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DUDE, WHERE’S MY WINE? THE POTENTIAL EFFECT OF GRANHOLM v. HEALD ON GEORGIA DIRECT WINE SHIPMENT REGULATIONS

INTRODUCTION

While enjoying a taste of his favorite beverage, Thomas Jefferson once remarked, “good wine is a necessity of life for me.”1 Presently, Jefferson’s penchant for good wine would be difficult to satisfy in those states that prohibit direct shipment of wine from out-of-state wineries.2 If alive today, the former president’s necessity for the “Nectar of the Gods”3 might even land him in a jail cell.4 The Supreme Court’s 5-4 decision in Granholm v. Heald precludes this disastrous result by invalidating laws that make it more difficult for out-of-state wineries to deliver wine to state residents than it is for in-state wineries.5 If Jefferson were to decide to take up residence in Georgia, however, his thirst for wine might still be difficult to quench.6

In recent years, as the growth of the Internet and increased desire to shop from home have resulted in a boom in the direct shipment business, states have begun moving toward stricter direct shipment laws.7 Challenges to these restrictions are primarily on the basis of

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7. See Shanker, supra note 4, at 356.

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Commerce Clause violations.\(^8\) With regard to general challenges to the Commerce Clause, courts evaluate whether the statute in question is facially discriminatory or discriminatory as applied.\(^9\) If it is discriminatory, the court considers whether there is a legitimate local purpose that cannot be served by any other nondiscriminatory means.\(^10\) If so, then the statute survives the challenge; if not, the statute is stricken down as unconstitutional.\(^11\)

The analysis becomes more complex with regard to commerce involving alcohol, where the court must also consider the Twenty-First Amendment, which repealed Prohibition and granted the states seemingly unlimited power over the transportation or importation of alcohol.\(^12\) Before \textit{Granholm}, the circuits were divided over how to reconcile the power granted to the states by the Twenty-First Amendment and the "historical rejection of barriers to interstate commerce at the heart of Commerce Clause jurisprudence."\(^13\) After the decision, however, it is clear that no reconciliation is needed: when a facially discriminatory statute faces a constitutional challenge under the Commerce Clause, the Twenty-First Amendment will not save it.\(^14\) What remains unclear, however, is the fate of a facially neutral statute whose effect may be construed as discriminatory.\(^15\)

In \textit{Granholm}, the majority focused on the facially discriminatory laws of Michigan and New York, finding both laws unconstitutional

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8. See Lucas, \textit{supra} note 2, at 912.
9. See \textsc{Erwin Chemerinsky}, \textsc{Constitutional Law: Principles and Policies} § 5.3.4 (2d ed. 2002).
10. See \textit{id.} § 5.3.6. "[I]f the Court concludes that a state is discriminating against out-of-staters, then there is a strong presumption against the law and it will be upheld only if it is necessary to achieve an important purpose." \textit{id.} at 410.
11. See \textit{id.}
12. U.S. CONST. amend. XXI; see Shanker, \textit{supra} note 4, at 369, 374 (discussing how the Twenty-First Amendment appears to give states complete discretion in issues involving alcohol and how the Amendment relates to the Commerce Clause).
14 See Granholm v. Heald, 544 U.S. 460, 486 (2005). "[T]he Twenty-first Amendment does not supersede other provisions of the Constitution and . . . does not displace the rule that States may not give a discriminatory preference to their own producers." \textit{id.}
15. See \textsc{Chemerinsky}, \textit{supra} note 9, at 414-15 (discussing how the Court never "has articulated clear criteria for deciding when proof of a discriminatory purpose and/or effect is sufficient for a state or local law to be deemed discriminatory").
as violating the dormant Commerce Clause. The Michigan law in question discriminated against out-of-state wineries by requiring them to distribute wine through licensed in-state wholesalers, while New York law achieved the same result by prohibiting out-of-state wineries from shipping wine directly to consumers unless they established an in-state presence, something that in-state wineries naturally have. Justice Kennedy, in a functionalist opinion, stressed that “[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.”

Currently, Georgia law places restrictions on the direct shipment of wine on both in-state and out-of-state wineries. Thus, a Georgia resident, in order to taste the wines of California in the comfort of his residence through direct shipment, must first physically present himself at the winery with identification in hand. This same Georgia resident, wishing to taste the wines of Southern Georgia in the comfort of his Atlanta home, must similarly comply with this restriction.

This Comment contends that because the Georgia direct wine shipping statutes are not facially discriminatory, the decision in Granholm should not impact their constitutionality. Part I discusses the history surrounding the decision in Granholm, including Prohibition, the Twenty-First Amendment, and the driving intent behind the Commerce Clause. Part II discusses Granholm in depth, from Justice Kennedy’s functionalist approach to Justice Thomas’s more formalistic opinion. Part III looks at Georgia’s approach to direct wine shipment, and contends that the regulations are

17. Id. at 469-70. New York law requires out-of-state wineries to establish “a branch factory, office or storeroom within the state” before they may ship directly to New York consumers. Id. at 470.
18. Id. at 493.
19. See O.C.G.A. § 3-6-31(c) (2004).
20. See id. §3-6-31(c)(3).
21. See id.
22. See discussion infra Part I.
23. See discussion infra Part II.
“evenhanded.” As such, this Comment asserts that because Georgia’s direct wine shipment law is facially neutral and there is no clear test for determining a discriminatory effect in such a statute, these laws will survive constitutional challenge under the Granholm analysis.

I. A HISTORICAL PERSPECTIVE

A. Prohibition: The Rise and Fall of the Eighteenth Amendment

During the first decades of the 19th century, many Americans consumed alcohol at an alarming rate, often drinking at every meal and even at work. “The unease that accompanied the social and cultural changes of the nineteenth century” created an American temperance movement which “sought to curb the prevalence of alcohol through social and legal means.” In response, Congress made many legislative attempts to limit the sales of liquor. In 1909, the COD Act “regulated interstate sales of liquor by specifying labeling requirements, requiring delivery to the specified consignee, and forbidding the carrier from collecting payment for the shipment from the consignee.” The Webb-Kenyon Act of 1913 “prohibited the shipment of intoxicating liquor into a state in violation of that state’s laws.”

24. See discussion infra Part III.
25. Id.
27. Lucas, supra note 2, at 915.
28. See id. at 916-917.
30. Id. at 916.

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State . . . or from any foreign country into any State . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used . . . in violation of any law of such State . . . is prohibited.

Id. at n.84 (quoting 27 U.S.C. § 122 (2006)).
enough to attenuate the prohibitionists’ concerns, however, who stated that “no evil can be exterminated by selling it the right to exist” in response to their belief that the federal government viewed the liquor industry as important because of the taxes it collected from the industry.\textsuperscript{31} In 1919, the ratification of the Eighteenth Amendment constitutionalized the prohibitionists’ view, prohibiting “the manufacture, sale, or transportation of intoxicating liquors . . . for beverage purposes.”\textsuperscript{32}

Due in large part to the growth of organized crime springing from the nationwide Prohibition, the Twenty-First Amendment was ratified in 1933, granting to the states extremely broad powers over the transportation and importation of alcohol.\textsuperscript{33} Read literally, the Amendment states that all laws (federal statutes or Constitutional provisions) pertaining to alcohol that are in violation of existing or future state law are invalid.\textsuperscript{34} While this literal interpretation was adopted early in the Amendment’s history, the Supreme Court began to shy away from the idea that the Twenty-First Amendment superseded the Constitution.\textsuperscript{35} The aim of the Twenty-First Amendment, according to Justice Kennedy in \textit{Granholm}, was to “allow States to maintain an effective and uniform system for controlling liquor,” not to give the States authority to discriminate against out-of-state producers.\textsuperscript{36}

\textbf{B. The Three-Tier System: Effects of Wholesaler Domination of the Market}

During the end of the Prohibition era, most states implemented a three-tier distribution system to regulate their internal market.\textsuperscript{37} The primary goals of this system were to collect taxes, to prevent the sale

\textsuperscript{31} Lucas, supra note 2, at 917.
\textsuperscript{32} U.S. CONST. amend. XVIII, \textit{repealed} by U.S. CONST. amend. XXI.
\textsuperscript{33} See Lucas, supra note 2, at 917-18; U.S. CONST. amend. XXI.
\textsuperscript{34} See U.S. CONST. amend. XXI.
\textsuperscript{35} See infra Part C.
\textsuperscript{37} See Lucas, supra note 2, at 906.
of alcohol to minors, and to “reduce the hold organized crime had gained on the liquor trade during Prohibition.”

The system works as follows: producers of alcoholic beverages sell to wholesalers (this is the first tier); wholesalers then sell to retailers (the second tier); and retailers sell to consumers (the third tier).

This structure, although varied by state, generally remains the same as it was in the 1930s.

With the advent of electronic commerce, the three-tier system becomes problematic, especially for small wineries that “rely on direct mailing to reach most of their customers.” As Justice Kennedy stated when discussing plaintiff Domaine Alfred, a small California winery, “[e]ven if the winery could find a Michigan wholesaler . . . the wholesaler’s markup would render shipment through the three-tier system economically infeasible.”

Because the number of wholesalers has dropped dramatically, it is not economical for them to carry smaller wineries’ products. Taking into consideration that the number of wineries in the United States has grown almost exponentially, this leaves only a few wholesalers to dominate the increasing national market.

Thus, the emergence of the ability to sell wine over the Internet has allowed small wineries to use this medium as a central outlet to deliver their product to consumers across the nation. When states restrict this outlet by

38. Id. at 906-07.
41. Shanker, supra note 4, at 364.
42. Granholm, 544 U.S. at 468.
44. See Lucas, supra note 2, at 907.
45. See Billingsley, supra note 43, at 1. “The Internet is an ideal medium for small wineries . . . to showcase . . . premium vintages.” Id.
prohibiting direct shipment to consumers, wholesalers are able to mark-up the price of wine considerably, forcing consumers to pay higher prices per bottle.\textsuperscript{46} To make things worse, wholesalers "have been among the most powerful and vociferous opponents of relaxing state direct shipping restrictions" and will do almost anything to preserve their stranglehold on the wine industry.\textsuperscript{47}

A by-product of the three-tier system is increased prices and lower selection for the consumer.\textsuperscript{48} As the war between small wineries and powerful wholesalers rages, consumers are increasingly subject to reduced variety and exorbitant prices.\textsuperscript{49} Due to the relatively small number of wholesalers and their ability to place a considerable mark-up on wine, consumers are paying approximately 18-25\% more per bottle.\textsuperscript{50} Thus, not only are small wineries being bullied out of the marketplace, but consumers are forced to open their wallets and choose from a more limited selection.\textsuperscript{51}

While it may seem that states support direct wine shipment prohibition to protect their local markets, it is apparent that states are more concerned with protecting their wholesalers and retailers.\textsuperscript{52} If out-of-state wineries can avoid selling their product to the middle tier and sell directly to in-state customers, the wholesalers and retailers stand to lose substantial revenue, which in turn would lead to a decrease in wine generated taxes for the state.\textsuperscript{53} States that give

\textsuperscript{46} See id. at 4. In addition to high mark-up, "many wholesalers do not keep pace with new vintages or carry the products of the small 'boutique' wineries," making consumer selection very limited. id.

\textsuperscript{47} Lucas, supra note 2, at 907. See also Billingsley, supra note 43, at 4 (stating that wholesaler Southern Wine and Spirits generates annual revenues of $2.3 billion, making it understandable for them, as well as other powerful wholesalers, to want to retain their monopoly advantage).

\textsuperscript{48} See Billingsley, supra note 43, at 4.

\textsuperscript{49} See Banner, supra note 40 (finding that reducing competition by prohibiting direct wine shipments raises the price of wine and reduces the variety available to the consumer). See also John McGee, More Wine, Less Whining: Commerce Clause Trumps State Statutes, 14-AUG BUS. L. TODAY 51, 52-53 (2005) ("Making direct purchase by consumers from out-of-state illegal may or may not deter mobsters, but it clearly serves to limit consumer choices and protect wine wholesalers.").

\textsuperscript{50} See Billingsley, supra note 43, at 4.

\textsuperscript{51} See id.

\textsuperscript{52} See Banner, supra note 40. See also Billingsley, supra note 43, at 7 (arguing that alcoholic beverages generate extensive revenue, and some state officials fear that allowing consumers to purchase their alcohol online will deprive the state of lucrative taxes).

\textsuperscript{53} Banner, supra note 40; Billingsley, supra note 43, at 7.
preferential treatment to in-state producers by granting them exemptions from the three-tier system, and thus allowing direct shipment to consumers, promote economic protectionism by improving local industries at the expense of out-of-state producers.\textsuperscript{54} Until \textit{Granholm}, small wineries had to cope with this patent discrimination, coupled with the considerable lobbying power of wholesalers.\textsuperscript{55} The Court wished to cure this extreme imbalance, and it did so by finally reconciling the dormant Commerce Clause and the Twenty-First Amendment.\textsuperscript{56}

\textbf{C. Historically Trying to Reconcile the Dormant Commerce Clause and the Twenty-First Amendment}

The dormant Commerce Clause is the implied assertion that state laws "are unconstitutional if they place an undue burden on interstate commerce."\textsuperscript{57} Although there is no express reference to this principle in the Constitution, it springs from the text of the Commerce Clause, which grants Congress the power to "regulate Commerce ... among the Several States."\textsuperscript{58} Thus, the dormant Commerce Clause provides a limiting function for the Court to regulate state and local laws where they burden or discriminate against interstate commerce.\textsuperscript{59}

This broad grant of power to the federal government seems to conflict directly with the Twenty-First Amendment’s broad grant of power to the States with respect to alcohol transportation or importation of alcohol.\textsuperscript{60} To avoid this inherent conflict, the Supreme Court viewed the Amendment as an exception to the dormant Commerce Clause soon after ratification of the Amendment, giving

\begin{flushleft}
\textsuperscript{54} See Lucas, supra note 2, at 931.
\textsuperscript{55} See id. at 908.
\textsuperscript{56} See infra Part II.B.
\textsuperscript{57} CHEMERINSKY, supra note 9, at 401.
\textsuperscript{58} U.S. CONST. art. 1, § 8, cl. 3; CHEMERINSKY, supra note 9, at 401. See also Billingsley, supra note 43, at 4 (stating that the Framers included the Commerce Clause because they were worried that states would engage in economic protectionism, in which they would erect barriers to their own state trade in an effort to protect their local interests).
\textsuperscript{59} CHEMERINSKY, supra note 9, at 401.
\textsuperscript{60} Shanker, supra note 4, at 369-70 (stating that the Twenty-First Amendment seemed to present an "immediate conflict" with the commerce clause).
\end{flushleft}
states broad authorization to discriminate with regard to the transportation or importation of alcohol.\textsuperscript{61} In \textit{State Board of Equalization v. Young’s Market Co.},\textsuperscript{62} the Court upheld a California statute that imposed an import license fee on beer importers but imposed no fee for beer produced in-state.\textsuperscript{63} The Court conceded in its decision that before ratification of the Amendment, the fee would have been unconstitutional because it would have been a “direct burden on interstate commerce.”\textsuperscript{64} However, the Court essentially held that there could be no Commerce Clause violation because of the existence of the Twenty-First Amendment.\textsuperscript{65}

Three years later, in \textit{Indianapolis Brewing Co. v. Liquor Control Commission},\textsuperscript{66} the Court upheld a Michigan statute that barred liquor dealers from selling any beer manufactured in a state that discriminated against Michigan beer.\textsuperscript{67} Here, the Court expressly stated that “since the Twenty-First Amendment, . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause.”\textsuperscript{68}

This view controlled for over twenty years, until the Court began to reign in some of the power over alcohol related commerce it had so willingly given to the states.\textsuperscript{69} In \textit{Hostetter v. Idlewild Bon Voyage Liquor Corp.},\textsuperscript{70} the argument that “the Twenty-first Amendment has somehow operated to ‘repeal’ the commerce clause” for alcoholic beverages was expressly rejected.\textsuperscript{71} Otherwise, the Court stressed,
“Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor.”\textsuperscript{72}

Hostetter set the stage for jurisprudence in this area for twenty years, when \textit{Bacchus Imports, Ltd. v. Dias},\textsuperscript{73} arguably the most relevant direct-shipment case until \textit{Granholm}, further promoted the Court’s anti-protectionist view of the Twenty-First Amendment.\textsuperscript{74} Here, importers challenged a Hawaiian excise tax of 20% based on the exemptions that existed for locally produced Hawaiian beverages.\textsuperscript{75} The Court expressly rejected the argument that Hawaii’s discrimination against out-of-state liquor was authorized by the Twenty-First Amendment, stating that “[t]he central purpose of the [Twenty-First Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition.”\textsuperscript{76} Fearful of economic protectionism by the states, the Court concluded that laws promoting such discrimination “are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.”\textsuperscript{77} Justices Rehnquist, Stevens and O’Connor dissented, unable to reconcile the earlier cases with the majority view.\textsuperscript{78} Interestingly, these three dissenting justices were the only members of the \textit{Bacchus} court to remain on the bench for \textit{Granholm}, and not surprisingly, dissented there as well.\textsuperscript{79}

\textsuperscript{72} \textit{Id.}
\textsuperscript{73} 468 U.S. 263 (1984).
\textsuperscript{74} \textit{See id.} at 265 (striking down a Hawaii liquor tax that exempted certain locally made liquors); Pamela R. Cote, Note, \textit{Constitutional Law—The \textquote{Grape} March on Washington: The Twenty-First Amendment, the Dormant Commerce Clause, and Direct Alcohol Shipments}, 26 W. NEW ENG. L. REV. 343, 356 (2004).
\textsuperscript{75} \textit{Bacchus}, 468 U.S. at 265-66.
\textsuperscript{76} \textit{Id.} at 276.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.} at 281-86 (Stevens, J., dissenting).
\textsuperscript{79} Banner, supra note 40. \textit{See also Granholm}, 544 U.S. at 497 (Thomas, J., dissenting) (Chief Justice Rehnquist, Justice Stevens, and Justice O’Connor joined Justice Thomas’s dissent).
II. GRANHOLM V. HEALD

A. Background

The plaintiffs in Granholm were three small wineries, two located in California and one in Virginia.80 These wineries had several potential customers in Michigan and New York.81 In the first action, the out-of-state winery Domaine Alfred, along with some Michigan residents, brought action challenging Michigan laws governing distribution of alcohol as violating the Commerce Clause.82 Under Michigan law, wine producers had to abide by the three-tier system and distribute their wine through a wholesaler.83 For in-state wineries, however, Michigan law granted an exception that allowed direct shipment to in-state customers, so long as the wineries acquired a special “wine maker” license.84 The cost of the in-state license varied with size, and for small wineries this cost was $25.85 Out-of-state wineries, on the other hand, could apply for a $300 license that only allowed them to sell to in-state wholesalers.86 The United States District Court for the Eastern District of Michigan granted summary judgment in favor of the state.87 The case went to the United States Court of Appeals for the Sixth Circuit, which reversed the district court’s judgment, finding that the State could not show that there were no other nondiscriminatory means to regulate alcohol within its borders.88

In the second action, Juanita Swedenburg, the owner of a small Virginia winery, and David Lucas, the owner of a California Winery, filed suit along with three of their out-of-state customers in the Southern District of New York.89 The plaintiffs sought a declaratory

80. Granholm, 544 U.S. at 468.
81. See id.
82. Id. at 469.
83. Id. at 468-69 (referencing M.C.L.A. §§ 436.1305 and MI ADC R. 436.1719(5)).
84. Id. at 469 (referencing M.C.L.A. §§ 436.1113(9) and 436.1537(2)-(3)).
85. Id. (referencing M.C.L.A. § 436.1525(1)(d)).
86. Granholm, 544 U.S. at 469 (referencing M.C.L.A. §§ 439.1109(9) and 436.1525(1)(e)).
87. See id. at 470.
88. See id.
89. Id. at 468, 470.
judgment that the New York direct wine shipment law violated the Commerce Clause.\textsuperscript{90} Under New York’s scheme, in-state wineries could apply for a license which bypassed the three-tier system and allowed direct sales to in-state consumers if the wineries produced wine only from New York grapes.\textsuperscript{91} Out-of-state wineries, however, had to establish a physical presence in the state, requiring that they set up “a branch factory, office or storeroom within the state of New York.”\textsuperscript{92} The district court granted summary judgment to the plaintiffs, rejecting the State’s argument that the Twenty-First Amendment granted it the power to discriminate against out-of-state wineries.\textsuperscript{93} The Court of Appeals for the Second Circuit reversed, finding that the New York direct shipment laws were “within the ambit of the powers granted to states by the Twenty-first Amendment.”\textsuperscript{94} The court specifically recognized that if the New York law regulated any product other than alcohol, the physical presence requirement could “create substantial dormant Commerce Clause problems,” but upheld the constitutionality of the statute due to the language of the Twenty-First Amendment.\textsuperscript{95}

The Supreme Court, in its 2004-05 term, consolidated these two cases and granted certiorari on the specific issue of whether “a State’s regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violates the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment.”\textsuperscript{96} Although the Court was sharply split on this issue, the majority found both the Michigan and New York laws unconstitutional as violating the dormant Commerce Clause even in light of the Twenty-First Amendment.\textsuperscript{97}

\textsuperscript{90} Id. at 470.
\textsuperscript{91} Id. (referencing McKinney’s Alco. Bev. Cont. Law. Ann. § 76-a(5) [hereinafter NY ABC Law]).
\textsuperscript{92} Granholm, 544 U.S. at 470 (referencing NY ABC Law § 3(37)).
\textsuperscript{93} See id. at 471.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} See id. at 493.
B. Majority Opinion

Justice Kennedy, writing for the majority, began by reminding the States that the Court has, "[t]ime and again," concluded that "state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" 98 Focusing on the facially discriminatory character of both the Michigan and New York regulatory schemes, the majority easily concluded both were discriminatory against interstate commerce. 99 The Michigan scheme, according to the majority, heavily increased the cost of out-of-state wines to Michigan consumers. 100 Additionally, small wineries were effectively barred from the Michigan market due to their inability, in some cases, to find a wholesaler willing to accommodate smaller shipments. 101

The New York regulatory scheme differed from Michigan's in that it [did] not ban direct shipments altogether. 102 However, out-of-state wineries were still required to establish a physical presence in the state in order to directly ship to New York consumers, something New York wineries already had. 103 Kennedy stated that this was "just an indirect way of subjecting out-of-state wineries, but not local ones, to the three-tier system." 104 In fact, no out-of-state winery had complied with the physical presence requirement and "availed itself of New York's direct-shipping privilege." 105

In support of the majority's contention that states should not be able to discriminate against out-of-state wineries, Justice Kennedy

99. See id. at 473-76. The majority stressed that State laws regulating the importation and transportation of alcohol would be protected under the Twenty-First Amendment as long as they were evenhanded, but found that the Michigan and New York laws involved "straightforward attempts to discriminate in favor of local producers." Id. at 489 (emphasis added).
100. See id. at 474.
101. Id.
102. Id.
103. See id. (interpreting NY ABC Law § 3(37)).
104. Granholm, 544 U.S. at 474.
105. Id. at 475.
discussed the main concern of the Framers to avoid the “economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”\(^{106}\)

Indeed, one of the major reasons for calling the Constitutional Convention was because of the “destructive trade wars the states waged with one another.”\(^{107}\) Thus, regulatory schemes that place in-state wineries at a competitive advantage by restricting trade only for their out-of-state rivals undermines one of the essential purposes of the Constitution: to have a stable national economy devoid of a “trade-based, competitive tit-for-tat.”\(^{108}\)

Michigan and New York next argued that even if their laws discriminated against interstate commerce, the laws were saved by § 2 of the Twenty-First Amendment, which allows states to regulate the transportation and importation of alcohol.\(^{109}\) The majority explicitly rejected this argument, maintaining that the States’ broad power to regulate liquor under the Twenty-First Amendment does not give States the authority to ban or restrict the direct shipment of wine while “simultaneously authorizing direct shipment by in-state producers.”\(^{110}\) In support of its holding, the majority recited the pre-Prohibition history of liquor regulation, separated modern Supreme Court cases into three categories, and then rejected the earlier line of cases, relying on a newer line of cases beginning with *Bacchus*.\(^{111}\)

First, the majority discussed a series of cases that invalidated a number of state liquor regulations prior to the ratification of the Eighteenth Amendment.\(^{112}\) In doing so, according to the majority, these cases advanced two important, yet distinct, propositions.\(^{113}\) The

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106. *Id.* at 472 (quoting Hughes v. Oklahoma, 441 U.S. 322, 325-36 (1979)).
109. *Granholm*, 544 U.S. at 476; *see also* U.S. CONST. amend. XXI ("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.").
111. *See id.* at 476-84 (discussing the pre-Prohibition law); *id.* at 486-488 (discussing the three categories modern cases fall into); *id.* at 488 (adopting the *Bacchus* line of cases).
112. *See id.* at 476-84.
113. *Id.* at 476.
first principle was "that the Commerce Clause prevented States from discriminating against imported liquor."\textsuperscript{114} The second principle was "that the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce."\textsuperscript{115} The majority then discussed events leading up to Prohibition, including the Wilson and Webb-Kenyon Acts.\textsuperscript{116} Justice Kennedy, near the end of his historical account of pre-Prohibition events, expressly rejected Michigan and New York's claim that the Webb-Kenyon Act removed all barriers to discriminatory state liquor regulations, stating that the rule of early cases that states were required to regulate their alcohol on level ground remained intact.\textsuperscript{117}

Next, the majority delved into an analysis of Supreme Court cases decided after the Twenty-First Amendment repealed the Eighteenth Amendment.\textsuperscript{118} Here, Kennedy quickly glossed over \textit{Young's Market} and \textit{Indianapolis Brewing Co.} in favor of more modern cases that "confirm that the Twenty-first Amendment does not supersede other provisions of the Constitution."\textsuperscript{119} To support this proposition, the majority divided the modern cases into three categories: (1) cases in which the Court has held that discriminatory state laws against other provisions of the Constitution are not saved by the Twenty-First Amendment;\textsuperscript{120} (2) cases stating that § 2 of the Twenty-First Amendment has not acted to repeal the Commerce Clause with

\begin{footnotes}
\footnote{114. Granholm, 544 U.S. at 476. See Scott v. Donald, 165 U.S. 58, 100 (1897) (finding discriminatory a South Carolina law limiting markup on locally produced wines, but not imported wines, unconstitutional); Walling v. Michigan, 116 U.S. 446, 454 (1886) (invalidating Michigan tax imposing taxes on imported liquor, but not local products); Tiernan v. Rinker, 102 U.S. 123, 127 (1880) (holding that Texas's tax exemption on local beer and wine, but not for foreign imported alcohol, unconstitutional against the Commerce Clause).}
\footnote{115. Granholm, 544 U.S. at 477. See Rhodes v. Iowa, 170 U.S. 412, 423 (1898).}
\footnote{116. See Granholm, 544 U.S. at 481-82. Taking a contextual approach, Justice Kennedy discusses his belief that the Webb-Kenyon Act is not inconsistent with the Wilson Act of 1890, which authorized States to regulate imported liquor on the same terms as domestic liquor. See id. at 482-83.}
\footnote{117. See id. at 482.}
\footnote{118. See id. at 485-88.}
\footnote{119. See id. at 485-86.}
\end{footnotes}
respect to alcoholic beverages; (3) and cases holding that "the nondiscriminatory principle of the Commerce Clause" limits state regulation of alcohol. Finding the third category most relevant to the case at bar, the majority refused to overrule or limit Bacchus to its facts, and went on to hold that the Twenty-First Amendment did not authorize states to create laws that discriminate against out-of-state wineries.

In dicta, Kennedy discussed the constitutionality of the three-tier system. In response to the States' argument that invalidating their laws calls into question the constitutionality of the three-tier system, Kennedy stressed that such a position does not follow from the holding. The Twenty-First Amendment gives states the power to regulate the transportation and importation of alcohol, but they must apply restrictions to in-state and out-of-state producers equally. Thus, states may "assume direct control of liquor distribution . . . through the three-tier system." Under this reasoning, states could feasibly ban direct shipments of wine altogether (by forcing producers to go through the three-tier system), provided that they do so equally with respect to in-state and out-of-state producers.

121. Id. at 487 (citing Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)).
122. Id. at 487 (citing Bacchus Imports v. Dias, 486 U.S. 262 (1984); Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986); Healy v. Beer Institute, 491 U.S. 324 (1989)).
124. Id. at 488-89. See also Gregory Castanias, Mondaq Business Briefing, The Supreme Court's Granholm v. Heald Decision: What It Means For Interstate Wine Shipping in the United States, MONDAQ BUSINESS BRIEFING 4 (June 21, 2005) (arguing that the Court's decision did not affect the three-tier system because Michigan and New York did not challenge such a scheme).
125. Granholm, 544 U.S. at 488.
126. See id. at 488-89.
127. Id. See also North Dakota v. United States, 495 U.S. 423, 432 (1990) (finding the three-tier system "unquestionably legitimate").
128. See Granholm, 544 U.S. at 488-89. "A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective." Id.
C. The Dissent

Justice Thomas’s dissent, which Chief Justice Rehnquist and Justices Stevens and O’Connor joined, spends almost 20 pages focusing primarily on the Webb-Kenyon Act and narrates its history quite differently from the majority. Thomas argued that “[t]he Webb-Kenyon Act immunizes from negative Commerce Clause review the state liquor laws that the Court holds are unconstitutional.” Thomas pushed the Twenty-First Amendment to the side and focused heavily on the textual reading of the Webb-Kenyon Act because he believed that the Act displaced any dormant Commerce Clause barrier to state regulation of liquor sales. In a formalistic opinion, Thomas declared that “the Court does this Nation no service by ignoring the textual commands of the Constitution and Acts of Congress.”

Although Thomas believed that the Webb-Kenyon Act itself authorizes the discriminatory nature of the Michigan and New York regulations, he nevertheless contended that these regulations were lawful under the text of the Twenty-First Amendment as well. Departing from Kennedy’s contextual approach to this analysis, Thomas instead reiterated the exact words of the Amendment to support the authorization of state discrimination with respect to the transportation and importation of alcohol. Calling the regulation of direct shipment of liquor a “clear concern” of the framers of the Twenty-First Amendment, Thomas completely disregarded Kennedy’s argument that small wineries are in effect barred from

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129. Id. at 497-514 (Thomas, J., dissenting); see also Banner, supra note 40 (stating that the dissenters found the majority's holding irreconcilable with the Court's interpretation of Section 2 for nearly fifty years).
130. Granholm, 544 U.S. at 498 (Thomas, J., dissenting).
131. Id.
132. Id. at 527.
133. Id. at 514.
134. Id.
direct shipment of wine due to blatantly discriminatory laws such as Michigan and New York’s regulations.\textsuperscript{135}

In this respect, the dissent is not fully persuasive, because it relies on a very textual view that incorporates the unease with which alcohol was being consumed in the early part of the 20th century.\textsuperscript{136} This view does not consider that that same “evil” stigma does not necessarily attach to alcohol in the 21st century, and overlooks the intent of the Commerce Clause itself, which is to prevent economic protectionism by the states.\textsuperscript{137} Regardless, while \textit{Granholm} provides states with broad authority to regulate alcohol, it prohibits discrimination against out-of-state wineries simply for the purposes of protecting local interests.\textsuperscript{138}

III. \textit{Granholm’s Impact on Direct Wine Shipments in Georgia}

\textbf{A. Georgia Direct Wine Shipment Regulations}

Georgia forbids the direct shipment of wine to in-state consumers by both in-state and out-of-state wineries, essentially forcing both to abide by the three-tier system.\textsuperscript{139} In 1997, the Georgia legislature passed the Felony Shipping Act, which created felony penalties for the unauthorized shipment of alcoholic beverages directly to consumers.\textsuperscript{140} In 2000, the legislature passed amendments which

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\item \textsuperscript{135} Granholm, 544 U.S. at 497-527 (Thomas, J., dissenting) (showing that Thomas never addresses Kennedy’s argument that small wineries are in effect barred from direct shipments).
\item \textsuperscript{136} See \textit{id.} at 527. “The Twenty-first Amendment . . . took those policy choices away from judges and returned them to the States.” \textit{id.}
\item \textsuperscript{137} See \textit{id.} at 494 (Stevens, J., dissenting). Justice Stevens characterizes younger generations as regarding alcohol as “an ordinary article of commerce,” rather than the “demon rum” it was known as in the 1920s and 30s. \textit{id.} at 494, 496 \textit{See also} New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273 (1988) (“This ‘negative’ aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”). \textit{id.}
\item \textsuperscript{138} See Granholm, 544 U.S. at 493.
\item \textsuperscript{139} See O.C.G.A. § 3-6-22 (2005).
\item \textsuperscript{140} See O.C.G.A. § 3-3-32(b) (1997). The statute states that anyone violating the prohibition on direct shipment “shall be issued a cease and desist order.” \textit{id.} If the direct shipper fails to cease and desist, then it is a felony. \textit{id.} \textit{See also} Kim Marcus, \textit{Georgia Legislator Hopes to Overturn Direct-Shipment Felony Law, available at http://winespectator.com/Wine/Archives/Show_Article/0,1275,2051,00.html} (stating that Representative
\end{enumerate}
\end{footnotesize}
relaxed this strict penalty, providing both in-state and out-of-state wineries an outlet to bypass the three-tier system and deliver their product to their customers directly.\footnote{See O.C.G.A. §§ 3-6-30-32 (2000); Dana Nigro, Direct Shipping Timeline, available at http://winespectator.com/Wine/Features/0,1197,1504,00.html.}

First, in order to directly ship their product, wineries must obtain a federal basic wine manufacturing permit.\footnote{O.C.G.A. § 3-6-32(a) (2005).} Wineries that hold such a permit are permitted to ship wine directly to consumers in Georgia for personal use under certain conditions, including: (1) the consumer must visit the winery, whether it be within or outside of Georgia\footnote{See id. § 3-6-32(a)(1) (2005).}; (2) the winery must verify that the consumer is of age\footnote{Id. § 3-6-32(a)(2).}; (3) no winery may ship in excess of five cases to one address or consumer in any calendar year.\footnote{Id. § 3-6-32(a)(3).} Additionally, a winery holding a “special order shipping license” may ship up to 50 cases of wine to consumers within Georgia without designating a wholesaler.\footnote{See O.C.G.A. § 3-6-31(c)(2) (2004).} If a Georgia resident wants premium vintages from California delivered directly to his front door, he must travel to the specific winery (or liquor store), prove he is of age, and then travel home.\footnote{See id. at § 3-6-32.} The same applies for a resident of North Georgia if he wants wine from South Georgia; he must physically travel there.\footnote{See id.} On its face, then, Georgia direct wine shipment law is nondiscriminatory towards out-of-state wineries.\footnote{See id.}

\section*{B. Granholm’s Impact on Georgia}

Georgia’s direct shipment laws after Granholm will likely survive constitutional attack.\footnote{See Press Release, Ga. Dept. of Revenue, U.S. Supreme Court Ruling Should Not Impact Georgia’s Direct Wine Shipping Statutes (May 17, 2005) available at http://www.etax.dor.ga.gov/pressrel/p051705.pdf.} It is apparent that the Georgia statutes subject
both in-state and out-of-state wineries to the same treatment; the central theme in the majority opinion in *Granholm* is Michigan and New York’s “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”\(^{151}\) Georgia regulations differ from Michigan and New York regulations in two respects: they do not impose any individual restrictions to out-of-state wineries in an effort to promote economic protectionism, and they are not facially discriminatory.\(^{152}\) What made *Granholm* an easy decision, at least to Justice Kennedy, was the obvious discriminatory nature of both the Michigan and New York laws.\(^{153}\)

1. **Court Inconsistencies: Facially Neutral Laws with Discriminatory Purpose/Effect**

Georgia’s facially neutral laws do not automatically indicate that they are immune from attack.\(^{154}\) The Court has found many facially neutral state and local laws to be discriminatory based on their purpose and/or effect, but has not provided clear rules to help decide whether a facially neutral law is discriminatory in its effect.\(^{155}\) For example, in *Hunt v. Washington State Apple Advertising Commission*,\(^{156}\) the Court found a North Carolina law requiring that containers of apples shipped into the state bear “no grade other than the applicable U.S. grade or standard” to be discriminatory.\(^{157}\) The law was facially neutral in that all apples, whether produced in-state or out-of-state, had to comply with this rule.\(^{158}\) Regardless, the Court found that the statute affected the sales of Washington apples and had

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152. Compare O.C.G.A § 3-3-31(a) (2004) (allowing out-of-state wineries to ship wine to in-state customers) with M.C.L.A. § 436.1525 (charging an out-of-state wineries a $300.00 fee not applicable to in-state wineries) and NY ABC Law § 76-a(6) (allowing licensed in-state wineries to sell directly to residents of the state).
153. See *Granholm*, 544 U.S. at 476.
154. See *CHEMERINKSY*, *supra* note 9, at 414.
155. *Id.* at 414.
157. *Id.* at 335, 350.
158. *See id.* at 352.
the effect of “stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself” and explained that the regulation had “a leveling effect which insidiously operates to the advantage of local apple producers.”

On the other hand, the Court has also found facially neutral laws non-discriminatory, even with “strong evidence of a discriminatory purpose.” In *Exxon Corp. v. Governor of Maryland*, the Court upheld a Maryland law that prohibited producers and refiners of petroleum products from operating retail service stations within the state. Because most of the petroleum products sold in Maryland were produced out of state, the law basically prohibited any out-of-state producers from operating in the state. Although the purpose of the law clearly was to favor local businesses, the Court found the law not discriminatory: “[T]he Act . . . does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market.” The absence of any of these factors, according to Justice Stevens, helped the Court decide that the law was nondiscriminatory.

Because of the inconsistencies in the Court’s analysis of facially neutral laws that may have a discriminatory effect, it is almost impossible to glean a clear cut framework as to how courts will rule in the future on a law similar to Georgia’s. A court will likely assess each situation and decide if each particular facially neutral law, in the context of the surrounding facts of the case, serves a

159. Id. at 351. See also C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 386 (1994) (finding discrimination based upon disparate impact of a facially neutral law that required all solid waste in the town to be deposited at the transfer station).

160. Chemerinsky, supra note 9, at 416.


162. Id. at 119, 125.

163. See id. at 137 (Blackmun, J., concurring in part and dissenting in part).

164. Id. at 126.

165. Id. See also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). In Clover Leaf Creamery, the Court held that “[a] Minnesota law prohibiting the sale of milk in plastic disposable containers, but allowed its sale in paper disposable containers,” did not violate the Commerce Clause even though the purpose of the statute was to promote local dairy and paper industries at the expense of the out-of-state economic interests of the dairy and plastics industry. Chemerinsky, supra note 9, at 416-17.

166. See Chemerinsky, supra note 9, at 414-15.
protectionist purpose in order to determine discriminatory impact.\textsuperscript{167} In Georgia’s case, it does not appear to fall under the line of cases that found facially neutral laws discriminatory.\textsuperscript{168} Both in-state and out-of-state wineries are affected by the regulations, and both require consumers to visit their respective wineries in order to bypass the three-tier system.\textsuperscript{169}

Out-of-state wineries may argue that because of the proximity of the Georgia wineries to the Georgia consumer, they are at a competitive disadvantage.\textsuperscript{170} While this argument has merit, \textit{Granholm} does not unequivocally repeal the Twenty-First Amendment.\textsuperscript{171} Although the Court generally applies a balancing test weighing the interests of the state against a facially neutral law’s burden on interstate commerce, \textit{Granholm} presents a different inquiry as to how the Court will review state alcohol regulations, because the Twenty-First Amendment makes liquor unique.\textsuperscript{172} Since the majority leaves some power for the states with respect to the regulation of alcohol as long as they treat out-of-state entities the same as in-state entities, it is likely that a court faced with a facially neutral law will defer to the state power under the Twenty-First Amendment, unless the purpose of the law is so blatantly discriminatory as to warrant it invalid against the Commerce Clause.\textsuperscript{173} The blatant discrimination appears as an easily identifiable protectionist motive, and without this, courts will likely hesitate to strike down any state law regulating the transportation and importation of alcohol.\textsuperscript{174}

Analyzing Georgia’s regulations, there does not seem to be anything blatantly discriminatory about them; the statutes impose the

\begin{itemize}
\item \textsuperscript{167} See id. at 417.
\item \textsuperscript{168} See O.C.G.A. § 3-3-31 (2005).
\item \textsuperscript{169} See O.C.G.A. § 3-6-32 (2005).
\item \textsuperscript{170} See generally id.
\item \textsuperscript{171} See generally \textit{Granholm} v. Heald, 544 U.S. 460 (2005).
\item \textsuperscript{172} See Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (applying to statute a balancing test between legitimate local interests against its effects on interstate commerce where the statute regulates even-handedly); \textit{Granholm}, 544 U.S. at 465-93; see also CHEMERINSKY, supra note 9, at 418.
\item \textsuperscript{173} See \textit{Granholm}, 544 U.S. at 489.
\item \textsuperscript{174} See generally id. at 480-90.
\end{itemize}
same burdens to both in-state and out-of-state wineries.\textsuperscript{175} Under the \textit{Granholm} analysis, Georgia reserves the power to regulate alcohol under the Twenty-First Amendment by barring the direct shipment of alcohol altogether.\textsuperscript{176} Absent specific evidence of a protectionist motive, courts will shy away from interfering with a state’s desire to enact laws that reflect its own policy objectives.\textsuperscript{177}

Georgia’s exceptions to the ban on direct shipment make Commerce Clause objections more powerful because the requirement of customer presence inherently forces a longer commute to out-of-state wineries.\textsuperscript{178} However, this alone will not suffice to prove a protectionist motive, as many wine connoisseurs prefer premium vintages available only in California, and will likely travel there to satisfy their thirst for such wine instead of settling for a shorter drive to Georgia wineries.\textsuperscript{179} Additionally, the exceptions apply equally to both in-state and out-of-state wineries, unlike New York and Michigan’s openly discriminatory laws.\textsuperscript{180} As the majority in \textit{Granholm} acknowledged, absent a particular protectionist motive, “[s]tate policies are protected under the Twenty-First Amendment when they treat liquor produced out of state the same as its domestic equivalent.”\textsuperscript{181}

\textbf{Conclusion}

\textit{Granholm} tells the states that they are no longer able to hide behind the Twenty-First Amendment when they decide to enact discriminatory regulations.\textsuperscript{182} This does not mean that they have no

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\textsuperscript{175} See O.C.G.A. §§ 3-3-31-32 (2005).
\textsuperscript{176} See 544 U.S. at 493.
\textsuperscript{177} \textit{Id.} at 490
\textsuperscript{178} See generally O.C.G.A. §§ 3-6-31, -32 (2005).
\textsuperscript{179} See, e.g., Billingsley, supra note 43.
\textsuperscript{180} Compare O.C.G.A § 3-3-32 (establishing the conditions for direct shipments to Georgia customers for both out-of-state and in-state wineries) \textit{with} M.C.L.A. § 436.1525 (discriminating between in-state and out-of-state wineries) \textit{and} NY ABC Law § 76-a(6) (discriminating against out-of-state wineries by requiring them to establish an in-state presence before they can ship to New York customers).
\textsuperscript{181} \textit{Granholm}, 544 U.S. at 489.
\textsuperscript{182} See \textit{id.} at 93.
\end{flushleft}
power over the transportation and importation of alcohol within and outside of their borders; the majority expressly rejects this extreme.\textsuperscript{183} However, states may no longer enact legislation that clearly places an in-state producer of alcohol at a competitive advantage over their out-of-state counterparts.\textsuperscript{184} \textit{Granholm} stands for the proposition that if consumers are to be able to access the wine market, they must be able to do so directly, either through the Internet or other means.\textsuperscript{185} States may enact legislation that completely bars direct shipment by both in-state and out-of-state producers of alcohol, but they may not favor in-state producers at the economic expense of out-of-state producers.\textsuperscript{186} The Court in \textit{Granholm} sought to balance the competing interests of the consumer and small winery with state autonomy, and decided to only strike down those laws which are clearly protectionist.\textsuperscript{187} Although there, Michigan and New York laws were deemed unconstitutional as violating the Commerce Clause, the Court's language clearly suggests that it will be reluctant to do so where the state is exercising its authority under the Twenty-First Amendment evenhandedly.\textsuperscript{188}

Georgia's regulations should withstand attack under this \textit{Granholm} analysis.\textsuperscript{189} Although the Court emphasized that states do not have the right to discriminate in order to overcome trade barriers, it still recognized that the Twenty-First Amendment makes liquor a special commodity.\textsuperscript{180} States will undoubtedly have regulatory concerns involving alcohol traveling directly into its borders, and the Court was careful to maintain that these states may assume control of liquor distribution through state-run outlets, as long as they do not do so in a straightforward discriminatory manner.\textsuperscript{191} Georgia regulations bar direct shipment of wine completely, with certain exceptions that

\textsuperscript{183} See \textit{id.} at 489.
\textsuperscript{184} Id. at 493.
\textsuperscript{185} See generally \textit{id.}
\textsuperscript{186} See \textit{id.} at 489.
\textsuperscript{188} See \textit{id.} at 493.
\textsuperscript{189} See supra Part III.B.
\textsuperscript{190} See McGee, supra note 49, at 57.
apply universally to both in-state and out-of-state wineries.\textsuperscript{192} The Granholm decision has no effect on the Twenty-First Amendment and Georgia’s ability to vigorously enforce its laws regulating wine, beer and spirits, as long as Georgia does so in a non-discriminatory manner.\textsuperscript{193}

Although Georgia’s exceptions make its laws more vulnerable to attack, courts will likely defer to the states’ discretion of regulating their alcohol unless they feel intervention must occur due to deliberate discriminatory actions on the part of the states.\textsuperscript{194} In its historical context, the Twenty-First Amendment’s original meaning remains clear, even after Granholm: states can regulate out-of-state liquor as restrictively as they regulate in-state liquor without worrying about the Commerce Clause, but they cannot regulate out-of-state liquor more restrictively.\textsuperscript{195} As a result, Granholm gives the wine lover, fresh off a screening of the movie Sideways, the chance to finally order the box of California pinot noir that he has been craving for so long on the Internet; if he is a Georgian, however, he may still have to hop on a plane to do so.\textsuperscript{196}

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\textsuperscript{192} See O.C.G.A. §§ 3-3-32, 3-6-31-32 (2005).
\textsuperscript{193} See McGee, supra note 49, at 57.
\textsuperscript{194} See id.
\textsuperscript{195} See Banner, supra note 40.
\textsuperscript{196} See generally Granholm v. Heald, 125 S. Ct. 1885 (2005).