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# Distracted Driving: How Technological Advancements Impede Highway Safety

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## I. INTRODUCTION

Traffic safety has long been a concern of the United States' legal system.<sup>1</sup> In 1966, the passage of the Highway Safety Act and the National Traffic and Motor Vehicle Safety Act empowered the federal government with the authority to "set and regulate motor vehicle and highway standards."<sup>2</sup> Subsequent improvements in automotive design resulted in a decline of vehicle-related deaths.<sup>3</sup> Despite these promising consequences, not all safety requirements were readily embraced.<sup>4</sup>

One of the most controversial requirements involved safety restraint systems, namely seatbelts.<sup>5</sup> Although vehicles came equipped with seatbelts, drivers and passengers retained the discretion to buckle up or not.<sup>6</sup> Misconceptions about the benefits of seatbelts thwarted the federal government's efforts to encourage seatbelt use.<sup>7</sup> Eventually, the National Highway Traffic Safety Association proposed that automotive manufacturers equip every vehicle with "an automatic restraint system."<sup>8</sup> State legislatures followed suit and began enacting mandatory seatbelt-

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1. See Toni Gantz & Gretchen Henkle, *Seatbelts: Current Issues*, UNIV. OF BERKELEY TRAFFIC SAFETY NEWSLETTER 1 (2002), available at <http://www.preventioninstitute.org/component/jlibrary/article/download/id-355/127.html>.

2. *Id.* at 3.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* Common misconceptions included that "seatbelts would prevent occupants from escaping if their vehicle went underwater or caught on fire," and that "the additional safety provided by the belt" would incentivize drivers to engage in "risky driving behavior." *Id.*

8. *Id.*

use laws.<sup>9</sup> Today, every state, except New Hampshire, has a law requiring all vehicle occupants to wear a seatbelt.<sup>10</sup>

Although seatbelt-use laws proved to be one victory in the promotion of highway safety, new hurdles have emerged. Recently, distracted driving has become a pressing safety concern, especially as it relates to the use of cell phones.<sup>11</sup> In fact, text messaging while driving has been deemed the modern-day form of drunk driving.<sup>12</sup> The manifestation of the dangers posed by cell phone use while driving has ignited a vehement response by federal and state legislatures.<sup>13</sup> Much like the passage of seatbelt use laws, opposition to laws prohibiting cell phone use while driving exists, and the best methods for enforcement remain an ongoing obstacle.<sup>14</sup>

The purpose of this Comment is to examine the evolution of distracted driving, its ramifications upon society, and solutions to ameliorate this pressing problem. Distracted driving is a broad concept encompassing various acts.<sup>15</sup> However, this Comment focuses mainly on the use of cell phones, including the act of text messaging, to analyze the distracted driving problem.

Part II of this Comment defines and explains distracted driving. Part II also uses statistics to demonstrate how pervasive the distracted driving problem has become. Additionally, Part II presents a survey of various state laws and proposed federal legislation, both of which seek to remedy the dangers caused by the use of cell phones while driving.

Part III analyzes the constitutionality of the proposed federal legislation and suggests ways to improve certain provisions. Next, Part III presents a new method of preventing distracted driving as an alternative to traditional avenues for resolving highway safety issues. Part III then considers criticisms of the new text messaging while driving laws, including problems with enforcement. Part III also discusses a recent United States Supreme Court decision addressing Fourth Amendment issues arising from the use of electronic devices, and the effects that decision will have upon laws prohibiting text messaging while driving.

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9. *Id.*

10. *Id.* at 4.

11. See generally U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., AN EXAMINATION OF DRIVER DISTRACTION AS RECORDED IN NHTSA DATABASES 1 (2009), available at <http://www-nrd.nhtsa.dot.gov/Pubs/811216.pdf> (providing data demonstrating the increased number of accidents involving driver distraction).

12. See Matt Richtel, *U.S. Withheld Data Showing Driving Risks*, N.Y. TIMES, July 21, 2009, available at <http://www.nytimes.com/2009/07/21/technology/21distracted.html>.

13. See *infra* notes 37-62 and accompanying text.

14. See *infra* notes 41-53 and accompanying text.

15. See *infra* notes 17-20 and accompanying text.

Finally, Part IV of this Comment reflects upon the current problems associated with laws prohibiting text messaging while driving, and concludes with considerations for addressing distracted driving concerns into the future.

## II. BACKGROUND

### A. *What is Distracted Driving?*

Distracted driving occurs when a driver “is delayed in the recognition of information needed to safely accomplish the driving task because some event, activity, object, or person within or outside the vehicle compels or induces the driver’s shifting attention away from the driving task.”<sup>16</sup> Distractions emerge in various forms, including “visual, something that takes your eyes off the road; cognitive, something that takes your mind off the road; or manual, something that takes your hands off the wheel of the vehicle.”<sup>17</sup> The critical feature that defines distracted driving is “the presence of a triggering event.”<sup>18</sup> Some common examples of driving distractions include eating, drinking, and tuning the radio.<sup>19</sup> One of the most prominent and prevalent forms of distracted driving, however, involves the use of cell phones.<sup>20</sup>

### B. *A Statistical Overview*

The proliferation of cell phone use has been dramatic; over 270 million people in the United States today have cell phone subscriptions.<sup>21</sup> While cell phones provide several obvious benefits, including improved communications and internet access, these electronic devices have also

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16. JANE C. SUTTS, DONALD W. REINFURT, LOREN STAPLIN & ERIC A. RODGMAN, *THE ROLE OF DRIVER DISTRACTION IN TRAFFIC CRASHES 3* (2001), available at <http://www.aaafoundation.org/pdf/distracton.pdf>.

17. JESSE WHITE, *DISTRACTED DRIVER’S TASK FORCE FINAL REPORT 3* (2008), available at [http://www.sos.state.il.us/departments/drivers/traffic\\_safety/ddtaskforcefinalreport08.pdf](http://www.sos.state.il.us/departments/drivers/traffic_safety/ddtaskforcefinalreport08.pdf).

18. SUTTS ET AL., *supra* note 16. “[A] triggering event distinguishes a distracted driver from one who is simply ‘lost in thought.’” *Id.*

19. See *Cyber Drive Illinois*, *Distracted Driving*, [http://www.sos.state.il.us/departments/drivers/traffic\\_safety/distracted.html](http://www.sos.state.il.us/departments/drivers/traffic_safety/distracted.html) (last visited Nov 17, 2009) (listing several other common examples of driving distractions).

20. See Matt Richtel, *Dismissing the Risks of a Deadly Habit*, N.Y. TIMES, July 19, 2009, at A1. Studies show that “drivers using phones are four times as likely to crash as other drivers.” *Id.*

21. See NAT’L SAFETY COUNCIL, *SUMMARY OF ESTIMATE MODEL, 1* (2009), available at [http://www.nsc.org/news\\_resources/Resources/Documents/NSC%20Estimate%20Summary.pdf](http://www.nsc.org/news_resources/Resources/Documents/NSC%20Estimate%20Summary.pdf).

presented an increasing problem in one specific context: distracted driving.<sup>22</sup>

In 2008, over five thousand fatal car accidents involved driver distraction.<sup>23</sup> Put another way, sixteen percent of the total number of reported vehicle-related fatalities involved driver distraction during that year.<sup>24</sup> The automobile crashes associated with distracted driving, however, are not solely limited to fatalities; over two million people were injured in motor vehicle traffic crashes in 2008, and twenty-two percent of those injuries involved driver distraction.<sup>25</sup>

Although these statistics encompass the general ambit of distracted driving activities,<sup>26</sup> the high volume of drivers who use cell phones has only exacerbated the distracted driving problem.<sup>27</sup> Research shows that drivers who talk on their cell phones are “four times as likely to crash than other drivers, and are as likely to cause an accident as someone with a 0.08 blood alcohol content.”<sup>28</sup> Even so, sixty-four percent of drivers who have a cell phone in their vehicle reported that they “always or usually answer incoming phone calls.”<sup>29</sup>

Text messaging while driving has also proved problematic. One study suggests that in 2008, text messaging while driving accounted for an additional three percent of automobile crashes caused by the use of a cell phone.<sup>30</sup> Recognizing that the use of cell phones while driving is an impending problem that threatens the safety of those traveling, several states have begun enacting laws to thwart the substantial number of automobile crashes that occur each year as a result of cell phone use.<sup>31</sup>

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22. *Id.*; see also Matt Richtel, *Federal Agency Plans Distracted Driving Forum*, N.Y. TIMES, Aug. 4, 2009, available at <http://www.nytimes.com/2009/08/05/us/politics/05drive.html>. The federal government’s plan for a “distracted driving summit . . . underscore[s] the growing focus on the dangers of texting and talking behind the wheel.” *Id.*

23. See U.S. DEP’T OF TRANSP., *supra* note 11, at 3. “In those crashes reported to have involved distraction, 5,870 fatalities (16% of the overall fatalities) occurred.” *Id.*

24. *Id.*

25. *Id.* National Highway Traffic Safety Administration data shows that out of 2,346,000 injuries resulting from motor vehicle accidents, 515,000, or twenty-two percent of all injuries, involved distracted driving. *Id.*

26. *Id.* at 2 (noting that the distracted driving data presented “includes participation in secondary tasks and cognitive distraction”).

27. See NAT’L SAFETY COUNCIL, *supra* note 21. National Safety Council model estimated that in 2008, cell phone use, including the act of text messaging, was attributed to 28% of all automobile crashes. *Id.*

28. See Richtel, *supra* note 20.

29. See U.S. DEP’T OF TRANSP., *supra* note 11, at 6.

30. See NAT’L SAFETY COUNCIL, *supra* note 21.

31. See generally GOVERNOR’S HIGHWAY SAFETY ASS’N, CELL PHONE DRIVING LAWS (2009), available at [http://www.ghsa.org/html/stateinfo/laws/cellphone\\_laws.html](http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html) (providing information about individual state driving laws addressing cell phone use and text messaging).

### C. State Laws

#### 1. Cell Phone Laws

Laws addressing the use of cell phones while driving vary across jurisdictions.<sup>32</sup> Currently, six states prohibit all drivers from talking on handheld cell phones while driving.<sup>33</sup> Although these states have made their cell phone laws applicable only to handheld cell phones, research shows that “hands-free devices do not eliminate the risks of distracted driving, and may worsen them by suggesting that the behavior is safe.”<sup>34</sup> Currently, no state bans both handheld and hands-free cell phones by all drivers, but twenty-one states ban all cell phone use by novice drivers.<sup>35</sup> The finding that drivers under age twenty constitute the age group with the greatest proportion of distracted drivers substantiates these age-specific bans.<sup>36</sup>

#### 2. Text Messaging Laws

More recently, states have begun to enact laws that prohibit drivers from text messaging while operating a vehicle.<sup>37</sup> Eighteen states currently maintain a blanket ban on text messaging for drivers of all ages,<sup>38</sup> while nine states prohibit text messaging only by novice drivers.<sup>39</sup> These bans have been made in reaction to recent research showing that text messaging while driving is more dangerous than driving with a 0.08 percent blood-alcohol content.<sup>40</sup>

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32. *Id.*

33. *Id.* California, Connecticut, New Jersey, New York, Oregon, and Washington, as well as Washington D.C., ban all drivers from talking on handheld cell phones. *Id.*

34. Matt Richtel, *Drivers and Legislators Dismiss Cellphone Risks*, N.Y. TIMES, July 18, 2009, available at <http://www.nytimes.com/2009/07/19/technology/19distracted.html>.

35. GOVERNOR'S HIGHWAY SAFETY ASS'N, *supra* note 31. Arkansas, California, Connecticut, Delaware, Georgia, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Nebraska, New Jersey, North Carolina, Oregon, Rhode Island, Tennessee, Virginia, and West Virginia, as well as Washington D.C., have restrictions on cell phone use for novice drivers. *Id.*

36. See DEP'T OF TRANSP., *supra* note 11, at 3. Sixteen percent of all drivers under the age of twenty involved in fatal crashes in 2008 reported distraction while driving. *Id.*

37. See generally GOVERNOR'S HIGHWAY SAFETY ASS'N, *supra* note 31.

38. *Id.* Alaska, Arkansas, California, Colorado, Connecticut, Illinois, Louisiana, Maryland, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Oregon, Tennessee, Utah, Virginia, and Washington, as well as Washington D.C. have all enacted a ban on text messaging for all drivers. *Id.*

39. *Id.* Delaware, Indiana, Kansas, Maine, Mississippi, Missouri, Nebraska, Texas, and West Virginia all have laws limiting the text-messaging ban to novice drivers only. *Id.*

40. See Richard Chang, *The Danger of Texting*, N.Y. TIMES, July 28 2009, at A8.

### 3. Enforcement and Penalties

State cell phone and texting laws are differentiated based not only upon the age of the driver, but also the manner in which the laws are enforced and penalties are assessed.<sup>41</sup> Some states with cell phone and text messaging laws have in place primary enforcement mechanisms whereby a driver can be ticketed for solely talking on a cell phone or using the phone to text message.<sup>42</sup> In contrast, other states have in place laws that make using a cell phone or text messaging only a secondary offense, which means that drivers cannot be ticketed solely for using their cell phone or for text messaging while driving.<sup>43</sup> In these states, the driver must also be committing another violation, such as speeding, before a cell phone or text messaging violation will be assessed.<sup>44</sup>

The penalties imposed for violating state laws that prohibit the use of cell phones while driving demonstrate the growing recognition of the serious danger posed by this form of distracted driving. Some states take this danger as seriously as drunk driving.<sup>45</sup> Utah, for example, has the most severe penalty for text messaging while driving.<sup>46</sup> In Utah, someone who is text messaging while driving can be charged with a misdemeanor and consequently face a maximum of three months in prison and a maximum fine of \$750.<sup>47</sup> If someone who is text messaging while driving causes an injury or death, that person can be charged with a felony and sentenced to a maximum of fifteen years in prison and

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41. See generally GOVERNOR'S HIGHWAY SAFETY ASS'N, *supra* note 31.

42. *Id.* Alaska, Arizona, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, North Carolina, Oregon, Rhode Island, Tennessee, Texas, Utah, and West Virginia, as well as Washington D.C. all have laws that make it a primary offense to use a cell phone or text message while driving.  
*Id.*

43. *Id.* Arkansas makes it a primary offense for bus drivers to use a cell phone and text message while driving, but cell phone use for novice drivers is only a secondary offense. *Id.* Louisiana's cell phone and text messaging laws are also considered a primary offense for bus drivers, but a secondary offense for all other drivers. *Id.* Maryland makes cell phone use a secondary offense, but text messaging a primary offense for drivers. *Id.* In contrast, New York makes it a primary offense to use a cell phone while driving, but only a secondary offense to text message while driving. *Id.* Finally, Virginia makes it a secondary offense to use a cell phone or text message while driving, but for bus drivers, the same offense is primary. *Id.*

44. See Clyde Haberman, *Use of Thumbs Confounds Use of Sense*, N.Y. TIMES, Sept. 1, 2009, at A20 (describing the various penalties imposed by laws banning text messaging while driving).

45. See Matt Richtel, *Utah Gets Tough with Texting*, N.Y. TIMES, Aug. 28, 2009, available at <http://www.nytimes.com/2009/08/29/technology/29distracted.html?ref=textmessaging>.

46. *Id.*

47. *Id.*

assessed a \$10,000 fine.<sup>48</sup> Text messaging while driving is no longer considered an “accident,” but “inherently reckless” in Utah.<sup>49</sup>

Other states have taken a milder approach than Utah.<sup>50</sup> California, for example, only assesses a twenty-dollar fine for those who are caught texting while driving.<sup>51</sup> New York imposes a fine for text messaging while driving, but because New York is a secondary offense state, this fine is not imposed unless the driver is also committing another traffic violation.<sup>52</sup> Although differences exist among states in the severity of penalties assessed, the purpose behind these laws is the same: prevent future fatalities and injuries by enacting laws that deter motorists from text messaging while driving.<sup>53</sup>

#### *D. Proposed Federal Legislation*

Congress has become increasingly concerned with the dangers posed by text messaging while driving.<sup>54</sup> Although many states have enacted laws prohibiting this dangerous driving behavior, other states have yet to follow suit.<sup>55</sup> Consequently, under both its commerce and spending powers, Congress has put forth a proposal that would allow the federal government to become involved in the implementation of these laws.<sup>56</sup>

The Avoiding Life-Endangering and Reckless Texting by Drivers Act of 2009 (“ALERT Drivers Act”) operates “to ensure minimum standards of protection” against text messaging while driving.<sup>57</sup> If enacted, the federal government will withhold twenty-five percent of federal highway funding apportioned to a state each year until such state

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48. *Id.*

49. *Id.* Lyle Hillyard, a Republican state senator in Utah, explains, “If you choose to drink and drive or if you choose to text and drive, you’re assuming the same risk.” *Id.*

50. *Id.*

51. *Id.*; see also CAL. VEH. CODE § 23123.5 (West 2009).

52. See Haberman, *supra* note 44.

53. See Richtel, *supra* note 45.

54. See Avoid Life-Endangering and Reckless Texting by Drivers Act of 2009, S. 1536, 111th Cong. (2009) [hereinafter ALERT Drivers Act]. One study found that drivers who sent text messages while driving a motor vehicle “had a collision risk that was 23 times greater while texting as compared to the risk when the operators were not texting.” *Id.* § 2(9). Another study “found that college students using a driving simulator were [eight] times more likely to have an accident while texting.” *Id.* § 2(10).

55. See GOVERNOR’S HIGHWAY SAFETY ASS’N, *supra* note 31 (providing information that shows only eighteen states have enacted laws banning text messaging for all drivers).

56. See ALERT Drivers Act, *supra* note 54, § 2(16). Cell phones are “instrumentalities,” “channels,” and “products of interstate commerce.” *Id.* § 2(1). As such, Congress has the power to regulate the use of cell phones. *Id.* § 2(2). Moreover, Supreme Court precedent permits Congress to “condition Federal highway funding on State compliance with certain conditions.” *Id.* § 2(3).

57. *Id.* § 2.



passes a law that both prohibits text messaging while driving and delineates some minimum penalty that increases for each repeated offense.<sup>58</sup> Once a state meets the requirements under the ALERT Drivers Act, any funding previously withheld will be apportioned back to the state.<sup>59</sup>

The federal government has successfully used its power to set a uniform standard for one other traffic safety issue: drunk driving.<sup>60</sup> In the drunk driving context, Congress threatened to withhold federal highway money from states to encourage state legislatures to raise the minimum drinking age to twenty-one and to adopt a standard blood-alcohol content level.<sup>61</sup> The passage of the ALERT Drivers Act, with its provision to withhold federal highway funding, would similarly incentivize states to enact laws that address the text-messaging problem.<sup>62</sup>

### III. ANALYSIS

#### A. *The Constitutionality of the ALERT Drivers Act*

*South Dakota v. Dole*<sup>63</sup> provides guidance on evaluating whether the ALERT Drivers Act will pass constitutional muster.<sup>64</sup> At issue in *Dole* was the constitutionality of a federal statute that withheld states' receipt of federal highway funds until the state raised its minimum drinking age to twenty-one.<sup>65</sup> The Supreme Court held that, under the Constitution's Taxing and Spending Clause,<sup>66</sup> Congress has the power to "attach conditions to the receipt of federal funds."<sup>67</sup> However, the Court explicitly stated "[t]he spending power is . . . not unlimited," but rather is subject to three restrictions.<sup>68</sup>

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58. *Id.* § 167(b)(2)(A)-(B).

59. *Id.* § 167(c) ("All funds withheld under this section from apportionment to a State for 1 or more fiscal years shall be available for apportionment to the State immediately upon a determination by the Secretary that the State meets the requirement under paragraph (2).").

60. See Matt Richtel, *Department Plans Forum on Driving While Distracted*, N.Y. TIMES, Aug. 5, 2009, at A11.

61. *Id.*

62. See ALERT Drivers Act, *supra* note 54.

63. *South Dakota v. Dole*, 483 U.S. 203 (1987).

64. *Id.*

65. *Id.* at 205.

66. See U.S. CONST. art. I, § 8, cl. 1. ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

67. *Dole*, 483 U.S. at 206.

68. *Id.* at 207.

First, “the exercise of the spending power must be in pursuit of ‘the general welfare.’”<sup>69</sup> In determining whether the spending power pursues the general welfare “courts should defer substantially to the judgment of Congress.”<sup>70</sup> Second, Congress must “unambiguously” condition states’ receipt of federal funds, thereby “enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>71</sup> Finally, “conditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’”<sup>72</sup>

The ALERT Drivers Act attempts to comply with these three restrictions. First, withholding federal funding to promote highway safety must serve the general welfare.<sup>73</sup> The Supreme Court has defined “the general welfare” as a malleable concept that must be tailored to the current needs of the nation.<sup>74</sup> Accordingly, the Supreme Court held that Congress retains the discretion to shape the boundaries of the nation’s general welfare as the nation’s needs evolve.<sup>75</sup>

Congress has determined that requiring states to enact laws prohibiting text messaging while driving promotes driver safety on national highways and roads.<sup>76</sup> Research shows that text messaging while driving poses a serious danger, with drivers exposing themselves “to a collision risk that [is] twenty-three times greater” than drivers who are not text messaging.<sup>77</sup> The dangers posed by drivers who text message have also emerged as a nationwide problem, which is evidenced by the numerous state laws already passed that ban the hazardous behavior.<sup>78</sup> Furthermore, safe travel is one of the main purposes for which highway funds are used.<sup>79</sup> Therefore, enacting the ALERT Drivers Act as a means to deter text messaging while driving and its accompanying risks directly promotes the general welfare.<sup>80</sup>

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69. *Id.* (quoting *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937)).

70. *Dole*, 483 U.S. at 207.

71. *Id.* (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

72. *Dole*, 483 U.S. at 207 (quoting *Mass. v. U.S.*, 435 U.S. 444, 461 (1978)).

73. *See Dole*, 483 U.S. at 207-08.

74. *Helvering*, 301 U.S. at 641 (“Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times.”).

75. *Id.* at 640 (explaining “[t]he discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.”).

76. *See* ALERT Drivers Act, *supra* note 54, § 2(15).

77. *Id.* at § 2(9).

78. *Id.* at § 2(12)-(14); *See* also GOVERNOR’S HIGHWAY SAFETY ASS’N, *supra* note 31 (providing information about individual state laws that prohibit text messaging while driving).

79. *See Dole*, 483 U.S. at 208.

80. *See* ALERT Drivers Act, *supra* note 54, § 2.

The second requirement, that the ALERT Drivers Act must unambiguously specify the requirements a state law must satisfy to avoid losing federal highway funding, proves problematic.<sup>81</sup> The ALERT Drivers Act sets forth two requirements with which states must comply: First, a state must enforce and enact a law that, “except in the event of an emergency, prohibits an operator of a moving vehicle from writing, sending, or reading a text message using a hand-held mobile telephone.”<sup>82</sup> Second, a state must impose a minimum penalty when a driver violates the text messaging law, and the penalty must increase for repeated offenses.<sup>83</sup> The penalty requirement is concerning, however, because the ALERT Drivers Act does not clearly and specifically delineate the penalties that states must adopt.<sup>84</sup>

In *Dole*, Congress made the condition upon which a state may receive funds clear from the outset: a state must either raise its drinking age to twenty-one or lose a set percentage of federal highway funding.<sup>85</sup> In contrast, the ALERT Drivers Act will allow the federal government to decide at a future date what penalties states must impose against violators of text messaging while driving laws.<sup>86</sup> Thus, Congress has not unambiguously stated the conditions with which states must comply.<sup>87</sup> The omission of specific penalties may prove critical to the constitutionality of the ALERT Drivers Act because, as written, states will be unable to make a knowing choice about whether to enact a law prohibiting text messaging while driving until a later date.<sup>88</sup>

Although potential problems with the second *Dole* requirement exist, there is no indication that the ALERT Drivers Act is “unrelated to the federal interest in particular national projects or programs.”<sup>89</sup> Congress’ strong interest in safe interstate travel has been frustrated by the national problem of text messaging while driving.<sup>90</sup> The ALERT Drivers Act remedies the problem by requiring states to impose penalties

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81. See ALERT Drivers Act, *supra* note 54, § 167(b)(2).

82. *Id.* § 167(b)(2)(A).

83. *Id.* § 167(d).

84. *Id.*

85. See *South Dakota v. Dole*, 483 U.S. 203, 205 (1987).

86. See ALERT Drivers Act, *supra* note 54, § 167(b)(2) (stating that “no later than 180 days after the date of enactment” of the ALERT Drivers Act, the Secretary will set forth the minimum penalties a state must impose to comply with the Act).

87. See *Dole*, 483 U.S. at 207.

88. See ALERT Drivers Act, *supra* note 54, § 167(d); see also *Dole*, 483 U.S. at 207 (quoting *Pennhurst*, 451 U.S. at 17).

89. *Dole*, 483 U.S. at 207.

90. See ALERT Drivers Act, *supra* note 54, § 2; see also *Dole*, 483 U.S. at 208-9 (providing another example of when Congress’ goal of safe interstate travel was “frustrated by varying drinking ages among the States” that incidentally encouraged drunk driving).

upon drivers who text message in their vehicles, thereby discouraging drivers from engaging in this dangerous behavior.<sup>91</sup> Therefore, the ALERT Drivers Act satisfies the third *Dole* requirement.<sup>92</sup>

As a final matter, the ALERT Drivers Act may also be rendered unconstitutional because of the amount of federal highway funding the federal government will withhold under the Act.<sup>93</sup> In *Dole*, until a state enacted a law that set the minimum drinking age at twenty-one, Congress withheld only five percent of the state's federal highway money.<sup>94</sup> The Supreme Court concluded this was "relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose."<sup>95</sup> In contrast, the ALERT Drivers Act will withhold twenty-five percent of a state's federal highway funds until the state complies with the Act's requirements.<sup>96</sup> Thus, the ALERT Driver's Act creates a situation wherein "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"<sup>97</sup>

The impending possibility of losing five percent of federal highway funding subsequently led every state to enact a minimum drinking age of twenty-one.<sup>98</sup> Based on this result, Congress could probably withhold a smaller percentage of highway funding to achieve its goal of incentivizing states to enact text messaging while driving laws.<sup>99</sup> If Congress lowers the percentage of funding withheld, the Act would be more likely to pass constitutional muster under the standards set forth in *Dole*.<sup>100</sup>

### B. *A Different Approach to Federal and State Laws*

Enacting new state laws and proposing federal legislation to address the emerging dangers of text messaging while driving provides one avenue for ameliorating the problem. However, these laws alone may

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91. See ALERT Drivers Act, *supra* note 54, § 167(b)(2).

92. See *Dole*, 483 U.S. at 207.

93. *Id.* at 211.

94. *Id.*

95. *Id.*

96. See ALERT Drivers Act, *supra* note 54, § 167(b)(1).

97. *Dole*, 483 U.S. at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

98. See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., COMMUNITY HOW TO GUIDE ON PUBLIC POLICY, app. 7, 1 (2001), available at [http://www.nhtsa.gov/people/injury/alcohol/Community%20Guides%20HTML/PDFs/Public\\_App7.pdf](http://www.nhtsa.gov/people/injury/alcohol/Community%20Guides%20HTML/PDFs/Public_App7.pdf).

99. See ALERT Drivers Act, *supra* note 54, § 167(b)(1).

100. See *Dole*, 483 U.S. at 207.

not be enough to deter offenders.<sup>101</sup> Enforcement issues arise as police officers struggle to find methods that will more accurately establish a person text messaged while driving in violation of the law.<sup>102</sup>

Drunk driving, for example, is easier to detect.<sup>103</sup> When assessing suspected violators of drunk driving laws, police officers can simply use a Breathalyzer to determine whether the driver in fact has met or exceeded the blood-alcohol content standard that warrants issuing a drunk driving violation.<sup>104</sup> In contrast, by the time a police officer stops a driver who appears to be text messaging, the driver likely has already put the cell phone away.<sup>105</sup> Consequently, establishing grounds that justify a distracted driving violation can be difficult to prove, and questions over how best to enforce these laws persist.<sup>106</sup>

One legal scholar, Lior Jacob Strahilevitz, has proposed deterring distracted driving through self-policing.<sup>107</sup> The foundational underpinnings for this proposed program arise from the use of a “reputation-monitoring regime.”<sup>108</sup> Specifically, the use of “How’s My Driving?” placards, which are commonly seen on the bumpers of commercial vehicles, has resulted in improved commercial vehicle safety.<sup>109</sup> By expanding the use of these placards to all vehicles, Strahilevitz suggests that the resulting improved roadway safety will translate to the greater automotive masses as well.<sup>110</sup>

The “How’s My Driving?” program traditionally used for commercial vehicles is straightforward. Drivers call the number provided on the placard to compliment or complain about the respective commercial driver’s roadway behavior.<sup>111</sup> A monitoring company answers these calls, makes a report of the incident, and then provides that report to the manager of the commercial vehicle.<sup>112</sup> The manager, in

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101. See Richtel, *supra* note 45 (explaining the difficulties of establishing someone violated a text messaging while driving law).

102. *Id.* (“[T]here is no immediate test for driving while texting; such drivers could deny they were doing so, or claim to have been dialing a phone number.”).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. See generally Lior Jacob Strahilevitz, “How’s My Driving?” For Everyone (*And Everything*), 81 N.Y.U. L. REV. 1699 (2006).

108. *Id.* at 1704.

109. *Id.*

110. *Id.* at 1717. “[How’s My Driving?] systems could do a much better job of identifying the worst offenders, even among a much larger population of drivers.” *Id.*

111. *Id.* at 1708.

112. *Id.*

turn, can take action accordingly, such as sanctioning the offending commercial driver or providing additional safety training.<sup>113</sup>

Similarly, the government could mandate that every vehicle contain a similar “How’s My Driving?” placard with “a unique identifier for each vehicle.”<sup>114</sup> The placard would symbolize a type of law-enforcement badge, essentially transforming “every vehicle into an unmarked police car.”<sup>115</sup> As such, drivers could report others’ dangerous driving behavior as it occurs, and the monitoring center would send offending drivers a periodic invoice with a bill for any fines assessed against the driver for traffic law violations.<sup>116</sup>

The “How’s My Driving?” program would also remedy the proof problem associated with text messaging while driving.<sup>117</sup> For example, if a collision occurred because a driver was text messaging, the calling center would “expect to receive several contemporaneous reports” about the accident.<sup>118</sup> Therefore, numerous callers would report that they saw the driver text messaging while driving, and these reports would help prove that the offending driver violated a text messaging while driving law.<sup>119</sup>

Despite its potential utility, the “How’s My Driving?” program is not without its limitations. For the program to be effective, drivers must use their cell phones to report dangerous behavior, which simultaneously diminishes and perpetuates this mode of distracted driving.<sup>120</sup> Fortunately, feasible solutions to this problem exist that could resolve the use of cell phones for reporting. One solution would be to install a system in every vehicle where, “[b]y pressing a button on their dashboards and speaking into a steering wheel-mounted microphone,” drivers would be automatically connected to a calling center.<sup>121</sup> Alternatively, a passenger in the vehicle, rather than the driver, could simply use a cell phone to make the report.

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113. *Id.*

114. *Id.* at 1717.

115. *Id.* at 1722.

116. *Id.* at 1719. Strahilevitz describes using a points system where “each motorist would be allotted a set number of positive and negative points that they could distribute to other motorists during a particular month.” *Id.* at 1718. If a driver received more negative than positive points for a given month, that driver would be required to pay a fine. *Id.* at 1719. Alternatively, if a driver received more positive than negative points, then that driver would receive a check as a “reward” for courteous driving behavior. *Id.*

117. *Id.* at 1721.

118. *Id.* Although Strahilevitz envisions this program as applying to all kinds of driver behavior, this Comment addresses the effect the program would have on the specific act of text messaging while driving.

119. *Id.*

120. *Id.* at 1737.

121. *Id.* at 1717-18.

The overall outcome of this proposed reporting method is to more effectively hold drivers accountable for their dangerous behaviors, ultimately resulting in improved roadway safety.<sup>122</sup> The ability of every driver on the road, not just police officers, to report dangerous driving behavior ensures that traffic law violations do not go undetected.<sup>123</sup> In the end, the new laws prohibiting text messaging while driving make the behavior unlawful, and the proposed “How’s My Driving?” program would serve as an effective mechanism for enforcing these laws.

### C. *Criticisms of Text Messaging while Driving Laws*

As newly enacted laws prohibiting text messaging while driving gain notoriety, criticisms of these laws have naturally ensued. First, the struggle to define distracted driving has proven problematic.<sup>124</sup> While text messaging remains the current paragon of distracted driving, other types of distracted driving, such as eating and drinking, have existed for decades without any legal action taken by the government to remedy those dangers.<sup>125</sup> Therefore, addressing the problem of text messaging while driving with laws tailored solely to that act will not remedy the entire ambit of distracted driving behavior.<sup>126</sup>

Another criticism of text-messaging laws is whether they are truly necessary. Reckless driving laws already exist under which drivers can be held accountable for any harm caused by text messaging while driving.<sup>127</sup> Because these reckless driving laws encompass all dangerous driving behavior, Congress would not have to enact an individual law addressing each form of distracted driving.<sup>128</sup> Thus, laws prohibiting text messaging while driving are essentially superfluous.<sup>129</sup>

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122. *Id.* at 1722. “[P]lacards remind commercial fleet drivers that they are accountable for behavior that is likely to annoy fellow motorists.” *Id.* at 1712. Similarly, placards on every vehicle would “result[] in substantial reductions in unlawful or inconsiderate driving behavior.” *Id.* at 1722.

123. *Id.* at 1721. With police departments placing most of their emphasis on issuing speeding tickets, “other traffic laws go underenforced.” *Id.* at 1722-23. The proposed “How’s My Driving?” program resolves the underenforcement problem by allowing any driver to report traffic violations as they occur. *Id.* at 1722.

124. See Edward Niedermeyer, *Editorial: Distracted Driving Ban Faces Distraction*, THE TRUTH ABOUT CARS, Oct. 1, 2009, available at <http://www.thetruthaboutcars.com/editorial-distracted-driving-ban-faces-distraction/>.

125. *Id.*

126. *Id.*

127. *Id.*; see, e.g., CAL. VEH. CODE § 23103.5(a) (West 2009) (“Any person who drives any vehicle upon a highway in willful or wanton disregard of the safety of persons or property is guilty of reckless driving.”); FLA. STAT. § 316.192(1)(a) (“Any person who drives any vehicle in wanton or reckless disregard for the safety of persons or property is guilty of reckless driving.”).

128. Niedermeyer, *supra* note 124.

129. *Id.*

Finally, enforcement of laws prohibiting text messaging while driving remains a pertinent problem. Until a program like “How’s My Driving?” or some other novel method is adopted, traditional law enforcement methods must suffice.<sup>130</sup> Police officers have already expressed the difficulty in proving a driver violated a text-messaging law, which raises concerns over how efficacious these laws will be in deterring this dangerous driving behavior.<sup>131</sup> At least one critic has suggested that enacting the ALERT Drivers Act in its current format would only magnify the enforcement problem because each state would ultimately bear the financial burden of enforcing its corresponding text-messaging laws.<sup>132</sup> As a result, these laws would likely remain a low priority at the local level due to limited funding.<sup>133</sup>

#### D. Privacy Issues

Finding effective methods for enforcing laws prohibiting text messaging while driving are only the beginning; these laws implicate pressing privacy concerns that must also be considered.<sup>134</sup> The quickness and ease with which an offending driver can put away a cell phone makes it difficult to prove a driver text messaged while driving.<sup>135</sup> However, if police officers were permitted to look at the text messages on the driver’s cell phone, the driver’s culpability could be more easily determined.<sup>136</sup>

Text messages have already proved useful as evidence in other contexts.<sup>137</sup> For example, text messages are now being used in divorce proceedings to prove that a spouse engaged in an extramarital affair.<sup>138</sup>

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130. See Strahelivitz, *supra* note 107.

131. See Haberman, *supra* note 44 (noting the difficulties police officers have in identifying someone who is text messaging while driving).

132. See Niedermeyer, *supra* note 124.

133. *Id.*

134. See Richtel, *supra* note 45. “If an officer or prosecutor wants to confiscate a phone or phone records to determine whether a driver was texting at the time of the crash, such efforts can be thwarted by search-and-seizure and privacy defenses, lawyers said.” *Id.*

135. See *id.*

136. See *id.*

137. See generally Laura Holson, *Text Messages: Digital Lipstick on the Collar*, N.Y. TIMES, Dec. 8, 2009, available at <http://www.nytimes.com/2009/12/09/us/09text.html> (describing the use of text messages as evidence in family law cases).

138. *Id.* A cocktail waitress presented text messages sent from Tiger Woods, indicating evidence of an affair. *Id.* Text messages sent and received on his government-issued cell phone and pager proved that the former mayor of Detroit, Kwame Kilpatrick had an affair with an aide. *Id.*



In another case, one party offered text messages as evidence to successfully prove that his spouse had physically abused him.<sup>139</sup>

Similar to how text messages can provide evidence of an affair or domestic abuse, text messages are also a critical, if not often the sole, piece of evidence establishing a person violated a law prohibiting text messaging while driving.<sup>140</sup> Unlike the use of text messages in family law matters, however, there would not necessarily be a need to unveil the actual text of the message.<sup>141</sup> Rather, a police officer would only need to know the time the driver sent or received the message to charge the driver with the appropriate text messaging while driving violation.<sup>142</sup> This temporal information could be easily gathered from either the phone itself or phone records that detail the time text messages were sent and received.<sup>143</sup> Additionally, the limited discovery of such information would serve a legitimate government purpose in promoting highway safety.<sup>144</sup>

Although the timing of the text messages could be easily gathered, the privacy rights drivers have in their cell phones may present a constitutional obstacle to obtaining that information.<sup>145</sup> Recently, the United States Supreme Court decided *City of Ontario v. Quon*,<sup>146</sup> a case involving a government employee's expectation of privacy in text messages sent during work hours on a government-issued pager.<sup>147</sup> The issue in *Quon* turned on whether the Ontario Police Department violated the Fourth Amendment rights of police sergeant, Jeff Quon, when it "searched" his employer-provided pager by reading the text messages both sent and received on the pager.<sup>148</sup>

In reaching its decision, the Court assumed that "the principles applicable to a . . . search of an employee's physical office" also applied to a search of an employee's electronic devices.<sup>149</sup> Accordingly, the Court noted that while "warrantless searches are 'per se unreasonable

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139. *See id.*

140. *See* Richtel, *supra* note 45.

141. *See id.*

142. *See id.*

143. *Id.*

144. *See* Richard Chang, *The Danger of Texting*, N.Y. TIMES, July 28 2009, at A8. Studies have found the dangers of texting while driving to be worse than the dangers of drunk driving. *Id.*

145. *See* Richtel, *supra* note 45.

146. *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

147. *Id.* at 2624.

148. *Id.* For purposes of its opinion, the Court assumed that "Quon had a reasonable expectation of privacy in the text messages" and that the Ontario Police Department's "review of the transcript constitutes a search within the meaning of the Fourth Amendment." *Id.* at 2630.

149. *Id.*

under the Fourth Amendment,”<sup>150</sup> an exception exists for searches in the workplace because of “special needs” arising in that setting.<sup>151</sup> In light of this exception, the Court held that the Ontario Police Department did not violate Quon’s Fourth Amendment rights because “the search was motivated by a legitimate work-related purpose” for determining whether the allotted number of text messages needed to be increased, and the search “was not excessive in scope.”<sup>152</sup>

Despite the Court’s narrow and fact-specific holding in *Quon*, the decision can nevertheless be viewed as a general proposition that Fourth Amendment rights and protections must continue to be accounted for in non-traditional modes of communication.<sup>153</sup> The Fourth Amendment protects a person’s privacy “against arbitrary and invasive governmental acts”—a constitutional guarantee that transcends the employment relationship presented in *Quon*.<sup>154</sup> Consequently, as courts and legislatures sculpt the confines of privacy in technology across various contexts and mediums, including text messaging while driving, Fourth Amendment protections must remain at the forefront.<sup>155</sup>

#### IV. CONCLUSION

The enactment of seatbelt-use laws proved to be a prelude of traffic safety concerns to come. Technological advancements have presented a new frontier of highway hazards that federal and state legislatures must continue to address. Even with new laws prohibiting drivers from using cell phones or text messaging while on the road, enforcement remains a paramount problem. Without an effective method for ensuring drivers comply with these new laws, their ability to prevent automobile accidents remains uncertain.

Fourth Amendment concerns will also continue to shape the future of these new traffic safety laws. As the Supreme Court noted in *Quon*, “Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior.”<sup>156</sup> Thus, societal norms will bear heavily on appropriate enforcement methods as expectations of privacy

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150. *Id.* (quoting *Katz v. United States* 389 U.S. 347, 357 (1967)).

151. *See Quon*, 130 S. Ct. at 2630 (quoting *O’Connor v. Ortega*, 480 U.S. 709, 725 (1987) (plurality opinion)).

152. *See Quon*, 130 S. Ct. at 2632-33.

153. *Id.* at 2630. “The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.” *Id.* at 2629. Accordingly, the Court chose “to dispose of this case on narrower grounds.” *Id.* at 2630.

154. *Id.* at 2627.

155. *Id.*

156. *Id.* at 2629.

in electronic gadgets evolve into the future. As such, legislatures must search for effective ways to promote highway safety as technology advances, and courts must ensure that Fourth Amendment guarantees are not impermissibly infringed upon in the process.