

CLARENCE CARSON



**BASIC
AMERICAN
GOVERNMENT**

SECOND EDITION

Basic American Government

**by
Clarence B. Carson**

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Basic American Government

Clarence B. Carson

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Preface

It would be a considerable fraud to do a book on American government which talked as if the constitution were still being substantially observed, that pretended that when Presidents took the oath of office they intended to observe the bounds set by the Constitution, that Congressmen recited their pledges with the same intent, and that Federal judges were still construing the Constitution as it was written. In sum, any book on American government worthy of the name ought to make clear how remote from the Constitution the government has become. Every effort has been made to do so in this book.

This book is not, then, simply a manual on the nuts and bolts of government which accepts whatever it is that government does without reference to constitutional authorization. It is not a manual on how to live under its authority and operate the government in the year of our Lord 1993. There are manuals aplenty that provide such information. On the contrary, this is a work addressed to potential citizens, who wish to constrain and control their government by constitutional means, not to conforming servants, beggars for portions of its loot, nor employees or operators of a leviathon-sized government.

This book contains an account of the general government as established by the Constitution, of the state governments which preceded it and came after it and their constitutions. More, it details the Ancient and modern foundations, scriptural and secular, on which these constitutions and governments rested. The Founders of the United States built on a great foundation, and the story of that is told in these pages. The story is told, too, how the Constitution of 1787 became the Higher Law for many Americans, including most of those who governed them, in the 19th century. It ends with a detailed account of the massive departures from the Constitution in the 20th century on the way to constructing a Leviathon, in which government is now out of control.

This is a work intended for citizens and potential citizens of the United States of all ages and conditions. Can such a work be intended for young people? Indeed, it can and is, for however shameful the departures from and

betrayal of the Constitution have been, the knowledge of them is not something from which anyone should be protected.

I am grateful to those who have helped in many ways to make this work possible, and especially to the Directors of American Textbook Committee, who have maintained a lively interest in it during the considerable while it was in preparation. My special thanks, too, go to my wife, Myrtice Sears Carson, who has not only done much to make the way of a writer smooth but also read copy, corrected proofs, and otherwise helped to produce this book. But my dependence upon these and other people in no way relieves me of responsibility for the accuracy of the facts and fidelity to the truth of the material contained herein. That responsibility is mine alone, and I accept it, albeit with more than a little misgiving.

Clarence B. Carson
Wadley, Alabama, 1993

Section I

Introduction and Examination of American Government

Chapter 1

Introduction: The Political Crisis

We might suppose that because of the means available for communicating with and informing one another that people are better informed in this day than they have ever been and in closer communion with one another than ever before in all of history. It is indeed the case that the means of communication have increased in number, variety, speed, and precision in the 20th century. It is now possible to transmit pictures and sound from almost anywhere on earth to anywhere else virtually instantaneously via satellite. Commercial and cable television brings these wonders to many of the peoples on earth. Not only can we speak to people by telephone but also transmit letters and copies of documents long distances and almost instantaneously by Fax machines. Older means of informing people survive, such as in bookmaking, but have been made much more effective in disseminating their messages by the rapidity of transportation and swiftness and scale of printing. In short, means of communicating and informing people abound in our time.

Yet it is most doubtful that we are thereby better informed or more adept at or successful at communicating with one another than in earlier eras. There are some obvious senses, of course, in which we are better informed, if we wish to be, and cases in which we can and do communicate more expeditiously than in earlier times. We get reports of sports events, for example, in many cases while the events are still in progress, but in any case within hours of their completion. Nor is it only frivolous events that we learn about swiftly. We often hear of catastrophes within minutes of the time they occur. That one country has gone to war with another is information brought all too swiftly over the airwaves, by satellite, and in the daily newspaper. At the private level, we can often get almost instantaneous notice of the illness, accident or death befalling relatives and friends by telephone or other swift means of communication. Or, to take another tack, there surely is vastly more information available about a great variety of matters in our day than there has ever been. Computers, data disks, and retrieval systems are making more and more such information available.

Yet in the midst of this great abundance of information, it is possible for us to be grossly ignorant or grotesquely misinformed about matters of great moment to us. The situation is analogous to people lost at sea who die of thirst afloat upon an ocean of water. Or again, amidst all the devices of communication it is possible to be very lonely for want of real communion with others because they are so busily engaged in superficial exchanges. In a similar fashion, it is possible in the midst of a wonderful variety of highly advanced instruments of communication to be alienated because the bonds that link individuals to one another, families and communities together, and make possible societies, can be so loosened or broken that less effective communication takes place. Thus, the means to communicate abound but the state of human relations that make effective communication safe and rewarding become rarer and rarer. The best contemporary example of this condition can be readily conceived in the breakup (or break down) of the family, especially in widespread divorce. Clearly, divorces do not ordinarily occur because there are any shortage of devices by which husbands and wives may communicate. Indeed, there has never been a time in all of history when mates who spend time separate from one another have had so many instruments with which to communicate. They can communicate in writing by first class and express packages, by telephonic fax machines, and by courier (as a last resort). Orally, they can communicate by shouting, telephones, both stationary and mobile, by short wave radio, and by closed circuit television. But no one supposes that the great incidence of divorce was brought on by the lack of means of communication. Still, to speak of the matters this way may help us to see more clearly the fact that the presence of facilities in no way assures us that they are being used for the highest and best ends.

There are undoubtedly points at which the matters on which we are grossly ignorant and the failure to communicate have intersected and interacted with one another. That, however, is not the main concern at this stage. Let us, instead, focus on the arena in which we are grossly ignorant or grotesquely misinformed. Such a focus should bring us to the political crisis of our times.

The political crisis of our times has been caused by the fact that peoples have been grotesquely misinformed about the nature and character of government. They have not had clearly in mind the inherent limits of government as a beneficent instrument for the concentration and exercise of power. They have not been well informed about how to limit, restrict, and restrain government. On the contrary, the main means of informing people have been used to convey distorted notions about the potentialities and possibilities of the use of government. This has, of course, been the message of numerous politicians, of many classes in schools, of the major media of communication, and so on. Although this story needs to be told in more detail, the fact of the crisis needs first to be made clear.

The political crisis of our times is the result of governments becoming gorged with power and running amok with the undisciplined exercise of power. It has probably been the most universally observable phenomenon in the 20th century. Hardly a country in the world has escaped a great growth and concentration of power and the unleashing of power in new directions, though there have been major differences in degree both in the concentration of power and the extent to which it was unleashed. Some countries aggressively expanded, making conquests of territory in other lands. Most countries, however, used the accretions of powers of government upon their own inhabitants.

Nazi Germany provided a grotesque example of the concentration of power in the hands of a central government ruled by a dictator and the aggressive bent to conquest in the 1930s and early 1940s. Hitler first conquered the people within Germany. He subdued or abolished all organized potential sources of opposition to his rule. As soon as he had removed potential opposition, he began large scale building programs, expanded the military force, mechanized it, and provided it with a major air force. As this rearming proceeded, Hitler became increasingly belligerent in foreign relations, making demands on adjoining foreign countries, eventually dispatching military force to carry on undeclared wars with his erstwhile neighbors. World War II was largely the result of Hitler's aggressive foreign thrusts and the responses of other countries to them.

A calm and dispassionate account of Hitler's concentration of power and loosing it upon surrounding countries does not, however, begin to capture the barbarity, oppression, and destruction which followed in its wake. Hitler came to be Chancellor of Germany legally, even though his tactics as an aspirant to office were hardly civilized. He was not only demagogic from the outset but surrounded himself with bullies and moved about in an undercurrent of violence which frequently erupted at his meetings. Once in power, he wasted little time in seizing the funds and shutting down the operations of labor unions, purging his organizations and jailing or killing his enemies, seizing the major means of communications, turning news into propaganda, and putting those whom he feared or despised into concentration camps, i.e., Communists, Jews, those people who call themselves Jehovah's Witnesses, Gypsies, and others who incurred his wrath from time to time. In lands which he conquered, he virtually destroyed them as nations, ruled by military government, and with puppet regimes. All restraints on his power to use the government as he would were removed. Hitler's was indeed a government run rampant.

But Nazi Germany has only been the best publicized and anathematized example of the tendency toward despotic and unrestrained government power in the 20th century. The Bolshevik (i.e., Communist) government which began to take over what it could of the Russian Empire in late 1917 not only antedated the rule of Hitler in Germany but showed him the way to

concentrate power, subdue the people, establish one party dictatorships, and use government power as a battering ram. Hitler learned much of the pattern he was to follow from the Soviet rulers, as did Benito Mussolini, and many other less well known tyrants. Indeed, Soviet Communism is much the better example of government powers swollen to the bursting point and employed in the unholy enterprise of subduing and transforming whole peoples. Communism's ideology was much more ample than that of Nazism or Italian Fascism. Its vision of transforming people was much more thoroughgoing and totalitarian than any other in this or any other century. Moreover, Nazism was only in power for about a dozen years; while Soviet Communism lasted for about 73 years, at least. Although the slaughter by the Nazis was of millions of people, the probability is that Soviet Communists may have killed—murdered is the appropriate term in both cases—five times as many, though there is some conjecture involved in both cases.

In any case, the tyranny of a government cut loose from all restraint was much longer, more sustained, more thorough, and more general in the Soviet Union than in Nazi Germany. The terror eventually applied to the Jews in Germany and in Europe generally during World War II was applied almost indiscriminately to whole peoples in the Soviet Union under Stalin. Virtually the whole population of the vast Soviet Empire was impoverished for well over a half century. All private property in land, buildings, and means of production was taken away from people. The possessions of millions were seized and virtually confiscated. Monasteries were suppressed, seminaries were greatly restricted, thousands of churches were either demolished or seized and used for state and secular purposes. Concentration camps were first operated by Communists during the rule of Lenin and greatly increased in number and expanded in population under Stalin. The suffering of millions of people sentenced to these slave labor camps, often located in parts of the Soviet Union with the greatest extremes of temperature and the most inhospitable locales, often beggars the imagination both of those who have undertaken to relate it and those fortunate enough only to read about it.

The Soviet Union was, of course, only one land in which Communism was more or less deeply established in the years during and after World War II. There have been many other countries where Communist rule has been imposed on more or less unwilling populations: Poland, Czechoslovakia, Hungary, Latvia, Estonia, Lithuania, Yugoslavia, Rumania, Bulgaria, Albania, North Korea, mainland China, North Vietnam (then all of Vietnam), Cuba, Cambodia, Laos, Nicaragua, Ethiopia, South Yemen, Afghanistan, Benin, Angola, Guyana, and in several other countries, such as Libya, Algeria, and Syria, to greater or less degrees. In the 1950s through the 1970s, Russia and China became competitive centers for the spread of Communism around the world.

Everywhere Communism was established, the government was charac-

terized by one party rule, dictatorship, an unbridled government security force, the taking over by government of most productive private property, and vast efforts by government action to make over the people. Religious persecution has been commonplace in Communist regimes. Government control and direction of the media of communication always follows or precedes Communist rule. Concentration (work or slave labor) camps are usually adjuncts to the power of monolithic totalitarian Communist states. Communism is a prescription for the most extensive and intensive use of government power to dominate and control populaces. The vision that activated Communist rulers from the outset was that every country in the world would eventually be Communist. Until that had been accomplished, the aim of Communist parties within virtually all the countries in the world was to undermine existing governments in preparation for Communist takeovers.

It would be a mistake, however, to focus attention exclusively on the totalitarian governments of the 20th century, whether Nazi, Fascist, or Communist. Indeed, dictatorship has been much more widespread than in the countries with ideologies of those distinct flavors. There have been many "right wing," dictatorships, as Communists and their camp followers tend to style anti-Communist dictatorships. Among the better known of these have been Franco in Spain, Juan Peron in Argentina, Salazar in Portugal, Fulgencio Batista in Cuba, and so on. These dictators frequently have one party rule, often persecute their political enemies, and develop surprisingly large Swiss bank accounts before they fall from power. They are in some measure the fall-out from the assault upon monarchy and hereditary aristocracies, particularly in Latin countries. Even so, they exemplify, often to a less frightening degree, the loss of legitimacy in governments, the concentration of power in them, and the lack of restraint (as well as corruption) in its exercise.

It would be a mistake, however, to suppose that countries that generally steered clear of outright dictatorship and one party rule have escaped the concentration of power in government and its increasingly unrestricted use to make over populations. No country in the world has been free of the movement or tendencies in this direction. The major impetus to this concentration, expansion, and exercise of government power has been one or another variety of socialism, though it has not necessarily been called by that name. Some sort of latent animus to the building of a perfect society has been the source of the effort. In practice, governments have used much of this energy in redistributing wealth and in restraining and regulating economic activity. Countries that have retained the outward form of popular rule—commonly referred to as "democracies"—have generally loosened the restraints on government and extended the use of their power. This has been the case in the United States, the United Kingdom, Canada, Australia, Sweden, Norway, France, Italy, and virtually every such country in the world since World War II, if not before.

Sweden took the lead in the 1930s in establishing what has since come to be called a "welfare state." Its main characteristics are government provision of all sorts of services and payments to people from funds acquired by virtually confiscatory taxation. Indeed, the government in Sweden early took on many, most, or, in some instances, virtually all, of the functions once provided by fathers; it is a paternal ("father-like") state. As soon as conception takes place, the state is ready to step in. Free maternity clinics were established for expectant mothers and their unborn children. The state even pays three-fourths of the cost of the mother's dental care. If the expectant mother should prefer a midwife to deliver the baby, the state will pay the fee. If she goes to a hospital, the state will pay the taxi-fare as well as the cost of the stay in the hospital. In addition, the state provides a substantial monetary award to the new mother after the birth of her child. There is then a supplement for cost of housing to mother and child and for the father as well, should he decide to live with them. Should the mother be a "single parent," the state has caused to be built and set aside for their special use apartments for unmarried mothers. Special support is provided for each child regardless of the status of his parents. If one or both parents dies, the children receive pensions from the government. Especially needy families can apply for and get additional supplements for each child. Of course, nurseries are provided for small children, and schools, books, dental and psychiatric as well as medical care, are provided for the children. In short, Sweden early established all sorts of aids and supplements to relieve parents of much of the cost and responsibility of childbearing, as well as for many other exigencies of living.

Of course, these amenities provided by government come at a high price indeed in individual taxes on working people. In times past, it has not been unusual for a workman to pay more than 50 percent of his income in taxes. Local and national income taxes have ordinarily taken away about a third of their pay. Those with higher incomes are taxed at much higher rates. A general sales tax is levied on the cost of most items bought. Unusually high taxes are levied on gasoline, liquor, beer, cigarettes, and chocolates. While businesses are usually privately owned, they are heavily taxed and closely controlled in Sweden. The people of Sweden have progressively lost control of their own affairs as the power of government has expanded.

Sweden was one of the earliest and most thorough examples of a "democratic" government focusing on redistributing wealth. Productive property remained in private hands generally, but great pressures were brought to bear for maximum productivity. Thus, the wealth to redistribute might be available in large quantity. By contrast, the United Kingdom of England, Scotland, and Wales may have been the best (or worst) example of a "democratic" government rushing headlong into socialism. In July, 1945, an election was held throughout the United Kingdom. The Labour Party won overwhelmingly, electing 393 members to the House of Commons to 189

for the Conservatives and 58 for all other parties. In its election manifesto for 1945, the Labour Party proclaimed that it was "a socialist party and proud of it."¹ And, the British Labourites went to work with a right good will to impose a system of socialism on the country.

In contrast to the Swedes, the British proceeded to take-over, i.e., "nationalize," major industries. The broad categories of industries nationalized were banking, power and light, transport, and iron and steel. The first nationalization was authorized by the Bank of England Act passed in 1946; the last major one was authorized by the Iron and Steel Act of 1949. A fairly typical nationalization measure was the Coal Industry Nationalization Act passed in 1946, to go into effect January 1, 1947. "The act provided for a National Coal Board appointed by the minister of fuel and power and consisting of nine representatives of various functions within the industry (such as finance, technology, labor, marketing) who were to operate all coal mines subject to the general supervision of the ministry. The public corporation replaced more than eight hundred private companies which surrendered their assets for a compensation. . . ."² However little the British Labourites might know about actually running an economy, they did know generally what industries comprise the main arteries of a modern economy, and they had nationalized them.

But the Labourites were hardly content with the nationalization of major industries. A vast network of controls, subsidies, priorities, prescriptions, proscriptions, and regulations were extended over the remainder of industry and agriculture. All that could be was done to give the government as complete control over the economy as possible without actually taking over every sort of business. The production that those in power judged desirable "was encouraged; luxury production was limited. Licenses were required to export raw materials and any manufactured articles needed at home. Domestic consumption was regulated by rationing subsidies and price controls. . . . New industrial enterprises seeking capital had to be approved by a government committee. . . . Treasury budgets were drafted with a view to controlling investment. . . ."³ As for agriculture, it was decided not to nationalize the land but to regulate and control activity in this area. The Ministry of Food was authorized to buy agricultural produce and became, in effect, the sole market in which farmers were to sell. Agriculture was controlled "by a range of other measures, such as the giving of acreage grants for particular crops, financial aid for improvements, loans to agricultural workers. . . ." Power was authorized to "give directions to farmers to plough up land and grow particular crops."⁴

Of course, the Labourites set up their own particular variety of the welfare state in Britain. And to pay for all this, steeply graduated income taxes were imposed. How steep it was is made clear by the following: "[A] big American business which had decided to pay the head of its English subsidiary a salary of 20,000 dollars (£5,000) was informed that, owing to the Income

Tax, the recipient would in fact touch half only. Not to be put off, the American business asked how much it would need to pay its servant to ensure him £5,000 net. The answer came back—£50,000, the figure which will, after taxation, leave £5,093 10s. 0d.’’⁵

Perhaps, the British Labour government in the years immediately after World War II was not completely out of control. After all, there were things it did not, perhaps could not, do. Freedom of speech and press still existed, and ancient rights to protect the individual from arbitrary imprisonment, and the like, were still in operation. But the government had ridden rough shod over long standing economic principles and the right of people to the product of their labor. The rights to own and operate productive property had been severely reduced, if not entirely abandoned. In short order, socialism in England came close to destroying the relics of a once great economy which had already been rigorously put to the test by two world wars and the government intervention of the 1930s.

That socialism in England was a failure, so far as nationalization of industry and government planning was concerned, was widely accepted by the 1950s. Until the British experiment with nationalization had failed so signally, socialists in the West had generally believed that was the way to go. Opinion now shifted more strongly toward government regulation and manipulation of an economy in which the forms of private property still existed. The Swedes had already shown the way toward the welfare state within a framework of private property. The United States moved that way before, during, and since World War II.

Blatant, aggressive socialism has been widely discredited over the past several decades. Over the past five years, Communism in the Soviet Union and Eastern Europe has disintegrated. Internationally, Communism is generally in retreat as well. The number of avowed socialists has rapidly declined, and may well be at an all time low for this century, or at least for the past 60 years. If the retreat from avowed socialism (including Communism) continues apace for the remainder of this decade, the ideology, as such, will have sunken from view.

Why, then, is there a political crisis in the world? Surely, the decline of socialism does not make a crisis, at least not one of government run amok. After all, by the preceding analysis, it would appear that socialism (in all its varieties) was a major source of out of control government. That is correct, so far as it goes. It does not follow, however, that the decline of avowed socialism will make any large inroads in the concentration and expansion of government power. After all, the United States has never had an avowed socialist government. Avowed socialist parties have never received more than a relatively small minority vote in the United States.

Even so, America has been gradually moving toward socialism for much of this century. Twenty-five years ago, Earl Browder, a former head of the

Communist Party of the United States, described how it came about this way:

America is getting socialism on the installment plan through the programs of the welfare state. . . .

Americans may not be willing to vote for a program under the name of "socialism," but put it under another party label—whether liberal Republican or Democrat—and they're by and large in favor of the idea. . . .

We have no real socialist party, no socialist ideology, but we have a large—and growing—degree of what 50 years ago would have been recognized as socialism.⁶

And, accompanying what Browder referred to as "socialism on the installment plan," there has been a great concentration of power in the central government and expansion of the exercise of power upon the people. It is true that during the Presidency of Ronald Reagan there was some talk, but much less action, of reducing the role of government in American lives. But the welfare state is still very much in place, and the Federal government is extended far beyond constitutional bounds.

The political crisis arises because the decline of avowed socialism has not been accompanied by any committed effort to circumscribe and limit government. The disintegration of Communism in Eastern Europe and the Soviet Union provides an opening for establishing much needed restraints upon the exercise of government power. But in their undeserved pride (and clear ignorance of the extent of the problem) Western leaders are not prepared to offer even advice about how to contain and restrain the exercise of government power. (Most of them are too busy exercising to the fullest extent any power they can get their hands on to even think about limiting power.) The most they have done is to urge that former Communist lands become what they are pleased to call "democracies." If they do that and adopt what is being called "capitalism" for an economy, they will presumably have solved all political and economic problems and can live happily ever after. In the current state of our political language, these terms are little more than "buzz" words. As the British political philosopher, Michael Oakshott admonished us, "we must stop hiding behind such irrelevant expressions as 'democracy' and 'capitalism'. . . ."⁷

"Irrelevant" is precisely the right term for the place of "democracy" and "capitalism" in the present situation. The critical problem facing us, as noted above, is one of government broken loose from its moorings and running amok. What is wanted are effective means of restraining governments, of holding them to their main, if not only proper, function of keeping the peace. Popularly elected officials and representatives, which is about all

that can be precisely meant by the term “democracy,” may well legitimize a government by providing authority for its actions, but it hardly restrains government in our day. Why this is so is explained, at least in part, by reference again to Oakeshott:

To some people, “government” appears as a vast reservoir of power which inspires them to dream of what use might be made of it. They have favorite projects, of various dimensions, which they sincerely believe are for the benefit of mankind, and to capture this source of power, if necessary to increase it, and to use it for imposing their favorite projects upon their fellows is what they understand as the adventure of governing men. They are, thus, disposed to recognize government as an instrument of passion; the art of politics is to inflame and direct desire. . . .⁸

What a marvelous description—“to inflame and direct desire”—of what politics has largely become in modern “democracies.” In such a setting, popular government does not restrain government but rather tends to expand government power to satisfy the desires the politicians have aroused. To put it somewhat more bluntly, politicians buy the votes of the electorate by promising them goodies to be provided by government. Rather than restraining government, this practice makes government into a ravenous scavenger preying on producers within its jurisdiction.

Nor is it readily apparent how or why “capitalism” would limit or restrain government. There are, of course, those who use the term to refer to an economic system in which there is private ownership of the means of production and freedom of enterprise within a free market. The late Ludwig von Mises used the term that way, or at least claimed that he did. There is a linguistic violation in using the term to signify such a system. “Capital” is a term with a fairly precise meaning in economics. It refers to one of the three basic elements of production. The other two are land and labor. “Capital” is most commonly defined as wealth used to produce commodities or goods. It can be most easily made concrete and visualized as tools used in the production of goods. When “ism” is added to “capital”, the resulting term should refer to an ideology or system of some sort. Most plausibly, it should refer to an economic system or ideology in which capital is given a preferential or dominant role in the economy, dominant over the other two elements of production. Governments often intervene to give such a preference, and a system such as that would clearly be “capitalism.” To make this term stand for private ownership and a free market, it is necessary to divest the term of its actual meaning and assign it a purely arbitrary one.

“Capitalism” is suspect on other grounds as well. If Karl Marx did not coin the term, which he is often credited with doing, he certainly gave currency to it. It cannot readily be separated from the usage he assigned to

it, nor is it clear why anyone would want to borrow from his weighted and heated language base. Marx rarely, if ever, contributed to clarity, and he sowed confusion with "capitalism." In any case, "capitalism" hardly solves the problem of governments out of control.

The main point of the discussion of these terms and their centrality in contemporary political and economic discourse is to emphasize how much political philosophy and thought has declined in our time. Confronted, as we are, by governments bloated by accretions of political power and prone to abusive use of it, all we can propose as a remedy is more "democracy." To illustrate the point, the following example is submitted. A journalist proposed in a recent newspaper column that what the United States needs is an entirely new Constitution. He says, "Like a broken watch, we should return the government for repair. This time, though, no mere tinkering. The whole inside has to come out and be discarded, to be replaced by something that works." He explains at more length how this is to be accomplished:

This means convening a constitutional convention to scrap the present Constitution, or most of it, and substitute a new document for today and tomorrow. The old Constitution worked remarkably well for two centuries but it no longer applies to the way the United States lives or to the people Americans have become. It can't be held together by glue and baling wire much longer. It's past time for a new model.⁹

The writer went on to outline some of what he considers failures of the various branches of government, but he does not link these to the Constitution in such a way as to show that they arise from that document. Instead, he makes his one concrete proposal to correct matters by way of a constitutional convention. His concern is with the racial, ethnic, and sexual composition of delegates to the convention. In his own words, "All delegates to the 1787 convention were white males. This time, the delegates must include females, African-Americans, Hispanic-Americans, Asian Americans and the usually forgotten Native Americans. And every other kind of American, hyphenated or not."¹⁰ He does not tell us by what electoral scheme such a diverse and presumably balanced group might be chosen for his convention, nor why, if it were, it would be likely to produce a constitution that would deal effectively with the ills which beset us. Obviously, however, the writer has absolute faith in "democracy," and is certain that if only a convention could be assembled that would be sufficiently representative, i. e., democratic, enough, it would be sure to produce a masterpiece. In sum, to him, and many others, "democracy" is the sufficient cure for all our political ills.

Here is some further evidence that this fixation on "democracy" indicates a decline in political philosophy. Some years back, a British political philosopher made the point that political philosophy had so far declined that

such political ideas as were alluded to generally were grotesque simplifications. He said, by way of example, "The dominant political idea in the modern world is democracy. . . . And where are the political theorists of democracy today? Instead of a rational theory it has become a sort of incantation. It is the open sesame of political treasure hunters everywhere." He explains his thought further, "Liberal democratic principles, evolved in the seventeenth and eighteenth centuries, dominated the nineteenth century, which however failed to refashion and think out anew, for the benefit of its successors, the ideas that it was living on. . . . Meanwhile democracy, for lack of thought, ceased to be a living political idea. It became a shibboleth, and is now not even serviceable as such. . . . Politicians, like the princess in the fairy-tale condemned to the oracular utterances of frogs, seem scarcely able to open their mouths without some platitude about democracy flopping out. . . ." ¹¹

The book in which these words appeared was published in 1960. At about the same time, the present writer published an article in which he concluded that "twentieth-century America is a wasteland so far as political thought is concerned. In part, at least, this absence of thought can be laid to the fact that thinkers have been mesmerized by the pleasing sound of the word democracy." ¹² The article was mainly concerned with exploring how the educational philosopher, John Dewey, had used the word with so many connotations and meanings, trying to make it evoke a whole philosophical outlook. In consequence, the word "has lost most if not all of its descriptive value. Contrariwise, it has picked up meanings in some kind of inverse proportion to its loss of descriptive accuracy. . . . It is so full of meanings that it has the long distance accuracy of a shotgun, as it were, in precise expression. It has become a loaded word." ¹³ The current bemusement with "democracy" owes much to Dewey's obfuscations.

The present low state of political thought and ignorance of our political heritage and terminology is currently being illustrated by the professed amazement of Senators and journalists over the candidacy of Judge Clarence Thomas to become a justice on the Supreme Court. Thomas has made known his attachment to the natural law philosophy. That should augment his qualifications for the post to which the President would appoint him, for the Founders of the United States were generally devotees of the natural law. Jefferson had written of the "laws of nature and of nature's God." The great documents of our founding years, including the Constitution, can hardly be understood or correctly interpreted without a considerable grasp of natural law doctrine. That is not to say that natural laws themselves are directly written into the Constitution. So far as there are natural laws, they operate without our acknowledgement, and it would be ludicrous to set them forth in a document prescribing the form, powers, and limits upon a government. But they nonetheless undergird and make the Constitution as written workable.

There is potential guidance in the United States Constitution both for those who may be looking for ways to limit and restrain government in lands where Communism has lately been repudiated. Even more important, there is guidance in our Constitution for Americans to bring their government under control once again, as well as for those in similar condition elsewhere. But to get that guidance, it is necessary to understand the political system that we inherited in its full richness and complexity. To do that, our understanding of politics and government has to go much beyond some vague and largely incorrect notion that the United States is, or was, a democracy. To do that, it is necessary first to study the Constitution and get clearly in mind the government authorized by that document. That will be done in the chapter that follows this one.

The book is written in this fashion because there may be those concerned in getting this summary knowledge only, or focusing on it. Then, the remainder of the book will fill in the background to the Constitution, its development, the departures from it, and how we have reached our current pass of bloated and ineffective government. Students may read chapter 2 first to get the Constitutional form and content of American government clearly in mind before studying its background and development. Or, they may read it last as a summary and review. Or, they may read it both first and last.

At any rate, the placement of chapter 2 should make clear the present writer's view, i. e., that the Constitution is the centerpiece of American government. More precisely, it became the basis and foundation of the general government of the United States—the government of the Union, so to speak. It is the foundation, the starting point, the guide to development, due north on our national compass, so to speak, the point of departure, and the place of return. That is its rightful place in American history, and this book will give it that central role.

That is not to say that the United States government is the only government in the country. Each of the states has its own constitution and its own government. These state governments are not constitutionally inferior to the United States government, though acts of the United States in accord with the Constitution do occupy a superior position at law. Even so, state governments have an origin and existence distinct from that of the United States. Some states preceded the Constitution, and all of them were brought into being by their citizenry before being admitted to the Union. All this, of course, will be taken up in its place. It needed to be stated generally here, however, to make clear the centrality of the Constitution to American government.

Chapter 2

American Government: Sum and Substance

The United States is not a democracy. It is a Constitutional Federated Republic. These three terms constitute the most summary manner in which it can begin to be comprehended. Indeed, the government of the United States is much more complex and broad than this phrase can fully cover. The United States government is a part of a federal system of government which includes the states as well, though with our contemporary bent for reductionism, it has become customary now to refer only to the general government as being “federal.” It is a limited government. It is in form a mixed government, though few people are any longer aware of that. But to call it a “constitutional federated republic” can be made to suggest much of this.

The important thing, however, is not to have some word or phrase which captures the essence of the American form of government. Such things are apt to be most useful in making bumper sticker slogans or battle cries at pep rallies than they are in advancing our understanding and giving a fuller grasp of subjects. Our stock of words is not so short nor time for the matter so brief that we are restricted to one word or a brief phrase in discussing our government. What *is* important from the outset is to understand that there are many facets to our government, that its nature cannot be comprehended in a word or phrase, that as a form it is the result of the long heritage of political thought developed during the emergence of Western Civilization, and though the popular base from which the government of the United States operates is highly important the populace as such has only an indirect impact on the government as constituted.

a. A Constitutional Government

There is a sense in which it would be true to say that any government that holds sway for more than the briefest of spans will have a constitution of sorts. That is, they will have some regular ways of conducting the business of government. Laws will be promulgated in one way or another by those who rule a country. Certain people have it as one or more of their duties to

enforce the laws. If a country is very large it will almost certainly have some sort of armed force, either in reserve or in the field. The force will have commanders, and these may be arranged in some sort of hierarchy from top to bottom. It is generally more convenient that a government be organized according to some regular pattern, and that the various regularities in government be observed as a rule. Tyrants may act arbitrarily, of course, and despots may not observe many of the rules. Even so, to the extent that there are regularities usually observed, a country could be said to have a constitution.

Sometimes a constitution may assume a firmer shape than what we conceive of as generally recognized ways of doing things. That was the case with the British Constitution. It comprises customary ways of carrying on the business of government, hereditary, appointive, and elective means of choosing those who are to govern, documents in which the monarch has recognized certain rights belonging to the citizenry, such as Magna Carta, the Petition of Rights, and the Bill of Rights, as well as some acts of Parliament. Still, it is not quite a written constitution, not in the American sense, anyhow, nor does it have quite the fixity of the United States Constitution.

Americans may not have invented the written constitution, but they certainly made important innovations in the form, strengthened its image, and broadened its coverage. The fact that it is written gives a fixity to it that it would not otherwise have. Moreover, the United States has the oldest written constitution still in operation in the world. It became the model for written constitutions after its success, as republics emerged in other countries. Perhaps its most important feature is that it not only prescribes the form and operation of the government, but it places substantive restrictions and limitations on the exercise of government power both by the United States and the states. It has been a bulwark both of stability and of individual liberty.

(1) Significance of Written Constitution

In 1803, Thomas Jefferson wrote the following to a friend, "I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."¹⁴ George Washington spoke to much the same point when he wrote in his "Farewell Address," "If in the opinion of the people . . . the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed." Washington was saying that those in authority should abide by the Constitution as written and seek to change it only by amendment. Jefferson even more explicitly claimed that

having a written Constitution should provide some security against its being changed by interpretation.

It is obvious that the written word is superior in important ways to the spoken word. The written word can become a fixed text, which can be re-examined from time to time and referred to again and again over the years. So long as the original text is preserved, what was said is not simply a matter of opinion; anyone may satisfy himself as to what was said by referring to it. The written word has occupied an especially lofty place in the minds and affections of Americans. We have been by and large a people of "the book," the Holy Bible. This has been especially so for the predominant Protestant portion of the population, who may well accord the greatest authority to the original Scriptures, but it is only to a lesser degree, if any, true of Catholics and Jews as well. In time, Americans found it easy to especially revere the original Constitution (plus the first ten Amendments) and to strongly favor a strict adherence to it.

"Law" also occupied an important role in the thought of those who drew up, adopted, and supported the Constitution as well. They especially favored having a "government of laws and not of men." They feared the rule of men unrestrained by law because it would be an arbitrary rule. Laws written down and codified were very important for a government of laws, for it provided much greater certainty as to what was the law in any particular case. There were two kinds of ordinary law known to the Founders of the United States. They were *statutory* law and *common* law. Statutory law is that law resulting from *statutes* passed by legislatures. It exists in a formal document, and is thus referred to as *written* law. Common law, on the other hand—the law recognized by Americans in the Constitution as well as in courts—is law built on custom and court decision. It is also referred to as *unwritten* law. Statutory law prevails over common law when the two deal with the same subject.

It was within this frame that Jefferson's observation about "Our peculiar security is in the possession of a written Constitution" is to be understood. What he was saying was that the United States Constitution did not arise out of age old custom and legal usage or court decisions. It was not a common law instrument. Hence, it was not legally subject to change by construction or changes in custom. It could be changed only by formal amendment. The Constitution bears this out. Article V specifies the ways in which the Constitution may be amended. One way is for two-thirds of the members of both Houses (the House of Representatives and the Senate) to propose amendments which are then submitted to the states, and when three-fourths of the states approve such amendments they become a part of the Constitution. The other way to start an amendment would be for two-thirds of the states to call a constitutional convention. Any changes the convention might propose would require approval of three-fourths of the states to go into effect. Congress has the option to prescribe whether the approval of the states shall

be determined by the legislatures of the states or by conventions held in the respective states. In two matters, the Constitution was placed beyond the amending process. One of these restrictions has long since expired, since it was in effect only until 1808, but the other—that no state shall be denied its equal suffrage (having the votes of two Senators) without its consent—is still in effect.

In certain respects, the provisions of the Constitution have the standing of statutory law, as noted above, but as the above paragraph implies, if it does not make it entirely clear, the Constitution is not on the level of *ordinary* law. Statutory law can be changed by the legislature competent to pass it in the first place. Thus, for example, Congress may pass laws with the standing of statutes (with the approval of the President, or over his veto with extraordinary majorities). But Congress cannot by itself amend or change the provisions of the Constitution. The Constitution was brought into being initially by extraordinary proceedings—by the calling and assembling of a Convention made up of delegates from all participating states—and went into operation by the concurrence of three-fourths of the participating states. As already noted, it can only be amended by analogous extraordinary measures.

In a word, the Constitution is a kind of *higher* law. Although the provisions of the Constitution are like statutes in that they are written, contained in a document and do not come into being by way of custom or court decisions, they are not statutes in being enacted or subject to nullification by legislatures alone. Nor do they apply directly to the generality of the inhabitants or citizenry in the ordinary course of going about their private business. The provisions of the Constitution are a law for the lawmakers, so to speak, or, more broadly, a law for those who govern. The Constitution prescribes the branches and major offices of government, how the officers are to be chosen, what qualifications may properly apply, how long their tenure in office may be, and what the powers, duties, and jurisdiction of these offices may be. It also lays restrictions on the power to be exercised by both state governments and the United States government. The Constitution is, then, so far as it is a law, a law for government.

It is higher than statutory law within its jurisdiction, either the statutes of state governments or those of Congress. That it is higher than state laws and constitutions in matters to which its authority reaches is stated explicitly in Article VI of the Constitution. Specifically:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In sum, laws enacted by Congress and treaties made by lawful authority, that is, in both cases, in accord with the Constitution, are supreme over anything in state laws or constitutions.

The Constitution does not explicitly state that statutes or other acts of those within any branch of the United States that are contrary to Constitution are null and void and of no effect. Nor does it designate a branch or body of the government which would make such decisions and give them force. Yet it is the logic of the situation that acts of anyone or body of the United States government contrary to the provisions of the Constitution should have no effect. The most direct evidence of this may be the oath prescribed for the President as he takes office. It reads, "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will, to the best of my Ability, preserve, protect, and defend the Constitution of the United States." Other major officers of the United States, whether elected or appointed, take similar oaths, though the terminology is not specifically prescribed by the Constitution.

Beyond that, though, the logic of the situation is that since the Constitution prescribes the powers of those who govern, if they exceed those prescribed they are acting without warrant and their acts are of no effect. Alexander Hamilton explained the case this way:

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master, the representatives of the people are superior to the people themselves, that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.¹⁵

Hamilton was not suggesting, of course, that each man may decide for himself whether a statute passed by Congress, for example, is authorized by the Constitution or not, and whether he will obey it or not. That would be anarchy. What Hamilton argued was that the courts must resolve this question, though they are not specifically so empowered by the Constitution. He noted that judges in the ordinary course of carrying on their jobs decide what laws to apply and how to construe them. It will fall to them in the course of their work, then, to discover whether a statute is in conflict with the Constitution. "The interpretation of the laws is the Proper and peculiar province of the courts," Hamilton said. More, "A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has superior obligation and

validity ought, of course to be preferred; or, in other words, the Constitution ought, of course, to be preferred to the statute, the intention of the people to the intention of their agents.”¹⁶ Again, Hamilton was saying that the Constitution is superior to ordinary law, and that courts are duty bound to make the superior prevail over the inferior by their rulings.

John Marshall had not served for long as Chief Justice of the Supreme Court before a case came before him involving a statute, one of whose provisions appeared to be contrary to a provision of the Constitution. The case was *Marbury vs. Madison*, and Marshall composed the decision in 1803. William Marbury had been appointed justice of the peace in the District of Columbia in 1801 by President John Adams. Marshall, who was then Secretary of State, neglected to deliver the commission to Marbury. When he became President, Thomas Jefferson ordered his Secretary of State, James Madison, not to deliver the commission to Marbury. Marbury went directly to the Supreme Court, as was provided by the statutory Judiciary Act of 1789, suing for a writ of mandamus compelling Madison to deliver the commission. A problem arose because the Constitution lists kinds of cases over which the Supreme Court has original jurisdiction and says that “In all other cases, the supreme court shall have appellate jurisdiction.” Justices of the peace and the like did not come under any of the cases listed for original jurisdiction for the court. There was, then, Marshall said, a conflict between the relevant portion of the Constitution and the applicable portion of an act of Congress.

As Marshall laid matters out in his decision, there was no doubt that Marbury was entitled to his commission and that some court should afford him relief. But had he come to the right place to get it? Marshall said no. When a statute conflicts with the Constitution, he maintained that the Supreme Court was bound by the Constitution. He put it this way:

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature contrary to the Constitution is void. . . .

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.¹⁷

Thus, he held the Supreme Court lacked jurisdiction and denied the mandamus to William Marbury.

The main point, however, is that Marshall, speaking for the court, had affirmed the superiority of the written Constitution to ordinary statutes. In effect, he had held that the Constitution was a kind of higher law. Hamilton, as quoted earlier, suggested that constitutional law was superior to statute because it stems from the people, whereas statutes proceed from their

agents. A better statement of the case might be that the United States Constitution and amendments to it require broader support and more extensive approval than legislative acts. We can also concur with the idea that a written constitution, as Marshall said, is intended to be and is adopted under the claim that it is superior to ordinary law. That might be enough to give it a special place of respect and veneration for people generally, which has certainly been the case for the United States Constitution during much of its history. It might have been enough, but there was more undergirding the veneration of the United States Constitution than that.

American belief in the superiority of constitutional law nestled in and was supported by a broader and deeper belief in higher law. At the mundane level, they had been subjected to British law, which was superior to the laws of their legislatures when the two were in conflict. For example, the charter which authorized the settlement and government in Maryland specified that "laws be made with the consent of the freemen and agreeable to the laws of England." Most colonies had charters or grants with similar provisions. Moreover, laws passed in the colonies were reviewed from time to time in England, and some of them were nullified as being in conflict with British law.

But the Founders also believed that there were laws higher than those of nations, that transcended the will of men and people, and with which human law must accord to be effective. William Blackstone, the British legal authority much admired by Americans, stated this view of higher law in 1765: "Upon these two foundations, the law of nature and the law of revelation, depend all human laws. . . . And herein it is that human laws have their greatest force and efficacy: for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to the former."¹⁸ Blackstone was referring to natural law and that which comes to us more directly from God by way of revelation. An American, Nathaniel Ward, writing in the early 17th century, declared: "Moral laws, royal prerogatives, popular liberties are not of man's making or giving, but God's. Man is but to measure them out by God's rule: which if man's wisdom cannot reach, man's experience must mend."¹⁹ Elsewhere he says, "The truths of God are the pillars of the world whereon states and churches may stand. . . ."²⁰ In the middle of the 18th century, Jonathan Mayhew said: "We may safely assert . . . that no civil rulers are to be obeyed when they enjoin things that are inconsistent with the commands of God. . . . All commands running counter to the declared will of the supreme legislator of heaven and earth are null and void. . . ."²¹

The belief in a higher law was affirmed and alluded to by many Americans contemporary with the making of the Constitution. On the matter of the right of expatriation (to leave one's native country and take up residence elsewhere), Jefferson exclaimed: "We do not claim these under the charters of kings or legislators, but under the King of kings."²² Alexander Hamilton,