Spiro, *Treaties*, *supra* note 73, at 2019-20.

145. See *supra* notes 69-74, 109-12 and accompanying text.

146. Professor Spiro does not think the answer is quite so clear-cut, primarily because he does not take the principle that seriously. While he argues that the use of treaty compliance as a governmental interest would ultimately fail as a doctrinal tool to challenge the supremacy of domestic constitutional rights, see *infra* note 147, he continues to search for a legal basis to do so. Spiro's solution is based on a trend he calls the constitutionalization of international law. See Spiro, *Treaties*, *supra* note 73, at 2001-02, 2021-25. He points out that "[r]ights have become a part of the international law landscape to the point that they have been constitutionalized," and suggests this "may supply a new basis for ceding domestic constitutional autonomy." *Id.* at 2021. As a result of what he calls a "rights floor" in international law, Spiro argues, "the prospect of ceding rights autonomy should be less alarming." *Id.* at 2022.

Spiro's defense of the international constitutional order, however, leaves much to be desired. First, he is so worried about answering the objections that he fails to offer any substantive advantages to prioritizing international rights determinations. Aside from amorphous claims about living in an international community, Spiro provides virtually no affirmative reason to prefer protection of rights through international mechanisms. See *id.* at 2023-25. Second, he admits that we are locked in a domestic constitutional order that asserts legal supremacy over international treaty obligations. See *supra* notes 69-74, 109-12 and accompanying text. That constitutional order provides very limited and difficult means for alterations or escape. See U.S. CONST. art. V. This situation requires more than simply wishing for a different system. It requires some basis within our current constitutional system to prioritize the determination of substantive rights at the international level rather than the national level. Spiro does not attempt any such justification other than pointing out isolated occasions in which courts have been influenced by international considerations. See *supra* note 110.

147. See *supra* notes 69-74, 109-12 and accompanying text. Professor Spiro

U.S. government could freely infringe on any constitutional protection simply by finding another country that would make an international agreement that infringed on that protection, and then agree to penalties for breach of that agreement that were sufficiently severe that a court would find that the interest in compliance was either substantial or compelling, depending on the level of scrutiny that the regulation was subject to.<sup>148</sup>

In addition, even if treaty compliance was regarded as an otherwise legitimate purpose, the courts might determine that it still does not escape the general rule that “a speech regulation passed with the purpose of keeping consumers ignorant is per se invalid, because it lacks a legitimate purpose, even if the government’s ultimate objective is to discourage or control activity that it concededly has the power to regulate.”<sup>149</sup> The per se invalidity of keeping consumers ignorant could very well extend to the desire to keep consumers ignorant simply to comply with the terms of an international agreement. If so, this interest would also fail, under the *Central Hudson* test, to justify the regulations required by the EU proposals.

#### d. International Relations as a Government Interest

The government could argue that they have a substantial

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agrees that “[i]f such accommodation were to occur . . . the Covert rule emerges as less categorical than the conventional account suggests.” Spiro, *Treaties*, *supra* note 73, at 2020. After all, “Constitutional rights ‘adjusted’ by treaty norms are changed by them. The Constitution is read to conform with the treaty.” *Id.*

Professor Spiro ultimately rejects this rationale as a sustainable doctrinal basis for submerging domestic constitutional rights to international law norms. *Id.* at 2020-21. He argues that the stakes of treaty compliance (or non-compliance) are no longer high enough to justify treaty compliance as a sufficiently important interest to trump important individual rights. *Id.*

148. Perhaps the greatest weakness in Professor Spiro’s argument is his blind faith that something like this would not happen in a world with weakened domestic constitutional protections. See *supra* note 146 (discussing Spiro’s faith in an international constitutional order). However, even if he is correct that individual rights would be protected, but simply with a different determination of the precise limits of those rights, that still creates serious concerns. See *supra* note 146. We can never be entirely sure that any decision-maker, domestic or international, will be correct in making constitutional determinations about rights. However, at least at the national level, the possibility of comparative analysis makes correction easier. Additionally, the fact that rights determinations are made at a more local level and for a smaller community makes the likelihood of those determinations becoming wildly out of touch with the attitudes of a particular community less likely.

149. Bhagwat, *supra* note 100, at 328; see *supra* note 126 and accompanying text.

interest in maintaining good trade relations with the EU, and thus to comply with their demands about commercial speech, regulation is sufficiently necessary and narrowly tailored to overcome First Amendment scrutiny. The asserted interest itself seems fairly reasonable. Certainly strong ties between the United States and the EU are important, and it is conceivable that the courts would determine that a substantial governmental interest exists.<sup>150</sup>

However, the remainder of the *Central Hudson* test would pose serious problems to this line of reasoning. The Court has held that the burden of justification rests on the Government and regulation of commercial speech must be the "last resort."<sup>151</sup> That sets a fairly high bar that must be met in showing that strong U.S.-EU relations could not be maintained without these speech restrictions. Deciding whether such a finding would be made at some future time is impossible right now, but it is difficult to imagine the circumstances under which it could be shown that all other options in saving diplomatic and trade relations had been exhausted before the United States agreed to restrict commercial speech.

To overcome this burden, the U.S. government would have to demonstrate that the EU could actually carry out any threatened damage to relations. This is a dubious proposition, however, given the dependence of the EU on trade with the United States.<sup>152</sup> The experience of the banana trade wars of 2000, in which the United States was able to escalate threatened tariffs until the EU backed down, demonstrates that total capitulation to any particular EU demand is not necessarily needed to main-

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150. It must be noted, however, that accepting such an asserted governmental interest for the purposes of justifying encroachments on constitutional civil liberties threatens to create a loophole similar to that warned of regarding the "treaty compliance" interest. See *supra* notes 145-47 and accompanying text. But instead of having to actually sign a treaty or international agreement, the U.S. government would now have to find some other government to make a significant enough threat to justify the otherwise unconstitutional action. This constitutional doctrine would have the additional drawback of having a built-in process of potential manipulation by a party with an interest in the outcome. To return to our present case as an example, we should be reluctant to accept a method of constitutional analysis that allows the EU to increase the chances of a favorable outcome for them by virtue of their increased recalcitrance.

151. See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 376 (2002).

152. See Lou Dobbs, *Show Some Steel, Mr. Bush*, U.S. NEWS & WORLD REP., Nov. 24, 2003, at 48. "It may have escaped the attention of the Brussels bureaucrats, but [the U.S.] is Europe's biggest and best customer, and the Europeans simply cannot afford the price of economic warfare." *Id.*

tain a relationship with the EU.<sup>153</sup>

### C. THE AFTERMATH

In light of the constitutional problems of U.S. compliance with the EU's claw-back proposals, one of four possible scenarios could result from such an amendment to the WTO Agreements. In the first scenario, all U.S. producers would just quietly accept the agreement and decide not to raise the First Amendment arguments that have been outlined here. This seems monumentally unlikely given the high economic stakes for U.S. producers and consumers<sup>154</sup> and the outrage of those in the United States in response to what they perceive as ridiculous restrictions of their ability to call products by the names they associate with them.<sup>155</sup>

The second scenario, similarly unlikely, is that the EU would simply allow U.S. courts to gut the enforcement of their proposals in the United States. Given the EU's belief that such protections are vitally important to European producers, there is no reason to think they would give up so easily, especially after they would have already gone so far to get these protections recognized on the international level.<sup>156</sup> The fact that the lack of progress at Cancun has not deterred the EU from continuing to advocate this proposal also strongly suggests that they would not give up these protections very easily once they were won.<sup>157</sup>

This would leave us with a certain conflict between the interests of the EU and the U.S. producers, with the U.S. federal courts as the likely battleground. This would give rise to one of the final two scenarios. The first possibility is that the U.S. courts would apply commercial speech principles in the way that the Court is now articulating them, and would strike down any attempt by the U.S. government to comply with the EU proposals.<sup>158</sup> This would put the United States in violation of explicit WTO provisions, and would likely trigger international retaliation similar to that which had been feared as a result of the 2003 WTO ruling holding U.S. steel tariffs illegal.<sup>159</sup> The WTO

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153. *See id.*

154. *See supra* notes 60-62 and accompanying text.

155. *See supra* notes 11-13, 50-59 and accompanying text; *supra* note 60.

156. *See supra* notes 15-17 and accompanying text.

157. *See supra* notes 5-6 and accompanying text.

158. *See supra* notes 113-51 and accompanying text.

159. *See U.S. Steel Tariffs Ruled Illegal, Sparking Potential Trade War*, WALL

Agreements do not make an allowance for superseding domestic law obligations, and make it the responsibility of each individual country to comply.<sup>160</sup> As a result, the U.S. Constitution, if faithfully applied by the Courts, would put the United States in clear violation of international trade law.

The final scenario is no more desirable. The courts might find some way to circumvent the relatively clear commercial speech protections that should prevent the types of broad-sweeping speech regulations that the EU proposes.<sup>161</sup> This would likely be done in a way that does not directly overturn *Reid v. Covert*,<sup>162</sup> but would leave it in shambles nonetheless.<sup>163</sup> Because these speech restrictions would clearly be illegal if they were not backed by an international determination, any rationale the U.S. courts would use to uphold them would likely be fairly transparent. This would seriously call into question the settled doctrine of *Reid v. Covert* that the U.S. federal government cannot act outside the limits of the U.S. Constitution, even when invited or ordered to do so by some international agreement. Perhaps more importantly, it would signal that the courts are willing to disregard fundamental domestic legal principles if the international price is right.<sup>164</sup>

## CONCLUSION

U.S. constitutional free speech guarantees may create seri-

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ST. J., Nov. 11, 2003, at A1.

160. See *supra* note 112 and accompanying text.

161. See *supra* notes 113-51 and accompanying text.

162. Even Professor Spiro, who would not be opposed to such a development, does not think that a direct repudiation of the doctrine of constitutional supremacy is realistic. See Spiro, *Treaties*, *supra* note 73, at 2025-26 ("It is unlikely in the extreme that the treatymakers would undertake . . . a frontal assault against the supremacy of constitutional rights given the clear lack of constitutional authorization to constrain rights on international law grounds.").

163. See *supra* notes 145-47 and accompanying text.

164. Ironically, this perhaps would undermine the precise rationale that Justice O'Connor offers for being "seen to be cognizant of other judicial systems," namely the "ability to act as a rule-of-law model for other nations." See O'Connor, *supra* note 110, at 2. Justice O'Connor correctly identifies the rule of law, defined in her words as "the notion that no person, including the sovereign, is above the law and that persons will be secure from the arbitrary exercise of the powers of government," as an important ideal to which communities should aspire. *Id.* at 3. However, if the U.S. courts decide that the sovereign can place itself above the law, in this case the First Amendment, simply by entering into an international agreement that requires a violation of that law, there will not be much rule of law for anyone else to model.

ous problems for international protections of GIs. If the EU insists on demanding protections for labels that are considered generic by U.S. consumers, it appears that they are on a collision course with our First Amendment. Conversely, the bargaining position of the United States would be substantially different if the U.S. negotiators pointed out that the restrictions that the EU is requesting are, *at best*, of questionable constitutionality.

The U.S. courts have consistently held that express limitations of the U.S. Constitution limit the power of the U.S. government even when it is acting in accordance with an international agreement and would likely find that U.S. duties under the WTO agreements are subordinate to the First Amendment. They have also consistently held that the First Amendment protects non-misleading commercial speech. The precise extent of the protection that is extended to commercial speech under the First Amendment is not clear. However, it must be emphasized that even under the *Central Hudson* test, the most deferential test possible under current First Amendment law, the U.S. government would have an extremely difficult time justifying the commercial speech restrictions that the EU is asking them to make.

It is in the interests of all parties at the negotiating table (or at least all parties that are interested in making a deal that would be enforceable in the United States) to make sure that their proposals do not run afoul of the First Amendment. The EU's current demands to prohibit even non-misleading use of generic labels would likely fail that test.

