

Winter 1998

"Constitutionalism" : The White Man's Ghost Dance, 31 J. Marshall L. Rev. 513 (1998)

Robert C. Black

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), [European Law Commons](#), [Legal History Commons](#), and the [Legislation Commons](#)

Recommended Citation

Robert C. Black, "Constitutionalism" : The White Man's Ghost Dance, 31 J. Marshall L. Rev. 513 (1997)

<https://repository.law.uic.edu/lawreview/vol31/iss2/7>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

BOOK REVIEW

“CONSTITUTIONALISM”: THE WHITE MAN’S GHOST DANCE

ROBERT C. BLACK*

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, 1995.¹

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?²

Once upon a time, there was a fair land called England. All the English were free men and most of them were serfs. Sheriffs, appointed by kings, the descendants of foreign conquerors, ran the self-governed English counties.³ England alone enjoyed the Common Law, handed down from Sinai by Moses, and dating from 1215 A.D.⁴

Secured by the Common Law, all men’s property was inviolable, and all of it belonged to the king.⁵ The Common Law, also known as Natural Law or God’s Law, only restricted conduct which

* B.A., University of Michigan; J.D., Georgetown University Law Center; M.A. (Jurisprudence and Social Policy), University of California at Berkeley (Boalt Hall) School of Law; M.A. (Criminal Justice), State University of New York (Albany); member, State Bar of California.

1. *The History of American Constitutional or Common Law with a Commentary Concerning Equity and Merchant Law* by Dale Pond, Howard Fisher, Richard Knutson, and the North American Freedom Council is a guide on how to use the Common Law as a tool to restore the democratic process in America. This book gives a detailed history of the type of country the United States was in its infancy, its eventual deterioration, and how “The People” can once again gain control of the United States bureaucratic system.

2. WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE FOURTH* act 3, sc. 1 (Louis B. Wright & Virginia A. LaMar eds., 1960).

3. R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 13 (1973).

4. *Id.*

5. THOMAS F. BERGIN & PAUL G. HASKELL, *PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS* 3 (2d ed. 1984).

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: Roman Catholicism was the state church, attendance at services was compulsory, and heretics were executed. The Common Law was always perfect and unchangeable, and it became even better when free and prosperous Englishmen fleeing persecution and poverty brought it to America. They repaired there, as Garrison Keilor purportedly quipped, to enjoy less freedom than they had in England.

As fantasy, this Common Law England would never find a publisher. The Common Law is not nearly as believable as Narnia or Never-Never Land. One does not even have to know any real law or history to notice that Common Law is self-contradictory nonsense. But as myth, the Common Law appeals to increasingly frustrated conservatives, libertarians, fundamentalists and conspiracy theorists who call themselves "Constitutionalists." These Constitutionalists have an urgent trans-rational 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 a history that explains, but also 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 were not looking. But the real law, the Common Law, still lives because it is deathless. The Common Law is God, Nature and Reason rolled into one. Although Constitutionalists loathe lawyers, they outdo them in their reverence for law and their solemn obeisance. Justice Oliver Wendell Holmes once mocked a certain conception of Common Law as being a "[b]rooding omnipresence in the sky"⁶

Constitutionalists look upon law as the word-magic of lawyer-necromancers who draw their wizardly powers from grimoires, from books of magic spells that they have selfishly withheld from the people. Constitutionalists have extracted white magic to confound the dark powers of legislation, equity and common sense from law books, judicial opinions, the Constitution, legal dictionaries and the Bible. Never mind the meaning of words such as "Sovereign Citizen" or "Lawful Money." What does "abracadabra" mean? It is what Constitutionalists "do" that counts. Unfortunately, Constitutionalist words do not achieve anything but lose court cases and invite sanctions. Constitutionalism is the white man's version of the "Ghost Dance." But believing you are invul-

6. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

7. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 67 (Anne H. Soukhanov et al. eds., 1994). "A word once held to possess magical powers to ward off disease or disaster." *Id.*

nerable to bullets puts one in more danger of being shot, not less.

Jutting out of the wreckage 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. During the time 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 apply. Good history does not always overthrow legal orthodoxy, but at the present, bad history never does.⁸ Judges and lawyers are so unprincipled, 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 would be baffled. Expecting to find, as libertarian Constitutionalist Ken Krawchuk says, "many of the rights we still enjoy today,"⁹ they would 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.

In 1215, a few dozen rebellious barons extorted the Magna Carta from King John.¹⁰ The Magna Carta became a dead letter within three months because England's feudal overlord, the Pope, voided it. It did almost nothing for most 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 villains, not freemen. Historian Sidney Painter once wrote that whenever provisions of the Great Charter may have benefited the ordinary man, the real concern after a closer examination, was his lord's pocketbook.¹¹ It was only a question of who would do the fleecing.

The Magna Carta, also known as the Great Charter, says, for example, nothing about free speech, unreasonable searches and seizures, self-incrimination, the right to bear arms, free exercise of re-

8. For a discussion of a celebrated recent resort to history in a constitutional case, see *Roundtable: Historians and the Webster Case*, 12 PUB. HISTORIAN 9 (1990).

9. Ken V. Krawchuk, *Common Law Courts in Pennsylvania*, 34 R.S.V.P. 22 (1995-1996).

10. SIDNEY PAINTER & BRIAN TIERNEY, *WESTERN EUROPE IN THE MIDDLE AGES* 317 (Alfred A. Knopf ed., 1970).

11. Sidney Painter, *Magna Carta, in FEUDALISM AND LIBERTY: ARTICLES AND ADDRESSES OF SIDNEY PAINTER* 248 (Fred A. Cazal, Jr., ed., 1961).

ligion, 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, or indictment by a grand jury.¹² Far from forbidding, the Great Charter even presupposes involuntary servitude.¹³ Even more startling, the Great Charter establishes and confirms religion in its very first provision.¹⁴

The real Magna Carta was not even remotely libertarian. Modern libertarian notions such as self-ownership, laissez faire, greatest equal liberty, the night watchman (minimal) state, and 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. The government authorized buying and selling at times and places referred to as "markets." Property rights were derivative and relative. Except for the king, nobody owned real property "allodially" or absolutely.¹⁵ Rather, title (ownership) was relative to other interests and in theory always subordinate to the paramount claims of the king.¹⁶ Constitutionalists disparage legislation, even though Magna Carta was nothing if not legislation. It was amendable and repealable like any other statute. By 1992, only three of its sixty-three provisions were still in effect.¹⁷

In the guise of declaring custom, the Magna Carta changed England's law, violating what Constitutionalists consider the Common Law. Constitutionalists cherish the county, to which the sheriff was answerable (they suppose).¹⁸ Rather, the Charter forbade sheriffs and other local officials from hearing the pleas of the Crown.¹⁹ This is similar to the President of the United States issuing an executive order for felonies to 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." That is, the law of the royal courts at Westminster distinguished from certain doctrines and remedies administered by a different royal appointee, the Chancellor. The Common Law might refer to judge-made rather than statutory law. Perhaps most often it refers to the law "common" to all Englishmen, which is the national law, as opposed to the varied local laws enforced by manor and hundred courts, borough courts, and courts of leet. Ironically, if there was

12. MAGNA CARTA chs. 1-63.

13. *Id.* at chs. 16, 20, 23.

14. *Id.* at ch. 1.

15. BERGIN & HASKELL, *supra* note 5, at 3.

16. *Id.* at 3, 5-6.

17. PAINTER & TIERNEY, *supra* note 9, at 326.

18. VAN CAENEGEM, *supra* note 3, at 13.

19. MAGNA CARTA ch. 21.

ever a trace of truth to the Constitutionalist dogma that jury members "judged the facts and the law," it was in the local courts outside the Common Law. It was the law of these local courts with which ordinary Englishmen were most familiar and which, as Julius Goebel argued, most heavily influenced colonial American law.²⁰

As if "Common Law" were not a phrase already overburdened with meanings, Constitutionlists give it even more meanings. They equate Common Law with Natural Law, Natural Reason, Christianity, and common sense. Ken Krawchuk gives the example of common-law marriage: If a guy and girl live together for seven years, they are married, because it is the common law.²¹ Krawchuk asserts that the concept of common-law marriage is plain common sense.²² It is neither. Mere cohabitation for however long a period never married anyone in England or America. There was no such thing as non-ceremonial 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. Additionally, the couple was required to have a reputation for being married and/or holding itself out as being married. The seven-year proviso is imaginary, and it is not common sense either. Why not six years and eleven months? Why not five years? These days, many legally solemnized marriages do not even last that long. Since when was common sense so dogmatic?

Constitutionalists contend that the Common Law is based on (litigation over) real property, known as land.²³ As for their generalizations, this one is not too far wrong, but it is not easy to square it with the concept of the Common Law as universal reason. Under Common Law, real property descended to the oldest male heir except in Kent.²⁴ In Kent, partible inheritance among male issue prevailed, with the proviso that the youngest son inherited the household, called "gavelkind."²⁵ Nowhere did land descend to any female if a male heir was alive, however remote the relationship. How is it that primogeniture is common sense everywhere in England except Kent?

Or consider the Common Law doctrine of marriage where husband and wife legally unite into one person with that person being the husband. If this is common sense, so is the Holy Trinity, a kindred dogma. The Common Law implies that wives have no property

20. Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth Century England*, 31 COLUM. L. REV. 416 (1931).

21. Ken V. Krawchuk, *Playing with the System and Winning*, 32 R.S.V.P. 9 (1995-1996).

22. *Id.*

23. DALE POND ET AL., *THE HISTORY OF AMERICAN CONSTITUTIONAL OR COMMON LAW WITH COMMENTARY CONCERNING EQUITY AND MERCHANT LAW* 3 (Dale Pond ed., 1995).

24. ALFRED W.B. SIMPSON, *A HISTORY OF THE LAND LAW* 21 (2d ed. 1986).

25. *Id.*

rights, which was very close to their legal status in England and colonial America.²⁶ The Common Law is not libertarian.

Krawchuk's illustrious predecessor is England's first Stuart king, the foreign-born James I.²⁷ In 1607, the king announced that he would join his judges on the bench at Westminster.²⁸ Common Law, he had heard, was "Natural Reason" just as Krawchuk would say, "common sense." James I 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 to it. To expound "the Artificial Reason of the Law" required experts, being judges.

There was never any such Manichean²⁹ (or Tolkienesque) war of good against evil or of the Common Law against equity and the conciliar courts as the Constitutionals believe. Over the centuries, there was jurisdictional jostling, ideological antagonism between jurists trained in different legal traditions, bitter political conflict over the scope of the royal prerogative, and thus discord over the power of the prerogative courts. This jostling was not a battle in a holy war. Some of it was nothing more than competition for business. Some battles settled into a rough division of functions. Litigants did not choose sides, they exploited the confusion. Thus, a plaintiff might bring an action in equity or another conciliar court to take advantage of its "English bill" procedure providing for pretrial discovery of evidence. Then, the plaintiff would introduce that evidence in a common-law action where the court could not have secured the evidence itself. The vast majority of Englishmen had nothing to do with these elite machinations.

Constitutionals absurdly proclaim 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.³⁰ For instance, instead of receiving oral testimony, depositions were taken, reduced to writing, and submitted to the court.³¹ Enormous piles of paper accumulated. Anybody who thinks equity proceeded summarily should reread *Bleak House*.³²

26. G.M. TREVELYN, *ENGLISH SOCIAL HISTORY, A SURVEY OF SIX CENTURIES CHAUCER TO QUEEN VICTORIA* 488 n.1 (1972).

27. MAURICE ASHLEY, *GREAT BRITAIN TO 1688* 309 (1961).

28. *Id.* at 312-13.

29. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 723 (Anne H. Soukhanov et al eds., 1994). Manichean relates to "[t]he syncretic dualistic religious philosophy taught by the Persian prophet Manes about the 3rd cent. A.D., combining elements of Zoroastrian, Christian, and Gnostic thought." *Id.*

30. PETER CHARLES HOFFER, *THE LAW'S CONSCIENCE EQUITABLE CONSTITUTIONALISM IN AMERICA* 27-28 (1990).

31. *Id.* at 13-14.

32. CHARLES DICKENS, *BLEAK HOUSE* (Alfred A. Knopf ed., 1991) (1853).

If the Constitutionalists are correct that courts of equity are tyrannical, obviously colonial Americans would never have created these courts, and revolutionary Americans would never have countenanced them in the Constitution. But in fact, by the eighteenth century there were homegrown equity courts in New York, South Carolina and other colonies.³³ Elsewhere in the colonies, common law courts assumed equity jurisdiction, as they have done to this day. The Constitution, which the Constitutionalists would rather revere than read, expressly assigns equity jurisdiction to the federal judiciary.³⁴

The Constitutionalist's main belief is that the United States 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? Then, why did they adopt the Bill of Rights? How is it possible to repeatedly improve upon perfection?

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 exceeding the other in excellence. Perhaps out of modesty, the Constitution of 1787 does not even mention the Common Law, although it mentions Equity.³⁵ Common Law possesses all virtues, especially modesty.

In Egyptian mythology, Set murdered his brother, the god Osiris, and scattered his dismembered pieces far and wide.³⁶ These pieces could no more die than could the immortal Osiris. If the dismembered pieces of his body remained dispersed and hidden, they were severally impotent.³⁷ But once his limbs were retrieved and reassembled, mighty Osiris rose from the dead and vanquished the forces of darkness.³⁸ That is how Constitutionalists regard the Common Law. Now that their treasure hunt has turned up all the missing pieces, the last step for Americans to complete, according to the Oklahoma Freedom Council, is to assemble all the pieces, and "[t]he country would be free overnight."³⁹ And they all lived happily

Bleak House is a satire on how the court of Chancery with its delays and costs ruined the parties to an estate settlement case. *Id.*

33. PETER CHARLES HOFFER, *THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* 86-87 (1990).

34. U.S. CONST. art. III, § 2, cl.1. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution." *Id.*

35. *Id.*

36. VERONICA IONS, *EGYPTIAN MYTHOLOGY* 56-57 (1968).

37. *Id.*

38. *Id.*

39. Comment from Larry Logan, Oklahoma Freedom Council (reprinted on cover of POND, *supra* note 23).

ever after.

The tragedy of Constitutionalism is that it hopes to evoke by its magic, an idealized imagined early version of the very form of our own society, 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. Constitutionalists do not consider money as some sacred substance, and whether it be gold, silver, paper or tobacco is only a matter of convenience.

Law is any application for the official use of coercion that succeeds. The proprietor, 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 used on those who believe in them. Judges do not believe in myth and magic and neither do many other people.

Constitutionalism combines the worst features of superstition and reality without the attractions of either. Like real law, Constitutionalism is dull as dirt. Unlike real law, it does not work. Like superstition, it is silly, self-contradictory, obscurantist, and ineffectual. It also lacks the poetry and pageantry which often enlivens myth and faith. Very few people espouse belief-systems as complicated and crackpot as Constitutionalism without being reared in them.

Yet 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 deeply conflicted popular ideas of law 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 the fount of justice. Constitutionalists are people who simultaneously experience both inclinations in exaggerated forms. Not surprisingly, they come across as wound up to the point of hysteria. Nonetheless, as caricature, they exaggerate popular attitudes that are far more widespread than their professed cult.

By perennially and pompously promising much more from the law than it has ever been able to deliver, jurists have helped generate great expectations. Hence, disappointment has set the Constitutionalists on a paranoid path. As historians and sociologists of the "revolution of expectations" and the "J-curve" have contended, this is the mentality which gives rise to revolutions.