THE NOLAN CHART

Ron Paul and the "libertarian statists"

Even legal immigrants backing out of homeownership

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The role of U.S. Libertarian Party (LP) Chair is an administrative position, that normally receives little public attention. That changed this January, after the current Chair, Nicholas Sarwark, appeared on a year-end Lions of Liberty podcast to discuss the 2016 LP presidential campaign of Gary Johnson and Bill Weld. One comment in that 40-minute interview "caused an eruption in comments on Facebook,"(**1**) and a "debate [that] raged on social media".(**2**)

During the discussion, the podcast host contrasted Johnson's messaging with Ron Paul's "ideologically pure" libertarian message; to which Sarwark responded "that you 'run a very dangerous line' by identifying [libertarian] beliefs with any one personality."(**1**) Then Sarwark made the comment that touched off the storm, saying of Paul:

"He had policy prescriptions that were straight-up wrong and anti-libertarian. None of us should be given a pass on having to have actual libertarian positions, or not be able to be called out when you say you oppose marriage equality. You know, that's not a libertarian position to have. State's rights is not a libertarian position, and it's something Ron Paul had pushed for a long time."(**2**)

"Libertarian Party Chairman Denounces Ron Paul's Support for States' Rights," was the headline on a Ron Paul Institute article by Adam Dick.(**3**) "The Libertarian Party believes Ron Paul is not a Libertarian," headlined Liberty Conservative, with writer Chris Dixon smugly commenting: "Before criticizing others for not being libertarian, the Libertarian Party should probably learn what it means to be a libertarian first."(**4**)

"I have many years ago given up any thought that the Libertarian Party might actually hold to a message that is libertarian. But sometimes the stupidity reaches new highs (or is it lows)," groused a columnist on the Lew Rockwell blog.(**5**) Lew Rockwell himself delivered the following paraphrase of Sarwark's comments: "There must be one huge centralized state, says a Libertarian official."(**6**)

Mike Maharrey of the Tenth Amendment Center (TAC) made a triple reply: in an article on the TAC blog, on his own Lions of Liberty podcast appearance, and in another Liberty Conservative article, by Shane Trejo."When you start allowing the federal government to do things like regulate marriage that it was never intended to do, you are undermining the entire system," Maharrey warned. "Libertarians have a tendency to do the same thing when it comes to

the Bill of Rights…. It's this desire to use centralized authority to impose liberty…. I find it very very dangerous, and it doesn't fit into the Constitutional system."(**2**)

Trejo added an attack on Sarwark's motives: "Libertarians like Sarwark would rather nitpick the Constitution, and use their own subjective framework when promoting the cause of liberty. Instead of relying on firm, timeless, bedrock principles, these misguided libertarians opt to make compromises and cut deals."(**2**) Elswhere, Trejo has since denounced Sarwark in even stronger terms: "because of smug full-of-sh*t pussies like Nicholas Sarwark, no self-respecting person can call even publicly themselves a libertarian these days without feeling embarrassed."(**7**)

Defenders of Sarwark confined themselves to pointing out that such headlines and reports were misleading: Sarwark's comments were not a 'denunciation' of Paul,(**1**) not a claim that he was 'not a Libertarian,' and certainly not a plea for 'one huge centralized state.'

Both fortunately and unfortunately, the storm blew over quickly. Fortunately, because it seemed like little more than an attempt by anti-LP libertarians to embarrass an LP figure, similar to many of the criticisms of Johnson and Weld during the campaign. Unfortunately, because (aside from Maharrey's contribution) there was little to no attempt to address the substantive issue that it reflected.

State vs. individual rights

At issue is the question of using the U.S. Bill of Rights, and the federal courts, to protect individual rights from state governments as well as from the federal government. Libertarians like Sarwark argue that "the Federal government can protect the equal rights of people from state discrimination" – while "states' rights" advocates like Maharrey claim that one "simply can't reconcile [that idea] with the Constitution. Whether you agree philosophically with Sarwark's constitutional construction or not, no founding era evidence exists to support it."(**8**)

Indeed, the "founding era evidence" is all on Maharrey's side: the U.S. Constitution was constructed specifically to limit the federal government, not the states; and this construction was followed in the first 10 amendments (the Bill of Rights), the last of which explicitly spells out that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."(**9**)

Aside from a few specific prohibitions (from acts like making treaties, issuing bills of credit, or granting titles of nobility), the Constitution pretty much left state governments free to do as they pleased.

However, in 1868 the Constitution was amended to include the 14th Amendment, which did contain language that clearly limited the power of state governments; the relevant language being:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."(**9**)

This constitutional limitation meant that state laws could be challenged in federal courts under Article 3 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution")(**9**). Federal courts have since used the amendment to strike down many state and local laws and ordinances, including those that:

- took private property without paying compensation *(Chicago, Burlington & Quincy Railroad Company v. City of Chicago, 1897)*
- prohibited the sale of contraceptives *(Griswold v. Connecticut, 1965)*
- banned interracial marriage *(Loving v. Virginia, 1967)*
- criminalized anal sex *(Lawrence v. Texas, 2003)*
- banned possession of handguns *(MacDonald v. Chicago, 2010)*
- banned same-sex marriage *(Obergefell v. Hodges, 2015).*

That last case is probably the source of Trejo's comments (paraphrasing Maharrey) about Sarwark "calling for the federal government to regulate marriage," and the "dangerous precedent" for more "illegal usurpations of power" that sets.(**2**) Note, though, that the "dangerous precedent" was actually set in 1967, when the Supreme Court struck down the Virginia law banning interracial marriage.

The marriage question does look like the bright line that divides libertarians on the "states' rights" issue. On one side are libertarians like Sarwark, who see individual rights as fundamental; who believe that the right to marry whomever one wants, regardless of sex or race, is one such right; and who are willing to use the Constitution and federal courts to have that right recognized. On the other are Sarwark's critics – Dick, Dixon, Rockwell, Maharrey, Trejo, et al – who believe in a more important Constitutional right, of state governments, to "act in the name of the people"(**4**) without Constitutional restraint, which must take precedence lest the "entire system" of constitutional rights be undermined.

The latter group calls the former "libertarian centralizers", and tends to mischaracterize them as "libertarians [who] often look towards the benevolent and freedom-loving federal government to destroy the 'grassroots tyranny' of state and local governments."(**10**) One could mischaracterize them in turn as "libertarian statists," who believe that, since state governments "act in the name of the people," there is no need to restrict them with pesky things like individual rights. So, since mischaracterization has been the name of the game throughout this debate, let us use that term for them.

Paul as a "libertarian statist"

Ron Paul falls on the "libertarian statist" side of that divide; and he has been there for a long time. For evidence of that, let us go back to 2003, when the Supreme Court overruled the

Texas law that criminalized anal sex in one's own home. Paul criticized that decision in an article on (where else?) the Lew Rockwell blog, "The Imaginery Constitution:"

Consider the Lawrence case decided by the Supreme Court in June. The Court determined that Texas had no right to establish its own standards for private sexual conduct, because gay sodomy is somehow protected under the 14th amendment "right to privacy." Ridiculous as sodomy laws may be, there clearly is no right to privacy nor sodomy found anywhere in the Constitution.(**11**)

Of course there is no "14th amendment 'right to privacy'" (or sodomy); nor did anyone, least of all the Supreme Court, claim to find one. The 14th Amendment listed no rights at all: it was intended not to come up with new privileges or immunities, but to declare that those already existing should limit state as well as federal power. Nor, as Paul says, is an explicit right to privacy enumerated (or "found", in Paul's term) anywhere else in the Constitution.

The Constitutiton does, though, explicitly state, in the 9th Amendment, that:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."(**9**)

In other words, just because an individual right is not enumerated in the constitution, that does not by itself make the right "imaginery." [sic] Americans do have other constitutionally-protected rights, a right to privacy (according to the Supreme Court) being one.

It is not that Paul is unaware of the 9th Amendment, or even that he is ignoring it. In fact, he goes on to discuss the 9th, and the 10th, in his very next sentence:

"There are, however, states' rights — rights plainly affirmed in the Ninth and Tenth amendments. Under those amendments, the State of Texas has the right to decide for itself how to regulate social matters like sex, using its own local standards."(**11**)

Let that sink in. The 10th Amendment, as we have seen, reserves unenumerated powers to the States "or to the people". Paul, though, reads out those last four words, and interprets the amendment as "affirming" that all such powers are reserved to the state governments, period. That is bad enough; but even worse is his interpretation of the 9th (which doesn't even mention states). In Paul's interpretation, that amendment's recognition of "rights retained by the people" somehow turns into "rights retained by [the state governments to regulate] the people."

This reinterpretation was not just a one-time occurrence, but something Paul has been saying throughout his career. For example, in the Ron Paul Institute article that launched the controversy, Dick gave two quotes to show Paul's real opinion on states rights; both of which contain the very same interpretations.

One, from his book *Liberty Defined*, reiterates that the 10th Amendment gives all unenumerated powers to the states (and none to the people): "States do have a 'right' under the Tenth Amendment to retain *all powers* not explicitly delegated to the federal government by the Constitution." (**3**; *stress added*)

The other, from a 2002 editorial, repeats the claim that the 9th Amendment, too, is all about the the "rights" of state governments: "Most of the worst excesses of big government can be traced to a disregard for states' rights, which means a disregard for the Ninth and Tenth amendments."(**3**)

Paul's reinterpretation of those two amendments looks exactly like the "game of semantics" that Dixon accuses Paul's opponents of playing.(**4**) The underlying reasoning seems to be: State governments are acting "on behalf of the people"; therefore, whenever the Constitution mentions the rights of "the people," it really means the rights of state governments. Imagine the implications: When the 2nd Amendment affirms the "right of the people to keep and bear arms," it really means the right of state governments (police and national guard) to keep and bear arms; or when the 4th Amendment mentions the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," it is really talking about the security of state government politicians and bureaucrats. Calling that reinterpretation "statist" is no stretch.

Paul and the 14th Amendment

But what of the 14th Amendment? Paul covered that, too; not just in the Lawrence article, but in another Lew Rockwell article, from 2005. In that article Paul was commenting on a 14th Amendment challenge that failed: *Kelo v. City of New London*, an attempt to stop that city from taking private property in order to build a shopping mall. Paul, as the libertarian that he is, opposed the idea of "using government power to condemn private homes to benefit a property developer." Nevertheless, as the "libertarian statist" that he is, he concluded that the Supreme Court was right to not interfere with the taking, albeit for the wrong reason: "the Supreme Court should have refused to hear the Kelo case on the grounds that the 5th amendment does not apply to states."(**12**) Despite what the 14th Amendment appears to say, in Paul's view, the Bill of Rights still does not (or at least should not) restrain states or local governments in the slightest.

Paul never changed his mind on this issue. As evidence of that, one can point to his so-called "We the People Act," which he introduced in Congress every year through 2012. Despite the name, this act deals exclusively with constitutional oversight of state governments; its key section was meant to clarify that federal courts, including the Supreme Court, may not adjudicate, or rely on as precedent:

- (A) any claim involving the laws, regulations, or policies of any State or unit of local government relating to the free exercise or establishment of religion;
- (B) any claim based upon the right of privacy, including any such claim related to any issue of sexual practices, orientation, or reproduction; or
- (C) any claim based upon equal protection of the laws to the extent such claim is based upon the right to marry without regard to sex or sexual orientation.(13)

On the face of it, this only partly limits the courts' use of the 14th Amendment: It would restore the "states' right" to ban birth-control pills, but not guns, for example; or to ban same-sex marriage, but not interracial marriage. However, Paul's Act contains another section, which

would bar federal courts from issuing "any order, final judgment, or other ruling that appropriates or expends money, imposes taxes, or *otherwise interferes with the legislative functions or administrative discretion of the several States*and their subdivisions." (13; *stress addded*). Any federal court ruling on any state or local action could turn out to be in violation of the Act; ironically, that would be left up to the federal courts, including the Supreme Court, to decide.(**13**)

Conclusion

After I finished the above, I showed it to a friend for criticism. He did not disagree with any of it, but did question why I wrote it. Why attack Ron Paul, he asked me, when he may have done more for bringing new people to the libertarian movement than anyone?

I replied that I wasn't attacking Paul himself – I still think Ron Paul is great – but some of his ideas; and my reason for attacking those ideas was precisely because he has been so many people's introduction to libertarianism. Far too many people in the movement are acquainted only with Ron Paul's variant, and they tend to equate that variant with libertarian belief in general. Like Andrew Sullivan, they can end up seeing libertarians as ideologically blinkered, if not outright hypocritical:

A real libertarian should be just as concerned about a State government's infringement of individual liberty as the Federal government's. There should be no distinction. Period. Instead, for some strange reason, American libertarians always rail against Federal power and champion the cause of unfettered State power. Why do … American libertarians historically champion the cause of unfettered State power in the name of "individual liberty"?(**14**)

As Damon Root has noted, Sullivan's description is not a fair portrayal of "American libertarians" in general. It certainly does not describe libertarian groups like the Cato Institute, the Institute for Justice, or the Foundation for Individual Rights in Education, all of which have successfully used the 14th Amendment to challenge state laws and local ordinances.

It does, though, fairly describe "libertarian statists" of the type discussed above, including Ron Paul, and their message. Having that statist message promulgated by libertarians, especially by those who identify it with the "firm, timeless, bedrock principles"(**2**) of "what libertarian is"(**4**), can only sow error and confusion among erstwhile libertarians and libertarian supporters. As another critic of the "libertarian statist" mentality has summed it up:

What Ron Paul, his fans, and his mentors are doing by chanting "States Rights!" is not promoting liberty. Instead, they are merely exchanging one set of chains, one set of masters, for another. They are not actually casting off said chains for liberty….

This is a disturbing trend in libertarian circles, brought on by the Ron Paul campaign and many of his fans. I think that many of them are genuine lovers of liberty, and want to see as much of it as possible. But when you're making the argument that only the federal government cannot oppress us, but the states somehow can — as well as making very specious arguments that rely on ignoring several crucial parts of the Constitution — you're damaging liberty, not helping it. And we really don't need any of that.(**15**)

Notes

(**1**) Joe, "On Ron Paul, 'States Rights' & Nicholas Sarwark," Joecephus, January 5, 2017. Web, Feb. 21, 2017. *http://joecephus.com/ron-paul-states-rights-nicholas-sarwark/*

(**2**) Shane Trejo, "Layin The Sarwark Down: Nullification Expert Mike Maharrey Pile-Drives Libertarian Chair On 'States' Rights'," Liberty Conservative, February 2, 2017. *http://www.thelibertyconservative.com/layin-sarwark-nullification-expert-mike-maharrey-pile-drives-libertarian-chair-states-rights/*

(**3**) Adam Dick, "Libertarian Party Chairman Denounces Ron Paul's Support for States' Rights," Ron Paul Institute for Peace and Prosperity, January 3, 2017. *http://www.ronpaulinstitute.org/archives/peace-and-prosperity/2017/january/03/libertarian-party-chairman-denounces-ron-paul-s-support-for-states-rights/*

(**4**) Chris Dixon, "The Libertarian Party Believes Ron Paul Is Not A Libertarian," The Liberty Conservative, January 7, 2017. http://www.thelibertyconservative.com/libertarian-party-believes-ron-paul-not-libertarian/

(**5**) 'Bionic Mosquito', "Libertarian Party Minus Libertarian Equals … What, Exactly?". LewRockwell.com, January 7, 2017. *https://www.lewrockwell.com/2017/01/bionic-mosquito/leftists-endorse-slavery/*

(**6**) Lew Rockwell, "There must be one huge centralized state, says a Libertarian official." Facebook, January 4, 2017. *https://www.facebook.com/LewRockwell/posts/10154604961778859*

(**7**) Jack Hadfield, "Libertarian Party Chairman repeats lie about Milo outing illegals at Berkeley," Breitbart News, February 6, 2017. *http://www.breitbart.com/milo/2017/02/05/libertarian-party-chairman-repeats-lie-milo-outing-illegals-berkeley/*

(**8**) Michael Maharrey, "Why Libertarians Should Support 'States' Rights'," Tenth Amendment Center, January 6, 2017. *http://tenthamendmentcenter.com/2017/01/06/why-libertarians-should-support-states-rights/*

(**9**) Constitution of the United States, Constitution Center. *http://constitutioncenter.org/media/files/constitution.pdf*

(**10**) Marcus Epstein, "Libertarians and States Rights," LewRockwell.com, January 9, 2003. *https://www.lewrockwell.com/2003/01/marcus-epstein/libertarians-and-states-rights/*

(**11**) Ron Paul, "The Imaginery Constitution," LewRockwell.com, August 12, 2003. *https://www.lewrockwell.com/2003/08/ron-paul/the-imaginery-constitution/*

(**12**) Ron Paul, "We Have No Jurisdiction in 'Kelo'," LewRockwell.com, July 5, 2005. *https://www.lewrockwell.com/2005/07/ron-paul/we-have-no-jurisdiction-in-kelo/*

*(***13**) "H.R.958 We the People Act," Congress.gov, 2011-2012. *https://www.congress.gov/bill/112th-congress/house-bill/958/text*

(**14**) Damon Root, "Do Libertarians Care More about States' Rights or State Abuses of Power?", Reason Hit and Run blog, January 9, 2012. *http://reason.com/blog/2012/01/09/do-libertarians-care-more-about-states-r*

(**15**) Jeremy Kolassa, "Comment Check: Ron Paul, States' 'Rights,' and Liberty," United Liberty, August 13, 2012. *http://www.unitedliberty.org/articles/10854-comment-check-ron-paul-states-rights-and-liberty*