

Liberty, Order, and Justice



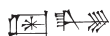
James McClellan

Liberty, Order, and Justice

*An Introduction to the
Constitutional Principles of
American Government*

❧ THIRD EDITION ❧

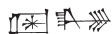
James McClellan



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First and second editions (1989, 1991) published by James River Press
for the Center for Judicial Studies

Cover art courtesy of the Library of Congress

12 16 17 18 19 C 6 5 4 3 2
16 17 18 19 20 P 10 9 8 7 6

Library of Congress Cataloging-in-Publication Data

McClellan, James, 1937–

Liberty, order, and justice: an introduction to the constitutional
principles of American government / James McClellan.

p. cm.

Originally published: Cumberland, Va.: James River Press, c1989.

Includes bibliographical references and index.

ISBN 978-0-86597-255-1 (hc: alk. paper)—ISBN 978-0-86597-256-8 (pb. alk. paper)

1. United States—Politics and government.
2. Constitutional history—United States.
I. Title.

JK274.M513 2000

342.73'029—dc21

99-046334

LIBERTY FUND, INC.
8335 Allison Pointe Trail, Suite 300
Indianapolis, Indiana 46250-1684

"Miracles do not cluster. Hold on to the Constitution of the United States of America and the republic for which it stands. — What has happened once in six thousand years may never happen again. Hold on to your Constitution, for if the American Constitution shall fail there will be anarchy throughout the world."

Daniel Webster

TO MY CHILDREN,
*Graham, Susannah, Margaret, Duncan,
Angus, Douglas, and Darby,
and to the rising generation of American youth
in the hope that they too will enjoy the fruits
of limited constitutional government
bequeathed by our ancestors.*

ABOUT THE AUTHOR

Prior to his appointment in 1999 as James Bryce Visiting Fellow in American Studies at the Institute of United States Studies of the University of London, James McClellan was Senior Resident Scholar at Liberty Fund, Inc. He held a Ph.D. in Political Science from the University of Virginia and a J.D. from the University of Virginia School of Law. Dr. McClellan served as the President of the Center for Judicial Studies and as John M. Olin Professor of Government at Claremont McKenna College. He taught American Government and Constitutional Law at the University of Alabama, Emory University, and Hampden-Sydney College in Virginia. Dr. McClellan also served as a member of the U.S. Senate staff, and from 1981 to 1983 was Chief Counsel and Staff Director of the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary. His publications include *The Political Principles of Robert A. Taft* (co-author, 1967), *Joseph Story and the American Constitution* (1971, 1990), *The Federalist: A Student Edition* (co-editor, 1990), and *Debates in the Federal Convention of 1787 as Reported by James Madison* (co-editor, 1989).

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Contents

	Preface	xvii
PART 1.	<i>The Constitution's Deep Roots</i>	1
	The Meaning of Constitutional Government	2
	The Lamp of Experience	10
	The Constitutions of Antiquity	14
	English Origins of America's Constitution	22
	The Growth of Parliament	26
	The Challenge of Parliamentary Supremacy	28
	The Common Law Tradition	32
	The Republican Tradition and the Struggle for Constitutional Liberty	39
	The Influence of Continental Thinkers	47
	The Education of the Founders	49
	The French and American Revolutions Compared	52
	<i>Suggested Reading</i>	60
	APPENDIX A. Relevant Chapters of Magna Charta (1215)	63
	APPENDIX B. Petition of Right (1628)	75
	APPENDIX C. The English Bill of Rights (1689)	80
PART 2.	<i>America's First Constitutions and Declarations of Rights</i>	89
	Colonial Governments	92
	Relations with Great Britain	103

Local Government in the Colonies	107
Civil Liberties in the Colonies	108
The Movement Toward Independence	111
The Declaration of Independence	121
The Rights Proclaimed	137
The First State Constitutions, 1776–1783	141
The Articles of Confederation	152
<i>Suggested Reading</i>	164
APPENDIX A. The Mayflower Compact	167
APPENDIX B. Fundamental Orders of Connecticut	168
APPENDIX C. Declaration and Resolves of the First Continental Congress	171
APPENDIX D. Declaration of the Causes and Necessity of Taking Up Arms	176
APPENDIX E. The Declaration of Independence (1776)	183
APPENDIX F. Virginia Bill of Rights	188
APPENDIX G. Thoughts on Government	191
APPENDIX H. Massachusetts Constitution of 1780	199
APPENDIX I. Articles of Confederation (1778)	230
 PART 3. <i>The Achievement of the Philadelphia Convention</i>	 241
The Problems of the Convention	242
The Delegates to the Convention	246
A Wide Range of Talents	248
Plans and Progress at Philadelphia	253
The Meaning of “Federal”	255
The Virginia Plan: A Supreme National Government	257
Hamilton’s Concept of a Unified America	259
The New Jersey Plan: Checks upon Central Power	262

The Benefits of Compromise	263
Compromise and Consensus	269
<i>Suggested Reading</i>	273
APPENDIX A. Virginia Plan	275
APPENDIX B. New Jersey Plan	278
APPENDIX C. Constitution of the United States of America (1787)	281
 PART 4. <i>Basic Constitutional Concepts: Federalism, Separation of Powers, and Rule of Law</i>	 295
A. FEDERALISM	297
Powers Delegated to Congress	299
Powers Denied to Congress	300
Powers Denied to the States	301
The Division of Powers	302
The Supremacy Clause	306
National and State Obligations	307
Obligations of the National Government to the States	308
Obligations of the States to the National Government	309
Obligations of the States to Each Other	309
The Role of the States in the Amendment Process	310
The Federalism Factor	311
The Advantages of Federalism	316
The Future of Federalism	321
 B. THE SEPARATION OF POWERS	 327
Checks and Balances	331
Checks upon the Congress	332
Checks upon the President	333
Checks upon the Judiciary	333

The Independence of Congress	334
The Independence of the President	334
The Independence of the Judiciary	335
Summary and Review	335
Separation of Powers: A Critical Evaluation	337
Separation of Powers at the Crossroads	341
 C. THE RULE OF LAW	 347
The Basic Principles of the American Constitution	351
<i>Suggested Reading</i>	354
APPENDIX A. The Federalist No. 10	357
APPENDIX B. The Federalist No. 45	365
APPENDIX C. The Federalist No. 47	371
 PART 5. <i>Defending the Constitution: The Struggle over Ratification and the Bill of Rights</i>	 381
 A. THE ANTI-FEDERALIST PERSUASION	 385
The Constitution Establishes a Consolidated Empire	385
The Constitution Establishes an Aristocracy	386
The Constitution Confers Too Much Power	389
An Imperial Congress	389
An Elected Monarch	390
An Omnipotent Judiciary	391
 B. THE FEDERALIST RESPONSE	 392
The Constitution Limits and Distributes Power	393
Congress Is Not an Oligarchy	398
The President Is Not a King	400
The Judiciary Is the Least Dangerous Branch	400
Whether a Bill of Rights Was Necessary	401
The Clash of Values	403

C. THE BILL OF RIGHTS	409
The First Amendment: Religious Freedom, and Freedom to Speak, Print, Assemble, and Petition	415
The Second Amendment: The Right to Bear Arms	419
The Third Amendment: Quartering Troops	419
The Fourth Amendment: Search and Seizure	420
The Fifth Amendment: Rights of Persons	420
The Sixth Amendment: Rights of the Accused	421
The Seventh Amendment: Trial by Jury in Civil Cases	422
The Eighth Amendment: Bail and Cruel and Unusual Punishments	422
The Ninth Amendment: Rights Retained by the People	423
The Tenth Amendment: Rights Retained by the States	425
Rights Versus Duties	426
<i>Suggested Reading</i>	427
APPENDIX A. The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents	429
APPENDIX B. Northwest Ordinance (1787)	454
 PART 6. <i>Interpreting and Preserving the Constitution</i>	 463
Principles of Statutory Construction	465
The Doctrine of Judicial Review	476
The Supreme Court as Final Interpreter	486
The States as Final Interpreters	490
Strict Versus Loose Construction	495
The Independence of the Judiciary	500
A. ORIGINS OF JUDICIAL INDEPENDENCE	501

B. THE JUDICIAL POWER	508
C. JURISDICTION	511
<i>Suggested Reading</i>	516
APPENDIX A. Marbury v. Madison	519
APPENDIX B. Martin v. Hunter's Lessee	526
APPENDIX C. Washington's Farewell Address (1796)	533
 PART 7. <i>Changing the Constitution — Together with an Explanation of the Amendments Added Since 1791</i>	 551
Our Living Constitution	552
Our Changing Constitution	556
Amending the Constitution	560
The Limits of the Amending Power	563
The Amended Constitution	566
A. AMENDMENT XI (1798)	566
B. AMENDMENT XII (1804)	567
C. AMENDMENT XIII (1865)	569
D. AMENDMENT XIV (1868)	570
E. AMENDMENT XV (1870)	575
F. AMENDMENT XVI (1913)	577
G. AMENDMENT XVII (1913)	578
H. AMENDMENT XVIII (1919)	582
I. AMENDMENT XIX (1920)	583
J. AMENDMENT XX (1933)	583
K. AMENDMENT XXI (1933)	585
L. AMENDMENT XXII (1951)	585
M. AMENDMENT XXIII (1961)	586
N. AMENDMENT XXIV (1964)	587
O. AMENDMENT XXV (1967)	587
P. AMENDMENT XXVI (1971)	589
Q. AMENDMENT XXVII (1992)	590
Conclusion	594
<i>Suggested Reading</i>	600
<i>Index</i>	603

Preface

Liberty, Order, and Justice represents a new and unique approach to the study of American government. It is based on the premise that in order to understand the dynamics of the American political system, the inquiring reader must first become familiar with the constitutional framework that shapes and controls the political process. In other words, the student of politics cannot fully understand what we call “the game of politics” unless that student first knows the rules of the game. This book, then, deals with the enduring principles and characteristics of the American political system, which serve as a guide for studying and understanding both the development of the American regime and its current operations.

The structure and behavior of our political parties provide a case in point. “Probably the most striking single characteristic of the Democratic and Republican parties,” observed Austin Ranney and Willmoore Kendall in their classic work on *Democracy and the American Party System* (1956), “is their decentralization.” This is what renders the American party system unique and distinguishes it from most parliamentary party organizations in the Western democracies. Except when they come together in a national convention every four years to nominate candidates for the offices of President and Vice President, neither the Democrat nor the Republican Party is in any meaningful way a national party. Each is really a coalition of State parties, and each State party is actually a confederation of semi-autonomous county and municipal parties, all having their own leadership, workers, and supporters. National conventions have little or no power, formal or actual, over State and local parties; and the numerous committees, caucuses, and officers that provide the formal structure of the Democrat and Republican parties are not, either in theory or practice, organized in a hierarchical or pyramidal arrangement with centripetal power flowing downward. No president or presidential candidate or central authority of any kind dictates policy or determines the makeup of the party’s leadership in the American political system.

It is little wonder, therefore, that both of our major political parties are also factionalized, often lacking any unity of thought or direction. They both have their liberal and conservative wings, and to the consternation of many seem unable much of the time to agree among themselves on policies or candidates, or to present a united front to the electorate. Ideological purity is surely not one of the chief attributes of American political parties. The same, of course, cannot be said of the highly disciplined parties of the parliamentary democracies, whose elected officials invariably follow “the party line” and rarely cross over to vote with the opposition.

What explains these peculiarities of the American party system? The answer, in large part, lies in the Constitution—a constitution that does not even mention political parties or acknowledge their existence. Yet it is the case that our political parties often look and behave as they do because of our constitutional system. More specifically, the peculiar structural and behavioral pattern of party politics in the United States may be traced directly to the ubiquitous principle of limited government that shapes, permeates, and protects every article of the Constitution. It was fear of power, especially concentrated power, that motivated the Framers to draft a constitution that limits power by fragmenting, dispersing, and counterbalancing it. One of the first foreign observers to understand all of this was James Bryce, a Scottish diplomat and scholar, who noted in his famous commentaries, *The American Commonwealth* (1888), that “the want of concentration of power in the legal government is reflected in the structure of the party system.”

At a more fundamental level, the Constitution reflects the intent of the Framers to make it difficult, if not impossible, for any single interest group, including one representing a popular majority, to gain absolute power over the whole nation and impose its will at the expense of other interests or groups. The political regime established by the Constitution is therefore decentralized, and nowhere in the system is there a single locus of concentrated power. Hence it is the federal structure of our Constitution, which divides power between the national and State governments, that best explains why each party is a loose confederation of State and local parties rather than a unitary organization of one central party. Federalism produces a highly decentralized political system encompass-

ing a broad range of sectional, cultural, and economic differences. Our political parties, built upon a federal structure, are a reflection of that diversity.

A knowledge of the federal features of the Constitution, in other words, and an appreciation of how the federal principle influences the political process, give us greater insight into the programs and policies of our parties, while at the same time providing a standard by which to judge their compatibility with the constitutional design. Simply put, the enterprising student who wishes to acquire a solid understanding of the American party system is sure to fall woefully short of expectation if the student disregards or ignores the constitutional environment in which the parties function.

Liberty, Order, and Justice, it may thus be seen, attempts to prepare the reader for the study of American politics by focusing attention on the constitutional superstructure. In this regard, it is quite unlike other introductory texts. The book introduces not only the general design of the system but, more important, seeks to explain how and why it functions as it does. It deals with timeless principles that have shaped our political institutions and procedures—and will continue to do so as long as we live under the Constitution of 1787. The book does not attempt to cover the entire field of American political activity. There is little or no discussion of politics, parties, and pressure groups, current civil rights disputes, foreign or domestic policy, or State and local government. Nor is a considerable amount of attention given to the organization of the legislative, executive, and judicial branches and their special powers and procedures. The reader will not find in these pages, for example, the steps of the law-making process showing how a bill becomes a law. All of this is important to know in due course, but it is beyond the scope and purpose of this book.

The book's purpose, rather, is to deepen our understanding and appreciation of the basic principles of the American political system. In particular, this book seeks to explain how and why the Constitution limits power, particularly through the uniquely American doctrines of federalism and separation of powers. The reader will also learn here the meaning and importance of constitutionalism and rule of law, and the general principles of constitutional interpretation that guide, or should guide,

governmental officials when they examine and apply the law in the light of the Constitution.

Moreover, this book emphasizes the importance of knowing the origin and development of these basic principles. The American Constitution is original in many respects, but it is also a product of Western man's endless quest for liberty, order, and justice. The founders of the American republic did not suddenly invent the American Constitution overnight. Learning from the mistakes of the past, they revised and applied constitutional concepts deeply rooted in America's colonial past, the history of Great Britain, and the chronicles of the ancient world. By understanding the mistakes of the past, of course, we improve our chances of not repeating them in the future. There is no doubt that many of the changes that have been proposed over the years to amend or "reform" the American political system would never have been seriously considered had the reformers been aware that their "improvement" undermined the genius of the Constitution or had been tried before and had proved to be a failure. The inclusion in this book of numerous legal and historical documents will, it is hoped, help the reader comprehend the evolution of the American republic and the political experiences of our ancestors that ultimately produced the Constitution.

Above all, *Liberty, Order, and Justice*, as the subtitle suggests, stresses the value and importance of *constitutional* government. It rests on the age-old assumption that in order to achieve liberty, order, and justice, we must first establish limited constitutional government. The Framers of our Constitution understood well enough that political power can be as destructive as well as a creative force, and that our safety and welfare depend upon our ability to check and balance power. Too much political power can be as dangerous as too little, no matter how well intentioned the claim to power may be. Good government is not feeble government, but neither is it unlimited government. These distinctions are sometimes lost or forgotten by those who put their favorite political programs and policies ahead of the Constitution, and act as though the end justifies the means. These lessons and more, it is hoped, greet the reader who ventures forth to read this primer.

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Liberty, Order, and Justice

PART 1

The Constitution's Deep Roots

❧ POINTS TO REMEMBER ❧

1. The American Constitution is an *evolutionary* rather than a revolutionary document. Though written in a revolutionary age, it embraces ideas and principles developed through trial and error that grew out of our colonial experience. Constitutional and legal development in England and the political history of the Greek and Roman republics also influenced the thinking of the Framers.

2. Three important political concepts drawn by the Americans from the Roman experience were the doctrines of republicanism, political virtue, and checks and balances. But it is the English Constitution, including the English charters of liberty and the English legal system, that had the greatest impact on American constitutional development. Representative government, a tradition of well-established civil liberties, and the heritage of the common law are three important political and legal institutions of England that Americans adopted in framing their own constitutions. Certain features of the English Constitution were rejected by the Americans, however, including the monarchy and the principle of legislative supremacy. The American Constitution therefore represents a blending of English and American constitutional traditions.

3. The Framers of the American Constitution had learned from ancient and from British history that republics, like other forms of government, are vulnerable to corruption, and that legislative bodies as well as courts of law can be just as much a threat to liberty as all-powerful monarchs. For this reason they did not place all their trust in any one branch of government, and they established checks on the powers of each.

The Meaning of Constitutional Government

TWO CENTURIES AGO, fifty-five men met at Philadelphia to draw up a constitution for the United States of America. The thirteen States that once had been British colonies urgently needed a more reliable general government, a better common defense against foreign powers, a sounder currency, and other advantages that might be gained through establishing “a more perfect union” founded on a solemn agreement, or fundamental law, called a constitution.

Today, the fundamental law of the United States of America still is that Constitution of 1787, a written document which is respected and obeyed almost as if it were a living thing. This book examines that Constitution, inquiring how it was developed, what its provisions mean, why it has functioned so well, and how it affects everybody’s life in America today.

What do we mean by this word *constitution*? As a term of politics, *constitution* signifies a system of fundamental principles—a body of basic laws—for governing a state or country. A constitution is *a design for a permanent political order*.

A constitution does its work through what is known as the rule of law: that is, people respect and obey laws, rather than follow their own whims or yield to the force of somebody else. Every country develops a constitution of some sort, because without a regular pattern of basic law, a people could not live together in peace. Lacking a tolerable constitution, they never would know personal safety, or protection of their property, or any reasonable freedom. Even savage tribes may be said to be governed by “constitutional” customs of a simple nature.

The most widely admired of all constitutions is the United States Constitution. It was written in 1787 and took effect in 1789. It was, and is, rooted in the experience and the thought of many generations of people. This is a major reason why the American Constitution still flourishes in our day. Like some great tree, the Constitution of the United States is anchored and nurtured by roots that run deep into the soil of human experience. Those constitutional roots are the political institutions, the laws, the social customs, and the political and moral beliefs of earlier ages and other lands.

Nowadays we tend to think of a constitution as a written document,