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Constitutional Law - Spending Clause - Twenty-First Amendment

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CONSTITUTIONAL LAW—SPENDING CLAUSE—TWENTY-FIRST AMENDMENT—23 U.S.C. § 158—The United States Supreme Court has held that the withholding of federal highway funds from states that failed to comply with a congressional directive establishing twenty-one as the states' minimum age for alcohol consumption and purchase is a valid exercise of the spending power.

South Dakota v. Dole, 107 S. Ct. 2793 (1987).

In 1984 Congress enacted the National Minimum Drinking Age Amendment[1] to the Surface Transportation Assistance Act of 1982 (the Act).[2] The amended Act directed the Secretary of Transportation to withold five percent of otherwise allocable[3] federal highway funds to states which permitted the purchase of alcoholic beverages by persons less than twenty-one years of age.[4] The Act also provided for reimbursement of witheld funds to states that subsequently raised their drinking age to twenty-one.[5]

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1. 23 U.S.C. § 158 (1982 ed. Supp. III), *as amended* by Act of April 7, 1986, Pub. L. No. 99-272, tit. IV, § 4104 (1986).

2. The Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 provides: "An Act to authorize appropriations for construction of certain highways in accordance with title 23, United States Code, for highway safety, for mass transportation in urban and rural areas, and for other purposes." *Id.* at 2097.

3. 23 U.S.C. § 158(a)(1) states: "The Secretary shall withold 5 per centum of the amount required to be apportioned to any State under each of sections 104(b)(1), 104(b)(2), 104(b)(5), and 104(b)(6) of this title on the first day of the fiscal year succeeding the first year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful."

23 U.S.C. § 104(b) directs the Secretary of Transportation to apportion sums authorized for expenditure under the Federal-aid system to several programs. These include the Primary System, the Secondary System, the Interstate System and the Urban System. *Id.* at §§ 104(b)(1)(2)(5)(6).

4. 23 U.S.C. § 158(a)(2) provides that after the first year of non-compliance with § 158, the Secretary is authorized to withold 10 per centum of the amount required to be apportioned to a state under the Federal-aid systems.

5. *Id.* at § 158 (b).

Under South Dakota law, nineteen and twenty-year-olds are permitted to purchase low point beer.[6] The State of South Dakota brought an action for declaratory and injunctive relief in United States district court alleging that the Act impaired the State's exclusive right under the twenty-first amendment[7] to determine the appropriate drinking age in South Dakota.[8] The State further alleged that the provisions of the Act violated the tenth amendment.[9]

The district court dismissed the complaint pursuant to a FED. R. CIV. P. 12(b)(6) motion.[10] The district court recognized the State's standing to challenge the Act[11] but concluded that the tenth amendment was not offended by the federal government conditioning the receipt of funds on compliance with a directive which Congress

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6. S.D. CODIFIED LAWS ANN. § 35-6-27 (1986) permits the sale of low point beer to nineteen-year-olds. Low point beer is defined as any malt beverage which contains not less than one-half of one percent of alcohol by weight but no more than three and two tenths percent of alcohol by weight. *Id.* at § 35-1-1(8).

Since 23 U.S.C. § 158(c) defined alcoholic beverages to include beer containing one half of one percent or more of alcohol by volume, the South Dakota enactment subjected the state to the withholding-of-funds provision.

7. U.S. CONST. amend. XXI, § 2 provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

8. South Dakota *v.* Dole, No. 84-5137 (D.S.D. May 3, 1985). In addition, the complaint alleged that the purpose of the legislation is penal in nature, and was in fact, described in that manner by its floor sponsor, Senator Lautenberg of New Jersey. *See* Plaintiff's Complaint at XVII, *id.*

9. U.S. CONST. amend. X states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

10. No. 84-5137 at 6. FED. R. CIV. P. 12(b)(6), "failure to state a claim on which relief can be granted." The district court presented two independent reasons as to why South Dakota's claim must be dismissed. First, since the state had no right to the funds absent congressional action, the "simple fact" that the federal government attached strings to the state's eligibility for these federal dollars did not mean that the state could not maintain its own drinking age. Second, even assuming *arguendo* that there did exist sufficient friction in the constitutional sense between the Act and the South Dakota statute, the "balancing of the factors weighed in favor of the federal interests." *Id.* at 7.

11. *Id.* at 7. Secretary Dole argued that South Dakota lacked standing to bring an action since any injury to the plaintiff at that time was "conjectual, hypothetical or speculative." The argument was grounded on the fact that § 158 (a)(1) would not withold funds until 1986.

The district court disagreed. Chief Judge Bogue recognized that South Dakota could have altered its position before the Act adversely affected the state. However, Judge Bogue concluded that the clash between the federal scheme and South Dakota law was "in place" and "(since) the issues are sharp . . . nothing is to be gained by postponing a decision of this case." *Id.* at 7.

deems is for the general welfare.[12] The court also believed that the Act did not constitutionally conflict with the twenty-first amendment since nothing in the Act prevented the State from maintaining its drinking age.[13]

The State appealed the dismissal to the Court of Appeals for the Eighth Circuit.[14] The Eighth Circuit affirmed, holding that the Act fell within the scope of Congress' spending power[15] and was not violative of either the twenty-first[16] or tenth amendment.[17] The ap-

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12. No. 84-5137 at 7, *citing* the "plain import" of Fullilove *v.* Klutznick, 448 U.S. 448, 475 (1980) and Buckley *v.* Valeo, 424 U.S. 1, 91 (1976). In recognizing that Congress has frequently employed the spending power to further policy objectives by conditioning the receipt of federal funds, the *Fullilove* court held the power to provide for the general welfare is an independent grant of legislative authority, distinct from other congressional powers. *Buckley* held that the grant of power in the general welfare clause is quite expansive, particularly in view of the enlargement of power by the necessary and proper clause.

13. *Id.* In resolving the twenty-first amendment issue, Judge Bogue recognized that there is no bright line between federal and state powers over liquor and noted that the question for the court to answer in such an analysis appears to be, "whether the interests implicated by a state regulation are so closely related to the powers reserved by the twenty-first amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with federal policies." *Id.* at 7, *citing* Bacchus Imports, Ltd. *v.* Dias, 468 U.S. 263, 275-76 (1984).

14. South Dakota *v.* Dole, 791 F.2d 628 (8th Cir. 1986). On appeal, South Dakota again argued that Congress had impermissably impaired the state's exclusive and constitutionally protected right to regulate the consumption of alcoholic beverages within the state. *Id.* at 630.

In response, the Secretary asserted that a state's broad power to regulate liquor is not exclusive and contended that Congress had simply attempted to enlist the state's cooperation in addressing drunk driving that not only transcended state lines but in Congress' view was actually aggravated by state lines. *Id.* at 630-31.

15. U.S. CONST. art. I, § 8, cl. 1 empowers Congress to "lay and collect Taxes, Duties, Imports, and Excises, to pay the Debts and provide for the Common Defense and General Welfare of the United States."

16. 791 F.2d at 633, 634. Circuit Judge Fagg was of the opinion that the primary intent of the twenty-first amendment was to create an "exception to the normal operation of the commerce clause." *See* Craig *v.* Boren, 429 U.S. at 206 (1976). Judge Fagg noted that the Supreme Court has repeatedly emphasized that in addition to a state's broad authority to regulate liquor within the state, the federal government retains its authority under the commerce clause to regulate interstate commerce in liquor. Judge Fagg concluded that since Congress' authority to legislate under the commerce clause is unaffected by the twenty-first amendment, "we have little doubt that its authority under the spending clause is equally unaffected". *Id.* at 633.

17. South Dakota's tenth amendment argument was undermined by the Supreme Court's decision in Garcia *v.* San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). The Court held that the principal limitation imposed upon the exercise of a delegated power is the built-in restraints that our system provides through state participation in federal government action. Judge Fagg noted that South Dakota

pellate court was of the opinion that Congress, in its discretion, could determine that imposing conditions on a portion of a state's federal highway funds was reasonably related to achieving a nationally uniform minimum drinking age, and therefore, within the scope of the spending clause.[18] In addition, the Eighth Circuit reasoned that the ability of the state to reject the funds eliminated conflict between the federal enactment and the state's right to establish its own drinking age.[19] The State petitioned for writ of *certiorari*. The United States Supreme Court granted *certiorari*[20] and affirmed the decision reached by the Eighth Circuit.

Despite the extended treatment of the issue by the parties,[21] the United States Supreme Court in *South Dakota v. Dole*,[22] reserved the question of whether the twenty-first amendment would prohibit the attempt by Congress to directly legislate a national minimum drinking age.[23] In so doing, Justice Rehnquist examined the "indirect" legislation using a spending clause analysis.

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failed to demonstrate how § 158 forced the state to restructure its governmental system or impaired the state's ability to function effectively in the federal system. 791 F.2d at 634.

18. *Id.* at 632, *citing* Helvering *v.* Davis, 301 U.S. 619, 640-41, 644-45 (1937). The *Helvering* court held that appropriate deference must be given to Congress' view of the national welfare and the means necessary to promote that welfare.

In its debates over the bill that became 23 U.S.C. § 158, members of Congress believed that the problem of young adults drinking and driving had substantial interstate ramifications—specifically as a result of young adults who were unable to legally consume alcohol in their home state driving to states with lower drinking ages. *See* 130 Cong. Rec. S8228 (daily ed. June 26, 1984).

19. *Id.* at 634. South Dakota argued that in the area of alcohol regulation, when state and federal interests directly conflict, a balancing of the state and federal interests involved may result in state law prevailing. Such a result appears most likely when the state law in question is "designed to promote temperence or to carry out any other purpose of the twenty-first amendment." *See Bacchus*, 104 S. Ct. at 3058-59.

The Eighth Circuit dismissed this argument "very simply" since South Dakota is "entirely free" to maintain its law and will violate no federal law if it chooses to do so. 791 F.2d at 634.

20. South Dakota v. Dole, 791 F.2d 628 (8th Cir. 1986), *cert. granted*, 107 S. Ct. 567 (1986).

21. *See* Brief for Petitioner at 43-44, South Dakota *v.* Dole, 107 S. Ct. 2793 (1987). South Dakota asserted that the setting of minimum drinking ages was clearly within the "core powers" reserved to the states under § 2 of the twenty-first amendment.

The Secretary in response, asserted that the twenty-first amendment does not confer on the state any power to permit sales that Congress seeks to prohibit. *See* Brief for Respondent at 25-26.

22. South Dakota *v.* Dole, 107 S. Ct. 2793 (1987).

23. *Id.* at 2795.

Justice Rehnquist, writing for the Court, initially analyzed applicable case law and concluded by recognizing the ability of Congress, under the spending clause, to condition the receipt of federal funds upon compliance with federal directives.[24] Noting that the clause was not unlimited, Justice Rehnquist cited four general restrictions on the spending power: (1) the exercise of the power must be in pursuit of the general welfare;[25] (2) congressional conditions must be unambiguous;[26] (3) the conditions imposed must be reasonably related to the purpose of the expenditure;[27] and (4) other constitutional provisions must not constitute an independent bar to the conditional grant.[28]

Applying these restrictions to the instant case, the Court believed that the Act was unambiguous since the condition upon which states received the federal funds could not have been "more clearly stated by Congress."[29] In addition, Justice Rehnquist readily concluded that the Act was exercised in pursuit of the general welfare, especially in light of the fact that "the concept of welfare or the opposite is shaped by Congress."[30] Justice Rehnquist stressed that Congress had found differing ages in the states had created incentives for young persons to commute to border states where the drinking age was lower.[31]

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24. *Id.* at 2796, *citing* United States *v.* Butler, 297 U.S. 1, 66 (1936), which held that the power of Congress to authorize the expenditure of public moneys is not limited to the direct grants of legislative power found in the Constitution. Thus, objectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

25. 107 S. Ct. at 2796. Justice Rehnquist noted that the level of deference to the congressional decision is such that the Court has more recently questioned whether "general welfare" is a judicially enforceable restriction at all. *See* Buckley *v.* Valeo, 424 U.S. at 90-91.

26. 107 S. Ct. at 2796. *Citing* Pennhurst State School *v.* Halderman, 451 U.S. 1, 17 (1981), holding conditioning of funds enables the states to examine their choice knowingly, cognizant of the consequences of their participation.

27. 107 S. Ct. at 2796. Without significant elaboration the Supreme Court has held that the federal government may establish and impose reasonable conditions relevant to the federal interest in the project. *See* Massachusetts *v.* United States, 435 U.S. 444, 461 (1978); and Ivanhoe Irrigation Dist. *v.* McCracken, 357 U.S. 275, 295 (1958).

28. 107 S. Ct. at 2796. *See* Lawrence County *v.* Lead-Deadwood School Dist., 469 U.S. 256, 269-70 (1985).

29. 107 S. Ct. at 2797.

30. *Id.* at 2797, *citing Helvering*, 301 U.S. at 645.

31. *Id. citing* Presidential Commission on Drunk Driving, Final Report 11 (1983).

In regard to the relationship of the condition to the federal purpose, Justice Rehnquist believed that the condition imposed by the Act was directly related to one of the main purposes for which highway funds are expended — safe interstate travel. Justice Rehnquist buttressed this argument with South Dakota's acknowledgment that the Act was related to a national safety concern in the absence of the twenty-first amendment.[32] The majority believed that since the goal of the interstate highway system had been frustrated by varying drinking ages among the states, congressional enactment of section 158 had conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment.[33]

Interestingly, Justice Rehnquist noted that prior cases have not required a definition of the "outer bounds" of the "relatedness" limitation on the imposition of conditions under the spending power. An *amicus curiae* brief submitted by the National Conference of State Legislatures urged the Court to take this occasion to establish that a condition on federal funds is legitimate only if it relates directly to the purpose of the expenditure to which it is attached.[34] Since the petitioner did not seek such a restriction and because the Court found any such limitation on conditional grants satisfied in the instant action, Justice Rehnquist did not address the issue of whether conditions less directly related to the particular purpose of the expenditure might be outside the bounds of the spending power.[35]

The Court then considered the issue of whether the twenty-first amendment constituted an independent constitutional bar to the conditions imposed. It was South Dakota's contention that Congress may not use the spending power to indirectly regulate that which it was prohibited from regulating directly.[36] The Court rejected this notion, holding that the constitutional bar limitation stands for the "proposition that the [spending] power may not be used to induce the states to engage in activities that would themselves be unconstitutional."[37] Since there had been no claim of unconstitutional in-

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32. *See* Brief for Petitioner at 52.
33. *Id.* at 2797.
34. *Id.* n.3. *See* Brief for National Conference of State Legislatures at 10.
35. 107 S. Ct. at 2797 n.3.
36. *See* Brief for Petitioner at 52-53.
37. 107 S. Ct. at 2798. Justice Rehnquist found support for this "unexceptionable" proposition in two principles: First, constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly. Second, a perceived tenth amendment limitation on congressional regulation of state affairs does not concomitantly limit the range of conditions legitimately placed on federal grants. *Id.* at 2798.

ducement in the instant action, the Court concluded that the "encouragement to state action" as found in the Act was a valid exercise of the spending power.[38]

Justice Rehnquist ended his analysis observing that certain circumstances of financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion".[39] As quickly as the Court had dismissed South Dakota's claim that the drinking age amendment was not reasonably related to the purpose of the Act, Justice Rehnquist concluded that the mild encouragement to the state in the instant action was constitutionally permissible.[40] Justice Rehnquist reasoned that the enactment of drinking ages still remained the prerogative of the states and "*all* South Dakota would lose if she adheres to her chosen course . . . is 5% of the funds".[41] (emphasis added).

In a dissenting opinion, Justice Brennan argued that the regulation of the minimum age of purchasers of liquor is a power reserved to the states under the twenty-first amendment.[42] Justice Brennan reasoned that since states possess this constitutional power, Congress cannot condition a federal grant in a manner that abridges this right.[43]

Unsatisfied with the majority's cursory application of the reasonable relationship limitation on the spending power, Justice O'Connor dissented.[44] Justice O'Connor's disagreement with the majority on the spending clause issue concerned the Court's application of the requirement that a condition imposed on a federal grant be reasonably related to the purpose for which the funds are expended.[45] The

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38. *Id.* at 2799.

39. *Id.* at 2798, *citing* Steward Machine Co. *v.* Davis, 301 U.S. 548, 590 (1937).

40. *Id.* at 2798-99.

41. *Id.* at 2798.

42. *Id.* at 2799.

43. *Id.*

44. *See id.*

45. *Id.* at 2800. Justice O'Connor also addressed the "supposed concession" by counsel for South Dakota. The majority observed that the State had never contended that the congressional action was unrelated to a national concern in the absence of the twenty-first amendment. However, Justice O'Connor noted that in the absence of the twenty-first amendment there is a strong argument that Congress might regulate the conditions under which liquor is sold under the commerce power, just as it regulates the sale of many other commodities that affect interstate commerce. Justice O'Connor refused to equate the fact that the twenty-first amendment was crucial to the State's argument with a concession that the condition imposed by § 158 was reasonably related to highway construction. *Id.*

majority asserted that the reasonableness of the relationship between the drinking age condition and the purpose of the expenditure was safe interstate travel.[46] Justice O'Connor conceded that when Congress appropriates money to build a highway it is entitled to insist that the highway be a safe one. However, the dissenter believed that Congress is not entitled to insist as a condition of the use of highway funds that the state impose or change regulations in other areas of the state's social and economic life because of an attenuated or tangential relationship to highway use or safety.[47]

Justice O'Connor observed that there is a clear place at which the Court can draw the line between permissible and impermissible conditions on federal grants and that the appropriate inquiry in this area is whether the spending requirement is a condition on a grant or whether it is regulation.[48] Justice O'Connor believed that Congress has no power under the spending clause to impose requirements on a grant that go beyond specifying how the money should be spent. Justice O'Connor contended that a requirement that is not such a specification is not a condition but in fact, a regulation which is valid only if it falls within one of Congress' delegated regulatory powers.[49]

Applying this analysis to the facts of the instant case, Justice O'Connor reasoned that since the age at which young adults may purchase alcohol has nothing to do with the funds which Congress has appropriated for highway construction, the drinking age amendment was not a condition determining how federal money shall be expended but rather, it was a regulation determining who shall be able to drink liquor.[50] As such, Justice O'Connor concluded the measure was not justified by the spending power.[51]

Justice O'Connor was also of the opinion that Congress lacked authority under the commerce clause[52] to displace state regulation of the age of purchasers of liquor under the twenty-first amendment.

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46. *Id.* at 2797.

47. *Id.* at 2800.

48. *Id.* at 2801. Justice O'Connor's analysis was identified in the Brief for the National Conference of State Legislatures at 19-20. *Amici Curiae* proposed that Congress has the power to spend for the general welfare, it has the power to legislate only for delegated purposes.

49. *Id.*

50. 107 S. Ct. at 2802.

51. *Id.*

52. U.S. CONST. art. I, § 8, cl. 3 empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."

As recently emphasized in her dissenting opinion in *324 Liquor Corp. v. Duffy*,[53] Justice O'Connor again argued that the history of the twenty-first amendment supports the view that the intent of the amendment was to return absolute control of the liquor trade to the states. Justice O'Connor concluded that the age of liquor purchasers falls squarely within the scope of those powers reserved to the state and Congress "simply lacks power under the commerce clause to displace state regulation of this kind".[54]

The federal government is one of enumerated powers.[55] Congressional authority to legislate is limited to the provisions of article I, § 8. Regulation of matters not so enumerated are "reserved to the States . . . or to the people".[56] The specific authorization granting Congress the power to spend is also found in article I, § 8.[57]

Since the time of the framing of the Constitution, there has been considerable debate as to whether the power "to provide for the general welfare" was meant to confer a grant of substantive power or was limited, so it could only be used to carry out the other enumerated powers of Congress.[58] James Madison, the chief proponent of a narrow view of spending power, argued that the words "general welfare" referred to and were limited by the subsequently enumerated powers given to Congress.[59] Advocating a strong federal government, Alexander Hamilton maintained that the words were used to signify additional objects of the taxing and spending power than those expressly enumerated.[60]

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53. 107 S. Ct. 720 (1987) (dissenting opinion).

54. 107 S. Ct. at 2802.

55. McCulloch *v.* Maryland, 4 Wheat 316, 405 (1819).

56. U.S. Const. amend. X.

57. U.S. CONST. art. I, § 8, cl. 1.

58. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1111-12 (1987) [hereinafter Rosenthal]. Two other prevailing interpretations of the clause include: (1) the grant is merely a part of a limitation on the purposes for which Congress may tax; and (2) the grant empowers Congress to legislate as well as to spend for the general welfare. Both views have been rejected by the Supreme Court in *United States v. Butler*, 297 U.S. at 64.

59. *See* Burdick, *Federal Aid Legislation* in 3 Selected Essays on Constitutional Law, 628, 631 (1938). This interpretation denies that the clause is intended to confer an additional substantive power and treats it solely as an express indication that Congress in establishing post offices, roads and in providing for a navy, etc., may back up its laws with the purse.

60. *Id.* at 631-34. Hamilton holds the words "common defense and general welfare" include two classes of objects: First, those which are within the scope of the subsequently enumerated grants of power; and second, all others that Congress may deem to be for the common defense and general welfare.

Despite the extensive debate over the nature of the power granted, the breadth of the power was never articulated by the Supreme Court until *United States v. Butler*[61] in 1936.[62] *Butler* involved the constitutionality of the Agricultural Adjustment Act[63] which sought to increase the income of farmers by reducing the production of certain farm products and providing for money payments to farmers who agreed to reduce their acreage and crops.

In striking down the Act as an unconstitutional invasion of the reserved powers of the states,[64] the Supreme Court in *Butler* adopted the Hamiltonian notion that the spending clause confers a power separate and distinct from those later enumerated.[65] Justice Roberts, writing for the majority, held that the spending power is not restricted in meaning by the grant of enumerated powers and Congress has a substantive power to tax and appropriate limited only by the requirement that such power shall be exercised for the general welfare.[66]

Although the majority insisted that it was not concerned with a provision that if certain conditions were not complied with the appropriation shall no longer be available, the Court did address the coercive nature of the Act.[67] The federal government argued that the Act was constitutionally sound because the higher prices it sought were to be achieved through voluntary cooperation.[68]

The Supreme Court found that a farmer could refuse to comply but believed the price of such refusal was the loss of significant

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61. 297 U.S. 1 (1936).

62. The scarcity of case law prior to this time appears to have been a result of rulings that neither a taxpayer nor a state government had standing as such to challenge the validity of a federal spending program. Massachussets *v.* Mellon, 262 U.S. 447, 482 (1923) involved a state challenge to an act which provided for appropriations to help state efforts to reduce infant mortality rates. The Supreme Court held that the complaint alleging invasion of the state's rights was political and not judicial in character, and therefore, did not present a justiciable controversy. 262 U.S. at 483.

63. Act of May 12, 1933, ch. 25, 48 Stat. 31. The provisions of the Act are discussed in detail in *Butler*, 297 U.S. at 53-56.

64. The dramatic expansion of the commerce power in Wickard *v.* Fillburn, 317 U.S. 111 (1942) makes it clear that regulation and control of agricultural production is no longer reserved exclusively to the states.

65. 297 U.S. at 65.

66. The dissenter, Justice Stone on behalf of Justices Brandeis and Cardozo concurred with this view believing the spending power to be an addition to the legislative power and not subordinate to it. *Id.* at 85.

67. Likewise, Justice Stone noted an unrestricted power to condition the expenditure of an appropriation would tend to nullify all constitutional limitations upon legislative power. *Id.* at 87.

68. 297 U.S. at 70.

benefits.[69] Justice Roberts stated that the amount offered was intended to exert pressure on the farmers since the growers who accepted benefits would be able to undersell those who elected not to accept.[70] Reasoning that such coercion by economic force made the government's asserted choice illusory, the Court concluded that this "scheme for purchasing with federal funds submission to federal regulation" was unconstitutional.[71]

The difficulty with the *Butler* majority's approach is that despite the express language adopting the Hamiltonian version of the spending power, it had limited the spending power to only those areas directly within Congress' legislative authority. Such a limitation was contrary to the Court's unanimous adoption of the Hamiltonian doctrine that the spending power is separate and distinct from those powers later enumerated.[72]

Justice Stone's dissent recognized the majority's inconsistency and noted that it is a contradiction in terms to say that there is a power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which would justify the expenditure.[73] Justice Stone suggested that the breadth of the spending power be contained by requiring that conditions attached to appropriations be reasonably related to achieving the purposes for which money is legitimately being spent.[74]

One year later, the Supreme Court in *Steward Machine Co. v. Davis*[75] and *Helvering v. Davis*,[76] considerably loosened the restriction placed on the spending power by the *Butler* majority. In both instances, the Court upheld sections of the Social Security Act[77] which provided for conditional tax credits and appropriations in areas outside the scope of Congress' enumerated legislative authority. These decisions enabled Congress to use the spending power to inject itself into local matters over which the federal government had no power to regulate directly.[78]

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69. *Id.*
70. *Id.* at 71.
71. *Id.* at 72.
72. *See The Federal Conditional Spending Power: A Search for Limits*, 70 Nw. U.L. Rev. 293, 300 (1975-76) [hereinafter *Federal Conditional Spending Power*].
73. 297 U.S. at 85-86.
74. *Id.* at 86. *See also Federal Conditional Spending*, *supra* note 72, at 300.
75. 301 U.S. 548 (1937).
76. 301 U.S. 619 (1937).
77. Act of August 14, 1935, ch. 531, 49 Stat. 620 (codified in scattered sections of 42 U.S.C.).
78. *See Federal Conditional Spending*, *supra* note 72, at 301.

In *Steward Machine Co. v. Davis*, the Court upheld the validity of an unemployment insurance program which imposed a federal tax upon employers of labor.[79] Although reaching a different conclusion, the majority reaffirmed *Butler* by asserting that the power to appropriate funds could not be a weapon of coercion that could destroy the autonomy of the states.[80] Justice Cardozo believed that "every rebate from a tax when conditioned upon conduct is in some measure a temptation," but refused to hold that "motive or temptation is equivalent to coercion." [81] Instead, Justice Cardozo defined coercion to be the exertion of a power akin to undue influence and concluded that the proceeds of the tax in controversy simply did not involve coercion.[82]

In upholding the validity of the payment of "Federal Old Age Benefits" pursuant to Title II of the Social Security Act, the Supreme Court in *Helvering v. Davis* declared that Congress may spend in aid of the "general welfare" and in so doing, the Court vested Congress with extremely broad discretion pursuant to the spending power.[83] Justice Cardozo recognized that the concept of general welfare is not static and asserted that the spending power must adapt and change with the times.[84] In reserving discretion and authority to draw the line between what is and is not the general welfare with Congress, Justice Cardozo emphasized that the Court will respect

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79. 301 U.S. at 573-78. The tax was coupled with a ninety percent credit against the tax granted to employers in states that adopted their own unemployment compensation plan meeting federal standards. *See* Act of August 14, 1935, ch. 531, § 902, 49 Stat. 639-40.

80. 301 U.S. at 586.

81. *Id.* at 589-90.

82. In reaching the conclusion that the tax involved was distinguishable from the "scheme" involved in *Butler*, Justice Cardozo listed the following observations:

(1) The proceeds of the tax in controversy are not earmarked for a special group.

(2) The unemployment compensation law which is a condition of the credit has had the approval of the state and could not be a law without it.

(3) The condition is not linked to an irrevocable agreement, for the state at its pleasure may repeal its unemployment law, terminate the credit, and place itself where it was before the credit was accepted.

(4) The condition is not directed to the attainment of an unlawful end, but to an end, the relief of unemployment for which nation and state lawfully cooperate. *Id.* at 592-93.

83. 301 U.S. at 641. The provisions of the Social Security Act are set forth in detail in *Helvering*, 301 U.S. at 634-35.

84. *Id.* at 641.

congressional determination unless the choice is clearly a display of arbitrary power.[85]

The Supreme Court has enthusiastically followed the *Helvering v. Davis* approach to the interpretation of the spending power, evident in the fact that no subsequent case has invalidated congressional spending as 'going beyond the power of Congress to authorize expenditure of public dollars for public purposes. In addition, the Court has enlarged the scope of the "general welfare" through the necessary and proper clause.[86] Specifically, the Supreme Court in *Buckley v. Valeo*[87] held that Congress may adopt all neccessary and proper means, not directly granted, to promote the general welfare and the fact that the chosen means might appear "unwise, or unworkable . . . is irrelevant" to the Court.[88]

Incident to this "enlarged" spending power, the Court has consistently held that Congress may condition the receipt of federal funds upon compliance by the recipient with federal statutory and administrative directives.[89] In *Oklahoma v. Civil Service Comm'n.*,[90] the Court considered the validity of the Hatch Act which authorized the withholding of federal funds from state agencies whose officials had engaged in political activities.[91] The State contended that an order under this provision invaded its sovereignty in violation of the tenth amendment.[92]

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85. *Id.* at 640. Justice Cardozo believed that Congress did not improvise a judgment when it found that the award of old age benefits would be conducive to the general welfare. Among the "great mass" of evidence supporting the policy of the Act, Justice Cardozo noted that extensive hearings determined that approximately three out of every four persons 65 or over were "probably dependent" wholly or partially on others for support. *Id.* at 641-43.

86. U.S. CONST. art. I, § 8, cl. 18 empowers Congress "[t]o make all Laws which shall be necessary and proper for the carrying into Execution the foregoing Powers, and all other Powers, vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

87. 424 U.S. 1 (1976). Among other things, *Buckley* held that Subtitle H of the Internal Revenue Code of 1954, 26 U.S.C. §§ 6096, 9001-12, 9031-42 (1970 ed. Supp. IV) was valid under the general welfare clause. The Court found that the measure, as a means to reform the electoral process, was clearly a choice within the power granted to Congress by the clause to decide which expenditures will promote the general welfare.

88. *Id.* at 91.

89. *See* Fullilove *v.* Klutznick, 448 U.S. at 474; Lau *v.* Nichols, 414 U.S. 563, 569 (1958); Oklahoma *v.* Civil Service Comm'n., 330 U.S. 127, 143-44 (1947); Steward Machine Co. *v.* Davis, 301 U.S. at 585-93.

90. 330 U.S. 127 (1947).

91. 53 Stat. 1147, *as amended*, 54 Stat. 767 (codified at 5 U.S.C. §§ 1501 *et seq.* (1971)). *See also* 330 U.S. at 129-33.

92. 330 U.S. at 142. The state believed that § 12(a) of the Hatch Act was

Although the *Oklahoma* Court found that "the United States is not concerned with, and has no power to regulate, local political activities as such of state officials", the Court nevertheless held that the federal government does have the power to fix the terms upon which its money allotments shall be disbursed.[93] Reminiscent of the Court's reasoning in *Steward Machine Co.*, the Court found no violation of the state's sovereignty because the state could, and did, adopt "the 'simple expedient' of not yielding to what she urges is federal coercion."[94]

In the area of conditional grants, the Court has also been extremely deferential to congressional findings and has approved federal grants conditioned on fixed terms and obligations. In *Fullilove v. Klutznick*,[95] the Supreme Court upheld Congress' Minority Business Enterprise program[96] which was implemented to help finance local public works projects. The program required that no grant would be made unless at least ten percent of the amount of each grant were expended for minority business enterprises.[97] The *Fullilove* Court recognized the ability of Congress pursuant to the spending power to further broad policy objectives by conditioning the receipt of federal directives.[98] The Court held that it was permissible for Congress to condition federal funds to induce state governments and private parties to voluntarily cooperate with federal policy.[99]

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constitutionally violative of the tenth amendment as applied, because this "penalty" provision invaded Oklahoma's sovereignty by providing for "possible forfeitures of state office or alternative penalties" against the state. *Id.*

93. *Id.* at 143-44. The Court asserted that unlike legislation passed pursuant to the commerce power, federal spending programs are not mandatory upon the state.

94. *Id. citing* Massachussetts *v.* Mellon, 262 U.S. at 482, which involved the Federal Maternity Act, Act of Nov. 23, 1921, ch. 135, 42 Stat. 224. The Act provided for appropriations to help finance state efforts to reduce infant mortality rates. By way of dictum the *Massachussetts* Court declared, "[i]f Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding." 262 U.S. at 482.

95. 448 U.S. 448 (1980).

96. Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, 42 U.S.C. § 6705 (f)(2) (1976 ed. Supp. II), *amending* Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94-369, 90 Stat. 999, 42 U.S.C. § 6701 *et seq.*

97. *Id.* at § 6705 (f)(2).

98. 448 U.S. at 474, *citing e.g.* California Bankers Assn. *v.* Shultz, 416 U.S. 21 (1974); Lau *v.* Nichols 414 U.S. at 563; Oklahoma *v.* Civil Service Comm'n., 330 U.S. 127 (1947); Steward Machine Co. *v.* Davis, 301 U.S. 548 (1937); Helvering *v.* Davis, 301 U.S. 619 (1937).

99. *Id.* at 473-75.

One year later, in *Pennhurst State School v. Haldeman*[100] the Supreme Court held the Developmentally Disabled Assistance and Bill of Rights Act[101] did not create any substantive rights in favor of the mentally retarded to "appropriate treatment" in the "least restrictive" environment.[102] The Act provided for a federal grant program by which states would receive federal funding by complying with conditons in the Act.[103]

Analogizing conditional legislation of this kind to the making of a contract, Justice Rehnquist's opinion in *Pennhurst State School* stated there can be no "acceptance if a State is unaware of the conditions" and therefore, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.[104] In this instance, the Court determined that Congress had not acted with the requisite "clear voice".[105]

Pennhurst attests to the fact that the Supreme Court's deference to congressional spending legislation is not absolute and the Court has articulated several general restrictions on congressional enactments. First, the case law provides that the exercise of the spending power must be in pursuit of the "general welfare".[106] Second, as Justice Rehnquist concluded in *Pennhurst*, conditional legislation must be unambiguous, enabling the states to exercise their choice knowingly, cognizant of the consequences of their participation.[107] Third, the Court has suggested without significant elaboration that conditions on federal grants must be reasonably related to the federal

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100. 451 U.S. 1 (1981).

101. 89 Stat. 486, *as amended*, 42 U.S.C. § 6000 *et seq.* (1976 ed. and Supp. III).

102. 451 U.S. at 25-31. The Supreme Court reversed the court of appeal's conclusion that Congress created rights and obligations pursuant to its power to enforce the fourteenth amendment. *See* 612 F.2d 84 (1979). The Court held that a comparison of the general language of § 6010 of the Act with the conditions Congress explicitly imposed on the states demonstrated that Congress did not intend to place either absolute or conditional obligations on the states under § 6010.

103. *See* 451 U.S. at 1-2.

104. *Id.* at 15-18. Justice Rehnquist distinguished legislation enacted under § 5 of the fourteenth amendment and found that legislation enacted pursuant to the spending power is contractual in the sense that states agree to comply with federally imposed conditions in return for federal funds.

105. *Id.* at 17. The Court observed that the state did not knowingly accept the contractual offer since the state was not cognizant of the consequences of their participation. *Id.*

106. *See* Helvering *v.* Davis, 301 U.S. at 640-41; United States *v.* Butler, 297 U.S. at 65.

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

interest in the project.[108] Finally, the Court has noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.[109]

The twenty-first amendment, adopted in 1933, repealed the eighteenth amendment[110] and gave the states the power to regulate the delivery, possession and use of alcohol within their borders. Section 2 of the amendment reserves to the states the power to regulate or prohibit entirely, the transportation or importation of intoxicating liquors.[111] Although it appeared to relate only to the movement of liquor, the history of consideration of the amendment by Congress and the ratifying states was sketchy.[112] As a result, the first cases arising under the amendment appeared to treat it as authorizing the states to exercise broad "home rule" powers to regulate almost everything pertaining to alcoholic beverages.[113]

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108. Massachssetts *v.* United States, 435 U.S. at 461. *See also* Ivanhoe Irrigation Dist. *v.* McCracken, 357 U.S. at 295.

109. Lawrence County *v.* Lead-Deadwood School Dist., 469 U.S. at 269-70. *See also* Buckley *v.* Valeo, 424 U.S. at 91, 96; King *v.* Smith, 392 U.S. 309, 333 (1968).

110. U.S. CONST. amend. XVIII, § 1 provided that "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

111. Ziffrin, Inc. *v.* Reeves, 308 U.S. 132 (1939), upheld the validity of a Kentucky statute that forbade transportation of liquor by unauthorized carriers as a permissible burden on interstate commerce. By way of dictum, the Court also declared that a state may "permit manufacture of whiskey only on condition that it be sold to an indicated class of customers." *Id.* at 139.

112. *See Bacchus Imports, Ltd. v. Davis*, 468 U.S. 263 (1984), which dismissed the legislative history of the amendment as "obscure", finding no clear consensus concerning the meaning of the provision. *Bacchus* noted that Senator Blaine, the Senate sponsor of the amendment resolution, espoused varying interpretations. Blaine said the purpose of § 2 was "to restore to the States . . . absolute control in effect, over interstate commerce affecting intoxicating liquors. . . ." 76 Cong. Rec. 4143 (1933). On the other hand, Blaine also expressed a narrower view: "So to assume the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line." *Id.* at 4141. *See Bacchus*, 468 U.S. at 275. *But see* Justice O'Connor's dissenting opinion in 324 Liquor Corp. *v.* Duffy, 107 S. Ct. 720, 730-34 (1987) for a "fresh examination" of the origins of the twenty-first amendment; and Hostetter *v.* Idlewild Liquor Corp., 377 U.S. 324, 338 (Black, J., dissenting). Justice Black held that the Senators who approved the twenty-first amendment thought they were returning absolute control over the liquor industry to the States and were "seeing to it that the federal government could not interfere with or restrict the State's exercise of the power conferred by the amendment." *See* 377 U.S. at 338.

113. Finch & Co. *v.* McKittrick, 305 U.S. 395 (1939); Indianapolis Brewing Co. *v.* Liquor Control Comm'n., 305 U.S. 391 (1939); State Board of Equalization *v.* Young's Market Co., 299 U.S. 59 (1936).

Alcohol has received greater state control than normally permitted other articles of commerce. The Supreme Court has viewed the amendment as an exception to the normal operation of the commerce clause.[114] However, the Supreme Court in *Hostetter v. Idlewild Liquor Corp.*,[115] expressly rejected the view that the twenty-first amendment has operated to "repeal" the commerce clause whenever regulation of intoxicating liquors is concerned.[116] In the instant action, the Court found that although the State had the power under the twenty-first amendment to regulate transportation of intoxicants in its territory, the commerce clause deprived the State of power to prevent transactions by the Federal Bureau of Customs involving intoxicants for delivery to consumers in foreign countries.[117]

Justice Black dissented in *Hostetter* and argued that the amendment promises that each state shall decide what is best for itself in regulating liquor traffic within its boundaries.[118] Justice Black fortified this argument with legislative history that "proved" when the Senators agreed to section 2 of the amendment they thought they were returning "absolute control" of liquor traffic to the States, free from all restrictions which the commerce clause might impose.[119] Interestingly, Justice Black was a Senator present at the creation of the amendment.[120]

Subsequent decisions have given wide latitude to state liquor regulation but the Court has also circumscribed this broad power by other provisions of the Constitution.[121] The Court has held that the

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114. Craig *v.* Boren, 429 U.S. at 206.

115. 377 U.S. 324 (1964). *Hostetter* involved an action against the New York State Liquor Authority by a liquor wholesaler for an injunction restraining the Liquor Authority from interfering with business. The wholesaler sold bottled intoxicants at a New York airport to international travelers under Federal Bureau of Customs supervision. The Authority claimed the business was unlicensed under the provisions of the New York Alcohol Beverage Control Act. *See id.* at 325-27.

116. 377 U.S. at 331-32. The Court found that such a conclusion would be "patently bizarre" and "demonstrably incorrect". *See also* Jameson & Co. *v.* Morgenthau, 307 U.S. 171, 172-73 (1939).

117. *Id.* at 329-34.

118. *Id.* at 338.

119. *See* 377 U.S. at 337-39. Other Senators also expressed fear that any grant of power to the federal government, even a narrow one, could be used to whittle away the exclusive control over liquor traffic given to the States by § 2. *See* 76 Cong. Rec. 4143 (1933) (Sen. Blaine). Senators Walsh, and Robinson also emphasized the plenary power granted the States by § 2. *See id.* at 4219, 4225.

120. *See* 76 Cong. Rec. at 4177-78 (Sen. Black).

121. *See generally* Bacchus Imports Ltd. *v.* Dias, 468 U.S. 263 (1984); California Retail Liquor Dealers Assn. *v.* Midcal Aluminum, Inc., 445 U.S. 97 (1980).

states cannot tax imported liquor in violation of the export-import clause [122]; nor can they insulate the liquor industry from the fourteenth amendment's guarantee of equal protection and due process.[123] In addition, the Court has held that a state may not excercise its power under the twenty-first amendment in a way which impinges upon the establishment clause of the first amendment.[124]

After reviewing this varied case law, the Supreme Court in *California Liquor Dealer v. Midcal Aluminum, Inc.*,[125] recognized that there remains no bright line between federal and state powers over liquor.[126] *Midcal* adopted a balancing test to resolve conflicts between federal statutes and state laws enacted pursuant to section 2 in a "pragmatic effort to harmonize state and federal powers."[127] Invalidating a California statute that required producers and wholesalers of wine to file trade contracts with the state,[128] the Court held that the twenty-first amendment grants the state virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.[129] However, the Court continued that although states retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations.[130]

The Court in *Capital Citied Cable, Inc. v. Crisp*,[131] noted that *Hostetter* and *Midcal Aluminum* were concerned only with conflicting state and federal efforts to regulate transactions involving liquor.[132]

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122. Department of Revenue *v.* James Beam Co., 377 U.S. 341, 345-46 (1964).

123. *See* Craig *v.* Boren. 429 U.S. at 204-09 (equal protection clause); Wisconsin *v.* Constantineau, 400 U.S. 433, 436 (1971) (procedural due process).

124. Larkin *v.* Grendel's Den, Inc., 459 U.S. 116, 122 n.5 (1982).

125. 445 U.S. 97 (1980).

126. *Id.* at 110.

127. *Id.* at 109. The Court found this "pragmatic effort" had been evident in several decisions where the Court held liquor companies liable for anticompetitive conduct not mandated by a state. *See* Kiefer-Stewart Co. *v.* Joseph E. Seagrams & Sons, Inc., 340 U.S. 211 (1951); United States *v.* Frankfor Distilleries, Inc., 324 U.S. 293 (1945).

128. *Id.* at 99-100. The Court found that a California wine pricing system, California Business and Professions Code, § 24866 (b) (West Supp. 1980), constituted resale price maintenance in violation of the Sherman Act since the wine producer held the power to prevent price competition by dictating the prices charged by wholesalers. *Id.* at 102-06.

129. *Id.* at 110.

130. *Id. citing* Hostetter *v.* Idlewild Liquor Corp., 377 U.S. at 332. The Court observed that competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case".

131. 467 U.S. 691 (1984).

132. *Id.* at 713-14.

The *Crisp* Court believed these cases to stand for the proposition that in the absence of a state attempt to directly regulate the sale or use of liquor within its borders —namely, the "core § 2 power"—a conflicting exercise of federal authority may prevail.[133]

Crisp involved a clash between an express federal decision to pre-empt all state regulation of cable signal carriage and a state effort to apply a ban on alcoholic beverage advertisements to wine commercials contained in out-of-state signals carried by cable systems.[134] The Court concluded that when, as here, a state regulation squarely conflicts with the accomplishment and execution of the purposes of federal law, and the state's central power under the twenty-first amendment of regulating the time, places and manner under which liquor may be imported and sold is not directly implicated, the balance tips in favor of federal law.[135]

Under a state's police power, the Court has recognized the authority to determine the age at which young adults are allowed to purchase and consume intoxicating liquors.[136] However, in the area of setting minimum drinking ages, the Court has not declared the states sovereign; nor has the Court decided whether a states' authority to establish a minimum drinking age flows from the twenty-first amendment.[137] The Supreme Court in *South Dakota v. Dole*, failed

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133. *Id.* at 713. The Court expressed that the question in each of these cases, as well as the instant action, is whether the interests implicated by a state regulation are so closely related to the powers reserved by the twenty-first amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies. *Id.*

134. *Id.* at 698-711. The Court held that application of Oklahoma's alcoholic beverage advertising ban, Okla. Stat., Tit. 37, § 516 (1981), to out-of-state signals carried by cable operators in Oklahoma was pre-empted by federal law.

135. *Id.* at 714. The Court found that Oklahoma's interest in discouraging comsumption of intoxicating liquors was limited since the State's ban was directed only at occasional wine commercials while permitting advertisements for all alcoholic beverages carried in newspapers and other publications printed outside the state. Measuring this limited interest against the federal objective of ensuring widespread availability of diverse cable services throughout the United States, the Court concluded the balance of power tips decisively in favor of the federal law and enforcement of the state statute was barred by the supremacy clause. *Id.*

136. *See* Craig *v.* Boren, 429 U.S. at 210 n.24, and Crowley *v.* Christensen, 137 U.S. 86, 91 (1890).

137. *See* South Dakota *v.* Dole, 791 F.2d 628, at 632-33. The court of appeals in *Dole* rejected the State's contention that its authority to establish a minimum drinking age flows from the twenty-first amendment. The Court believed while the twenty-first amendment in no way increased congressional authority to legislate with respect to liquor, the amendment did not limit Congress' ability to exercise authority under its existing delegated powers, including the spending power. *Id.* at 633. For

to address the issue of whether setting minimum drinking ages is a "core power" reserved to the states under section 2 of the amendment. The Court found no need in the instant action, since Congress had "indirectly" encouraged uniformity in the states' drinking ages through use of the spending power.[138]

In *McCulloch v. Maryland*,[139] Chief Justice Marshall wrote:

> [s]hould 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, should a case requiring such a decision come before it, to say that such an act was not the law of the land.[140]

Was the National Minimum Drinking Age Amendment the painful measure alluded to? If Justice Rehnquist had interpreted *Crisp* dictum to hold that the twenty-first amendment forbade direct federal regulation of the drinking age as an infringement of the State's "core power" to regulate the manner in which liquor may be sold, the Supreme Court might have had occassion to decide an interesting issue concerning the power of Congress to threaten states with loss of federal highway funds.[141] Such a determination might have rendered the "indirect" drinking age amendment unconstitutional like the "statutory plan (designed) to regulate . . . a matter beyond the powers delegated to the federal government" involved in *Butler*.

In refusing to decide in this case whether the twenty-first amendment would prohibit a direct attempt by Congress to legislate a drinking age, Justice Rehnquist cast aside available precedent and applied a fifty-year-old spending clause analysis which is a principle that generates little disagreement. As Justice O'Connor observed, the problem in this area is not the principle but its application that generates difficulty.

The majority's contention that there is no conflict between South Dakota's law and the federal enactment not only overlooks the limitation on authority in the twenty-first amendment but also ignores

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a detailed discussion of whether the setting of minimum drinking ages is a "core power" reserved to the States under § 2 of the twenty-first amendment, *see* Brief for Petitioner at 43-44, 107 S. Ct. 2793 (1987) and Brief for Respondent at 25-26, *id.*

138. 107 S. Ct. at 2795-96.
139. 17 U.S. (4 Wheat.) 316 (1819).
140. *Id.* at 423.
141. *See* Rosenthal, *supra* note 58, at 1137 n.148.

the realities of federal spending programs. In the half-century since the Court's broad pronouncements on which the government relies to establish conditions, the realities of the "simple expedient of refusal" justification have changed dramatically. Whatever may have been the case in the 1940's, states are no longer free to forgo needed federal funds to avoid the accompanying conditions.[142] In adhering to her chosen course, South Dakota stands to lose twelve million dollars in otherwise available highway funds.[143]

The Supreme Court's failure in *South Dakota v. Dole* to apply a check on Congress' overexpansive reach into areas traditionally reserved to the states demonstrates that the Court is apparently unwilling to abandon its extremely deferential posture to regulations enacted pursuant to the spending clause. It is hoped that subsequent cases address Justice Rehnquist's footnote (3) and define the outer bounds of the "relatedness" limitation in light of the fiscal mismatch that exists between the states and the federal government.[144]

Jeffrey L. Love

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142. *See* Brief of *Amici Curiae* for the States of Colorado, Hawaii, Louisiana, Montana, Ohio, South Carolina, Vermont and Wyoming, South Dakota *v.* Dole, 791 F.2d 628 (8th Cir. 1986). Estimated state losses of highway funds occassioned by 23 U.S.C. § 158 (in millions of dollars):

	Fiscal Year 1987	Fiscal Year 1988
Hawaii	$ 5.9	$11.8
Idaho	4.5	8.7
Ohio	16.5	33.1
Vermont	2.6	5.3
Wisconsin	7.2	14.3
Wyoming	4.5	9.0

Id. at app. A.

143. *See* 791 F.2d at 630.

144. *See* R. Leach, *American Federalism* 200 (1970).