

**Constitutionalism in the 21st Century:
Is the Rule of Law Still Relevant?**

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Introduction.

Thank you, President Hargis, for that kind introduction. It's great to be on the campus of Oklahoma State University. OSU is a land grant institution, and one that takes the land grant mission seriously. I am proud to be connected to Oklahoma State University in a number of ways. First, as mentioned, I have just started my fourth year on the Board of Regents for the Oklahoma Agricultural and Mechanical Colleges, the board that governs OSU. I have eight wonderful colleagues on that board. Let me tell you about them. They serve, without compensation, and put in an incredible amount of time to do the work to make OSU a great institution of higher education. When I say they work hard, I really mean it. Although no rule or regulation requires it, they regularly put in 15, 20, 30 or more hours per week, without pay. They do it because they love

Oklahoma in general and OSU in particular, and they want to make sure OSU fulfills its mission in the most excellent way.

Second, although I had completed my formal education before I ever came to Oklahoma, I am proud that my daughter, Susan Lester, is attending Oklahoma State University (she regularly reminds us she is the only member of our family who can claim to be a native Oklahoman; though, having lived in Oklahoma for almost 30 years, I think I come close).

The Practice of Constitutional Law

I've been blessed with an enjoyable career and profession. Among other things, I litigate constitutional law cases. People actually pay me to argue cases, in all kinds of courthouses, involving intricate constitutional issues. Sometimes they involve state constitutional questions.

Other times, the federal constitution is at issue. It is not necessarily the most remunerative area of the practice of law. But it is intellectually stimulating and thoroughly fulfilling. If you have the chance to do it, and feel called to do it, I highly recommend it.

Celebrating the Anniversary of the Constitution

Two hundred twenty three years ago, fifty-five American leaders gathered in Philadelphia for two months to discuss the future of the fledgling American republic. The United States of America, a collection of thirteen sovereign states, had only recently won independence from the world's only superpower. But continued independence was by no means guaranteed.

Why were the thirteen United States called states? The word "state" is an international law term. In international law, states are sovereign entities: France was a state. Spain

was a state. Portugal was a state. So too were Virginia, Massachusetts, Pennsylvania, New York, my home state of North Carolina, and the rest.

These states had banded together to gain independence. Against all odds, they prevailed. They had their independence. But continued independence was by no means certain.

The British, from whom we gained our independence, were never far away. After Yorktown and the Treaty of Paris, they didn't all simply withdraw across the Atlantic Ocean to England. They were just across the border in Canada. They were in the important islands of Bermuda, Jamaica and others. The Spanish were in Florida. The French were never far away. And the western frontier was far from secure.

The men who gathered in Philadelphia – delegates

from most of the states – knew, as did most of their fellow countrymen, that the existing order was not working. Both external threats and internal strife beset the new country. Debts went unpaid. If invasion from without seemed possible, disintegration from within seemed virtually imminent.

So the delegates to the Constitutional Convention came together, swore each other to secrecy, locked themselves in a small, unairconditioned, barely ventilated room during a hot Philadelphia summer, and went about the work of drafting a constitution. They worked to establish a central government, and to create the rules which would govern that system.

The Remarkable Document.

It was a remarkable event. Think about it. The entire nation had a population roughly the size of Oklahoma's

population today. Fifty-five of the brightest minds came together in Philadelphia. By no means did they agree. Indeed, by this day 223 years ago, only 39 remained to sign the proposed Constitution. Some were bitterly opposed. Yet, they drafted a remarkable document, one that, in the ensuing two-and-a-quarter centuries, has been amended only twenty-seven times, or, on average, only once every five years.

Let me point out how remarkable that is. Of the twenty-seven amendments, ten were added immediately, as the Bill of Rights. Two amendments came about in short order thereafter, one in response to a Supreme Court ruling, another to avert an electoral disaster in the election of the President and Vice President.

Another six decades passed before there was another amendment to the Constitution. Think about this: Many say

Abraham Lincoln was the greatest American president. Yet, in Lincoln's lifetime, there was not a single amendment of the Constitution.

Three amendments came immediately after the Civil War, to secure the rights of the former slaves. Another forty-three years, to the day, went by before the next amendment was ratified. Two amendments, which came within a decade and a half of each other, essentially canceled each other out – first adopting, then repealing, prohibition.

And the last amendment, number twenty-seven, actually was offered as part of the original Bill of Rights, but, unlike the first ten amendments, took over two hundred years to gain the necessary votes for ratification. The history of that ratification is unusual. From 1789 to 1792, seven states ratified it. In the entire nineteenth century, only

one additional state ratified the proposal. Then, from 1984 to 1996, an additional thirty-eight states ratified what is now known as the Twenty-Seventh Amendment.

Compare that to the Oklahoma Constitution. If you look in the official volumes of the Oklahoma statutes, the American Constitution takes a mere eleven pages. By contrast, the Oklahoma Constitution covers one hundred sixty pages. And amendments? This November alone, according to the State Election Board, we will be voting on ten amendments to the State Constitution. Two years ago, we approved four others. And we tend to do similarly every couple of years.

The Rule of Law Remains Relevant.

The United States Constitution has governed this nation now through the end of the 18th century, throughout the 19th and 20th centuries, and into the 21st century. Is it

still relevant? Will it continue to be relevant? Will we continue to be a nation governed by the rule of law? How do others view the notion of constitutionalism?

I told several colleagues and friends that I was making this address, and had given it the title “Constitutionalism in the 21st Century: Is the Rule of Law Still Relevant,” and a couple of them asked, “Well, what are you going to say? Is it relevant or not?” I told them I was scheduled to speak for 30 to 40 minutes, and that if the answer were “no,” the speech would be too short. So, let me get straight to the heart of the matter and answer my own question with an emphatic, “Yes.”

So what is my evidence for this conclusion? Look at the world around us and consider this. When the drafters of our Constitution emerged from that hot, humid room with their proposal, and when the states subsequently ratified it,

this young country had the first modern written constitution. Today, throughout the world, nations repeatedly emulate the American standard. At the beginning of this week, for example, Turkey voted to overhaul its constitution to conform to western standards. Now don't get me wrong. I'm not saying others do or even should copy our Constitution or adopt our system. Yet, the notion of the rule of law has become a worldwide aspiration.

It may seem like ancient history now, but just a few short years ago, the dominating theme of global politics was the Cold War. When the Soviet Union collapsed, several new nations suddenly looked westward for guidance on how to secure their newly found freedom.

A Constitutional Law Specialist in the former USSR.

I had the good fortune shortly after the fall of the

Soviet Union to work in several of the newly independent republics as a Constitutional Law Specialist. My job was not to try to impose American ideals on anyone. Thank goodness for that, for attempting to do so would be a silly, chauvinistic and fruitless exercise. However, my job was to acquaint my hosts with American and western constitutional ideals, so that they then could know the various options available to them, and, hopefully, choose what would work best for them.

I would like to talk about this experience, explain a bit of what happened, and demonstrate why the continual spread of the rule of law in the 21st century is one of the most hopeful signs of a bright world future.

Drafting a Constitution.

Let's try to draft a constitution from scratch. Where do we start? What do we consider? These were the issues

confronting the Americans of 1787, the Oklahomans of 1907, the 15 ex-Soviet republics in the mid-1990s, and so many other nations today.

What are the issues? Let me suggest a brief agenda will include answering the following questions: What kind of central government with what kind of powers do we want? What will be the relationship between the central government and the local or regional governments? How best do we protect individual liberties?

Several things are subsumed in these questions. Who has ultimate power – the government or the people? Do we want a unitary government? Or is a federal system better? Do we want to separate the powers of government, and thereby sacrifice efficiency? Or do we want government to be efficient, and thereby sacrifice liberty? Do we prefer a presidential system? Or is a parliamentary one better? How

do we conduct elections? Do we like proportional representation or do we prefer winner take all? This agenda will cover much.

The Sources of Governmental Power.

Let's start with the most fundamental of all questions: Where does power come from? There are really only two choices: Power comes either from those who rule or from the people. That determination makes all the difference in the world.

When we think of the American Constitution, we behold a thing of beauty. It is not just that it is written in clear, concise, grammatical English. The Constitution starts with a premise we take for granted, though we should not, that all power comes from the people. "We the People of the United States" are the opening words. And note that our Constitution actually does not try to do too much. Indeed, I

suggest that it does only two things: It establishes a central government and it limits its powers. One can legitimately argue it does other things, too, such as limit the powers of the states – the Fourteenth Amendment does that – and outlaw slavery – the Thirteenth Amendment accomplished that – though I would respond that those and other things actually are a part of establishing and limiting the central government. But that argument is for another day.

Let me take a side trip here for a moment. Think about this. Where do we get our rights? Do we get them from the Constitution? My answer is a clear “No.” The Constitution does not give us rights. It merely secures our rights. For example, the First Amendment does not give us the right to free speech. That right existed long before the First Amendment. Instead the First Amendment merely prohibits the government from doing anything to abridge our right of

free speech. No, it is not the Constitution which gives us our rights. According to our founding document – the Declaration of Independence – we already have those rights. “We hold these Truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.” Our rights do not come from the government. They come from “the Creator.”

And consider the very next point in the Declaration of Independence. We determined that the goal of government is not to create rights, but to secure them: “That to secure these Rights, Governments are instituted among Men.”

A decade later, the drafters of the American Constitution continued to believe the same thing. Look at the Preamble: “We the People of the United States, in

Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America.”

Of course, the American model is not the only one. To the contrary, it differs from most others. And, when the newly liberated nations of central and eastern Europe looked for help, they had plenty of models from which to choose.

Unfortunately, the American notion of power emanating from the people is rare. Although perhaps the old notions of “*Rex est lex*” – the king is law – or “*L’etat, c’est moi*” – Louis XIV’s “I am the state” – no longer hold sway, it is much more common to see the central

government as the source of political power.

Individual Rights.

This distinction may seem small, especially where the fundamental law contains protections for individual rights.

But, as we move to discussing how to protect individual rights, consider this: Which system best protects liberty?

The one where the state guarantees the right of free speech?

Or the one where the state is prohibited from impairing an individual's preexisting right of free speech? The former

was the Soviet model: "citizens of the USSR are guaranteed freedom of speech, of the press, and of

assembly," per the 1977 Constitution, Article 50. The latter

is the American system: "Congress shall make no law ...

abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble."

So, let's get back to drafting a constitution. Should we

have positive rights – those rights the government guarantees – or negative rights – those where the government is prohibited from acting? Should the constitution provide a right to welfare benefits? Or should we be concerned with keeping the government from acting to inhibit individual action? These are the kinds of debates one sees around the globe today.

What individual rights do we, or should we, have? Free speech, free media, free expression, free religious practice. Protections against unreasonable searches and seizures. Prohibitions against cruel and unusual punishments, or, to use the more common term around the world, protection against torture. And don't forget the right to use and dispose of property, free from government interference.

I want to pay special attention to one right that, in the

contemporary world, is vital: namely, an equal protection clause. We adopted such a provision after the Civil War, in an attempt to secure the rights of the newly emancipated slaves against unequal treatment from the states formerly in rebellion. It took a long time for the aspirations of the equal protection clause to become meaningful. We struggle in this regard to this day.

In other parts of the world, equal protection, though vital, is virtually non-existent. We believe we must prohibit the state from treating citizens differently from each other simply based upon race, nationality, language, religion, sex, and other reasons which simply should not be a factor.

In modern democracies, the majority exercises power. The minority needs assurance that its place in society is no different than that of the majority. Minorities, especially national minorities as exist in many parts of the world, are

bound to feel, per Ludwig von Mises, like “political pariahs who have no say when matters concerning them are being debated.” The best remedy? Limit the size and scope of government; keep government from interfering with the rights of any; and thereby, protect all.

By adopting a statement of rights as a part of the fundamental document of society, and by establishing a strong and independent judiciary, we empower every citizen of the country to enforce the constitution. And, though it often appears they do so for selfish reasons, they are simultaneously doing so for society as a whole, even if they don't realize they are doing so. Each citizen becomes the protector of the rights, the liberty, of all.

Separation of Powers – the Best Protection of Liberty.

Next, let's consider the separation of powers. The proud boast of modern free societies is that they are nations

where the rule of law prevails. This concept, that we are a “government of laws and not of men,” or women, is nothing more than the embodiment of the separation of powers.

In our own Constitution, we established a central government within a federal system. States ceded a measure of their sovereignty to the central government. The people granted legislative power to a bicameral Congress. They did not grant all possible powers, but did grant the broad powers specified in Article I: e.g., to lay and collect taxes – Art. I, § 8, cl. 1; to borrow money – Art. I, § 8, cl. 2; to regulate commerce – Art. I, § 8, cl. 3; particularly relevant today, to establish uniform rules of naturalization – Art. I, § 8, cl. 4; and, also apt today, to declare war – Art. I, § 8, cl. 11.

The people gave the executive power to a President.

Article II. I find it interesting some argue against the notion of a unitary executive today, as if the concept is a strange notion, when the words of the Constitution itself could hardly be clearer – “The executive Power shall be vested in a President of the United States of America.” Contrast that language with Article III, which vested “the judicial Power of the United States ... in one supreme Court, and in such inferior Courts as the Congress may from time to time establish.” In any event, by thus delineating the powers of the central government, the Constitutional drafters made clear the importance of the notion of the separation of powers.

Actually, the Framers considered the separation of powers to be the great protection of liberty. In *The Federalist*, No. 47, James Madison wrote:

The accumulation of all powers, legislative,

executive, 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.... [T]he preservation of liberty requires that the three great departments of power should be separate and distinct.

Similarly, Madison later wrote in *The Federalist*, No. 51:

[S]eparate and distinct exercise of the different powers of government...[is] essential to the preservation of liberty....

The Framers understood human nature. And this understanding impelled them to be cautious in the distribution of governmental power:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

The Federalist, No. 51.

So should we keep the powers of government separate? How separate is separate enough? One objection I encountered during my time in the former Soviet Union went directly to the heart of the matter. “Separated powers are inefficient. Right now, we need efficient government. Won’t separate powers inhibit our ability to meet our needs?” Well, the honest answer to that questions is, “Yes.” But the former USSR showed what happens when state powers are not separated.

Per the Soviet Constitution, Article 2, “The people exercise state power through the Soviets of People’s Deputies, which constitute the political foundation of the USSR. All other state bodies are under the control of, and accountable to, the Soviets of People’s Deputies.” Efficient in the exercise of the government power? Absolutely. But also the very definition of tyranny. And, not just in theory,

but, as the Soviet Union proved, in practice as well. So, we give up a measure of efficiency, for what we hope is the best deterrent to tyranny.

One important aspect of contemporary constitutionalism is a strong and independent judiciary. Through the so-called non-political branch, individuals can enforce their rights against encroachments by the government. Of course, the judiciary does not create individual rights. But it provides a means for individuals to protect their rights.

Courts exercise judgment. They do not legislate. They do not execute the laws. They simply declare the meaning of the laws in specific cases. And they rule on the constitutionality of the acts of the other two branches of government.

Now let me say it is virtually impossible to create an

absolute separation of the powers of government. The American Constitution certainly does no such thing. The President has a veto power over legislation. The Vice President sits as President of the Senate, and occasionally casts a tie-breaking vote. Congress has the power of ratification of treaties. The Senate must be consulted on the Presidential appointment of judges.

The genius of the American Constitutional framework consists in the Founders' understanding that, to be effective, a Constitution must not be simply a theoretical aspiration, but also must be practical. In *The Federalist*, No. 73, Alexander Hamilton recognized “the insufficiency of a mere parchment delineation of the boundaries” delineating the separation of powers. Hence, they created a system of supplying “opposite and rival interests ... that the private interest of every individual may be a sentinel over

the public rights,” and thereby provided the necessary protection against excessive concentration of power in any one person or body.

Jefferson wrote that “the natural progress of things is for liberty to yield and government to gain ground.” Let’s be clear: We must have government. But let’s also be clear that government is the greatest threat to liberty. The American Constitution is an attempt at reaching a balance between effective government and the protection of liberty. It’s not the only way of achieving that balance. Others, with different societal histories, may try to reach a different equilibrium. But to “be a government of laws and not of men,” that is, for the rule of law to prevail, any nation must separate the powers of government.

Federalism – the Vertical Separation of Powers.

We’ve discussed the separation of powers within the

central government. I call this the horizontal separation of powers, that is, separating the powers of the same level of government. But what about a vertical separation of powers? If separating the powers of the central government is the great protection against tyranny, wouldn't separating the powers between the central government, on the one hand, and regional and local governments, on the other hand, provide additional protections of liberty? Should we have a unitary state? A federal state?

As you know, our country has a federal system. Separate, sovereign states banded together to form a central government. The states retain their sovereignty, though they gave up a measure of that sovereignty in hopes of fulfilling the promises of the Constitution's Preamble.

What do you think of the word, "Federalism?" My guess: you probably don't think about it too often. If you're

like most Americans, you likely take it for granted. You understand it isn't the only means of organizing a government. But you wouldn't react strongly to the word, one way or the other.

Yet, when I mentioned the word "federalism" in the ex-Soviet republic of Moldova, you might have thought I had just called for the violent overthrow of the government. While in Moldova, a tiny country of (and, interestingly enough, here's that number again) about 3.5 million, sandwiched between Ukraine and Romania, I led a two-week long seminar on constitutionalism. Attendees included leading government and community leaders from Moldova, including some representing a breakaway area called Transdnistria. Only months earlier, there had been a brief but bloody civil war, in which several hundred people lost their lives. The Russian Fourteenth Army, then, as

now, stationed in Transdniestria, was enforcing the ceasefire.

The speech I gave on federalism was so controversial that, the next evening when I prepared to discuss the horizontal separation of powers, government officials sent in so-called “observers” – thuggish-looking people, former KGB agents, meant to intimidate, or, to put it more bluntly, to shut down dissent. Many used the opportunity to rail against federalism. Others issued harsh demands that the seminar sponsors no longer mention the concept at all.

Isn't free speech great? We say harsh things against our government and government leaders, and do so without fear of reprisal. A few years ago, I appeared on national television, and called the President of the United States “cowardly.” So, a few months later, when I debated a civil libertarian who, perhaps over-zealously, believed the

government was trying to curtail dissent, I responded by citing my own example, and stating that it never occurred to me that anyone with the government would do anything against me (of course, had I sought a favor from the administration, I doubt I would have been rewarded).

Debate federalism? Why, we do it all the time. Criticize the President? Governors? Senators? The Speaker of the House? It's an all-American sport. We take it for granted, as we should. The world observes us, and aspires to enjoy what we have.

Must a modern, democratic state have federalism? Of course not. But federalism is a concept that can help a diverse nation both come together and protect against encroachments on liberty.

Universal Principles.

So, what are the universal principles? Power comes

from the people. Residual power remains in the people. The people create government, not for the benefit of those who govern, but for the benefit of the people. Those who rule are, in actuality, not so much rulers, but mere servants of the public. The people create a limited government, with limited and separated powers, and thereby “secure the blessings of liberty to themselves and their posterity” while restricting the government from interfering with their rights.

A constitution is not merely a document which lists rights. As both Burke and Disraeli argued, it is more than the formal procedures of elections and the relationship among the various branches of power. A constitution is a reflection of the practices, instincts, legal systems and political culture of the people who make up a society. It embodies the hopes and aspirations a society has for itself.

Conclusion.

The American model is unique. It is not the only way. We cannot and should not try to force our system on anyone. However, the American Constitution is a great and wonderful document which, if not necessarily embodying the hopes and aspirations of all societies, certainly contains all of the necessary elements for a free and just society anywhere.

Is it perfect? By no means. No one, not even its drafters, would argue it is. But it is a great document, written by fallible humans who live in a fallible world. When you realize it is the oldest written constitution in the world, that it has survived where so many others have failed, perhaps we can agree that the drafters of our Constitution did an extraordinary job under extraordinary circumstances.

Thank you.