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National Minimum Drinking Age Act of 1984: Once Again Congress Mails Home Another Fist

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NOTE
THE NATIONAL MINIMUM DRINKING AGE ACT OF 1984:
ONCE AGAIN CONGRESS
MAILS HOME ANOTHER FIST

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I. INTRODUCTION

On July 17, 1984 the National Minimum Drinking Age Act of 1984
was signed into law by President Ronald Reagan.1 The law calls for
the states to raise their minimum drinking age to a nationally uniform
age of twenty-one. Those states that do not comply by July 1986 face a
reduction in the highway funds allocated to them under the Federal
Highway Aid Act.2

The purpose of the law is to save the lives3 of Americans who travel our
highways, but it is specifically aimed at alleviating the disproportionate
number of fatal accidents among young people each year.4 There can be
no debate that this goal is legitimate, rational and based on an identified

§ 158 Sec. 6(2), Ch. 1, 23 U.S.C. (1984)).
4 Id.
need. Essentially, it constitutes the federal interest which is given its validity by the power granted Congress under the commerce clause.

This Note will examine the federal interest as it conflicts with the states’ interest in setting their own drinking ages, which are derived from section two of the twenty-first amendment and the tenth amendment, respectively. This conflict is given sharper focus when examined in the context of Supreme Court tests and balancing measures developed in recent decades in these constitutional arenas.

A controversy has arisen because of the congressional imposition of a national minimum drinking age on the states through coercive withholding of federal funds. Many concerned persons question whether this vehicle is constitutionally empowered under the commerce clause. Similarly, it is argued that the rights reserved to the states under the tenth and twenty-first amendment should bar Congress’ actions.

It is the purpose of this Note to examine the controversy created by the Drinking Age Act. The presentation will begin with a background and history of the drinking age legislation and a closer examination of the promulgation of the law. This will be followed by a discussion of the debate over the need for such a measure, examining factual studies, public sentiment and the arguments pro and con. The focus will then shift to an examination of the constitutional considerations of the Drinking Age Act. Finally, the conclusion reached herein is that the Drinking Age Act is constitutional and the body of this article is devoted to the assertion of that proposition.

II. BACKGROUND

It is no secret that the youth of our nation are familiar with the use of alcohol. The young person’s familiarity with alcohol leads to an attitude

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5 Id. at 2-4.
6 "The Congress shall have the power to . . . regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.
7 "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." U.S. Const. amend. XXI, § 2. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.
8 A national survey conducted for the National Institute on Alcohol Abuse and Alcoholism (N.I.A.A.A.), early in 1974, indicated that 93% of boys and 87% of girls in their senior year of high school, had experimented with alcohol. More than half of the nation's seventh graders had tried drinking at least once during the previous year. *Survey of Adolescent Alcohol Drinking, Behavior, Attitudes, and Correlates*. Report prepared for the N.I.A.A.A. by Research Triangle Institute, Inc., 1974. **Alcohol, Health and Research World**, Summer 1975, N.I.A.A.A.

At the end of 1983, the percentages have remained relatively constant, with 93% of all high school seniors surveyed reporting they have used alcohol. The N.I.A.A.A. reports that
that its regular use is socially acceptable. This attitudinal change over the past two decades, in conjunction with the increase in mobility of the younger generation, has caused a dramatic increase in alcohol-related traffic fatalities in the sixteen to twenty-four year old age group.

The increase was first noted in the wake of widespread state legislative acts lowering the legal drinking age early in the decade of the seventies. As the state legislatures were expanding the baby boom generation's civil rights, a concerted effort was undertaken by the federal government to reduce the problems associated with teenage use of alcoholic beverages. The federal initiative culminated in the passage of the Comprehensive

approximately 41% of the 1982 high school sample reported occasional heavy drinking (five or more drinks on one occasion during a two week period prior to the survey). **Fifth Special Report to the U.S. Congress on Alcohol and Health** 2 at 4, (U.S. Dept. of Health and Human Services)(Dec. 1983).

9 31% of the 1981 high school seniors surveyed did not disapprove of taking one or two drinks nearly every day. **Fifth Special Report to the U.S. Congress on Alcohol and Health** at 5.


11 When the twenty-seventh amendment to the Constitution was ratified in 1971, giving 18, 19 and 20 year olds the right to vote in national elections, many states lowered their minimum legal drinking ages. The belief by many legislators was that if young people were old enough to vote, marry and serve in the armed forces, they were old enough to drink responsibly. As a result, between September 1970 and September 1973, twenty-four states lowered their drinking ages from 21 to 20, 19 or 18. **Alcohol & Health Notes**, (U.S. Dept. of Health, Educ. and Welfare) (Oct. 1973).

As of 1977 the following changes were made in several states:

<table>
<thead>
<tr>
<th>Changes In Alcohol-Purchasing Age by State</th>
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<tr>
<td><strong>From 21 to 18</strong></td>
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<tr>
<td>Connecticut (1972)</td>
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<td>Florida (1973)</td>
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<td>Georgia (1972)</td>
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<td>West Virginia (1972)</td>
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<td>Wisconsin (1972)</td>
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Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act Amendments of 1974. That Act's purpose was to provide community resources, through federal funding, to eradicate alcohol abuse and its related problems. The Act was intended to encourage prevention and treatment of problem drinking and problem drinkers through community-based programs designed to divert problem drinkers from the criminal justice system.

The Prevention Act has been effective in creating a public awareness of the enormous alcohol problem in our society and it has spawned a proliferation of alcoholism treatment programs. However, the Act has failed to address the problem of drunk driving with particularity.

In this decade, we have seen a decline in the programmatic approach to our nation's problems such as drunk driving, and are experiencing a more "militant" approach. This is evidenced by the emergence of grassroots political groups, which advocate the enactment of tough laws against drunk drivers and have succeeded in convincing legislatures to pass tougher laws. Having experienced success at state and local levels these organizations, led by Mothers Against Drunk Driving (M.A.D.D.), are now focusing their energies on national issues.

Backed by studies proffering considerable evidence that increasing the legal age for the possession, purchase, consumption or sale of alcoholic beverage can be effective measure to reduce drunk driving accidents among youth, a movement was underway by 1980 to require a national

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15 Mothers Against Drunk Driving (M.A.D.D.), Remove Intoxicated Drivers (R.I.D.), Students Against Drunk Driving (S.A.D.D.).
16 One commentator offers an excellent exemplary discussion of tougher new drunk driving statutes. See Bitem, Under the Influence of California's New Drunk Driving Law: Is the Presumption of Innocence on the Rocks?, 10 Pepperdine L. Rev. 91 (1982). A California law makes it a crime to drive a motor vehicle when one's blood-alcohol level is .10% or more, curtails the ability to plea bargain in a DWI case and creates stiff new penalties for conviction. See also Gifford and Friedman, A Constitutional Analysis of Ohio's New Drunk Driving Law, 15 U. Tol. L. Rev. 133, 136 n. 29 (1983)(cites numerous state statutes, including Ohio's, that make driving with a .10% blood-alcohol concentration a violation).
minimum drinking age of twenty-one. By rallying support from local community groups, sufficient national attention was mustered to demand congressional action. Congress first addressed the need for a minimum national drinking age of twenty-one in 1982. Early in 1982 President Reagan established the Presidential Commission on Drunk Driving which recommended that a national minimum drinking age be enacted throughout the United States. In September of 1983, with the consent of the Administration and widespread support in Congress, legislation was introduced in the House of Representatives calling for the National Minimum Drinking Age Act of 1984.

The bill quickly made its way through congressional channels and was signed into law by President Reagan on July 17, 1984 as part of the Surface Transportation and Uniform Relocation Assistance Act of 1984. Section 141 of the Act amended Title 23 of the United States Code by

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*Raising the Minimum Legal Drinking Age on Traffic Accidents in Maine, N.H.T.S.A. TECHNICAL REPT. (Dec. 1981).*

18 Congress first addressed the need for a National Minimum Drinking Age in 1982 by "encouraging each state to prohibit the sale of alcoholic beverages to persons who are less than 21 years of age." Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 209, 1982 U.S. CONG. & ADMIN. NEWS (96 Stat) 2140. The first reported lobbying effort was by Ms. Candy Lightener of M.A.D.D. who received the support of House Majority Leader Jim Wright (D-Tx.) in July 1983. M.A.D.D. NATIONAL NEWSLETTER, Fall, 1984 at 8.

19 The Commission recommended that states "should immediately adopt twenty-one as the minimum legal purchasing and public possession age for all alcoholic beverages; [and that] "such legislation should provide that the Secretary of the United States Dept. of Transp. disapprove any project under Section 106 of the Federal Aid Highway Act (Title 23 U.S.C.) for any state not having and enforcing such a law. PRESIDENTIAL COMM. ON DRUNK DRIVING, FINAL RPT. at 10. (John Volpe, Chmn.) (Nov. 1983).

20 "Drunk driving is a national menace, a national tragedy and a national disgrace. It is my fervent hope that this report will receive the attention it deserves, and that it will speed the adoption of whatever measures are appropriate to remove this hazard from our national life." PRESIDENTIAL COMM. ON DRUNK DRIVING, FINAL RPT. at i. (John Volpe, Chmn.) (Nov. 1983). (An excerpt from a letter to the American people by President Reagan.)


22 The following is the legislative history of the Drinking Age Act. See Id. for the House of Representatives' first proposal. The Senate's first proposal was S.2719 by Mr. Lautenberg on May 29, 1984, calling for an amendment to Section 6(2), Chapter 1 of Title 23, U.S.C., § 2719 98th Cong., 2d Sess., 130 CONG. REC. S-6456 (daily ed., May 24, 1984).


adding Section 158 titled "National Minimum Drinking Age", which provides that the Secretary of the United States Transportation Department shall withhold five per cent of the amount required to be apportioned to any state under each of sections 104(b)(1), 104(b)(2), 104(b)(5), and 104(b)(6) of Title 23 U.S.C. (Federal Highway Aid Act). The funds are to be withheld on the first day of the fiscal year succeeding the first fiscal year beginning after September 30, 1985, in which it is lawful for a person who is less than twenty-one years of age, to purchase alcoholic beverages or to possess such in public. The percentage of federal highway funds that shall be withheld pursuant to Title 23, U.S.C. Section 158 doubles the following fiscal year for any state that continues to permit the purchase of public possession of any alcoholic beverage by a person under the age of twenty-one.\(^23\)

### III. The Debate: Is There a Need for a National Minimum Drinking Age?

The House Committee on Energy and Commerce drafted the Drinking Age Act in response to the recognition that having differing state minimum drinking ages created an "interstate problem".\(^24\) This lack of uniformity among state laws provides teenagers with an incentive to drink and drive as they cross state borders in search of a lower drinking age.\(^25\) The result of having approximately one-half of the states without a twenty-one minimum is a "crazy quilt of different States' drinking laws and far too many blood borders where teens drive across to reach states with lower drinking ages."\(^26\)

Empirical studies have been conducted which substantiate the "crazy quilt" theory.\(^27\) Generally, the current data shows that raising the legal

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\(^{24}\) See supra note 3.

\(^{25}\) PRESIDENTIAL COMM. ON DRUNK DRIVING, FINAL RPT. at 11. (John Volpe, Chmn.) (Nov. 1983).

\(^{26}\) President's statement to the public, 20 WEEKLY COMP. PRES. DOC. 1035 (July 23, 1984).

\(^{27}\) Cook, The Effect of Minimum Drinking Age Legislation on Youthful Auto Fatalities, 1970-1977, 13 J. LEGAL STUD. 169 (1984). (Study reports that the cumulative effect of minimum drinking age laws during the early 1970's was to cause a substantial increase in 18 to 20 year old automobile fatality rates, averaging about 150 lives per year during the mid-1970's.); Williams, The Effect of Raising the Legal Minimum Drinking Age on Involvement in Fatal Crashes, 12 J. LEGAL STUD. 169 (1983). (Reports a substantial decrease in fatalities among law-affected age groups when states raise their legal minimum drinking age.); Williams, The Legal Minimum Drinking Age and Fatal Motor Vehicle Crashes, 4 J. LEGAL STUD. 219 (1975)(Study that concentrated on border areas of eleven states indicated a significant rise in fatalities in areas that changed their laws.); See also Smart, Effects of Reducing the Legal Alcohol Purchasing Age on Drinking and Drinking Problems: A Review of Empirical Studies, 38 J. STUD ALCOHOL 1313 (1977); Hingson, Impact of Legislation

http://engagedscholarship.csuohio.edu/clevstlrev/vol34/iss4/7
drinking age can be expected to result in an average annual reduction of twenty-eight percent of nighttime fatal automobile crashes involving eighteen to twenty year old drivers. The conclusion of the authors of the studies indicates that raising minimum legal drinking ages will have substantial societal benefits.

The target group of eighteen to twenty year olds has not been chosen arbitrarily. It has been shown that this age group is involved in a disproportionate number of fatal automobile crashes, which have been caused in part, by the contemporary propensity of teenagers to drink more often and to consume more alcohol during social events. While most informed legislators and politicians would agree that there has been a serious increase in the problems associated with youths drinking and driving, not all agree on how to address the problems.

As evidenced by the Congress' expedient passage of the Drinking Age Act, the majority opinion is that a national approach is the solution. There also is a showing that a large majority of the general public is in favor of a national minimum drinking age of twenty-one. The most recent report finds that as of June 1, 1985, twenty-four states will have a strictly twenty-one age limit and at least eighteen other states are considering similar laws. Recently, a group of northeastern governors convened in an effort to ensure that a uniform minimum drinking age is enacted in their region.

Generally the proponents of the Drinking Age Act cite the social benefits of reducing traffic fatalities and protecting the entire public's safety on the highway as the primary reason for the law. The argument that federal intervention is needed is supported by the belief that state legislatures will be slow to act because of special interest group compe-

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*Raising the Legal Drinking Age in Massachusetts from 18 to 20, 73 AM. J. PUB. HEALTH 163 (1983).

28 See PRESIDENTIAL COMM. ON DRUNK DRIVING, FINAL RPT. at 10.
29 See authorities cited, supra note 27.
30 See supra notes 7-9 and accompanying text.
31 The Gallup Poll, released Thurs., Jan. 27, 1983, found that 79% of those persons surveyed favored passage of a 21 drinking age law. Even the 18 to 20 year old age group gave 53% majority approval. Reprinted in N.Y. Times, July 8, 1984, § 1 at 22, col. 3.
33 Bazemore, Efforts to Increase Drinking Age Bolstered, 15 CRIM. JUSTICE NEWSLETTER 5 (Jan. 3, 1984).
tition. This will result in an indefinite postponement of a solution to the problems of "teenage highway carnage."

Because of the disproportionate number of fatalities along the borders of states with differing age limits, the sponsors of the law argue that "teenage highway carnage is an interstate commerce concern properly regulated by the federal legislature." Backed by a legal opinion that even local and intrastate commerce in alcoholic beverages can be regulated by Congress, the proponents of the Act assert that it is constitutional. This opinion has been borne out by recent Supreme Court decisions.

The opponents of the Act raise the issue that, in its current form, the Act treads on the sacred ground of state sovereignty. The argument in favor of the states regulating the drinking age is that, in a culturally diverse democracy, state action is a more effective method of controlling social behavior. Also, the opponents urge that a history lesson proves a new prohibition on drinking will be no more successful in preventing problems associated with alcohol than were the original Prohibition laws. They also argue that arbitrarily denying any age group the right to consume alcohol, punishing those who do not have problems with drinking, is tantamount to age discrimination and inherently unfair.

The main contention of state officials' is their opposition to what is known as the mailed-fist approach used by Congress. The objection of these opponents is that enlargement of the federal role in alcoholic beverage legislation is ineffective and misguided. Finally, those persons in the affected age group oppose the legislation on the grounds that they are being singled out for a problem which affects all age groups. These opponents argue that better education and stricter enforcement of traffic violations would accomplish the goals of the twenty-one drinking age limitation much more effectively than the National Minimum Drinking Age law. They also cite stronger enforcement at the point of sale and higher scrutiny in licensing drivers as furthering the same goals.

Past legislation using federal highway funds to coerce states into adopting the fifty-five mile-per-hour speed limit has resisted constitutional challenges. Speed limit legislation is analogous to the matter at issue in the Drinking Age Act and will serve as precedent for the new law. In response, at least one critic has stated that although "there is no

35 Bazemore, Raising the Drinking Age, 14 CRIM. JUSTICE NEWSLETTER 24, at 1-2 (Dec. 5, 1983).
36 H.R. REP. No. 606, 98th Cong., 2d Sess. 2, at 2, 4 and 5.
37 Id. at 5-7. See also Florio, 70 A.B.A. J. 18 at 23-24.
39 See Bazemore, supra note 33, at 2.
40 N.Y. Times, June 27, 1984, § 1, at 24, col. 2.
42 Id. See also Bazemore, supra note 33, at 2.
right to drive fast,” a case can be made out under the twenty-first amendment that the right to drink is not within the purview of the federal government to prohibit. In fact, there are lawsuits pending in Ohio and South Dakota, which challenge the Drinking Age Act on constitutional grounds. These suits raise tenth and twenty-first amendment objections to the Drinking Age Act. Hence, these two amendments to the Constitution set the parameters for the constitutional debate.

IV. CONSTITUTIONAL CHALLENGES

The most apparent vulnerability of the Drinking Age Act is whether it will withstand a constitutional challenge based on states’ rights under the tenth and twenty-first amendments. These rights will likely be invoked by a state, in its own right, or by an associational plaintiff who can pass the Constitution’s article three “case or controversy” requirements of standing in federal court. Generally, an associational plaintiff must show “injury-in-fact,” that there is a “logical nexus” between its statutes under the challenged law and the controversy it presents and that its interests are within the “zone of interests” affected by the law. There are other putative arguments that individual plaintiffs may assert, such as age discrimination or denial of substantive due process, but these challenges seem more tenuous than those founded on states’ rights. If a plaintiff expects to present a justiciable challenge to the Drinking Age Act, that plaintiff will have to focus on the issues raised when the commerce power of Congress clashes with the tenth and twenty-first amendments.

The lines of analysis used in tenth and twenty-first amendment adjudication bear similarities but have rarely converged in the same

43 See Coleman, supra note 38, at 24. (Ex-Secretary of Transp. Coleman argues that the twenty-first amendment serves as a constitutional obstacle to the Drinking Age Act.)


46 The two suits pending rely solely upon tenth and twenty-first amendment challenges to the Drinking Age Act. South Dakota v. Dole, No. Civ 84-5137 (D.S.D. filed Sept. 21, 1984) relies on the authority of the State Attorney General to bring suit, while Ohio Retail Permit Holders v. Dole, C No. 284-1541 (D. Ohio filed Aug. 23, 1984) involves a suit by an associational plaintiff who has joined a corporation, its president and a nineteen year old resident of Ohio as individual plaintiffs. The complaint alleges the corporation, a saloon, will be forced out of business because of the Drinking Age Act, and that the young man will be deprived of “his right” he lawfully enjoys to purchase and possess liquor. There is no other mention of individual rights being violated and the heart of the complaint relies on the tenth and twenty-first amendment rights afforded to the states.
case. A state's challenge will be the same whether it invokes either amendment as a basis for the Act's unconstitutionality. The analysis used by the Supreme Court will be distinct and separate when it considers each amendment. Therefore, these two areas of Supreme Court analysis warrant separate discussion herein.

V. TENTH AMENDMENT CONSIDERATIONS

A. Commerce Clause v. Tenth Amendment

Throughout American history, the Supreme Court has made several attempts to explain the tension between Congress' power to regulate commerce and the states' right to sovereignty. Beginning with a bold statement in Gibbons v. Ogden47 in 1824 that the Congressional commerce power has broad applications,48 the Court has given us a palinode of decisions reflecting historical political considerations.49 The Court's analysis of the commerce clause, from 1937 through 1976, is more pertinent to the issue at hand because it has created legal principles50

48 Chief Justice Marshall first described the congressional power to regulate commerce as such, "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent; and acknowledges no limitations, other than are prescribed in the constitution." Id. at 196.
49 After Gibbons, but before the passage of the Interstate Commerce Act (1824-1887), the Supreme Court's decisions were inconsistent. Some cases lined up with Gibbons and offered the view that the limitations on congressional commerce power were political rather than constitutional. In other cases, the Court took early steps towards the theory of dual sovereignty which would later limit the power granted to Congress by the commerce clause. See L. Tribe, American Constitutional Law, § 504, n. 6 (1978).

From 1887 to 1937 the Court consistently placed limitations on the congressional power over commerce. Perhaps most of these decisions reflected the political need to allow industry to grow during this period of great industrial growth in the United States. To justify its decisions the Court created a formalistic classification doctrine to judge which activities were subject to regulation under the commerce clause. See e.g., Carter v. Carter Coal Co., 298 U.S. 238 (1936)(holding as unconstitutional the bituminous Coal Conservation Act of 1935 because it regulated "production" and not "trade". United States v. E.C. Knight Co., 156 U.S. 1 (1895)(the Court distinguished between "commerce" and "manufacture").

In NLRB v. Jones Laughlin Steel Corp., 301 U.S. 1 (1937), the Court abandoned its formalistic approach and developed the beginnings of the "substantial economic effect" doctrine, determining that, "[A]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relationship to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." Id. at 37.

50 The "substantial economic effect" doctrine is the first of these doctrines articulated by the Court. It was applied to a very colloquial activity of a wheat farmer consuming his own grain. The Court upheld federal wheat marketing quotas noting that, "[e]ven if [an] activity
that remain salient today, especially in light of the court's decision to overrule *National League of Cities v. Usury*, a landmark case of its time, which gave great deference to state sovereignty.

One such principle is known as the "protective principle." It is a form of federal commerce regulation that imposes protective conditions on the privilege of engaging in an activity that affects interstate commerce or utilizes the channels or instrumentalities of such commerce. The Court has had no difficulty upholding federal legislation that utilizes protective conditions to address activities that are not strictly within the realm of the regulation of commerce. Most often the protective principle applies

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be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'.” *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

The substantial economic effect test seems to be more refined and subject to broader application in “the area of the National interest” under the “determinative test” of the congressional commerce clause power stated in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). “In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is ‘commerce which concerns more States than one’ and has a real and substantial relation to the national interest.” *Id.* at 255.

The Court formulated the “cumulative effect” principle in *Wickard v. Filburn*, 317 U.S. 111 (1942). The principle examines the aggregate economic effects of acts, which taken alone are insignificant and trivial, but which are part of a class of acts whose cumulative effect can reasonably be deemed to have substantial national consequences. The Court held that Congress could control a farmer's home consumption of wheat because the cumulative effect of many farmer's consumption would affect the supply and demand relationship in the interstate wheat market.

The "cumulative effect" test was used by the Court in upholding federal legislation such as; the Consumer Credit Protection Act, 18 U.S.C. §§ 891 et. seq. (1964) in *Perez v. United States*, 402 U.S. 146 (1971); the Civil Rights Act of 1964, 42 U.S.C. § 2000a - 2000a-6 in *Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964). In these decisions, the Court continually speaks of a “class of activities” that congressional fact-findings have found to involve a social evil. *See, e.g.*, *Perez v. United States*, 402 U.S. at 154-55.

The "protective principle" is a tool of the Court used to recognize and permit the use of the commerce clause by Congress to achieve regulation in areas of social or business life that are not strictly commercial. The Court used this principle in upholding the Fair Labor Standards Act of 1938 which provided for minimum wages and maximum hours for employees. The Court states the rudiments of the principle as:

Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to public health, morals or welfare, even though the state has not sought to regulate their use.

*United States v. Darby*, 312 U.S. 100, 114 (1941).

52 *See supra* note 50.
53 *Id.*
to regulation of activities that may be construed as racist, or "injurious to the public health, morals or welfare." It has been generally stated that Congress may impose whatever conditions it sees fit, so long as the conditions themselves violate no independent constitutional prohibition.

The protective principle read in conjunction with the substantial impact doctrine creates a judicial framework which can accommodate the argument that the sale, possession and consumption of alcoholic beverages has a great effect on interstate commerce, whether it be local or truly interstate. The imposition, by Congress, of the Drinking Age Act on the states with conditional withholding of highway funding, is within the congressional power to protect the public welfare. The magnitude of the hazard of drunk driving on our nation's highways may, alone, be considered an umbrella rationale that will justify any subordinate measures taken to ensure that the problem is eliminated.

Assuming that the alcoholic beverage industry has had a substantial economic impact on interstate commerce, the congressional regulation affecting the industry should fall in place with the unbroken string of precedents, in the forty years following the decision in *NLRB v. Jones & McLaughlin*, that granted Congress great latitude to legislate for the public good in deference to states' rights. With the overruling of *Usery*, Congress' authority to enact the Drinking Age Act has been bolstered. Consequently, the Drinking Age Act must be examined in light of contemporary tenth amendment analysis. Traditionally, the Supreme Court then narrowed the doctrine of state sovereignty in subsequent decisions.

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55 *Darby*, 312 U.S. at 114.
56 *Id.*
57 See supra note 50.
60 301 U.S. 1 (1937).

The Court then narrowed the doctrine of state sovereignty in subsequent decisions,
Court has taken differing approaches in this analysis depending on whether the sale of alcohol in a given state is a private commercial function, or a function of the state government.

B. Sale of Alcohol as a Private Function

When the sale of alcohol in a state is a private function, it is highly unlikely that any attack on the constitutionality of the Drinking Age Act will be successful. The Supreme Court affirmatively stated in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, that "[a] wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these law conflict with federal law."\(^{62}\)

The case law that is exemplified by this quote from *Hodel* indicates that it would be futile to attempt an attack on the Drinking Age Act in a state that allows the purveyance of alcohol as a private function.\(^{63}\)

C. Sale of Alcohol as a State Government Function

When the sale of alcohol is primarily a function of the state government, by and through its agents, analysis of its constitutionality is not as cut and dry as it is under private function law. In the past decade there has been a strong sentiment that "there are attributes of state sovereignty attaching to every state government which may not be impaired


Consequently, the *Usery* doctrine suffered a major setback in *EEOC v. Wyoming*, 460 U.S. 226 (1983). The Court held that the Age Discrimination in Employment Act did not violate the tenth amendment. The Act is very similar to the Fair Labor Act invalidated in *Usery*. The Court did not overrule *Usery* but placed a greater emphasis on a "balancing approach" to tenth amendment analysis. In *EEOC*, the Court gives greater significance to the one paragraph concurring opinion of Justice Blackmun in *Usery*, in which he states, "[i]t seems to me that it [the Court] adopts a balancing approach" *Usery*, 426 U.S. at 856. See, e.g., *Note, National League of Cities v. Usery to EEOC v. Wyoming: Evolution of a Balancing Approach to Tenth Amendment Analysis*, 1984 DUKE L. J. 601 (1984).

Finally, the doctrine of state sovereignty as it was articulated in *Usery* has been replaced by the tenant that states' rights are protected by "the solicitude of the national political process [which provides] for the continued vitality of the States." *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985). The ruling in *Garcia* hails a new era in Federalism and returns our national political process to pre-*Usery* doctrine. *See supra* notes 47-59 and accompanying text.

\(^{62}\) *Hodel*, 452 U.S. at 290.

by Congress." Consequently, one must still consider the vestiges of state sovereignty that remain in the wake of Garcia v. San Antonio Metro. Transit Authority, which expressly overruled Usery v. National League of Cities. In the Garcia opinion, the Court posits that, "[I]f there are to be limits on the Federal Government's power to interfere with state functions—as undoubtedly there are—we must look elsewhere to find them."67

Prior to Garcia it was necessary to go through a cumbersome four-tiered analysis to determine when force of state immunity from federal regulation would apply. Application of the rule of state immunity depended on judicial appraisal of whether a particular governmental function could be classified as an integral or traditional function in the particular state. This appraisal came from the principles enunciated in Usery.68 However, Garcia expressly rejects the use of the traditional governmental function rule "as unsound in principle and unworkable in practice" because the "rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance."70

The infirmities of the Usery doctrine did not go unnoticed by academia. Many critics assailed the Usery tests as ambiguous and confusing.71

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64 Usery, 426 U.S. at 845.
66 The Garcia opinion has "once again settled" the debate concerning Federalism. The Court has changed directions in this note case and severely limited state immunity from federal regulations. The doctrine of state sovereignty, which protected traditional or integral functions of state governmental has gone by the wayside. Specifically, the Court held that San Antonio Metropolitan Transit Authority (SFMTA) was not immune from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA). (The same law at issue in Usery.) The Court determined that the attempt to judicially appraise the nature of traditional governmental functions was unworkable and inconsistent with established principles of federalism. In essence the commerce power was given back the clout that was temporarily diminished by the Usery rhetoric. The integrity of the political interplay between Congress and State has been renewed as the primary guarantee against the overextension of the commerce power.
67 469 U.S. at 547, emphasis added.
68 Usery established three tests, each of which had to be met before federal legislation would be invalidated. They were: (1) the federal statute must regulate the States as States; (2) the federal regulation must address matters that are indisputably attributes of state sovereignty; (3) it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions. The fourth test was a balancing test that was added in subsequent decisions and was applied even if the three preceding requirements were not all met, provided the federal interest was so great as to justify state submission.
69 Garcia, 469 U.S. at 546.
70 Id. at 547.
Therefore, it is clear that any challenge against the Drinking Age Act's constitutionality, based on the doctrine that traditional state governmental functions are immune from federal regulation, is for naught in the post-\textit{Garcia} view of Federalism.\textsuperscript{72}

Any viable attack on the constitutionality of Congress' power to enact the Drinking Age Act will be primarily based on a twenty-first amendment premise. However, the tenth amendment's reservation of sovereign powers is not obliterated by the \textit{Garcia} decision. "The States unquestionably do `retain[ ] a significant measure of sovereign authority.'"\textsuperscript{73} A well reasoned challenge of the Act will encompass those aspects of state sovereignty that can be gleaned from reading the tenth and twenty-first amendments in tandem. After all, these amendments are still integral parts of the Constitution which has given meaning to all the freedoms and choices we hold dear in this democracy. The Court asserts that, "the text of the Constitution provides the beginning rather than the final answer to every inquiry into question of federalism.

Because the twenty-first amendment seemingly grants the states power over the control of liquor within its borders; an opponent of the Drinking Age Act may use the tenth amendment's grant of "those powers . . . reserved to the states,"\textsuperscript{74} as persuasive authority while arguing the merits of the twenty-first amendment's grant of authority to the states. That amendment gives an individual state the power to regulate alcohol as it deems appropriate. Therefore, the tenth amendment may still play a role in the opposition to the Drinking Age Act, but in light of \textit{Garcia} it will merely be a perfunctory one.

The \textit{Garcia} Court makes it very clear that the federal judiciary should not be given the authority to determine which state policies are legitimate and which are not.\textsuperscript{75} This policy has the overture of a death knell for any challenge to the Drinking Age Act in federal court. The language that the majority uses in \textit{Garcia} specifically refutes the \textit{Usery} traditional governmental functions doctrine. However, the precedent of \textit{Usery} should


\textsuperscript{72} The two lawsuits filed shortly after the passage of the Drinking Age Act based their constitutional challenges on the \textit{Usery} doctrine of state sovereignty. \textit{E.g.}, State of South Dakota v. Dole, No. CIV 89-5137 (D.S.D. filed Sept. 21, 1984); Ohio Retail Permit Hodlers v. Dole, C. No. 284-1541 (D. Ohio filed Aug. 23, 1984).

\textsuperscript{73} 469 U.S. at 549. (Quoting from EEOC v. Wyoming, 460 U.S. at 269).

\textsuperscript{74} U.S. \textit{Const. amend. x.}

\textsuperscript{75} "Any rule of state immunity that looks to the `traditional' . . . nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." 469 U.S. at 546.
not be disregarded in any challenge, because the dissent in Garcia is strong, and Justice Rehnquist states in his short soliloquy that he is confident the Usery approach will in time commend the majority of the Supreme Court.66

To counter the dissent, the majority in Garcia emphasizes that state sovereign interests are more effectively protected by the very structure of the federal system than by judicially created limits on the federal power. The majority sums up its opinion in Garcia by asserting that, "[t]he political process ensures that laws that unduly burden the States will not be promulgated."77 In essence, the internal safeguards built into our federal system with its separation of powers, and checks and balances, is all that is necessary to ensure states' rights. The majority goes on to say that the bench in Usery underestimated the solicitude of the national political process and in doing so, "the Court tried to repair what did not need repair."78

Because the Drinking Age Act was proposed and passed by locally elected representatives of Congress, the state's will has been done. Any individual state that desires to challenge the viability of the newly reaffirmed federal system will have to wait until the composition of the Court changes in such a way as to support Justice Rehnquist's prediction.

VI. TWENTY-FIRST AMENDMENT CONSIDERATIONS

A. Generally

The most difficult issue concerning the constitutionality of the National Minimum Drinking Age Act is contained in the twenty-first amendment. Section one of the amendment repealed Prohibition; section two provides that "[t]he 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." The controversy over the Act will center on whether the preservation of states' rights in the amendment will void the Congressional enactment made under the commerce power.

Section two of the amendment has been the subject of considerable academic and judicial interpretation. Historically, it has been interpreted in two opposing manners.79 These views are known as the "absolutist"

66 Id. at 579.
67 Id. at 556.
68 Id. at 557.
70 Note, The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors, 75 Colum. L. Rev. 1578, 1579-81 (1975); Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment, 72 Harv. L. Rev. 1145, 1147 (1959).
view, which states that section two of the twenty-first amendment gives the states absolute power over the possession and sale of liquor within its boundaries; and the "federalist" view, which declares that section two provides the states wishing to remain alcohol-free the power to do so, but retains in Congress the power over interstate commerce in alcohol. The "federalist" position seems to be the more readily accepted view in modern times.80

B. National History of Alcohol Regulation

In the late nineteenth century, the alcoholic beverage industry had reached national proportions which prompted the first federal attempts to regulate the flow of alcohol among the states. The first enactment was the Wilson Act in August of 189081 which provided that upon arrival in a state, liquor would be subject to the laws of the state as if it were domestic liquor. The manner in which the Supreme Court construed the Wilson Act spawned a massive interstate traffic in mail order package liquor.82 In response to what it perceived as an abuse of the law in dry states, Congress passed the Webb-Kenyon Act83 of 1913, making it a federal offense to transport liquor into a state in contravention of its laws, and further provided that the state law takes effect when the liquor reaches its borders. The purpose of the Act was to protect dry states and give them a higher degree of control over alcohol brought into the state. Commentators on the history of the Webb-Kenyon Act have interpreted it as belonging to the "federalist" tradition.84 It is generally considered to be an impediment to congressional commerce power but not a grant of plenary authority to the states' control over liquor.

82 Scott v. Donald, 165 U.S. 58 (1897)(the states could not forbid importation from another state); Rhodes v. Iowa, 170 U.S. 412 (1898)(the state control did not take effect until received by the consignee because "arrival" was construed to mean delivery to him rather than arrival in the state).
83 37 Stat. 699 (1913), (codified at 27 U.S.C. § 122 (1984)) (passed March 1, 1913). "The shipment or transportation . . . of any liquor . . . from one state . . . into another . . . to be received, possessed, sold or used . . . in violation of any law of such state . . . is prohibited." The Webb-Kenyon Act was held constitutional in Clark Distilling Co. v. Western Maryland R.R., 242 U.S. 311 (1917), on grounds that the plenary power of Congress over interstate commerce justified its delegation of power to the states in this instance.
The regulation of problems developing in the interstate trafficking of alcohol was rendered moot by the passage of the eighteenth amendment in 1919. For the next fourteen years, the interstate commerce of alcoholic beverages became illegal. It was under this cloud of regulation and prohibition that the debates on the ratification of the twenty-first amendment began in 1933.

The legislative history of the twenty-first amendment is ambiguous because it is not quite clear under which theory (federalist or absolutist) the amendment was passed. Senator Blaine, Chairman of the Senate Judiciary Committee in 1933, made statements supporting both theories. He ultimately stated to Congress that the intention of the drafters was merely to incorporate the Webb-Kenyon Act into the Constitution. Thus, the passage of section two of the twenty-first amendment was "but a restatement of the Webb-Kenyon law already on the law books, which would write into the Constitution the right of the dry states to have federal protection against the importation of liquor." While it is not clear under which theory it was adopted, it is evident that a legislative federalist intention can be read into the twenty-first amendment. Considering the contemporary movement of the Supreme Court towards a federalist interpretation of the twenty-first amendment in its latest decisions, no further inquiry into the legislative intent of its framers will be made.

The Court has meted out the intent and purpose of the amendment over the years and seems content to rest on what it has already presented. In fact, the Court recently stated that it chooses to focus on the language of section two of the twenty-first amendment rather than the legislative history behind it.

C. Early Supreme Court Position

The Supreme Court, in its early decision interpreting the amendment, sided with the "absolutist" position upholding states' rights to exercise considerable control over liquor. Its first major decision was State Bd. of Equalization v. Young's Market Co., which granted states plenary

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85 "After one year from the ratification of this article the manufacture, sale of transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. CONST. amend. XIV.
87 76 CONG. REC. 64 (1933).
88 76 CONG. REC. 4141 (1933).
89 Statement of Sen. Bingham, 76 CONG. REC. 4228 (1933).
91 299 U.S. 59 (1936).
power over importation of alcohol from other states. The court upheld a
California statute requiring a license fee for the privilege of importing
beer, a law the Court noted would not have been permissable before the
twenty-first amendment. 92
Justice Brandeis continued to afford the states even greater power in
the three subsequent opinions he authored on the subject. Mahoney v.
Joseph Triner Corp. 93 gave the twenty-first amendment priority over the
fourteenth amendment in an equal protection clause challenge. The
petitioner's contention that state restrictions on the importation of
foreign liquor were discretionary toward him was squarely rejected by
Brandeis. In Indianapolis Brewing Co. v. Liquor Control Comm'rn94 and
Joseph S. Finch & Co. v. McKittrick, 95 the Court found that "[s]ince the
Twenty-first Amendment as held in the Young case, the right of a state
to prohibit or regulate the importation of intoxicating liquor [was] not
limited by the commerce clause." 96 The rationale of Young's Market
was sustained through these opinions and was solidified in Ziffrin v.
Reeves, 97 which gave the states "absolute" authority over the control of
alcoholic beverages within their boundaries. Further, the Court gave the
states a blanket power to adopt measures "reasonably appropriate" to
exercise their police power over alcohol. 98 This type of thinking
dominated the Court's opinions, with few exceptions, 99 over the next
twenty-five years.

92 Id. at 62.
93 304 U.S. 401 (1938).
94 305 U.S. 391 (1939).
95 305 U.S. 395 (1939).
96 305 U.S. 391, 394 (1939). Also Justice Brandeis reaffirmed that "[T]he substantive
power of the State to prevent the sale of intoxicating liquor is undoubted." Id.
97 308 U.S. 132 (1939).
98 Id. at 139.
99 There are two areas of alcohol regulation in which the Court found no problem
limiting the states' power. They are: foreign importation and exportation and shipments to
(per curiam), the Court held that the states did not have exclusive power over alcohol
imported from abroad. The Court sidestepped the issue of federal power confronting the
twenty-first amendment. The opinion in Dept. of Revenue v. James B. Beam Distilling Co.,
377 U.S. 341 (1964) went along the same lines, holding that the states cannot levy an
importation tax on imported liquor because it contravened the export-import clause of the
Constitution.

The next major restriction to the states' plenary power over liquor came in Collins v.
Yosemite Park & Curry, Co., 304 U.S. 518 (1938), where the Court rejected the State of
California's contention that the twenty-first amendment gave it the power to regulate and
tax liquor shipped into the Yosemite National Park. The Court reasoned that there was not
transportation into California "for delivery or use therein," and therefore, the State was
powerless to regulate the shipments. Id. at 538.
The transition of the Court from an "absolutist" position to a "federalist" position was a smooth one. As noted, the absolutist position has been chipped away and seems to have met its demise in the last two decades. The twenty-first amendment has been used as a challenge to major constitutional provisions, other than the commerce clause, and has failed to prevail over them. This fact strengthens the argument that the plenary power of the states is eroding.

Under its current mode of analysis the Court has considered the conflict of the twenty-first amendment with the federal commerce power in two major cases, Hostetter v. Idlewild Bon Voyage Liquor Corp. (1964) and California Retail Liquor Dealers Ass'n. v. Midcal Aluminum (1980). These two decisions are the key to determining the constitutionality of the Drinking Age Act. Just as in tenth amendment analysis, the Court has developed a balancing approach to weigh the federal power under the commerce clause against the states' power granted by the twenty-first amendment.

100 See supra note 99 and the cases discussed therein. See also Nippert v. Richmond, 327 U.S. 416, 425 n.15 (1946)(commerce clause vs. state taxing authority at issue). The Court made a chip in the "absolutist" position when it included this footnote in its opinion:

Thus, even the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the states the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the state's regulation squarely conflicts with regulation imposed by Congress . . .

101 See Dept. of Revenue v. James B. Beam, 377 U.S. 341 (1964). Taking another chip at the twenty-first amendment powers of the states the Court explained that:

To sustain the tax which Kentucky has imposed in this case would require nothing short of squarely holding that the Twenty-first Amendment has completely repealed the Export-Import Clause so far as intoxicants are concerned. Nothing in the language of the Amendment nor its history leads to such an extraordinary conclusion.

377 U.S. at 345-46.

See also Craig v. Boren, 429 U.S. 190 (1976). The Court reasons that neither the text nor the history of the amendment suggests that it qualifies individual rights protected by the fourteenth amendment. The Court struck down an Oklahoma statute that violated the equal protection clause by discriminating between males and females in the sale of beer to the 18-20 age group. In Wisconsin v. Constantineau, 400 U.S. 433 (1971), the Court held that a Wisconsin act, which allowed city officials to post lists of persons who drank excessively so as to be a threat to the peace, violated the individual's procedural due process rights. It recognized that such an action of "labeling" was too serious a matter to be permitted without notice and a hearing. Most recently, the Court, in Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982), struck down a Massachusetts statute allowing churches and schools to veto liquor license applications by restaurants within a 500 foot radius of these institutions, as violative of the establishment clause of the first amendment. The state could not delegate power over liquor in a manner that infringes on the establishment clause.


D. The "Accommodation" Theory

The Court in *Idlewild* made an affirmative ruling that the commerce clause does act as a check on the broad powers granted to the states over alcoholic beverage regulations. Justice Stewart recanted the Court's early absolutist position that a state is totally unrestricted by the commerce clause to control alcohol within its borders, and he cites the key decisions that have elucidated this proposition. He then goes on to qualify the precedential value of these opinions with the oft-quoted passage:

To draw a conclusion from the line of decisions that the Twenty-first Amendment somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd over simplification. If the Commerce Clause had been pro tanto 'repealed', then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect.

The next line in the opinion gives effect to the proposition that the commerce clause does limit the twenty-first amendment. Justice Stewart then pronounces the "accommodation principle" as such: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case."

Accommodation of the twenty-first amendment with the commerce clause led the *Idlewild* Court to the conclusion that the states could not...
prevent transactions exercised under the protection of the laws passed by Congress when that body exercises its commerce power to regulate commerce with the foreign nations. In a later decision, the Court gave the "accommodation principle" of Justice Stewart a more general interpretation such that, "competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case'". These statements of principle are of great significance in determining the constitutionality of the Drinking Age Act, because they provide the judicial authority to balance the federal interests of highway safety and preservation of life against the alleged sovereign rights of states to sell alcoholic beverages and determine their own minimum drinking age.

In Idlewild, the federal interest was the freedom of international trade as facilitated by the Bureau of Customs. Opposing it was the state's interest in assuring that the sales of liquor would be subject to public scrutiny and governmental regulation. It seems that at the heart of all liquor control statutes and regulations therein lies a public policy that consumers must be protected, whether it be through laws regulating the manufacture, distribution, sale, consumption or use of alcohol, or through the enactment of tougher criminal sanctions for behavior arising from the abuse of alcoholic beverages. This public policy is inherent in the language of the twenty-first amendment because it was enacted to enable dry states to remain dry. Hence, the "traditional" grant of authority to the states to control and regulate alcoholic beverages within their borders took effect.

Arguably, it is wise to leave the power to protect the people with the unit of government best suited to provide the protection that the people are entitled to receive under the law. However, by subjecting a "traditional" state interest based on this public policy to a balancing against the federal commerce clause interest, the Court has made a momentous shift in Idlewild as to how it decides controversies arising between the commerce clause and twenty-first amendment powers.

By determining the federal interest in international trade (which arguably affects a vastly smaller number of American citizens than those affected by drunk driving) to be greater than state regulation of liquor, the Court has, by association, opened the door to consideration of a wide range of domestic interests. It also has shed new light on the relative strength of the federal regulatory role in the alcoholic beverage industry. This can be argued because the regulation of commerce among the several states and foreign nations are concurrent powers of Congress, included in the same clause of the Constitution. Where it can be shown that deference to state sovereignty over the years, under the traditional

109 Mideal, 445 U.S. at 110.
110 377 U.S. at 325-32 nn. 1 and 2.
public policy of the twenty-first amendment, has in fact contributed to the creation of the special problem of teenage drunk drivers crossing state borders in pursuit of otherwise unavailable alcohol, it is probable that the Court will consider the Drinking Age Act as a plausible solution to the problem. It will likely accommodate the Act in the same light as the states' rights afforded by the twenty-first amendment.

The federal interest furthered by the Drinking Age Act supports the values of temperance and protection of the public welfare. These values represent the core of the twenty-first amendment. It seems ludicrous to convolute the amendment simply in the name of tradition. Considering the Court's willingness to uphold these values, it is likely they will be willing to break the fifty years of tradition favoring state oriented solutions to alcohol problems. Thus, by blending the concept of dual sovereignty with the accommodation principle, the Court can make the argument that the public welfare is being served in a proper manner, under the federal Constitution, through enactment of the Drinking Age Act.

Through recognition of the accommodation principle, the Court seems willing to shift its focus away from the traditional protective role of the states and is more apt to consider a "non-traditional" federal approach to a national problem not easily addressed by individual state actions. In other words, it will "accommodate" a federal protective interest under the commerce power where there is potential conflict with states' interests under the twenty-first amendment. This does not mean that greater emphasis is being placed on federal approaches to alcohol related problems. A more credible assessment is that the Court, now more than ever, will adjudicate in favor of the public health, safety and morals by accommodating the interest best suited to this end, whether it be state or federal.

This was the obvious objective of the Supreme Court in California v. La Rue. The case did not involve a federal interest question, but did use the accommodation principle in considering the twenty-first amendment in light of the first and fourteenth amendments. The controversy arose when liquor license holders and topless dancers challenged the constitutionality of state regulations prohibiting sexually explicit entertainment in licensed bars and nightclubs. The Court concluded that the states' interest in protecting the public safety, health and morality was

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112 After hearing evidence at public hearings relating to sexually explicit entertainment in "topless" and "bottomless" bars and nightclubs, which evidence indicated that sexual contact had taken place between customers and entertainers, and that rape, prostitution, indecent exposure and assaults on police officers had taken place on or immediately adjacent to the licensed premises, the California Dept. of Alcoholic Beverage Control promulgated regulations prohibiting certain specified acts. Id. at 110-11.
greater than the dancers' freedom of expression under the first amendment. Consequently, the state law was held to be constitutional even though a couple of the "specified acts" would have been protected under the first amendment if they had been at issue outside the context of the twenty-first amendment. The essence of *La Rue* is that the Court pursued a policy of public protection and implicitly upheld the value of temperance, which is inherent in the twenty-first amendment.

Some commentators state that *La Rue* has been hailed as a return by the Court to its former position that states have broad and plenary powers under the twenty-first amendment. To read *La Rue* in this manner is to misconstrue the Court's disdain for lewd and obscene acts as a repudiation of its recent accommodation approach. The Court is willing to downplay what it considers the "barest minimum of protected expression" in favor of the state's interest in preventing social harms. The grant of power to the State of California in this opinion springs from the twenty-first amendment through the filter of the balancing process, which indicates the Court has not abandoned the accommodation principle. Also, this opinion can be narrowly read to have no reach beyond the zone where the first and twenty-first amendments cross paths.

The authority of the commerce clause and the continued viability of the accommodation principle are manifested in *California Liquor Dealers Assoc. v. Midcal Aluminum*. The Court invalidated a state statutory plan for resale price maintenance of wine as violative of the Sherman Antitrust act. The state's presentation of the twenty-first amendment as a shield from the reach of the federal statute was not endorsed by the Court. The Court was unwaivering in making its argument that the...
federal interests in a competitive economy prevailed over the state's interest in orderly market conditions.\textsuperscript{119}

Justice Powell, when writing this opinion, followed the lead of Justice Stewart in \textit{Idlewild}.\textsuperscript{120} He undertook the same perfunctory task of placing the earlier decisions in their proper historical perspective\textsuperscript{121} and then went on to quote the pivotal language of \textit{Idlewild}.\textsuperscript{122} Justice Powell establishes a pragmatic approach to harmonizing federal and state powers over liquor because he recognized that, historically, there has been no "bright line" between them.\textsuperscript{123} This accommodation analysis lends itself easily to the proposition of this Note: that the balancing process is alive and well and will be utilized if and when the Drinking Age Act's constitutionality is tested in our highest Court.

Further support that a federal interest, as expressed through a statute, can withstand a challenge based on an amendment to the Constitution, comes from \textit{Midcal}. The Court emphasized the relative importance of the Sherman Act, as it prevailed in this case over the twenty-first amendment, with the following passage, "[a]lthough the federal interest is expressed through a statute rather than a constitutional provision, Congress 'exercis[ed] all the power it possessed' under the Commerce Clause when it approved the Sherman Act."\textsuperscript{124} Undoubtedly, this judicial recognition gives the Drinking Age Act clout since it, too, is exercised under the power of the commerce clause. Justice Powell also gives implicit recognition to the relative strength of the commerce clause when it is used to validate a federal interest in protecting its citizens.

As general precedential value, \textit{Midcal} stands for the proposition that a competitive economy, essential to the individual consumer's needs and well-being, is more important than a state's interest in exerting control over one aspect of the sale of liquor. By way of analogy, the assurance of safe highways, essential to the health and welfare of individual citizens, has great potential value as precedent when used as a proposition to challenge a state's interest in assuring that its eighteen to twenty-year-old residents are free to buy alcoholic beverages.

\textit{Midcal}, 445 U.S. at 112-14.

This action by the Court signifies that it will not be sufficient to merely beat the drum of temperance as the legitimate interest behind a law, without showing some substantial relationship between the statute and its effect on alcohol consumption.

\textsuperscript{119} 445 U.S. at 110-11.
\textsuperscript{120} 377 U.S. 324 (1964).
\textsuperscript{121} 445 U.S. at 106-08.
\textsuperscript{122} \textit{Id.} at 109.
\textsuperscript{123} \textit{Id.} at 110.
\textsuperscript{124} \textit{Id.} at 111 (quoting Atlantic Cleaners & Dryers v. United States, 286 U.S. 427, 435 (1932)).
In summary, *Midcal* affirms the rationale of accommodation which began in 1964 with the *Idlewild* opinion. It serves as a stepping stone in the development of this process, and as such, provides the conceptual groundwork the Court [should] utilize as the controversy over control of intoxicating liquors takes shape in the remaining half of the 1980's. The Minimum Drinking Age Act of 1984 is a controversial law because, once again, Congress has taken bold initiatives in an area where some would say it has no power to regulate.

VII. CONCLUSION

The National Minimum Drinking Age Act of 1984 will surely create local controversy as the separate states are forced to legislate a uniform minimum drinking age of twenty-one. The academic and political worlds offer divergent opinions as to the law's propriety, effectiveness and fairness to the youth groups affected by the Act.125 As noted, the constitutional issues are not well settled. The informal legal opinions related to the law offer reinforcement for argument both pro and con. The weight of the legal authority that will likely be relied on seems to favor the Act's constitutional soundness.

As is always the case in this democracy, the courts will speak and settle the issue.126 The Supreme Court of the United States is likely to be the final arbiter of the controversy. Under the Court's most recent approach to the tenth amendment in *Garcia*, the Act will easily clear this hurdle. The most interesting and novel challenge will arise as the tenth and twenty-first amendments intersect. The Court in its twenty-first amendment analysis is willing to "accommodate" that legislative interest, either federal or state, which most effectively addresses the problem a law seeks to alleviate.

Turning to the interests being asserted, it can be summarized that the federal interest of the Drinking Age Act is to curb highway deaths of teenagers who drink and drive. The Act also protects the general motoring public. On the other hand, the states have a legitimate interest in asserting their sovereign decision making authority and practicing "home-rule" in determining what is best for their residents.

The need for a uniform and consistent national drinking age law is obvious.127 Because young people have traditionally been the beneficiaries of special governmental protection, it appears the federal interest will prevail. Congress has used a legitimate, reasonable and previously

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125 See *supra* notes 24-46 and accompanying text.
126 See *supra* note 24.
127 See *supra* notes 24-29 and accompanying text.
tested approach\textsuperscript{128} to coerce the state sovereign will. This approach now appears stronger in post-\textit{Usery} jurisprudence than ever before. On the strength of the \textit{Garcia} decision and the "accommodation" of strong federal interests, the Act will survive any legal challenges it faces.

\textbf{KEVIN KADLEC}

\footnotetext{\textsuperscript{128} During the Sixties the withholding of highway funds was used to compel states to set their billboard advertising away from the highways, and in the Seventies the same approach was used to bring about a national uniform speed limit of fifty-five miles per hour.}