Written by **Joe Wolverton, II, J.D.** on June 4, 2018

To Make America Great Again, We Must Make America States Again

As cities are torn apart — as our country is torn apart — by partisanship political vitriol that has in some cases turned violent, one wonders what can be done to decrease the enmity that seems to grow more dangerous and more decadent every day.

In an article published on the *Law and Liberty* blog, constitutional law professor John O. McGinnis identifies populism as one of the principal causes of the disease that has debased and partially destroyed our society, and he proposes a constitutional cure for the chaos that is concomitant with populism. McGinnis writes:

> With the rise of populist figures as ideologically diverse as President Donald Trump and Senator Bernie Sanders, we may well be now witnessing the backlash against the elite element of government that comes from the excessive reduction of the Constitution's popular element. If so, the remedy for populism is not to stamp it out, but to restore the elements of our original Constitution that gave it greater play. We need a constitution that will bend to populist winds so that it will not break.

Populism, as described by McGinnis, is not a mala per se; rather, it is an impulse that functions best in smaller political units such as states. And the Constitution created a federal union that not only recognized the role of the states in maintaining peace and liberty, but its perpetuation depends on the use by the states of their sovereignty to restrain the excesses of the elites who are — and historically always have been — in control of the central government.

James Madison arguably is this country's ablest advocate of federalism and he recommends the federal arrangement created in the Constitution as the antidote to the excesses and abuses native to populism. In the seminal essay on factions — *The Federalist* No. 10 — Madison prescribes the proper remedy.

"If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution," Madison declares.

In support of federalism, Madison expects the states to play the role of chief defender. In *The Federalist*, No. 45, he writes:

> The State governments will have the advantage of the Federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and

> frustrating the measures of each other.

And he's right. Well, he was right. Today, the Supreme Court has relegated the states to secondary status. In dozens of decisions, the highest federal court has drawn lines around the powers of the states so narrow and confining that they are now nothing more than subordinate enforcers of federal edicts.

Again, from Professor McGinnis's essay:

> The power of states, however, has declined in our government and with it the popular element. Most obviously, the Court has been directly responsible for the diminution by interpreting the Fourteenth Amendment to override the popular moral choice of state citizens without warrant in the text of the Constitution, most notably on matters like abortion. But it also has been indirectly responsible by increasing the role for federal preemption of state legislation beyond express preemption and clear conflicts with federal law as contemplated by the Supremacy Clause.

On that last point, I have written extensively on the subject so suffice for this article for me to remind the readers that the so-called Supremacy Clause of Article VI contains a very tight restraint on the predominance of the federal government.

Article VI reads, in relevant part: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

The fact is the Supremacy Clause does not declare that all laws passed by the federal government are the supreme law of the land, period. A closer reading reveals that it declares the "laws of the United States made in pursuance" of the Constitution are the supreme law of the land.

In pursuance thereof, not in violation thereof. If any federal program, pronouncement, or policy is not permissible under any enumerated power given to Congress in the Constitution; then they were not made in pursuance of the Constitution, and therefore they are not the supreme law of the land.

In Chapter 5 of Part I of his *Democracy in America*, the imminently influential Alexis de Tocqueville explains how, in the United States, local government was once the preeminent political entity and towns were where the people learned liberty and learned to be vigilant over the doings of their elected leaders. De Tocqueville writes:

> The town, taken as a whole and in relation to the central government, is only an individual like any other to whom the theory I have just indicated applies.
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> Town liberty in the United States follows, therefore, from the very dogma of the sovereignty of the people. All the American republics have more or less recognized this independence; but among the people of New England, circumstances have particularly favored its development.
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> In this part of the Union, political life was born very much within the towns; you could almost say that at its origin each of them was an independent nation. When the Kings of England later demanded their share of sovereignty, they limited themselves to taking central power. They left the town in the situation where they found it; now the towns of New England are subjects; but in the beginning they were not or were scarcely so. They did not therefore receive their powers; on the contrary, they seem to have relinquished a portion of their independence in favor of the state; an important distinction which the reader must keep in mind.
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> In general the towns are subject to the states only when an interest that I will call social is concerned, that is to say, an interest that the towns share with others.

> For everything that relates only to them alone, the towns have remained independent bodies.
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> No one among the inhabitants of New England, I think, recognizes the right of the state government to intervene in the direction of purely town interests.

It was federalism — the system where the lion's share of power is held locally with only the most necessary allotment of authority granted to the general government — that made America free and kept her that way.

As Madison wrote in *Federalist*, No. 39:

> [T]he Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves. The act, therefore, establishing the Constitution, will not be a NATIONAL, but a FEDERAL act.
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> That it will be a federal and not a national act, as these terms are understood by the objectors; the act of the people, as forming so many independent States, not as forming one aggregate nation, is obvious from this single consideration, that it is to result neither from the decision of a MAJORITY of the people of the Union, nor from that of a MAJORITY of the States. It must result from the UNANIMOUS assent of the several States that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority, in the same manner as the majority in each State must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes, or by considering the will of the majority of the States as evidence of the will of a majority of the people of the United States. Neither of these rules have been adopted. Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a FEDERAL, and not a NATIONAL constitution. (Emphasis in original.)

If we are, then, really serious about making America great again, we must first get serious about making America states again.

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