

Constitutional Reflections: A Recurrence to Fundamental Principles and Forming a More Perfect Union

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Editor's Note:

This article is part one of a two-part series on the fundamental principles of the U.S. Constitution. Part one discusses the first three fundamental principles of the U.S. Constitution: popular sovereignty, federalism, and separation of powers. Part two, which will be published in the October issue of Nevada Lawyer, will discuss the additional constitutional principles of the Bill of Rights and the rule of law, as well as two unspoken principles taught by the U.S. Constitution and America's framers: unity and civic charity.

We the People, as judges, lawyers, and engaged citizens, are the standard-bearers of freedom and guardians of the U.S. Constitution. It is our duty to understand, teach, and defend America's Constitution and its foundational principles. Our generation's leaders, as George Washington foresaw, are among the wise and honest who will uphold and repair "the standard" that protects the rights and freedom of all people throughout the world.¹ It is time for a recurrence to these principles.²



to the world? I will highlight five: popular sovereignty, federalism, separation of powers, the Bill of Rights, and the rule of law.³ In this article, I will discuss popular sovereignty, federalism, and separation of powers.

Popular Sovereignty

The *people* are the only legitimate wellspring of power for government. Government is chartered by limited, enumerated powers to be exercised only as authorized by them according to their written law, which is the Constitution. This American experiment is

We are living in the most profound and perilous days of our lifetimes. The ongoing success of America—this great experiment in self-government as established by the U.S. Constitution—will be determined based on the choices we make now, whether we act or are acted upon. Consequently, we must dust off our constitutional instincts for freedom in America and forge new conventions of understanding, leadership, and unity. No greater immediate responsibility rests upon citizens of this republic, or of any republic, than to protect the freedom vouchsafed by the Constitution of the U.S.

America's founders laid the constitutional cornerstones of freedom for all. The generations that follow are to build the superstructure of a more perfect union upon it. This cause of freedom and justice in government is a continuing, noble work—established line upon line, precept upon precept, generation by generation, individual by individual. This work requires a clear understanding of the fundamental principles that Washington and his founding generation set forth to the world in America's founding documents.

What are the foundational constitutional principles for this standard of freedom that has been raised

unlike any in the world. “In Europe, charters of liberty have been granted by power,” James Madison explained. “America has set the example ... of charters of power granted by liberty[;] ... [government] derived not from the usurped power of kings, but from the legitimate authority of the people[.]”⁴

Popular sovereignty as a fundamental principle of self-government is the chief cornerstone and lodestar of all constitutional jurisprudence. It supports and illuminates every aspect of our Constitution’s creation, interpretation, and implementation. To this end, the American people resolved to form a new constitutional government, unlike any other, to advance the cause of freedom and protect individual, unalienable rights. They created a democratic republic—one established by the consent of the governed, with elected representatives, and fixed in a written Constitution to guarantee liberty for future generations. This new form of constitutionalism, properly understood and practiced, would become the greatest political creation in the history of the world for the cause of freedom.

Because America’s government is *of* the people, *by* the people, and *for* the people, it must operate within the boundaries expressly enjoined *from* the people. The metes and bounds of the people’s government is set forth in the Preamble of the U.S. Constitution. There, we find the six reasons *We the People* instituted and empowered government in the first instance. America’s self-government is ordained and established for these purposes:

1. To form *a more perfect Union*,
2. To establish *Justice*,
3. To insure *domestic Tranquility*,
4. To provide for the *common defense*,
5. To promote the general *Welfare*, and
6. To secure the *Blessings of Liberty* to ourselves and our posterity.⁵

If government action is not doing these things, it is likely acting outside the people’s granted authority. Similarly, if we as citizens, civic leaders, politicians, or corporate institutions are engaging in action that compromises these fundamental six purposes, then we, too, are acting contrary to our ultimate best interest, and, in the end, endanger the very political system that sustains us.

Federalism

This principle is generally understood as the division of political power and responsibilities between a centralized national authority and dispersed state or regional ones. It is an arrangement in which two or more governing bodies share power to achieve mutual benefits. The primary purpose of federalism is to diffuse centralized power. But federalism is more than this.

To truly understand federalism, it is helpful to begin with the original meaning of the term. Federalism derives from the Latin word *foedus*, meaning an “alliance,” “treaty,” “compact,” or, more specifically, a “covenant.” *Foedus* comes itself from an older Latin word, *fides*, meaning “trust,” “faith,” “honor,” or “reliability.” The concept reflects a mutual relationship with privileges and responsibilities on both sides. Federalism, therefore, implies a collective political covenant, one we might think of as between people and the government they have chartered.

The founders developed our constitutional system to fix this trust—this covenant—between the American people and their government in perpetuity. The people would grant power to a new dual government, with authority shared both nationally and regionally, premised upon their government’s promise to safeguard and defend the people’s liberty and civil rights from all enemies, including all future governments themselves. Additional reasons for creating a dual federalism in government, or division of power between national and state governments, include the following:

1. To disperse access to power and political authority, thereby establishing a bulwark against centralized government and those who may seek to consolidate and control it;
2. To provide local citizens a meaningful stake in government by affording greater participation and control in their politics;
3. To direct resources based on the specific needs and priorities of local communities;
4. To permit state democracies to become laboratories for new ideas in governance and solving regional problems; and
5. To allow regional autonomy to ease political tensions, prevent succession, and promote unity by having multiple levels of regional and national government share principles of mutual respect, justice, and civil rights.

Thus, federalism is not merely a means to diffuse power; it is a principle for elevating and preserving self-government, thereby protecting the rights and privileges of all citizens. Federalism preserves and encourages the voices of both majorities and minorities, regardless of race, religion, or region, and unifies a vast, diverse republic. Our nation is strengthened and unified as its leaders remember and honor their original covenant to safeguard the individual liberties of all citizens equally at all levels of government. This is the true promise of federalism.

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Separation of Powers

The founders carefully laid the foundation of America's superstructure of liberty by creating within the U.S. Constitution's architectural framework an enlightened system that distributes the power allotted to government among its constituent parts. This system further safeguards liberty by preventing the consolidation of state authority through an elegant system of checks and balances among these parts.

In particular, in every government there are three types of power: legislative, executive, and judicial. The U.S. Constitution divides these powers into separate, coordinate, and equal branches of government. Moreover, each branch of government is expressly limited in its power by an internal system of checks and balances among the branches. The result is a system of self-government that assiduously diffuses centralized power. No branch of government can arrogate to itself what power it pleases. As James Madison explained, "The accumulation of all powers, the executive, legislative and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."⁶ Thus, the framers made power check power by the arrangement of things: bulwarks beyond mere parchment to safeguard the people against the encroaching spirit of power. The Constitution's elegant system of checks and balances both diffuses power to protect liberty and integrates dispersed powers into a workable government. As Justice Robert H. Jackson has written, "It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."⁷

Too few of our national leaders today understand the significance of these wise restrictions on each branch of government. Too few refrain from the seductive tendency to venture into the field of a coordinate branch to which they were neither elected nor appointed. We would do well to remember that the principle of separation of powers is so significant to the safeguard of liberty that George Washington himself warned in explicit terms against those in future generations who might be tempted to unwisely institute arbitrary changes to coordinate branches of government for political gain. He taught that the *only* legal and proper manner to change the delicate balance among the people's disseminated powers among their three branches of government is by constitutional amendment, as expressly set forth in the Constitution itself. Washington was most resolute on this point:

*"But let there be no change by usurpation; for through this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed."*⁸

It is upon the fundamental principles of the Constitution that good government is built. Our U.S. Constitution with its enduring principles of truth and freedom binds disparate people together as one national family. It at once liberates and unites. When properly understood and practiced, our constitution teaches unceasingly. It is the greatest political creation in the history of the world for the cause of freedom. And yet there is more for us to discover.

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ENDNOTES:

1. "Let us raise a standard to which the wise and honest can repair; the event is in the hand of God." George Washington, Constitutional Convention, 1787. George Washington was speaking of the American principles as embodied in the proposed Federal Constitution. Our nation's first president understood that the U.S. Constitution would be paramount to the cause of freedom throughout the world, and that it was only a beginning.
2. America's founders repeatedly counseled our nation's citizens to study vigilantly the Constitution's fundamental principles. George Mason in June 1776, writing the first Bill of Rights for the state of Virginia, said "no free government, or the blessing of liberty, can be preserved to any people but by ... frequent recurrence to fundamental principles." VA Decl.

of Rights, Sec. 15 (1776). Benjamin Franklin, just three months later, after the Declaration of Independence was signed, was equally clear in the Declaration of Rights for Pennsylvania: "a frequent recurrence to fundamental principles ... is absolutely necessary to preserve the blessings of liberty, and keep a government free[.]" PA Const. of 1776, Decl. of Right No. 14. Four years after that, John Adams, in his Massachusetts Bill of Rights of 1780, confirmed the point a third time: "a frequent recurrence to principles of the Constitution ... is absolutely necessary to preserve the advantages of liberty and to maintain a free government." MA Decl. of Rights, Art. 18 (1780).

3. The 2020-2021 President's Messages of the Federal Bar Association, published online at www.fedbar.org and in *The Federal Lawyer*, analyze these five foundational principles of the U.S. Constitution in separate articles.
4. James Madison *Charters*, NAT'L GAZETTE, Jan. 18, 1792.
5. U.S. CONST. pmbl.
6. THE FEDERALIST NO. 47 (James Madison).
7. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
8. George Washington, *Farewell Address* (1796) <https://www.ourdocuments.gov/doc.php?flash=false&doc=15&page=transcript>.

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