

'States Rights' Today: Philosophy Of Fear

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By HENRY S. COMMAGER
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Not for more than a century has the doctrine of states' rights been so defiantly proclaimed as now; not since Appomattox has it found such widespread support.

We can dismiss as irrelevant the demagoguery of a Governor Wallace or a Governor Barnett. But we cannot dismiss so easily the formal endorsement by as many as a dozen states of constitutional amendments which embody a states' rights philosophy and assert "no confidence" in the Constitution and the Government of the United States. Revolutionary as these proposed amendments are, they have received curiously little public attention. Indeed, it is safe to say that the average American is wholly unaware of them or of the changes they would bring about in the American constitutional system.

The first of these proposed amendments is a clumsy effort to repeal the Supreme Court decision, in *Baker vs. Carr*, that Federal courts may take a hand in reapportioning seats in state legislatures; it would deny them any jurisdiction in this area. The second, and most pernicious, would allow state legislatures to bypass the Congress entirely in the amendment process by permitting amendments to the Federal Constitution solely through state action. The third would create a super Supreme Court to be composed of the chief justices of the fifty states, with power to overrule decisions of the United States Supreme Court in all cases involving state-Federal relations. So far, the first of these amendments has been approved by 12 states, the second by 11, the third by four.

There is perhaps little likelihood that these gestures toward constitutional anarchy will command the support of three-fourths of the states, or that they will be endorsed by the Congress. Yet we should not forget that the Bricker amendment—designed to paralyze Presidential conduct of foreign relations—failed of passage in the Senate by but one vote, and that the 22nd Amendment limiting Presidents to two terms—an amendment which President Eisenhower himself called an example of retroactive vindictiveness—slipped through the Congress and the state legislatures almost without notice.

What we are witnessing in these amendments—and in the defiance of the Supreme Court by state governors, in the assault on the constitutional powers of the President to conduct foreign affairs, in the ground swell of revolt against what is vaguely called "Federal centralization"—is not merely a recrudescence of states' rights. It is an expression of something deeper—of a philosophy of anti-government and of no-government. Whereas the Constitution was designed "to form a more perfect Union," this is an effort

to form a much less perfect Union. It is a philosophy, in fact if not in concept, of constitutional anarchy.

For one thing which is clear is that the proponents of these amendments are not genuinely concerned with the powers of the states. They are concerned with non-powers in the nation. They do not want to see state governments invigorated, carrying through broad legislative programs; they want to see the national Government frustrated, incompetent to carry through legislative programs. The ambition which animates them is not to strengthen the states, but to paralyze the nation.

Does anyone for a moment suppose that if the apportionment amendment should by some quirk become law, the states would then proceed to reapportion legislative seats on a fair basis? They have had 50 years in which to deal with the problem and have failed to do so; some states have actually defied their own constitutional mandates requiring decennial reapportionment.

Does anyone really suppose that if the amendment permitting the states to bypass the Congress in the amending process became law, the states would proceed to set their domestic houses in order—to end the scandal of racial discrimination themselves, to reform antiquated tax structures, to deal vigorously with the problems of conservation and of public lands, to take care of the needs of public education and public health through a series of constitutional amendments? Clearly, the new authority would be used not to carry through programs of public welfare but to repeal existing programs of public welfare.

Does anyone for a moment suppose that if the fantastic proposal for a super Supreme Court were to materialize, that court would rule impartially between the claims of state and nation? That amendment would enable 26 chief justices representing (and representing unfairly) states with one-sixth the population of the United States, to rewrite constitutional law. In all likelihood, such a court would strip the Supreme Court of that crucial function of harmonizing the Federal system which is quintessential to the survival of the nation. As Justice Holmes said half a century ago: "I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make the declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views."

Make no mistake about it. These amendments, and the forces behind them, are inspired by deep-seated hostility to the national government. They are designed to weaken the whole constitutional structure—not only the positive power of government under the Constitution, but rights guaranteed to persons under the Constitution. They look ultimately to paralyzing the effective operation of the operation of the Constitution.

which means, of course, paralyzing the nation itself.

There is nothing new about this. Thomas Jefferson invoked the principle of states' rights on behalf of freedom, but he was almost the last statesman who did so. For well over a century now, this pernicious doctrine has been invoked for two major purposes, and almost exclusively for those purposes: to weaken government and to endanger freedom.

The most notorious, and historically the most decisive, use of the doctrine of states' rights was, of course, to protect the institution of Negro slavery. States' rights were invoked, too, to delay expansion into the West, to defeat the regulation of trusts and railroads, to frustrate prohibition of child labor, to hold up the grant of suffrage to women, and to oppose social security, the conservation of natural resources, the creation of hydroelectric power for national purposes, the encouragement of public education and the protection of equality. It is worth adding—it is something Southerners might note—that the doctrine of states' rights was used, too, to disrupt and eventually to destroy the Confederacy itself.

No political doctrine in American history has been more consistently invoked on behalf of privilege; none has had a more egregious record of error and calamity.

What is the explanation of this record, and of attitude which it reflects?

It is not, I think, to be found in any deep passionate attachment to the states. There was some of that earlier, and we are still reminded of it on ceremonial occasions. But there is no persuasive evidence that what animated a John Adams, a Jefferson, even a Calhoun, is still a vital force.

The modern champions of states' rights have none of that loyalty to the community which impelled a Jefferson to build the University of Virginia and cherish its integrity, which persuaded a Franklin to lavish his rich talents on his adopted city of Philadelphia; which convinced earlier generations of Bostonians that they had built Zion upon a hill, and later generations that their city was the Hub of the Solar System ("You couldn't pry that out of a Boston man," said Oliver Wendell Holmes, "if you had the tire of all creation straightened out for a crowbar"). They have not even that generous vanity which compels Texans and Californians to vie with each other in building universities and museums and foundations, and in preserving the natural resources and beauty of their states.

No, the states' rights champion of our time displays no real pride in his state, no sense of its past, no feeling for its traditions, no respect for its dignity, no pride in its future. What has he done, what does he do, to preserve its natural resources, to cherish its institutions of learning, to protect its good name? What interest does he show in the richest possession of any state—the welfare of its men and women and children? The mobs invading the university campus at Oxford, the Negro children huddled behind wire fences in Birmingham and police dogs in the streets—these are the stigmata of states' rights today.

What shall we say of the other side of the shield: that fear of nationalism, that suspicion of the Federal Government, which motivates not only the whole crusade against the political effectiveness of the national Government?

What an extraordinary spectacle it is, this fear of the United States by its own citizens! The generation of the Founding

Fathers worried and bickered over the potential hostility between large states and small, and wrote safeguards against the exploitation of small states into the Constitution. We can see now that these fears were unreal and absurd. But they were neither as unreal nor as absurd as the fear that grips large segments of our population today—the fear of the national Government itself.

What an extraordinary spectacle it is! One might imagine, to hear some of our contemporary nihilists talk, that we were not one people but many, not Americans but Virginians and Mississippians; one might suppose that Jefferson Davis was right when he wrote, long after the Civil War, that "no such political community or corporate unit as one people of the United States existed, has ever been organized, or yet exists, and that no political action by the people of the United States in the aggregate has ever taken place, or ever can take place, under the Constitution." One might suppose that we had not existed as a nation for 175 years. One might conclude that the attempt at federal union, so hopefully inaugurated in 1787, and so widely copied throughout the globe, had proved a failure, and that we were now called upon to go back to 1787, reject the Constitution, and cleave to the old Articles of Confederation.

Is there any foundation for the misgivings that animate the champions of states' rights; is there any justification for their fears?

Has the national Government proved dangerous to the liberties of Americans, or to the rights of the states?

Certainly it would be asking a great deal to ask Negroes to believe that the national Government has been the enemy of freedom, and the states the guardians of freedom. It would be asking a great deal to ask labor to subscribe to the doctrine that it should look to the states, not to the nation, for the preservation of its rights.

Opponents of national "centralization" never cease to deplore the invasion of the "rights" of private citizens by the nation-

al Government, and Governor Wallace played variations on that weary theme in his proclamation. It is fair to ask: What rights have they lost? Freedom of religion, of speech, of press, of assembly, of petition, or association? Due process of law, the right to a jury, immunity from unreasonable search and seizure, from cruel and unusual punishment, from self-incrimination?

To ask these questions is to answer them. As far as the Federal Government is concerned (and it is very much concerned) these rights are still unimpaired—or impaired only where considerations of national security have appeared to require qualification. For the past thirty years or so the Federal courts have engaged not in restricting but in enlarging the scope and meaning of these rights. The same, cannot be said for the states. Who can deny that in the overwhelming majority of instances impairment of the rights and liberties of men has come from the states—and in large measure from precisely those states whose spokesmen are the most vigorous proponents of states' rights. If ever it can be said that advocates do not come into court with clean hands, it can be said of those who today lament the "destruction" of liberties of the states by the national Government.

Who, knowing our history, can doubt for a moment that the real source of danger to the freedoms of Americans has been the states themselves? There are some exceptions, to be sure—the episode of the Alien and Sedition Acts of 1798, for example, the repressive legislation of the First World War, the manifestations of McCarthyism in the fifties.

But anyone familiar with the history of freedom in the United States knows that it is the states that interfere most frequently with academic freedom, the states that set up censorship of press and stage and films, the states that threaten freedom of association, the states whose un-American activities commit-

tees have chalked up the most shameful records, the states that have most frequently flouted the due process of law and denied equal protection of the laws, and challenged or denied religious freedom. The vast majority of civil-liberties cases in the Supreme Court come up from the states, and involve local ordinances or state laws.

Do those who now invoke states' rights do so because they want higher standards of freedom, or because they fear the Supreme Court is too active on behalf of freedom?

Has the national Government threatened those institutions on whose prosperity our society depends for its social and moral health? Has it threatened the independence of the church? The Federal Government started off with complete separation of church and state; it was in the states that discrimination on the basis of religion lingered on. When Madison proposed that the prohibitions of the First Amendment be applied to the states, his proposal was defeated.

Has the national Government threatened the integrity of arts and letters and science? On the contrary. Since the early years of the 19th century, the national Government has maintained such institutions as the Library of Congress, the United States Geological Survey, the National Observatory, the Smithsonian Institution and, more recently, the National Archives and the National Gallery of Art. Have these institutions been free? Certainly they have been more free than many state universities. Congress has never interfered with the Library of Congress, for example, as the legislatures of Ohio and Colorado are even now interfering with their state universities.

It is precisely because the national Government is so generous to arts and sciences that the proponents of states' rights fear it, for they do not really believe in freedom, nor in those institutions that preserve and prosper freedom: universities, libraries, scientific institutes. All

of these foster the open mind and the cosmopolitan spirit. How alien these are to the philosophy of states' rights can be observed in the South of 1860—or of 1960.

Has the national Government threatened the general welfare, or failed to promote it? On the contrary. That whole body of welfare legislation whose wood is interwoven with the warp of private enterprise to make the fabric of our life today finds its authority and support largely in the national Government: Social Security, public health, conservation and, now, education and civil rights.

It is precisely because the Federal Government does promote the general welfare that its proponents of states' rights fear it. They proclaim that these enterprises should not be performed by the national Government, but by the states. But they are not truly concerned with the general welfare, but only with that of members of their own faction. And they have failed egregiously to promote the welfare of even these—to provide schools and housing, for example. All too often, the states have wasted their resources of water and forest and soil, or handed them over to predatory private interests. Ever since the days of Theodore Roosevelt it has been the United States which has stepped in to protect these resources.

Has the national Government failed to form a more perfect union, to provide for the general defense, to insure domestic tranquility? Quite the contrary. There has never been a serious threat to the union from the national Government, or to the domestic tranquility. There has never been an adventurer, a soldier or fortune, a dictator, or a tyrant in the executive chair.

The only threats to the Union have come from the states. States' rights imperiled the Union in 1803 when New England states flirted at secession because Congress had bought Louisiana. States' rights threatened the disruption of the Union during the War of 1812, when states refuse to permit their

militias to serve outside state territories. States' rights threatened the integrity of the Union in the eighteen-twenties when Georgia nullified Federal treaties and Supreme Court decisions protecting the Cherokee Indians, and in the eighteen-thirties when South Carolina nullified tariff laws and enforcement laws. States' rights actually broke up the union in 1861, and precipitated the most tragic war in which the American people have ever been engaged. We cannot say that the doctrine of states' rights threatens the Union today, but clearly it disturbs domestic tranquility by defying the constitutional mandate of equality and justice.

And what of the states? Have they, in fact, lost any of the rights or powers they originally possessed? They have lost the "right" to secede. That, at least, was settled by Appomattox. They have lost the "right" to deprive persons of life, liberty or property without due process of law, or deny the equal protection of the laws; they have lost the "right" to deprive any person of suffrage on account of race or color. These "rights" they did indeed forfeit, and it was Appomattox which settled them all.

It would be a mistake to imply that the current revival of states' rights has been entirely insincere or misguided. Bigness is dangerous; the welfare state can dry up initiative; power does tend to corrupt, and there is much to be said for fragmentation of political authority; eternal vigilance is the price of liberty.

But a states' rights philosophy that has its origin in fear of government itself, and is rooted in a deep distrust of majority rule and of the democratic process, forfeits its claim to respect. A states' rights philosophy which is never inspired by generosity, never excited by a passion for freedom or for justice, never exalted by magnanimity, but takes refuge in narrowness and selfishness and vindictiveness, exhausts its claim to tolerance.

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