

THE LAST PREROGATIVE

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The Hamiltonians knew the importance of being in touch with the sentiment of the people. They knew that leadership requires the ability to present new ideas in a positive, acceptable, easily understood format. Labels are critical in the political process, not so much because they give a real definition, but because their connotations will determine whether people will get close enough to a movement, and study it long enough, to understand what it is all about.

Hamilton and his confreres chose the label Federalists. They could have called themselves Nationalists or Unificationists. Such labels certainly would have described more accurately what it was that Hamilton and Madison were trying to do. They saw the need for a strong, national sovereignty. George Washington, whose valiant efforts on the revolutionary battlefields had won the fledgling nation its freedom, was almost despairing of achieving permanent peace and prosperity. His letters during the period of the Articles of Confederation reveal the bleak outlook which fostered the drive for nationalism among the most prudent leaders of that day. But although prudent, far thinking men in the 1780s realized the need for a stronger national government, practical political considerations and a sensitivity to the feelings, fears and predilections of the public made it necessary to advance the cause of union under a label which reassured those who associated a strong central government with the tyranny of George III. And so the Hamiltonians chose the word Federalist, to emphasize that their concept of union was one in which the states were inviolable components. Still, they wanted a federal union.

It was a national federal government, rather than a mere league of independent states, that they incorporated in the Constitution of 1787. They made it acceptable to the American people, and established and consolidated it so successfully over the next ten years that, when the Jeffersonian era came about and the Federalists passed quietly from the political stage, the principle they had advanced had become an axiom of American government.

It was clever of them to call themselves Federalists. Their opposition, the Patrick Henrys and the stalwarts of state sovereignty, put up an awful hue and cry. The word 'Federalist' had been stolen from them, they insisted. Federalism was part and parcel of federation. It had to do with the coming together of separate parts. It carried the image, the connotation, of joining together without losing independence or identity. "We are the true Federalists", they shouted, "Hamilton and his cohorts are Unionists in federal clothing." Fortunately for the country, though unhappily for themselves, Patrick Henry and his colleagues lost the battle of the slogans. Federalism became the accepted euphemism for nationalism, and the out-manuevered state supremacists found themselves stuck with the unflattering, negative label of Anti-Federalists. Half the battle in politics, really, is to get your opponent identified as anti-something. Then you have him in an unattractive, negative, defensive posture. Anti-movements are like sniper's nests or guerrilla warfare. They are effective for harassment and disruption, but they do not, of themselves, support responsible governing coalitions, as the Anti-Federalists of two hundred years ago finally learned. When the Anti-Federalists were able to shake off the negative label and become known as Democratic Republicans, they were able to come to power.

The ancient label 'Federalist' is a label which is sufficiently ambiguous to convey a sense of balance. It has a good, sensible, nonradical ring to it. How can a Federalist be a bad guy,

when Hamilton, Madison, Washington and John Marshall were Federalists? How can a Federalist be bent on the destruction of the nation, when federalism carries the historical connotation of nationalism and union? It's a safe word. And yet it is a word full of meaning and pregnant with possibilities for political reform in the 1980's. Because federalism continues to embrace the opposing notions of national sovereignty and state sovereignty, it continues to express, in a single, agreeable word, the traditional concept of dual sovereignty in the United States. Federalism says that the national government is supreme in its proper sphere, and that the states are supreme in their proper sphere. Two hundred years ago, the first half of that axiom needed assertion and defense. Today, it is the second half of the statement which requires bolstering.

Federalism is still federalism. But the new Federalist differs from the old, not in what he stands for, but in the back-drop against which he stands. Surrounded by a clamoring band of state-house loyalists, the Federalist of 1782 appeared to be a radical nationalist. In the Washington-dominated economy of 1982, the Federalist of our days is viewed as an anachronistic exponent of states' rights. The very notion of dual sovereignty needs re-expression and re-learning. I am afraid that sloppy thinking, which has pervaded our elementary and secondary schools for so long, has taken over the rhetoric in colleges, universities and in the media to such an extent that not even lip service is given any more to the federalist plan of dual sovereignty.

Just recently Ronald Reagan announced a plan called New Federalism, the gist of which is that the national government proposes to transfer responsibility for a number of programs to the governments of the several states. I ask myself, "Where is it written that the federal government decides what programs the states are to undertake?" I review my dog-eared copy of the United States Constitution again and again, but I find nothing. Nowhere does it say that the federal Congress divides the powers and duties of government between itself and the states.

I think if we were to cross examine the average high school civics teacher, we would discover that the common, reasonably well-informed opinion in America makes no distinction between the relationship of the states to the national government and the relationship of the counties and cities to the states. Particularly since the advent of local home rule in the cities and counties, the principle of local autonomy is generally accepted. As a matter of political theory, it is widely believed that a governmental function is best, most efficiently performed, if it is at all possible, by that unit of government which is closest to the people. Local control and local accountability are factors which favor keeping the functions of government close to home. There is, of course, a difference between home rule and dual sovereignty. City or county home rule is the creation of the state. Cities and counties are the creatures of the state. State statutes and state constitutions can abolish or alter local municipalities, change their boundaries, their powers or their status. Municipalities are subdivisions of state government, wholly subservient to the states and wholly dependent upon the states for their continued existence and authority. And so it is entirely within the province of state government to impose duties upon counties and cities, and to declare which functions will be performed at the state level and which at the local level. It is all a matter of organization, and the only principle involved, constitutionally speaking, is that of equal protection of the laws as it relates to the evenhanded treatment of various classes of municipalities by the general government of the state.

The relationship of the states to the federal government is an entirely different one. The states are not subdivisions of the national government. The states are sovereign components of the federal union. The states are, with respect to their proper sphere of authority, as final and independent as the government of the United States. The powers of the state governments are not traceable to the federal government. Their powers are traceable

to their respective constitutions adopted by their respective people.

Now, this dry, and I fear uninspiring, discourse on the theory of dual sovereignty is not without some importance in our day. **I**n indeed, the proper role of the states in our scheme of representative democracy is a particularly timely subject as we struggle with a sputtering economy. In that connection, I want to make two general observations before proposing some solutions.

First, it seems to me that the phenomena of recession and depression are not so much national ones as we have been led to believe. A recent news story reported that twenty-one 'of the American states are experiencing double digit unemployment. The existence of double digit unemployment is no surprise to me. I am from Michigan. In Michigan we talk about cities with 16 or 17 percent unemployment as being pockets of prosperity. What did interest me about the story is that there must be twenty-nine states which do not have double digit unemployment. The suggestion is that some of them may be doing relatively well, that there are good times in the South and the West, just as there are hard times in the East and the North. In the decennial census of 1980 it appeared that, were it not for the extension of life expectancy, the industrial states of the Northeast and the Midwest would have experienced actual population declines in the 1970s. In the East more people are moving out than are moving in. In parts of Florida and Arizona, they are expecting to triple or quadruple their population by the end of this century. They are building sewers and schools and worrying about population density and planning for the problems that come with a rapid increase in population. In our state you see losses of jobs, plant closings, school closings and an exodus of people and investment capital.

I do not present these matters as a mere litany of woes, but to demonstrate what I believe is an important principle of economics, which needs to be considered now. People live and work and raise their families in the states. They build their churches and schools in the states. They die and are buried in the states. For most of us, the economy of our state is a good deal more important in our daily lives than is the economy of the nation. The national economy is a blur of numbers printed in *The Wall Street Journal*, a staccato of statistics punctuating the nightly news. The state and local economy is seen and understood in terms of busy or empty stores, friends and relatives working or out of work, savings accumulating or being used up. We have the Farm Belt, the Sun Belt, and the Snow Belt; manufacturing states, recreational states, and financial centers; populations that are predominantly young or old, skilled or unskilled, urban or rural; we are not a homogeneous nation, but a composite of local, state and regional interests and concerns. There is not a single American economy, but 50 different state economies. These are more or less grouped by regions, but even within the regions there are important variations, because different people have made different choices, because they have dealt with similar problems in different ways from state to state. This is my first point: the states are not merely historical units of government, but separate economic entities, whose prosperity is only partially affected by national trends and policies.

The second point is closely related to the first, and it is simply this: the federal government is incompetent to manage the economy of the whole nation. I would like to support that assertion with three observations. First, the federal Constitution did not design a national government for the purpose of managing the economy. Our forefathers had more limited, classical governmental functions in mind. The form of government they devised was suited to making political choices, but not for making business judgments. Second, the economy is too diverse to be controlled from a single nerve-center and too varied to respond to uniform national solutions. Third, and finally, I submit as evidence of the federal government's incompetence to manage the national economy the dismal failure of so many

well intentioned public servants, including those in the current administration in Washington. A national debt which now exceeds a trillion dollars; a generation of deficit spending, with annual deficits soon to top the 100 billion dollar mark; the inability to keep promises to, and meet the expectations of, senior citizens, students, the sick, the poor, the disabled, minorities, veterans, refugees and all the other segments of our population who have come to rely upon entitlements; the inability of our nation to keep abreast of the military capability of adversaries and potential adversaries around the world; all of these danger signs, coming as they have in spite of the best efforts of a President committed to fiscal responsibility and holding an impressive popular mandate for reordering the national establishment, point to one incontrovertible, uncomfortable and unavoidable fact: that our problems are not temporary or political, that our difficulties cannot be ascribed to one political party or the other, or attributed to a few office holders or to a particular policy, but that our problems are structural. They relate to the balance of power within the federal government and between the federal government and the states.

Now, structural problems do not respond to superficial solutions. We need to make some major changes. The 1980s must become the decade of constitutional reform in the United States of America. If we are to secure the blessings of liberty to ourselves and to future generations, into the third century of our independence and beyond, we must begin in this decade- to remodel thoughtfully the institutions of government in a number of ways. But if the 1980s are to be the decade of constitutional reform, the impetus for that reform will not come from the national government in Washington. It will come from the states.

The reform has already begun. Under Article V of the federal Constitution, the legislatures of two-thirds of the states have the power to demand the calling of a convention for proposing amendments to the Constitution of the United States. In the history of our country, more than 400 state applications for a convention have been filed with the Congress, but Congress has always refused to act on them. In recent years, the rate of state applications has increased. Three or four times in this century the number of states currently demanding a convention has risen to approach the critical level of two-thirds. Each time the convention has been averted by political maneuvering or by a shift in the political winds. At this very moment, thirty-one of the necessary thirty-four states have demanded that an amendatory convention be called to require a balanced federal budget. The fate of that movement may very significantly affect the direction that the evolution of our Constitution will take over the next generation. Let me tell you why I think so. First of all, the right to demand an amendatory convention under Article V of the federal Constitution is the last prerogative of the several sovereign states of the American union. If dual sovereignty means anything in the United States any more, if there is any irreducible minimum beyond which the lawful authority and inherent power of the states cannot be diminished, it must lie in the clear mandate of Article V. By the plain words of Article V, the people of three-fourths of the states can amend the Constitution of the nation. Speaking either through their state legislatures or through state ratification conventions, the people of the fifty states, counted state by state, are the ultimate sovereign authority by which the federal Constitution is amended. But the right and the reserved power of the people of the states to pass upon constitutional amendments is hollow indeed without the prerogative of demanding an amendatory convention to discuss, refine, draft and propose amendments.

An amendatory convention under Article V is an instrumentality of the national government, because it is created by the express terms of the federal Constitution. It would be a fourth branch of government, within its own area, co-equal with the courts, the executive and the Congress. Certainly, the convention does not belong to the Congress. It is not subservient to the President. It is not controlled by the courts. The convention is an instrumentality created by the federal Constitution to represent the sovereign people of the fifty states, to propose amendments on their behalf and to serve their purposes.

If there is any one point that all the writers and scholars who have studied Article V have agreed upon, it is this premise: "That an Article V amendatory convention is an alternative means for proposing amendments to the Constitution, a means initiated by the state legislatures and intended as an alternative to the method of proposing amendments by a two-thirds vote of both houses of the national Congress." Article V requires Congress to call a convention when two-thirds of the states apply for it. That provision is mandatory. Congress has no choice. Congress may not ignore the state applications. Congress cannot stop the convention from taking place. After all, independence from the will of Congress is the whole idea of the alternative method of proposing amendments by convention. It follows that Congress cannot limit the convention, cannot dictate its agenda, cannot choose its delegates or control its operations. Indeed, if two-thirds of the states are agreed to meet in convention, the convention should take place under the auspices, not of Congress, but of the Constitution. The people of the several states are the constituency which gives the convention its mandate. So long as two-thirds of the states wish to be convened under the authority of Article V, the convention can exist. Conversely, whenever more than one-third of the states want the convention disbanded, it cannot continue.

There is no danger of a runaway convention. That phrase, "runaway convention", and all the accompanying horror stories about repealing the Bill of Rights are utterly without substance. They are myths, harmful to democracy, invented by those who are afraid to let the people exercise their historic and God-given right to self government. I must admit, of course, that the phrase "runaway convention" is a deliciously effective political slogan. It conjures up all kinds of mental images, mostly of wild, madcap sessions of the political conventions at which the national Democratic and Republican Parties nominate candidates for President and Vice-President. Who wants to let the Constitution of the United States be amended by a bunch of screaming, chanting, flag waving, sign carrying, people wearing funny hats and tooting toy horns? That picture, of course, is totally inapplicable to a solemn, deliberative, national constitutional convention. We are not talking about an exhibition of political enthusiasm which is repeated every four years as the kickoff for a presidential campaign. We are talking about significant exercise of statesmanship which has not occurred for two hundred years and which will affect the lives and fortunes of millions of human beings long after every person alive today has passed from the earth.

Because the convention is a solemn and significant undertaking, there are those who seek to forestall it by the technique of spraying the issue with question marks. They insist that the convention is new and untried. No one knows how it would work. There are unanswered questions. How are the delegates to be selected? Where would it meet? Who pays for it? Who is eligible to be a delegate? And on and on. Some people want Congress to legislate ground rules for the convention, as though the exercise of fundamental political sovereignty can somehow be codified and neatly contained in rules. All this question-raising and head-

scratching and chin-stroking is irrelevant and unnecessary. Article V is nothing if not a self-executing acknowledgment of the sovereignty of the people of the several states in relation to constitution-making and constitutional amendments. For nearly two hundred years, the state legislatures have been applying for conventions pursuant to Article V. They have not needed congressional permission to do so, nor have they awaited congressional guidelines before invoking their constitutional power to apply for a convention. All the procedural questions can be answered by reference to the words of Article V, the nature of the convention and the historical precedent of the constitutional convention in Philadelphia in 1787. There is no need for any new rules to guide the convention. The convention can organize itself, and perform its historic function just as its predecessors at both the state and national levels have done.

Each state will select and commission its own delegates. Given that a national constitutional convention has not been convened for two centuries, and given the long-term implications of its work, there is every reason to believe that each state would send a delegation consisting of its most able and dedicated citizens. An Article V amendatory convention should be the most prestigious gathering of civic leaders it is possible for the nation to convene - men and women, not brought together to manage public affairs on a day to day basis, but convened to address the much more important issue of curing defects in the form of government itself. Only a body made up of such persons, convoked for such purpose, should debate, consider and formulate constitutional amendments, such as those directed to assure the fiscal responsibility of the federal government.

Proponents of the so-called balanced budget proposal are ill-advised to abandon their drive for a convention in exchange for a congressionally drafted and proposed constitutional amendment, purporting to address the problem of deficit spending. Even a cursory examination of the language of the current proposal in the United States Senate, designed to defuse the balanced budget convention drive, reveals that the congressional fox is a very poor guardian of the constitutional hen-house. Senate Joint Resolution No. 58 is nothing but a smokescreen, a long-winded anti-constitutional cover-up for continued deficit spending. The wording of that proposal would not have surprised Madison, Hamilton and Jay, the authors of the *Federalist Papers*. They understood human nature. They knew that whenever it is possible to use the wealth of a nation to purchase political popularity for elected officeholders, to corrupt the power of taxation and abuse the public credit as a means of keeping incumbent officeholders in power, the weakness and cupidity of human nature will conspire to assure that common resources will be wasted and the labor of future generations given over to the bondage of public debt. George Washington warned us that the preservation of public credit is the first measure of national defense. He urged us to pay off, during times of peace, those debts made necessary by war, so as not to cast, ungenerously, upon our children the obligations which we ought to bear ourselves.

Despite the befuddlement of Keynesian economics, government fiscal responsibility is not, as so often urged by "gliberals", a mere question of transient political or economic policy, better left to statutory or administrative regulation than constitutional mandate. The Congress is already empowered by the Constitution to lay and collect taxes for the purpose of paying the debts of the United States. I seriously doubt that any of the delegates who labored through that hot summer of 1787 to write the Constitution would have believed for a moment that Congress might someday neglect or refuse to lay and collect taxes to pay the debts of the United States and persist in that refusal year in and year out until more than a trillion dollars of unpaid obligations had accumulated. Indeed, I think that any fair reading of Article I, Section 8 of the Constitution would yield the conclusion

that if the common defense and the general welfare are things that ought to be provided for, debts of the United States are things that ought to be paid.

Fiscal responsibility is not a matter of politics or economic policy. Capitalist states can be run on red ink, and socialist regimes can have balanced budgets. Fiscal responsibility is not merely the platform of a political party or the goal of a particular administration. It is a measure of the credibility and viability of the established institution of government itself.

Nor is fiscal responsibility a matter of choice. The effects of fiscal irresponsibility are not immediate, but they are certain. We know that our government is deeply committed as the guarantor of the nation's economy. The government stands behind mortgage loans, business loans, and student loans. The government protects our bank deposits and bond issues. These secondary obligations are so immense that they dwarf even the monstrous primary public debt, not to mention the moral commitment which underlies our many national entitlement programs. If we default on these obligations, we can expect nothing less than civil disorder. This is an irrefutable lesson of history. Shay's Rebellion, the Whiskey Rebellion, the Veteran's March and the Welfare Marches show that the American people are not apathetic when they are hungry or homeless. They will not exchange a lifetime of savings for a fistful of worthless scrip without a fight. In such an extreme case, the American people will show no more restraint in preserving the institutions of government than they will be inclined to protect the unhappy temporary occupants of public office.

In summary, I submit to you the following propositions. Since fiscal integrity relates to the stability of our system of government, the means of assuring it belong in our Constitution. The proper constitutional means of assuring the fiscal responsibility and integrity of the union can only be reliably proposed by a body of citizens which is not itself participating in the excesses to be guarded against. An amendatory convention called pursuant to Article V of the United States Constitution is such a body, created and intended by our forefathers precisely for the purpose of enabling the sovereign people of the several states of the American union, without bloodshed, to assert their last prerogative as free men and women: to alter the form of the government (as it was said in the declaration of independence), ". . . laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."

Finally, I submit to you that the act of convening an amendatory convention under article V would in itself be more significant than whatever particular amendment or amendments 'might be agreed upon as a result of it. For the convention itself represents a return to first principles. It represents a reassertion of the right of self-determination, and a return to representative democracy in America. I can think of no cause more worthy of any responsible citizen's best efforts and total commitment.