CONSTITUTION

No people should give government power over them
without first setting conditions on the use of that power.

Such is the purpose of Constitution.

Contrary to popular legend, King John did not personally sign Magna Carta,
but authorised (under pressure) the application of his Great Seal
which shows the king enthroned, and bears the legend
Johannes Dei Gracia Rex Anglie Dominus Hibernie
John by the grace of God King of England and Lord of Ireland.

CONSTITUTION

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1.
Ideals of Constitutionalism

Reviewing momentarily the very beginnings of political and social evolution, the first, fundamental step in political development is the movement from total lawlessness, or anarchy, to some kind of centralized law and order. The politically developed nations have long accepted the concept of a central authority or government, and the Rule of Law which sets restraints upon the scope of people's actions; and this remains as the foundation of government and of a nation's compact with its government.

When power, the ability to physically influence the behavior of others, is centralized, the rule of law is thus imposed. Instead of individuals arguing and settling their differences in a continuing series of battles based on personal power, the authority to establish decisions on social conduct together with the power necessary to enforce them is vested in a centralized institution – a monarch, dictator, or elected parliament.

Society can benefit from the stability afforded by centralized rule of law. And if government can formulate and enforce fair, just and universal rules of social conduct, citizens will be able to live at peace with one another in positive and productive collaboration.

However – and this is a major qualification – when the people hand the power of decision over their lives and livelihoods to a centralized institution, they would be well advised before doing so, to qualify that power with strict rules of procedure, and so ensure that the power thus delegated can never be misused.

“We The People” have over the years given to government, or we have stood by while government has taken and continues to take, more and more power over our lives. Constitution sets the conditions on which that power can be used.

That of course is nothing more than an ideal. Power is not handed over conditionally by the people to their newly delegated public administrators. Centralized power is established by strength, then used to benefit those who hold it. Thus in practice any rules attempting to delineate and discipline the use of centralized power must be introduced after the event, generally with considerable resistance on the part of the rulers.

Today we understand clearly and accept fully the idea that Constitution should set limits over absolute power. Yet for early reformers it was a contradiction in terms to talk of limiting absolute power. If the power is absolute, then how can it be limited except through a greater power, and what is the nature of that greater power?

The “greater power” which sets limits on autocrats and parliaments is by common consent the power of reason, conscience, and custom.

“The idea of constitutionalism is older than the existence of written constitutions. Constitutionalism places limits upon government, proscribing the means by which official power may be exercised. Constitutionalism establishes boundaries between the state and the individual, forbidding the state to trespass into certain areas reserved for private action.

"Constitutionalism also has a deeper and older connotation, demanding adherence by government to recognized customary procedures. The idea of a constitution in this procedural sense can be traced all the way back to Aristotle, who in his *Politics* and the *Constitution of Athens* described all the known political arrangements of ancient Greece."

[*Constitutions that have made History* Ed. Blaustein and Sigler, Paragon House, NY, 1988.]

Though *constitutionalism,* the spirit of constitution, had already been alive and practiced for many years, England's Magna Carta, the Great Charter of 1215, is now widely accepted by general consent of history as the world's first major constitutional document. Indeed it is interesting to read the constitutions of the USA, both the federal constitution and those of individual states, as well as the constitutions of many Commonwealth countries, and note how many passages from Magna Carta have simply been copied word for word.

Magna Carta provided Britain's reformers with a firm foundation, a cornerstone on which subsequent constitutional documents could be added to form the assemblage which, combined with unwritten custom, is commonly referred to as Britain's "constitution" today.

Constitution limits absolute power. This it achieves by placing conditions on the use of that power, by requiring the sharing of power with those subject to it through a process of debate, and by establishing boundaries beyond which the law may not intrude.

No government, president or monarch, no institution of law or enforcement, should be created or be allowed to exist and to function without a constitution. No one should have power over others, unless and until that power and the conditions of its use have been strictly defined. In the words of Thomas Paine: "government without a constitution is power without right".

2.
The Great Charter of 1215

A thousand years ago, in late Anglo-Saxon times, England was united into one kingdom ruled by a king and his council, and the institution of kingship was already established as having limited powers.

The king was bound by his Coronation Oath to defend the church, to punish crime and violence, and to rule with clemency and mercy. He was also bound by customary rules of law, and to some extent his power was restricted by his council. He was viewed as a religious and moral leader, a protector of the people in war and in peace.

Following earlier tradition, the English king was not generally regarded as a source of law, although occasionally he might declare the law with the consent of his council or issue written laws called "dooms".

The great body of Anglo-Saxon law was the unwritten folk law, handed down from one generation to the next, giving the common people rights and duties of what we would today call citizenship, and setting out procedures for determining fault or guilt and methods of punishing wrongdoers. While change was not impossible, arbitrary alteration of the rules was considered improper, and indeed, bordered on impiety.

This tradition did not of course preclude the frequent occurrence of abuse by monarchs keen to enhance their own powers, or simply reluctant to recognize any form of constraint over their conduct. In such cases it would be the powerful barons and clergy who would bring the king to order in the name of constitutional custom, reinforced by a growing body of written constitutional documents agreed by the kings either freely or under pressure.

When Henry I succeeded to the English throne in 1100 his first aim was to secure his claim more firmly by pacifying the people's and particularly the barons' anger, which had been roused by the irresponsible and expensive conduct of his predecessor William Rufus.

Henry therefore issued a Coronation Charter, also known as the Charter of Liberties, in which he promised to observe the feudal code and to correct the abuses of his predecessors against the barons and the church. He further commanded the barons, his tenants-in-chief, to behave in like manner to their own tenants. Most significantly, he made the charter applicable to all his subjects: "I henceforth remove all bad customs through which the kingdom of England has been unjustly oppressed."

While the charter was no more than a proclamation of intentions and promises binding only insofar as Henry saw fit to observe them, its form – a written royal grant – gave it legality and lasting significance. Its chief importance was its admission by the king that even his royal powers were limited under the feudal contract.

It also helped to strengthen the principle of defined and disciplined constitutional rule, and as such it was to be influential in the formulation of a later and much more famous constitutional document: the Great Charter sealed in 1215 under King John.

The youngest child of Henry II and Eleanor of Aquitaine, John was born in Beaumont Palace, Oxford on December 24th, 1167. When his elder brother King Richard the Lionheart died, John succeeded to the throne on April 6th, 1199. He was crowned in Westminster Abbey on the 27th of May in that same year.

Richard the Lionheart had been totally preoccupied with foreign wars, holy crusades and French conquests, and had given very little time or energy to the affairs of his own country. As a result the barons, knights and free men had to a large extent become the true governors of England, though all was still done in the king's name.

At first John neither diminished those powers nor undermined the authority of the council, and for a while England enjoyed the twin advantages of a strong and active king, and a powerful council within which the voice of the subjects could be heard and from which power was to pass to the knights of the shires and to all free men.

Shortly after John's accession however, the King of France had invaded Normandy, of which John was Duke, then pursuing his conquest throughout all the other provinces of the English kings. John fought expensively but unsuccessfully to defend his lands and by 1204, five years after his accession, Normandy, Anjou and Maine were lost. All that remained were the Channel Islands and the province of Gascony.

The barons, now deprived of all but their English possessions, were angered by the king's defeat. They, as well as humbler men, were shocked and humiliated by the nation's losses. In derision they nicknamed the king John Lackland. More seriously, the nation now had to pay for his unsuccessful wars.

In 1205 John rejected the Pope's nomination of Stephen Langton as Archbishop of Canterbury. A papal interdict was laid over the whole country in 1208 and John was excommunicated. John was forced to submit at last by resigning his kingdom to the Pope and receiving it back as a fief of the papacy before the interdict and excommunication were ended in May 1213, a humiliating experience for the whole nation.

In 1214 John conducted another campaign in France and suffered a catastrophic defeat at Bouvines. During his absence the barons banded together under the leadership of Stephen Langton to protest against the longstanding misgovernment of the realm.

Gathered at Bury St. Edmunds (in the coastal county of Suffolk) in November 1214, the barons agreed to petition the king to grant the liberties and laws set forth in the Coronation Charter of Henry I, swearing that if he refused they would renounce their allegiance to him and go to war.

3.
The Battle of Magna Carta

Battle? Surely that's one that doesn't figure in the history books. But battle it was. A battle which began in 1215 and remains today in the background of governance, in the competing inter-relationships of politics.

The Rule of Law requires the existence of centralized power to give law its authority. That creates an on-going battle between the wielders of power, and those who would set constraints on its use. In 1215 it was Magna Carta versus Monarch.

Today a universal lack of constitutional discipline allows corruption of varying degrees from the most extreme abuse, down to the "soft" corruption of the over-staffing and over-payment which results from government's non-competitive environment.

In January of 1215 a deputation of barons placed a list of their demands before the king; dressed in full armour they would have left the king in no doubt as to their mood. King John asked for and was granted three months to consider these weighty matters. But his ultimate response was clear: "Why, among these unjust demands, did the barons not ask for my kingdom as well? Their demands are vain, foolish, and utterly unreasonable."

This was taken as a declaration of war. On May 17 the barons' army marched on London; the city opened its gates to them and they were joined by many others who had hitherto stayed out of the conflict. The king took refuge in Windsor castle where he became a virtual prisoner. John sent emissaries to the barons, this time with the message that he was willing to grant the charter of liberties they demanded.

On June 10 the two parties met on neutral ground in a green meadow by the River Thames at Runnymede, midway between the king's castle at Windsor, and London which was now the barons' stronghold. The name *Runnymede* suggests that this was not the first time councils had been held there; the first part is an old English word *Runieg*, meaning Council Island; *mede* being a flat field or meadow.

After considerable negotiation a preliminary document was formulated, briefly listing forty-nine points upon which the king was willing to yield. To it King John attached his seal and upon the basis of that initial document a formal Charter was to be drawn up for signature by the king at a further meeting a few days later.

The title of this preliminary document is significant. It read: *These are the Articles which the Barons require and which the King concedes.*

King John had been compelled by force of arms to comply with the demands of the barons who had risen in armed and successful rebellion against him, and the preliminary heads of agreement recorded that the king *conceded* the demands which the barons *required*.

Yet the final, formal version of the Great Charter to which John acceded a few days later on June 15, the Charter we know today, begins with a greeting from the king to his *loyal subjects*, and records that he has *acted with their advice*. This change in wording clearly shows that the stability of the monarchy was considered as important as its reformation, and nothing was done to diminish the apparent authority of the king even in the hour of his humiliation and defeat.

With the formal sealing of the Charter, the monarch had confirmed the essential principles of constitutional discipline: the obligation to rule responsibly, to rule in consultation with his peers, and to conduct himself within the bounds of established law and custom.

True, the Magna Carta was dependent for its observance largely on the monarch's goodwill, which was not always forthcoming. But in one respect at least, the king's subjects had a degree of leverage; it was upon them that the king depended for money to carry on his government and foreign wars, not to mention maintaining his lavish royal lifestyle.

Clause 12 of Magna Carta had already made the raising of taxes (aid or *scutage*) dependent on the general consent of the kingdom, and clause 14 laid down the method whereby the general consent was to be obtained:

"To obtain the general consent of the realm for the assessment of an aid or scutage we will cause the archbishops, bishops, abbots, earls, and greater barons to be summoned individually by letter... to come together on a fixed day and at a fixed place."

The periodic convening of his influential men by the king continued during the 14th, 15th and 16th centuries, developing gradually into an early form of parliament which would later challenge and claim precedence over the power of the king.

4.
England after Magna Carta

One of the first major writers on the subject of English constitutional law and custom following Magna Carta was Henry Bracton. Bracton was born, lived and worked in the southwestern county of Devon during the early 1200s (his birthdate unknown, he died in Exeter, in 1268). He was both a cleric and a justice – as indeed was common at that time, for few but the clergy could read. From 1245 he was an Itinerant Justice for King Henry III, and from 1247 to 1257 was a judge of the *Coram Rege* which later became the King's or Queen's Bench.

His (Latin language) document *On the Laws and Customs of England* is one of the oldest systematic treatises on English common law.

It also deals in depth with the obligations of, and disciplines upon royal power, concentrating on three major themes: that the king should himself be subject to, and act within the law, that he should rule wisely and justly, and that he should rule in consultation with his peers, the "eminent men" of the land.

The king must first of all be subject to, and act within the law.

In stressing the king's relationship with the law, Bracton identifies two aspects of law and the apparent contradiction between them. One aspect of law consists of orders and regulations, and in this sense the king is the source of law. The other aspect of law is the body of custom we would now call the constitutional framework; here the king must himself be subject to law, for the king and the very institution of monarchy owe their existence to law in this constitutional sense.

So Bracton insists that "the king must be under God and under the law, because the king's position owes its very existence to the wider framework of law.

"Let him therefore in his laws, observe the due process of law through which he himself exists. For the king is not fulfilling his legal obligations when he rules by personal will, rather than by due process of law under the ultimate will of God."

Bracton also expects the king to obey his own laws, for the king, though the source of law, is not outside the law:

"What the king is bound by virtue of his office to forbid to others, he ought not to do himself. Let him, therefore, temper his power by the due process of law, which is the discipline upon power, that he may live according to the laws, for the law of mankind has decreed that the lawgiver should be bound by his own laws.

"Nothing is more fitting for a sovereign than to live by and within the laws, nor is there any greater sovereignty than to govern according to the due process of law, and the sovereign ought properly to yield to the tradition and process of law that makes him king."

Bracton strengthens his argument with this forceful reference to Christian example:

"That the king must bow to the process and formality of law is paralleled in the example of Jesus Christ. Though many ways were open to Him to fulfill His destiny in the redemption of the human race, He chose to destroy the devil's work, not through the arbitrary use of His great powers, but by subjecting Himself to the existing laws of justice. In this way He willed Himself to be under the law that He might redeem all those who must live under it. He chose to use not force, but judgement."

Monarchs of England and Europe have often claimed to rule by Divine Right. The kings themselves interpreted the concept of Divine Right as placing them above and beyond the reach – or reproach – of the law, and of those whom they ruled.

Bracton however voices an earlier understanding of Rule by Divine Right, namely that the king is God's minister, and as such is under obligation to rule wisely and responsibly:

"The King is vicar and minister of God on earth, and from God comes the power of justice. Therefore the King's power is that of justice, not injustice. The power of injustice is from the devil, not from God. The king will be the minister of him whose work he performs. Therefore as long as he does justice he is the vicar of the Eternal King, but he is the devil's minister when he deviates into injustice or injury. The king is called King, not from reigning, but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care."

Bracton also stresses the requirement of participation in the formulation of laws:

"The king should not propose or enact laws rashly by his own will or whim; the law should be properly decided with the counsel of his peers, the king giving it formal authority only after full joint deliberation and consultation."

Bracton thus set out the three major ideals of constitutional monarchy: that the king should himself be subject to and act within the law, that he should rule wisely and justly, and that he should rule in consultation with his peers.

The spirit of Magna Carta lived on and indeed thrived during the Middle Ages. In 1297 King Edward confirmed Magna Carta, declaring that the king's courts shall incorporate its provisions into the common law. Four years later in 1301, again under Edward I, the Charter was elevated to the position of a fundamental statute.

In 1594 Sir Edward Coke was appointed Attorney General to Queen Elizabeth I. Tracing the medieval origins of common law, he collected ancient precedents that later filled the volumes appearing under the title *The Institutes of the Laws of England and the Reports of Sir Edward Coke Kt. in English in Thirteen Parts Compleat*.

A subsequent document, his *Reports and Institutes* were to become the basis of legal education in England and America throughout the 1700s. He was influential upon early judicial developments in America, having contributed to the Virginia Charter drawn up in 1606.

As attorney general and later chief justice, Coke attempted to impose the essential principles of constitutional discipline upon the Acts of Parliament. In his opinion given in Dr. Bonham's Case (1610) for example, Coke declared: *"when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void."*

While it is doubtful whether Parliament would have acknowledged then, or would accept today, such an uncompromising view of absolute judicial supremacy, this ideal would become reality some 150 years later through the US Supreme Court.

It was however, the concept of *consultation* which would occupy England during 1600s. As the century opened the country was ruled by a monarch who still considered himself "absolute". The execution in 1649 of Charles I who held similarly absolutist views, was a dramatically symbolic turning point.

His trial and sentencing were performed not by a rabble crowd but by a "special proceeding" of Parliament created and staged with suitable solemnity similar in present-day terms to the Impeachment Proceedings of a US President, thus representing a final denial of the Divine Right of autocratic monarchs and the assertion of parliamentary supremacy.

In 1689, following the turbulent years of the Republic, William and Mary ascended the throne, the monarchy now restored at the invitation of Parliament on Parliament's own terms, and the battle for consultation was finally sealed with the Royal Assent to the Bill of Rights. As the new century dawned, Britain had become the Constitutional Monarchy it remains today.

But now a new constitutional challenge would appear: the challenge of subjecting not the king, but *Parliament* to constitutional discipline. Subsequent political development would attempt to ensure that, while Parliament would remain and grow as the institution of legislation and of popular representation, the power of Parliament itself should not become absolute:
Parliament must be subject to the same rules of underlying constitutional precedent which had previously been formulated to discipline monarchs.

This was the background from which America's Founding Fathers drew both fear and inspiration: fear of re-creating a new autocratic monarchy or presidency, and inspiration for the creation of a new kind of government, a government *representing* its people not dominating or oppressing them.

5.
Constitution in the New World

When the thirteen British colonies in North America declared their independence in 1776, they laid down that *governments are instituted among Men, deriving their just powers from the consent of the governed.* In so doing they were consciously echoing the words of the Great Charter which King John had sealed 561 years before, wherein he had undertaken that no tax *may be levied in our kingdom without its general consent.*

However, while England had for centuries been intent on limiting the power of the absolute monarchy, American constitution-writers in 1787 now focused on limiting the power and potential danger of the new "absolute ruler" – Congress, and the power of federal government institutions generally.

This they sought to achieve not only through constitutional provisions and the Bill of Rights, but also through the celebrated "checks and balances" whereby two Houses, and the President as Executive, exercise discipline and restraint over one another. The judiciary was also placed to act as a restrictive force; indeed the US Supreme Court has traditionally seen itself as the ultimate discipline upon government power, and champion of the citizen against government excesses.

The supremacy of the constitution over any and all branches of government was seen by America's Founders as the essential assurance of orderly and disciplined government, a view clearly described by Mr Hugo LaFayette Black, who was Associate Justice of the US Supreme Court, 1937-1971.

"The form of government which was ordained and established in 1789 contains certain unique features which reflected the Framers' fear of arbitrary government and which clearly indicate an intention to limit absolutely what Congress could do.

"The first of these features is that our Constitution is written in a single document. Such constitutions are familiar today and our country was the first to have one.

"Certainly one purpose of a written constitution is to define and therefore more specifically limit government powers. An all-powerful government that can act as it pleases wants no such constitution – unless to fool the people. England had no written constitution and this once proved a source of tyranny, as our ancestors well knew.

"Jefferson said about this departure from the English type of Government: *Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction.*

"A second unique feature of our Government is a Constitution supreme over the Legislature. In England, statutes, Magna Carta, and later declarations of rights had for centuries limited the power of the King, but they did not limit the power of parliament. Although commonly referred to as a constitution, they were never the *supreme law of the land* in the way in which our Constitution is, much to the regret of statesmen like Pitt the elder. Parliament could change this English Constitution; Congress cannot change ours. Ours can only be changed by amendments ratified by three-fourths of the States.

"A third feature of our Government, expressly designed to limit its powers, was the division of authority into three co-ordinate branches, none of which was to have supremacy over the others. This separation of powers with the checks and balances which each branch was given over the others was designed to prevent any branch, including the legislative, from infringing individual liberties safeguarded by the Constitution. All of the unique features of our Constitution show an underlying purpose to create a new kind of limited government."

[Completion of the Constitution was followed shortly after by James Madison's proposed ten additions or Amendments, these becoming collectively known as the Bill of Rights. Mr Justice Black continues:]

"Central to all of the Framers of the Bill of Rights was the idea that since Government, particularly the national government newly created, is a powerful institution, its officials – all of them – must be compelled to exercise their powers within strictly defined boundaries.

"As Madison told Congress, the Bill of Rights' limitations point *sometimes against the abuse of the Executive power, sometimes against the Legislative, and in some cases against the community itself; or, in other words, against the majority in favor of the minority.*

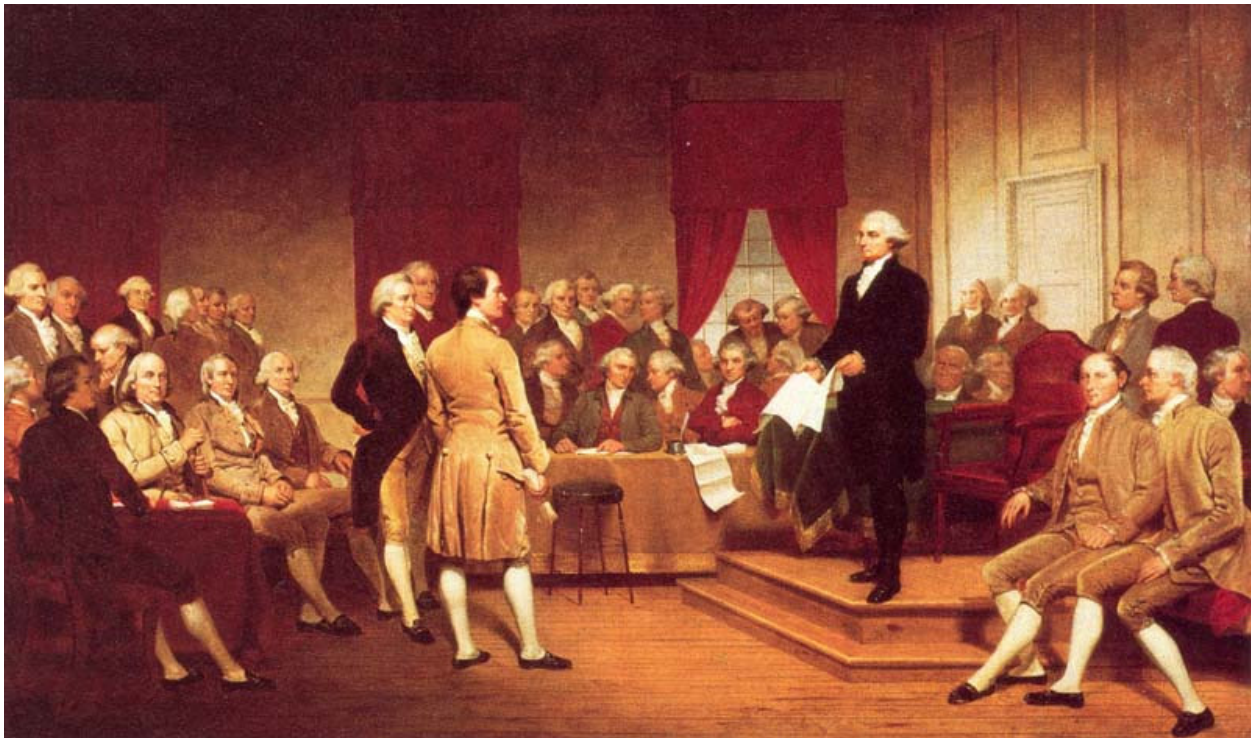
"Madison also explained that his proposed amendments were intended to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode.

"Mr. Madison made a clear explanation to Congress that it was the purpose of the First Amendment to grant greater protection than England afforded its citizens.

"He said: *In the declaration of rights which [England] has established, the truth is, they have gone no farther than to raise a barrier against the power of the Crown; the power of the Legislature is left altogether indefinite. Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, came in question in that body, invasion of them is resisted by able advocates, yet their Magna Carta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution.*

"It was the desire to give the people of America greater protection against the powerful Federal Government than the English had had against their government that caused the Framers to put these freedoms of expression, again in the words of Madison, *beyond the reach of this Government."*

[*"One Man's Stand For Freedom" - Mr. Justice Black and the Bill of Rights* - Hugo LaFayette Black: A collection of his Supreme Court opinions - Published 1963 by Alfred A. Knopf, Inc.]



The distinguished group of delegates who assembled in Philadelphia in May 1787 included many who would be important in the conduct of the new nation's affairs. Among them were George Washington, James Madison, Edmond Randolph, and George Mason of Virginia; Benjamin Franklin, James Wilson and Gouverneur Morris of Pennsylvania: Alexander Hamilton of New York, John Dickinson of Delaware; and Charles Pinckney of South Carolina.

The Convention had been called for the purpose of revising the Articles of Confederation, but the delegates quickly decided to go beyond their mandate and construct an entirely new constitution. A new government had to be formed that could deal successfully with the critical issues of finance, commerce and security – a government that, in the words of James Madison, would achieve a balance between power and liberty. Despite the wide differences between those with nationalist leanings and those who supported states' rights, a spirit of compromise ruled, and at length a constitution was hammered out. It was adopted by the Convention on September 17, 1787.

After the many debates and writings on individual liberties preceding the Revolution, it is surprising that the original Constitution did not contain a Bill of Rights.

The only provisions reminiscent of the earlier demands for guarantees of rights and liberties are those of Article I, section 9, denying Congress the power to suspend the writ of *habeas corpus* or to pass bills of *attainder* or *ex post facto* laws: those of Article III, section 2, providing for jury trial in the federal courts, and section 3, placing limitations on trials for treason: and that of Article VI, section 3, prohibiting religious tests for officers.

The question of including a Bill of Rights was considered during the convention. Charles Pinckney submitted a list of thirteen propositions on the liberties of the citizen for consideration, but no action was taken on his proposal. As the final vote on the Constitution approached, George Mason urged that it be prefaced by a Bill of Rights to "give great quiet to the people." This plea was brushed aside.

Many members of the Convention, particularly the Federalists, believed that such a bill was unnecessary. Its purpose, they contended, was to protect the subject from tyrannical rulers, and such provisions had no place in a constitution in which the ultimate power was in the people: moreover, to specify particular rights was to limit constitutional protection to those rights only. This was the prevailing view: nevertheless, the omission of a bill of rights became a rallying point for the Anti-Federalists in the state ratifying conventions.

The Constitution of 1787 was a practical document aimed at creating a machinery of government. Inherent in that machinery was protection against arbitrary authority in the division of power among the executive, legislative and judicial branches.

The Constitution represented an experiment in government, and was necessarily written with little basis in practical experience. Still, in the minds of many of the delegates were principles of the British constitution, which Pinckney declared to be "the best constitution in existence." Those principles would be evidenced more clearly in the subsequently enacted Bill of Rights, as well as Constitutions of individual States.

Most of the original founder-States of the USA had produced their own Constitutions, and when *territories* were granted *statehood*, they too felt the need to set forth the essential procedures, obligations and limitations controlling the function and laws of their governments. Right from her very birth, America would espouse the principles of constitutional supremacy and popular participation for which England had fought so hard and so long.

Constitutional tradition as it developed in Britain and spread later to America and much of the Commonwealth was indeed a slow and occasionally violent process. It is a thousand-year-old story, which may be said to begin in the year 1215 when the Great Charter sought to limit the powers of an absolute monarch.

Yet despite the persistence of reformers and the progress made at the birth of the United States, the development of true constitutional security from autocratic rule is by no means complete even today.

Indeed, when one compares the modern government, with its unlimited rights of taxation, its near-total lack of managerial and financial discipline, and the tenuous relationship between elected Members and their voters, one may reasonably wonder how far real and effective constitutional discipline over those wielding political power has progressed since the Great Charter of 1215.

The need for constitutional discipline over government today is every bit as great as was the need for constitutional discipline over the monarchy in 1215. It is therefore worth exploring the theory of constitutional government in more detail.

6.
Constitutional Government

Before embarking on any task it is advisable to define its purpose. Only then will the work proceed in an orderly and purposeful manner, and only then can its completion be judged in terms of its pre-defined objective. What is the purpose of a constitution, and what is its role in the overall process of government?

Governments make laws which apply to the conduct of citizens. This comes with the explicit consent of the citizens, who have relinquished the right to settle differences between themselves by argument and force if necessary, in favour of handing the power both of decision and enforcement to government.

The advantage is relative peace, as governments gradually assemble a body of generally acceptable law which citizens observe, having confidence that others too will observe the same laws.

However, the handing over of individual power of many citizens into the hands of a relatively few members of government creates dangers of abuse which need to be foreseen and as far as possible excluded. Governments need to be told what is expected of them, what are the limitations upon the scope of their laws, and in what specific manner they should proceed, ensuring for example opportunity for debate, as well as checks and balances between various government branches or departments. Herein lies the purpose of constitution. While governments make laws applicable to citizens, constitutions set the frame and regulations applicable to government.

It is interesting to note that the Magna Carta, the Great Charter of 1215, was not only the world's first major constitution, it was also a rare example of a consumer-driven constitution. The Magna Carta was drawn up by the clergy and barons as the king's subjects and in their capacity as "consumers" of the law. The Clauses of Magna Carta told the king exactly what he might and might not do, and set out certain procedures he was to follow, its major purpose being to protect the people's liberties.

By contrast, the United States constitution was not drawn up by "the people" but was the product of a power-sharing contest between the States and the proponents of a strong central, federal government. Though the powers of the different branches of government were specifically limited through the celebrated checks and balances between different and equal branches, it was Madison's Amendments, the Bill of Rights, which asserted some basic rights of citizens relative to government – an essential, if not *the most essential* element of a constitution.

An interesting example of latter-day constitution-writing can be seen in the efforts of the European Union. Here again, as in Philadelphia 1787, the basic focus is a power struggle between federalists and nationalists, with barely a nod of recognition towards the eurocitizens whose daily lives the document would hope to regulate.

It may indeed be necessary for the EU to establish departments, branches and procedures together with their functions and limitations. But more important in the minds of citizens will be issues of limitations on the overall powers and reach, as well as the cost of government, and it would be interesting to have a Bill of Citizens' Rights drawn up by members of the various societies representing civil liberties, limitations on government size, and taxation.

Popular and regularly recurring examples of constitutional restrictions which protect citizens' liberties from encroachment by government are provisions which protect freedom of religion, assembly and speech. Such commonplace generalities may be predictable, but should nonetheless be present.

Today however, the provisions for citizens' protection against the spread of government influence and intrusion must be more precisely stated and considerably more sophisticated if liberty is to be preserved.

One of the most basic rules of constitutional principle is that government should not be permitted to conduct its affairs in any way which would be unacceptable in the private citizen or business. That the law-makers, either monarch or government, should be subject to their own laws is one of the fundamental principles of constitutionalism.

And yet if we apply this principle in the area of finance we can at once see the glaring disparity between the financial laws and disciplines governing the conduct of private sector business, and that of government.

Government can go into debt on its current account, then simply continue to go ever deeper into debt without any hindrance whatsoever. Conduct which the law would never tolerate in private citizens or business is, apparently, quite acceptable in government. This is a sure sign of a lack of constitutional discipline.

Of more concern to many citizens is the assumed right of government to take and to increase taxes as of right, without any apparent limitation and without any accounting or productivity disciplines. The establishment, monitoring and enforcement of rigorous *constitutional* disciplines over government operational and financial conduct and efficiency is essential, albeit currently little more than wishful thinking.

A constitutionally-imposed openness and discipline in the area of government productivity and finance would be of economic benefit in terms of the overall standard of living. Government does after all take some 40 to 50% of the national income. Productivity in an area of this magnitude would prove enormously influential.

At the same time however, government financial and functional transparency would impose corresponding disciplines on the electorate, forcing a public awareness of the fact that government can only give away what it has already taken (less a substantial handling charge) and that government "programs" and subsidies have to be paid for. Other basic truths would have to be faced in the areas of public health systems and pension schemes, neither of which can give out more than is taken in.

The motivation to improve government productivity and its standards of business practice is unlikely to come from inside government itself, and even if it does, the disciplines thus created are likely to be more cosmetic than real.

Governments frequently pay lip-service to improving productivity and financial discipline, but seldom make any real changes. Self discipline is a noble ideal, but discipline is always more effective when it is imposed from outside, or more importantly, from above.

7.
Constitution – the Supreme Law of the Land

Since it sets the rules for government, the Constitution must by its nature and definition stand above the total governmental process as the supreme authority in the land. However this ideal is rarely reflected in practice.

Britain's assemblage of historical documents and unwritten custom loosely known as its "Constitution" exercises little practical control over the process and content of law and is quoted more often in academic debate than it is applied in the practical operation of government.

In the United Sates, Congress makes the laws which the President as Executive signs into formal legislation. The President may send them back on the grounds of personal disagreement based on party policy differences, but there is no requirement for the President to check laws in order to ensure that they comply with the Constitution before they are formally promulgated.

Nor does the US Supreme Court verify laws prior to Execution. As its name implies, the Supreme Court is a Court of Appeal at the head of the judicial system, and will only review the constitutionality of a particular law as a last resort after it has been challenged by enterprising and persistent citizens through the lower courts.

If the Constitution is to take its place as the Supreme Law of the Land, then it must stand, not as a Court of Law at the apex of the *judicial* system, but as the Ultimate Executive at the apex of the *legislative* process, having the same voice, stature and substance as a the US Supreme Court but charged with the verification of proposed legislation *prior* to its formal enactment.

This position of supremacy can be assured in a constitutional system by placing the Constitution at a critical point in the governmental process.

There are two basic elements inherent in the process of governing. The first is *decision*, the second is *force*. Government decides what laws are necessary for the proper conduct of society, then sees that they are enforced. Decision, and Force. The process of governing depends on fulfilling these two functions individually, then uniting them so that they are mutually supportive. This process of union is vital. There is no point in government's making laws if it cannot enforce them. Likewise there is no point in having police, judiciary, and correctional institutions if they are given no orders, no laws to enforce.

The process of government involves two elements: making laws, and enforcing them. And since neither of these two elements works without the other, they must have continuing contact.

Constitution can exert its supreme power in a constitutional system by placing itself *above and between* the two processes of law-making and law-enforcement and thus controlling that vital link without which each process in itself is ineffective.

A truly *Constitutional* system of government can be achieved through the separation of *decision* and *enforcement*, the two being connected so that each can empower the other *only* through the constitution, and only on condition that both comply with constitutional requirements.

We can thus visualize a theoretical constitutional system of government as three points of a triangle.

At the top point of the triangle we have the Constitution.

At lower left, we have the Legislative Process – proposal, debate, and formulation of laws; at lower right the Enforcement Agencies – police, judiciary, correction.

Legislation, at "bottom left", is formulated according to the appointed processes, but as yet has no "force of law". In the form of a proposal, each newly formulated law is then passed up the left side of the triangle to the Constitutional Executive, where it is verified to ensure that its content and the procedures of its formulation are fully in accordance with the provisions of the Constitution.

If it passes this test, the legislative proposal is then given "force of law" and is passed down the right side of the triangle to the Enforcement Agencies. But once again there is Constitutional Verification. For the Enforcement Agencies must also be subject to Constitutional provisions and thus continuously monitored to ensure that they so comply.

The two points at the base of the triangle, representing the Legislature on the left, and the Enforcement Agencies on the right, are not directly joined. This is the very essence of Constitutional Government.

Decision and Force are allowed no direct contact; legislative proposals cannot be passed directly to Enforcement. Only by moving upwards and passing successfully through the process of Constitutional Verification can legislative proposals gain the formal force of law. And similarly, only through continuous compliance with the constitutional provisions can the Enforcement Agencies qualify to receive legislative instructions.

Decision and Force. Each powerless without the other. Each empowered, and the two joined, only by and through the Constitution, only on condition that each and both fulfill the provisions of the Constitution.

A further issue of constitution relates to the process of constitutional amendment. The United States Supreme Court rules on points of constitutional interpretation. But America's Founding Fathers left no suitable provision for amendment of the Constitution.
Since the purpose of constitution is to discipline the legislature, it is clearly not appropriate to ask the legislature, albeit the Upper House, to amend it. Only a body of similar stature to the Supreme Court should be entrusted to fulfill this function.

With the passage of time new perceptions or conditions will make it necessary for existing constitutional articles to be reconsidered, or new ones to be added. Without adequate provision for amendment, inconsistencies are bound to develop as the customs and expectations of civilization change.

An example of a current need for new constitutional discipline over government conduct can be seen in the present absence of fiscal constraints, without which government can plunge itself and the nation into apparently limitless debt. All that is needed is that government be required to conduct its finances according to the same rules of fiscal propriety which the law presently and rightly demands of private citizens and corporations.

The importance of Constitution, both in its content and its status, is little appreciated by the general public. "We the people" must never forget the basic fact that we have, as a price of social development and stability, handed over a substantial area of control over our lives to our governments.

And we should bear constantly in mind that there is no form of government yet devised, or yet devisable, which can be trusted to function successfully and honestly without the discipline of clear constitutional rules laying down the essential principles to which government can be held accountable.

"*No man's life, liberty, or property is safe while the legislature is in session.*"
Mark Twain (1866)

So where does that leave us today? With indebted governments dominating our lives with a mix of austerity and excessively intrusive regulation, a reconsideration of Constitution is timely.

8.
Constitution Re-visited

Governments have a life of their own. They thrive on their own growth, seeking more and yet more opportunity to guarantee that growth though more and yet more laws.

On the other hand, they abhor any interference by outside groups daring to question the existence, or absence of law. And they reject absolutely and suggestion of productivity – doing a better job with less staff – or any suggestion of financial discipline, balancing the books.

Clearly more and clearer constitutional discipline is required. We might begin at the beginning, with a fundamental reconsideration of the role of government and law in our society.

Freedom is a wonderfully evocative word. And we tend to view freedom, like all ideal states, as being without limitations. But there must be limits to our socio-political freedom, our relationships with one another.

If one person is totally free to do whatever he likes, then he is free to limit or indeed eliminate the freedom of another, thereby reducing that second freedom, possibly to zero.

The best we can do is to maximize freedom, and this we achieve when we all accept certain limitations on our individual freedoms so that we do not infringe the freedom of others. To describe this concept of shared, limited freedom we use the word of Latin-Roman origin: *liberty*.

A Land of Liberty is not a land in which all citizens have absolute freedom to do exactly as they please. That would be a land of anarchy, since everyone would be free to limit, or eliminate the freedom of anyone else.

A Land of Liberty is a land in which all individuals and institutions are subject to restraint in those actions which are harmful or detrimental to others. In this way, the general liberty can be maximized.

The idea is well summarized by Lord Denning, in his book 'The Family Story': *"Each man should be free to develop his own personality to the full; the only restrictions upon this freedom should be those which are necessary to enable everyone else to do the same."*

If this principle is then applied in government, the guiding policy becomes clear and simple: the purpose of government and law is the identification and prevention of exploitation, harm or injury between people. This guiding principle has been expressed in many forms through the centuries; it is stated clearly and concisely in the words of Thomas Jefferson: *"the purpose of government is to prevent men from injuring one another"*.

It is worth considering this proposition in detail, for it has implications far beyond its apparent simplicity.

Clearly, Jefferson was not confining *injury* to grievous bodily harm, any more than he was confining the term *men* to the male gender. The purpose of government in this view is to prevent people from injuring one another, and *injury* can take many forms which grow in number and complexity as the world develops.

One can harm one's fellow citizens by making and selling a machine which is unsafe in use; or through incorrect labelling of a food product which results in a user consuming an additive to which he or she is strongly allergic.

There are many ways in which we can injure one another, in our personal activities, in commerce and industry, in our use (or misuse) of natural resources. In Jefferson's view it is government's job to identify and define those actions leading to the injury of others, then to prevent them through appropriate laws and their enforcement.

When government as referee identifies those actions which are harmful or detrimental to others, then prevents such actions by law and its enforcement, government is limiting individual freedom; but in so doing it creates the conditions in which the general overall liberty is maximized.

The *Maximization of Liberty* defines the duty of government in terms of obligation and *limitation*.

Its *obligation* is: the formulation and enforcement of legislation which will ensure that in the exercise of their liberties citizens do not harm or infringe the liberties of one another. *Where there is injury, the law must be obligated to act.*

Its *limitation* is that legislation is restricted to the protection of liberty from identifiable infringement, and must avoid oppressive or intrusive law which itself institutes a prime intrusion of liberty. *Where there is no injury, there can be no law.*

This concept of Liberty is nothing new. Most people object in principle to any excess of regulation. They dislike meddlesome government; they find unnecessary regulation tiresome and annoying; they abhor oppressive government. Yet few would object to being told they may not do something, if it can be clearly shown that their action is injurious to others. And when a person is suffering injury at the hands of another, that person's right to remedy and protection in law would be readily accepted.

When Government as referee identifies those actions which are harmful or detrimental to others, then prevents such actions by Law and its Enforcement, Government is limiting individual freedom; but in so doing it creates the conditions in which the general overall Liberty is maximized.

Good Government should protect people from injury in all its aspects. Equally important is that government should not itself create injury in the form of oppression by intrusive laws.

This sets clear limits on the scope of law and government activity by restricting law between the twin confines of obligation and limitation.

The purpose of law is to prevent injury, and the identification of an injury either actual or potential *obligates* government to initiate the legislative process.
The formulation of legislation which will prevent that injury either totally or as nearly as practicably possible will conclude the process. That defines government obligation.

The *limitation* upon law is that without a clearly identifiable "injured party" - an injury caused to one person or party by another – there can be no cause for law.

Thus government-initiated intrusive or oppressive laws cannot pass. In the words of John Stuart Mill, *"The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."*

The adoption of such clearly defined boundaries affects the process of legislation and government, as well as the very status and function of legislators.

Both obligated, and limited in their actions, Legislators lose their arbitrary powers, becoming subject to clear disciplines and thus answerable for their every action. Legislators become the *servants of justice*, not the manipulators of it. And they must serve both diligently, and cost-effectively.

Quality, Productivity, and Service – three words not normally associated with Government today!

Clear job descriptions and benchmarks for each department allow for accurate assessment of performance.

Many existing government departments and programs would inevitably be abandoned as being non-essential, while each of those remaining would be required to state clearly what it is doing, what it is costing, and the extent to which it is fulfilling its stated objectives productively.

Government is a service to its consumers and as such should be subject to the strictest possible commercial disciplines; its performance should be at least as good as and preferably better than the Private Sector.

Any Commercial Legislation relating to accounting, standards, productivity or quality of Private Sector business and commerce should immediately and automatically apply to any and all functions of Government.

The process of auditing and applying the necessary disciplines to Government should be entrusted to a specially constituted Committee with Constitutional status; no institution, least of all Government, can be trusted to discipline itself.

The aim of Government should be the same as that of any well-run Private Sector industry or service: to provide the best possible service at the lowest possible price.

Throughout private sector business and industry, managements are under constant underlying pressure to be ever on the alert. It is easy to let quality slip, to miss an opportunity to improve productivity, or to fill a new market need. No one accepts pressure through choice. The need arises only because competition can overtake a business, even cause its demise.

Commercial monopolies do not suffer such pressures, thus it is easier for service standards to stagnate or fall back. Yet there is an escape route for dissatisfied customers: one can always, or almost always opt out.

If your electricity supplier really annoys you, you can close the account and light your home with oil lamps. Inconvenient perhaps, but the option remains, for though a monopoly supplier, your power company does not require you to use its services. It is not an *enforced* monopoly. It is in this respect that Government stands alone.

Government is not only a monopoly, it is the one single unique example of an enforced monopoly, there is no option to reject it, and refusal to pay its taxes is a crime.

Thus it is of the utmost importance that honesty, productivity, accounts, transparency and service standards in all aspects of Government and Government Services be rigorously monitored, enforced and maximized. The best possible service, the lowest possible cost. Always.

The application of this Ideal, that Government should fully define and protect Liberty while avoiding any further intrusion into oppression, would maximize Liberty in the Nation. Furthermore, this Principle can be so clearly defined, that it sets its own obligations and limitations upon Government activity.

If Government were also strictly disciplined in its financial and administrative operations in such a way as to ensure that it fulfils its functions as efficiently and as cost-effectively as possible with continuously rising productivity, we would not only maximize Liberty, we would do so without incurring an over-burdensome tax on our earnings.

It may sound a utopian ideal; but it has been expressed before. Thomas Jefferson proposed these very same objectives in his first Inaugural Address given on March 4th, 1801:

"A wise and frugal Government, which shall restrain Men from injuring one another yet leave them otherwise free to regulate their own pursuits of industry and improvement, and which shall not take from the mouth of labor the bread it has earned: this is the sum of good Government necessary to complete the circle of our felicities."

– Freedom is the freedom to limit or eliminate the freedom of others. Liberty is freedom which is defined so as to permit maximum latitude of action, yet without restricting that of others, thus allowing maximum liberty and creativity.

– The purpose of Government is to define liberty by preventing men from injuring one another.

– If there is injury, the law must act to prevent it.

– Without injury, there can be no law.

– The processes of law and administration must be executed with the same level of productive efficiency that the law should demand of private sector business and industry.

Whereas

The People may from time to time fall prey to the Sins of Greed, Envy and Aggression thus with the employment of Force and Nefarious Devices causing Injury, Distress and Want among their Fellow-men,

Therefore

The People, being prompted by Conscience, a Modicum of Wisdom and the Voice of the Good Lord agree to accept and submit to such Laws as shall curb their Manifold Transgressions one against another, thus promoting Justice, Peace and Prosperity throughout the Land,

Establishing

to this End a Government charged with the Duty and Responsibility of Formulating, Promulgating and Enforcing such Laws as shall ensure, inter alia:

– That persons do no physical, mental or psychological harm or injury one to another;

– That use of Natural Resources should respect the Earth's potentialities, should balance the needs and legitimate expectations of Individuals with those of the Collectivity, and should observe the laws of Good Husbandry and Planetary Stewardship;

– That relations between Worker and Master, Buyer and Seller should be based on Principles of Fair Trade and Social Responsibility, the goods and services offered in trade being accurately and honestly represented.

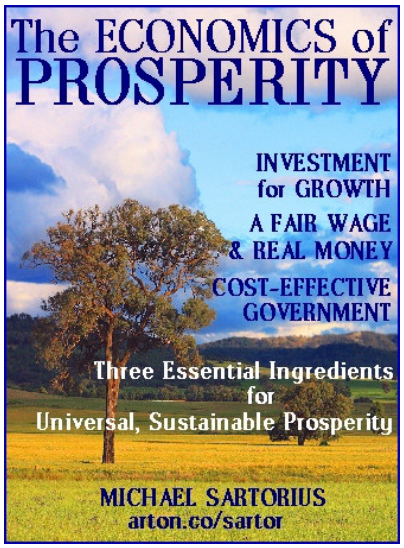
And lest

Government Neglect, or Abuse the Powers thus granted to it, Government shall at all times Itself become subject and servant to a Code of Conduct:

– *Obligating* Government to provide such Laws as shall be necessary to protect the Citizen from Injury, Theft, Injustice, Diverse Deceits and Skullduggery;

– *Prohibiting* Government from enacting any Law which does not explicitly prevent a clearly identifiable injury of one person or party by another, lest Government may of itself cause Oppression among the People;

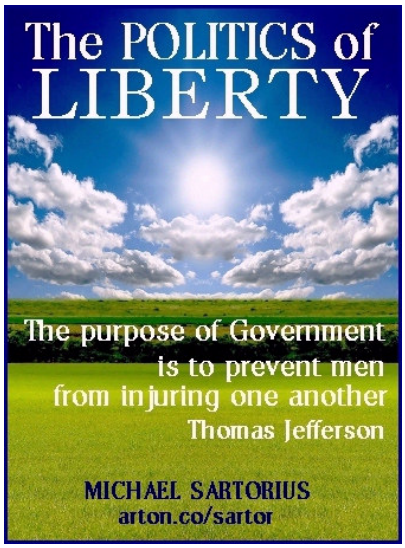
– *Regulating* the Process of Governance so to guard against Secrecy and Corruption, and to ensure Honesty, Competence, and the General Satisfaction, conducted within a strict Economy of Means.



Regional Development Banks established specifically to provide longterm investment for industry and infrastructure can create jobs and industries NOW, with genuine, repayable investment loans.

The absence of a fair and sustainable work-reward relationship creates inflation and monetary instability. Job-evaluated pay is already a reality in major companies. The combination of Pay, Profit and Price Evaluation can guarantee a fair day's pay, rising productivity full employment, and a stable monetary unit.

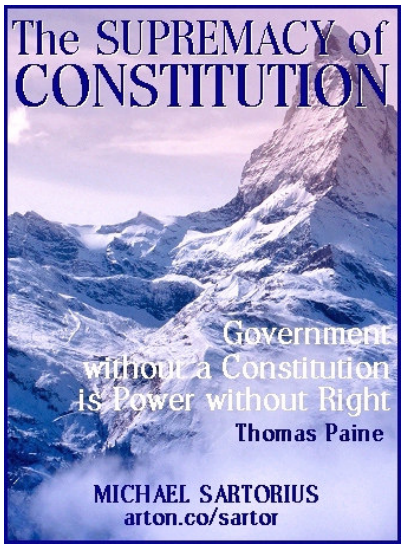
Maximizing productivity must become a nationwide objective, especially in government as the nation's biggest employer and its least productive.



Politics as we know it today consists of two "sides": Red and Blue, Socialism and Conservatism, each trying to secure gains for its own supporters at the expense of the others.

The result is confrontation, stalemate and ultimately dysfunctionality, while government takes an ever-increasing share of citizens' hard-earned incomes.

The need is clear for a fundamental re-invention of politics, based not on sectional advantage but on a policy of mutual respect, clearly defined fairness and justice, and maximum liberty for all, administered by a financially disciplined government.



No people should give government power over them, without first setting conditions on the use of that power. Such is the purpose of Constitution.

Governments govern people, constitutions govern governments, by establishing procedures, obligations, and perhaps most importantly, limitations on the powers of government.

If we are not to drift slowly and surely, ever deeper into debt and dictatorship, the issues of Constitution, its Provisions, its Supreme Status in the process of governance, and the provision for periodic and necessary Amendment must be given urgent and serious consideration.
