



Herbert Wechsler: A  
Prophet, he was not

Here's a good legal Rule Of Thumb: whenever anyone makes a federalism argument concerning any dispute, do not take them seriously.

It's a mug's game. The Venn Diagram of "people who argue for federalism" and "people who lack control over the federal government" is pretty much a perfect circle. And the positions will completely flip depending on the political correlation of forces.

And no one, of course, epitomizes this better than the current occupant of the Oval Office.

"Remember, the States are merely an 'agent' for the Federal Government in counting and tabulating the votes," the Donald Trump [wrote on Truth Social](#). "They must do what the Federal Government, as represented by the President of the United States, tells them, FOR THE GOOD OF OUR COUNTRY, to do."

I would say that he misread the Constitution, but since he is functionally illiterate, he hasn't read it at all. And in keeping with the Rule Of Thumb, the supposed party of states' rights is absolutely fine with this and supports him on it.

But Trump's latest attack on the Constitution reminded me of one of the most-quoted, most-revered, articles in the history of legal scholarship: [Herbert Wechsler's famous 1954 Columbia Law Review article](#), "The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government." It is obviously an old article but is still routinely cited and is often serves as the basis for thinking about "our federalism."

Wechsler's thesis was relatively simple (and is well-encapsulated by the subtitle): states pick the circumstances and conditions of federal representation in the House, and in the Senate, small states can get together to block even popular national initiatives. This structural

feature of the Constitution, suggested Wechsler, meant that states need not rely on the judiciary to protect them, but could rather do it themselves. Members of Congress that did not represent the interests of states would soon find themselves redistricted out of a job or their political careers put in jeopardy by voting rules and other ways to make their hold on office tenuous. In terms of the Upper House, "the composition of the Senate is intrinsically calculated to prevent intrusion from the center on subjects that dominant state interests wish to preserve for state control." Wechsler thus confidently announced - in 1954 - that

the national political process in the United States-and especially the role of the states in the composition and selection of the central government-is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states. Far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse, necessitating the widest support before intrusive measures of importance can receive significant consideration, reacting readily to opposition grounded in resistance within the states.

The last few years, and especially the last few months, have shown this view to be almost comically quaint. Why did Greg Abbott call a special session to hyper-gerrymander the Lone Star State? Simple. [Trump told him to do so](#). The same thing is probably going to happen in Indiana, and maybe Florida (although that could be harder because it is so egregiously gerrymandered already).

The One Big Barbaric Budget Bill is already threatening state budgets, and causing [rural hospitals in red states to shut down](#). [Rural state GOP Senators didn't want the bill to destroy wind power project subsidies so quickly](#) - but it did, they saluted smartly, and voted for it. [Missouri's Josh Hawley demanded in late spring that Congress should not cut Medicaid](#), pointing to how it would eviscerate health care in the Show-Me State, and the state health care industry loudly complained. And then Hawley bent the knee.

Even though Donald Trump is increasingly unpopular within the public as a whole - his poll numbers are dropping rapidly and he is now in the low 40's - he dominates the Republican Party, No one in the party can resist him, because they will face a primary challenge, and at

least for members of the GOP, the idea of not being in office is so horrible that anything, **anything**, is better than that. So all the fancy talk about checks and balances, and structural protections for liberty, and decentralized power, is just that: fancy talk.

As he did so often, Abraham Lincoln predicted it. In an otherwise undistinguished speech in Ottawa during his debates with Stephen Douglas, [he observed that](#):

public sentiment is everything. With public sentiment, nothing can fail; without it nothing can succeed. Consequently he who moulds public sentiment, goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed.

In the GOP base, Trump has a hold on public sentiment. And so he can mould GOP officeholders to his will. It doesn't hurt that he also has paramilitary forces that can threaten and intimidate them. He can also mould Supreme Court Justices to his will, even though they allegedly have life tenure. In Trump's America, institutions do not exist; only individuals do. And they are caving.

Given Trump's latest takeover of the means of production by seizing 10% of Intel, I should also acknowledge the prescience of Marx and Engels, [who wrote](#) that in a revolutionary age:

All fixed, fast-frozen relations, with their train of ancient and venerable prejudices and opinions, are swept away, all new-formed ones become antiquated before they can ossify. All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober senses, his real conditions of life, and his relations with his kind.

All that is solid melts into air. This is the way we live today.



All That Is Solid Melts Into Air