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REGIONS VERSUS STATES

BY AMRY VANDENBOSCH*

There are two highly important problems in our constitutional system to which we have given no proper solution. These two problems are the relation of the Executive to Congress and of the States to the Federal Government. These two questions have plagued us through every stage of our national development, at certain times more acutely than at others, but at no time have we really been free from these two leading questions. This is especially true of the question of the relation of the States to the National Government. Almost every great crisis in our national politics has turned on this question. It lay at the heart of the bitter controversy over nullification, it was at the center of the disastrous controversy over the extension of slavery, and today several important issues, chief among them prohibition and public utility regulation, have brought public discussion to focus around this fundamental theme. There is every indication that this question is going to be a cardinal question of public discussion in the period immediately ahead of us.

Since our present federal system, with the states as the component units, has crystallized into patriotic dogma, any frontal attack upon it is sure to arouse intense resistance. Practical politics, therefore, bids us shy clear of any proposed solution which involves a modification of our present system. However, if it embodies glaring defects, such that we cannot hope to thrive so long as we retain it unmodified, an early and fearless criticism of it, in order that we may remedy its defects, remains the only enlightened policy to pursue.

As a typically orthodox statement of the principle governing the division of powers we may take the statement of James Wilson in an address to the Convention of Pennsylvania: "Whatever object of government is confined in its operation and

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effect within the bounds of a particular state, should be considered as belonging to the government of that state, whatever object of government extends its operation or effects beyond the bounds of a particular state, should be considered as belonging to the government of the United States.”¹ “In short”, says a leading modern scholar, “there should be one government for national affairs and a number of local governments for local affairs.”² This formula, so unquestionably accepted, sounds simple enough, but it would be a rare genius indeed, who could divide the functions of government on this principle between the national government and states varying in size as do the forty-eight states. The area of Rhode Island is 1,067 square miles, an area less than that of most counties in western states, while Texas covers an area of 262,398 square miles, or an area equal to the combined areas of Belgium, Holland, Denmark, Austria and Germany. A problem quickly spills over state boundary lines in Rhode Island, whereas problems of vast magnitude remain local problems as far as Texas is concerned. What may be a county affair in the West becomes an inter-state affair in New England, while Texas can successfully regulate a problem which in Europe would require international action.

There has arisen on all sides a great concern over the decline of the states, and that from unexpected quarters. The best state’s rights speeches of the last decade have come not from unreconstructed southern Democrats, but from Republicans in high places. President Coolidge warned against the danger to the states from federal encroachments and pleaded for the necessity of maintaining the vigor of state governments, and President Hoover has expressed himself in the same vein.³ This concern for the future of the states is not unwarranted. “The truth is,” as Professor Merriam puts it, “that the state is standing upon slippery ground as a political unit.”⁴ This need surprise no one, in fact the surprise is that they continue to reflect as much vitality as they do. Only thirteen of our states have an independent historic background, and that historic background

¹ *Elliot's Debates*, II, 424.

² Garner, *Introduction to Political Science*, pp. 193-4.

³ Lincoln Day Speech. Text in *New York Times*, February 13, 1931.

⁴ In an article on “Metropolitan Regions,” *The University of Chicago Magazine*, May, 1928.

has been pretty well obliterated, due to population movements and new social and economic integrations. Most of the other states are creatures of the surveyor's chain, their boundaries are lines drawn in the sand. Few of our states are economic and social units and their validity as units of organization and representation is subject to serious challenge. Through an inevitable process the states have lost power and prestige to both city and the nation, both of which are vigorous, organic units.

All this anxiety over the declining vitality of the states is misplaced concern. The dangers of overcentralization in the federal government are real, but the problem is in no way met by trying to keep alive decaying, artificial political units by frantically applying the pulmotor. Those who look for a counter weight to the increasing power of the national government must look elsewhere. Professor Merriam tersely suggests that "those interested in preserving the balance of powers between the national and local governments, might find the urban community a more effective counter-weight to the centralizing tendencies of the Federal Government than the feebly struggling states which now make such ineffectual resistance to the continuous pressure of national consolidation. A city would not be obliged to climb far to go beyond a state. Already there are seventeen cities of a population of over 500,000, nine states with less population than that. And if economic resources and cultural prestige are added to numbers, the contrast is far more striking." However, the best solution to the problem of finding both a counter-weight to federal centralization and a more effective governmental unit than the State is to be found in the region.

The problem will be simplified by laying down certain fundamental principles which ought to be observed in the erection of any administrative and political units.⁵ First, in the interest of economy of administration and the avoidance of unnecessary conflict of jurisdiction there should be a minimum of overlapping jurisdictions and no twilight zone in which no authority is competent to act. Until the Eighteenth Amendment there was no very serious problem of overlapping jurisdic-

⁵ See Lindsay, "Social Aspects of Federal and State Control," *The Annals of the American Academy of Political and Social Science*, Vol. CXXIX, 88 ff.

tion, but the concurrent duty, if such it be, imposed by the Eighteenth Amendment represents a departure which will make confusion worse confounded. Even more alarming is the extension of the area of the twilight zone which lies between state and federal functions, by the action of the Supreme Court in vetoing state laws under the equal-rights and due-process clauses of the Fourteenth Amendment. Nothing more calculated to undermine the vitality of state government could be conceived than this judicial vetoing of state action in "matters confessedly of local concern, dealing solely with local situations, and expressing remedies derived from local experiences." The Court seems at present bent on destroying the vitality of the states by so limiting their powers as to render them impotent in coping with local social-economic problems. The Supreme Court has invalidated more state legislation in the last ten years than in the fifty years preceding. The mortality rate of such laws coming before the Court during the last decade has run between thirty and thirty-five per cent. Felix Frankfurter brands this judicial veto over state social-economic legislation as "the most vulnerable aspect of undue centralization" and as at once the most destructive and the least responsible.⁶

A second guiding principle in determining governmental units is that the jurisdiction of the controlling authority on the one hand should be as extensive as the problem or institution to be regulated, while on the other hand the unit should be kept as small as possible in order that the control may be vested as near as possible to the people directly affected in the exercise of that control. It is a commonplace that our social and economic environment and the technique of social cooperation have thrust themselves upward and outward, causing small units to become obsolete and decay, making possible the transference of functions from the smaller to the larger area of administration, and ever making larger units necessary. Failure to move functions up to larger governmental areas or creating new ones is the cause of serious mal-adjustment, which we have been slow in correcting. This is especially true of our local units. A reduction in the number of the counties in Kentucky from 120 to something like 30 would greatly improve the efficiency of admin-

⁶ *The Public and Its Government*, 1930, p. 50.

istration, and yield an annual saving to the people of the state of a sum variously estimated at between 3 to 8 million dollars. That our changing social environment is creating a constantly increasing number of regional problems—problems too large for the state and too small for national jurisdiction, is indicated by the increasing number of inter-state suits and inter-state compacts. Prior to 1880 there were eleven inter-state suits and eight inter-state compacts, during the following 43 years there were 28 suits and 24 compacts. The compact clause has been resorted to to solve legislative difficulties in such widely varying and important fields as the control and improvement of navigation, penal jurisdiction, uniformity of legislation, conservation of natural resources, utility regulation and taxation.

This problem of jurisdictional areas has become acute with respect to public utilities which operate on a regional basis. This is well illustrated by the East Ohio Company case before the United States Supreme Court in 1930. This company, which distributes natural gas from West Virginia to about fifty Ohio cities, sought an injunction against Ohio to restrain it from collecting an excise tax on its business on the grounds that the tax violates the interstate commerce clause. Mr. Gilbert Bettman, Attorney General of Ohio, succinctly summarized the significance of the case and some of the problems involved. "If the Supreme Court of the United States should adopt the East Ohio contention and should tie together the engineering and financial developments of modern America so that the business of these great underlying commodities of power, oil and gas remained inter-state commerce from point of origin to point of final consumption, then the original gift, so grudgingly bestowed by the States on the National government, of the power to regulate inter-state commerce would indeed be a quit claim deed to half the sovereignty of the individual States this will discriminate against the gas-producing industry and the digging of gas wells in Ohio. The only alternative would be to permit all business of local gas distribution to escape the burden of taxation, thus freeing a vast and profitable enterprise whose properties and activities are protected locally and whose earning power is substantially guaranteed by State regulation, from

bearing its legitimate part of governmental expense."⁷ The Supreme Court fortunately rendered a decision upholding the Ohio tax.⁸ However, this decision by no means solves all questions involved in the general problem. A regional problem such as this requires regional solution.

It is generally asserted that the governmental unit should be kept as small as possible in order that the government may be kept near the people, for centralization of power in distant centers supposedly leads to tyranny, corruption and social paralysis. In the light of conditions generally prevailing in our counties, some so small that one cannot conveniently turn around in them in a Ford, the virtue of small political units may have been overrated. It is not proved that small governmental units are the most vital, nor the best and most cheaply governed, nor the ones in which the voters take the greatest interest.

The third and most important guiding principle with respect to administrative and political units is that the area should as nearly as possible represent social and economic unities. Our state lines for the most part have been drawn in utter defiance of social and economic facts. As just two glaring examples of this we may point to the metropolitan areas of Chicago and New York, each of which includes territory of three states. More important for our immediate discussion is the fact that by reason of its vast size the United States socially and economically is divided into regions rather than into states. Differences of climate, geography, economic specialization and social habits have united regional groups of states in interest and character. "The New England states," wrote Woodrow Wilson, "have always been in most respects of a piece, the Southern States had always more interests in common than points of contrast, and the Middle States were so similarly compounded even in the day of the erection of the government that they might without material inconvenience have been treated as a single economic and political unit."⁹ Sectionalism, while largely ignored by the government and political scientists, is constantly utilized by politicians. Our foremost interpreter of the signifi-

⁷ *New York Times*, April 24, 1931.

⁸ *East Ohio Gas Company v. Tax Commission of Ohio*, 283 United States Reports 465.

⁹ *North American Review*, CLXXXVII, 684 ff.

cance of the frontier, F. J. Turner, points out that "again and again throughout our political history there has been a breakdown of party voting and alliances between regional groups regardless of party affiliations. Calhoun's whole political career shows a desire to use a sectional balance of power and to combine the West with the South. Van Buren would have an *entente cordiale* between the plain Republicans of the middle region and the planters of the South led by Virginia. Henry Clay and John Adams would join the northern zone of the Ohio valley and the North Atlantic. Benton wished to hold the West to a position where, as its political power increased with the admission of new states and with the growth of population, it should be 'bid for', as he said by other sections." The difficulties which this sectionalism is now causing our major parties, is too painful for extended discussion.

This sectionalism causes great political difficulties. Presidential elections are won by a combination of sections, but it is very difficult to hold the sections in line in Congress between elections. Since the majority of voters live in the industrial North East, roughly, in the region north of the Ohio and east of the Mississippi, that region almost invariably controls the president as well as the majority of the House of Representatives, but the rural South and West control the Senate. No matter which party or combination is used to win the presidential election, close cooperation between the executive and both branches of Congress must always be more of a miracle than a normal expectation. If some of these issues which cause bitter sectional alignments in Congress could be devolved upon homogeneous regions there would be a vast gain all around.

These regions are in the largest sense of the term, metropolitan areas. They are characterized by the financial and industrial dominance of some large city. People within a considerable radius of this metropolis are under its economic and social sway. Bound together by the facts of nature rather than by political expediency, these metropolitan regions are sure of a lasting vitality, and their people will be drawn together to press the conservation and promotion of regional interests. Examples of this are not lacking. An outstanding example of this is the New England Council created in 1925 to devise means of

overcoming the economic depression in that section in those years. As a result of the work of this Council, composed of representatives of six states, in stock-taking, self-analysis, and planning for the future, a new hopeful regional philosophy has been engendered, and through a regional mercantilism readjustment has been substituted for what seemed like a permanent decline.

The government has on a few occasions been led to the recognition of regions. Under the Federal Reserve Banking Act the country was divided into twelve regions. The Department of Commerce has undertaken a survey of our national resources as an aid to their exploitation, and for the purposes of this survey the country has been divided into nine regions. In its first report, the Commercial Survey of the Southeast, which appeared in 1927, this large section of the country is described as a definite economic province, possessing "homogeneity in fundamental economic factors." Now one may be sure that a definite economic province inevitably develops a cultural unity and a common political outlook.

Now what constitutional devices are there which may be utilized for the settlement of regional problems and for setting up regional jurisdictions. Frankfurter mentions about ten devices for settling problems transcending state lines but not of a nature for Congress to handle. Most of them are of limited potentiality, especially for developing regional governments and are therefore only mentioned. They include conferences on uniform state legislation, reciprocal legislation, conferences of governors and other state officials for the purpose of stimulating common state action, auxiliary federal legislation, grants-in-aid, the achievement of a practical fusion of control by means of joint sessions and joint action of legally distinct administrative agencies; the jurisdiction of the Supreme Court over controversies between states, and finally the compact clause.

Of these devices the compact clause holds the greatest promise for establishing anything like regional political and administrative units, though that promise is still clothed in un-

certainty and is at best probably none too good.¹⁰ The Port of New York Board may be cited as an instance of the very successful application of the compact clause for the purpose of regulating and developing an interest common to two states, an interest which neither acting singly could adequately control or develop. Under this compact a new administrative district is set up, with commissioners, chosen by each state, to act as the governing body. A great advantage of the interstate compact is the suppleness in dealing with interstate but non-regional problems. To put it differently, the compact may be used causally, and not merely spatially. As an example of this I may cite the recent suggestion of Secretary Wilbur in a letter¹¹ to the Governors of Texas, California, Oklahoma, Ohio, Kansas, Louisiana, Arkansas, Wyoming, Colorado and New Mexico, in which he recommends that these states, so widely separated geographically, but all confronted by a common problem, should enter "an interstate agreement to provide uniformity in State Conservation laws on certain major points, such as (1) unit operation, (2) protection against waste consequent on overproduction, and (3) conservation of gas energy; coupled with coordination between the States of their conservation efforts under an arrangement for liaison which will insure that curtailment in one State may not be followed, as at present, by unproportional production for another State." This is a highly suggestive proposal which it is hoped will be acted upon for it holds out promise for the solution of some difficult problems. The depression and confusion prevailing in the coal industry, for example, might well be solved by an interstate agreement similar to the one suggested.

However, whatever its advantages, the interstate agreement is subject to very serious defects as an instrument of government. In the first place, the method of the interstate compact is practically like the treaty process in international relations, and like it, a slow and clumsy process, subject to all kinds of hazards during the stages of negotiations and ratification. A single state, with a relatively small population, may veto a

¹⁰ See article by Frankfurter and Landis, "Compact Clause of the Constitution—A Study in Interstate Adjustments," in *Yale Law Review*, XXXIV, 685 ff. Also Warren, *The Supreme Court and Sovereign States*, 1924.

¹¹ *New York Times*, April 11, 1931.

project of vital importance to another state or group of states. Or if a single state may not always exercise an absolute veto, it may greatly delay the execution of such projects. In the meanwhile, irreparable damage may have been done. We have two very recent examples of the possibilities of obstruction which the compact system affords single recalcitrant states. Arizona held up the Boulder Dam project for several years through its obstructionist tactics during the negotiation of the Colorado River Compact and by its refusal to ratify that agreement. New Jersey has played a similar role in the Tri-State Compact between New York, New Jersey and Pennsylvania for the diversion of the water of the upper Delaware River water shed for the use of New York City

And what is the remedy if one of the states fails to carry out its part of the agreement? Would and could the Supreme Court enforce an interstate compact? In 1915 Washington and Oregon entered a compact for the protection of fish in the Columbia River, but Washington has failed to carry it out. If the compact is not self-executory, can the Supreme Court compel a state legislature to pass the necessary legislation for its execution, or otherwise hold the state responsible?

In doubt, also, is the nature and extent of power which may be conferred upon an administrative body erected under an interstate agreement. For example, in *Cooley v Board of Wardens of Philadelphia*¹² the Supreme Court, in the interpretation of the interstate commerce clause, laid down the doctrine that whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, require exclusive legislation by Congress. Could a regional body under an interstate compact be given jurisdiction over regional interstate commerce? Could Congress thus divest itself of its power over vast areas of interstate commerce? And what about the limitations of the powers of the state in taxing interstate commerce? All this is still in doubt.

Another defect of the interstate agreement is that control set up under it would not be subject to any single superior or corrective body responsible to the people. Any faults the administration may develop cannot be speedily corrected because

¹² 12 Howard 299, 13 L. Ed. 996.

of the joint control. Moreover, many of the regional problems require constant creative legislation, and cannot be regulated by an administrative board. Furthermore, the compact method would lead to many compacts, each compact confined to a specific problem, and thus lead to a bewildering multiplicity of boards, and a disintegrated interstate administrative system.

In spite of all its defects, it is desirable that the compact method be fully exploited, in order that its potentialities may be learned. If it fails, and all other existing constitutional methods for developing regional government fail, we may find ourselves at a crucial point in our constitutional history, caught between the opposite evils of impotent, de-vitalized states and an overburdened, bureaucratic, centralized national government. It may well be that all the forces of reaction will line themselves behind the mask of state rights, in order to evade all effective regulation. The American people might after a period of stagnation be led into a mood more acceptable to fundamental constitutional revision, a revision in which the region would receive recognition as a basic political unit.