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*by Earl M. Maltz**

One of the most conspicuous features of the Rehnquist era has been the revival of the concept of enumerated powers as an important theme in constitutional jurisprudence. In the period from 1937 through 1995, the Court routinely concluded that the Commerce Clause[1] granted the federal government power to regulate private activities which were traditionally relegated to local control.[2] However, in *United States v. Lopez*[3] and *United States v. Morrison*,[4] a majority of the Court concluded that federal power under the Commerce Clause was subject to significant limitations.

By their nature, the decisions in *Lopez* and *Morrison* called into question the scope of other enumerated powers as well. One of the most important issues is raised by cases of "conditional" spending—situations in which Congress seeks to extend the reach of its authority by imposing conditions on states' receipt of federal funds. The early Rehnquist Court decision in *South Dakota v. Dole*[5] suggested that Congress had broad authority to use this device to achieve its objectives.[6] However, some have argued that *Lopez* and *Morrison* implicitly undermine the premises on which *Dole* was founded.[7]

Rather than focusing on the specific reasoning of *Lopez* and *Morrison*, this article will measure the constitutionality of conditional spending against basic principles of constitutional interpretation. The article will first briefly summarize the decision in *Dole* itself. The article will then observe that the spending power by its terms is plenary, and that there is no direct evidence which suggests that the framers considered the issue of conditional spend-

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1 The Commerce Clause permits Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3.

2 *E.g.*, Katzenbach v. McClung, 379 U.S. 294, 301-05 (1964).

3 514 U.S. 549, 551 (1995).

4 120 S. Ct. 1740, 1748 (2000).

5 483 U.S. 203 (1987).

6 *Id*. at 206-07

7 *E.g.*, Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1911-15 (1995).

ing. Finally, the article will conclude that conditional spending is not inconsistent with constitutionally established principles of state sovereignty or state autonomy.

SOUTH DAKOTA V. DOLE

South Dakota v. Dole[8] is the leading case dealing with the constitutionality of conditional spending by Congress. In *Dole*, Congress decreed that a state would lose five percent of its federal highway funds if it allowed persons under the age of twenty-one to purchase alcoholic beverages or to possess such beverages in public.[9] The state argued that the imposition of this condition exceeded the powers of Congress.[10] Over two dissents, the Court rejected this contention. Speaking for the majority, Chief Justice Rehnquist conceded that the imposition of a condition on spending might be unconstitutional if it was "unrelated 'to the federal interest in particular national projects or programs'"[11] or "pas[t] the point at which 'pressure turns into compulsion.'"[12] However, he concluded that the problem of underage drinking was clearly related to highway safety and, therefore, to the purpose for which the funds were expended.[13] Moreover, Rehnquist rejected the claim that the condition was unduly coercive, noting that only a small portion of highway funds were involved.[14] Thus, the majority concluded that the imposition of the condition was constitutionally unexceptionable.

The tone of the *Dole* opinion is quite different from that of more recent decisions in which a majority of the Court has imposed significant limitations on the power of Congress. Admittedly, the *Dole* majority noted the relatively minor nature of the penalty that states faced for refusing to bow to the will of Congress in that case.[15] Moreover, the Court clearly left open the possibility that it might look less favorably on other attempts to use the mechanism of conditional spending to induce state compliance with congressional wishes. Nonetheless, the emphasis on deference to congressional judgment in *Dole* stands in marked contrast to (for example) the majority opinion in *United States v. Morrison*[16]—also authored by Chief Justice Rehnquist—where the Court explicitly rejected congressional findings of fact in holding

8 483 U.S. 203 (1987).

9 23 U.S.C. § 158 (a)(1) (Supp. III 1982) (amended 1998).

10 *See Dole*, 483 U.S. at 205.

11 *Id.* at 207-08 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

12 *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1987)).

13 *Id.* at 209-12.

14 *Id*. at 211.

15 *Id*.

16 120 S. Ct. 1740 (2000).

that Congress had exceeded its enumerated powers.[17] Thus, the key question is whether *Dole* can be reconciled with the basic premises underlying the constitutional structure of federalism, as well as the Court's more recent pronouncements on related issues.

The Original Understanding

In an ideal world, the original understanding of conditional spending would provide some guidance to the proper treatment of the constitutional questions presented by *Dole* and similar cases. However, the problem of conditional spending does not seem to have been addressed by the framers of the Constitution. The framers did not contemplate a system in which the states would look to the federal government as a source of revenue. Instead, in the model they envisioned, each government would be responsible for generating revenue for its projects through its own independent financing system. By its nature, the problem of conditional spending simply would not arise under such a regime.

Of course, even without specific guidance from the original understanding, it could still be contended that the use of the conditional spending mechanism violates the basic precepts of federalism established by the constitutional structure. In theory, such an argument could be based on either of two related principles. First, the use of conditional spending programs might be unconstitutional because they are inconsistent with the notion that states retain a quasi-sovereign status within the Union. Second, it might be argued that such programs unduly infringe on state autonomy. These two arguments are sometimes conflated; however, while clearly connected in some important ways, they are in fact analytically quite separate.

State Sovereignty

The rhetoric of state sovereignty has figured prominently in the federalism jurisprudence of the Rehnquist Court. The majority opinion in *Alden v. Maine*[18] exemplifies this phenomenon. There, citing the Eleventh Amendment, the Court concluded that states could not be held liable in damages for violation of the federal Fair Labor Standards Act.[19] Speaking for the majority, Justice Kennedy argued that "the [Constitution] 'specifically recognizes the States as sovereign entities'"[20] and that "it reserves to [the states] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering

17 *Id.* at 1752.
18 527 U.S. 706 (1999).
19 *Id*. at 712.
20 *Id*. at 713 (quoting Seminole Tribe v. Florida, 517 U.S. 44, 71 n.15 (1996)).

in that status."[21] Sounding the same theme, he later concluded that "[t]he States . . . retain 'a residuary and inviolable sovereignty.'[22] They . . . retain the dignity, though not the full authority, of sovereignty."[23]

Alden is by no means unique in its appeal to the concept of state sovereignty. Similar threads run through the other Eleventh Amendment cases decided by the Court,[24] as well as *Printz v. United States*,[25] where a majority of the justices concluded that the federal government could not compel state officials to be conduits for the enforcement of federal gun control legislation. Taken together, these decisions clearly reflect an attempt to resuscitate the concept of state sovereignty as an important element of constitutional jurisprudence.

At times, the concept of state sovereignty has been connected to the idea of state autonomy—the power of the states to choose among policy alternatives without interference from the federal government. Thus, for example, in *The Federalist Papers,* Alexander Hamilton argued that any threat to state sovereignty from the Constitution was illusory because, under the Constitution, "the State governments would clearly retain all the rights of sovereignty which they before had[,] and which were not[,] by [the Constitution] *exclusively* delegated to the United States."[26] Similarly, in *Alden*, the majority opinion linked its defense of state sovereignty with the Tenth Amendment,[27] which reserves to the states and the people those powers which are neither delegated to the federal government nor prohibited to the states by the Constitution.[28]

State sovereignty and state autonomy are clearly linked in a general sense. However, the extent of the connection can easily be overstated. Sovereignty is a fairly abstract concept connoting a distinct, independent political community.[29] Autonomy, by contrast, simply requires that a particular government have the right to make policy decisions. A sovereign state might by treaty limit its policy autonomy or even subject itself to the will of another

21 *Id.* at 714.

22 *Id*. at 715 (quoting THE FEDERALIST NO. 39 (James Madison)).

23 *Id.* at 715.

24 *E.g.*, College Sav. Bank v. Florida Prepaid Postsecondary Expense Bd., 527 U.S. 666 (1999).

25 521 U.S. 898 (1997).

26 THE FEDERALIST NO. 32, (Alexander Hamilton) *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 678 (Bernard Bailyn ed., 1993).

27 U.S. CONST. amend. X.

28 *See Alden,* 527 U.S. at 715.

29 *E.g.*, EMER DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 11 (Charles G. Fenwick trans., William S. Hein & Co. 3rd ed. 1995). For a detailed contemporary discussion of the concept of sovereignty and its relationship to constitutional federalism see Andrzej Rapazynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341 (1985).

sovereign for specific purposes.[30] Conversely, state constitutions at times grant a considerable degree of policy autonomy to entities such as cities or counties which clearly lack the attributes of sovereignty.[31]

Whatever measure of policy autonomy they may currently enjoy, state governments in the twenty-first century can hardly be viewed as sovereign in any meaningful sense. Even in the late eighteenth century, it was clear that the Constitution had deprived states of many attributes of sovereignty—a point that was seized upon by many of the Antifederalists who opposed ratification.[32] Subsequent events have diminished the political status of the states even further. Perhaps most importantly, the issue of secession was settled by the Civil War, leaving the states permanently bound to the federal government. The Reconstruction amendments that were adopted after the War sharply circumscribed the ability of the states to define the rights of their own inhabitants. A century later, the Voting Rights Act of 1965[33] and *Reynolds v. Sims*[34] and its progeny imposed stringent federal limits on the forms of government that the states were allowed to choose. Finally, a series of cases beginning with *Graham v. Richardson*[35] greatly limited the ability of states to distinguish between aliens and citizens, thereby undermining the significance of the bond between citizen and government that is central to the idea of a sovereign political community.

Against this background, Eleventh Amendment cases such as *Alden* have an almost quixotic aspect. They seek to preserve the vestige of a political status whose prime features states have lost—seemingly irrevocably—in other contexts. Thus, for example, while the ability of the federal government to dictate the policymaking structure of state governments remained unchallenged, the *Alden* Court protects the ability to determine the wages of the ministerial employees charged with carrying out those policies. Such a regime is hardly well suited to provide truly significant protection for state sovereignty.

Moreover, the *Dole* analysis could survive even a regime based on stronger protection for the political concept of state sovereignty. One of the generally accepted powers of sovereign gov-

30 *See* DE VATTEL, *supra* note 29, at 11.

31 *Id.*

32 *E.g.*, Arthur Lee, *Reply to Wilson's Speech: "Cincinnatus"* [Arthur Lee] V, letter to NEW YORK JOURNAL (November 29, 1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 114- 20 (Bernard Bailyn ed., 1993).

33 Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)).

34 377 U.S. 533 (1964).

35 403 U.S. 365 (1971).

ernments is the right to make agreements with other sovereigns.[36] Often such agreements provide that a sovereign will take some action that it might not otherwise undertake in return for receiving a benefit—sometimes money—from another sovereign. Conditional spending measures fit comfortably into this pattern. In *Dole* itself, for example, the states basically agreed to raise the drinking age in return for continuing to receive their full allotment of federal highway funds. Against this background, conditional-spending schemes can hardly be viewed as a threat to state sovereignty; indeed, if anything, they could be seen as exalting the status of state governments by implicitly conceptualizing them as equal partners in a freely bargained relationship. In short, state sovereignty theory provides little if any support for the proposition that conditional spending schemes should be subject to close constitutional scrutiny.

State Autonomy

On its face, the concept of state autonomy might appear to be a more promising starting point for a constitutional attack on conditional spending. First, unlike state sovereignty, there can be little doubt that (in theory at least) the Constitution is premised on the view that states will retain a significant degree of decision-making autonomy. This premise is implicit in the idea that the federal government is one of enumerated powers, and made explicit by the Tenth Amendment, which reserves to the states "[t]he powers . . . not delegated to the United States by the Constitution nor prohibited by it to the States."[37] The breadth of this concept is embodied in Madison's famous dictum that "[t]he powers reserved to the several States . . . extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State."[38]

Second, conditional spending programs have an obvious potential to effectively circumscribe the freedom of action envisioned by the Framers. *Dole* itself is a paradigmatic example. Establishing the eligibility requirements for the purchase of alcoholic beverages is a classic state prerogative; indeed, it is explicitly protected by the Twenty-First Amendment.[39] Admittedly, in formal terms the states remained free to set the age limit after the passage of

36 *See* DE VATTEL, *supra* note 29, at 160.

37 U.S. CONST. amend. X.

38 THE FEDERALIST NO. 45 (James Madison) *reprinted in* 2 THE DEBATE ON THE CONSTITUTION 105 (Bernard Bailyn ed., 1993).

39 The Twenty-First Amendment provides "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

the National Minimum Drinking Age Amendment. However, the loss of even a portion of federal highway funds might be so catastrophic that in reality, the state had no choice except to raise the drinking age to twenty-one. Thus, the argument concludes, significant judicial scrutiny of enactments such as this are necessary to preserve the balance between state and federal power envisioned by the framers.

Although this argument might have some initial appeal, it faces a number of important difficulties. First, the claim in cases such as *Dole* is quite different from that which garnered majority support in *Lopez* and *Morrison*. In *Lopez* and *Morrison*, the contention was that Congress had taken some action that was not within the scope of its enumerated powers. In *Dole*, by contrast, no one questioned the authority of Congress to spend funds for highway construction. The problem was that Congress had *refused* to take an action within its powers—to spend money for the construction of highways in states which refused to raise their drinking age.

Moreover, there would clearly be no constitutional difficulty with congressional action that produced exactly the same result through less formal means. For example, the members of the Senate and the House of Representatives could publicly agree among themselves that they should not provide highway funds to states where the drinking age was below twenty-one, and craft the relevant appropriations bills to delete funding for the projects in those states. The leaders of both parties could then promise to restore funding to states, which raised the drinking age to twenty-one.

Even more importantly, taken as a whole, the highway-funding program actually *enhances* state autonomy. To understand this point, one must begin by envisioning a world in which the federal government plays no role in the construction of highways. In such a world, each state would have two choices. The state could either choose not to construct highways at all, or it could construct the highways and finance the construction through some internal financing mechanism. In either case, of course, the decision to construct or not to construct would be independent of the state decision on the drinking age.

Even after the adoption of the National Minimum Drinking Age Amendment,[40] the federal highway program did not foreclose either of these options for states which had a drinking age that was less than twenty-one. Instead, it provided each of those states with a new alternative—constructing highways with federal funds and increasing the drinking age. Of course, decoupling the funding from the drinking age would have provided the states with

40 23 U.S.C. § 158 (a)(1) (Supp. III 1982) (amended 1998).

still greater flexibility. However, there is no constitutional requirement that federal government programs provide the maximum flexibility to state governments. At most, Congress is prohibited from unduly infringing upon the freedom that states would possess if they were completely independent.

Some might argue that this line of reasoning ignores the practical realities of federalism in the twenty-first century. They might contend that, because of the magnitude of the tax burden already imposed by the federal government, the practical ability of a state to tax its citizenry in order to finance internal improvements is extremely limited. Thus, the option of providing necessary improvements independently of the federal government is essentially foreclosed, and the states are, in effect, forced to rely on federal funding. Under these circumstances, it might be argued placing limits on the conditions that Congress may attach to federal funding is absolutely necessary to provide protection for state autonomy.

The basic thrust of this objection is not that there is anything intrinsically wrong with conditional spending programs, but rather that federal tax policy has in effect significantly limited the states' freedom of action. If this is the concern, then the remedy ought to be to impose constitutional limitations on the magnitude of the taxes that the federal government is allowed to exact. The difficulty is that, except for the provision dealing with direct taxation and the long-irrelevant Slave Trade Clause,[41] the Constitution imposes no such limitations. Indeed, the Framers themselves were well aware that they were creating a system in which the imposition of taxes by one government might, in effect, preempt the ability of other governments to impose similar taxes.

During the ratification debates, some Antifederalists warned that the Constitution created the potential for this problem to arise. They argued that "Congress may monopolise [sic] every source of revenue, and . . . the taxes, duties and excises imposed by Congress may be so high as to render it impracticable to levy further sums on the same articles."[42] Thus, they warned, Congress in effect had the power to "indirectly demolish the state governments."[43]

Responding to this argument, Federalists did not dispute the claim that the federal government had the theoretical authority to impose taxes so massive that states would feel constrained not to increase the tax burden on their citizenry. Instead, they relied on the political system to prevent this eventuality. In *The Federalist*

41 U.S. CONST. art. I, § 9, cl. 1.

42 *Dissent of the Minority of the Pennsylvania Convention* (December 18, 1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 526, 537 (Bernard Bailyn ed., 1993).

43 *Id.*

Papers, Alexander Hamilton first considered the problem in connection with his defense of the view that the grant of taxing power to the federal government left the states generally free to impose taxes of their own:

> It is . . . possible that a tax might be laid on a particular article by a State which might render it *inexpedient* that thus a further tax should be laid on the same article by the Union; but it would not imply a constitutional inability to impose a further tax. The quantity of the imposition, the expediency or inexpediency of an increase on either side, would be mutually questions of prudence; but there would be involved no direct contradiction of power. The particular policy of the national and of the State systems of finance might now and then not exactly coincide, and might require reciprocal forbearances [but the Constitution would not constrain the policy of either side].[44]

Later, he made an analogous point:

> Though a law . . . for laying a tax for the use of the United States would be supreme in its nature, and could not legally be opposed or controuled [sic]; yet a law for abrogating or preventing the collection of a tax laid by the authority of a State. . . would not be the supreme law of the land, but an usurpation of power not granted by the constitution. As far as an improper accumulation of taxes on the same object might tend to render the collection difficult or precarious, this would be a mutual inconvenience not arising from a superiority or defect of power on either side, but from an injudicious exercise of power by one or the other, in a manner equally disadvantageous to both. It is to be hoped and presumed however that mutual interest would dictate a concert in this respect which would avoid any material inconvenience.[45]

Hamilton's discussion reminds us of an important structural feature of our system of government that is too often lost in modern constitutional theory. Many important decisions, which profoundly affect the nature of federalism—like many decisions dealing with individual rights—are properly left to the political branches of government. Such allocations of authority should be respected not because we agree with them or believe that they provide adequate protection for the interest at stake,[46] but rather because they are mandated by the Constitution itself.

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44 THE FEDERALIST NO. 32 (Alexander Hamilton), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 678, 681 (Bernard Bailyn ed., 1993).

45 THE FEDERALIST NO. 33 (Alexander Hamilton), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 127, 145 (Bernard Bailyn ed., 1993).

46 The classic formulation of the argument that the political structure of the federal government provides sufficient protection for state autonomy may be found in Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the Federal Government*, 54 COLUM. L. REV. 543 (1954).

Recognition of this basic principle reinforces a different but related point. We can create elaborate doctrines which are designed to induce the judiciary to protect federalism, free speech, privacy or any other value that we hold dear; the judicial efforts will be in vain, however, if the citizenry lacks the political will to ensure that those values are protected by the other branches of government. In short, if state autonomy is really an important concern, we should be concerned less about elaborating new, judicially-created doctrines and more concerned about using the political process to insist that Congress respect local prerogatives in its legislative actions.