

# LOWERING THE BAR: RETHINKING UNDERAGE DRINKING

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*First daughter Jenna Bush burst into tears when cops busted her and twin sister, Barbara, for underage drinking after Secret Service agents tried to whisk them away, according to police reports. Fresh details on the arrest emerged as it was learned that Barbara Bush has pleaded no contest to the charges. She was fined \$100 and ordered to attend alcohol awareness classes and perform community service. Her record will be wiped clean if she stays out of trouble until Sept. 7. Jenna Bush, who pleaded no contest to underage drinking last month, has pleaded innocent to the latest charge of using a borrowed ID to purchase liquor.<sup>1</sup>*

Rather than merely furnishing an opportunity for scandal, the tribulations of the First Daughters in early summer 2001 presented the ideal set of circumstances with which to evaluate more broadly the current laws that prohibit young adults from drinking alcohol in the United States. But it proved to be a missed opportunity.

Since the start of the 2000 presidential campaign, Jenna and Barbara Bush have been two of the most closely watched young women in the world. Their actions are well-documented by both the mainstream and the tabloid press.<sup>2</sup> They have constant Secret Service protection. They have a father whose acknowledged problems with

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1. Dave Goldiner, *Jenna Cried the Blues*, DAILY NEWS (N.Y.), June 9, 2001, at 8.  
2. See *infra* note 12.

alcohol prompted him to stop drinking at age forty.<sup>3</sup> Any potential misstep on their part could be embarrassing and politically problematic for their family. Yet, in their home state of Texas—where they could be immediately recognized—each of them used false identification to try to obtain alcoholic beverages.<sup>4</sup> Jenna, in fact, faced two drinking-related charges in as many months.<sup>5</sup> Clearly the Bush twins were not likely to escape detection, but perhaps they hoped to avoid punishment.

More than two decades ago, the United States Congress, as a means of combating drunk driving, passed the National Minimum Drinking Age Act (NMDA) that made the states' receipt of full federal highway funding dependent on their raising the minimum legal drinking age (MLDA) to twenty-one.<sup>6</sup> Since that time, millions of dollars have been spent annually on attempts to prevent underage drinking<sup>7</sup> by financing research and evaluation, community education, intervention, and technical assistance efforts.<sup>8</sup>

Despite these government efforts, the attempts to curb underage drinking have not been successful. Indeed, the example of the Bush sisters is compelling not because of their family fame, but rather due to the ordinariness of their situation. Despite a multiplicity of factors that should have deterred them, Barbara and Jenna were behaving as typical college students who want to purchase and drink alcohol in public places while underage.<sup>9</sup> Like many others, they were willing to break the law to do so. Although statistical estimates vary, experts

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3. Lois Romano & George Lardner Jr., *1986: A Life-Changing Year: Epiphany Fueled Candidate's Climb*, WASH. POST, July 25, 1999, at A1.

4. Goldiner, *supra* note 1, at 8.

5. *Id.*

6. Pub. L. No. 98-363, § 6(a), 98 Stat. 435, 437 (1984) (codified as amended at 23 U.S.C. § 158 (2000)). This Article uses “drunk driving” because it is a catch-all term. It was also used to inform the debate on the issue in the 1980s. *See* Exec. Order No. 12,358, 47 Fed. Reg. 16,311 (Apr. 14, 1982) (establishing Presidential Commission on Drunk Driving as means to “attack the drunk driving problem”).

7. According to the General Accounting Office, \$71.1 million was spent in 2000 to prevent underage drinking. *See* NAT'L RESEARCH COUNCIL AND INST. OF MED., *REDUCING UNDERAGE DRINKING: A COLLECTIVE RESPONSIBILITY* 14 (Richard J. Bonnie & Mary Ellen O'Connell eds., 2004) [hereinafter *REDUCING UNDERAGE DRINKING*].

8. *Id.* at 233–35.

9. Jenna's own remarks to the police officer who responded to the Austin restaurant manager's call made reference to the supposed normalcy of this behavior. “‘She stated that I do not have any idea what it is like to be a college student and not be able to do anything that the other students get to do,’ Officer Clifford Rogers wrote in a report.” Goldiner, *supra* note 1.

indicate that “[d]espite minimum legal drinking age laws, actual drinking patterns in the United States suggest that almost all young people use alcohol before they are 21.”<sup>10</sup> Almost seventy-four percent of respondents to the 2003 National Survey on Drug Use and Health reported “they had started using alcohol before the current legal drinking age of 21.”<sup>11</sup>

Given the widespread lack of compliance with laws prohibiting underage drinking, it could be concluded that their initial adoption and continued retention is a colossal failure and a glaring example of misguided public policy. The drinking age question, however, is seldom raised in a way that encourages any sustained or meaningful dialogue.<sup>12</sup> Even “Margaritagate”<sup>13</sup> did not provoke the widespread inquiry into alternative approaches that might avoid the creation of an entire generation of scofflaws.

There may be several reasons for this lack of attention to the problem of the ineffectiveness of underage drinking laws. First,

10. REDUCING UNDERAGE DRINKING, *supra* note 7, at 35. Survey results about alcohol usage differ markedly among similar populations depending in part on methodology. For example, the National Survey on Drug Use and Health (NSDUH), which is conducted among youth with parental permission in the household setting, typically results in a much lower prevalence of reported alcohol use than the school-based Monitoring the Future (MTF) survey. See OFFICE OF APPLIED STUDIES, DEP’T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2002 NAT’L SURVEY ON DRUG USE AND HEALTH: NAT’L FINDINGS 172 (2003), <http://www.oas.samhsa.gov/nhsda/2k2nsduh/apps.pdf>. Statistical outcomes and the subsequent use of data obtained can be affected by numerous factors including differences in methodological approaches, which requires thorough examination before drawing conclusions. Please see discussion of the use of statistics in the context of public policymaking *infra* notes 275–304 and accompanying text.

11. OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., THE NSDUH REPORT: ALCOHOL DEPENDENCE OR ABUSE AND AGE AT FIRST USE (Oct. 22, 2004), <http://www.oas.samhsa.gov/2k4/ageDependence/ageDependence.pdf>.

12. The commentary in the popular press at the time expressed almost universal condemnation for the twenty-one-year-old drinking age in the U.S. See, e.g., Dennis Prager, *Jenna Bush Is Old Enough to Drink*, WALL ST. J., June 8, 2001, at A14; *Free Jenna! A Joan of Arc, burning on the pyre of American puritanism*, ECONOMIST, June 9–15, 2001, at 11; Mark Steyn, *A toast to hypocrisy: Bush twins’ problems expose insanity of legal drinking age*, CHI. SUN-TIMES, June 10, 2001, at 35, available at 2001 WLNR 4458538; Dave Kopel & Glenn Harlan Reynolds, *Persecuting Jenna, and Ourselves*, NAT’L REV. ONLINE, June 5, 2001, at <http://www.nationalreview.com/kopel/kopel060501.shtml>.

13. Pundits used the phrase “Margaritagate” to describe the underage drinking charges that resulted from the Bush offsprings’ experience ordering margaritas at Chuy’s, a restaurant in Austin, Texas. See, e.g., Josh Tyrangiel, *This Is What You Call Protection?*, TIME, June 11, 2001, at 18.

society may be convinced the real problem is not the existing policy *per se* but rather the inability to craft an effective strategy within that policy framework to curb young-adult drinking. Or it could result because those most affected by the under compliance with the law, such as school administrators, law enforcement, and parents, have not focused sufficient energy on forcing a reexamination of the issue through either legislation or litigation. Perhaps the matter of underage drinking laws, despite its seriousness, seems in the end like a relatively frivolous topic that does not deserve the public's time and attention in an age where we are more concerned about terrorism, war, the budget deficit, and income security for retirees.

In spite of all these obstacles to open public dialogue about drinking age laws, it is absolutely necessary that lawmakers pay due attention to this issue. Though Congress passed the laws in order to deal with drunk driving, in many ways the laws may have resulted in more harm than good.<sup>14</sup> Our current drinking age laws affect young adults by setting them apart for disparate treatment in a way that ultimately creates disrespect for the legal system. Furthermore, because the law imposes a ban on underage drinking, it deters underage drinkers from seeking help to deal with problem drinking early on. Additionally, the prohibition on public consumption of alcohol by young adults forces drinking behind closed doors and encourages binge drinking while thwarting opportunities to combine alcohol with celebratory activities in a responsible manner.

Although these results of the twenty-one-year-old drinking age laws are all negative, in terms of public policy, it is nevertheless often challenging for policy makers to determine if a change in the status quo is warranted. In light of this challenge, the twenty-first birthday of the NMDA is a propitious time to reexamine the current prohibition

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14. A number of college administrators, for instance, have publicly voiced their perception that raising the drinking age has not resulted in overall net benefits, and in fact, has raised newer, more serious problems. "‘Before the age was increased, we had a very different environment,’ said Ronald D. Liebowitz, the current president of Middlebury College. ‘You had kids drinking beer and getting sick on beer, but you didn’t have gross alcohol poisoning and binge drinking.’” Pam Belluck, *Vermont Considers Lowering Drinking Age to 18*, N.Y. TIMES, Apr. 13, 2005, at A13. Roderic Park, former chancellor of the University of Colorado at Boulder, says “‘We’re dealing with real hypocrisy to say that kids under age 21 don’t drink . . . . What we are doing is teaching them to flout the law.’” Karen Lee Scrivo, *Drinking on Campus*, CONG. Q. RESEARCHER, Mar. 20, 1998, at 246. According to Carl Wartenburg, Dean of Admissions at Swarthmore College, “The 21 law makes alcohol a forbidden fruit and encourages underage students to drink.” Ed Carson, *Purging Bingeing*, REASON, Dec. 1995, at 61.

against drinking by eighteen to twenty-year-olds. Because of the evident failure of the NMDA to curb underage drinking,<sup>15</sup> states should attempt to regain control over age-related alcohol restrictions.

Returning alcohol regulation to the states permits states to engage in their time-honored tradition of experimentation in areas of social policy.<sup>16</sup> For instance, giving the states control will allow policymakers to craft alcohol regulations that are best suited to the needs of their specific populations in light of factors such as geographic location, driving age licensing restrictions, number of college campuses, and tourism. Furthermore, state legislators are in the best position to make the determination whether fiscal expenditures for current compliance efforts should be shifted to treatment programs or youth alcohol prevention and reduction initiatives. Accordingly, this Article will evaluate the means by which the states could attempt to regain this control: either through litigation or legislation. After evaluating each of these means, the Article concludes that legislation will be the most effective method and offers several policy considerations for state legislators in analyzing and potentially changing their MLDA.

Part I of this Article discusses the history of the lowering of the twenty-one-year-old drinking age in the United States and its subsequent reinstatement. Part II examines past attempts to change the existing age laws through litigation based on equal protection doctrine and challenges to Congress's use of the spending power. Part III discusses the possibility of changing the current nationwide MLDA through legislation. It summarizes legislative action at the federal level that affects the drinking age, including the 2005 Sober Truth on Preventing Underage Drinking Act, and presents examples of recent efforts at state statutory reform in Vermont, Wisconsin, and Hawaii. Part III concludes with a recommendation for returning age-related alcohol control matters to the states through new legislation. Part IV identifies relevant considerations for state legislators in establishing an appropriate drinking age, placing particular attention on the impact of statistical data in the debate.

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15. See *supra* notes 10–12 and accompanying text; *infra* Part IV.D.

16. See *infra* note 258.

## I. BACKGROUND ON CHANGING THE MINIMUM LEGAL DRINKING AGE

State restrictions on the purchase and consumption of alcohol by minors began in the 1880s.<sup>17</sup> These age-related prohibitions coincided with greater state intervention in the parent-child relationship and a heightened paternalistic attitude toward youth generally, as evidenced by the enactment of compulsory education requirements, the advent of the juvenile court system, and the initiation of child-labor regulations.<sup>18</sup> After the repeal of federal Prohibition in 1933, states regained control of alcohol regulation.<sup>19</sup> Nearly all states designated twenty-one as the minimum age for lawful public possession and consumption; however, New York chose an eighteen-year-old drinking age.<sup>20</sup>

The ratification of the Twenty-sixth Amendment in 1971 lowered the voting age from twenty-one to eighteen.<sup>21</sup> As a result, the benchmark for achieving adulthood, as measured by participation in public life, was eighteen years old. This also comported with the age for male eligibility for the draft<sup>22</sup> for the Vietnam War. Beginning in 1971, legislation was passed in twenty-nine states that lowered the minimum legal drinking age from twenty-one.<sup>23</sup> Fairness and equity issues arising from the eighteen-year-old draft and voting age seemed to be the impetus for lowering the drinking age.<sup>24</sup>

In 1982, after the drinking age had been either eighteen or nineteen years old in most states for over ten years, President Ronald

17. Michael P. Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK. L. REV. 649, 652 (1988).

18. *Id.* (citing Marks, *Detours on the Road to Maturity: A View of the Legal Conception of Growing Up and Letting Go*, 39 LAW & CONTEMP. PROBS. 78, 85–88 (1975)).

19. U.S. CONST. amend. XXI.

20. Rosenthal, *supra* note 17, at 652.

21. U.S. CONST. amend. XXVI.

22. 50 U.S.C. app. §§ 453(a)–454(a) (2005); *cf.* 10 U.S.C. § 505(a) (2005) (“[N]o person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian . . .”).

23. Lu Ann Snider, Comment, *The Politics and Consequences of the New Drinking Age Law*, 13 FLA. ST. U. L. REV. 847, 847 (1985). Typically, an age of eighteen was selected. *Id.*

24. As one commentator noted, “[w]hen states lowered the age of majority and the minimum drinking age because boys were serving and dying in Vietnam, however, they did so because society felt it was *unfair* to have them serve and die and yet not have the rights and privileges of adults.” Rosenthal, *supra* note 17, at 653.

Reagan signed an Executive Order establishing the Presidential Commission on Drunk Driving.<sup>25</sup> The Commission's report listed reform of the MLDA as a strategy to reduce the number of young people who were driving under the influence.<sup>26</sup> A national legislative approach was at odds with the Reagan White House's usual fealty to states' rights.<sup>27</sup> Mothers Against Drunk Driving (MADD), however, began lobbying intensely for federal legislation to address drunk driving.<sup>28</sup> Ultimately, the White House altered its previous stance opposing federal legislation and announced its support for a bill designed to impose a minimum legal drinking age of twenty-one.<sup>29</sup>

Under the NMDA, the Secretary of Transportation was directed during fiscal year 1987 to withhold five percent of the federal highway funds to be apportioned to a state if the purchase or public consumption of alcoholic beverages by persons under age twenty-one was lawful in that state.<sup>30</sup> The amount to be withheld increased to ten

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25. Exec. Order No. 12,358, 47 Fed. Reg. 16,311 (Apr. 14, 1982). In his accompanying oral remarks, Reagan referred to the impact of grassroots organizations on encouraging state and local officials to expand anti-drunk driving initiatives. See Remarks on Signing Exec. Order 12,358, Establishing the Presidential Commission on Drunk Driving, 1 PUB. PAPERS 461 (Apr. 14, 1982). Contemporaneous news commentary suggests that MADD and several Congressmen provided the impetus for the Commission. See Margie Bonnett Sellinger, *Already the Conscience of a Nation, Candy Lightner Prods Congress Into Action Against Drunk Drivers*, PEOPLE, July 9, 1984, at 105.

26. National Commission Against Drunk Driving, Presidential Commission Recommendations, [http://www.ncadd.com/pc\\_recommendations.cfm](http://www.ncadd.com/pc_recommendations.cfm) (last visited Nov. 9, 2005).

27. See Ted Galen Carpenter, *Eroding Rights of the Young*, CHI. TRIB., Jan. 29, 1985, § 1, at 13.

28. Sellinger, *supra* note 25, at 105. MADD was originally a grassroots organization started in California by Candy Lightner, whose young daughter was killed by an intoxicated driver. *Id.*

29. Douglas B. Feaver, *Reagan Now Wants 21 As Drinking Age*, WASH. POST, June 14, 1984, at A1.

30. 23 U.S.C. §158(a)(1) (2000). Under 23 C.F.R. § 1208.3 (2005), "purchase" and "public possession" are defined:

*Public possession* means the possession of any alcoholic beverage for any reason, including consumption on any street or highway or in any public place or in any place open to the public (including a club which is *de facto* open to the public). The term does not apply to the possession of alcohol for an established religious purpose; when accompanied by a parent, spouse or legal guardian age 21 or older; for medical purposes when prescribed or administered by a licensed physician, pharmacist, dentist, nurse, hospital or medical institution; in private clubs or establishments; or to the sale, handling, transport, or service in dispensing of any alcoholic beverage pursuant to lawful employment of a person under the age of

percent beginning in fiscal year 1988 if purchase and public consumption by persons under age twenty-one remained lawful.<sup>31</sup> Under the implementing regulations, the National Highway Transportation Safety Administration (NHTSA) and the Federal Highway Administration (FHWA) are responsible for monitoring compliance.<sup>32</sup>

Prime sponsors of the NMDA included Congressmen from so-called “blood border” states that experience an increase in accident rates when people drive home across state lines after drinking in a less age-restrictive locale. New Jersey, for example, supported the bill because of its location between New York, one of the first states to lower the drinking age, and Pennsylvania, which had consistently resisted attempts during the 1970s to reduce its drinking age from twenty-one.<sup>33</sup> During the debate period, MADD continued an active advocacy role and spurred on the rhetoric utilized by the bill’s

twenty-one years by a duly licensed manufacturer, wholesaler, or retailer of alcoholic beverages.

*Purchase* means to acquire by the payment of money or other consideration.

*Id.*

31. 23 U.S.C. §158(a)(2) (2000). This legislation would have expired at the end of 1988 but section 158(a)(2) was amended under section 4104 of the Consolidated Omnibus Budget Reconciliation Act of 1985 to make permanent the annual withholding of ten percent of federal highway funds from states that failed to enact legislation prohibiting the purchase and public consumption by those under age twenty-one. Pub. L. No. 99-272, § 4104, 100 Stat. 82, 114 (1986).

32. 23 C.F.R. § 1208.6 (1988) establishes the procedure for demonstrating compliance:

(a) Every fiscal year, each State determined to be in noncompliance with the National Minimum Drinking Age, based on NHTSA’s and FHWA’s preliminary review of its statutes for compliance or non-compliance, will be advised of the funds expected to be withheld under §1208.4 from apportionment, as part of the advance notice of apportionments required under 23 U.S.C. 104(e), normally not later than ninety days prior to final apportionment.

(b) If NHTSA and FHWA determine that the State is in noncompliance with the National Minimum Drinking Age based on their preliminary review, the State may, within 30 days of its receipt of the advance notice of apportionments, submit documentation showing why it is in compliance. Documentation shall be submitted to the National Highway Traffic Safety Administration, 400 Seventh Street SW, Washington, DC 20590.

*Id.*

33. See Jane Perlez, *Teen-age Drinking Vote: Crusader Is ‘Delighted’*, N.Y. TIMES, June 9, 1984, at L5. The use of the term “blood border” signified the increase in accident rates when people drive home across state lines after drinking in a less age-restrictive locale. See *id.*



supporters by centering it on drunk driving victims and their families.<sup>34</sup>

MADD's approach may have been an emotionally charged one, but it was nevertheless effective. In commenting on MADD's approach in the 1980s, Mary Hawkesworth, director of the Center of American Women and Politics at Rutgers University, stated, "Part of the smartness of their strategy was to focus on kids who were killed by drunk drivers. There were no complexities of being adults and being guilty. These were innocent kids who . . . had their lives snuffed out by drunk drivers."<sup>35</sup> Chuck Hurley, a National Safety Council officer, observed, "MADD gave a face and a voice to victims and thus 'transformed the landscape of drunk driving'" and, consequently, the

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34. During Senate hearings on the NMDA, Senator Frank Lautenberg acknowledged the legislative advocacy role of parents concerned about drunk driving:

Those who support this bill are not high-paid lobbyists; they do not know all the tricks of the trade or the mysteries of the Senate rules. But they do know the pain of losing a child—a daughter or a son, or a niece or a nephew—to this senseless practice. They come to Washington not asking us the impossible, not asking us to bring back their children, but to help another mother or father avoid the same tragedy. We owe them a hearing and we owe them a bill.

*Examining the Tragedy of Alcohol-Related Auto Fatalities and Whether the Answer to This Problem Is to Increase the Minimum Drinking Age to 21 Years of Age: Hearing Before the Subcomm. on Alcohol and Drug Abuse of the S. Comm. on Labor and Human Resources*, 98th Cong. 19–20 (1984) (statement of Sen. Lautenberg). MADD founder Candy Lightner was present as President Reagan signed the legislation, and even pinned a MADD button on both the President and Vice President Bush. Steven R. Weisman, *Reagan Signs Law Linking Federal Aid to Drinking Age*, N.Y. TIMES, July 18, 1984, at A15. The ABA Journal in a story on the NMDA a few months after its passage characterized Candy Lightner's role in the legislative process by stating "the law was a satisfying victory for her and MADD, a 4-year-old organization . . . that had lobbied strongly for it." Faye A. Silas, *Drinking curb: Highway money at stake*, A.B.A. J., Nov. 1984, at 35. MADD's on-going lobbying prowess is exemplified by its effect on the late Representative James Howard (D-NJ), the chair of the House Committee on Public Works and Transportation, who consistently asked prior to voting, "How do the mothers feel?" Lynn Smith, *MADD at 20: Still A Force For Change*, L.A. TIMES, Apr. 2, 2000, at E1. Appeals to sympathy are effective, in part, because it is difficult to fairly challenge someone who has suffered a grievous personal loss. See Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 65–70 (1992) (explaining use of fallacious reasoning such as appeals to fear and sympathy in context of public policy debates on gun control).

35. Smith, *supra* note 34. A member of the print media observed about MADD: "There was no mystery to MADD's magic in the media: here were mothers willing to go public with their grief over the loss of their children in a society where the marriage of booze and cars was punishable by a slap on the wrist. Enough was enough!" Tom Gorman, *Head of MADD Tempers Group's Image to Keep Message Alive*, L.A. TIMES (San Diego Co. ed.), Mar. 22, 1987, at 1.

debate surrounding MLDA laws.<sup>36</sup> Founder Candy Lightner, undoubtedly aware of the political clout wielded by MADD, concluded, “Even Senators who oppose ‘21,’ because they feel it violates states’ rights, support what I am trying to do.”<sup>37</sup>

Unlike his New Jersey colleagues, the late Representative James Howard (D-NJ) was initially opposed to the NMDA because he believed it was up to the states individually to set drinking ages.<sup>38</sup> Yet after looking at the traffic data, he decided to support the NMDA, concluding that “[t]he statistics are so overwhelming, I have changed my position on it.”<sup>39</sup> One alcohol researcher, by contrast, claims that the statistics upon which Congress relied were largely attributable to a single study that focused only on short-term effects of drinking and driving by young adults, thus lending them their powerful numerical impact.<sup>40</sup> Despite the possibility that the statistics were misleading, in the end, less than a handful of members of Congress “rose to oppose the politically popular proposal.”<sup>41</sup> The heart-wrenching narratives from the family members of drunk-driving victims and the traffic-fatality statistics, limited though they might have been, ultimately held sway over federal lawmakers, resulting in passage of the bill. Subsequently, most states “voluntarily” raised their MLDA to twenty-one.

## II. LOWERING THE EXISTING DRINKING AGE THROUGH LITIGATION

Most states raised their minimum legal drinking ages to avoid the loss of millions of dollars in federal highway funds. Some state legislators who recognized that successful federal court litigation might represent the best hope to reinstate an under-twenty-one drinking age had added “court of last resort” provisions to their

36. Smith, *supra* note 34. In March 2005, Mr. Hurley was appointed the CEO of MADD. Press Release, Mothers Against Drunk Driving, MADD Announces Charles A. Hurley As Chief Executive Officer (Feb. 22, 2005), <http://www.madd.com/news/0,1056,9418,00.html>.

37. Sellinger, *supra* note 25, at 102 (caption below photo).

38. See Paula Schwed, *House Votes to Penalize States Without Drinking Age of 21*, UNITED PRESS INT’L, June 7, 1984.

39. *Id.*

40. Mike Males, *The Minimum Purchase Age for Alcohol and Young-Driver Fatal Crashes: A Long-Term View*, 15 J. LEGAL STUD. 181, 181–83 (1986).

41. Schwed, *supra* note 38.

legislative enactments.<sup>42</sup> In other words, if the NMDA was invalidated pursuant to a court of last resort's action, then the state's raised drinking age law would be repealed.<sup>43</sup> A few state holdouts decided to litigate the federal legislation by arguing that the NMDA violated the Equal Protection or Spending Clauses. These challenges culminated in the U.S. Supreme Court decision in *South Dakota v. Dole*,<sup>44</sup> which determined that the NMDA was a legitimate exercise of congressional authority under the Spending Clause.<sup>45</sup> Although the litigation against the NMDA was widely unsuccessful, these cases are instructive for states hoping to regain control over their MLDAs.

### A. Previous Litigation Based on Equal Protection

Some equal protection challenges have addressed the drinking-age laws directly.<sup>46</sup> Others have arisen in the context of objections to state laws passed in response to a federal mandate that imposed a presumption of intoxication for those under twenty-one at a blood alcohol concentration (BAC) of .02 when a higher BAC, typically .08, is the presumption for those over twenty-one.<sup>47</sup>

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42. See Snider, *supra* note 23, at 851 (providing example of "court of last resort" amendment adopted by Senate Commerce Committee in Florida).

43. See *Id.*

44. 483 U.S. 203 (1987).

45. See discussion on *Dole* *infra* notes 87–104 and accompanying text. Following *Dole*, in 1988, Wyoming became the last state to reinstate a twenty-one-year-old age requirement for the purchase and consumption of alcohol. Robert W. Black, *State Moves Slowly on Alcohol*, CASPER STAR TRIB. (Wyo.), Mar. 3, 2005, <http://www.casperstartribune.net/articles/2005/03/03/news/legislature/084640fde0793a3287256fb800643173.txt>. A law prohibiting motor vehicle passengers from carrying "open containers" was recently defeated in the state legislature. *Id.* "[I]f there's one thing that Wyomingites don't like to do is to have any form of individual liberty be stepped on," offered Phil Roberts, a history professor at the University of Wyoming. *Id.*

46. *Felix v. Milliken*, 463 F. Supp. 1360, 1363–64 (E.D. Mich. 1978); *Manuel v. State*, 692 So. 2d 320, 324–25 (La. 1996), *rev'd on rehearing*, 692 So. 2d 320 (La. 1996).

47. See, e.g., *Commonwealth v. Howard*, 969 S.W.2d 700, 702 (Ky. 1998); *Mason v. State*, 781 So. 2d 99, 99–100 (Miss. 2000); *State v. Luchau*, 992 P.2d 840, 842 (Mont. 1999); *Collins v. State of Oklahoma ex rel. Dep't of Pub. Safety*, 991 P.2d 557, 559–60 (Okla. Civ. App. 1999) (challenging law revoking driver's license for persons under twenty-one with any measurable quantity of alcohol in blood or breath and for persons over twenty-one having BAC of .10 or more); *State v. Crain*, 972 S.W.2d 13, 15 (Tenn. Crim. App. 1998). This so-called "Zero Tolerance" federal legislation is discussed *infra* notes 170–176 and accompanying text.

### *I. Direct Challenges*

*Felix v. Milliken*, a consolidated case involving a *direct* challenge to the drinking age in Michigan, was initiated after voters approved a state constitutional amendment in 1978 that raised the MLDA to twenty-one.<sup>48</sup> The plaintiffs alleged numerous constitutional infirmities, including violations of religious free exercise and the right of parents to control their children's upbringing.<sup>49</sup> However, the court indicated its primary focus would be on the plaintiffs' equal protection arguments.<sup>50</sup> After a detailed analysis of existing federal equal protection doctrine and applicable standards of review, the Michigan Supreme Court concluded that the age classification was not suspect and that the right involved was not fundamental in nature, thus requiring the application of only a rational basis level of scrutiny.<sup>51</sup> The court determined that the goals of increased highway safety among eighteen to twenty-year-olds outweighed any interest of the same group to "have what they perceive to be all of the prerogatives of adulthood," including the right to lawfully purchase and consume alcohol.<sup>52</sup>

The factual circumstances in Michigan were not well-suited to a resolution in the plaintiffs' favor: the drinking age was raised voluntarily at the state level by a constitutional amendment that was initiated and voted on by the electorate in a state with no heightened legal protection from age discrimination.<sup>53</sup> Moreover, the Michigan legislature had enacted a law raising the MLDA to nineteen that was scheduled to take effect immediately prior to the resolution of the *Felix* case; this law was not challenged by the plaintiffs.<sup>54</sup>

In contrast, Louisiana must have seemed like the ideal battleground for the plaintiffs in *Manuel v. State* to attack that state's alcohol regulation scheme.<sup>55</sup> To retain its eligibility to receive the maximum level of funding from the federal government after

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48. 463 F. Supp. at 1363.

49. *Id.* at 1364.

50. *Id.*

51. *Id.* at 1376.

52. *Id.* at 1389.

53. See MICH. CONST. art. I, § 2; see also *People v. Perkins*, 309 N.W.2d 634, 636 (Mich. Ct. App. 1981) (noting "[a]ge is not a suspect classification for equal protection purposes"). *But cf.* MICH. COMP. LAWS ANN. § 37.2102 (West 2001) (affording protection against age discrimination in areas of employment, housing, and public accommodations or services).

54. *Felix*, 463 F. Supp. at 1364.

55. 692 So. 2d 320 (La. 1996).

enactment of the NMDA, Louisiana adopted Act 33 of 1986, which prohibited the purchase or public possession of alcoholic beverages by those under twenty-one.<sup>56</sup> The law as drafted imposed sanctions only on underage consumers and not on the retailers or sellers of alcoholic beverages.<sup>57</sup> Although this created enforcement problems, the absence of punishment for suppliers notably did not jeopardize federal highway funding because the provisions of the NMDA did not “require states to prohibit the *sale* of alcoholic beverages to persons under twenty-one.”<sup>58</sup>

Louisiana’s Act 639 of 1995 closed the enforcement “loophole” in the earlier Louisiana law by creating sanctions for retailers who sold alcohol to individuals under twenty-one.<sup>59</sup> This change provoked the *Manuel* litigation, in which the plaintiffs objected to the entire revised statutory scheme that prohibited either the sale or purchase of alcoholic beverages involving those under twenty-one as violative of the Louisiana constitutional guarantee against age discrimination.<sup>60</sup> In its original opinion, the Louisiana Supreme Court upheld the trial court’s determination that the statutes should be invalidated on the basis of impermissible age discrimination.<sup>61</sup>

Due to the unique nature of the state constitution that provides specific protection for age-based classifications, the court employed an intermediate standard of scrutiny in ruling that “the State has clearly failed in the instant case to carry its burden of proving this presumptively unconstitutional classification on the basis of age substantially furthers the important governmental objective of improving highway safety.”<sup>62</sup> Upon the state’s application for rehearing, the court agreed “to reconsider the correctness” of its previous decision after a judicial vacancy was filled.<sup>63</sup>

The court’s original opinion emphasized that the application of intermediate scrutiny in Louisiana age discrimination cases requires a close means-ends fit; that is, “the [age] classification can only be found constitutional if it is the classification which most directly

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56. *Id.* at 322.

57. *See id.*

58. *Id.* at 323 n.3.

59. *Id.* at 322–23.

60. *Id.* at 322. The Louisiana Constitution provides: “No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations.” LA. CONST. art. I, § 3.

61. *Manuel*, 692 So. 2d at 321.

62. *Id.* at 324, 331.

63. *Id.* at 338.

implicates or furthers the asserted governmental interest.”<sup>64</sup> Statistical data presented at trial showed that in fact, drivers in the twenty-one to twenty-four-year-old age group had a *greater number* of alcohol-related fatal and injury-causing traffic accidents than did eighteen to twenty-year-old drivers.<sup>65</sup> The court therefore concluded that the state’s interest in avoiding the loss of a percentage of federal highway dollars was an illegitimate governmental interest, given the heightened constitutional protection against “arbitrary, capricious or unreasonable” age classifications provided in Louisiana.<sup>66</sup>

The opinion of Justice Lemmon on rehearing emphasized this statistical drinking and driving evidence presented at the trial level, but also stressed that the appropriate inquiry was not the total number of serious accidents but rather the *percentage* of serious accidents by age group.<sup>67</sup> The rehearing court determined that eighteen to twenty-year-olds were proportionately the most dangerous.<sup>68</sup> The court acknowledged that a classificatory fit analysis should be mindful of underinclusiveness and overinclusiveness.<sup>69</sup> According to the majority, the age classification here was both, because “it does not address a major portion of the perceived problem” and because “it prohibits young adults from drinking even when they would not be driving.”<sup>70</sup> Nevertheless, Justice Lemmon rejected the original majority’s conclusion and upheld the law.<sup>71</sup>

The issuance of conflicting published opinions from the same court within such a brief time frame is unusual, as is the fact that the court granted rehearing at all.<sup>72</sup> The case outcome was dependent on the respective majority’s dueling interpretations of the statistical presentations, although the result was affected by other factors.<sup>73</sup>

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64. *Id.* at 324.

65. *Id.* at 327–28.

66. *Id.* at 332.

67. *Id.* at 341–43.

68. *Id.* at 342; *see also id.* at 357 (Calogero, C.J., concurring).

69. *Id.* at 344 n.10.

70. *Id.* The Court suggested that the overinclusiveness “is somewhat overcome” due to the number of exceptions that the legislature had carved out to allow young adults to drink under the auspices of parents and in private settings. *Id.*

71. *Id.* at 348.

72. Richard Ieyoub, the Louisiana Attorney General, had requested the rehearing and Governor Mike Foster requested the legislature to initiate a constitutional amendment to reinstate the twenty-one-year-old drinking age. Rick Bragg, *Louisiana Stands Alone on Drinking at 18*, N.Y. TIMES, Mar. 23, 1996, at A1.

73. The four to three original vote to strike down the statute shifted to a five to two decision on rehearing when temporary appointee Judge Burrell Carter was replaced by

Despite the pro-plaintiff factors in the Louisiana litigation, the Court sustained the age classification.

## 2. Indirect Challenges

Indirect equal protection challenges based on differential age-dependent blood alcohol levels (BACs) have suffered fates similar to those of direct challenges, but even more readily. The best opportunity for a plaintiff to overturn a differential scheme was presented in *Mason v. State*.<sup>74</sup> To preserve federal highway dollars, states sought compliance with federal legislation by establishing a presumption of intoxication level at .02 BAC for drivers under twenty-one.<sup>75</sup> Whereas most states incorporated this requirement under their motor vehicle codes, Mississippi situated its BAC differential in “a felony statute requiring a lesser burden for conviction of a minor than an adult, while at the same time trying the minor as an adult.”<sup>76</sup> The majority concluded that review of a statutory classification on appeal warrants no more than what appears to be a form of “weak” rational basis scrutiny.<sup>77</sup> The court upheld the Mississippi statute along with petitioner’s fifteen-year prison term for a drunk driving accident that caused the death of one person and seriously injured another.<sup>78</sup>

## 3. Potential for Success Through Litigation Based on Equal Protection

States hoping to determine their own minimum legal drinking age without facing federal sanctions will likely not achieve success through equal protection litigation. Previous litigation efforts raising equal protection arguments against age-based alcohol regulations have been unsuccessful. Age classifications challenged under equal protection are generally subjected to the lowest level of rational basis

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Judge Joe Bleich. *Louisiana Court Upholds Drinking Age of 21*, N.Y. TIMES, July 3, 1996, at A17. He joined the original dissenters and Chief Justice Calogero who “switched sides” in the formation of a new majority that upheld the statute. *Id.*

74. 781 So. 2d 99, 99–100 (Miss. 2000) (ruling on criminal prosecution of then-eighteen-year old for felony drunk driving).

75. *See* 23 U.S.C. § 161 (2000).

76. *Mason*, 781 So. 2d at 104 (McRae, J., dissenting).

77. *Id.* at 103–04 (citing *Heller v. Doe*, 509 U.S. 312 (1993)) (stating that “in the appellate review of a statute involving classification, the law must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification”).

78. *Id.* at 104.

scrutiny.<sup>79</sup> If a weak or even a “garden variety” rational basis standard of review is used, challenges rarely will be sustained.<sup>80</sup> Predictably, the courts have refused to find an equal protection violation on either state or federal constitutional grounds in cases raising the age discrimination issue directly in the context of the MLDA.<sup>81</sup> A more vigorous “rational basis with bite” approach could permit a cognizable claim.<sup>82</sup> Given the U.S. Supreme Court’s antipathy toward expanding the classifications subject to heightened scrutiny, change is highly improbable.<sup>83</sup>

A state court such as the original *Manuel* majority could rely on specific state constitutional guarantees and employ heightened scrutiny to strike down an age-based classification.<sup>84</sup> If the factual context involves a controversial topic such as underage drinking, however, the Louisiana experience demonstrates that the backlash could be swift and potentially problematic for an elected bench.<sup>85</sup>

### *B. Previous Litigation Efforts Based on the Spending Clause*

In *South Dakota v. Dole*, the U.S. Supreme Court denied a state challenge based on the Twenty-first Amendment<sup>86</sup> and upheld the

79. In *Massachusetts Bd. of Retirement v. Murgia*, the Court firmly established a rational basis standard of review reasoning that individuals subject to age-based classifications do not meet the criteria for heightened review such as political powerlessness, history of discrimination, and classification as “discrete and insular” minorities. 427 U.S. 307, 313–14 (1976).

80. See Kevin H. Lewis, *Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 179 (1997) (stating that “courts almost always defer to legislative judgment and uphold laws when using rational basis review”).

81. See, e.g., *Felix v. Milliken*, 463 F. Supp. 1360, 1382 (E.D. Mich. 1978); *Manuel v. State*, 692 So. 2d 320, 338 (La. 1996), *rev’d on rehearing*, 692 So. 2d 320 (La. 1996).

82. See Lewis, *supra* note 80, at 180.

83. The late-Chief Justice Rehnquist in particular was resistant to multiple levels of scrutiny for equal protection purposes. See *Craig v. Boren*, 429 U.S. 190, 218–21 (1976) (Rehnquist, J., dissenting).

84. See *supra* notes 60–67 and accompanying text.

85. The Louisiana Supreme Court’s initial ruling apparently resulted in “fiery criticism” in the press that was fueled by religious groups and those involved in alcohol prevention. Mat Herron, *Officials Question Minimum Drinking Age, Enforcement*, KY. KERNEL, Oct. 22, 1997, <http://www.kernel.uky.edu/1997/fall/10/22/news01.shtml> (daily student newspaper of the University of Kentucky).

86. The Twenty-first Amendment to the U.S. Constitution provides:



enactment of the NMDA as a legitimate exercise of congressional authority under the Spending Clause.<sup>87</sup> The Rehnquist-crafted majority opinion in *Dole* established a four-part test to gauge the constitutionality of federal action involving the imposition of conditions on federal highway funding provided to the states.<sup>88</sup>

First, as stated by the Court, the constitutional text mandates in Article I, sec. 8, “the exercise of the spending power must be in pursuit of ‘the general welfare.’”<sup>89</sup> The Court adopted a substantially deferential approach to the determination of Congress in this respect.<sup>90</sup> Second, congressionally imposed conditions on the states’ receipt of federal funds must be unambiguous so that States accept the money with full awareness of the consequences.<sup>91</sup> The Court determined that this requirement was easily satisfied because the conditions in the legislation for state receipt of funds “could not be more clearly stated by Congress.”<sup>92</sup>

The Court relied on previous case law in stating that the third prong of the constitutionality test was that “conditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’”<sup>93</sup> It was this “germaneness” or “relatedness” requirement that was the focus of

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

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

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

U.S. CONST. amend. XXI.

87. 483 U.S. 203, 206 (1987). The Court explained that the NMDA passed constitutional muster “even if Congress may not regulate drinking ages directly.” *Id.*

88. Chief Justice Rehnquist was joined by Justices White, Marshall, Blackmun, Powell, Stevens, and Scalia. *Id.* at 204.

89. *Id.* at 207; U.S. CONST. art. I, § 8. This clause is referred to as both the General Welfare and the Spending Clause.

90. *See id.* (citing *Helvering v. Davis*, 301 U.S. 619, 640, 645 (1937)). In a footnote, Rehnquist explained that this level of deference “is such that the Court has more recently questioned whether ‘general welfare’ is a judicially enforceable restriction at all.” *Id.* at 207 n.2.

91. *Id.* at 207.

92. *Id.* at 208.

93. *Id.* at 207–08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

Justice O'Connor's dissenting opinion.<sup>94</sup> Fourth, there must be no "independent bar" from other constitutional provisions to prevent placement of conditions on the federal money.<sup>95</sup> Petitioner South Dakota had relied almost exclusively on the argument that the Twenty-first Amendment is the type of "independent bar" or constitutional impediment that would block otherwise permissible federal legislative action.<sup>96</sup> Dissenter Justice Brennan seemed most receptive to the petitioner's state autonomy argument.<sup>97</sup>

Finally, the Court added that "in some circumstances the financial inducements offered by Congress might be so coercive as to pass the point at which Congressional 'pressure turns into compulsion.'"<sup>98</sup> The majority declined to differentiate between "coercion" (the so-called stick), which is a prohibited approach, and "inducement" (the so-called carrot), which is an appropriate methodology.<sup>99</sup>

In dissent, Justice O'Connor did not dispute the test developed by the majority but concentrated instead on its misapplication to the *Dole* facts.<sup>100</sup> According to O'Connor, the Court's application of the relatedness requirement was "cursory and unconvincing."<sup>101</sup> From her perspective, this requirement was not satisfied by the imposition of penalties for a state's refusal to adopt a twenty-one-year-old drinking

94. *See id.* 213–15 (1987) (O'Connor, J., dissenting).

95. *Id.* at 208.

96. *See id.* at 205.

97. *See id.* at 212 (Brennan, J., dissenting).

98. *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). The Court views its test as composed of four parts, although some commentators include "coercion" to make it a five-part test. *See, e.g.*, Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 143 (2004). Mitchell Berman probably got it right when he characterizes "coercion" as "effectively a fifth prong, though not so denominated . . ." Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 30–31 (2001).

99. The Court concludes that "Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose." *Dole*, 483 U.S. at 211. The minimal amount of money at stake seems to figure prominently in the majority's analysis. Professor Berman finds coercion in *Dole* by shifting the traditional paradigm to view conditional offers from the perspective of the offeror who can engage in impermissible coercive conduct even where the stakes are so miniscule that the recipient would not feel coerced. Berman, *supra* note 98, at 40–41. The Court's pinched, incomplete definition of coercion may not be surprising given the propensity of the Court to define "coercion" narrowly even in the context of individual rights. *See, e.g.*, *United States v. Drayton*, 536 U.S. 194, 204 (2002) (refusing to find coercion involving drug interdiction stop on Florida bus, reversing 11th Circuit's contrary finding).

100. *Dole*, 483 U.S. at 212 (O'Connor, J., dissenting).

101. *Id.* at 213.

age where the professed goal was the promotion of highway safety.<sup>102</sup> As O'Connor explained, although drunk driving is a safety concern, those aged twenty-one and older will cause the greatest number of alcohol-related traffic accidents and some drinkers under twenty-one will never drive at all.<sup>103</sup> Enacting a twenty-one-year-old drinking age as a condition for full receipt of federal highway funds was both fatally overinclusive and underinclusive.<sup>104</sup> Despite the common-sense attraction of this argument, O'Connor was unable at the time to convince any of her more states' rights-oriented colleagues to accept her point of view.

### *C. Potential for Success Through Litigation Based on the Spending Clause*

Some commentators have suggested that the Court might now be poised to reexamine its Spending Clause jurisprudence.<sup>105</sup> Despite these claims, in their most recent 9-0 decision in *Sabri v. United States*, a criminal matter implicating the Spending and Necessary and Proper Clauses, the Justices did not give a clear indication of their current thinking on the *Dole* test.<sup>106</sup>

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102. *See id.* at 213–14.

103. *Id.* at 214–15.

104. *Id.*

105. *See, e.g.,* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1914 (1995) (observing that reexamination of *Dole* should be on agenda of remaining Justices in *Lopez* majority and that, due to changes in court membership since *Dole*, “the possibility of change is therefore real”); Vikram Davis Amar, *The New “New Federalism”*, 6 GREEN BAG 2d 349, 355 n.26 (2003) (“Many analysts believe that unless the Court revisits, and tightens up, the limits on Congress’ power to attach conditions to federal funding, then the other areas of the new federalism jurisprudence are rather meaningless in the real world.”); Ryan C. Squire, Note, *Effectuating Principles of Federalism: Reevaluating the Federal Spending Power as the Great Tenth Amendment Loophole*, 25 PEPP. L. REV. 869, 937 (1998) (“Refusal to confine Congress’s use of the Spending Power Clause is inconsistent with both history and the constitutional principles underlying the Court’s recent jurisprudence.”).

106. *Sabri v. United States*, 541 U.S. 600, 605 (2004). In *Sabri*, a real estate developer defendant was charged with a violation of 18 U.S.C. § 666(a)(2) for attempting to bribe a local Minneapolis official in connection with a commercial development project. *Id.* at 603. Bribery or attempted bribery is a federal crime under section 666(a)(2) if the local government organization receives more than \$10,000 in federal funding per year; the City of Minneapolis easily qualified. *Id.* The statute is potentially quite broad because there is no statutorily imposed nexus requirement between the criminal conduct at issue and the federal money. This nexus gap argument, however, had persuaded the U.S. Court of Appeals in both the Second and

There are a number of rationales that might prompt the Court to rethink its prior approach or previous interpretation in a particular area. First, there may be an acknowledgment that a case was just wrongly decided initially. A recent example is *Lawrence v. Texas*,<sup>107</sup> in which the court struck down a discriminatory Texas sodomy law in the face of contradictory precedent in *Bowers v. Hardwick*.<sup>108</sup> Justice Kennedy, writing for the majority in *Lawrence*, characterized its prior decision by saying, “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”<sup>109</sup> Given the sacrosanctity of *stare decisis*, the Court’s blunt acknowledgments of a “change of mind” are rare.<sup>110</sup> There is a greater probability that the Court will attempt to distinguish its previous course of action in a principled way.<sup>111</sup>

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Third Circuits to overturn convictions. See *United States v. Santopietro*, 166 F.3d 88, 93 (2d Cir. 1999); *United States v. Zwick*, 199 F.3d 672, 681–87 (3rd Cir. 1999).

*Sabri* arose in a unique procedural context that may have skewed its precedential value because petitioner chose to raise a facial challenge to the statute’s supposed constitutional infirmities rather than to attack the statute as applied. *Sabri*, 541 U.S. at 603–04. As one legal commentator observed about *Sabri*, “virtually everything that the Court said about the Constitution is colored by the Court’s general distaste for such facial challenges, especially when obviously constitutional applications of the statute are readily at hand.” Gary Lawson, *Making a Federal Case Out of It: Sabri v. United States and the Constitution of Leviathan*, CATO SUP. CT. REV. 119, 158 (2003–2004). The posture of *Sabri* is actually quite different from the type of conditional spending grant that was at issue in *Dole*. See Young, *supra* note 98, at 145 (noting that defendants in section 666 cases have not contracted with federal government and so “the requirement that they avoid bribery” is not condition attached to federal funding) (quoting Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 60 (2003)).

107. 539 U.S. 558, 578 (2003).

108. 478 U.S. 186, 196 (1986).

109. *Lawrence*, 539 U.S. at 578.

110. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (striking down “separate but equal” established nearly six decades earlier in *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (overruling three-year-old compulsory school flag salute precedent in *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940)); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (establishing right to trial counsel in felony matters invalidating *Betts v. Brady*, 316 U.S. 455 (1942)); *West Coast Hotel v. Parrish*, 300 U.S. 379, 400 (1937) (overturning *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), which held that minimum wage laws violated freedom of contract).

111. For example, the Court adopted a “totality of the circumstances” test for use in probable cause determinations involving informants in *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983). However, the Court did not disavow the prior test outright. Rather, it chose to abandon a strict application of the two-pronged “basis of knowledge” and “veracity” test previously established in *Aguilar v. Texas*, 378 U.S. 108, 114 (1964)

In the *Dole* context, it is possible that the Court could rethink its earlier determination that the Twenty-first Amendment was not an impediment to congressional Spending Clause power.<sup>112</sup> This seems unlikely as the Court has already carved out exceptions to the inviolate nature of the Twenty-first Amendment in cases involving the Commerce Clause<sup>113</sup> and individual rights.<sup>114</sup> The Court could claim an epiphanous experience with respect to the original meaning of the Spending Clause that resulted in an erroneous application previously. However, given that the Hamiltonian position on the reach of the Spending Clause was well-known at the time *Dole* was decided, this too seems improbable.<sup>115</sup>

A second basis for the Court's overturning even relatively recent precedent may result from the fact that the law is unworkable. Unworkability can sometimes be a pretextual argument that allows the Court to avoid a blunt acknowledgement that it erred previously.<sup>116</sup>

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and refined in *Spinelli v. United States*, 393 U.S. 410, 415–16 (1969), but then sanctioned its use as a reference point in the newly-created, more flexible *Gates* test.

112. See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 151–52 (1993).

[In *Dole*], the Court noted the many occasions on which Congress had been able to attach conditions to the receipt of federal funds. Where such conditions do not involve any efforts by Congress to expand its effective power, however, these provisions are easily distinguishable. Where the conditions involve powers reserved to the states under the Tenth Amendment, the Court has traditionally required that the federal government show a sufficiently compelling interest to override the state interest. The danger that Congress will leverage its broad spending power to subvert the Twenty-first Amendment is as great as the danger that it will leverage its power to subvert the Tenth Amendment, and should be met with the same judicial response.

*Id.* (footnotes omitted).

113. See, e.g., *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 114 (1980) (finding no Twenty-first Amendment bar in upholding applicability of Sherman Act to negate wine resale agreements that were lawful under state law).

114. See, e.g., *Craig v. Boren*, 429 U.S. 190, 209–10 (1976) (holding that Twenty-first Amendment did not protect Oklahoma statute that violated equal protection by creating differential purchase age for men and women to buy beer).

115. See generally Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003) (providing historical overview and explanation of Hamiltonian and Madisonian positions on General Welfare Clause and Necessary and Proper Clause).

116. For example, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 557 (1985), the Court overruled its recent decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which had protected state sovereignty against federal encroachment in areas of “traditional government functions.” The Court acknowledged in *Garcia* that the traditional government functions test from *National League of Cities* was “unsound in principle and unworkable in practice.” 469 U.S. at 546–47. The larger issue at the time may have been the Court's discomfort with the

There may be problems with application or enforcement of the underage drinking laws; however, unworkability here relates to whether the law is proving difficult for lower courts to apply.<sup>117</sup> Application problems should generate a revision of the earlier test or standard rather than an overruling of the previous case. In Spending Clause cases, the lower courts have sometimes been constrained by aspects of the Court's ruling in *Dole*.<sup>118</sup> Despite the Court's failure to provide sufficient criteria to assess "germaneness" or "coercion" under its multi-part test,<sup>119</sup> there has been no outcry from the lower courts that might provide a practical reason for overturning *Dole*.

A third justification for disregarding *stare decisis* is the Court's realization that state laws have changed in the pertinent subject area.<sup>120</sup> Somewhat to the chagrin of some members of the current Court, international consensus can apparently have an impact as well.<sup>121</sup> Since the primary effect of the NMDA legislation at issue in *Dole* was

view that it should serve "as a special protector of state sovereignty." Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 96.

117. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (questioning *stare decisis* based on "unworkable" or "badly reasoned" precedents); see also Kelly Parker, Comment, *Of Sleeping Dogs and Silent Love: Stare Decisis and Lawrence v. Texas*, 41 IDAHO L. REV. 177, 200 (2004) (arguing that unworkability suggests that "the precedent may need to head for the scrap heap" but cautioning that it is more challenging to disregard prior case relied on by number of lower courts); Todd E. Freed, Comment, *Is Stare Decisis Still the Lighthouse Beacon of Supreme Court Jurisprudence?: A Critical Analysis*, 57 OHIO ST. L.J. 1767, 1793 (1996) (indicating that lower courts "are on the front line of the judiciary" and may therefore be in the best position to assess workability).

118. See *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997) (per curiam) (striking down portion of Individuals with Disabilities Education Act (IDEA) on basis that it was coercive to states); see also *Kansas v. United States*, 24 F. Supp. 2d 1192, 1198–99 (D. Kan. 1998) (applying coercion test since it "stands as the law at the present time" even though court believes it is "ill-conceived and probably unworkable").

119. See *supra* notes 93–99 and accompanying text.

120. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (mentioning that twenty-two States recommended overruling *Betts v. Brady*, 316 U.S. 455 (1942)); *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002) (noting that large number of States now outlawing execution of defendants with mental retardation represented noticeable shift from Court's earlier ruling in *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989)).

121. See *Roper v. Simmons*, 125 S. Ct. 1183, 1199–1200 (2005) (discussing prohibitions on imposition of juvenile death penalty in international treaties and in domestic laws of other nations); *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (referring to decisions from European Court of Human Rights that demonstrate how Court's reasoning in previous case had been rejected elsewhere).

to eradicate state variations with respect to alcohol policy, it is not likely that a number of states will experiment with other options.<sup>122</sup>

A fourth rationale for the Court's willingness to make a change on a particular issue might be to bring its actions in line with other jurisprudential areas. This thesis has some viability here because the Court's deferential attitude toward Congress in the Spending Clause area is at odds with its 1990s "revolution" in the Commerce Clause arena.<sup>123</sup> To promote overall consistency, the Court should reconcile its Commerce Clause and its Spending Clause approaches.<sup>124</sup>

In *United States v. Lopez*,<sup>125</sup> and then in *United States v. Morrison*,<sup>126</sup> the Court reviewed legislation passed pursuant to Congress's Commerce Clause power. Chief Justice Rehnquist, writing for the majority in *Lopez*, examined the applicable commerce clause approach and concluded that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."<sup>127</sup> But in both the above cases, the Court held Congress to a more exacting, higher standard in demonstrating that the activity regulated had a sufficient economic nexus to permit the exercise of Congressional authority under the Commerce Clause.<sup>128</sup>

122. *But see* discussion on the recent legislative efforts in Wisconsin, Vermont, and Hawaii *infra* notes 235–255 and accompanying text.

123. Professor Lynn Baker has been the strongest advocate for a judicial reexamination of *Dole*, especially since the decision is out of sync with *United States v. Lopez*, 514 U.S. 549 (1995), and its progeny. See Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1916 (1995) (arguing that Court "should reinterpret the Spending Clause to work in tandem, rather than at odds, with its reading of the Commerce Clause"); see also Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 483 (2003) (stating that "*Dole* coheres poorly with the body of current federalism doctrine"); Squire, *supra* note 105, at 937 ("Refusal to confine Congress's use of the Spending Power Clause is inconsistent with both history and the constitutional principles underlying the Court's recent jurisprudence."); Young, *supra* note 98, at 141 (suggesting that "[e]ven as the Rehnquist Court has sought to revive other doctrinal limits on Congress, its leading Spending Clause precedent, *South Dakota v. Dole*, stands as a landmark of permissiveness and deference").

124. As one observer has noted, "such a stark jurisprudential distinction is simply not justified." Angel D. Mitchell, Comment, *Conditional Federal Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions*, 48 U. KAN. L. REV. 161, 170 (1999).

125. 514 U.S. 549 (1995).

126. 529 U.S. 598 (2000).

127. 514 U.S. at 559.

128. See *id.* at 549–51; see also Case Note, *Commerce—A Retreat From Clarity: The Supreme Court Adds a Wrinkle to the "Aggregated Effects" Doctrine of its Commerce Clause Jurisprudence—United States v. Morrison*, 519 U.S. 598 (2000),

This nexus requirement resembles the “relatedness” imperative of *Dole*.<sup>129</sup>

By striking down the Gun Free School Zones Act in *Lopez* and then portions of the Violence Against Women Act (VAWA) in *Morrison*,<sup>130</sup> the Court signaled an end to its nearly sixty years of acquiescence to Congressional decision making in the passage of Commerce Clause legislation.<sup>131</sup> The Court’s failure to demand a similar showing from Congress at least on the “relatedness” prong in *Dole* stands in marked contrast to its recent Commerce Clause pronouncements.<sup>132</sup> Indeed, it was the “relatedness” prong that created the greatest difficulty for dissenter Justice O’Connor in *Dole*.<sup>133</sup> If the Court now requires Congress to do its Commerce Clause homework in proving economic effect and relationship to interstate commerce, it seems that a similar mandate regarding “relatedness” is in order under a Spending Clause analysis.

The Court ultimately limited the scope of constitutionally permissible Congressional authority in both *Lopez* and *Morrison*. Both cases involved social policy legislation in the areas of prevention of gun violence and the prevention of gender violence, respectively, that the federal government wanted to impose on the states.<sup>134</sup> These particular health and safety concerns are similar to the goal of preventing drunk driving to promote highway safety that induced

75 TEMP. L. REV. 163, 164 (2002). At least one scholarly commentary has characterized this higher Court-imposed economic requirement as “particularly dangerous” due to the Court’s failure to define this requirement sufficiently. Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605, 618 (2001).

129. See *supra* notes 93–94 and accompanying text.

130. *Lopez*, 514 U.S. 549; *Morrison*, 529 U.S. 598.

131. See Richard E. Levy, *Federalism: The Next Generation*, 33 LOY. L.A. L. REV. 1629, 1639 (2000) (noting that *Lopez* was “the first decision since 1937 to declare that regulation of a particular activity was beyond the scope of the commerce power”).

132. See *supra* notes 125–128 and accompanying text.

133. 483 U.S. 203, 213–14 (1987) (O’Connor, J., dissenting). O’Connor recognized that under a reasonable relationship test, “Congress could effectively regulate almost any area of a State’s social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced.” *Id.* at 215.

134. However, by the time of the passage of the Gun Free School Zones Act, most of the states had already enacted legislation that proscribed gun possession in and near schools. See *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). By contrast, although all jurisdictions had both civil and criminal laws to address gender violence, VAWA was passed to ensure even greater protection for women. See *Morrison*, 529 U.S. at 619–20. The Court determined that the portion of the Act establishing a civil rights cause of action in gender violence cases exceeded Congressional authority under the Commerce Clause. See *id.* at 619.



passage of the NMDA. There is, however, one subtle but important difference. The attempt to eradicate gun violence in the educational setting was made with legislation that proscribed weapons in close proximity to schools;<sup>135</sup> the effort to reduce gender violence was geared toward curtailing that violence directly.<sup>136</sup> But the NMDA legislation in *Dole* attempted to eliminate drunk driving, a legitimate social concern, by condemning not drinking and driving, but rather the drinking of alcoholic beverages by a select group of adults.<sup>137</sup> Arguably, this is a much more attenuated connection than the federal government's regulations that were rejected by the Court for Commerce Clause purposes in *Lopez* and *Morrison*.

*Dole's* loose interpretation of "coercion" under the Spending Clause for social legislation that exacts a policy change among reluctant states arguably gives the federal government an advantage in the precarious federalism construct.<sup>138</sup> In *New York v. United States*, a Tenth Amendment case involving the dormant Commerce Clause, the Court went on record with its opposition to federal "commandeering," especially where it obscures political accountability between the state and federal governments.<sup>139</sup> While tipping the balance in favor of the

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135. See Gun Free School Zones Act of 1990, 18 U.S.C. § 922(q) (Supp. V 1988).

136. See Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994).

137. See National Minimum Drinking Age Act of 1984, 23 U.S.C. § 158 (1988).

138. One scholar indicates that the real issue is not the desirability of any conditions on spending but "rather the proper demarcation of the division of powers between separate sovereigns." EPSTEIN, *supra* note 112, at 153. But see Earl M. Maltz, *Sovereignty, Autonomy and Conditional Spending*, 4 CHAP. L. REV. 107, 111–14 (2001) (arguing that federal conditional spending is not necessarily incompatible with state sovereignty or autonomy).

139. 505 U.S. 144, 161, 168–69 (1992). In striking down the "take title" portion of the Low-Level Radioactive Waste Policy Amendments Act, the Court stated, "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 166. The Court however, upheld other provisions of the Act where Congress used its spending power to "encourage" the state activity without mandating a specific approach. *Id.* at 187. See also, *Printz v. United States*, 521 U.S. 898, 917–18 (1997) (describing statutes and Presidential directives that simply requested, but did not "commandeer" or force, State assistance). But see *Reno v. Condon*, 528 U.S. 141, 150–51 (2000) (allowing Congress greater authority to regulate so-called "state activities," but not where Congress attempts to influence State regulation of private parties) (quoting *South Carolina v. Baker*, 485 U.S. 505, 514–15 (1988)). Various scholars have also criticized the loss of political transparency that comes from commandeering. See Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 485 (2002) (concluding that "it is surely likely that voters with little political knowledge may be confused about the true distribution of responsibility for policies that rely on federal

federal government may be justified when federal funds act only as an inducement, it should be noted that the remedy under the NMDA was to *withhold* five percent of federal highway funds in the first year, and ten percent each year thereafter, from noncompliant states.<sup>140</sup> This looks less like a “carrot” and more like the type of “stick” that the Court effectively denounced for Commerce Clause purposes in *New York*.<sup>141</sup>

One suggestion for strengthening the coercion test advocates for a return to an earlier, more explicit version that was set forth nearly seven decades ago by the Court in *Steward Machine Co. v. Davis*.<sup>142</sup> The *Steward Machine* Court indicated that “the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact.”<sup>143</sup> The *Dole* Court referenced the “compulsion” language of *Steward Machine*.<sup>144</sup> The Court refrained from conducting a more in-depth inquiry in *Dole* that might have placed greater emphasis on such facts as the amount of cumulative funds in jeopardy and the subjective perceptions of state legislators forced to enact conforming legislation.<sup>145</sup>

commandeering of state governments”); McCoy & Friedman, *supra* note 116, at 124 (speculating that state voters are likely to view conditional federal grants as gifts, neglecting to realize that “it is their own money being returned to them with strings attached”). *But cf.* Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 228 (2001) (contending that in Spending Clause area, political accountability does not necessarily result in increased aggregate social welfare).

140. *See supra* notes 30–31 and accompanying text.

141. *See generally* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1009 (1995) (examining various sticks and carrots that Congress uses to “either compel state inaction or induce affirmative state action consistent with federal objectives”).

142. 301 U.S. 548, 590 (1937).

143. *Id.* *See* Coulter M. Bump, Comment, *Reviving the Coercion Test: A Proposal to Prevent Federal Conditional Spending that Leaves Children Behind*, 76 U. COL. L. REV. 521, 547 (2005) (arguing for formal adoption of coercion test as fifth explicit limitation on Spending Clause).

144. *See* *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

145. One commentator suggests that despite the Court’s paying lip service to the notion of coercion, another rationale seemingly took precedence in *Dole* over fidelity to the established spending clause test:

So, in a context where national uniformity is important, and thus holdout by states is a serious threat, one could imagine the Court accepting even a coercive use of the spending power. Indeed, the government in *Dole* argued that absolute national uniformity of drinking ages was an important goal, and the Court’s acceptance of this argument may have been the real basis for its refusal to heed the claim of coercion.

In general, if limiting the states' receipt of highway money or other similar sources of funds is tapped repeatedly as a means of encouraging the states to do the federal government's bidding, then the cumulative effect of "a billion here, a billion there" could seem more coercive.<sup>146</sup> For example, receipt of federal highway funds are potentially put in jeopardy by a state's failure to adopt a twenty-one-year-old drinking age,<sup>147</sup> the .08 BAC law for all drivers,<sup>148</sup> and the .02 BAC for underage drivers.<sup>149</sup>

While the expressed perspective of affected states in determining coercion may be self-serving, it is still a relevant part of the assessment. South Dakota memorialized this sentiment in the text of its legislation to raise the drinking age, enacted post-*Dole*.<sup>150</sup> State legislators, even to the present day, express the sense that they have been coerced by the federal government with respect to highway-related matters.<sup>151</sup>

Finally, as a practical matter, the new composition of the Court could result in abandonment of its earlier approach, provided that there is a principled basis for a change. Long recognized as the champion of states' rights, Chief Justice Rehnquist's authorship of the

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Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1182 n.121 (2005) (citing *South Dakota v. Dole*, 483 U.S. 203, 208–09 (“[S]afe interstate travel . . . had been frustrated by varying drinking ages among the States.”)).

146. “A billion here, a billion there, and pretty soon you’re talking real money” is often ascribed to the late Illinois Senator Everett McKinley Dirksen; however, the attribution is apocryphal. See Dirksen Cong. Ctr., “A Billion Here, a Billion There . . .”, [http://www.dirksencenter.org/print\\_emd\\_billionhere.htm](http://www.dirksencenter.org/print_emd_billionhere.htm) (last visited Nov. 12, 2005).

147. 23 U.S.C. § 158(a)(1) (2000) (withholding ten percent of funds).

148. *Id.* § 163(a), amended by Pub. L. No. 106-346, § 101(a), 114 Stat. 1356, 1356A-34 (2000) (withholding two percent for noncompliance in 2004, four percent in 2005, six percent in 2006 and up to eight percent in 2007 and beyond).

149. *Id.* § 161(a) (2000) (withholding five percent of funds for noncompliance in 1988, and ten percent in 1999 and beyond).

150. The text of the relevant statute provides:

**Legislative intent and purpose for raising minimum drinking age.** The South Dakota Legislature enacts chapter 261 of the 1987 Session Laws to raise the state's minimum drinking age to twenty-one years of age solely under the duress of a funding sanction imposed by the United States department of transportation under 23 U.S.C. § 158. The Legislature strongly objects to being forced to choose between loss of highway construction funds, which are badly needed to construct priority road projects to promote the public health and safety of the state's inhabitants and visitors, and loss of its right to set its own drinking age.

S.D. CODIFIED LAWS § 35-9-4.1. (1999).

151. See, e.g., *infra* note 246 and accompanying text.

*Dole* decision may have seemed incongruous to some observers.<sup>152</sup> John G. Roberts, Rehnquist's successor as Chief Justice, assisted in the preparation of a 1986 amicus brief on behalf of the National Beer Wholesalers' Association in *South Dakota v. Dole*.<sup>153</sup> As he has cautioned, his work as an advocate does not reflect his personal views nor signal the way he might rule on any particular topic.<sup>154</sup> His involvement in the *Dole* litigation case, however, suggests that Roberts would have a complete understanding of the arguments addressed by the Court in *Dole*, particularly the Twenty-first Amendment's limitation on Congressional spending power.<sup>155</sup>

Justice O'Connor, one of only two *Dole* dissenters, was a consistent champion of states' rights. During her tenure on the Court, she emerged along with Justice Kennedy as the fulcrum for much of the Court's crucial decision making. Just as Justice O'Connor was able to convince Justice Brennan to join her *Dole* dissenting opinion in 1987, a Justice with a states' rights orientation in the O'Connor mold might garner support from some of the more nationalist Justices such as Souter, Ginsberg, or Breyer.<sup>156</sup>

Justices Scalia and Stevens are the only two remaining members of the *Dole* Court and both signed onto the Court's opinion without

152. At least one contemporaneous scholarly commentary noted that Chief Justice Rehnquist's approach in *Dole* was not at odds with his previous federalism jurisprudence. According to the authors, Chief Justice Rehnquist believed "there is a difference between obtaining an end through regulation, and obtaining the same end by a grant or a withholding of benefits." McCoy & Friedman, *supra* note 116, at 126.

153. Brief for Nat'l Beer Wholesalers' Ass'n et al. as Amici Curiae Supporting Petitioner, *South Dakota v. Dole*, 483 U.S. 203 (1987) (No. 86-260), 1987 WL 880308.

154. For example, during his previous federal court confirmation hearing in 2002, Roberts cautioned, "I do not believe that it is proper to infer a lawyer's personal views from the positions that lawyers may advocate on behalf of a client in litigation." Stephen Labaton & Jonathan D. Glater, *As a Lawyer, Court Nominee Was Considered a Skillful Advocate for Corporate Clients*, N.Y. TIMES, July 21, 2005, at A25.

155. See Brief for Nat'l Beer Wholesalers' Ass'n et al., *supra* note 154, at 8-12. It was the operation of the Twenty-first Amendment as an independent bar on congressional power that caught the attention of Justice Brennan in *Dole*. See *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (Brennan, J., dissenting).

156. Professor Baker offers an "intriguing possibility" for coalition building based on Justice Breyer's dissent in *College Savings Bank v. Florida Prepaid Postsecondary Education*, 527 U.S. 666, 697 (1999) (Breyer, J., dissenting), where, joined by Justices Stevens, Souter, and Ginsburg, Justice Breyer indicated that coercion might exist with respect to certain conditional grants from the federal government to the States. See Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 116 (2001).

writing separately. *Dole* was decided during Scalia's first term on the Court; he and a majority of the Court have demonstrated an increasingly stronger commitment to states' rights over the course of the past two decades.<sup>157</sup> Scalia might join Justice Thomas and opt for limiting Congressional power based on the original understanding of the Framers regarding the Spending Clause.<sup>158</sup> Stevens' viewpoint is more difficult to predict given that he seems to tolerate federal overreaching to a greater degree than some of his colleagues.<sup>159</sup>

There may be greater appeal for a Spending Clause challenge among those who have traditionally supported strong congressional action.<sup>160</sup> States' rights advocates have been aligned more frequently

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157. Indeed, in *Florida Prepaid Postsecondary Education v. College Savings Bank*, Justice Stevens observed that "this Court once again demonstrates itself to be the champion of States' rights." 527 U.S. 627, 664 (1999) (Stevens, J., dissenting).

158. For example, Professor Natelson examines the three traditional interpretations and the historical underpinnings of the General Welfare Clause (also known as the "Spending Clause"):

[F]irst, that it is a plenary grant of regulatory and spending power to Congress; second, that it is a plenary grant of textual power only; and, third, that it is not a grant of power at all. I find severe textual problems with the first and second interpretations, and my subsequent historical analysis confirms that those interpretations have little basis in original understanding. I find that the third view is the most textually sound. Examination of history, however, shows that the General Welfare Clause is more than a mere "non-grant" of spending power. It was intended to be a sweeping *denial* of power—specifically, it was intended to impose on Congress a standard of impartiality borrowed from the law of trusts, thereby limiting the legislature's capacity to "play favorites" with federal tax money.

Natelson, *supra* note 115, at 4.

159. Stevens's authorship of the majority opinion in the medical marijuana case *Gonzales v. Raich*, might be offered as an example of his deference to congressional regulation. 125 S. Ct. 2195 (2005). It may not, however, be a bellwether of his current overall approach to either the Commerce Clause or the Spending Clause. The *Raich* opinion focuses on congressional authority to regulate the "cumulative effect" of economic activities that substantially affect interstate commerce, relying on *Wickard v. Filburn*, 317 U.S. 111 (1942), and distinguishes the facial challenges in *Lopez* and *Morrison*, where "the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety" because the activities in question were non-economic. 125 S. Ct. at 2209.

160. This might apply to those on the Court as well as to others. With respect to the Court, Richard E. Levy has observed that Congress's increasing reliance on spending legislation "might eventually force the pro-federalism majority on the Court to rework its spending power jurisprudence or even reconsider *Dole*, although there are few indications of such a development at the present time." Levy, *supra* note 131, at 1662. As far as liberals are concerned, Professor Baker has suggested that they should recognize that their optimism about the federal government and their pessimism about the states is unwarranted because "[t]here have always been areas of social policy in

with conservative viewpoints; liberals have tended to be more tolerant of “big government” at the federal level. But conditional grants coming from a Republican-controlled Congress would surely be disconcerting to liberals and progressives who might view the states as providing better protection for individual rights in such areas as capital punishment, reproductive freedom, physician-assisted suicide, stem cell research, and choice of a marriage partner. It is difficult to predict whether a coalition of disgruntled liberals could successfully align themselves with conservatives or libertarians skeptical of the federal government’s power grab through its Spending Clause authority.

Unlike other states’ rights challenges that might not need to tackle the *Dole* precedent head on, any attempt by the states to address the NMDA using a Spending Clause rationale must confront *Dole* directly. A direct challenge to *Dole* by the states is not hopeless; however, it would be an audacious tactic. Moreover, it would necessitate compelling facts and the cooperation of a state plaintiff.<sup>161</sup> Given the multiple uncertainties, it seems more prudent to wait for the Court to chip away at the foundations of *Dole* in another context first.

### III. LOWERING THE EXISTING DRINKING AGE THROUGH LEGISLATION

Because Equal Protection and Spending Clause litigation would likely not prove fruitful as a means of returning control over drinking age laws to the states, this Article turns now to an analysis of legislative efforts to do so. At this time, Congress does not appear amenable to rethinking the NMDA. Indeed, since the passage of the NMDA, Congress has undertaken similar attempts at passing conditional spending legislation. State legislation, by contrast, emerges as the best possible means of lowering the drinking age due to the flexibility with which state legislators can confront the issue.

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which certain states have been more ‘progressive,’ more ‘liberal’ than the federal government, and those areas are particularly marked today.” Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433, 452 (2002).

161. Litigation requires a case or controversy and someone, usually the client, to underwrite the costs. States, many saddled with budgetary shortfalls, are caught in a “Catch-22” in the NMDA context: they may be unwilling to enact statutes that jeopardizes federal highway funding—even in the short run—for the sole purpose of creating a litigation situation, with or without persuasive facts. *See* discussion on the state legislative process *infra* notes 213-258 and accompanying text.

## A. Federal

### 1. The NMDA

The 1984 passage of the NMDA represents the initial congressional effort under its spending power to exert influence over states by linking federal highway dollars to laws regulating alcohol possession and consumption by those under twenty-one.<sup>162</sup> Hailed as landmark legislation, proponents credit the NMDA, along with other MLDA laws, with saving more than 21,000 lives through 2002.<sup>163</sup> Since the NMDA's passage, Congress has not relented in its efforts to take control of drinking laws away from the states.

### 2. Other Conditional Spending Laws

#### a. Drug-Free Schools and Communities Act Amendments

After the Supreme Court placed its imprimatur on the conditional spending grant in *South Dakota v. Dole*,<sup>164</sup> Congress seized upon other opportunities to address underage drinking. For example, in 1989 Congress passed the Drug-Free Schools and Communities Act Amendments of 1989.<sup>165</sup> One provision amended Title XII of the Higher Education Act of 1965<sup>166</sup> to add a new section titled "Drug and Alcohol Abuse Prevention."<sup>167</sup>

As a condition of the continued receipt of federal funds, "including participation in any federally funded or guaranteed student loan program," colleges and universities were required to implement

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162. 23 U.S.C. § 158 (2000). See discussion on the Congressional spending power *supra* notes 87-99 and accompanying text.

163. This is the National Highway Traffic Safety Administration's (NHTSA) estimate as of 2002. NAT'L CTR. FOR STATISTICS & ANALYSIS, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS 2002: YOUNG DRIVERS 5, <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF2002/2002ydrfacts.pdf>. But see discussion on the use of statistical information *infra* notes 275-304 and accompanying text.

164. 483 U.S. 203, 211-12 (1987).

165. Drug-Free Schools and Communities Act Amendments of 1989, Pub. L. No. 101-226, 103 Stat. 1928 (1989).

166. Title XII of the Higher Education Act of 1965 is currently codified as amended at 20 U.S.C. §§ 1001-1155 (2000).

167. Drug-Free Schools and Communities Act Amendments § 22, 103 Stat. at 1938-39.

drug and alcohol prevention programs including the adoption of “standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities.”<sup>168</sup> In addition, institutions of higher education must provide “a clear statement that the institution will impose sanctions . . . up to and including expulsion or termination of employment and referral for prosecution, for violation of the standards of conduct required by [section] (1)(A).”<sup>169</sup>

b. “Zero Tolerance” Bill

Congress returned to the specific issue of drinking and driving in 1996 with the passage of the so-called “Zero Tolerance bill.”<sup>170</sup> Under its terms, the states must enact and enforce a .02 BAC legal limit for all drivers under twenty-one years old.<sup>171</sup> States were required to “[m]ake operating a motor vehicle by an individual under age 21 above the legal limit a *per se* offense”<sup>172</sup> and to authorize license suspensions or revocations for violation.<sup>173</sup> Like the sanction first imposed in the NMDA twelve years earlier, up to ten percent of federal highway funds would be jeopardized by failure to comply by October 1999.<sup>174</sup>

All states passed the necessary legislation in short order, although different approaches were used to accomplish the “zero tolerance” goal.<sup>175</sup> As with the NMDA, observers identify this legislation as an important factor in the reduction of drunk driving deaths nationwide.<sup>176</sup>

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168. *Id.* at 1938.

169. *Id.* The Drug and Alcohol Abuse Prevention implementing regulations, which include requirements for mandatory institute of higher education biennial review and compliance reporting to the Secretary of Education, are published at 34 C.F.R. § 86 (2005).

170. 23 U.S.C. § 161 (2000).

171. *Id.* §161(a)(3).

172. 23 C.F.R. § 1210.4(c)(3) (2005).

173. *Id.* § 1210.4(c)(5).

174. 23 U.S.C. § 161(a)(2).

175. For a discussion of legal challenges to state “zero tolerance” laws, see *supra* notes 74–78 and accompanying text.

176. See Andrés Villaveces et al., *Association of Alcohol-related Laws with Deaths due to Motor Vehicle and Motorcycle Crashes in the United States, 1980-1997*, 157 AM. J. EPIDEMIOLOGY 131, 137 (2003) (finding twelve percent reduction in alcohol-related mortality due to implementation of zero tolerance laws).



### 3. Committee on Developing a Strategy to Reduce and Prevent Underage Drinking

Operating through means other than direct legislation, Congress allocated \$500,000 to the National Academy of Sciences and Institute of Medicine in the fiscal year 2002 appropriation for the Department of Health and Human Services (HHS) to examine underage drinking.<sup>177</sup> Using this funding, the Board on Children, Youth, and Families of the National Research Council and the Institute of Medicine established the Committee on Developing a Strategy to Reduce and Prevent Underage Drinking.<sup>178</sup> The Committee was charged with conducting a comprehensive study to review existing programs and to develop an effective strategy to achieve its titular goal.<sup>179</sup>

Some who desired a more broad-based approach to examining the use of alcohol by teens and young adults may have been heartened by the Committee name, which seems to contemplate “harm reduction” strategies in addition to prohibition. However, while the Committee’s members indeed possessed superior credentials,<sup>180</sup> some critics argued that the Committee’s composition was one-sided and stacked with “anti-alcohol radicals.”<sup>181</sup> Indeed, the Committee concluded that Congress intended it “to work within the framework of current law, anchored in the National Minimum Drinking Age Act of 1984, and that reconsideration of the 21-year-old drinking age, and of the premises upon which it is predicated, [was] beyond [its] mandate.”<sup>182</sup>

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177. See H.R. REP. NO. 107-342, at 110–11 (2001) (Conf.Rep.).

178. REDUCING UNDERAGE DRINKING, *supra* note 7, at 2.

179. *Id.*

180. See *id.* at 296–301 (providing biographical sketches of Committee members).

181. See JOHN E. FRYDENLUND, CITIZENS AGAINST GOV’T WASTE, UNDERAGE DRINKING STUDY: WASTEFUL AND BIASED 7–8 (2003), [http://www.cagw.org/site/DocServer/Underage\\_Drinking\\_Report.pdf](http://www.cagw.org/site/DocServer/Underage_Drinking_Report.pdf)

The incestuous nature of this NAS [National Academies of Science] panel is extraordinary, with a majority of members coming from very similar backgrounds, receiving funding from the same source, and expressing carbon-copy anti-alcohol bias. The NAS refused to include any of the well-known academic experts that were recommended for inclusion on the panel by members of Congress.

*Id.* According to one report, eight of the twelve panel members had ties to the “prohibitionist” Robert Wood Johnson Foundation. Steve Milloy, *Prohibitionists Write Federal Alcohol Report*, FoxNews.com, Sept. 26, 2003, <http://www.foxnews.com/story/0,2933,98339,00.html>.

182. REDUCING UNDERAGE DRINKING, *supra* note 7, at 25. The Committee recognized that the “current policy framework,” including the MLDA, were

Working within its perceived directive, the Committee produced a thorough report that made a number of recommendations for the media, the alcohol and the entertainment industries, campuses and communities, and government at all levels.<sup>183</sup> The section of the report dealing with access to alcohol by underage drinkers, for example, encouraged voluntary compliance with existing laws by heightening adult awareness of the consequences of underage drinking.<sup>184</sup>

In addition, the Committee also focused several of its proposals on beefing up existing laws in a number of ways. Recognizing that state laws vary greatly in terms of the access minors have to alcohol, the Committee proposed restrictions that would make alcohol available to minors only when parents provide alcohol to their own children in their own homes.<sup>185</sup> On the commercial side, the Committee also recommended increased compliance checks for retailers,<sup>186</sup> increased education for sellers and servers,<sup>187</sup> heightened dram shop liability,<sup>188</sup> and tighter regulation of internet sales and home delivery.<sup>189</sup>

With respect to third parties, recommendations included enforcement programs to deter “straw man” purchases,<sup>190</sup> keg registration to capture and track data on purchasers,<sup>191</sup> imposition of social host liability through legislation or principles of common law

questioned by some; however, the Committee was persuaded by a scientific foundation that supported retention of the laws. *Id.*

183. *See generally* REDUCING UNDERAGE DRINKING, *supra* note 7. The published report also includes numerous reference sources and a CD-ROM with background research papers. *Id.* at vii. The Committee, of course, was not writing on a blank slate and some of its suggestions had been advanced previously. *See generally* REDUCING UNDERAGE DRINKING, *supra* note 7.

184. *Id.* at 158–59.

185. *Id.* at 166. For examples of state variations, see *infra* Appendix.

186. REDUCING UNDERAGE DRINKING, *supra* note 7, at 169–70.

187. *Id.* at 172.

188. *Id.* at 174. The term “dram shop liability” refers to the “[c]ivil liability of a commercial seller of alcoholic beverages for personal injury caused by an intoxicated customer.” Jill Thompson Snyder, *Equal Protection—The Supreme Court Of Wyoming Holds Constitutional A Statute Limiting A Liquor Vendor’s Liability When That Vendor Has Legally Provided Alcohol To Another*. *Greenwalt v. Ram Restaurant Corp. of Wyoming*, 71 P.3d 717 (Wyo. 2003), 35 RUTGERS L.J. 1491, 1493 n.15 (2004) (quoting BLACK’S LAW DICTIONARY 509 (7th ed. 1999)). The vast majority of states have some variety of dram shop law. *See* Nina J. Emerson & Sarah B. Stroebel, *Another Look at Dram Shop Liability*, WIS. LAW., Aug. 2000, at 14, 17.

189. REDUCING UNDERAGE DRINKING, *supra* note 7, at 174–75.

190. *Id.* at 176.

191. *Id.*

negligence,<sup>192</sup> and greater restrictions on drinking in quasi-public settings by the use of more restrictive permitting systems.<sup>193</sup>

Finally, strategies geared toward younger consumers included stricter penalties for the use of fake identification to purchase alcohol,<sup>194</sup> greater enforcement of zero-tolerance laws to combat underage drunk driving,<sup>195</sup> graduated driver's licensing programs that restrict time and number of passengers for younger drivers,<sup>196</sup> and the use of sobriety checkpoints to detect violations of blood alcohol concentration laws.<sup>197</sup>

#### 4. STOP Underage Drinking Act

In July 2004, legislation was introduced in the Senate to implement many of the Committee's recommendations.<sup>198</sup> In February 2005, the bill, known as the Sober Truth on Preventing Underage Drinking Act or STOP Underage Drinking Act, was reintroduced by Senator Mike DeWine (R-OH) along with six Democrat and two Republican co-sponsors.<sup>199</sup> Representative Lucille Roybal-Allard (D-CA) introduced the identical measure in the House with eleven Democrat and seven Republican co-sponsors.<sup>200</sup>

The STOP Underage Drinking Act has four primary emphases. First, it creates an Interagency Coordinating Committee under the auspices of the HHS to provide overall coordination of an annual reporting requirement for federal agencies responsible for combating underage drinking.<sup>201</sup> Second, the bill authorizes one million dollars of annual funding to continue a national media campaign to increase

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192. *Id.* at 177–78.

193. *Id.* at 178.

194. *Id.* at 182–84.

195. *Id.* at 179.

196. *Id.*

197. *Id.* at 180. The U.S. Supreme Court upheld the use of fixed highway sobriety checkpoints involving only a brief interaction to check for drunk driving in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990). However, some state courts have determined that these checkpoints, at least in the context of drivers over age twenty-one, violate constitutional provisions. *See, e.g.*, *State v. Blackburn*, 620 N.E.2d 319 (Ohio Mun. 1993); *City of Seattle v. Mesiani*, 755 P.2d 775 (Wash. 1988).

198. Sober Truth on Preventing Underage Drinking Act, S. 2718, 108th Cong. (2004).

199. Sober Truth on Preventing Underage Drinking Act, S. 408, 109th Cong. (2005).

200. Sober Truth on Preventing Underage Drinking Act, H.R. 864, 109th Cong. (2005).

201. S. 408 § 201; H.R. 864 § 201.

adult awareness of the problem of underage drinking.<sup>202</sup> Third, the bill authorizes five million dollars to communities for intervention programs and another five million dollars to form state-wide coalitions to prevent underage drinking at institutions of higher education and their surrounding communities.<sup>203</sup> Finally, the legislation proposes financial support for research into acquiring “[i]mproved knowledge of the scope of the underage drinking problem and progress in preventing and treating underage drinking.”<sup>204</sup>

### *B. Potential for Success Through Federal Legislative Efforts*

Because Congress has both proposed and enacted recent federal legislation reaffirming the twenty-one-year-old drinking age, it is doubtful that control will be handed quickly back to the states, despite the proven problems with this national drinking age. However, that has not stopped some candidates for federal office from advocating a return to state control and an eighteen-year old drinking age. For instance, during the 2004 U.S. Senate race in Colorado, Republican Senate candidate Pete Coors, a long-time critic of federal interference with state alcohol regulation, chose to address the issue as one of states’ rights and personal responsibility. Although Coors denied an express desire to lower the drinking age to eighteen when questioned by an opponent at a candidates’ forum during the summer of 2004, he nevertheless noted his belief that an eighteen-year-old drinking age was not a problem.<sup>205</sup> A Coors spokesperson stated, “Pete believes it’s a states-rights issue and should be debated at the state . . . . He

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202. S. 408. § 301; H.R. 864 § 301.

203. S. 408 §§ 401–402; H.R. 864 §§ 401–402.

204. S. 408 §§ 501–502; H.R. 864 §§ 501–502.

205. See Valerie Richardson, *Coors Urges Lower Drinking Age*, WASH. TIMES, June 24, 2004, at A1. When questioned at a candidates’ debate about his beliefs on the issue, Coors replied, “I haven’t said that 18 is a better age, I’m saying that we should reopen the debate and let the citizens decide, without bureaucratic intervention.” *Id.* But he also stated, “We got along fine for years with the 18-year-old drinking age . . . . We’re criminalizing our young people.” *Id.* One editorial commenting on the Colorado U.S. Senate Republican primary noted that “TV ads, radio spots and recorded phone calls for both candidates are obsessed with alcohol and who should imbibe it” despite the issue’s absence from debate at either the state or national level for some time. Peter Blake, *Drinking-Age Debate Causes Great Ferment in GOP Race*, ROCKY MTN. NEWS (Colo.), Aug. 7, 2004, at 12C, available at 2004 WLNR 1218468.

was always an advocate for responsible drinking and continues to be that way.”<sup>206</sup>

During his Senate run, Pete Coors was on a leave of absence from his position as the CEO of Coors Brewing Company, a family-owned beer and spirits business based in Golden, Colorado.<sup>207</sup> As a result, his comments on the drinking age issue were viewed as less than objective—even by those who are like-minded.<sup>208</sup> Coors was defeated by Ken Salazar in his quest for a U.S. Senate seat in the 2004 general election.<sup>209</sup>

The reluctance of Congress to rethink the NMDA is not an enigma; Congress has consistently been unreceptive to legislation that undercuts the promotion of a uniform age-related drinking policy. Certainly, various lobbying groups have been effective in getting, and keeping, the attention of particular congressional members. Voices in opposition to the NMDA include the alcohol, entertainment, and restaurant industries and a diffuse group of young adults who will reach twenty-one and subsequently lose some of the passion for change around the age-related alcohol proscription.<sup>210</sup> Although the former group is certainly well-funded, its clout is minimal in comparison to the expressions of grief and righteousness represented by family members of drunk driving victims. In addition, the “blood border” problem that proved vexing to lawmakers twenty years ago is prevented by a consistent drinking age nationwide.<sup>211</sup> Although any reasonable drinking age could be selected, the focus of Congress has

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206. Meagan Balink, *What if You Could Drink at 18?*, COLO. DAILY, June 27, 2004, <http://www.coloradodaily.com/articles/2004/06/28/news/newsol.txt>.

207. Richardson, *supra* note 205.

208. Colorado State Treasurer Mike Coffman expressed basic agreement with Pete Coors and his position on state-federal relations but seemed to question Coors' effectiveness as a spokesperson for alcohol-related concerns by stating, “I'm sympathetic to his view that the policy should have originated in Colorado, but it did seem self-serving.” *Id.*

209. *Salazar Defeats Coors for Colorado Senate Seat*, USA Today.com, Nov. 2, 2004, [http://www.usatoday.com/news/politicselections/vote2004/2004-11-02-cousenate-salazar-coors\\_x.htm](http://www.usatoday.com/news/politicselections/vote2004/2004-11-02-cousenate-salazar-coors_x.htm).

210. Advocates for lowering the drinking age at both the federal and state levels might be well-advised to examine the strategy of motorcycle activists who challenged mandatory helmet laws. See Jacob Sullum, *Freedom Riders*, REASON, Nov. 2005, at 40. Despite strong opposition from insurance companies and safety groups, relentless and pervasive lobbying techniques were used by those opposed to helmet laws for almost a decade. The ultimate result was the repeal of 1995 federal legislation that operated much like the NMDA and made retention of full highway funding dependent on passage of state helmet laws. *Id.* at 42.

211. See *supra* note 33 and accompanying text.

been consistent for more than two decades: to prevent drinking by those under twenty-one.<sup>212</sup> Lastly, there is little incentive for Congress to minimize the use of its spending power. Conceding in any way that its prior action constituted even slight encroachment of state authority could present an obstacle in the future when Congress wishes to implement other programs.

Legislation-based strategies certainly could be employed at the federal level to repeal the NMDA. If the goal is to lower the drinking age, then proceeding on the national legislative front would be a dubious strategy due to the fact Congress has been the primary agent in creating and reinforcing the current minimum legal drinking age laws. There may be a growing recognition that despite Congress's best efforts, current policy to date has failed to eliminate, or meaningfully reduce, alcohol use by young adults. Yet it seems premature to address the issue of lowering the drinking age directly at the federal level by repealing the NMDA, for example. Congress might, however, be more agreeable to allowing some type of experimentation at the state level.

### C. State

#### 1. Background

Along with repealing Prohibition, the passage of the Twenty-first Amendment in 1933 placed alcohol laws directly under state control.<sup>213</sup> Most states selected twenty-one, then the age of majority, as the minimum legal drinking age.<sup>214</sup> After 1971, when the voting age was lowered, twenty nine states reduced their MLDA's as well.<sup>215</sup> Gradually some states increased their MLDA's, resulting in universal reinstatement of the twenty-one-year-old drinking age after enactment of the NMDA in 1984 and the Supreme Court's rejection of the state's claims in *South Dakota v. Dole* three years later.<sup>216</sup>

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212. See discussion *supra* notes 162–204 and accompanying text.

213. See *supra* note 86.

214. Rosenthal, *supra* note 17, at 652. New York chose an eighteen-year-old drinking age. *Id.*

215. Snider, *supra* note 23, at 847.

216. See *supra* notes 29–41, 87–88 and accompanying text.

## 2. Existing Laws

Because uniformity was a major theme behind Congress's passage of the NMDA, the breadth of current variations among states with regard to alcohol regulatory schemes might come as a surprise to even the cognoscenti.<sup>217</sup> The NMDA passed by Congress required that to avoid forfeiture of up to ten percent of federal highway funding, states enact legislation prohibiting the *purchase* or *public possession* of alcoholic beverages by those under twenty-one.<sup>218</sup> There is greater license in the NMDA than appears at first glance; some states have taken advantage of this latitude without jeopardizing their highway funds.<sup>219</sup>

In some jurisdictions, for example, underage persons are permitted to go into bars and clubs where alcohol is served if there is a reliable system to identify those who can lawfully purchase and consume intoxicating beverages.<sup>220</sup> In several states, those between eighteen and twenty-one are permitted to consume alcohol in non-public settings if they are in the presence of specially designated persons over age twenty-one; usually, that means a parent or guardian.<sup>221</sup> Some state alcohol regulatory schemes, however, permit underage drinkers who are at least eighteen to be supervised by a spouse over twenty-one.<sup>222</sup> Other schemes permit underage drinking for those eighteen and older in homes or private residences with supervision by older adults.<sup>223</sup>

A few states have enacted broad-based laws that prohibit those under twenty-one from purchasing, selling, consuming, serving, and handling alcoholic beverages or from being present in drinking establishments; however, states with more tightly-controlled alcohol

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217. See PAC. INST. FOR RESEARCH AND EVALUATION, ALCOHOL BEVERAGE CONTROL ENFORCEMENT: LEGAL RESEARCH REPORT 1 (2003), <http://www.nllea.org/reports/ABCEnforcementLegalResearch.pdf> (describing results of state control as "creating a patchwork of laws and regulations with wide variation across jurisdictions") [hereinafter ABC REPORT].

218. 23 U.S.C. § 158(a)(1) (2000).

219. See, e.g., discussion of Louisiana law that placed sanctions only upon consumers and not sellers or retailers *supra* notes 56–58 and accompanying text.

220. This can be as simple as marking the hands of underage patrons with an "X" in indelible ink or issuing plastic bracelets. See, e.g., *Colgate v. Mughal Bros., Inc.*, 836 So. 2d 1229, 1232 (La. Ct. App. 2003) (discussing use of bracelets); *State v. Chumbley*, 714 N.E.2d 968, 969 (Ohio Ct. App. 1998) (discussing use of hand stamp).

221. See *infra* Appendices.

222. *Id.*

223. *Id.*

policies seem to be in the minority.<sup>224</sup> Given the range of less restrictive possibilities that already exist, these minority states could move in the direction of permitting wider exposure to alcohol by those under twenty-one without running afoul of the constraints imposed by federal law and the concomitant loss of highway funding.

### 3. Enforcement

While the NMDA required states to enact laws raising the drinking age, nothing in the original legislation directly addressed the critical issues of enforcement mechanisms, penalties, or sanctions.<sup>225</sup> As a result, there is a hodge-podge of methodologies employed from state to state and from community to community within individual states.<sup>226</sup> The potential for selective enforcement raises concerns about disparate treatment with respect to a multiplicity of factors, including concerns about discrimination based on socioeconomic class, race, or ethnicity as well as the classic “town and gown” divide in university communities.<sup>227</sup>

Lax enforcement by police of MLDA is typically the result of limited resources.<sup>228</sup> When compared to serious felony offenses, it is understandable that law enforcement may be forced to look the other way despite awareness of underage drinking. Failing to enforce the laws on the books, however, has been a long-standing way of

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224. At present, only one state, Kentucky, provides no exceptions whatsoever. *See* KY. REV. STAT. ANN. § 244.085 (LexisNexis 2004).

225. *See* 23 U.S.C. § 158 (2000).

226. *See* ABC REPORT, *supra* note 217, at 1.

227. *See generally* PAC. INST. FOR RESEARCH AND EVALUATION, FINDING COMMON GROUND TO ADDRESS UNDERAGE DRINKING ON CAMPUS, <http://www.udetc.org/documents/CampusUnderageDrinking.pdf> (describing tension that often exists between local law enforcement’s desire to address community complaints by strictly enforcing underage drinking laws and interest of higher education institutions in disseminating alcohol awareness information to students and using internal judicial sanctions) (last visited Nov. 13, 2005).

228. Researchers note “[e]nforcement is often lax, and the agencies charged with upholding these laws are underfunded in many states.” Henry Wechsler et al., *Underage College Students’ Drinking Behavior, Access to Alcohol, and the Influence of Deterrence Policies*, 50 J. AM. C. HEALTH 223, 224 (2002). Furthermore, at a 2000 summit hosted by the International Association of Chiefs of Police and the National Highway Traffic Safety Administration, sixty-three law enforcement executives identified the three main obstacles to preventing “drunk and drugged driving by youth”: “funding/resources; insufficient staffing levels; and lack of parental involvement and values.” U.S. DEP’T OF TRANSP., LAW ENFORCEMENT EXECUTIVES SUMMIT ON DRUGS, DRIVING AND YOUTH: 2000 SUMMIT SUMMARY REPORT 12 (2000), <http://www.nhtsa.dot.gov/people/injury/enforce/LawEnf1.pdf>.



nullifying or circumventing the letter of the law and could be employed as a tacit strategy by state officials to permit underage drinking while at the same time preserving federal highway funds.<sup>229</sup>

Another approach to avoid harsh consequences resulting from federally imposed regulation is the elimination of strict penalties for non-compliance with drinking laws. An example is the decriminalization of conduct such as the possession of alcohol by minors. In 1996, the District of Columbia City Council passed an ordinance making underage alcohol possession and consumption a civil rather than a criminal offense.<sup>230</sup> Yet despite this action, metro police continued to arrest underage drinkers.<sup>231</sup> In September 2004, a D.C. judge certified a class action lawsuit alleging police and prosecutorial misconduct in arresting underage drinkers in violation of the D.C. ordinance.<sup>232</sup> Since *Cass v. District of Columbia*, the case which preserved the criminal conviction of a minor in possession of alcohol, the District was in the untenable situation of having prosecutors pursue similar offenses as criminal, while judges were forced to dismiss them.<sup>233</sup> Thus, the D.C. City Council again was compelled to enact legislation on an emergency basis to stop the arrests and prosecutions, which became permanent September 2004.<sup>234</sup>

#### 4. Recent State Legislative Reform Efforts

Legislation has been introduced at the state level to change existing MLDA laws. For example, during the 2005 session, two drinking age related bills were introduced in the Vermont legislature. The initial bill proposed “to lower the minimum age for purchasing and consuming alcohol from 21 to 18.”<sup>235</sup> Its prime sponsor, Representative Richard Marron (R-Stowe), in reference to selective alcohol prohibition based on age, stated, “‘It’s very much a civil rights

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229. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 198 n.2 (1986) (Powell, J., concurring) (discussing moribund nature of sodomy laws as evidenced by “history of nonenforcement”).

230. D.C. CODE ANN. § 25-1002 (LexisNexis 2004).

231. See *Cass v. District of Columbia*, 829 A.2d 480, 482 (D.C. 2004) (reversing criminal conviction for possession of alcohol by minor upon finding that D.C. city council intended alcohol possession to be civil offense).

232. Aaron Terrazas, *Lawsuit Seeks to Erase Alcohol Related Arrest Records*, THE HOYA, Oct. 22, 2004, at A1, <http://www.thehoya.com/news/102204/news3.cfm> (student newspaper of Georgetown University).

233. *Id.*

234. *Id.*

235. H. 139, 2005 H.R. (Vt. 2005).

issue. At 18 years old you have the right to vote, to marry, to join the military and die for your country. There's not much room for a double standard."<sup>236</sup> Representative Marron offered other rationales such as: removing the lure of alcohol as a forbidden fruit; creating opportunities for responsible, young adult drinking in restaurants and homes; and reducing the high cost of enforcement.<sup>237</sup>

Although Representative Marron's proposal received bipartisan support, none of the co-sponsors were optimistic that the bill would pass, citing concerns about loss of federal highway funds.<sup>238</sup> Vermont Governor James Douglas, while philosophically in agreement with an age of eighteen for full citizenship rights and privileges, was also very concerned about the loss of federal transportation funds.<sup>239</sup> Despite the skepticism about successful passage, the numerous co-sponsors echoed concerns about fairness, state autonomy, and compliance problems with the twenty-one-year-old drinking age.<sup>240</sup>

Two of Representative Marron's colleagues appreciated his efforts to bring the issue out in the open. Senator Sara Kittell (D-Franklin County) supported Marron's bill to lower the drinking age "as a tool to have a discussion about our young people and drinking."<sup>241</sup> Representative Brian Dunsmore (R-Georgia) likewise

236. Jennifer Huberdeau, *Alcohol: Better with Age?*, BENNINGTON BANNER (Vt.), May 30, 2005, <http://www.benningtonbanner.com/Stories/0,1413,104~8676~2895334,00.html>.

237. *Id.* Rep. Marron denied that his ownership in a resort with a liquor license spurred his legislative agenda. See Belluck, *supra* note 14.

238. Rep. Norm McAllister (R-Highgate) a Vietnam veteran, characterized the potential loss of nearly \$9.7 million of funding as "the blackmail" from the federal government." Leon Thompson, *Lawmakers Back Drinking at 18*, ST. ALBANS MESSENGER (Vt.), Feb. 7, 2005, <http://samessenger.com/20705.html>.

239. See Ross Sneyd, *Lower Drinking Age, Says Legislator*, TIMES ARGUS (Vt.), Jan. 26, 2005, <http://www.timesargus.com/apps/pbcs.dll/article?AID=/20050126/NEWS/501260350&SearchID=73223554810817>.

240. Rep. Kathy Lavoie (R-Swanton) mentioned equity and independent state decision making but focused on the lack of past success in her remarks to the media:

Anecdotal information and statistics show 18-year-olds are drinking, despite the law. I believe allowing 18-year-olds to drink will actually decrease the amount of binge drinking we see across the state. I think these young adults force themselves to over-drink when alcohol is available, because they are not sure when it will be available again. The House Education Committee has heard testimony that says our colleges and universities agree. If the age were 18, they would be able to better control the environment in which young adults are drinking.

Thompson, *supra* note 238.

241. *Id.*

gave his assessment: “I do not think the bill will see any movement this session, but it does get a discussion going, and I believe that is what Rep. Marron was trying to do.”<sup>242</sup>

Prior to Representative Marron’s proposed legislation, initiating frank discussions about underage drinking was not, in fact, a new issue in Vermont. An earlier attempt to stimulate a dialogue on the drinking age issue in Vermont was initiated by the public remarks of former Middlebury College President John McCardell who concluded that the twenty-one-year-old drinking age law “has not reduced drinking on college campuses, it has probably increased it” and circumscribed the efforts of colleges to combat alcohol abuse.<sup>243</sup> Contemplating the possibility of making up the difference itself, the college had calculated the amount of federal highway funding that would be lost to Vermont if the state drinking age were lowered; it abandoned the idea when it was discovered the amount might be in excess of ten million dollars.<sup>244</sup>

Barely a week after the initial bill was proposed, another specifically targeted drinking age bill was introduced in the Vermont legislature: the “Joint resolution requesting Congress to exempt the state of Vermont from federal transportation funding penalties if the legal drinking age is lowered to 18 for members of the military.”<sup>245</sup> The text of the resolution indicated that Vermont raised the legal drinking age to twenty-one “only because of the threat that the federal government would deprive the state of much-needed federal transportation revenue.”<sup>246</sup> The resolution was to be forwarded to the Governor; Vermont Adjunct General, Major Martha Rainville; the Vermont Congressional delegation; and Norman Mineta, the U.S. Secretary of Transportation.<sup>247</sup>

The Wisconsin legislature followed suit a few weeks later with a slightly different variation on the same theme—exempting those in the state in the military on active duty who were age nineteen and older from the generally applicable underage drinking prohibitions.<sup>248</sup> This

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242. *Id.*

243. Jeffrey Kluger, *How to Manage Teen Drinking (The Smart Way)*, TIME, June 18, 2001, at 42, 43.

244. *Id.*

245. J.R.H. 19, 2005 H.R. (Vt. 2005).

246. *Id.* This statement seems to belie the Supreme Court’s determination about the non-coercive nature of the NMDA’s conditional spending grant that was at issue in *Dole*. See *supra* notes 87–99 and accompanying text.

247. J.R.H. 19.

248. A.B. 141, 2005 Leg. (Wis. 2005).

exception would apply only if the state obtained a waiver from the federal government to avoid relinquishment of highway funds or participated in a federal pilot program whereby the state would not be penalized under the NMDA for its lowered drinking age.<sup>249</sup> Wisconsin Representative Scott Suder (R-Abbotsford), who recently returned from active duty in Qatar, expressed military personnel's frequent lament about fairness and competency: "I think a lot of those individuals wonder why they can go overseas and handle an M-16 and handle major military weapons, yet the country doesn't trust them to go into a bar and have a couple drinks."<sup>250</sup> As in Vermont, the Wisconsin bill garnered widespread bipartisan support.<sup>251</sup>

Another state legislative effort was recently initiated in Hawaii to lower the drinking age.<sup>252</sup> The unique island configuration and geographic setting avoids the "blood border" problem of non-resident underage drinkers imbibing and then driving home across state lines. If properly handled, a lower drinking age could be a boon to the tourism and hospitality industries that comprise an essential part of Hawaii's economy.<sup>253</sup>

Nevertheless, there may not be a consensus about alcohol policy in Hawaii, as evidenced by the fact that Lieutenant Governor James "Duke" Alona, along with the support of MADD, has advocated for a complete ban on alcohol sales at the University of Hawaii-Manoa campus.<sup>254</sup> The state legislature is also considering a "Use It and Lose It" bill that would suspend or delay procurement of drivers' licenses by those under twenty-one who are found in possession of alcohol.<sup>255</sup>

249. *Id.*

250. Tom Sheehan, *Bill Targets Drinking Age for Troops*, LA CROSSE TRIB. (Wis.), Mar. 1, 2005, <http://www.lacrossetribune.com/articles/2005/03/01/news/03drinking.eml>.

251. The bill has sixteen co-sponsors, ten Republicans and six Democrats. *Id.*

252. H.B. 1203, 23d Leg. (Haw. 2005).

253. For example, in 2003, the Hawaii travel and tourism economy was expected to produce 22.4% of gross state product, provide 21.7% of total employment, and contribute 24.1% of total state and county tax revenue. HAWAII TOURISM AUTH., 2003 ANNUAL REPORT TO THE HAWAII STATE LEGISLATURE 24 (2003), <http://hawaii.gov/tourism/files/hta2003.pdf>. U.S. Territories such as Puerto Rico and the U.S. Virgin Islands that are vacation destinations have maintained a drinking age of 18. P.R. LAWS ANN. tit. 13, § 8115c(c)(5) (2004); V.I. CODE ANN. tit. 14, § 485 (1996). According to one source, "to replace the lost tax revenue, the commonwealth [of Puerto Rico] installed toll booths along its major highways." Ed Quillen, *Get Rid of Minimum Drinking Age*, DENVER POST, Apr. 25, 2004, at E-06.

254. Michael Tsai, *Focus Shifts to Underage Drinking*, HONOLULU ADVERTISER, Feb. 27, 2005, at 1, available at 2005 WL 3033789.

255. H.B. 597, 23d Leg. (Haw. 2005).

*D. Potential for Success Through State Legislative Efforts*

The above examples of unpassed state legislation demonstrate that successful bill passage at the state level is dependent in part on vigorous legislative advocacy. In Vermont, for instance, Alex Koroknay-Palicz, executive director of the National Youth Rights Association, focused intense efforts on lobbying in support of state control over the drinking age.<sup>256</sup> The possibility of losing federal highway funding is seemingly the primary deterrent to state legislative action to lower the drinking age.<sup>257</sup> If a state were willing to risk the loss of a conditional spending grant, then the state could make changes for targeted groups such as those in the military or for all young adults.

State legislators who decide to take on the federal government with respect to age-related alcohol regulation must be prepared to present justifications to convince their legislative colleagues, not to mention their constituents, that it is a reasonable course of action. Preservation of state autonomy on social issues is a powerful lure. The states have traditionally been viewed as places for experimentation.<sup>258</sup> An issue such as an age-related drinking prohibition provides an excellent opportunity to test various theories about the most effective means to combat drunk driving and other alcohol-related problems.

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256. The executive director of the National Youth Rights Association in Washington, D.C. rallied legislative support at Vermont colleges by stating that lowering the drinking age “is a matter of civil rights and safety for teenagers.” Belluck, *supra* note 14.

257. “‘I don’t really know if the age is relevant,’ [Vermont legislator] DePoy said. ‘I think it’s just going to boil down to the mere fact that this state needs the transportation funds.’” *Id.* In Wisconsin, for instance, a legislator proposed a bill under which soldiers age 19 and 20 would be fined no more than \$5 for underage drinking, instead of officially lowering the drinking age. *Pettis Bill Sets \$5 Fine For Soldiers*, ST. PAUL PIONEER PRESS, Aug. 12, 2005, at 2B, available at 2005 WLNR 15786769. “Pettis said he drafted the new bill because of opponents’ continued focus on that potential loss of federal money.” *Id.*

258. More than seventy years ago, Justice Brandeis gave a classic formulation of the role of states in his dissenting opinion in *New State Ice House v. Liebmann*: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 217 (1994) (Rehnquist, C.J., dissenting) (citing Brandeis’s statement about state experimentation with approval stating, “His observation bears heeding today, as it did when he made it.”).

#### IV. RELEVANT CONSIDERATIONS IN THE SELECTION OF A LEGAL DRINKING AGE

Successful litigation on the drinking age issue would appear to require the right congruence of a sympathetic plaintiff mounting an equal protection challenge in a state with heightened protection for age-based classifications, or a shift in the U.S. Supreme Court's Spending Clause jurisprudence. While the former set of circumstances are rather unpredictable, there is a possibility that the Court could begin to chip away at Congress's authority. Meanwhile, Congress has shown no inclination to alter its commitment to taking the necessary steps to maintain a twenty-one-year-old drinking age. Some disgruntled state legislators have demonstrated initiative by introducing legislation to lower the drinking age, albeit without immediate success.

State legislatures represent the best opportunity to make a change in the MLDA provided there is a willingness to forego a percentage of federal highway funding, at least in the short run, in order to do so. Despite *Dole*, states still have a strong constitutional claim to the authority to regulate alcohol at the state level. The intersection of the Twenty-first Amendment and the Commerce Clause involving the interstate shipment of alcohol suggests that the Twenty-first Amendment still has meaning.

Despite these constitutional arguments, in the end, state legislators must still get the approval of their constituents who will inevitably ask: why make a change? The rationales for choosing an appropriate minimum drinking age should therefore be at the forefront of any debate on the issue. In many ways, the factors to consider in the age-selection process are nearly identical today to those raised more than two decades ago.<sup>259</sup> It is worthwhile to review them to gauge their impact on public policy making at the state level. There are now twenty-one years of history with which policy makers may evaluate the efficacy of raising the MLDA. Accordingly, the final section of this Article provides reasons to support lowering the age for alcohol purchase and public consumption by looking at these various factors, including the ultimate failure of the NMDA to prevent underage drinking.

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259. *See generally* David J. Hanson, Responses to Arguments Against the Minimum Drinking Age, <http://www2.potsdam.edu/alcohol-info/YouthIssues/1064263072.html> (presenting award-winning website summary of arguments against MLDA) (last visited Sept. 21, 2005).

### A. *Appropriate Ages of Initiation*

Most arguments in favor of lowering the legal drinking age below twenty-one emphasize the fact that the rights and privileges of full participation in public life are typically conferred at an earlier age.<sup>260</sup> Eligibility for military service at age eighteen without eligibility for the other concomitant privileges of adulthood was a compelling argument during the Vietnam War and it remains compelling today.<sup>261</sup> However, as the late Professor Michael Rosenthal explained:

To the extent that the Vietnam War was responsible for lowering the age of majority in general and the minimum drinking age in particular in a large number of states, it should be realized that the changes were for reasons somewhat different than the reasons an age of majority is usually lowered or raised. Normally, a change is based on society's view of the age that should be considered the age of responsible decision-making or competency. When states lowered the age of majority and the minimum drinking age because boys were serving and dying in the War, however, they did so because society felt it was *unfair* to have them serve and die and yet not have the rights and privileges of adults. The states did not inquire whether the boys were mature enough to vote or to handle liquor; they just deemed the treatment to be unfair.<sup>262</sup>

Two rationales for challenging an age-discriminatory alcohol policy are fairness and competency. These arguments sometimes become intertwined or conflated. As the recent debate in Vermont illustrates,<sup>263</sup> closer examination suggests that each of these should be primary considerations in determining an appropriate MLDA.

#### 1. *Fairness*

In the early 1970s, as well as now, much of the non-legal commentary on the appropriate drinking age focused on fairness. The fairness argument emphasizes the irony implicit in the situation in which eighteen-year olds may die in service of our country's freedoms, yet may not toast to those very freedoms. Or, as one student writer at Georgetown University characterized it, "I'm fairly appreciative that my nation will soon deem me old enough to operate

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260. See *supra* notes 21–22 and accompanying text.

261. See *supra* notes 22–24.

262. Rosenthal, *supra* note 17, at 653.

263. See *supra* notes 235–237.

a two-ton vehicle, drop bombs on civilian populations and to have a glass of Chardonnay afterward.”<sup>264</sup>

A sense of overall fairness may have propelled the Vietnam War era ratification of the Twenty-sixth Amendment that lowered the voting age to eighteen.<sup>265</sup> If military service had been the sole impetus behind lowering the drinking age, then it might have been appropriate to allow alcohol consumption for those on active duty in the military and recently returning veterans or only for those subject to the draft. This suggestion leads to its own fairness concerns, as it effectively would have precluded most young women from the legal purchase and consumption of alcohol.<sup>266</sup> The fairness argument regarding legal alcohol intake became more compelling when the age of consent for nearly all other activities, for both men and women, was changed to age eighteen.

264. Kerry Howley, *Another Voice Silenced in Drinking Age Debate*, THE HOYA (D.C.), Nov. 8, 2002, <http://www.thehoya.com/viewpoint/110802/view3.cfm>.

265. See U.S. CONST. amend. XXVI, § 1. Another moving force may have been the end of the era of paternalism that reflected attitudes toward young people in earlier time periods. See generally Lee E. Teitelbaum, *Children's Rights and the Problem of Equal Respect*, 27 HOFSTRA L. REV. 799, 801–04 (1999) (exploring ways law and society have treated minors in different contexts and situations). Subsequently, greater recognition of the privacy and autonomy rights of young adults, for example, induced passage of legislation and resulted in court decisions protecting those interests. For example, the Family Educational and Privacy Rights Act (FEPPA) provides some protection for college students from parental interference. See 20 U.S.C. § 1232g(d) (2000). However, FEPPA was amended in 1998 to allow disclosure to parents of alcohol infractions by underage students. See Pub. L. No. 105-244, § 952, 112 Stat. 1581, 1836 (1998) (codified at 20 U.S.C. § 1232(g)(i) (Supp. IV 1994)); 34 C.F.R. § 99.31(a)(15) (2005). Fairness issues pertaining to the government's treatment of youth have arisen in other areas as well. See *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (permitting independent decision making by minors in area of reproductive freedom); *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976) (same); *In re Gault*, 387 U.S. 1, 30–31 (1967) (extending due process protections to juveniles in delinquency proceedings).

266. Ratification of the Twenty-sixth Amendment occurred in July 1971. U.S.C.A. Const. Amend. XXVI, § 1. The Equal Rights Amendment, which granted equality of rights to women, was not sent to the states for ratification until March 1972. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973). Interestingly, some states had differential ages for purchase of alcohol for men and women, which was the basis of the challenge in *Craig v. Boren*, 429 U.S. 190, 192 (1976). Using a newly-crafted intermediate standard of scrutiny to review a sex-based equal protection claim, the Court struck down an Oklahoma law that permitted women to purchase 3.2 beer at age eighteen while men were prohibited to do so until age twenty-one. *Id.* at 197, 210.



## 2. Competency

Perhaps more important, opponents of lowering the drinking age often contend that younger adults are not competent to make critical decisions and to behave responsibly when dealing with alcohol.<sup>267</sup> Again, the military service argument becomes relevant; one online commentator notes that we do consider these same younger adults “old enough to drive tanks, shoot foreigners, and operate high-power weaponry while decked out in nifty uniforms.”<sup>268</sup>

Competency may involve a combination of ability, skill, education, experience, and responsible decision making. In the context of drinking, the concerns seem to be lack of experience, which might lead to irresponsible decision making with respect to the amount of alcohol consumed or misjudgment about the effects of alcohol.

In attempting to counter the age differential, supporters of age twenty-one as the MLDA generally proclaim that we set different age limits for a variety of activities.<sup>269</sup> The requirement that one be twenty-five years or older to run for the U.S. House of Representatives is often used as an example.<sup>270</sup> In reality, that is one of the only differentials that mandate an age above eighteen.<sup>271</sup> For the sake of argument, it is instructive to look at some of the things that most eighteen, nineteen, and twenty-year-olds *can* do legally in the United States: vote, enter into contracts, employ others, get married, hold public office, own businesses, purchase cigarettes and other tobacco products, obtain medical treatment, terminate a pregnancy, gamble, adopt children, serve on juries, be imprisoned in the state penitentiary,

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267. See Teitelbaum, *supra* note 265, at 808 (noting that increase in drinking age was not result of state legislative determination that eighteen-year-olds were not competent to drink responsibly, but rather result of congressional determination to that effect by its passage of NMDA).

268. Joel Miller, Random Fire: Bushwhacking Young Boozers, WorldNetDaily.com, June 12, 2001, [http://wnd.com/news/printer-friendly.asp?ARTICLE\\_ID=23199](http://wnd.com/news/printer-friendly.asp?ARTICLE_ID=23199) (last visited Nov. 12, 2005).

269. See, e.g., Center for Science in the Public Interest Alcohol Policies Project, Talking Points/Arguments: Answering the Critics of Age-21, <http://www.cspinet.org/booze/mlpatalk.htm> (last visited Nov. 12, 2005).

270. See U.S. CONST. art. I, § 2, cl. 2.

271. Cf. U.S. CONST. art I, § 3, cl. 3 (requiring Senators to be at least thirty years old); U.S. CONST. art II, § 1, cl. 4 (requiring President to be at least thirty-five years old); MISS. CODE ANN. § 13-5-1 (West 1999) (stating that minimum age for jury service is twenty-one); NEV. REV. STAT. § 463.350 (2003) (making twenty-one legal age for gaming in casinos).

be executed, drive automobiles/motorcycles/trucks, fly airplanes, obtain hunting licenses, serve in the military, and purchase firearms.

Specialized training along with testing is required to lawfully engage in some of the activities on the preceding list with the exception of procurement of the most inherently dangerous product: a firearm. But those requirements must be met by all people who participate in those activities regardless of their age of initial participation. Efforts to increase competency by providing mandatory practical education about alcohol or allowing gradual initiation by drinking in controlled settings have been overlooked.<sup>272</sup>

Moreover, drinking alcoholic beverages is not in and of itself a dangerous activity on par with the last five activities in the above list. Instead of envisioning a young person's having a bottle of beer after a round of golf or a glass of champagne at a wedding reception, the "worst case scenario" drives policy in the case of alcohol consumption: an inexperienced drinker and vehicle operator who lacks alcohol education imbibes excessively, then gets behind the wheel of a car filled with passengers and drives recklessly. We seem disinclined to conjure up horrific hypotheticals where a gun-toting young adult's judgment was impaired as the result of stress in combat, or where an adrenaline-fueled youthful military pilot makes an inaccurate assessment while landing an aircraft.

Somehow, inexplicably, competency concerns involving alcohol usage disappear at age twenty-one. As the student media has documented, the overall hypocrisy toward fairness and competency issues has not gone unnoticed by many youthful commentators.<sup>273</sup>

272. Rather than prohibition, some alcohol experts have proposed "provisional drinking licenses" for young people:

There could be time and place restrictions. The license holder could drink, for example, only in an establishment where at least 75% of sales receipts were for food (no bars, no liquor-store purchases). No service after 11:00 pm. Moreover, a 19- or 20-year-old could have to undergo formal instruction about alcohol and pass a licensing exam. Parents and other authorities could unilaterally revoke/suspend the special license without which service/consumption would be illegal. In addition, this provision would not be accompanied by any changes to the current .02% BAC law for under-21 drivers.

David J. Hanson et al., *Rethinking Alcohol Use by the Emerging Adult*, <http://www2.potsdam.edu/hansondj/YouthIssues/1046347764.html> (last visited Oct. 10, 2005).

273. See, e.g., Jonathan Cipriani, *NYUers Old Enough to Drink*, WASH. SQ. NEWS (N.Y.), Feb. 3, 2005, at 4 (characterizing MLDA laws as "affront to common sense presented by having a separate age of majority for drinking than for almost everything else"); Jonathan Riches, *Moderating Drinking Laws Will Moderate Young Drinkers*,

Illogical alcohol policy pronouncements make it easier for these same young adults to justify noncompliance.<sup>274</sup>

### *B. Safety and Statistics*

In addition to competency and fairness concerns, safety issues must be addressed by state legislators in any policy discussion about lowering the minimum legal drinking age. Several studies demonstrate a correlation but not a causal relationship between raising the drinking age to twenty-one and lowering alcohol-related traffic fatalities.<sup>275</sup> Others have concluded that any ostensible relationship between an MLDA and decreased traffic fatalities is not primarily attributable to raising the drinking age.<sup>276</sup> It is a monumental task for policy makers to sort through the research on any topic; however, it may be particularly challenging with the research surrounding the intersection of alcohol use, safety, and the minimum legal drinking age. As the London-based Social Issues Research Centre advises:

One of the problems facing those concerned with the development of policies and legislation on alcohol issues is the sheer volume of research and publications on this subject. In addition, these works span a variety of disciplines, and are often couched in academic jargon which may be incomprehensible to non-specialists.<sup>277</sup>

It may be necessary to rely on empirical data, scientific studies, and sociological research, for example, in making determinations about critical public policy issues. But legislators and interested others must exercise caution in the statistical interpretative process. The oft-

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ARIZ. DAILY WILDCAT, Mar. 22, 2005 (arguing that “if policymakers and citizens have decided that individuals are adults at age 18, then let us treat them that way”), available at 3/23/05 UNIWIRE 01:09:26.

274. See discussion of “flouting” *infra* notes 325–332 and accompanying text.

275. See, e.g., Ruth Shults et al., *Reviews of Evidence Regarding Intervention to Reduce Alcohol-Impaired Driving*, 21 AM. J. PREVENT. MED. 66, 72–75 (2001) (finding correlation between higher MLDAs and fewer alcohol-related fatalities).

276. See e.g., Peter Asch & David T. Levy, *Does the Minimum Drinking Age Affect Traffic Fatalities?*, 6 J. POL’Y ANALYSIS & MGMT. 180, 185 (1987) (finding that MLDA is not significant or even perceptible factor in fatality experience of all drivers or even young drivers). Another study also determined that states that maintained a lower MLDA from 1976–1981 experienced a greater, albeit not statistically significant, decrease in traffic fatalities involving under-twenty-one drivers than did those states that had raised the drinking age. Males, *supra* note 40, at 183. This suggests “that raised drinking ages are not associated with any net reductions in fatal crashes by young drivers.” *Id.*

277. SOCIAL ISSUES RESEARCH CENTRE, SOCIAL AND CULTURAL ASPECTS OF DRINKING 8 (1998), [http://www.sirc.org/publik/social\\_drinking.pdf](http://www.sirc.org/publik/social_drinking.pdf).

quoted statement that “[t]here are three kinds of lies: lies, damn lies, and statistics”<sup>278</sup> resonates with at least some semblance of truth.<sup>279</sup>

One of the most comprehensive studies on this topic reviewed forty years of drinking and driving data involving fifty-seven published studies with a total of 102 crash outcome measures.<sup>280</sup> The authors, University of Minnesota School of Public Health researchers Alexander Wagenaar and Traci Toomey, determined that “[o]f the 102 analyses, 52 (51%) found a statistically significant inverse relationship between the legal drinking age and crashes; that is, as the legal drinking age was lowered, the number of crashes increased, and as the legal age was raised, the number of crashes decreased.”<sup>281</sup> Although the data manage to draw out some connection between the drinking age and car accidents, a fifty-one percent, statistically significant, inverse relationship barely meets the preponderance of the evidence standard that is applied in civil litigation, which seems like weak support for retention of MLDAs.<sup>282</sup>

278. This quote is from Mark Twain’s 1924 autobiography in which he attributes it to Benjamin Disraeli. GORTON CARRUTH & EUGENE EHRlich, *THE HARPER BOOK OF AMERICAN QUOTATIONS* 562 (1988).

279. Another problem with statistical analysis may be the lack of emphasis on the over and under inclusiveness of the policy being examined, which is a constitutional consideration. During the discussion prior to the New York State Senate vote in 1985 on a bill to raise the drinking age, at least one senator raised the issue of fairness in conjunction with statistical analysis. “‘Statistics, statistics, statistics,’ said Senator Martin Conner, a Brooklyn Democrat. ‘I’m sure that we can save a lot of lives by lowering the speed limit to 21 and raising the drinking age to 55. And I can prove that statistically. So what? We’re not going to do it. Our system is one of fairness, that you don’t let the majority take away the rights of the minority.’” Jeffrey Schmalz, *New York Raising Its Drinking Age to 21 in December*, N.Y. TIMES, June 19, 1985, at A1.

280. Alexander C. Wagenaar & Traci L. Toomey, *Effects of Minimum Drinking Age Laws: Review and Analyses of the Literature from 1960 to 2000*, 14 J. STUD. ALCOHOL 206, 213 (2002).

281. *Id.* The term “crashes” was used “to include all traffic-related outcome measures.” *Id.* The researchers characterized seventy-nine of the 102 studies as of higher methodological quality; fifty-eight percent of those studies found a significant inverse relationship between the legal age and traffic crashes. *Id.* at 215. There is also evidence that there was a “spike” in alcohol-related traffic accidents in the twenty to twenty-four-year-old age group when the drinking age was raised. *See* Males, *supra* note 40, at 184.

282. A fifty-one percent inverse relationship could be statistically significant provided that other variables have been appropriately excluded. For example, since the nationwide restoration of the twenty-one-year-old drinking age in the 1980s, there have been numerous other developments that have increased safety and served to reduce alcohol-related traffic deaths generally, and for young drivers in particular, such as: heightened consumer education; designated driver campaigns; mandatory seat belt laws; speed limit restrictions; safer vehicles with additional equipment such

Discounting somewhat the importance of the numerical data, the researchers conclude that “even modest effects applied to the entire population of youth result in very large societal benefits.”<sup>283</sup> The study also summarizes frequently offered, policy-based objections to an age twenty-one MLDA, with the authors’ suggested counter-responses based on the research.<sup>284</sup> Their perceived need to include policy-based responses at all is slightly unsettling, perhaps suggesting that the authors found it necessary to do more than allow the science to speak for itself.

The Wagenaar and Toomey review presents varied examples of the complexities facing policy makers in sifting through statistical data and research. First, lay people cannot help but be impressed with the seemingly thorough nature of their research and its professional

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as automatic ignition shut-off switches, air bags and roll bars; harsher drunk driving sanctions; lower BACs; portable breathalyzers; free taxi services from drinking establishments; and graduated drivers’ licensing schemes with time-of-day and passenger limits. From the Wagenaar and Toomey article, it is not readily apparent how each of the studies examined by the authors controlled for these other contemporaneously-adopted measures that might have affected reductions in drunk driving fatalities. Wagenaar and Toomey seem to minimize other factors with a potential impact on reducing the number of alcohol-related crashes, relying instead on the time factor: “After the age-21 MLDA was implemented, alcohol-involved highway crashes declined immediately (*i.e.*, starting the next month) among the 18- to 20-year-old population. Careful research has shown declines are not due to enforcement of and tougher penalties for driving while intoxicated, but are directly a result of the legal drinking age.” Wagenaar & Toomey, *supra* note 280, at 221.

The authors then use a kind of “shifting sands” rationale; they abruptly adopt an advocacy stance and raise an unrelated issue as a solution by stating: “To achieve long-term reductions in youth drinking problems, we have to change the environment by making alcohol less accessible . . .” *Id.* The connection to the initial issue presented, that of reasons for decreases in young adult drunk driving crashes, is unclear.

Others, by contrast, have credited a multiplicity of factors in improving highway safety. On the twentieth anniversary of the passage of the NMDA act, Senator Elizabeth Dole (R-NC), former Secretary of Transportation, acknowledged that other efforts such as mandated seatbelt use and airbags combined with the twenty-one-year-old drinking age “totally changed the climate of highway safety in America.” Karen MacPherson, *Underage Drinking Still a Concern for Safety Advocates*, PITTSBURGH POST-GAZETTE, July 15, 2004, at A6.

Furthermore, research indicates that young drivers are not necessarily drinking less, but rather that they are more clearly separating drinking from driving. Peter J. Roeper & Robert B. Voas, *Underage Drivers Are Separating Drinking from Driving*, 89 AM. J. PUB. HEALTH 755, 757 (1999).

283. Wagenaar & Toomey, *supra* note 280, at 219. The studies of specific populations such as college students were deemed to be weak, thus preventing an assessment of the impact of MLDA’s for those groups. *Id.*

284. *Id.* at 219–22.

methodology.<sup>285</sup> At the same time, the piece does not contain an indication of funding sources, if any, that support the work of the various researchers whose studies form the basis for the Wagenaar and Toomey assessment.<sup>286</sup> This exclusion does not necessarily evidence bias on the part of the researchers or reviewers, but information about financial support could be useful to policymakers who are trying to assess the weight to ascribe to various studies.

A second problem in the evaluation of existing studies is the contradictory research and the dueling statistics phenomenon.<sup>287</sup>

285. See SOCIAL ISSUES RESEARCH CENTRE, *supra* note 277, at 8. An excellent resource for lawyers concerning the use of statistical evidence in legal writing generally—and academic writing in particular—is contained in Eugene Volokh, ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, SEMINAR PAPERS, AND GETTING ON LAW REVIEW 117–25 (2d ed. 2005).

286. Many of the researchers relied on by Wagenaar and Toomey frequently conduct research in the area of alcohol studies. Some of those experts seem to be associated with a more “anti-alcohol” perspective, such as Herbert Wechsler, Ralph Hingson, and Wagenaar himself. Some of the more notable “pro-alcohol” experts are David Hanson, Ruth Engs, and Mike Males. It is difficult to ascertain if, and which, researchers are affiliated with organizations that present a specific perspective about alcohol use. For example, on his personal website, David Hanson takes the American Medical Association (AMA) to task for skewing its statistics on the MLDA by relying almost exclusively on the work of Alexander Wagenaar. See David J. Hanson, The American Medical Association (AMA): Abstinence Motivated Agenda, <http://www.alcoholfacts.org/AMA.html> (last visited Oct. 10, 2005). Yet, Hanson’s website also contains the disclaimer that he “has received no financial support or other consideration” from anyone to maintain the site. *Id.* The Center for Alcohol and Substance Abuse Addiction (CASA), the Robert Wood Johnson Foundation, and MADD, for example, have been identified as demonstrating alcohol prohibitionist stances. Radley Balko, *Crying in Your Beer*, TECH CENTRAL STATION, Mar. 27, 2003, <http://www.techcentralstation.com/032703D.html> (last visited Nov. 15, 2005). On the other hand, the alcoholic beverages industry might have an interest in lowering the drinking age. A few experts who oppose a twenty-one-year-old drinking age have been accused of being mere mouthpieces for various industry interests. For example, Elizabeth Whelan of the American Council on Science and Health, an organization that receives funding from beer, alcohol, and associated industries, SourceWatch, American Council on Science and Health, [http://www.sourcewatch.org/index.php?title=American\\_Council\\_on\\_Science\\_and\\_Health](http://www.sourcewatch.org/index.php?title=American_Council_on_Science_and_Health), (last visited Dec. 2, 2005), acknowledges that she has been referred to as “a paid liar for industry so many times [she has] lost count.” *Flack Attack*, 5 PR WATCH, 1998, at 1, <http://www.prwatch.org/prwv5n4.pdf>; see also Morris E. Chafetz, ‘Sin’ Levies Only Add to Alcohol’s Allure, N.Y. TIMES, May 25, 1986, at F2 (stating in byline that Dr. Chafetz’s Health Education Foundation receives money from alcohol industry). MADD itself was forced to deal with the public relations fallout when its founder, Candy Lightner, became a paid consultant for the American Beverage Association who lobbied against a .08 BAC limit for drunk driving. Smith, *supra* note 34.

287. See Kerry J. Strand, *Sociological Approaches Hold Promise to Curb Campus Drinking*, FOOTNOTES (Am. Sociological Ass’n), Dec. 2002,

Legislators and judges are forced to draw their own conclusions about alcohol research data, much as jurors must do when confronted with conflicting expert testimony. Although parsing through competing statistics can be extremely difficult, Congress or state legislatures may have an advantage over judges and juries because they have the opportunity to request specific input to clear up discrepancies during the hearing process. Trial court judges, by contrast, must await the presentation of information as dictated by the strategy and tactics of counsel and the finances of the parties.<sup>288</sup> At the same time, the legislative and the political processes may be more responsive to the rhetoric of special interest groups than the judiciary.<sup>289</sup> Even principled studies may be no match for citizen lobbyists grieving the loss of a family member killed by a drunk driver.<sup>290</sup>

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<http://www2.asanet.org/footnotes/dec02/fn7.html> (acknowledging that conclusions of three well-known sociologists in area of alcohol policy, Henry Wechsler, director of College Alcohol Studies at Harvard School of Public Health, H. Wesley Perkins at Hobart and William Smith Colleges, and David Hanson at State University of New York-Potsdam, “differ in important respects”).

288. For example, *Manuel v. State*, discussed *supra* notes 55–84, underscores the critical nature of appropriate interpretations of statistical data by courts. 692 So. 2d 320, 326–32 (La. 1996).

In *Roper v. Simmons*, Justice Scalia weighs in and concludes that legislatures are better equipped to deal with statistical data than courts. 125 S. Ct. 1183, 1223 (2005) (Scalia, J., concurring). He states that “[l]egislatures ‘are better qualified to weigh and ‘evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.’”<sup>44</sup> *Id.* (quoting *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987)). Scalia offers no independent rationale for his conclusion that the legislatures do it better. *See id.* He does, however, say that the *Roper* majority in accepting only the statistical data to support its conclusion that the death penalty is categorically inappropriate for defendants younger than eighteen has “look[ed] over the heads of the crowd and pick[ed] out its friends.” *Id.*

289. Recent commentary revisits the growing influence of interest groups on the political process, using as an example the alcohol-themed advertising that surfaced in the Coors-Salazar 2004 Colorado Senate race to attack Republican candidate Coors, the CEO of Coors Brewing Company. Glen Justice, *Concerns Grow About Role of Interest Groups in Elections*, N.Y. TIMES, Mar. 9, 2005, at A20, available at 2005 WLNR 3586587. However, there has been some resistance by members of Congress to avoid undue influence by lobby groups when setting alcohol policy. For instance, when Congress was deciding whether to make the states’ loss of federal highway funding permanent two years after passage of the NMDA, then-Representative Jim Jeffords (R-Vt.) addressed his colleagues and chided them for failing to adequately consider the NMDA and the studies demonstrating that alcohol related fatal accidents did not decrease as a result of raising the drinking age. 132 CONG. REC. 3783, 3795–96 (1986).

290. When New York State debated raising the drinking age in 1985, lawmakers walked by Doris Aiken, founder of the Remove Intoxicated Drivers (RID). She conducted a silent vigil in the Senate lobby by holding up a sign with the caption

Chief Justice Rehnquist acknowledged the bench's statistical sorting difficulty when reviewing social science data in *Atkins v. Virginia*, a recent death penalty case involving a death row inmate with mental retardation.<sup>291</sup> In his dissent, Chief Justice Rehnquist explained that “[e]verything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results.”<sup>292</sup>

Justice Scalia's dissenting opinion in *Roper v. Simmons*, the case overturning the juvenile death penalty, presents another variation on this theme.<sup>293</sup> Scalia expressed distaste for the lack of consistency demonstrated by experts and professional organizations when taking a position on the same or remarkably similar issues.<sup>294</sup> He focused on the way in which the American Psychological Association (APA) assumed contradictory stances in *amicus curiae* briefs filed in cases about adolescents' decision making competency—an area that is potentially relevant to a drinking age determination.<sup>295</sup> According to Justice Scalia, the APA considers young teenage girls to be sufficiently mature to make an informed decision about whether to terminate a pregnancy; however, the APA views even older youth as unable “to take moral responsibility” in death penalty-eligible homicide crimes.<sup>296</sup>

In addressing alcohol use and abuse statistics, Dr. Morris Chafetz, a former member of the National Commission on Drunk Driving and the first chair of the National Institute on Alcohol Abuse and Alcoholism, points out the obstacles that either group may encounter when attempting to receive accurate information on this topic. Chafetz explains:

For most of my professional life, I have been involved in the study of an emotionally charged subject: people's relations with

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“Drunk Driving Deaths” that contained twenty-four photos of young victims. Schmalz, *supra* note 279.

291. 536 U.S. 304, 326 (2002) (Rehnquist, C.J., dissenting).

292. *Id.* There may be another problem in the U.S. as well when it comes to alcohol research because “the dominance of problem-oriented perspectives has led to a serious imbalance in the study of alcohol, whereby problems affecting only a small minority of drinkers have received disproportionate attention, while the study of ‘normal’ drinking has been neglected.” See SOCIAL ISSUES RESEARCH CENTRE, *supra* note 277 at 7–8.

293. 125 S. Ct. at 1223 (Scalia, J., dissenting).

294. *Id.*

295. *See id.*

296. *Id.*



alcoholic beverages. . . I have seen what emotional investment in a subject can do to anyone's objectivity. I have seen alcohol researchers literally shout down each other with conflicting interpretations of the same data.<sup>297</sup>

A third problem with the use of statistics as a basis for making legislative decisions concerns the inconsistent definition of terms. The above-mentioned Wagenaar and Toomey study specifically examines "driving after drinking."<sup>298</sup> When looking at alcohol-related traffic accidents for example, it is possible to affect the outcomes by including all accidents where *someone* has been drinking.<sup>299</sup> Let's imagine that someone has two drinks while out to dinner, resulting in a BAC of .035, and then drives home.<sup>300</sup> While completely stopped at a red light, an inattentive non-drinking driver plows into the rear of the recent diner's vehicle. By some measures, that is an alcohol-related accident even though the fact that the stopped driver had two drinks was not even a "but/for" cause of the collision. A further inconsistency problem arises from changes in data collection and methodology that sometimes render longitudinal comparisons unreliable. For example, beginning in 2003, the NHTSA changed its measure of annual alcohol-related fatalities from the number per year to the number per 100 million vehicle miles traveled (VMT).<sup>301</sup>

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297. MORRIS E. CHAFETZ, *THE TYRANNY OF EXPERTS: BLOWING THE WHISTLE ON THE CULT OF EXPERTISE* xii (1996).

298. Wagenaar & Toomey, *supra* note 280, at 213. Many of the studies relied on self-reporting of alcohol consumption; BAC levels or exact amount of alcohol consumed was not the focus. *See id.* at 210–12.

299. In its eight-page fact sheet, the National Highway Transportation Safety Administration characterizes its alcohol-related data in various ways using narrative text and graphics. Careful scrutiny is required to discern the differences between crashes with alcohol involvement and those involving intoxicated drivers *or nonoccupants* with BACs of .08 or greater. NAT'L HIGHWAY TRANSP. SAFETY ADMIN., *TRAFFIC SAFETY FACTS 2002: ALCOHOL 2* (2002), <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF2002/2002alcfacts.pdf> (emphasis added).

300. This example was inspired by a scenario described by one columnist. Dave Kopel, *Two Hysterical Drinking Stories: Wire Reports About College Students and Alcohol Mixed Ridiculous Assumptions, Sloppy Journalism*, ROCKY MTN. NEWS (Colo.), Apr. 21, 2002, <http://www.davekopel.com/Media/RMN/2002/TwoRidiculousDrinkingStories.htm>.

301. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *INITIATIVES TO ADDRESS IMPAIRED DRIVING* 7 (Dec. 2003), <http://www.nhtsa.gov/people/injury/alcohol/IPTRreport/FinalAlcoholIPT-03.pdf>. Data collected through 2002 cannot easily be compared with post-2002 data due to this new methodological approach. This is certainly problematic because comparisons are critical in order to determine the efficacy of earlier public policy pronouncements.

Finally, while inconsistent data can present problems of interpretation, a more troubling scenario involves the use of erroneous data.<sup>302</sup> This is, undoubtedly, a rare occurrence.<sup>303</sup> But it may be too late to “unring the bell” once the media has publicized information, even when it is subsequently proven to be incorrect.<sup>304</sup>

### C. Health

The claim that “alcohol kills brain cells” has long been fodder for comedians and writers of humorous greeting cards. If the perceived accuracy of this statement has infused our popular culture, then it may have an unconscious impact on some policymakers as well.

It seems, however, that alcohol intake may not put brain cells themselves at risk. Roberta Pentney, a former professor of anatomy and cell biology at the University of Buffalo, and her co-investigator, Cynthia Dlugos, concluded “that daily consumption of alcohol did

302. See Anne Marie Chaker, *A Good Cause Uses Some Bad Numbers In Its Ad Campaign—MADD Spots Linking Alcohol To Teenage Ills Were Based On Several Shaky Statistics*, WALL ST. J., June 2, 1999, at CA1; Glen Fest, *A Recall To Renumber*, ADWEEK, June 7, 1999, at 3; see also *Study Now Puts Underage Drinking At 19.7% of Total*, WALL ST. J., Feb. 26, 2003, at D3.

303. A rather well-publicized alcohol example involved a reputable organization devoted to health-related concerns. Columbia University’s National Center on Addiction and Substance Abuse announced a few years ago that underage drinkers account for twenty-five percent of all the alcohol consumed in the U.S. Tamar Lewin, *Teenage Drinking a Problem But Not in Way Study Found*, N.Y. TIMES, Feb. 27, 2002, at A19. It was subsequently demonstrated by government agency statistics that the figure was about eleven percent, less than half the number that CASA reported. *Id.*

304. Chief Justice Rehnquist, for example, was accused of relying on generous estimates even by NHTSA standards when he attributed 25,000 annual roadway deaths to drunk driving in his majority opinion in *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 451 (1990), the fixed sobriety checkpoint case. See Radley Balko, *Drunk Driving Laws Are Out of Control*, CATOINSTITUTE.ORG, July 27, 2004, <http://www.cato.org/dailys/07-27-04.html>. One resource to gauge the accuracy of current statistics including those concerning alcohol-related issues is the Statistical Assessment Service (STATS) which describes itself as “a non-partisan, non-profit organization” affiliated with the George Mason University Center for Media and Public Affairs. See About STATS, <http://www.stats.org/record.jsp?type=page&ID=26> (last visited Nov. 16, 2005). The organization “monitors the media to expose the abuse of science and statistics before people are misled and public policy is distorted.” *Id.* Another source for verifying the accuracy of statistical information arising in the context of public policy debates is the University of Pennsylvania’s Annenberg Political Fact Check, which describes itself as a “nonpartisan, nonprofit, ‘consumer advocate’ for voters that aims to reduce the level of deception and confusion in U.S. politics.” See FactCheck.org, <http://www.factcheck.org> (follow “About Us” hyperlink) (last visited Nov. 29, 2005).

create temporary damage in the connections between brain cells. However, the damage was able to repair itself"; Pentney found this to be "a hopeful note."<sup>305</sup> New discoveries have also been made about the brain's greater-than-anticipated power to rejuvenate itself.<sup>306</sup> While even a temporary alcohol-related loss in brain functioning may be undesirable, research suggests it may not lead to permanent damage.<sup>307</sup>

Health benefits from moderate drinking, including a reduced risk of heart disease and heart attack, reduced risk of stroke, lowered risk of gallstones, and possibly reduced risk of diabetes have been documented by recent research.<sup>308</sup> The results of these studies are so consistent, in fact, that some medical professionals now believe that "[t]he science supporting the protective role of alcohol is indisputable; no one questions it any more."<sup>309</sup>

The overall impact of alcohol on the brains of young adults is nevertheless unclear.<sup>310</sup> In the areas of memory and learning, there is

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305. Danielle Slutzky, *Study: Beer Does Not Kill Brain Cells*, COLUM. DAILY SPECTATOR, Dec. 8, 2004, available at 12/8/04 UNIWIRE 00:53:34 (daily student newspaper of Columbia University).

306. See generally DAVID PERLMUTTER & CAROL COLMAN, *THE BETTER BRAIN BOOK* (2004) (demonstrating that even nutritional changes and use of certain supplements can have significant impact on brain functioning); JEAN CARPER, *YOUR MIRACLE BRAIN* (2000) (same).

307. Kimberly Nixon & Fulton T. Crews, *Temporally Specific Burst in Cell Proliferation Increases Hippocampal Neurogenesis in Protracted Abstinence from Alcohol*, 24(43) J. OF NEUROSCIENCE 9714, 9714–17 (2004), <http://www.jneurosci.org/cgi/reprint/24/43/9714.pdf> (finding that inhibition of brain cell development during alcohol dependency was followed by pronounced increase in new hippocampal neuron formation after four to five weeks of abstinence). It should be reassuring to baby-boomer lawmakers who came of age during a time of legal alcohol availability to learn that they have not squandered their lives as a result of significant irreparable brain cell loss due to alcohol consumption.

308. MayoClinic.com, *Alcohol and Your Health: Weighing the Pros and Cons*, Aug. 27, 2004, <http://www.mayoclinic.com/invoke.cfm?id=SC00024> (last visited Oct. 10, 2005). Another recent study involving more than 10,000 nurses suggests that there was less mental decline among older women who were moderate drinkers of alcoholic beverages. Meir J. Stampfer et al., *Effects of Moderate Alcohol Consumption on Cognitive Function in Women*, 352 NEW ENG. J. MED. 245, 250 (2005).

309. Abigail Zuger, *The Case for Drinking (All Together Now: In Moderation!)*, N.Y. TIMES, Dec. 31, 2002, at F1 (quoting Dr. Curtis Ellison, professor of medicine and public health at Boston University School of Medicine).

310. The research to date indicates the potential for longer-term negative impact when adolescents drink excessively as compared to other population groups. See AMERICAN MEDICAL ASSOCIATION, *HARMFUL CONSEQUENCES OF ALCOHOL USE ON THE BRAINS OF CHILDREN ADOLESCENTS, AND COLLEGE STUDENTS*, <http://www.ama->

evidence that “adolescents” are affected by alcohol to a greater extent than adults.<sup>311</sup> At the same time, alcohol might have a reduced sedation effect on younger drinkers; this group is also less vulnerable to alcohol’s impact on motor coordination.<sup>312</sup> Researchers acknowledge that further work needs to be done in this area.<sup>313</sup>

The Harvard School of Public Health, for instance, acknowledges alcohol’s positive impact on health but also advises that “[m]oderate drinking sits at the point at which the health benefits of alcohol clearly outweigh the risks.”<sup>314</sup> Policy makers must recognize that the

assn.org/ama1/pub/upload/mm/388/harmful\_consequences.pdf (last visited Nov. 16, 2005).

Unfortunately, it is unclear what age ranges are encompassed by the use of the term “adolescent” or the intake amount considered “excessive.” Similar interpretative problems exist with respect to research demonstrating that the brain’s crucial development continues longer than previously thought, possibly into the early twenties. See SOCIETY FOR NEUROSCIENCE, BRAIN BRIEFINGS: YOUNG BRAINS ON ALCOHOL (Oct. 2002), [http://apu.sfn.org/content/Publications/BrainBriefings/BrainBriefings\\_Oct2002.pdf](http://apu.sfn.org/content/Publications/BrainBriefings/BrainBriefings_Oct2002.pdf) [hereinafter SFN BRAIN BRIEFINGS]. One problem arises because brain structure studies evidencing differences were conducted on those ages twelve to sixteen years old and then compared to other test subjects ages twenty three to thirty rather than in the contiguous age grouping of seventeen to twenty-two year olds. See *id.*

311. AARON M. WHITE, SUBSTANCE USE AND THE ADOLESCENT BRAIN: AN OVERVIEW WITH A FOCUS ON ALCOHOL 14–15 (2004), <http://www.duke.edu/~amwhite/Adolescence/Adolescent%20webpage%20paper%200504.pdf> (extrapolating from testing performed on human subjects in their early twenties and from animal studies involving adolescent rats). Like White, other publications find that animal studies are appropriate substitutes for the limitations involved in human research. “Findings are hard to confirm in humans because scientists can’t provide underage children with alcohol and then dissect their brains. Some evidence, however, is in line with the animal work.” SFN BRAIN BRIEFINGS, *supra* note 310.

312. WHITE, *supra* note 311, at 16–17.

313. See SFN BRAIN BRIEFINGS, *supra* note 310. One alcohol treatment expert characterized neuroscience research as ““very exciting state-of-the-art research that has tremendous implications.”” American Psychological Society, *Adolescents and Alcohol Abuse: New Knowledge, New Challenges*, APS OBSERVER, Dec. 2001, <http://www.psychologicalscience.org/observer/1201/niaaa.html>. Although advances in neuroscience have been on-going for more than thirty years, the law is just beginning to realize its impact. NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE I (Brent Garland ed., 2004).

314. Harvard School of Public Health, Alcohol, (2004) <http://www.hsph.harvard.edu/nutritionsource/alcohol.html>. What constitutes moderate drinking, however, is not easy to quantify as evidenced by the experience of *Food and Wine Magazine* wine reviewer Lettie Teague. Lettie Teague, *Everything In Moderation*, FOOD & WINE, Jan. 2003, at 54. Teague was interested in avoiding an occupational hazard and attempted to find parameters for moderate drinking. *Id.* According to Ms. Teague:

documented problems with alcohol often come from its abuse or from its use in conjunction with a potentially dangerous instrumentality such as an automobile or a weapon.<sup>315</sup> Legislators have a responsibility to safeguard public health and to regulate harmful substances, even using the force of the criminal law as a means of control. However, alcohol is not an inherently unhealthy or harmful commodity and its responsible use should not be subject to heavy-handed regulation such as complete prohibition for young adult consumers.

#### D. Compliance with Existing Laws

In addition to more general considerations of health and safety relating to alcohol use, policy makers should also look at the compliance with existing laws by underage people to determine their efficacy. Such efficacy considerations should be utilized in determining the appropriateness of establishing a new minimum legal drinking age. For instance, during a Senate hearing on underage drinking, a Yale University student was queried on the availability of alcohol to his peers and he replied: ““Why, it’s obtainable, sir; the greater the attempts at enforcement of the law, the stronger the sentiment against the law.””<sup>316</sup> There is nothing surprising about this exchange except perhaps for the fact that it was uttered in 1926 during Prohibition.<sup>317</sup>

Raising the age for the lawful purchase and consumption of alcohol does not appear to have been successful in eradicating drinking among young adults or substantially decreasing their access

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Just about every doctor I spoke to, including my longtime family physician, had a different idea of what it means to drink moderately. Some of the experts I consulted were vague as to exact amounts; others said a single glass of wine a day ““or less”” was the limit, which really depressed me.

*Id.*

315. The danger of alcohol abuse and addiction and the concomitant ill effects should be acknowledged and effective screening and treatment protocols made available for all age groups. If young adults are legally proscribed from imbibing alcohol, then they may be disinclined from seeking help for problem drinking, even when recognized. See discussion on harm reduction *infra* notes 348–364 and accompanying text.

316. Hans S. Nichols, *U.S. Drinking Culture—Getting Drunk on Rebellion*, INSIGHT ON THE NEWS, July 16, 2001, <http://www.insightmag.com/media/paper441/news/2001/07/16/Nation/U.Drinking.Culture.Getting.Drunk.On.Rebellion-161158.shtml> (subscription required for access).

317. *Id.*

to alcohol.<sup>318</sup> Some statistics suggest that up to eighty percent of twelfth grade survey respondents may have consumed alcohol.<sup>319</sup> Furthermore, there is little research data available indicating whether raising the drinking age had any impact on activities such as the purchase, “possession, or consumption” of alcohol. One researcher notes, “there is only weak evidence that increasing the minimum drinking age reduces youth alcohol consumption.”<sup>320</sup> In other words, increasing the MLDA has not necessarily led to increased compliance with the law.

Alcohol age restrictions have arguably resulted in the routine circumvention of the laws by millions of young adults.<sup>321</sup> Common methods involve “straw man” purchases by others and the creation

318. In a 2004 survey, forty-eight percent of twelfth graders admitted to drinking an alcoholic beverage in the thirty-day period prior to the survey and almost ninety-five percent reported that alcohol is “fairly” or “very” easy to get. LLOYD JOHNSTON ET AL., NATIONAL INSTITUTE ON DRUG ABUSE, MONITORING THE FUTURE: NATIONAL RESULTS ON ADOLESCENT DRUG USE: OVERVIEW OF KEY FINDINGS 2004 32 (2004), <http://www.monitoringthefuture.org/pubs/monographs/overview2004.pdf>. In an article on the teen drinking culture in Washington, D.C., high school students in Georgetown told a journalist that alcohol was easy to get:

They say they know plenty of people with fake IDs, courtesy of desktop publishing and the photocopying machines, but they don’t usually need to take the risk. Most often, they “give money to bums” to buy booze for them, or get it from older friends or siblings. Several say they steal from their parents’ liquor cabinets, and one boy claims he drinks every day when his parents aren’t home. “My parents work late, they’re workaholics,” he says.

Susan Cohen, *Drinking Age: Early Teens, Clueless Parents and the New Culture of Alcohol*, WASH. POST (Magazine), June 7, 1998, at 11.

319. REDUCING UNDERAGE DRINKING, *supra* note 7, at 44–45; *cf. supra* note 318.

320. Robert Kaestner, *A Note on the Effect of Minimum Drinking Age Laws on Youth Alcohol Consumption*, 18 CONTEMP. ECON. POL’Y 315, 324 (2000). Professor Kaestner urges additional research to address the “apparent paradox” that MLDAs have reduced drunk driving by those underage but not consumption. *Id.*

321. Threat of arrest may not operate as a strong deterrent; however, underage drinkers may not be forthcoming about past offenses that result in intervention by law enforcement. The University of Iowa College of Law began granting amnesty during orientation to entering students who wished to amend responses to questions posed on their school applications. Based on three years accumulated data, there were fifty-nine students who requested an amendment; twenty-eight were for alcohol-related offenses. Linda McGuire, *Lawyering or Lying? When Law School Applicants Hide Their Criminal Histories and Other Misconduct*, 45 S. TEX. L. REV. 709, 716 (2004). After clearly expressing the importance of getting information from students about existing or potential “dependency and addiction” problems, the author notes that “[w]hile the incidence of these [alcohol-related] offenses indicates a disregard for the law, it does not necessarily signal a drinking problem.” *Id.* at 717.

and use of fake IDs.<sup>322</sup> For example, on a busy night, about ten fake IDs will be presented to someone such as Travis, a bouncer at a Forth Worth, Texas bar who commented to a reporter, “Fake IDs are everywhere . . . . Anyone who wants one can get one, and they’re almost perfect.”<sup>323</sup> Given national security issues and the high incidence of identity theft, the fake ID industry is a growing concern for law enforcement.<sup>324</sup>

Achieving full compliance with the law may be complicated by the fact that an underage drinking law “is an example of a prohibition that is *malum prohibitum* (wrong because it is prohibited) rather than *malum in se* (wrong in itself).”<sup>325</sup> This contradiction may lead young people restricted by the twenty-one-year-old drinking age to turn the police into the enemy and encourage disrespect for the law generally.<sup>326</sup> The late Sidney Wertimer, former Professor Emeritus of Economics at Hamilton College, expressed his concerns about this negative consequence of the age-restrictive drinking laws in observing that it is no wonder that young people, who almost universally have been introduced to alcohol, disrespect the law: “as the motto on the

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322. Although detection techniques are improving, the advent of sophisticated desktop publishing programs along with computer-savvy teens allow for the creation of millions of fake IDs. Donna Leinwand, *Fake IDs Swamp Police*, USA TODAY, July 2, 2001, at A1.

323. Mandy Thomason, *Fake IDs Must-Haves for Hundreds of Underage College Students*, THE WITCHITAN, Sept. 15, 2004, <http://wichitan.mwsu.edu/2004-0922/features.asp> (student newspaper of Midwestern State University).

324. The U.S. Department of Justice’s Office of Community Oriented Policing Services reported in a September 2004 guide that “[u]nderage drinkers obtain alcohol from two main sources: third parties, such as legal-age friends, siblings, and strangers; and commercial outlets, such as stores, bars, and restaurants (often by using a fake ID).” KELLY DEDEL JOHNSON, U.S. DEP’T OF JUSTICE, PROBLEM ORIENTED GUIDES FOR POLICE: UNDERAGE DRINKING 8 (Sept. 2004), <http://www.cops.usdoj.gov> (footnote omitted). The guide reported that fake IDs are widely available from the internet, directly from counterfeiters, or by presenting false documents to obtain a drivers’ license. *Id.* at 9. Furthermore, the guide stated that “[r]ecent advancements in technology have made the counterfeiting of state-issued ID cards easier, using a scanner and a color printer.” *Id.*

325. REDUCING UNDERAGE DRINKING, *supra* note 7, at 28.

326. See generally Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1406 (2005) (offering original, experimental evidence to support author’s thesis that “a perceived unjust law leads to lower levels of compliance with unrelated laws”). Nadler uses Prohibition as a prototype of perceived legal injustice that results when the law “conflicts with commonsense notions of what justice requires.” *Id.* at 1433. She explains that just prior to the end of Prohibition, there was growing anxiety among “prominent leaders” that pervasive noncompliance would diminish respect for the law overall and for other specific laws unrelated to alcohol regulation, in other words, there was concern about the “Flouting Thesis.” *Id.*

seal of our University says, ‘*Leges sine Moribus Vanæ*’—freely translated, ‘Law without the force of custom is in vain.’”<sup>327</sup>

In addition to anecdotal evidence of noncompliance with the law, more formal studies and statistics demonstrate the consequences for compliance after Congress passed the NMDA in 1984. For instance, two University of Florida criminology professors conducted a study in the mid-1980s on young people affected by the change in the drinking age with interesting results.<sup>328</sup> The professors reported that “[t]he illegal drinkers developed a sense of injustice at their arbitrarily lost rights, an attitude . . . that often results in disrespect for the laws and increased deviance.”<sup>329</sup> One of the authors summarized their findings by stating, “‘The more we scrutinized the surrounding and resulting issues of the age change . . . the more factors we discovered that may in fact negate or offset any progress in terms of highway safety.’”<sup>330</sup> Among the unintended consequences from raising the MLDA were underage drinkers engaging in other forms of crime in order to obtain alcohol, underage drinkers associating with other lawbreakers in order to drink, and possibly concluding that laws are unjust due to the apparent arbitrariness of age limits.<sup>331</sup> The researchers concluded by indicating that with respect to the MLDA, “it would be ironic if it created more problems than it solved.”<sup>332</sup>

A survey of more than 500 college officials identified alcohol consumption as a major problem at colleges and universities.<sup>333</sup> Nevertheless, only twenty percent of administrators thought that underage drinking would be reduced by stricter enforcement of MLDA’s.<sup>334</sup> While raising the drinking age barely put a crimp in the alcohol intake of young people, some would contend that it did drive

327. Sidney Wertimer, Letter to the Editor, *Yes, Lower the Age*, PA. GAZETTE, May 1998, <http://www.upenn.edu/gazette/0598/0598letters.html>.

328. Lon Lanza-Kaduce & Pamela Richards, *Raising the Minimum Drinking Age: Some Unintended Consequences of Good Intentions*, 6 JUST. Q. 247 (1989).

329. Responding to Crime: ‘Policy Relevant Research’ Will Shape Future of Criminal Justice System, says Lon Lanza-Kaduce, <http://clasnews.clas.ufl.edu/news/clasnotes/9802/kaduce.html> (last visited Nov. 7, 2005).

330. *Id.*

331. Lanza-Kaduce & Richards, *supra* note 328, at 260–61.

332. *Id.* at 261.

333. See Henry Wechsler, Barbara A. Moeykens & William DeJong, *Enforcing the Minimum Drinking Age Law: A Survey of College Administrators and Security Chiefs*, HIGHER EDUCATION CENTER BULLETIN SERIES: ALCOHOL AND OTHER DRUG PREVENTION, 1995, at 2–3. [hereinafter HIGHER EDUCATION CENTER] (analyzing results of 1993 Harvard School of Public Health survey).

334. *Id.* at 8.



drinking activities behind closed doors and into unsupervised house party settings, into dorm rooms, and into the restrooms of concert halls and sports arenas.<sup>335</sup>

### E. Comparative Perspectives

The twenty-one-year-old MLDA sets the United States apart from the rest of the world in that it has the highest MLDA of any country; some countries have no MLDA whatsoever.<sup>336</sup> If an age limit exists at all in Western European countries, it is either sixteen or eighteen.<sup>337</sup> At the same time, many other countries have an eighteen-year-old driving age and many have lower BAC limits for drunk driving as well.<sup>338</sup> A recent study showed that college students in Canada, where

335. A commentator described the concept of “pregaming” in a recent essay: Pregaming is probably unfamiliar to people who went to college before the 1990s. But it is now a common practice among 18-, 19- and 20-year-old students who cannot legally buy or consume alcohol. It usually involves sitting in a dorm room or an off-campus apartment and drinking as much hard liquor as possible before heading out to the evening’s parties.

Barrett Seaman, *How Bingeing Became the New College Sport: And Why It Would Stop if We Lowered the Drinking Age*, TIME, Aug. 29, 2005, at 80. For example, Arthur Levine, president of Teachers College at Columbia University and author of *When Hope and Fear Collide: A Portrait of Today’s College Student*, said that universities do not have it easy in terms of crafting alcohol policies. See Charles Robinson, *Despite Restrictions, Tailgating Rages On*, STATE NEWS (Mich.), Nov. 16, 1998, <http://www.statenews.com/alcohol/tailgatemain.html>. Discussing tailgate parties in particular, Levine said, “What’s the safest thing (a university) can do? Let’s say the university starts enforcing and throws that stuff off of campus. Tailgate parties are going to start happening outside of campus. Do you want all of these people who have been drinking on the roads?” *Id.*

336. See International Center for Alcohol Policies, Minimum Drinking and Purchasing Age Laws, [http://www.icap.org/ICAP/policy\\_issues/young\\_peoples\\_drinking/young\\_peoples\\_drinking\\_table.html](http://www.icap.org/ICAP/policy_issues/young_peoples_drinking/young_peoples_drinking_table.html) (last visited Oct. 10, 2005). The Center acknowledges receipt of funding from the alcoholic beverages industry. Sponsors for International Center for Alcohol Policies, <http://www.icap.org/Home2/AboutICAP/Sponsors/tabid/111/Default.aspx> (last visited Nov. 16, 2005); see also Nat’l Highway Transp. Safety Admin., On DWI Laws in Other Countries (Mar. 2000), <http://www.nhtsa.dot.gov/people/injury/research/pub/DWIothercountries/dwiothercountries.html>.

337. See International Center for Alcohol Policies, *supra* note 336.

338. A convenient chart with driving ages throughout the world can be found at 2Pass.co.uk. See Minimum Driving Age Europe, <http://www.2pass.co.uk/ages.htm> (last visited Oct. 10, 2005); see also PETER ANDERSON, EUROCARE, DRINKING AND DRIVING IN EUROPE 15,

the drinking age is eighteen in most provinces and nineteen in others, drink more frequently but in much lesser amounts than their U.S. counterparts.<sup>339</sup>

There are well-established factors in these other cultures that may encourage moderate, responsible use of alcohol:

- 1) Drinking in a social group is differentiated from drunkenness.
- 2) Drinking is tied to dining and “ritualistic feasting.”
- 3) Drinking does not exclude either gender or any age group, whether particular individuals in the group drink or not.
- 4) Drinking is separated from escapism.
- 5) Drinking in the group is encouraged if responsible and punished if irresponsible.<sup>340</sup>

Other researchers agree with the importance of cultural factors on alcohol behavior and characterize the United States as an ambivalent alcohol culture rather than an integrated one.<sup>341</sup> Alcohol’s long-standing relationship to celebration and ritual, including religious ceremonies, sends mixed messages to minors and young adults when access is forbidden entirely. Seldon Bacon, a pioneer in the field, urged a broader sociological approach to the study of alcohol more than sixty years ago.<sup>342</sup> Yet, the primary research focus in the U.S. has been on problem drinking or the problems associated with drinking.<sup>343</sup>

[http://www.eph.org/IMG/pdf/Drinking\\_and\\_Drg\\_in\\_Euro.pdf](http://www.eph.org/IMG/pdf/Drinking_and_Drg_in_Euro.pdf) (last visited Nov. 16, 2005).

339. Meichun Kuo et al., *More Canadian Students Drink but American Students Drink More: Comparing College Alcohol Use in Two Countries*, 97 ADDICTION 1583, 1583 (2002).

340. See Miller, *supra* note 268 (citing Norman E. Zinberg, clinical professor of Psychiatry at Harvard Medical School and director of Psychiatric Training at The Cambridge Hospital).

341. ROBIN ROOM, RESPONSES TO ALCOHOL-RELATED PROBLEMS IN AN INTERNATIONAL PERSPECTIVE: CHARACTERIZING AND EXPLAINING CULTURAL WETNESS AND DRYNESS 2 (conference presentation at Santo Stefano Belbo, Italy, Sept. 1989), <http://www.bks.no/response.pdf>. As Room notes, the terms “dry” and “wet” cultures are sometimes used to describe the same phenomena depending on the relative terms of different cultural groups. *Id.* at 5.

342. SOCIAL ISSUES RESEARCH CENTRE, *supra* note 277, at 5.

343. Some have observed that “the dominance of problem-oriented perspectives has led to a serious imbalance in the study of alcohol, whereby problems affecting only a small minority of drinkers have received disproportionate attention, while the study of ‘normal’ drinking has been neglected.” *Id.* at 4–5; see also R. Curtis Ellison, Continuing Reluctance to Accept Emerging Scientific Data on Alcohol and Health, <http://www.aim-digest.com/gateway/index.htm> (follow “Moderate Drinking” hyperlink; then follow “Continuing Reluctance . . .” hyperlink) (last visited Oct. 16, 2005) (presenting information that researchers in 1970s who found health benefits associated with moderate drinking were discouraged from going public with their findings).

Dr. Elizabeth Whelan, who studied preventive medicine at the Harvard School of Public Health, and now heads the American Council on Science and Health observes:

In parts of the Western world, moderate drinking by teenagers and even children under their parents' supervision is a given. Though the per capita consumption of alcohol in France, Spain, and Portugal for example is higher than in the United States, the rate of alcoholism and alcohol abuse is lower.<sup>344</sup>

As Professor Dwight Heath of Brown University puts it: "In countries where people start to drink at an early age, alcohol is not a mystical, magical thing' . . . . People are less likely to 'drink to get drunk because they know that's a stupid thing to do.'"<sup>345</sup> By contrast, young adults in the U.S. are not necessarily learning responsible drinking at home, in the presence of family members; nor are they learning responsible behavior in bars and clubs with bartenders and owners who have a vested interest in regulating intake due to dram shop acts that impose liability.<sup>346</sup>

In the United States, there seems to be an inability to make a distinction between the use and abuse of alcohol. To some folks, if you're under twenty-one, it's abuse, period. This viewpoint is baffling to the rest of the world.<sup>347</sup>

#### *F. Harm Reduction and Responsible Drinking*

Another factor that state legislators should consider when making drinking age policy is the efficacy of "harm reduction" approaches as opposed to a policy of outright prohibition on alcohol consumption. Current policy seemingly creates a frightening no-win situation: because they are not supposed to be drinking at all, young adults

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344. Elizabeth Whelan, Editorial, *Let Jenna and Barbara Have a Drink*, AMERICAN COUNCIL ON SCIENCE AND HEALTH, June 6, 2001, [http://www.acsh.org/healthissues/newsID.281/healthissue\\_detail.asp](http://www.acsh.org/healthissues/newsID.281/healthissue_detail.asp).

345. Doug Bandow, *Outmoded Paternalism*, 48 THE FREEMAN: IDEAS ON LIBERTY 467, 468 (1998).

346. See generally DAVID J. HANSON, PREVENTING ALCOHOL ABUSE: ALCOHOL, CULTURE, AND CONTROL (1995) (outlining historical trends in American alcohol consumption in contrast to other ethnic and national identities, in particular focusing on sociocultural, political and economic aspects of alcohol abuse).

347. British journalist Andrew Barr begins his book on the drinking culture in the U.S. by stating, "It is not generally appreciated how extreme American attitudes about alcohol appear from the other side of the Atlantic." ANDREW BARR, DRINK: A SOCIAL HISTORY OF AMERICA I (1999).

cannot get their good faith questions answered and they may be deterred from asking for help with alcohol abuse.

Successful harm reduction programs to identify problem drinkers, where participants are encouraged to deal with their alcohol issues in a forthright manner, could be jeopardized if individuals are unwilling to risk punishment by disclosing incriminatory information about their own proscribed conduct or by seeking treatment for substance abuse.<sup>348</sup> MLDA legislation with its focus on illegality and possible subsequent imposition of sanctions for violations could be counterproductive in alcohol-related emergency situations. Young adults may be afraid to contact the proper authorities if a problem with alcohol poisoning affects one of their friends.<sup>349</sup> For example, when officials at Tufts University changed the disciplinary policy to drop severe sanctions for first-time, alcohol-related conduct, calls to the Tufts Emergency Medical Service (TEMS) for assistance with students in crisis “jumped by a significant percentage.”<sup>350</sup> The old stricter disciplinary policy created a dilemma for students according to Tufts senior Kate Anderson: “‘if there was someone really in trouble you called. But there was always that line you weren’t sure you wanted to cross especially if it meant they could get in trouble.’”<sup>351</sup>

348. See, for example, the discussion on fear of reprisals as a deterrent to students seeking necessary emergency medical assistance for alcohol poisoning *infra* notes 349–351 and accompanying text.

349. See Daniela Perdomo, *Changed Alcohol Policy Leads to More TEMS Use*, TUFTS DAILY, Feb. 17, 2004, [http://www.tuftsdaily.com/vnews/display.v/ART/2004/02/17/40a13ef5104ea?in\\_archive=1](http://www.tuftsdaily.com/vnews/display.v/ART/2004/02/17/40a13ef5104ea?in_archive=1) (daily student newspaper of Tufts University). Even organizations that place greater emphasis on prevention are aware that young people are hesitant to seek medical and other assistance for intoxicated friends. For example, the National Institute on Alcohol Abuse and Alcoholism (NIAAA) College Drinking Prevention web site recognizes that there is a long-term psychological cost for survivors of alcohol-related tragedies: “Sadly enough, too many college students say they wish they would have sought medical treatment for a friend. Many end up feeling responsible for alcohol-related tragedies that could have easily been prevented.” *Students Examining the Culture of College Drinking, Risky Business*, <http://www.collegedrinkingprevention.gov/students/risky/alcoholpoisoning.aspx> (last visited Oct. 14, 2005).

350. Perdomo, *supra* note 349.

351. *Id.* During the 2004–2005 academic year, concerns about binge drinking provided an impetus for examining the tradition of leniency in the on-campus enforcement of alcohol policies at Yale University. Raymond Pacia, *Time Sees Changes in Alcohol Rule*, YALE DAILY NEWS, Feb. 17, 2005, at 1, <http://www.yaledailynews.com/article.asp?AID=28447>. In discussing the possibility of reform, Deputy Provost Charles Long stated that the University’s top priority would continue to be “safety, rather than punishment.” *Id.*

An unlikely source weighed in on this debate a few years ago. After a spate of well-publicized, alcohol-related problems on college campuses in his state, in 1997 Virginia Attorney General Richard Cullen called for a discussion about lowering the drinking age.<sup>352</sup> Cullen reasoned that drinking “will come out of the closet into areas where it can be supervised and managed by college officials and peers.”<sup>353</sup>

In this way, if the drinking age were lowered to eighteen—the legal age of adulthood—then “harm reduction” could be emphasized based on compassionate pragmatism rather than “zero tolerance,” seemingly based in part on moralistic idealism.<sup>354</sup> Right now young adults and college administrators, many of whom support reducing the MLDA, are placed in an untenable position on this issue.<sup>355</sup> A survey conducted by the Harvard School of Public Health in 1993 asked college administrators to indicate “which of several policy statements describe what their schools do about drinking.”<sup>356</sup> In response, “[s]eventy-six percent reported that they encourage ‘responsible drinking,’ while 55 percent said they tolerate drinking but try to keep

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352. *Will Student Drinking Decrease if Brought Out of the Closet?*, AID FOR EDUC. REPORT, Dec. 16, 1997, at 4.

353. *Id.*

354. Researcher Ruth Engs explains the current alcohol temperance movement in the U.S. as a moralistic reaction against the rebellious “flower power” generation. RUTH CLIFFORD ENGS, *CLEAN LIVING MOVEMENTS: AMERICAN CYCLES OF HEALTH REFORM 202* (2000). Perhaps due to the fact there is the potential for dependency on alcohol with concomitant ill effects from chronic alcoholism, a total abstinence approach has been advocated by some organizations. The most well-known of these groups, the National Women’s Christian Temperance Union (WCTU), characterizes itself as “the oldest continuing non-sectarian women’s organization in the world.” *History of Women’s Christian Temperance Union*, <http://www.wctu.org/history.html> (last visited Nov. 16, 2005). The WCTU was founded in 1873. *Id.* According to Mrs. Rachel B. Kelly, its former President:

The alcohol industry is the number one parasite in the United States. It does nothing beneficial for mankind but its very existence depends upon the corruption, tribulations, disasters, and ruination of its victims. It eats away at the physical, moral, economic, and spiritual lifeblood of our nation to gain its selfish objective—money.

National Women’s Christian Temperance Union, *Alcohol #1 Drug Problem*, [http://www.wctu.org/alcohol\\_1\\_drug\\_problem.html](http://www.wctu.org/alcohol_1_drug_problem.html) (last visited Nov. 16, 2005). If one shared Mrs. Kelley’s beliefs, then it would be much easier to support stronger alcohol restrictions because the legislature would be keeping those who are deemed most vulnerable as a result of their youth from a product that is unnecessary at best and dangerous at worst.

355. Forty percent of more than 500 college officials surveyed supported lowering the drinking age. HIGHER EDUCATION CENTER, *supra* note 333, at 5.

356. *Id.* at 4.

students from becoming ‘drunk and disorderly.’ Only 41 percent said they discourage or try to prevent all student drinking.”<sup>357</sup>

The social-norms approach on campuses provides accurate information to students about the actual prevalence of alcohol use on campus.<sup>358</sup> Programs such as the Brief Alcohol Screening and Intervention for College Students (BASICS) use peer and professional counselors to assess alcohol behaviors and help students create attainable goals for changing alcohol-related behavior.<sup>359</sup> State legislators considering lowering the MLDA must recognize that if American colleges and universities can teach freshman students to do calculus or to speak Chinese, they are likely capable of learning and utilizing information about blood alcohol concentration levels, the

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357. *Id.*

358. See generally H. Wesley Perkins et al., *Misperceiving the College Drinking Norm and Related Problems: A Nationwide Study of Exposure to Prevention Information, Perceived Norms and Student Alcohol Misuse*, 66 J. STUD. ALCOHOL 470 (2005). According to academic researchers who conducted a recent nationwide study on social norming on campuses, “although the actual norm is an important predictor of personal consumption, students’ perception of the norm is a much more powerful predictor of their drinking behavior than the amount actually consumed by most of their school peers.” *Id.* at 476.

In addition to exposing students to the social norms approach and addressing students who drink problematically out of peer pressure, policy makers must also consider students who drink problematically based on mental health reasons. A George Mason University researcher advises that colleges need to “look at what drives students to drink . . . . If we deal with the underlying issues better, there will be less of a drug and alcohol problem.” See Scrivo, *supra* note 14, at 260. Empirical data indicate that college students coming to campus counseling centers in recent time periods often have more complex and more severe mental health problems, in contrast with the more typical relationship and developmental issues identified in their predecessors. See Sherry A. Benton et al., *Changes in Counseling Center Client Problems Across 13 Years*, 34 PROF. PSYCHOL. RES. & PRAC. 66, 69 (2003). A survey by the American College Health Association conducted in 2004 revealed that “nearly half of all college students report feeling so depressed at some point in time that they have trouble functioning, and 14.9 percent meet the criteria for clinical depression.” HealthyMinds.org, American Psychiatric Association, College Mental Health Statistics, <http://www.healthyminds.org/collegestats.cfm> (last visited Oct. 13, 2005). The website also reports that “[a]ccording to a recent study in the *Archives of General Psychiatry*, 18 percent of U.S. College [sic] students (1=24% of men, 13% of women) suffered from clinically significant alcohol-related problems, compared with 15% of their non-college attending peers (22% of men, 9% of women).” *Id.*

359. See DEPARTMENT OF HEALTH AND HUMAN SERVICES, BASICS FACT SHEET, (May 2003), <http://modelprograms.samhsa.gov/pdfs/Fctsheets.BASICS.pdf>. The BASICS program is a Substance Abuse and Mental Health Services Administration (SAMHSA) model program developed by researchers at the University of Washington. *Id.*

short-term effect of alcohol on the brain's functioning, and helpful information about their own drinking habits as compared to others.

Furthermore, legislators seeking to lower the drinking age would also be well-advised to pass related legislation encouraging responsible drinking by all consumers of alcohol. Indeed, in the United States, the drinking age should not be lowered without first establishing other supportive and educational programs.<sup>360</sup> Lawmakers should be willing to make a financial commitment to underwrite educational programs in particular. If the drinking age is lowered, some dollars now spent on enforcement could be shifted to efforts to curb drunk driving, alcohol education, and alcohol screening and treatment.

Instruction about alcohol could occur in schools beginning at the middle school level. Older adults and parents should serve as good role models and convey appropriate attitudes toward drinking which includes not downplaying intoxication or inappropriate drinking behavior.<sup>361</sup> As sociology professor David J. Hanson points out, "drinking in moderation or abstaining are both equally acceptable options for adults."<sup>362</sup>

Drinking should be separated from driving; designated drivers should consume no alcohol.<sup>363</sup> Drinking games or contests, especially harmful rituals such as "21 for 21" or "power hour" should be discouraged and other "rites of passage" activities should be substituted.<sup>364</sup>

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360. See generally David J. Hanson, Children, Alcohol and Parenting, <http://www2.potsdam.edu/hansondj/ChildrenAndParenting.html> (last visited Oct. 10, 2005) (offering suggestions for teaching responsible drinking).

361. See Stanton Peele & Archie Brodsky, *The Antidote to Alcohol Abuse: Sensible Drinking Messages*, WINE IN CONTEXT: NUTRITION, PHYSIOLOGY, POLICY 66, 68 (Andrew L. Waterhouse & JoAnne M. Rantz, eds. 1996), available at <http://www.peele.net/lib/antidote.html> (stating that parental role model is most reliable mechanism for differentiating between responsible and irresponsible drinking).

362. Hanson, *supra* note 360.

363. A number of community partnerships are focusing on the importance of programs designed to encourage the use of designated drivers, with the support of the NHTSA. See Discretionary Cooperative Agreements to Support the Demonstration and Evaluation of Innovative Alcohol-Impaired Driving Projects, 62 Fed. Reg. 7819 (Feb. 20, 1997). For instance, Doctors for Designated Driving, a group comprised of members of the medical community, promotes designated driving within the hospitality industry. See Pete Thomson, *A Simple Goal: Promoting Safe Drinking*, NEW PHYSICIAN, Mar. 2005, at 37.

364. Kate Zernike, *A 21st-Birthday Drinking Game Can Be a Deadly Rite of Passage*, N.Y. TIMES, Mar. 12, 2005, at A1 (describing tradition of celebrating one's

Greater financial resources should be allocated to fund independent research studies that assess the effectiveness of current alcohol-related laws and policies. Finally, any proposed solutions should consider a full range of future options and should not be constrained by traditional approaches, especially those that have proved to be unworkable.

## CONCLUSION

As suggested by the public commentary largely condemning the current drinking age after the arrest of Jenna and Barbara Bush, there seems to be a growing consensus that laws dramatically at odds with human behavior are ineffective. We need, therefore, to rethink our current public policy regarding underage drinking. Twenty-one years of experience with the NMDA demonstrates that alcohol consumption among eighteen- to twenty-year-olds remains high. Alcohol's continued illegality for young adults has undermined the use of effective harm reduction techniques in medical emergency situations and for problem drinkers as well.

The best chance for success in lowering the drinking age is through state legislative action. States need to reclaim their traditional role of crafting appropriate alternatives to failed public policy initiatives on social issues. Congress should be kept out of the process and, instead, lobbied to permit trial programs that will not be subject to the loss of federal highway funds such as those geared toward military personnel.

It is essential that effective legislative advocacy be coupled with supporting data provided by reputable social scientists whose research demonstrates that the reduction of alcohol-related traffic fatalities is the result of multiple factors. The right combination of arguments concerning state autonomy, fairness, decreases in drunk driving among young adults unrelated to MLDA's, lack of compliance with existing laws, and possible contraindications of focusing on prohibition rather than harm reduction might be sufficiently persuasive to encourage a state legislature to experiment with a lower drinking age in some form. States that are unwilling to jeopardize federal highway funding should consider loosening more restrictive

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twenty-first birthday by publicly downing twenty-one shots, often in period between midnight and bar's closing time); *see also* Be Responsible About Drinking, Inc. (B.R.A.D.), <http://www.brad21.org> (last visited Oct. 10, 2005) (providing information and educational outreach about harmful drinking after being founded in response to son's death from alcohol poisoning on his twenty-first birthday).



age-related alcohol policies while maintaining minimal compliance with the NMDA's requirements.

Using the force of the law to prevent harmful conduct is desirable; however, such laws should be based on fact and not emotionally charged arguments buoyed by questionable statistics. Blanket prohibition on the consumption of any amount of alcohol by young adults simply is not warranted. In the end, informed and vigorous public debate on this important social policy question is imperative. The best legacy we can give to young adults is not a criminal record but rather a robust lawmaking process that allows periodic reexamination of misguided and unworkable legislation.