

“Constitutionalism”: The White Man’s Ghost Dance

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1995

Dale Pond, Howard Fisher, Richard Knutson, and the North American Freedom Council. *The History of American Constitutional or Common Law with Commentary Concerning Equity and Merchant Law*. Santa Fe, New Mexico: The Message Company, 1995.

Glendower: I can call spirits from the vasty deep.

Hotspur: Why, so can I, or so can any man. But will they come when you do call for them?

— *Henry IV, Part I* (III, i, 53)

Once upon a time, there was a fair land called England.

All the English were free men and most of them were serfs. All the English were self-governing in counties run by sheriffs appointed by kings, the descendants of foreign conquerors. England alone enjoyed the Common Law, handed down from Sinai by Moses, and dating from 1215 A.D. Secured by the Common Law, all men’s property was inviolable, and all of it belonged to the king. The Common Law, also known as Natural Law and God’s Law, only restricted conduct which harmed the person or property of another, such as swearing, fornicating, possessing weapons in the royal forests, converting to Judaism, or dreaming that the king had died. There was complete religious freedom, *i.e.*, Roman Catholicism was the state church, attendance at services was compulsory, and heretics were executed. As perfect, as unchangeable as the Common Law always was, it got even better when free and prosperous Englishmen fleeing persecution and poverty brought it to America. They repaired there, as Garrison Keilor quipped, to enjoy less freedom than they had in England.

As fantasy, this Common Law England would never find a publisher. It’s not nearly as believable as Narnia or Never-Never Land. You don’t even have to know any real law or history to notice that it’s self-contradictory nonsense. But as myth, it appeals to increasingly frustrated conservatives, libertarians, fundamentalists, and conspiracy theorists — “Constitutionalists” — with an urgent transrational need to believe that the world was once the way they want it to be now.

The deeper allure of Constitutionalism is that it purports to be, not only history which explains, but technique which controls. Resentful and suspicious, Constitutionalists are certain that conniving judges, legislators and lawyers switched their own false law for the *real* law when the people weren't looking. But the real law, the Common Law, lives still, for it is deathless; it is God, Nature, and Reason all rolled up in one. Although Constitutionalists loathe lawyers, they outdo them in their reverence for Law and their solemn obeisance before what Justice Oliver Wendell Holmes mocked as Law regarded as a "brooding omnipresence in the sky."

Constitutionalists look upon law as the word-magic of lawyer-necromancers who draw their wizardly powers from grimoires, from books of magic spells they have selfishly withheld from the people. Constitutionalists have extracted from these books — from judicial opinions, from the Constitution, from legal dictionaries, from the Bible, from what-have-you — white magic with which to confound the dark powers of legislation, equity, and common sense. Never mind what words like "Sovereign Citizen" or "Lawful Money" mean — what does "abacadabra" mean? — it's what they *do* that counts. Unfortunately, Constitutionalist words don't do anything but lose court cases and invite sanctions. Constitutionalism is the white man's version of the Ghost Dance. But believing you are invulnerable to bullets puts you in more, not less, danger of being shot.

Uttering out of the wreckage are called Constitutionalism are certain more elevated piles, such as "Common Law" and "Magna Carta." These are, if in no better repair than the rest of the ruins, at least of respectable antiquity. Back when little was known of English legal history — when history as a discipline scarcely existed — ingenious jurists like Selden, Coke and Hale manipulated these hoary myths to win some limited victories over royal absolutism. Even if Constitutionalists were juridical Jack Kennedys and not, as they are, Dan Quayles, the conditions for getting away with pious lying about these parts of the past no longer obtain. Good history does not necessarily overthrow legal orthodoxy, but by now bad history never does. So unprincipled are judges and lawyers that they will even tell the truth if it serves their purposes. Consider, for instance, the unscrupulous ways in which they might point out what the Magna Carta actually says and what the Common Law actually is.

Constitutionalists revere the Magna Carta, but if they were to read it, they'd be baffled. Expecting to find, as libertarian Constitutionalist Ken Krawchuk says, "many of the rights we still enjoy today," they'd find themselves adrift in an alien, feudal world of "aids," "wardship," "scutage," "knight service," "reliefs," "wainage," "castle guard," "socage," "burgage," and other arcana even medievalists toil to comprehend.

Magna Carta — extorted from King John by a few dozen rebellious barons in 1215, a dead letter within three months, voided by England's feudal overlord, the Pope — did almost nothing for almost all of England's two million people. It confirmed or created privileges for churchmen and barons, occasionally for knights, and in only two instances for "free men." Most Englishmen were villeins, not freemen. And as historian Sidney Painter has written, "Whenever provisions of the Charter seem to benefit the ordinary man, a close examination will show that it is his lord's pocketbook that is the real cause of concern." It was only a question of who would do the fleecing.

The Great Charter has nothing to say about free speech, unreasonable searches and seizures, self-incrimination, the right to bear arms, free exercise of religion, the obligation of contracts, *ex post facto* laws, bills of attainder, rights of petition and assembly, excessive bail, the right to counsel, cruel and unusual punishments, indictment by grand jury, etc., etc. Far from forbidding even involuntary servitude, it presupposes it (chs. 17, 20 and 23). Far from forbidding the establishment

of religion, it confirms it in its very first provision (ch. 1).

The real Magna Carta was not even remotely libertarian. Modern libertarian notions such as self-ownership, *laissez faire*, greatest equal liberty, the nightwatchman (minimal) state, even private property itself would have bewildered the signatories of Magna Carta. They understood liberties, not liberty; privileges, not property. The free market was a concept of the far future: “markets” were times and places where the government authorized buying and selling. Property rights were derivative and relative. Except for the king, nobody owned real property “allodially,” absolutely. Rather, title (ownership) was relative to other interests, and in theory always subordinate to the paramount claims of the king. Constitutionlists disparage legislation, but that’s all Magna Carta ever was, amendable and repealable like any other statute. By 1992, only three of its 63 provisions were still on the books.

In the guise of declaring custom, Magna Carta changed the law, violating what Constitutionlists consider the Common Law. They cherish the county, for instance, to which the sheriff was answerable (they suppose) — but the Charter forbid sheriffs and other local officials from hearing the pleas of the Crown (ch. 24). It is as if the President of the United States issued an executive order that felonies should be tried only in federal courts!

As for this Common Law (cue the angelic chorus here), just what *is* it anyway? The term has at least a half dozen meanings. It might refer to English law as distinguished from the civil-law systems of Europe. It might be “law” as distinguished from “equity,” *i.e.*, the law of the royal courts at Westminster distinguished from certain doctrines and remedies administered by a different royal appointee, the Chancellor. It might refer to judge-made rather than statutory law. Perhaps most often it refers to the law “common” to all Englishmen, the national law as opposed to the varied local laws enforced by manor and hundred courts, borough courts, and courts leet. Ironically, if there was ever a trace of truth to the Constitutionalist dogma that the people in juries “judged the facts and the law,” it was in the local courts outside the Common Law. And it was the law of these courts with which ordinary Englishmen were most familiar and which, as Julius Goebel argued, most heavily influenced colonial American law.

As if “Common Law” were not a phrase already overburdened with meanings, Constitutionlists load on even more. They equate Common Law with Natural Law, with Natural Reason, with Christianity, and with common sense. Ken Krawchuk’s example is common-law marriage: “If a guy and girl live together for seven years, they’re married; it’s the common law. It’s plain common sense.” It’s neither. Mere cohabitation for however long a period never married anyone in England or America. There was no such thing as nonceremonial “common law” marriage in England at all. In America, where the practice developed, such a marriage required — not just shacking up — but also an agreement to marry and a public reputation for being married and/or the couple holding itself out as being married. The seven-year proviso is imaginary, and it isn’t common sense either. Why not six years and eleven months? Why not five years? A lot of legally solemnized marriages don’t last that long these days. Since when was common sense so dogmatic?

Constitutionlists contend that the Common Law is based on (litigation over) real property — land. As their generalizations go, this one is not too far wrong, but it isn’t easy to square it with a conception of the Common Law as universal Reason. Under Common Law, real property descended to the oldest male heir — except in Kent, where partible inheritance among male issue prevailed, with the proviso that the *youngest* son inherited the household (“gavelkind”). Nowhere did land descend to any female if there lived a male heir, however remote the relationship. How

is it that primogeniture is common sense everywhere in England except Kent?

Or consider the Common Law doctrine that in marriage, husband and wife become legally one person — and that person is the husband. If this is common sense, so is the Holy Trinity, a kindred dogma. It implies that wives have no property rights, which was very close to their legal status in England and colonial America. But libertarian it is not.

Krawchuk has an illustrious predecessor: England's first Stuart king, the foreign-born James I. In 1607, the king announced that he would join his judges on the bench at Westminster. Common Law, he had heard, was "Natural Reason" — as Krawchuk would say, common sense — and he had at least as much Natural Reason as anybody! Gently but firmly, Sir Edward Coke corrected His Majesty. It was true that the Common Law was based on Natural Reason, but it was not identical with it. To expound "the Artificial Reason of the Law" required experts: judges.

There was never any such Manichean (or Tolkienesque) war of good with evil — of the Common Law against equity and the conciliar courts — as the Constitutionalists believe. Over the centuries there was jurisdictional jostling, ideological antagonism between jurists trained in different legal traditions, and bitter political conflict over the scope of the royal prerogative and thus over the power of the prerogative courts. But these were not battles in a holy war. Some of it was nothing more than competition for business. Some of it settled down into a rough division of functions. Litigants didn't take sides, they exploited the confusion. Thus a plaintiff might bring an action in equity to take advantage of its "English bill" procedure providing for pretrial discovery of evidence — and then introduce that evidence in a common-law action where the court could not have secured that evidence itself. The vast majority of Englishmen had nothing to do with these elite machinations.

It's absurd to say, as Constitutionalists do, that equity was a summary form of procedure in which litigants had no rights. On the contrary, from at least as early as the Elizabethan period, equity was condemned for being too cumbersome and slow. For instance, instead of receiving oral testimony, depositions were taken, reduced to writing, and submitted to the court. Enormous piles of paper accumulated. Anybody who thinks equity proceeded summarily should reread *Bleak House*.

If Constitutionalists are correct that courts of equity are tyrannical, obviously colonial Americans would never have set them up, and revolutionary Americans would never have countenanced them in the Constitution. But in fact, by the eighteenth century there were home-grown equity courts in New York, South Carolina and other colonies. Elsewhere in the colonies, "Common Law" courts assumed equity jurisdiction, as they've done to this day. The Constitution which the Constitutionalists would rather revere than read expressly assigns equity jurisdiction to the federal judiciary (art. III, sec. 02(1); Am. XI).

Which brings us up to the Constitutionalist conviction that the Constitution is part of the inherited and immemorial Common Law. This poses obvious logical difficulties. If equity is not Common Law, but the Constitution includes equity, how can the Constitution be the same thing as Common Law? If Americans, once rid of British tyranny, enjoyed the Common Law in its plenitude, why did they take the trouble to adopt the Constitution? And then the Bill of Rights? How is it possible to improve upon perfection — over and over again?

In the fairy tale, the king had twelve beautiful daughters, each more lovely than all the rest. Constitutionalism has the Common Law, the Magna Carta and the Constitution, each replete with every excellence of all the others, and then some. The Constitution of 1787 does not even mention the Common Law (although it mentions Equity) — perhaps out of modesty, a virtue the

Common Law necessarily possesses, since it possesses them all. And then some.

In Egyptian mythology, the god Osiris was slain by his brother Set, and his dismembered pieces were scattered far and wide. But these pieces could no more die than could immortal Osiris, although so long as they were dispersed and hidden, they were severally impotent. But once his limbs were retrieved and reassembled, mighty Osiris rose from the dead and vanquished the forces of darkness. That's how Constitutionalists regard the Common Law. Now that their treasure-hunt has turned up all the missing pieces, all Americans have to do, according to the Oklahoma Freedom Council, is get it all together and "the country would be free overnight." And they all lived happily after.

The tragedy of Constitutionalism is that it hopes to evoke by its magic an idealized, imagined early version of the very form of society — our own — which was the first to banish magic from the world. With growing commerce came calculation, quantification, and the distinction of "is" from "ought." Myth is timeless, but when it comes to the performance of contracts, "time is of the essence." Money is merely a generally accepted medium of exchange, not, as Constitutionalists suppose, some sacred "Substance" — whether it be gold, silver, paper or tobacco is a matter of convenience.

And law is any application for the official use of coercion that succeeds. The proprietor or trader — or even the lawyer — is indifferent to whether his invocation of the law against a trespasser, a thief, a business rival, or a communist revolutionary owes its effectiveness to immemorial custom, legislation, the Ten Commandments, or a well-placed bribe. Myth and magic are merely tactics to try on those who believe in them. But judges don't believe in Constitutionalism and neither do very many other people.

Nor ever will. Constitutionalism combines the worst features of superstition and reality without the attractions of either. Like real law, it's dull as dirt; unlike real law, it doesn't work. Like superstition, it's silly, self-contradictory, obscurantist and ineffectual; but it entirely lacks the poetry and pageantry which often enliven myth and faith. Very few people espouse belief-systems as complicated and crackpot as Constitutionalism without being brought up in them, which has hitherto been the fate of only an unfortunate few — very unfortunate but happily very few.

But the very absurdity of so-called Constitutionalism should be more alarming than amusing to lawyers. That the ideology has any acceptance at all — and it does have some — attests to deep and deeply conflicted popular ideas of law and lawyers. It's not news that many people look upon law as a mysterious, malignant power manipulated by an unholy priesthood of judges and lawyers. What is perhaps more newsworthy, but at least as important, is that many people — most of them the same people — look upon law as the foundation of social order and a fount of justice. Constitutionalists are people who experience both inclinations in exaggerated forms and simultaneously. Not surprisingly they come across as wound up to the brink of hysteria, but as caricatures, they exaggerate popular attitudes which are far more widespread than the cult of Constitutionalism itself. By perennially promising more from law than it has ever been able to deliver, jurists have helped generate the expectations whose disappointment has set the Constitutionalists on their paranoid path. And as historians of the "revolution of expectations" and sociologists of the "J-curve" have argued, this is the mentality which gives rise to revolutions.

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Retrieved on 1 January 2010 from www.spunk.org
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