THE SURFACE TRANSPORTATION ASSISTANCE ACT: FEDERALISM'S LAST STAND?

INTRODUCTION

In 1984, Congress enacted legislation that intrudes upon state control over alcoholic beverages. The Surface Transportation Assistance Act (hereinafter referred to as the STAA) provides for the withholding of a portion of federal highway funds from any state which fails to raise its minimum drinking age to twenty-one years.[1] The STAA has a two-year grace period beginning on September 30, 1984 whereby a state will have until October 1, 1986 to raise its drinking age to the "national level."[2] The STAA does provide for reimbursement of any withheld funds to states that subsequently raise their drinking age to twenty-one.[3] But the potential loss of important federal funding is not solely at stake here. This Act weakens the concepts of federalism and of states rights.

This note will examine the constitutionality of the STAA. Arguments for and against its implementation will be proposed, and various provisions of the Constitution will be examined either to justify or criticize the STAA's enactment. In addition, the STAA will be scrutinized under the principles of federalism, and the constitutional utility and prudence of passing such legislation will be discussed.

I. CONSTITUTIONAL CHALLENGES AND ANALYSIS OF THE STAA

The State of South Dakota has challenged the constitutionality of the STAA in *South Dakota v. Dole*.[4] South Dakota brought an action against the Secretary of Transportation, Elizabeth H.

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1. 23 U.S.C. § 158 (1984). This amendment in subsection (a)(1) provides in pertinent part: The Secretary of Transportation "shall withhold five per centum of . . . [highway funds] apportioned to any state . . . on the first day of the fiscal year beginning after September 30, 1985 in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years is lawful." Subsection (a)(2) provides in pertinent part: "The Secretary shall withhold ten per centum of amount required to be apportioned to any state . . . on the first day of the fiscal year beginning after September 30, 1985." *Id.*

2. *Id.*

3. *Id.* Reimbursement is required under § 158 (b).

4. South Dakota v. Dole, No. 84-5137 (D.S.D. May 3, 1985).

Dole, seeking both declaratory and injunctive relief.[5] The United States District Court for the District of South Dakota granted Secretary Dole's motion to dismiss,[6] and South Dakota has subsequently appealed to the United States Court of Appeals for the Eighth Circuit.[7] Nine states have submitted a brief Amici Curiae in support of the appellant state of South Dakota.[8] Vermont, one of the Amici States, stands to lose some eight million dollars in highway funds,[9] while Ohio could lose close to fifty million for noncompliance with the STAA.[10]

The loss of highway funds is not the only concern. Opponents of the STAA state the Act violates the twenty-first amendment.[11] Proponents, on the other hand, argue the Act is a legitimate exercise of the spending power.[12] Both constitutional provisions provide considerable weight for the justification of or bar to the STAA's enactment. The federal commerce power is also worthy of discussion, since the STAA could have possibly been passed pursuant to this power as well.

A. The District Court Findings in Dole

In *South Dakota v. Dole*, the district court cited two independent reasons for the dismissal of South Dakota's complaint.[13] First, the court found no constitutional conflict between the STAA and the South Dakota statutes.[14] The court determined that the STAA simply provides "strong incentives for South Dakota to re-evaluate

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5. *Id.* at 1.

6. *Id.* at 6.

7. South Dakota v. Dole, No. 84-5137 (D.S.D. May 3, 1985) *appeal docketed*, No. 85-5223-SD Civil (8th Cir. 1985).

8. Brief for Amici Curiae, South Dakota v. Dole, No. 85-5223-SD Civil (8th Cir.) (hereinafter cited as Amici Curiae Brief). Those nine states include: Vermont, Colorado, Hawaii, Montana, Ohio, South Carolina, Wisconsin, and Wyoming. Vermont, albeit still one of the Amici states, has passed legislation that raises the drinking age to twenty-one. 1986 Vt. Acts 99 (to be codified at 7 VT. STAT. ANN. § 2(25)).

9. Amici Curiae Brief, at Appendix A. This figure is based on both the 1987 and 1988 fiscal years.

10. *Id.*

11. *Dole*, No. 84-5137, slip op. at 5.

12. *Id.* at 4.

13. *Id.*, slip op. at 6.

14. *Id.* South Dakota provides for a special class of low point, i.e., low-alcoholic, beer containing "not more than three and two-tenths per centum of alcohol by weight." S.D. CODIFIED LAWS ANN. § 35-1-1. (1977 and Supp. 1985). South Dakota allows persons who are nineteen-years old to purchase low point beer. S.D. CODIFIED LAWS ANN. § 35-6-27 (1977 and Supp. 1985).

its drinking age."[15] Since the state has no constitutional right to federal highway funds in the first place,[16] the court also found that the federal government, pursuant to its spending authority, may attach conditions to the state's eligibility for federal dollars.[17] The court noted that the state was not required to raise its drinking age, and was not denied its power to regulate the use and possession of alcoholic beverages as granted under the twenty-first amendment.[18] Therefore, the court concluded that it could not forbid the federal government from merely offering inducements to a state to change its drinking age.[19]

The *Dole* court further determined that even if there was sufficient constitutional friction between the STAA and the South Dakota statutes, a balancing between the federal and state laws would result in the STAA's favor.[20] The STAA's avowed purpose, espoused by Secretary Dole, was to save lives on the highways.[21] South Dakota, however, contended it had a right to "act as a sovereign in the area of setting drinking ages."[22] The court declared that it was in no position to evaluate the merit of the Secretary's claim; however, it could recognize a congressional purpose in promoting highway safety by passing the STAA.[23] The court deemed highway safety an appropriate concern,[24] and found the threat to state sovereignty minimal since states were not forced to act.[25] A

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15. *Dole*, No. 84-5137, slip op. at 6.

16. *Id.*

17. *Id.* at 7. The Dole court by virtue of this assertion is merely adhering to longstanding Supreme Court precedent. *See, e.g.*, Helvering v. Davis, 301 U.S. 619 (1937); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Lau v. Nichols, 414 U.S. 563 (1974); Fullilove v. Klutznick, 448 U.S. 448 (1980).

18. *Dole*, No. 84-5137, slip op. at 7. Section 2 of the twenty-first amendment provides in pertinent part: "The transportation or importation into any state . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U. S. CONST. amend. XXI, § 2.

19. *Dole*, No. 84-5137, slip op. at 7.

20. *Id.*

21. *Id.* The reasoning presumably underlying this "purpose" is that prohibiting 18-21 year-olds from lawfully drinking, more lives will be saved because fewer people will be driving while intoxicated.

22. *Id.*

23. *Id.* The court did not say precisely why it was not in a position to evaluate the merit of this claim. Presumably, the court felt such recognition would be based on conjecture due to a lack of statistical data to prove an inverse relationship between the drinking age and the highway fatality rate amongst the 18-21 year-old age group.

24. *Id.*

25. *Id.* The court apparently refused to recognize the difference between actual coercion and theoretical non-coercion. In other words, no coercion existed "on paper." Hence, the court declared that state sovereignty was not infringed upon, although a state would

closer analysis of certain constitutional provisions proffer a possibly different view on how this balance should have been struck.

B. The Spending Power and General Welfare Clause

The federal government successfully argued that the STAA was a legitimate exercise of the spending power in *South Dakota v. Dole*.[26] Article I, section 8, clause 1 of the United States Constitution provides in pertinent part: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises . . . to pay the debts and provide for the common defense and general welfare of the United States. . . ."[27]

The spending power has traditionally been given an extremely broad interpretation by the United States Supreme Court. In *Helvering v. Davis*,[28] the Court declared that Congress may spend dollars in aid of the general welfare.[29] The Court found that the concept of general welfare is not static, and, therefore, the spending power must adapt itself to the crises and necessities of the times.[30] In *Helvering*, the Court further asserted that what is critical or urgent changes with the times,[31] and that Congress has both the authority and wisdom to draw the line between what is and is not the general welfare.[32] Congress' determination has to be respected by the courts, unless such decision is plainly arbitrary.[33]

The Supreme Court has enthusiastically followed the *Helvering* approach to the interpretation of the spending power and general welfare clause.[34] The general welfare has been declared a grant of power whose scope is quite expansive, particularly in view of the enlargement of power by the necessary and proper clause of the

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have to sacrifice its sovereignty if it desired to acquire federal dollars. *Id.*

26. *Id.* at 4.

27. U.S. CONST. art. I. § 8, cl. 1.

28. 301 U.S. 619 (1937).

29. *Id.* at 641. *Helvering* upheld the validity of Title II and Title VIII of the Social Security Act. Title VIII imposed a special income tax upon employees to be deducted from their wages and paid by the employers. Title II provided for the payment of old age benefits. *Id.* at 634-35.

30. *Id.*

31. *Id.*

32. *Id.* at 640.

33. *Id.*

34. *See, e.g.*, Cleveland v. United States, 323 U.S. 329 (1945); United States v. Gerlach Livestock Co., 339 U.S. 725 (1950); Abbate v. United States, 359 U.S. 187 (1959); Rosado v. Wyman, 397 U.S. 397 (1970); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

Constitution (article 1, section 8, clause 19).[35] This clause has been interpreted to enlarge, not diminish the powers, such as the spending power, vested in the federal government.[36] The power of Congress to authorize expenditure of public dollars for public purposes is also not limited by the direct grants of powers found in the Constitution.[37] The fact that the chosen means might appear "unwise, or unworkable . . . is irrelevant" to the Court; Congress may adopt all necessary and proper means, not directly granted, to promote the general welfare.[38]

In addition, the Court has approved the issue of the constitutionality of federal grants conditioned on certain fixed terms or obligations.[39] Such conditional grants have been held to be a legitimate exercise of the spending power, and the Court has been no less deferential to Congress in this somewhat "specialized" area of the spending power.[40] The Court's stance on conditional grants is particularly relevant, because *Dole* involves states having to fulfill certain conditions to receive their full amount of discretionary federal funds.

The Supreme Court previously decided a case that is somewhat analogous to *Dole* and the STAA controversy. In *Fullilove v. Klutznick*,[41] the validity of Congress' Minority Business Enterprise (MBE) program was upheld by the Court.[42] The MBE was designed to help finance local public work projects, but specified that no grant would be made unless at least ten percent of articles, materials, and supplies were purchased from minority business enterprises.[43] The congressional purpose, deemed legitimate by the Court, was to direct much needed funds into the minority business community.[44]

The *Fullilove* Court recognized the legitimacy of Congress us-

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35. Buckley v. Valeo, 424 U.S. 1, 90 (1975).

36. McCulloch v. Maryland, 4 Wheat. 316, 419 (1819).

37. *Buckley*, 424 U.S. at 90-91.

38. *Id.* at 91. For instance, Congress' power to authorize expenditure of public moneys for public purposes is not limited by direct constitutional grants of legislative power. *Id.* at 90-91.

39. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980).

40. *See, e.g.*, California Bankers Association v. Shultz, 416 U.S. 21 (1974); Lau v. Nichols, 414 U.S. 563 (1974); Helvering v. Davis, 301 U.S. 619 (1937).

41. 448 U.S. 448 (1980).

42. *Id.* at 492.

43. *Id.* at 458.

44. *Id.* at 454.

ing the spending power to provide for the general welfare and to further broad policy objectives consistent with the notion of general welfare.[45] Moreover, the Court noted that conditional receipt of federal dollars contingent on compliance with certain federal statutory directives is a frequently employed and a valid congressional device.[46] The Court stated that it was constitutionally permissible to use such techniques to induce "state governments and private parties to cooperate voluntarily with federal policy."[47] One year later, the Court mirrored the *Fullilove* reasoning by stating, in *Pennhurst State School v. Haldeman*[48] that there can be no doubt that Congress may fix the precise terms on which it shall disburse federal dollars to the states.[49] The Court has gone so far as to compare legislation of this kind enacted pursuant to the spending power to the making of a contract.[50]

In *Pennhurst,* the Developmentally Disabled Assistance and Bill of Rights Act[51] was held not to create, in favor of the mentally retarded, any substantive rights to "appropriate treatment in the least restrictive environment."[52] The Act established a federal-state grant program whereby the states would receive the benefits of federal funding in exchange for complying with conditions set forth in the Act.[53] The Court held that nothing in the Act or its legislative history suggested that Congress intended that the states, as one of the so-called contractual conditions, assume the cost and responsibility of providing appropriate treatment in the "least restrictive environment" to the mentally retarded, in order to receive federal funding.[54]

The Court in *Pennhurst* determined that in this instance Congress had not spoken with the requisite "clear voice."[55] In other words, congressional intent in the federal-state area, had to be unambiguous, to enable states to exercise their choice knowingly and

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45. *Id.* at 474.
46. *Id.* at 458.
47. *Id.* The issue of voluntariness is, of course, raised when one is actually required to do something before receiving any vital benefits.
48. 451 U.S. 1 (1981).
49. *Id.* at 17.
50. *Id.*
51. 42 U.S.C. § 6000 et seq. (1975).
52. *Pennhurst,* 451 U.S. at 18.
53. *Id.* at 11.
54. *Id.* at 18.
55. *Id.* at 17.

cognizant of all the consequences of participation in the "contract."[56] As long as a state voluntarily and consciously accepts the terms of the offer, the spending power is properly exercised.[57] Therefore, the offer of federal benefits to a state, predicated on state cooperation with federal plans that purportedly further the general welfare, is "not unusual" and presumably constitutional, unless it can be shown the "contractual conditions" have not been met.[58]

Several problems arise under the contract theory advocated in *Pennhurst* and other decisions,[59] including the notions of "voluntariness" and "agreement" that are stated, or at least implied, in the federal-state grant relationship. An agreement is "a manifestation of mutual assent by two or more to one another."[60] Integral to this notion of an agreement is that the parties volunteer to make a contract. As the Court has attempted to assert in cases such as *Pennhurst* and *Fullilove,* states are supposedly given the option to enter into a "contract" with the federal government for federal dollars.[61] However, a difference exists between a situation in which two parties freely enter into a contract, and one in which a party enters into a contractual agreement out of fear that it will be unable to compensate adequately for the expected loss in revenue that will result from failure to contract.

Many contracts are made between parties with unequal bargaining power. Nevertheless, the contract theory promulgated by the Court fails in logic because states have essentially *no* bargaining power.[62] The most a state may "withhold" is its refusal to comply with a federally imposed condition. The decision to comply will, of course, be significantly impacted by the state's ability to compensate for the loss of federal funds. The contractual benefits in situations such as *Pennhurst, Fullilove* and, most importantly for purposes of this note in *Dole,* only flow in one direction. The state has no power to withhold anything that the federal govern-

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56. *Id.*

57. *Id.*

58. Oklahoma v. United States Civil Serv. Comm., 330 U.S. 127, 144 (1947).

59. *See, e.g.,* King v. Smith, 392 U.S. 309 (1968); Rosado v. Wyman, 397 U.S. 397 (1970); Oklahoma v. United States Civil Serv. Comm., 330 U.S. 127 (1944).

60. WILLISTON AND THOMPSON, SELECTIONS FROM WILLISTON ON CONTRACTS 3 (1920).

61. *Pennhurst,* 451 U.S. at 17.

62. But states, through their elected representatives, can shape federal policy that, presumably, is made for the general welfare. Hence, they do have possibly some bargaining power.

ment cannot afford to lose or function without.[63] Hence, there is an absence of any practical bargaining power on the part of the states in most of these conditional grant situations. Under the STAA, the states *must* comply with the national drinking age in return for federal funds. Any state's noncompliance results in loss of substantial benefits. The federal government, conversely, realizes no losses nor does it suffer in any material way from a state repudiating the "offer." Therefore, a contractual theory applied here is illogical and considerably strained.

In reaction to the STAA, many states have raised their drinking age to twenty-one years, including South Carolina, one of the Amici states in *Dole*. South Carolina enacted such legislation "reluctantly,"[64] with a provision to permit the drinking age to revert to the previous age of nineteen, provided the STAA is found unconstitutional.[65] South Carolina, like many states, is apparently fearful of losing federal funds. In spite of South Carolina's presumed lack of confidence in the STAA's unconstitutionality,[66] the state felt compelled to enter into a "contract" with the federal government.[67]

But freely entering into a contract is quite different from agreeing to certain conditions solely out of fear of economic reprisal. The STAA would seem to stand for the latter proposition, which contains elements of coercion. A state will lose significant federal funding if it refuses to comply with the Act's provisions.

The Supreme Court has not been silent on the issue of coercion. In *United States v. Butler*,[68] the Court stated that "the power to confer or withhold unlimited benefits is" very often "the power to coerce or destroy."[69] *Butler* involved the constitutionality of the Agricultural Adjustment Act which sought to increase the prices of certain farm products by decreasing the quantities produced.[70] The Act itself was held to invade the reserve powers of

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63. States can withhold, theoretically speaking, compliance with national policy. However, such noncompliance is considerably weakened by a state's need for federal funding. Hence, compliance with national policy usually seems very secure under these conditions.

64. Amici Curiae Brief, *supra* note 25, at 11.

65. *Id.* at 11 n. 4.

66. *Id.*

67. *Id.*

68. 297 U.S. 1 (1936).

69. *Id.* at 71.

70. *Id.* at 53-54. The decrease was to be attained by making payments of dollars to farmers who would reduce their acreage and crops under agreements with the Secretary of

the states; regulation and control of agricultural production was declared beyond the powers delegated to the federal government.[71] The federal government argued the Act was constitutionally sound because the end sought (i.e. higher farm prices) was achieved by voluntary cooperation.[72] The Court responded that, although the farmer could refuse to comply, the price of such refusal was the loss of substantial benefits.[73] The Court stated that the amount offered was intended to exert pressure on the farmer to agree to the proposed regulations, because those who accepted the benefits could effectively undersell those who did not.[74]

The Court stated that coercion by economic pressure makes the asserted choice illusory.[75] Congress would be, under the pretense of exercising the spending power, actually accomplishing prohibited ends.[76] Chief Justice Marshall, more than 150 years ago, addressed this very issue by stating:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say such an act was not the law of the land.[77]

The *Butler* Court, in its adherence to the spirit of Chief Justice Marshall's warning, stated the spending power could not be used to tear down federal-state barriers and invade the states' reserved powers.[78] The Court concluded by referring to the Agricultural Act as a "scheme" designed to force submission to federal regulation in exchange for federal funds.[79] One year later the Court reaffirmed

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Agriculture. *Id.* at 54.

71. *Id.* at 68.

72. *Id.* at 70.

73. *Id.*

74. *Id.* at 70-71.

75. *Id.* at 71.

76. *Id.* at 77. The prohibited end in *Butler*, regulation and control of agricultural production, is no longer reserved exclusively to the states. However, the *Butler* rule concerning federal coercion in the area of federal-state grants has not been expressly overruled.

77. *McCulloch*, 4 Wheat. at 423. The pretext doctrine of *McCulloch*, coupled with the economic coercion theory of *Butler*, will be discussed *infra* text accompanying notes 147-154, later in relation to a court's potentially ruling in favor of the states and invalidating the STAA.

78. *Butler*, 297 U.S. at 78. The Court further added that Alexander Hamilton, a leading advocate of a broad interpretation of the spending power, suggested that such a power could be used to destroy sovereignty. *Id.* at 77.

79. *Id.*

the *Butler* rule, in *Steward Machine Company v. Davis*,[80] by stating the power to appropriate funds could not be a weapon of coercion that could destroy or impair the autonomy of the states.[81]

Increasingly, states have come to rely heavily on federal aid. Conditions placed on the receipt of such aid provides an effective means of federal control of state authority, and it is clearly not as offensive or as conspicuous as outright regulatory control.[82] In this area, the Court has chosen largely to ignore the spirit of *Butler* and has allowed the federal government to legislate with little, if any, fear of judicial reprisal.[83] Ironically, Justice Stone's dissent in *Butler*, especially his warning that "the only check upon our own exercise of [judicial] power is our own sense of self-restraint,"[84] is more frequently cited than the majority opinion.[85] Justice Frankfurter, in his dissent in *Machinists v. Street*,[86] strongly criticized the *Butler* decision for the Court's finding of coercive implications in the Agricultural Adjustment Act.[87] Frankfurter stressed, as did the dissent in *Butler*, the lack of legal compulsion to act, and also that the mere offer of compensation for doing something should not be held to be a species of economic coercion.[88]

Both Justice Frankfurter, and the *Butler* dissent ignore the practical effects of federal programs that offer inducements or compensation for state compliance with federal regulations. Most states can ill afford to lose federal dollars and, therefore, are liter-

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80. 301 U.S. 548 (1937).

81. *Id.* at 586. The Court in *Steward Machine* upheld the validity of a tax imposed by Title IX of the Social Security Act of 1935 upon the employer of labor. *Id.* at 598. The Court went on to distinguish *Butler* by stating the proceeds of the tax in controversy were not "earmarked for a special group" nor did the Social Security tax involve coercive contacts. Furthermore, it was not directed to the attainment of an unlawful end. *Id.* at 592-93.

82. L. TRIBE, AMERICAN CONSTITUTIONAL LAW SUPPLEMENT 13 (1979).

83. *Id.*

84. *Butler*, 297 U.S. at 79.

85. *See, e.g.*, Board of Education v. Pico, 457 U.S. 853, 886 n. 2 (1982); Furman v. Georgia, 408 U.S. 238, 467 (1971) (Rehnquist, J., dissenting); Machinists v. Street, 367 U.S. 740, 807 (1961) (Frankfurter, J., dissenting).

86. 367 U.S. 740 (1961). The Court in *Machinists* reversed a lower court's decision that had found a union-shop agreement unconstitutional. *Id.* at 775. The agreement required that employees, as a condition of continued employment, pay dues that were allegedly used to help finance various political campaigns. *Id.* at 743-44. The Court held that, absent a showing of an actual class of workers who specifically opposed sums of their moneys being used for political purposes, the agreement itself was constitutional. *Id.* at 774.

87. *Id.* at 807 (Frankfurter, J., dissenting).

88. *Id.* Despite the criticism of *Butler* and its preceeding the Court's expansive view of federal power, the case has not been overruled. Hence, economic coercion is unconstitutional.

ally *forced* into compliance in order to receive the federal benefits. Theoretically, while it would appear that the states have a choice, an exacting inquiry is not necessary in order to see that the federal government realizes that states often must comply with certain guidelines, because of their financial dependence on federal programs. Hence, the federal government can coerce the states into submission and adherence to requisite preconditions, even though a purported option exists. The resulting situation is not unlike the situation in *Butler*. The Court can invalidate legislation that involves coercion. However, the Court has historically chosen to recognize theoretical choices that usually prove nonexistent in practice.[89]

Butler is applicable to the STAA controversy. Although Congress has not passed a law requiring states to raise their drinking age, it has provided a strong "incentive" to do so. This incentive does not promise any reward, but rather, the incentive here promises the maintenance of the status quo of already existing federal highway funds. As the *Dole* Amici brief points out, it is difficult to see why this is not blatant coercion.[90] Complete coercion may not be discernible, since an apparent "choice" remains. However, a state will have to endure a serious financial loss for noncompliance with the STAA, a loss few states can afford. Federal grants presently constitute approximately thirty percent of state and local receipts.[91] In 1977 alone, the federal government granted the states and localities $6.173 billion for highway construction.[92] Thus, it is unrealistic to assert that states have a genuine choice. Because of the states' dependency and needs, conformity to federal law seems the only real choice.

The present judicial posture on federal-state grants under the spending power would seem to preclude the states from defeating a constitutional claim under article 1, section 8, clause 1. However, examination of other constitutional provisions offers a balanced and full evaluation of the STAA's potential constitutionality. Analysis of the federal commerce power in particular further demonstrates the broad scope of federal authority. Without a proper check on the federal government's reach under both the commerce and spending power, state sovereignty in any area could perish.

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89. *See supra* note 30-37 and accompanying text.
90. Amici Curiae Brief, *supra* note 25, at 7.
91. D. BALAZAR, AMERICAN FEDERALISM 70 (1984).
92. *Id.* at 71.

C. The Commerce Power

The federal government did not claim that its authority to enact the STAA was derived from the commerce power. However, proponents of the Act could theoretically assert its constitutionality under this doctrine. The legitimacy of this argument is supported by precedent in which the Supreme Court has gone to great lengths to validate legislation through commerce clause analysis.

Several reasons could be proffered to justify the STAA's enactment pursuant to the commerce clause. First, setting a national drinking age is relevant to commerce, because eighteen to twenty-one year olds tend to get into a substantial number of alcohol-related accidents on federal highways. These accidents create traffic jams that impede commerce, by virtue of delaying vehicles such as trucks from reaching their destinations on time. The goods themselves that are not delivered on time often result in higher prices and/or shortages. Hence, these accidents and subsequent delays interfere with the normal flow of commerce. The STAA would be a valid means of unclogging the congested highways by denying eighteen to twenty-one year olds the right to drink. Two United States Supreme Court decisions lend weight to the above hypothetical argument.

In *Katzenbach v. McClung*,[93] the Supreme Court upheld the constitutionality of Title II of the Civil Rights Act of 1964.[94] The provision required "that all persons shall be entitled to the full and equal enjoyment of goals and services of any place of public accommodation without discrimination or segregation on the ground of race, color, religion, or national origin."[95]

Katzenbach involved a restaurant, located on a state highway eleven blocks from an interstate, that had refused to serve blacks in its dining room since its original opening in 1927.[96] The Court found the restaurant's refusal to adhere to Title II an unconstitutional violation of the Act.[97]

The Court proposed, in defense of Congress' action, that the restaurant's refusal to seat blacks in the dining room impeded

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93. 379 U.S. 294 (1964).
94. *Id.* at 305.
95. *Id.* at 298.
96. *Id.* at 296.
97. *Id.* at 304.

commerce.[98] Discrimination had a restrictive effect on interstate travel by blacks, because the practices prevented blacks "from buying prepared food [while traveling] . . . , except in isolated and unkempt restaurants."[99] This obviously discouraged travel and obstructed interstate commerce "for one can hardly travel without eating."[100] The Court determined that commerce was further affected because established restaurants in such areas sold less interstate goods, since fewer people, i.e., blacks, were traveling.[101]

Admittedly, racial discrimination is an evil of a very different constitutional magnitude than traffic delay or prohibiting eighteen to twenty-one year olds the right to drink. However, a broad reading of *Katzenbach* illustrates the Court's willingness to permit Congress to accomplish ends—not necessarily prohibited but presumably difficult to enact—through means that are not directly, if at all, related to the actual end sought. Hence, the cumulative effect of teenage alcohol-related accidents, one could argue, has an impact on interstate commerce. Once the burdensome impact is identified, regulation of the "obstacle" would be permissible as it was in *Katzenbach.* In each case, be it race discrimination or the drinking age, Congress could accomplish an end by utilizing the broad and often indirectly related commerce power.

In *Garcia v. San Antonio Metropolitan Transit Authority,*[102] the Court ruled that the political process alone serves as a means of minimizing the burdens that the states would have to bear under the commerce clause.[103] *Garcia* represents the Court's latest stance and interpretation of the federal government's reach under the commerce clause. According to the Court, the political process

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98. *Id.*

99. *Id.* at 300.

100. *Id.*

101. *Id.* The *Katzenbach* Court refused to view the facts in isolation and only from the perspective of the restaurant's impact on interstate commerce. The Court instead applied the cumulative or aggregate test of Wickard v. Filburn, 327 U.S. 111 (1942) and subsequently ruled that the volume of food purchased by the restaurant, when taken together with other restaurants, was neither trivial nor insignificant in terms of impact on interstate commerce. *Id.* at 301.

102. 105 S.Ct. 1005 (1985).

103. *Id.* at 1020. *Garcia* upheld the constitutionality of the overtime and minimum wage requirements of the Fair Labor Standards Act (FLSA) 29 U.S.C. § 206 (1974), as applied to the San Antonio Metropolitan Transit Authority (SAMTA). The Court determined that SAMTA faced nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, had to meet. This obligation was not destructive of state sovereignty or violative of any constitutional provision. *Id.*

of our democracy will ensure that laws that unduly burden the states' representatives will not be promulgated.[104] Built-in restraints in the federal system provide the states with the opportunity to limit federal commerce by allowing for state participation in federal governmental action.[105] In short, the Court's theory is that the states' representatives will not allow any federal commerce legislation to pass that they do not view as acceptable or necessary. Applied to the STAA controversy, if the states had not wanted the STAA to become law, they would not have elected members of Congress who voted for its enactment, or the states would have made clear to their representatives the repugnant nature of the STAA.

The above analysis of the commerce and spending powers demonstrates the Court's extension of the power and reach of the federal government. The federal government, through either the spending or commerce power, can intrude upon almost every aspect of a state's activities. The twenty-first amendment will next be examined as a possible limit on the federal government and as a possible bar to the STAA's enactment.

II. State Rights Under the Twenty-First Amendment

The twenty-first amendment[106] repealed the eighteenth amendment[107] and granted power to the states to regulate the transportation or importation of intoxicating liquors within their boundaries according to state law.[108] The Supreme Court has broadly construed this amendment to grant the states a formidable core or central power in this area.[109]

In *Dole,* the State of South Dakota, along with the Amici states, is attempting to assert that the twenty-first amendment preserves for the state an unreachable core power to determine the age at which individuals may lawfully purchase alcohol.[110] The

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104. *Id.*

105. *Id.*

106. U.S. Const. amend XXI.

107. U.S. Const. amend XXI, § 1. The eighteenth amendment had prohibited the manufacture or sale of intoxicating liquors. U.S. Const. amend XVIII.

108. U.S. Const. amend. XXI, § 2.

109. *See, e.g.,* Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939); New York Liquor Authority v. Bellanca, 452 U.S. 714 (1981); California Liquor Dealers v. Medical Aluminum, 445 U.S. 97 (1980).

110. *Dole,* No. 84-5137, slip op. at 7.

states further contend that Congress' encouragement or discouragement of the exercise of this power through the STAA qualifies as substantial interference with the "states' free exercise of a constitutionally granted right."[111] Hence, this substantial interference violates the Constitution and makes the power an "empty right."[112]

The Amici states cited recent Supreme Court precedent allegedly establishing a state's complete control over an individual's consumption of liquor.[113] The setting of minimum drinking ages was consequently within the area of exclusive state regulation.[114] A close analysis of this Supreme Court precedent is necessary to determine if the state core power is absolute or whether the Court has, at least, afforded to the states a unique power deserving of special consideration.

A. The Scope of State Power Under the Twenty-First Amendment

As early as 1939, in *Ziffrin, Inc. v. Reeves*,[115] the Court determined that the state could absolutely prohibit the manufacture of intoxicants, as well as their transportation, sale, or possession within its territory by virtue of the twenty-first amendment.[116] *Ziffrin* involved the Kentucky Alcoholic Beverage Control Law which regulated the production and distribution of alcoholic beverages.[117] The Court declared that the twenty-first amendment sanctions the right of a state to legislate concerning liquors brought into its territory.[118] The regulation was determined to impose a permissible burden on commerce, especially since Congress had failed to legislate specifically in this area.[119]

Alcohol, as an article of commerce, has been given greater state control than normally permitted with other articles of commerce by virtue of the twenty-first amendment.[120] The states consequently enjoy extremely broad power under section two of the

111. *Id.* at 8.
112. *Id.*
113. *Id.* at 5.
114. *Id.*
115. 308 U.S. 132 (1939).
116. *Id.* at 138.
117. *Id.* at 134.
118. *Id.* at 138.
119. *Id.* at 141.
120. Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 329-30 (1964).

twenty-first amendment.[121] According to the Court, the amendment acts primarily as an exception to the normal operation of the commerce clause.[122] But the twenty-first amendment has not obliterated or repealed the commerce clause.[123] Moreover, the Court has resisted the assertion that section two of this amendment freed the states from all restrictions found in other provisions of the Constitution.[124] Indeed, there exists no bright line, according to the Court, between federal and state powers over liquor.[125]

Nevertheless, the twenty-first amendment does grant states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.[126] The Court has granted the states, through the twenty-first amendment, extraordinary power that has often been declared weightier than constitutional provisions believed to be of paramount importance.[127] However, the Court has not declared the states sovereign in the area of setting minimum drinking ages.

Yet, in *Capital Cities Cable, Inc. v. Crisp*,[128] the Court admitted that the states do enjoy broad power under section two of the twenty-first amendment, and in addition declared that "when a state has not attempted directly to regulate the use of liquor within its borders—the core section two power—a [potentially] conflicting exercise of federal authority may prevail."[129] Opponents of the STAA could argue that the states have directly attempted to

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121. Capital Cities Cable, Inc. v. Crisp, 104 S.Ct. 2694, 2707 (1984).

122. *Id.*

123. *Hostetter*, 377 U.S. at 332.

124. California Liquor Dealers v. Medical Aluminum, 445 U.S. 97, 108 (1980). The Court specifically held that the California Wine Price System was tantamount to resale price maintenance and thereby violated the Sherman Act. Moreover, the twenty-first amendment does not bar application of the Sherman Act. *Id.* at 103.

125. *Id.* at 110.

126. *Id.* Presumably, the age at which one may purchase alcohol is part of the liquor distribution system, since no court has distinguished between state power over wholesale distribution and state power over retail sales.

127. Two first amendment—twenty-first amendment cases, New York Liquor Authority v. Bellanca, 452 U.S. 714 (1981) and California v. LaRue, 409 U.S. 107 (1972), demonstrate the Court's willingness to ascribe to the states a special source of power, derived from the twenty-first amendment, that permits them to abridge one's freedom of expression. Such abridgement is rarely permitted. *See infra* text accompanying notes 130-43.

128. 104 S.Ct. 2694 (1984). *Capital Cities* involved the issue of whether or not Oklahoma may require cable television operators in that state to delete all advertisement for alcoholic beverages contained in out-of-state signals that they retransmit by cable to their subscribers. The Court ruled that state regulation was pre-empted by federal law. *Id.* at 2695.

129. *Id.* at 2708.

regulate the use of liquor by fixing a legal age for alcohol consumption. Moreover, regulation of alcohol would logically entail state laws concerning the consumption of it. Hence, the *Capital Cities'* language could be taken to mean that federal regulation may not prevail if the state has already legislated in the particular area.

An even more interesting and problematic judicial assertion was made in *New York Liquor Authority v. Bellanca.*[130] *Bellanca* dealt with a provision of New York's Alcoholic Beverage Control Law that prohibited nude dancing in establishments licensed by the state to sell liquor for on-premises consumption.[131] The provision was ruled constitutional and deemed a valid exercise of a state's authority under the twenty-first amendment to regulate the sale of liquor within its boundaries.[132]

The respondents, owners of restaurants and bars, asserted that the New York State regulation violated the right to freedom of expression.[133] The Court rejected this contention and determined that the artistic or communicative value of topless dancing was overcome by the state's exercise of its broad power under the twenty-first amendment.[134] In addition, the Court took notice of the state's assertion that sexual acts and performances often create disorderly behavior.[135] Thus, the New York Liquor Authority had acted in a reasonable and constitutional manner in prohibiting nude entertainment at establishments selling liquor, to avoid disturbances associated with the mixing of alcohol and nude dancing.[136]

The Court, in *Bellanca*, declared that the state has "broad power under the twenty-first amendment to regulate the *times, places, and circumstances* under which liquor may be sold."[137] The states in *Dole* could make an argument for the STAA's unconstitutionality based on the above statement. However, one may contend no actual conflict exists in *Dole* between competing constitutional

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130. 452 U.S. 714 (1981).

131. *Id.*

132. *Id.*

133. *Id.* at 715.

134. *Id.* at 718.

135. *Id.* at 717-18.

136. *Id.* at 718. Presumably, the weight the Court apparently attaches to the state's assertion that many disturbances are often created by the mixing of sexual entertainment and alcohol could be challenged by showing no such disturbances occur on the premises of these bars or restaurants.

137. *Id.* at 715 (emphasis added).

provisions as there was in *Bellanca,* i.e., between the first and twenty-first amendments. As the district court pointed out in *Dole,* no direct constitutional conflict allegedly existed between the STAA and the twenty-first amendment; the states were presumably free to ignore the STAA and maintain their present drinking ages.[138]

One could narrowly construe *Bellanca* to apply only to establishments which provide both alcohol and recreational diversions. Moreover, judicial concern over public health and morals might underlie the Court's reasoning in *Bellanca.* Nevertheless, the Court apparently attributed special qualities to state power under the twenty-first amendment, since it was deemed weightier than the first amendment freedoms clearly abridged in *Bellanca.*

Another case that sheds further light on the Court's interpretation of the reach of the twenty-first amendment is *California v. LaRue.*[139] The Court ruled that the California Department of Alcoholic Beverage Control had lawfully issued regulations prohibiting explicit live sexual entertainment and films in establishments licensed to sell liquor.[140] The Court recognized the broad sweep of the twenty-first amendment as conferring more than normal state authority over public health, welfare, and morals.[141] The Court also stated that the twenty-first amendment requires "the added presumption in favor of the validity of the state regulation in this area."[142] However, the Court emphasized that the first amendment does not supersede all other sections of the Constitution in the area of liquor regulations.[143]

Thus, the power granted to the states under the twenty-first amendment is not absolute. However, it is important to note that the Court has upheld state power under the twenty-first amend-

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138. *Dole,* No. 84-5137, slip op. at 6-7. However, the issue again arises as to whether or not a court will be willing to examine the practical effect of the STAA, i.e., the STAA will and does restrict the exercise of the twenty-first amendment power and possibly coerces a state into relinquishing its core power because it will lose federal funds if it does not comply.

139. 409 U.S. 109 (1972).

140. *Id.* at 118-19.

141. *Id.* at 114.

142. *Id.* at 118.

143. *Id.* at 115. The Court held, for example, in Wisconsin v. Constantineau, 400 U.S. 433 (1971), that the due process clause of the fourteenth amendment was applicable to a state statute providing for the public posting of names of persons who had engaged in excessive drinking.

ment in the face of what is probably the most significant federal constitutional protection against governmental power, i.e., the first amendment.[144] As the Court stated, "[t]he constitutional right of free expression is powerful medicine in a society as diverse and populous as ours."[145] Justice Marshall, in his dissent in *California v. LaRue*, described first amendment values as ones which had in the past two hundred years or so "been thought so important as to provide an independent restraint on every power of Government."[146] One could subsequently assert that any power which can infringe upon presumably sacred first amendment rights is a unique and considerable one. This special power of the twenty-first amendment should not be ignored or significantly intruded upon as it has been by the STAA.

Hence, the real issue in *Dole* is not whether states enjoy expansive and distinct powers under the twenty-first amendment because undoubtedly they do. The real issues, unaddressed by the *Dole* court, are two-fold: assuming that the setting of the drinking age is a reserved state power, first, does the conditional revocation of federal funding sufficiently conflict with this power and, second, can a court invalidate the STAA without upsetting contemporary views of the federal spending power?

B. Revival of the Butler Doctrine Within the Context of Regulating Alcohol

The federal government should be able to provide incentives for the states to act or legislate in a certain fashion. However, incentives which are in effect penalties for nonconformity should be more closely scrutinized by the courts. In *United States v. Butler*, the Court warned that "the power to confer or withhold . . . is the power to coerce or destroy."[147] The *Butler* Court stated that Congress could not "ignore constitutional limitations upon its own powers and usurp those reserved to the states."[148] As applied to the STAA controversy, the states have been given the clear option to change their laws or else lose federal funds. *Butler* declared this very type of coercion unconstitutional.

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144. *See e.g.*, Patterson v. Colorado, 205 U.S. 454 (1907); Kovacs v. Cooper, 336 U.S. 77 (1949) (Frankfurter, J., concurring).

145. Cohen v. California, 403 U.S. 15, 24 (1971).

146. *LaRue*, 409 U.S. at 135.

147. *Butler*, 297 U.S. at 71.

148. *Id.* at 75.

Courts should examine the realities of the STAA's purported choice. As was the situation in *Butler,* economic coercion is being exerted at the expense of state autonomy.[149] Unlike *Butler,* the power being infringed upon, in *Dole,* traces its source to a constitutional provision and express grant of authority. The STAA, therefore, arguably represents congressional disregard for a reserved state power. A court's willingness to uphold the STAA enables Congress to attain, no matter how indirectly, a prohibited end under the pretext of the spending power.[150] This "invasion" further breaks down the barriers that allegedly exist between state and federal powers.[151] In fact, the STAA's enactment and subsequent federal intrusion into state sovereignty further implies that the concept of federalism is being greatly undermined and ignored.

The reasoning of *Butler* seems very applicable to this area of state power that undoubtedly holds very special status within our Constitution. The STAA could be construed as coercion, and presenting an option to forego a privilege that is vital to a state's maintenance of its highways.[152] States which do not comply with the STAA conceivably risk creating unsafe highway conditions, due to both a shortage of funds that will likely result and their roads' necessary delapidation.[153] This likelihood further strengthens the argument that states ultimately have no choice and will "voluntarily" raise their drinking ages to the national level.

The twenty-first amendment, coupled with the *Butler* rule, presents a court with the authority to invalidate the STAA, because the federal government has perhaps overstepped constitutional boundaries by passing legislation with coercive implications. If a state may prohibit possession of alcoholic beverages within its territory,[154] then that state should be permitted to determine the age at which one may lawfully purchase alcohol. The STAA interferes with what seems to be a natural, co-existent right of a state (under the twenty-first amendment) to set its minimum drinking age. Moreover, the interference appears to be done in an unconstitutional fashion.

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149. *See supra* text accompanying notes 106-14.

150. *Butler,* 297 U.S. at 68.

151. *See, e.g.,* Garcia v. San Antonio Metropolitan Transit Authority, 105 S.Ct. 1005 (1984); Chandler v. Florida, 449 U.S. 560 (1980); Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

152. *Butler,* 297 U.S. at 72.

153. This possibility is somewhat ironic, since the STAA's purpose is highway safety.

154. *Ziffrin,* 308 U.S. at 138.

If the implications of cases such as *Butler, Bellanca,* and *La-Rue* are ignored, opponents of the STAA could still contend that the Act is constitutionally imprudent and violates the precepts of federalism. The STAA is an example of the federal government's intrusion on what was once sovereign state ground.

III. FEDERALISM: A BAR TO THE STAA'S IMPLEMENTATION

A. The Need for State Experimentation to Preserve Federalism

Justice Brandeis announced in his now famous dissent in *New State Ice Co. v. Liebman:*[155]

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country . . . . If we would guide by the light of reason, we must let our minds be bold.[156]

New State Ice dealt with an Oklahoma statute that declared the manufacture, sale, and distribution of ice to be a public business and prohibited anyone from engaging in it without first having procured a license.[157] The statute was held to be inconsistent with the due process clause of the fourteenth amendment.[158]

In his dissent, Justice Brandeis stated that limitations set by courts on experiments in fields of social and economic science[159] served to discourage proposals which could be for the betterment of society.[160] A power, Brandeis continued, must exist within the nation to remold through experimentation our institutions to meet changing social and economic needs.[161]

This "power" Brandeis speaks of can be traced back to the

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155. 285 U.S. 262 (1932).

156. *Id.* at 311.

157. *Id.* at 271.

158. *Id.* at 280. The regulation was judicially declared repugnant to the due process clause because it unreasonably curtailed, if not in fact denied, the common right to engage in lawful private business. *Id.* at 278.

159. *Id.* at 310-11.

160. *Id.* at 311.

161. *Id.*

original Framers of the Constitution. Indeed, the *Federalist* evinces some of the Framers' intent to protect and nurture the precepts of the state's power to experiment and mold its institutions. In the *Federalist*, James Madison stated that each state in ratifying the Constitution was to be considered as a sovereign body.[162] The powers delegated to the federal government were to be "*few* and defined,"[163] the powers remaining with the states "numerous and indefinite."[164] In addition, the states were to be independent of all others and only bound by their individual, voluntary acts.[165] Madison further asserted that the federal and state governments were "different agents and trustees of the people."[166] Each was instituted with different powers, designated for different purposes.[167]

Alexander Hamilton in the *Federalist* stated with little fear, and no hindsight, that "it will be always easier for the state governments to encroach upon the national government, than for the national government to encroach upon the state authorities."[168] The strength, Hamilton predicted, will always remain on the side of the people and the state governments will commonly possess the most influence over its citizens.[169] The "natural conclusion" was that contests between the state and federal governments for the people's will would ultimately end to the disadvantage of the national governments.[170] Moreover, Hamilton was confident that the state governments would retain all the rights of sovereignty which they had originally possessed and which were not exclusively delegated to the federal government.[171] The people of the states would take special care to preserve the equilibrium between the federal and state governments.[172]

The faith exhibited by both Hamilton and Madison in federalism and state sovereignty has been mistakenly echoed by the

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162. THE FEDERALIST No. 39, at 193 (J. Madison) (G. Wills, ed. 1982).
163. THE FEDERALIST No. 45, at 236 (J. Madison) (G. Wills, ed. 1982).
164. *Id.*
165. THE FEDERALIST No. 39, at 193 (J. Madison) (G. Wills, ed. 1982).
166. THE FEDERALIST No. 46, at 237 (J. Madison) (G. Wills, ed. 1982).
167. *Id.*
168. THE FEDERALIST No. 17, at 81 (A. Hamilton) (G. Wills, ed. 1982).
169. THE FEDERALIST No. 31, at 151 (A. Hamilton) (G. Wills, ed. 1982).
170. *Id.*
171. THE FEDERALIST No. 32, at 152 (A. Hamilton) (G. Wills, ed. 1982).
172. THE FEDERALIST No. 31, at 151 (A. Hamilton) (G. Wills, ed. 1982).

United States Supreme Court.[173] Both the Court and the federalists failed to envision or refused to accept the growth of our nation and the federal government's expansion. The Framers were confident that the Constitution, in the future, would insulate the states from an overextensive reach of congressional power. Such confidence was misplaced.[174]

In *Garcia v. San Antonio Metropolitan Transit Authority*,[175] the Supreme Court relied on the design and composition of the federal government to protect states from overreaching by Congress.[176] According to the *Garcia* Court, the Framers chose, as courts should today, to rely on a federal system in which special restraints on federal power over the states could be located in the workings of the national government, rather than in any limitations on objects of federal authority.[177] Therefore, state sovereignty was properly preserved by procedural safeguards inherent in the federal system's structure.[178] Judicially created limitations on federal power were both inappropriate and unnecessary.[179]

The *Garcia* Court offered several examples of these so-called procedural safeguards, such as the electoral college, the senate, and the house of representatives.[180] Ironically, the Court cited the federal grant system as one manifestation of the states' power in the federal system.[181] The Court noted that states have been able to direct a substantial proportion of federal revenues into their own treasuries in the form of general and program-specific grants in aid.[182]

However, the procedural safeguards extolled by the *Garcia* Court have consistently failed to materialize on behalf of the states. Instead, the "federal system" has, with judicial stamp of ap-

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173. *See, e.g.*, Garcia v. San Antonio Metropolitan Transit Authority, 105 S.Ct. 1005 (1985).

174. *See infra* notes 165-166 and accompanying text.

175. 105 S.Ct. 1005 (1985).

176. *Id.* at 1018.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* The Court asserts that the states have been able to exercise considerable influence to obtain federal support and have also been able to exempt themselves from a wide variety of obligations imposed by Congress. This has allegedly minimized the burdens that the states bear under the commerce clause. *Id.* at 1019.

181. *Id.*

182. *Id.*

proval, been used to coerce states into compliance with often involuntary legislation. An example, besides the STAA, is the national 55-mile speed limit law.[183] As with the STAA, states were given the "choice" of either lowering their speed limits or else forfeiting valuable fiscal support.[184] The states, as they have been continually forced to do, complied with federal guidelines.[185] Hence, the procedural safeguards have paradoxically served to disarm, rather than protect, the states.

Indeed, the Framers might have taken further steps to ensure state sovereignty, if they were able to foresee, in addition to congressional disregard for federalism and subsequent judicial inaction, powerful lobbying groups, the conditional federal grant system, and growing state fiscal dependency on the federal government. Hamilton's and Madison's inexorable faith in federalism might have been somewhat shaken had they witnessed the growth of the federal government. Although *Garcia* insisted on remaining superficially faithful to antiquated concepts of federalism, many courts have been extremely vocal about the need to rediscover state autonomy. The Brandeis dissent in *New State Ice* has become, in large part, the gospel of such judicial advocacy.

In *Chandler v. Florida*,[186] the Supreme Court upheld the constitutionality of a Florida law which permitted electronic media and still-photography coverage of public judicial proceedings.[187] The Court emphasized the built-in safeguards present in this experimental program[188] which the Florida Supreme Court promulgated.[189] The appellants asserted that the law violated their due process rights;[190] however, the Court felt there was insufficient

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183. 23 U.S.C. § 154 (1974). The Act permits the Secretary of Transportation to withhold a percentage of highway funds from states which fail to set a maximum speed limit on any public highway at 55 m.p.h. *Id.*

184. *Id.*

185. *See, e.g.*, Massachusetts v. Mellon, 262 U.S. 447 (1923), whereby the Court upheld the constitutionality of the maternity act. The act offered federal dollars in the area of health care in exchange for the states' acceptance of certain federally established conditions. *Id.* at 479. The Court declared that states could simply refuse to yield to "congressional temptation." *Id.* at 482.

186. 449 U.S. 560 (1981).

187. *Id.* at 582.

188. *Id.* at 577.

189. *Id.* at 566. The entire experiment could be completely abolished and all broadcast coverage or photography barred, upon a showing that such coverage interfered with the judicial proceedings. *Id.*

190. *Id.* at 568.

(present) empirical data to establish that the presence of the broadcast media has an adverse effect on the process.[191]

In *Chandler*, the Court adhered to Brandeis' notion of federalism by permitting the state to experiment in this area.[192] The Court admitted that dangers do exist in most experiments; however, unless one can conclude that coverage under all conditions is prohibited by the Constitution, the states must be free to try and implement novel approaches in various areas.[193] It was forcefully declared that courts are not empowered to oversee or harness procedural experimentation.[194] Moreover, the Court seemed impressed by seventeen states submitting Amicus briefs in support of Florida's experimental program.[195]

Justice Rehnquist, in his dissent in *Santosky v. Kramer*,[196] articulated concerns readily applicable to those of Justice Brandeis in *New State Ice* and to the STAA controversy. In *Santosky*, the majority held unconstitutional a New York statute that permitted the state to terminate, over parental objection, rights of parents in their natural child upon a finding that the child was permanently neglected.[197] The New York law required only that a fair preponderance of the evidence support the finding.[198] The Supreme Court ruled, however, that a higher standard of proof, i.e., clear and convincing evidence, was necessary.[199]

Justice Rehnquist cited *Santosky* as but another example of federal intrusion into an area of law that had been left to the states "from time immemorial."[200] The majority's approach, in Rehnquist's view, necessarily led to the federalism of family law.[201]

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191. *Id.* at 578-79.

192. *Id.* at 580.

193. *Id.* at 582.

194. *Id.* The case would seem distinguishable from *Dole* based on *Chandler*'s emphasis on procedural experimentation. *See supra* text accompanying notes 187-95. Yet, what underlies both cases is the principle of experimentation in general. Justice Brandeis in *New State Ice* made no distinction between the types of acceptable experimentation; he simply encouraged experimentation of all kinds. *New State Ice*, 285 U.S. at 311; *see supra* text accompanying notes 155-61.

195. *Chandler*, 449 U.S. at 576.

196. 455 U.S. 745 (1982).

197. *Id.* at 747-48.

198. *Id.* at 747.

199. *Id.* at 748. The Court specifically cited the due process clause of the fourteenth amendment as demanding a higher standard of proof. *Id.* at 747.

200. *Id.* at 770 (Rehnquist, J., dissenting).

201. *Id.* at 773.

This trend, according to Rehnquist, thwarts state searches for better solutions in an area where this Court ought to encourage state experimentation.[202]

Rehnquist's dissent mirrors the sentiments of the Amici states and South Dakota in *Dole*. These states contend that the STAA invades traditional core state power and intrudes into an area of law that was solely within the state's sovereignty.[203] The states could argue that state experimentation could produce the requisite empirical evidence that was apparently lacking in the STAA's avowed purpose (saving lives).[204] The states then, with the federal government's cooperation, could work out a program to combat alcohol-related highway accidents and deaths.

Further support for allowing states to experiment in the area of alcohol control is found in *Reeves, Inc. v. Stake*,[205] which upheld South Dakota's implementation of a resident-preference program for the sale of cement.[206] The program was implemented to address shortages of cement and take care of all South Dakota customers first.[207] The Court declared that the states must be allowed to fashion effective and creative programs for solving certain problems.[208] The decision exhibited and promoted a healthy regard for federalism and also encouraged state governments to confront and attempt to solve diverse dilemmas.

In order to revive federalism, especially in light of the reach of both the commerce and spending power clauses, the federal government should allow states to experiment further in the area of

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202. *Id.*

203. Amici Curiae Brief, *supra* note 25, at 4.

204. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 617 (1982) (Burger, C.J., dissenting). Recall the district court in *Dole* saw no merit in the federal government's claim that the STAA would definitely save lives. The court broadened the federal interest into one of highway safety which consequently permitted it to support a federal interest. *See infra* note 209. *Dole*, No. 84-5137, slip op. at 7.

205. 447 U.S. 429 (1980).

206. *Id.*

207. *Id.* at 432.

208. *Id.* at 441. Admittedly the sale of cement is not on the same scale as highway fatalities. However, the federal government cannot conclusively prove that the STAA will cease highway accidents or fatalities. Indeed, since not only eighteen to twenty-one year olds drink and drive, maybe the STAA should require the raising of minimum drinking age even higher. Then the question becomes how high will one go to ensure highway safety. This suggests the necessity for examining other alternatives that will work better to promote highway safety and not impinge on either the state's right under the twenty-first amendment and eighteen-year old's individual liberties.

drinking and driving abuse.[209] If an experiment fails, the legislative process remains available to terminate the unwise experiment.[210] To simply "nationalize" the problem ignores the available resources and tools each state possesses to confront this challenge.

As the Court stated in *San Antonio Independent School District v. Rodriguez*,[211] our pluralistic society affords ample opportunity for experimentation, innovation, and salutary competition.[212] *Rodriguez* involved a Texas system of financing public education that allegedly favored certain school districts (the richer ones) over others.[213] The Court stressed that each locality should be free to tailor local problems to local needs.[214] Like education, highway safety is an important concern for the nation and the states. States experience problems in these areas in varying degrees. The Court's willingness to permit experimentation in the vital field of education should also be carried over to the area of highway safety.

As Chief Justice Burger noted in his forceful dissent in *E.E.O.C. v. Wyoming*,[215] flexibility for experimentation permits a state to find the best remedies to its own dilemmas and such flexibility is often a means by which other states may profit from the experiments and activities of one state.[216] The Chief Justice stated "nothing in the Constitution permits Congress to force the states into a Procrustean national mold that takes no account of local needs and conditions."[217] To allow this would be the antithesis of what the authors of the Constitution contemplated for our federal system.[218]

B. The Constitutional Imprudence of the STAA

The district court in *Dole* conceded that the STAA's avowed

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209. Among the "experiments" states could attempt would be stiffer penalties for certain age groups or required courses in high school concerning alcohol and driving.

210. Whalen v. Roe, 429 U.S. 589, 598 (1977).

211. 411 U.S. 1 (1973).

212. *Id.* at 50.

213. *Id.* at 7-8.

214. *Id.* at 50.

215. 103 S.Ct. 1054 (1983).

216. *Id.* at 1075 (Burger, C.J., dissenting). Presumably each state is encountering problems of different proportions in the area of driving and drinking. One state, due to strict enforcement of the law, might have fewer problems than another state which has more lenient penalties or is composed of a different sociological makeup.

217. *Id.*

218. *Id.*

purpose, saving lives on highways, could not be evaluated.[219] Presumably this was stated because no conclusive data existed to support the federal government's claim.[220] As implied by the district court, no one knows with certainty that raising the drinking age to twenty-one will ultimately lead to fewer highway fatalities. Thus, states should be permitted to experiment in areas that have no panaceas.

Even if it could be proven that raising the drinking age will save lives, states should be allowed, not economically coerced, to raise the drinking age. Presumably, as reasonable entities, the states would conform.

The STAA is Congress' attempt to force the states into the "Procrustean national mold" that Chief Justice Burger warned of in his dissent in *E.E.O.C. v. Wyoming*.[221] This attempt does not consider the differences that undoubtedly exist between states in regard to drinking and driving problems.[222] The purported or illusory choice proffered by the STAA makes the states ultimately more dependent on the federal government and further erodes principles of federalism. This is constitutionally imprudent. The Constitution recognizes and is supposed to preserve state sovereignty,[223] and states must be free from coercion to preserve and foster their autonomy.[224]

Lawrence Tribe states the Constitution was written and predicated on the presupposition that the states exist as entities independent of the federal government.[225] Congress should subsequently treat the states in a manner that is consistent with their independent status.[226] "If any danger exists," Tribe warns, it is in "the tyranny of small decisions" whereby Congress is able to "nibble away" at state sovereignty until nothing is left but a "gutted shell."[227]

The STAA does not represent a small decision. In one broad sweep, Congress has determined that by raising the drinking age to

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219. *Dole*, No. 84-5137, slip op. at 7.
220. *See infra* note 228 and *supra* text accompanying notes 22-25.
221. 103 S.Ct. 1054 (1983).
222. *Id.* at 1075 (Burger, C.J., dissenting).
223. B & O Railroad v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting).
224. *Id.* at 402.
225. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 301 (1978).
226. *Id.*
227. *Id.* at 302.

twenty-one, the states' and nation's highway safety concerns will be significantly alleviated without appropriate supporting data. The STAA, however, ignores state sovereignty in the alcohol-regulation area, and, moreover, impedes on state autonomy. Further, the STAA conceivably ignores statistics that point to other age groups as possible culprits or "co-conspirators" in the alcohol-related highway accidents problem.[228]

Alcohol-related highway deaths, without the STAA, have declined to about 23,500 in 1984 from 28,000 in 1980.[229] Tougher laws and effective educational programs, like those sponsored by MADD and SADD,[230] have helped contribute to this decline.[231] Certainly, part of the solution to this problem is to alter the public's view and to educate and impress upon *all* members of the public the consequences of drunk driving.[232] In addition to tougher laws, roadblocks or drunk-driving checkpoints have been effectively used by police, and so far, have not been declared per se stitutional by the United States Supreme Court.[233]

Also, the eighteen-year old who is capable of voting or serving in the armed services should be equally capable of making informed decisions about drinking and driving, provided he or she is exposed to a proper education and an environment that promotes responsible behavior and safe driving habits. Many alternatives exist; the STAA deprives the states of the opportunity to seek solutions to a problem that is not monolithic, but varies according to the state and locality. The Court's present interpretation of the spending power makes the STAA a constitutionally permissible act; however, based on the precepts of federalism that underlie our Constitution, the STAA is a constitutionally imprudent measure.

CONCLUSION

The federal spending power is very broad and far-reaching.

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228. Interview with John F. Cronan, Assistant State's Attorney, in Wallingford, Connecticut (Dec. 27, 1985). Mr. Cronan estimates that in Connecticut less than ten percent of the total drunk driving arrests involve 18 to 21-year olds. In view of this, one could argue that the sole means of ensuring the best, or at least better, highway safety conditions is to raise the drinking age to 35 so that the "happy hour crowd" is included.

229. Wall Street Journal, Nov. 6, 1985, at 35.

230. Mothers Against Drunk Driving, Students Against Drunk Driving.

231. Wall Street Journal, Nov. 6, 1985, at 35.

232. *Id.*

233. *See* Delaware v. Prouse, 440 U.S. 648 (1979).

Undoubtedly, Congress may attach "strings" to the distribution of funds to the states. However, a fiscal mismatch exists between the states and the federal government.[234] The division of powers, central to federalism, is seen by some as rapidly deteriorating.[235] Courts, however, are apparently unwilling in the area of funding to apply a check on the federal government's expansive reach into state affairs. Consequently, the federal government possesses the power to impact state independence.

The Surface Transportation Assistance Act represents one example of federal intrusion. The STAA is a coercive device which threatens the continued existence of federalism, and significantly interferes with a core power reserved to the states by the twenty-first amendment. The twenty-first amendment expressly grants authority to the states to regulate the distribution and management of alcohol. States have been given the "option" to either change their laws and sacrifice state autonomy in the alcohol area or lose vital federal funding. The STAA forces states into raising their drinking ages without regard to the states' ability to formulate policy and retain reserved constitutional power.

The concept of states as laboratories is also ignored under the STAA. The Supreme Court's faith in ensuring federalism through the political process should be replaced by judicial recognition that the federal government presently can legislate with little fear of state noncompliance due to the conditional nature of federal funds. This "stick and carrot" methodology employed by the federal government attacks and diminishes state sovereignty. Economic coercion, under the guise of the STAA, should not be permitted at the expense of state autonomy provided by the twenty-first amendment.

The STAA is also a constitutionally imprudent law. Courts should abandon their deferential posture and follow convincing precedent such as *United States v. Butler* and *New York Liquor Authority v. Bellanca*. Only then can courts, as the ultimate preservers of federalism, invalidate the STAA and subsequently protect states from the overextensive reach of the federal government.

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234. R. LEACH, AMERICAN FEDERALISM 200 (1970).
235. *See id.*.