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BY CHARLES A. BEARD

"IT IS the will of God; obedience is necessary." *Deus vult.* Thus spake the militant priest in seeking to bend the minds of his hearers.

"It is the law of Nature; break it at your peril." In such language the positivist sought to achieve his designs.

"It is the voice of Reason; its commands are clear." Under this hypothesis the eighteenth-century rationalist assailed the old régime and brought forth revolution and a new order.

"I disclose the commands of Science, reveal its immutable laws, and draw its inexorable conclusions. It is not I speaking; it is the very nature of things, known to my cult of competence." The voice of "scientific" assurance is heard on issues of the hour—currency, banking, and government interference with "the natural order of economy."

"The Constitution commands; I merely bow to its mandates and proclaim them." The absolute speaks in the name of the law.

"My fixed star is the sovereign right of the States; by that we must sail or perish." Out of the New South and the Old North comes this revelation of omniscience and omnipotence.

Owing to some curious twist in the constitution of their minds, men seek to clothe their hopes and desires in the language of an imperative not of their own confessed making. In confronting the issues of life they are unwilling to say: "I represent this interest, cherish this design, believe it worthy, and fain would make it prevail." They shrink from speaking openly on their own authority, such as it is, even when they have a good case. To confess a mere desire seems to be regarded as childish, utopian, a gesture of "good will." We must appeal to something exigent, something above us. We must "stand by" its revelations and commands, proclaim them, in tones of borrowed thunder. God, Nature, Reason, Science, or the Constitution compels us to take this position, to make this assault, to die in this ditch, to unhorse this foe.

To be sure, men of some knowledge are aware that there are differences of opinion, even among the best of oracles, on these commands. It is only in matters of faith and morals that the Pope of Rome claims to speak infallibly; on matters of social insurance, currency, banking, public utilities, and state intervention, the faithful may differ. Experts in the laws of man's nature quarrel among themselves over the inexorable revelations of their oracle. Socialists as well as individualists appeal to reason. Who will admit that he is "unreasonable"? When those who call themselves "scientists" get down to concrete cases of practice they, too, reveal profound differences of "opinion" about things that must be done and the probabilities of outcome. Then, there is the Constitution. The highest oracle of all—the Supreme Court —occasionally is infected with doubts; four of the nine judges often dissent; and still more amazing, the oracle sometimes actually reverses itself, flatly and by open confession. At length we come to those who swear by, live by, and die

by, the rights of the States. They are for the Constitution, of course, but they claim to be resting their case on something primordial—something older than the Constitution, the original, inherent, and indestructible possessions of the States.

As a matter of fact, in all the great controversies about public affairs that rage in the United States we are likely to encounter appeals to all high tribunals of inescapable authority. It is true that God is not mentioned in the Constitution, or in the Hawley-Smoot tariff bill, but still some are bold enough to assume that all "proper" things are done under divine dispensation. Nature, Reason, and Science are almost certain to appear somewhere in the pronouncements of politicians, economists, editors, columnists, and other instructors and keepers of the public conscience and will. If God, Nature, Reason, and Science are neglected, the Constitution is certain to come into the disputation. With blaring vociferation the proponents and opponents of every great issue that has engaged popular interest since the foundation of the Federal Government have sought shelter under the Constitution, have appealed to its mandates, and rested their case on its "insistent and indubitable finalities." The protective tariff was constitutional to Federalists, Whigs, and Republicans; and unconstitutional, for a long time, to Democrats. And seldom, if ever, do those who report the voice of this oracle admit a doubt on the point. They do not say: "This is my view of the Constitution." Rather do they thunder at us in the tones of Mount Sinai: "This *is* the Constitution."

Things have gone so far that diffidence is treated as revealing a taint of treason. This puts mere students of affairs in dire peril. They listen to the frightful din on both sides; they read the speeches of men who say that the Constitution means one thing and the speeches of men who say that it means exactly the opposite; and as a result they suspect that both cannot be right. If, however, they allow their suspi-

cions to become doubts about the whole business, and refuse to join one side or the other, they are likely to be treated as pitiable objects unable to make up their minds. If they range themselves with one party they are hailed as "profound scholars"—by that party; and treated as mere "highbrows"—by the other.

Yet it may be useful for those who still have some diffidence in the premises and suspect their own omniscience, to inquire into and look around the subject of the Constitution and States' rights;—useful, that is, to those who would mitigate the bitterness of conflicts and seek a resolution of difficulties with reference to considerations somewhat higher than the partial view. Without professing to attain absolute reason, one may surely employ a little reason. Without professing to know exactly what the Constitution is, one may know something about the Constitution and its history. Without claiming to understand the nature of "all the facts," one may possibly acquire a speaking acquaintance with many facts, especially facts conveniently neglected by the busy makers of "perfect cases." Inquiries carried on in this spirit, if pushed boldly enough, may possibly lead some statesmen to stand and say to their opponents: "These covering phrases of absolutism have long been a part of the great game. Let us come down from Mount Sinai. Let us recognize that when we speak of the sacred Constitution and States' rights we always have in mind some concrete actions and interests which we *desire* to promote, and let us submit these actions and interests to our constituents for discussion on their merits." Perhaps this utopian state of affairs is never to be realized, but we may draw nearer to it, at least in our minds.

II

In starting an exploration of the Constitution and States' rights in the spirit of limited omniscience, we encounter at the outset the respectable theory that the Constitution it-

self commands a strict interpretation of its own words, and that the Jeffersonian party has obeyed this command with a high degree of consistency. Alongside this hypothesis runs the respectable theory that the Constitution commands a liberal construction of its terms, and that the party of Hamilton, Webster, and McKinley has obeyed this command with a high degree of consistency.

Now multitudinous facts in the case do not fit into this theory of political history at all. Jefferson did take a strict view of the Constitution when he opposed Hamilton's highly centralized bank of issue and when he opposed the Sedition Act which was designed to suppress criticism of the Adams administration. Authentic documents support this statement.

But Jefferson had other than abstract and linguistic reasons for taking a strict view of the Constitution in these cases. He feared the growth of a national money-power around the United States Bank—a money-power that threatened to be a drain upon the earnings of agriculture, the particular interest with which he was associated and on which he centered his affections and faith. He also knew very well that the penalties of the Sedition Act would fall and did fall especially upon the members of his party. They were the chief critics of the Adams administration, and it was by criticism and counter-proposal that they hoped to oust from power the Federalist President and his party. Thus Jefferson had real reasons as well as good reasons for attacking the Bank and the Sedition Act. And he found them both unconstitutional—invasions of the rights of States. Which of these was the controlling element in turning the balance of his mind: a theory of the Constitution or the determination to resist these concrete measures on his judgment of their merits? If we cannot answer this question positively, we can properly entertain a suspicion. In any event we are justified by the record in saying that both considerations entered the formulation of his decision and opinion.

We are more than justified when we examine Jefferson's practice while he himself was in power. With some propriety Jefferson has been called "the first great nationalist." Did he allow a strict interpretation of the Constitution to prevent the purchase of Louisiana? He said flatly that the act was not warranted by the Constitution and wanted an amendment authorizing it. But when he saw that amendment was impracticable, he went ahead anyway, and told Madison that the less said about constitutional difficulties the better. What about the embargo? The Constitution gave Congress power to "regulate" foreign commerce. Jefferson's embargo legislation abolished it. Constitutional scruples did not prevent that drastic action. Nor did they stop Jefferson's party from enacting a law re-establishing a United States Bank in 1816. The party was in financial troubles and it chose what seemed the best way out.

Meanwhile what were the Federalists doing? They had taken a broad view of the Constitution when they wanted to pass the bank bill and crowd the Alien and Sedition bills through Congress. But some of them were ready to secede when the Jeffersonians brought Louisiana into the Union, "overbalancing" the rights of the seaboard States in the original federation. The Massachusetts legislature declared an embargo act unconstitutional. Connecticut resisted the call of the President of the United States during the second war against Great Britain. And the Hartford Convention veered in the direction of nullification. Even the great Daniel Webster, in a speech made in 1814, warned the House of Representatives that the States of New England would provide "for the security of their own liberties" against the Conscription Act.

Nor were the staunch States' rights Democrats of the middle period unwilling to use the powers of the Federal Government for the protection of one great interest of the South—the slave-holding interest. Never in the history of Federal legislation, save perhaps in war time, were local

rights and the rights of persons, clearly set forth in the Constitution, more flagrantly disregarded than by the Fugitive Slave Act of 1850. "In no trial or hearing under this Act," runs the language of the law, "shall the testimony of such alleged fugitive be admitted in evidence"; this, in spite of the fact that the alleged fugitive might well be a free citizen of the North. No tenderness for the liberties proclaimed in the Constitution. No regard for the liberties declared in State constitutions. The Fugitive Slave Act simply ran a steam roller over States' rights. Chief Justice Taney sustained it as good law under the Constitution.

And many a member of the new Republican party, which was to take a broad view of the Constitution and the Union, began his public career in open resistance to the enforcement of the Fugitive Slave Act. The legislature of Wisconsin solemnly denounced Chief Justice Taney's declaration that the Supreme Court is the final arbiter in cases of conflict between the general and the State governments. Then in the language of the Kentucky Resolutions it proclaimed nullification: ". . . as in all other cases of compact between parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress." Two years later Wisconsin Republicans who had approved this act of defiance against the supremacy of Federal law and authority were marching away to the South in arms to sustain the very Union which they had defied.

Entrenched in power in Washington, the Republican party certainly made the Constitution a thing of wax for many years, and forced upon the Southern States the Fourteenth Amendment subjecting every exercise of State and local authority to the opinions of the Supreme Court of the United States. Republicans showed no fear of "centralization" in those days. But when in 1894 the Democrats sought to impose an income tax on centralized wealth in the Northeast, who were most strident in denouncing this "violation

of the Constitution," this "assault on the rights of States"? Who then took a narrow view of the Constitution? The very men who a few years before had been proclaiming the broad view and trampling down "the rights of States."

When the Democratic party came into power under President Wilson, did it reverse the processes of history and go back to strict construction and States' rights? The answers are written in the statutes of the United States passed between 1913 and 1921. The Democratic party did not revoke the centralized interference with business begun under the Sherman Anti-trust Act. On the contrary, the Clayton law made this interference more detailed, specific, and drastic. There is no clause in the Constitution explicitly authorizing the creation of a Federal land-bank system—any more than Hamilton's project; but the Democratic party created an elaborate central machine for lending money to farmers. The Constitution does not explicitly empower Congress to spend money for "internal improvements"; mighty Democrats of old thundered against the very idea of appropriating Federal money for such purposes. Yet the Highway Act of 1916, to which Democrats now point with pride, marked the launching of the most expensive and elaborate program of highway construction in the history of the nation. Do any of the Democrats and Republicans who roll comfortably in their cars over these far-spread highways rail at centralization and loose interpretation of the Constitution? Do presidents of local chambers of commerce, who welcome the coming of continental trunk lines and denounce Federal interference, ever form connections between the two lobes of their brains?

Among the hundreds of additional illustrations that may be drawn from the practices of Democrats, as distinguished from their words, education may be mentioned. Is there anything about education in the Constitution? Is that not a State and local function in itself and in all right reason? Yet for more than half a century Democrats and Republi-

cans have been outbidding one another in voting Federal aid to education and devising centralized standards of administration. To the credit or shame of the Republican party may be laid the Morrill Act of 1862 dedicating public lands to the cause of higher education in the States. The idea was denounced once by a Senator from Virginia as "an unconstitutional robbery of the Treasury for the purpose of bribing the States." But what did the Democrats do under the leadership of President Wilson? Let the Smith-Lever Act of 1914 and the Smith-Hughes Vocational Education Act of 1917 answer. Then what of the Shepard-Towner Act of 1921? Did not Democrats and Republicans in Congress vote for it? And whence came the protest tried out in the Supreme Court of the United States? From the old Federalist stronghold of loose construction, Massachusetts; there she stands.

Why go on? The pages of American history are so crowded with inconsistencies and violations of "principles" by leaders of both parties, and by the Supreme Court, that even Macaulay's schoolboy blushes when he hears his elders now raging and tearing their hair over "the sacred Constitution" (as the speakers choose to understand it) and the "sacred doctrine of States' rights" (as the speakers choose to understand that). It is only because our editors, orators, columnists, and instructors of the public are ignorant of history or willfully distort it that they write and spout the way they do over the ancient myths of small minds.

It is impossible to survey the history of this long conflict over the nature of the Constitution and States' rights without coming to the conclusion that, in the main, theories follow interests instead of controlling them. As Justice Holmes once said in passing upon the constitutionality of a statute, "General propositions do not decide concrete cases. The decision will depend upon a judgment or intuition more subtle than any articulate major premise." And in the judgment or intuition will be found some conception of in-

terests—some conception of things deemed desirable by the man who is possessed by the judgment or intuition.

Such a verdict does not mean that great masses of simple-minded people are not swayed by slogans and symbols beyond their powers of understanding and explanation. It does imply, however, that men who know what they are doing always have in mind promoting or retarding concrete interests when they take refuge in the Constitution or phrases such as States' rights. Recognition of this plain fact should mark the beginning of a clarification of the din and dust of contemporary politics. "No ideas without interests; no interests without ideas."

III

When we come down to concrete cases, we find that the interests which appeal most vociferously to a narrow construction of Federal power and a broad construction of State power are the interests which desire to escape the regulation of both governments. They wish to preserve "the twilight zone" between the two powers. For example, giant holding companies in the utility field, operating in many States, know very well that State governments cannot effectively regulate them or the local concerns against which they lodge heavy financial charges. If perchance a State does make a persistent effort to reach the roots of these interests, and trace them to their source, then the holding companies can appeal to the Federal judiciary against an exercise of "State rights." When, on the other hand, the Federal Government attempts to control gigantic holding companies, the companies take the narrow view of the Constitution and the broad view of States' rights.

In this great game as played in the twilight zone there is nothing necessarily reprehensible, unless we are asked to take the verbal argument at face value. These companies are not passionately and primordially concerned with upholding legal abstractions. They are naturally concerned

with the protection and advancement of their interests. Whether any particular financial configuration or activity is to be praised or condemned depends not upon the nature of the Constitution but upon some conception of the nature of American society and the rôle of private utilities in its economy. It is only by dragging the underlying interests out into daylight that we can discuss either the Constitution or States' rights in any other than scholastic and formal terms.

Yet there is a powerful tradition in the United States against mentioning the substance of things. To suggest that economic interests even enter into political considerations, to say nothing of dominating them, is generally regarded as a form of lese majesty. To the majority of American historians the very idea seems to be almost indecent; gentlemen do not mention it. Economists, of course, deal with economic interests, but usually in a manner to show that they will produce a beautiful social harmony if governments will only let them alone. To many, if not most, economists, politics is a kind of corrupt and reprehensible interest that springs out of a vacuum and invades the field of pure and efficient business enterprise. To be sure, the case is not often so baldly stated, but that is about what the argument of economists amounts to. Hence it is almost beyond hope to expect a realistic consideration of contemporary issues from historians, politicial scientists, or economists. The exceptions are not numerous enough to disprove the rule.

IV

Despite, however, the propensity of writers and politicians to take refuge in the formalism of words, they have not managed to conceal thought entirely. Scattered widely here and there in academic treatises and political speeches are fragments of recognized facts which, when brought together in a configuration, show clearly that the Constitution and

States' rights take on meaning at particular times and for particular persons from underlying economic interests to be opposed or promoted. Without meaning, words are empty ghosts.

And broadly speaking, it is dimly indicated in these writings and speeches that the conception of States' rights was appropriate to an order of agriculture and self-sufficing homesteads and communities. In such an order of economy State governments, as originally conceived under the Constitution, could discharge with a high degree of effectiveness nearly all the functions required by a fairly civilized community. If that kind of order exists and is to be perpetuated, then nothing could be more fitting than an emphasis on local autonomy.

But that order of economy no longer exists in the United States. Even in agriculture specialism makes every community dependent upon distant markets beyond its jurisdictional control. The great manufacturing industries, which do the major portion of the nation's business, are likewise dependent upon distant markets beyond the authority of the States in which they are located. Control over the management of these major concerns is concentrated in a few hundred corporations beyond the reach of State governments, beyond the reach even of their shadowy and nominal stockholders. The wealth from which States draw their sustenance is highly centralized in a few regions and yet depends for its vitality upon all parts of the country.

For more than a century, steam, machinery, electricity, and industry have been knitting American life together in a close mesh of interdependent activities. The Constitution was written before this revolution in American economy had started, and that instrument of government has survived only through loose and general interpretations of its general clauses. This integration of our economy proceeds today with accelerating tempo. Members of all parties and representatives of all interests, in their calmer and more lucid intervals, recognize the fact of this integration.

When Herbert Hoover was in a place of authority, and not in the mere opposition, he recognized it. "We are," he said, "almost unnoticed, in the midst of a great revolution, or perhaps a better word, a transformation in the whole super-organization of our economic life. We are passing from a period of extremely individualistic action into a period of associational activities." This verdict of history, the inexorable, Mr. Hoover saw confirmed by the hundreds of pages of facts assembled by the Committee on Recent Social Trends, which was organized and which functioned under his auspices. Yet as the Sage of Palo Alto, Mr. Hoover insists upon seeing the trees and missing the forest: we are a nation of warring individualists, mainly at least, with the government called in to prevent us from slitting throats and making the battle too raw. It is proper, then, to appeal from Mr. Hoover out to Mr. Hoover in.

In a moment when it was not caught up in a political fight, the United States Chamber of Commerce was equally convinced on this point of integration and centralization in economy. Its committee on business and employment reported in 1931: "We have left the period of extreme individualism and are living in a period in which national economy must be recognized as the controlling factor. Under our form of industry a large part of the national income is distributed through the instrumentality of industry and business." American economy is national in character, and a large part of the national income is distributed through the instrumentality of the national mechanism. That was in 1931. If it was true then, it is true now.

Presidents of both parties, "conservatives" and "liberals," have taken the ground that this new economic situation calls for the exercise of commensurate legal powers by government—by the Federal Government acting alone or by the collaboration of State governments along new lines. In his famous speech on "New Nationalism," delivered in 1910, Theodore Roosevelt forcibly stated this view of things and declared that "there must remain no neutral ground [be-

tween the Federal Government and the States] to serve as a refuge for law-breakers." In the same year President Taft, in a letter to the Governors' Conference, placed among its objects the promotion of "the general national welfare by uniformity of State legislation upon subjects having general national interest which are not, by the Constitution, intrusted to Congress and the central government." Woodrow Wilson, then Governor-elect of New Jersey, in an address before the Conference, confirmed this conception of national needs—the necessity for enlarging national powers or evoking new powers by the co-operation of the States.

The movement of ideas and interests, called history, proceeds. The economy upon which the great majority of American people depend for even the necessities of life is a national economy. The scandalous and piratical attacks on that economy, the speculation and peculation so heavily responsible for the depth of the losses and ruin spread by the crash opening in 1929, were made mainly by bodies and corporations acting under State authority or law. Every effort, right or wrong, good or bad, to deal with the crisis in that economy, the misery and degradation accompanying it, involves the use of commensurate national power. The choice before the States is that of participating in the administration of national standards imposed by the Federal Government or submitting to the Federal enforcement of those standards. It may be that the present deadlock will be broken for a brief period by that mysterious "prosperity just around the corner," but the problems raised by the transformation in economy will persist, and unless American intelligence and will are paralysed, policies and measures more adequate to the exigencies of the age will be evolved and applied. The past is closed, for all time. The United States cannot go back to 1928 or 1789 any more than a grandfather can recover his boyhood. That choice is not before us. The choice is among new policies and measures. Neither nature nor science reveals them as they must be. If the thought is tragic, it must be endured.

Looking to history for guidance in the future, what do we find? We discover changes in human affairs. Sometimes they move slowly; at others, swiftly. When changes have reached a certain point of development a conflict in ideas appears. It is at first dimly recognized that the ideas appropriate enough for the disappearing order are no longer applicable to the changed order of things. Hints that ideas must be brought abreast of the movement of interests appear here and there in the thought of scattered persons. Hints become more and more positive. Their outlines become clearer and firmer. Finally some leader or statesman, such as Jefferson Davis or Abraham Lincoln, formulates these hints and outlines in a platform or program of action. He may, no doubt, make a wrong forecast of the outcome, but he crystallizes confused and scattered opinions into a configuration of appealing thought. At that point in history an adjustment of some kind takes place—compromise, surrender, or open conflict. Fortunate is the nation that can prevent such tensions from snapping into revolution or war and can ease them by acts of power within the framework of law.

Applying this version of history to the issue before us, what conclusions emerge? The substances and practices of American economic life have been revolutionized, or as Mr. Hoover corrected himself to say, transformed, since the Constitution of the United States was drafted. The ideas originally associated with that instrument and the rights of States under it cannot be effectively applied to the changed configuration of interests. This fact was dimly recognized years ago. It has now been more or less clearly recognized by leaders of importance in American politics. The recognition spreads and penetrates. The time approaches when, if the processes of history continue, positive definition and formulation will come. Happy will be the nation if clear and flexible intelligences resolve the consequent dilemma by the operation of flexible institutions.