Written by **Joe Wolverton, II, J.D.** on November 17, 2014

Why Silence on Most Important Victory in 2014 Elections?

While the debate continues on whether the recent Republican electoral victories will result in an increase in liberty and fiscal restraint, there is one outcome of the mid-term elections that is good for federalism, freedom, and constitutional construction.

Nick Hankoff, writing for Ron Paul's Voices of Liberty website, reported on the good news that has been nearly universally ignored, even by the self-styled conservative news media. Hankoff wrote:

> Most have heard of the continued success of states legalizing marijuana with Oregon and Alaska following the lead of Colorado and Washington. But an even bigger event took place in Arizona. Proposition 122, the Arizona Rejection of Unconstitutional Federal Actions Amendment, passed. This codified in the state's constitution the legal doctrine called "anti-commandeering," the right of a state to not be forced by the feds to fund programs foisted upon it.

Proposition 122 passed narrowly in Arizona with just over 51 percent of voters in the Grand Canyon state approving the ballot measure. The thinness of the margin of victory is lamentable, particularly in light of the fact that proponents spent millions advocating for their position and at least three years getting 122 onto the ballot.

Regardless of the closeness of the outcome, the result is laudable. Proposition 122 "permits the state to exercise its sovereign authority by restricting state and local government personnel and financial resources to the purposes that are consistent with the constitution of the United States."

Hankoff rightly identifies that Prop 122 is an example of the legal principle known as "anti-commandeering." Put simply, anti-commandeering prohibits the federal government from forcing states to participate in any federal program that does not concern "international and interstate matters."

While this expression of federalism ("dual sovereignty," as it was named by Justice Antonin Scalia) was first set forth in the case of *New York v. United States* (1992), most recently it was reaffirmed by the high court in the case of *Mack and Printz v. United States* (1997).

Writing for the majority, Justice Antonin Scalia explained:

> As Madison expressed it: "The local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." *The Federalist* No. 39, at 245. [n.11]
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> This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from

> either front."
>
> When the federal government assumes powers not explicitly granted to it in the Constitution, it puts the states on the road toward obliteration and citizens on the road to enslavement.

The Founding Fathers understood this. For example, speaking at the convention considering ratification of the new Constitution in New York, part-time Constitutional Convention attendee Alexander Hamilton said:

> I maintain that the word supreme imports no more than this — that the Constitution, and laws made in pursuance thereof, cannot be controlled or defeated by any other law. The acts of the United States, therefore, will be absolutely obligatory as to all the proper objects and powers of the general government … but the laws of Congress are restricted to a certain sphere, and when they depart from this sphere, they are no longer supreme or binding.

He put a finer point on the subject in *The Federalist*, No. 33:

> There is no position which depends on clearer principles, than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid.

Other Founders, speaking in other state ratification conventions, expressed the same understanding of the "supremacy" of federal law.

At the Pennsylvania convention, signer of the Declaration of Independence Thomas McKean said:

> The meaning [of the Supremacy Clause] which appears to be plain and well expressed is simply this, that Congress have the power of making laws upon any subject over which the proposed plan gives them a jurisdiction, and that those laws, thus made in pursuance of the Constitution, shall be binding upon the states.

Down in North Carolina, federalist leader and famed jurist James Iredell echoed the theme:

> When Congress passes a law consistent with the Constitution, it is to be binding on the people. If Congress, under pretense of executing one power, should, in fact, usurp another, they will violate the Constitution.

Couldn't be much clearer than that.

Hankoff rightly posits that Arizona's passage of Prop 122 is a welcome retrenchment of the core constitutional principle of federalism. He writes:

> This fundamentally changes how politics works in America. As the federal government gets bigger and more unwieldy, the local level officials will be called upon to act as an intermediary. When people know the impact they can have through local action, new coalitions will form that challenge the crumbling establishment. The beauty of it is no two states have to be on the same page on any issue so long as they recognize their right to not cooperate with the feds.

Of course, there are many who argue that once the Supreme Court or Congress has spoken, then the federal mandate trumps all state laws as state authority is inferior to federal authority.

If one were to assume that the Constitution is not an agreement among equals, then one must also accept the corollary that the states are mere subordinates of the federal government without the right to seek a remedy to the wrongs perpetrated by the plutocrats on the Potomac. The states, as dissatisfied

children, would have to submit to their parent government, with no more morally acceptable remedy than to complain and to bristle.

However, sovereignty is not an either/or proposition. The states are the possessors of original governing sovereignty (as an aggregation of the popular political will) and they created another government with powers derived from their own. The government of the United States was not created ex nihilo.

This concept is succinctly set forth by Alexander Stephens in his book *A Constitutional View of the Late War Between the States*. In this landmark two-volume treatise examining the causes and effects of the Civil War through a constitutional lens, Stephens explains, "Only sovereign states could endow a common government with sovereignty."

It's that simple. State governments could not create a central authority with any degree of power unless they held that power in at least an equal degree prior to the latter's creation. Put another way, could the states give the central government something they themselves did not already possess?

Finally, should a state or states decide not to continue silently suffering constant breaches of that agreement by one of the other parties or by the agents of the general government created by it, they may lawfully demand a halt to the offending behavior and a performance by the breaching party of its contractual obligations.

If the breaches are significant enough, however, the states may demand rescission of the entire contract and return to their pre-contractual position. And remember, there is no requirement that the states expressly retain this right of rescission in the agreement — it is available as an independent operation of law. James Madison was no lawyer, but he knew and understood this legal principle. In fact, he summed it up perfectly in a speech he made at the Philadelphia convention:

> Clearly, according to the expositors of the law of nations, that a breach of any one article, by any one party, leaves all other parties at liberty to consider the whole convention to be dissolved, unless they choose rather to compel the delinquent party to repair the breach.

The success of Proposition 122 in Arizona can and should be duplicated in every state in this union, especially if lovers of liberty are to retain any hope for the perpetuation of the Constitution and the individual freedom it was drafted to protect.

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