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THE TWO FACES OF FEDERALISM

ANTONIN SCALIA*

When I began to prepare some thoughts for this conference on federalism, I got out my handy *vade mecum* copy of *The Federalist Papers* to see what they might have to say about the subject. In reading the relevant portions, I found that they were not talking about what I expected this group to be addressing. In fact it was quite clear that if a resurrected and updated Alexander Hamilton had been invited to this conference the subjects he would have expected to hear addressed are quite different from — and the tenor of his own remarks would have been quite the opposite of — what we have heard over the past few days.

The underlying explanation for this duality of meaning in the word “federalism” is expressed in a vaudeville routine which many of you may know. The straight line is, “How’s your wife?” and the response, is “Compared to what?” That question, “Compared to what?”, is important in all the affairs of life, not excluding federalism. In meeting to discuss federalism, we have to bear in mind that it is a form of government midway between two extremes. At one extreme, the autonomy, the disunity, the conflict of independent states; at the other, the uniformity, the inflexibility, the monotony of one centralized government. Federalism is meant to be a compromise between the two. As such, it is a stick that can be used to beat either dog. When Alexander Hamilton exalted its virtues, he meant it as a criticism of colonial disunity; we mean it today — in this group, at least — as a criticism of central control.

Conservatives have tended to take this non-Hamiltonian perspective for at least the past half-century, opposing the national government’s intervention and extolling the benefits of state and local control. It is interesting to speculate why this is so. One reason, perhaps, is simply an unthinking extension of notions of natural autonomy that are quite appropriate with regard to the power of the state over the individual into the quite different field of the

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priority of one coercive governmental unit over another. The individual possesses, as the Declaration of Independence points out, a God-given freedom, which rightly counsels an attitude of suspicion if not hostility towards novel impositions of governmental constraint. By contrast, no particular governmental or authoritarian unit can claim any natural right to rule — except, perhaps, the family, whose rights our law has generally protected through the individuals who compose it. The decision concerning which level of government should have the last word is, therefore, a pragmatic one, to be determined by the practicalities of the matter. To be sure, decision at a lower level of government tends to maximize overall satisfaction, by permitting diversity instead of submerging large regional majorities beneath a narrow national vote. But that is a practical rather than a transcendental concern, to be laid beside other practical concerns such as the need for national rather than local enforcement of certain prescriptions. It justifies a predisposition towards state and local control — but not, I think, the degree of generalized hostility towards national law which has become a common feature of conservative thought.

A better reason for conservatives' antagonism towards federalism (in the Hamiltonian sense) is the fact that conservatives have simply been out-gunned at the federal level for half a century. Since the 1930's, the policies that have come from that source have been policies that conservatives disfavor. That is surely an understandable tactical reason for opposition to the exercise of federal power. Unfortunately, a tactic employed for half a century tends to develop into a philosophy. And an anti-federalist philosophy on the part of conservatives seems to me simply wrong. The result of it is that conservatives have been fighting a two-front war on only one front — or at least fighting it purely defensively on one of the two fronts. When liberals are in power they do not shrink from using the federal structure for what they consider to be sound governmental goals. But when conservatives take charge, the most they hope to do is to keep anything from happening. I understand that in some of the offices of the current administration there are signs on the wall that read, "Don't just stand there; undo something." That seems to me an inadequate approach.

Consider, for example, economic regulation — an area in which it is clear that the Founding Fathers meant the federal government to restrain the centrifugal tendencies of the states. Conservatives believe that the free market has the ability to order things in

the most efficient manner, and should generally be allowed to operate free of government intervention. That is a *positive* policy, not the absence of one. Yet I do not know a single federal statute that seeks to enact that policy. Numerous laws impose federal regulation to some degree and then go on to say “and the states will not interfere,” but I know of no federal statute that simply says “the states shall not regulate.” To the extent that such a policy has been imposed, it has been by the courts through the negative Commerce Clause. (I do not happen to think that a good idea — but that is another question.) Why does it not even occur to those who believe strongly in a policy of market freedom to have it adopted by federal legislation in those segments of the economy that are truly national? Let me mention a few areas where one would at least expect this to be debated.

Anyone from a city that has recently gotten “wired” knows of the extraordinary exactions that are imposed upon cable by municipalities. Competing applicants for the franchise are set to out-bidding one another in the promise of “freebies” (although, as we know, someone is paying for them). They offer “free” channels for the schools, “free” channels for the city council, “free” channels for public access, and much more. I do not think the most dyed-in-the-wool anti-federalist among you would deny that the federal government has *power* to establish the regulatory environment for cable — which is, realistically, part of an interstate delivery system that brings information and entertainment from the production studios of New York and California to the individual home. And there are, indeed, proposals that various national restrictions be placed upon cable operations; but I am unaware of any proposed federal requirement that cable be — in one respect or another — simply left alone.

The administration floated a proposal some time back (I do not know what happened to it) to deny federal housing funds to cities with rent controls. The theory was that cities should not be paid to remedy a housing shortage that is largely of their own creation. But if the theory is correct, and if local housing is the federal government’s proper concern, then why has no one even *floated* a federal law that says, “no rent controls” period?

I could multiply the areas in which one would expect economic conservatives to seek establishment of a federal policy excluding state regulation: The prohibition in some building codes of construction materials that are universally recognized to be safe, and

whose only sin is that they are not labor-intensive. State court creation of new tort theories of "enterprise liability" or of design defect which subject interstate businesses to greatly increased damages. State antitrust laws which permit treble damage actions by indirect purchasers that the federal antitrust law has been held to exclude. State "antiescape" laws that penalize (through the obligation to compensate workers) businesses that choose to close plants and move to another state.

I am not suggesting that federal action barring state regulation would be a good thing in all of these fields. In some, it seems to me, the national power exists, but the national interest is not sufficient to justify intervention. The point I wish to make, however, is that with all these targets out there — and with what has generally been regarded as a conservative economic mood in Washington — one would have expected at least a few targets to be shot at. The inaction has less to do with the merits than with the unfortunate tendency of conservatives to regard the federal government, at least in its purely domestic activities, as something to be resisted, or better yet (when conservatives are in power) undone, rather than as a legitimate and useful instrument of policy. Such an attitude is ultimately self-defeating, since it converts the instrument into a tool that cuts only one way.

I urge you, then — as Hamilton would have urged you — to keep in mind that the federal government is not bad but good. The trick is to use it wisely.