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Abstract

People who study American constitutionalism refer often to religion as an analogy, or treat constitutionalism as a form of civil religion.

KEYWORDS: civil, religion, atheist

American Constitutionalism as Civil Religion: Notes of an Atheist

Duncan Kennedy*

People who study American constitutionalism refer often to religion as an analogy, or treat constitutionalism as a form of civil religion. I want to take this analogy to religion somewhat more seriously than seems to have been fashionable during the bicentennial year.

The religion analogy sometimes indicates that people "reverence" the Constitution (perhaps as an emanation of the democratic deity The People) much as they reverence the Bible as God's word in mainstream religion, that they attribute great power to law, as a kind of analog to the Holy Spirit, an emanation of divinity, that there is an aura of spirituality to discussions of the document and of the rights that it supposedly guarantees, that the Framers are like prophets, and that the document gets exegesis in a spirit like that of biblical exegesis.

The conclusion that seems most obviously to follow from the analogy might be something like: "one should not be too rationalistic in trying to understand what the Constitution is all about and especially in trying to understand how people react to the United States Supreme Court." The analogy might be to the cult of the British Royal Family and its role in British social and political life.

There is an implicit theory of what religion is and how it functions in social structure that makes the analogy seem interesting and important, and makes this seem a plausible conclusion to draw from it. That theory seems to be something like: a religion is a body of metaphysical beliefs, moral precepts and ritual practices, irrationally founded and self-consciously shared across some group. The role of religion in society would be something like:

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* Professor of Law, Harvard Law School. This article is a lightly edited version of a bicentennial address I delivered at the University of Miami School of Law and the University of California School of Law in 1987.

Editorial Note: Duncan Kennedy graduated from Yale Law School and has been a professor at Harvard Law School for more than two decades. His law review articles are among the most widely read (and cited) in American legal scholarship and his other publications include *Legal Education and the Reproduction of Hierarchy* (1983) and *Sexy Dressing Etc., Essays on the Power and Politics of Cultural Identity*, the latter collection published by Harvard University Press in 1993. The following essay reflects comments provided by Professor Kennedy on a speaking occasion at the time of the bicentennial of the United States Constitution. The considerable contribution made by this essay to the critique of legal realism and the continuing development of critical legal studies amply justifies its retrieval and publication here.

shared religious beliefs, precepts, and rituals define patterns of daily life, bind the members of a society together, and give the society its identity as against others, such as foreigners and internal deviants (people who profane the constitutional faith, say, like maybe communists except that they are always wrapping themselves in it). As long as everyone is being tolerant (an important proviso), religion is at worst a harmless and at best an enormously socially valuable and spiritually valid part of communal life.

But this British Royal Family model of constitutionalism as civil religion is only part of the story. We also use the analogy to understand obedience to the Supreme Court, and here its meaning is that obedience goes far beyond what one would expect if one saw it as based on rational agreement, on force, or on contract.

This notion is summed up in the juxtaposition of Justice Brewer's famous remark in the *Debs* case,[1] that the strikers dispersed voluntarily as soon as they heard that the court had decided their action was illegal, with Justice Holmes' contemporaneous remark that issues of the kind involved in that very strike ultimately came down to matters of policy about which judges of different economic sympathies might well disagree.[2] The idea of religion seems useful to understand the ability of the Court to command obedience to politically controversial decisions when it lacks what we think of as the standard instruments of power.

But what kind of religious belief is analogous to this aspect of constitutionalism? How does the analogy to religion help us understand the place of constitutionalism in American political culture? The Supreme Court does not fit the British Royal Family model of civil religion, because the cult of the BRF followed its loss of real political power.

The Supreme Court is, for those whose attitude we compare to that of the religious, the authoritative source of true interpretations of the Constitution, and its determinations are understood to have binding force over the members of the society. The idea of binding force clearly has both a moral component—people believe they ought to obey the law—and a practical one—decrees are backed to some extent by state coercion.

It is of course easy to see the Court as a priestly corps, so that it is like the Pope when he speaks ex cathedra. But then we have to add the element of state force. The correct analogy might seem to be a theocracy, say Khomeini's Iran. But here the problem is that in our usual model of theocracy, the priestly corps has all political power, whereas in our society

1. *In re* Debs, 158 U.S. 564 (1895).

2. Oliver W. Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

it is clear that the Court has limited power. There are some political acts we do not expect it to do, and if it tried to do them it would probably fail to impose itself on the other elements in the political system.

Another analogy would be to the Delphic oracle, which gave answers, in the form of sophisticated riddles clearly based on inside information, to political questions brought from far and wide. But here there is lacking both the coercive aspect and the crucial feature of textual interpretation, with the authority of the practitioners based on a combination of supposed reverence for the source of the text and belief in the neutral or at least impersonal character of the interpretive process.

How about the practice of divination, by looking into the entrails of animals or interpreting the flight of birds, that seems to have had an institutionalized place in the political systems of ancient Greece and Rome? The priest or priestly corps in these cases seems to be able to decisively control events through the interpretive process, without having a claim to unlimited political power. For example, I vaguely remember that it was the priests doing divination who figured out that the lack of wind preventing the Greek fleet from sailing for Troy was an expression of the anger of the gods, and that the wind would come up if the Greeks assuaged the gods by Agamemnon agreeing to sacrifice his daughter Iphigenia.

I do not know that much about divination. It might be better to use the church courts of the Middle Ages with their jurisdiction over family matters, an imperium in imperio vis a vis the emerging national states. My point is simply that if we want a religious analogy to the role of the Court in our society, we will have to go back a ways, and we will have to choose an analogy to a form of religious life, and a set of beliefs about what religion is, that are quite far from mainstream American Protestantism, Judaism, or Catholicism.

When we try to understand the role of, say, divination in ancient Greece, or witchcraft in traditional society, it is common (let me put this delicately) to start from the assumption that the belief of the participants in the practical, causal efficacy of their rituals and hermeneutic techniques is incorrect. In other words, in interpreting earlier stages of our own culture, and some of its present aspects as well, and in interpreting many aspects of traditional cultures, we sometimes, with more or less trepidation, just reject the claims that the participants make about what is really going on.

We reject, with more or less trepidation, their claim that the text or natural event (flight of birds) holds the secret of divine intentions, intentions that are accessible through an interpretive technique. We just "do not believe in" their gods or animist spirits, or that divinities reveal themselves through the disposition of entrails to those who have the secret of interpreta-

tion, or that they have intentions about specific, currently unfolding events, or modify their intervention in those events in response to actions like human sacrifice.

For example, we do not believe that the gods opposed the sailing of the Greek fleet to Troy. We just reject the Greek idea that there are gods of the type they believed in (if they really did believe in them). In so much as they seriously attributed events to their gods' interventions in human affairs, we tend to think they were (strong word coming) deluded. Deluded.

If we turn now to the practice of divination, we have the priestly corps making quite specific, strong claims about what it is doing. It is using an interpretive technique that will allow correct determination of the will of the gods. But if there were no gods, what were they actually doing? First, they must have been making what we cannot avoid calling mistakes. In so much as they believed that they could understand what was happening in their world through correct divination, and that correct divination was sometimes accomplished, we think they were (strong word coming) deluded.

I know I am on dangerous ground here, because the American scholarly community has no consensus about the status of claims of religious knowledge, beyond the vague injunctions to mutual toleration I have already mentioned. But I intend to press on across the dangerous ground. The question I want to pose is, how do we regard those claims of United States Supreme Court justices that look most like those of a priestly corps engaged in divination?

More broadly, how do we regard the claims, not just of judges but of the producers of American political ideology in newspapers and school textbooks, that there are correct and incorrect interpretations of the Constitution, and that one correct interpretation of the Constitution is that the Supreme Court has legitimate power to strike down legislation that violates the provisions of the Bill of Rights?

My belief is that those of us who more or less professionally study American constitutionalism carefully nurture within ourselves three quite contradictory attitudes toward this question, and that we might profit by trying to be more precise about the jurisprudence that underlies our social theory.

First, in commentary on constitutional history, the tone is often that the Supreme Court is a political institution like any other, so that one asks whether Dred Scott[3] was wise, whether it was right or wrong in the larger

3. Scott v. Sandford, 60 U.S. 393 (1856).

sense of political morality, likewise *Lochner v. New York*,[4] *Brown v. Board of Education*,[5] the Nixon Tapes case,[6] and so forth. In this mode, we seem to assume that the issue of "technical legal correctness" is irrelevant or insignificant or meaningless in deciding how we feel about what happened, and also in interpreting the conduct of the actors. We assume that the Court acted "politically" and is to be judged by criteria of statecraft (was the Louisiana Purchase wise or foolish?) rather than according to a conception that clearly differentiates its role from that of other political institutions.

Note that this approach is consistent with at least three underlying attitudes toward judging. 1) It might be that in some cases there is a technically correct interpretation of the law and in others there is not. In these important cases there was not—they were of "first impression," perhaps—so that the Court had to proceed in the general mode of statesmanship. The judges' rhetoric of legal necessity could be understood as a convention or a mystification. 2) It might be that there is never a technically correct solution, so that in all its work the Court proceeds "politically." 3) It might be that there is always a technically correct legal solution, which moreover is entitled to some weight in the normal case, but fades pretty much into insignificance in "great cases." Regardless of which of these attitudes one adopts, in the first mode the judge is judged not by asking whether he or she has done his or her duty by the Constitution, but whether he or she has done the right thing in the broadest sense of what is best for the polity.

A second attitude that is just as common and just as much in each of us is that the Constitution expresses the commitment of the Founders to the realization of a particular set of political ideals and principles that everyone in our society shares or ought to share. Indeed, in this view it encompasses all the ideals and principles that we as a collectivity subscribe to, so that constitutional adjudication properly done is morally as well as legally authoritative. We might say that the Constitution represents the ethical in our political life.

Ideals and principles have to be reinterpreted over time and also have always to be compromised to one extent or another in the face of "reality" or "the fact of scarcity" or "human nature as it is rather than as we would wish it to be" or "entrenched interests without ethical claims" or "practical politics." Nonetheless, the Constitution actually has some meaning that allows its interpreter to adopt a critical attitude toward actual social practices

4. 198 U.S. 45 (1905).

5. 349 U.S. 294 (1955).

6. Nixon v. Warner Communications, 435 U.S. 589 (1978).

and to find them "unconstitutional" in some other sense than just saying "speaking as a citizen participant in American life my subjective view is that this practice is morally and politically wrong."

A crucial point about this second view is that although it treats constitutional adjudication in great cases as very different from crass everyday legislative politics, and treats the Constitution itself as an autonomous force in political culture, it places no emphasis whatever on the merely technical correctness of important decisions. Being "faithful" to the Constitution, in this view, is a matter of interpreting "broadly," of its "spirit," rather than of determining the "legally correct" outcome according to a method of legal hermeneutics clearly autonomous from the other types of reasoning we use in deciding whether a decision is good or bad.

Yet a third attitude is that legal reasoning (not that very vague word "law") is distinct as a way of deciding what to do in a concrete situation from "political," and also from "principled" or ethical decision. When a judge sets out to do legal reasoning, he or she will end up with an outcome that may or may not correspond to the one that he or she would have reached if asked to "do whatever he or she wanted," "make the morally correct choice," "do what is politically expedient," and so forth. What the Supreme Court does or ought to do in constitutional adjudication is legal reasoning, based on the text and whatever other materials the "interpretive community" deems "relevant."

This view that legally correct constitutional interpretation is possible is consistent with many mutually opposing views about constitutional law.

1) You can believe that the Constitution is just great, so that decisions that are technically correct interpretations are likely to or sure to be just what you would have wanted on general moral or political philosophical grounds. Or you can believe that the Constitution and the body of relevant materials embody a much more partial set of ideals and principles, say those of a "capitalist society" or a racialist or patriarchal society, so that correct interpretations will be authoritative only for those who share the underlying social vision.

2) You can believe in the liberal program of formal and substantive equality plus free cultural expression, or in the organicist conservative program of cultural and class hierarchy and authority, or in the atomist conservative program of libertarianism restrained only by state enforcement of a natural right to property, and still believe in correct legal reasoning, which may or may not come out the way you personally would have wished it to in any particular case.

3) You can be an activist or a passivist on the issue of how and when the Court should overrule the democratically elected legislature, and still believe in legal correctness.

4) You can believe that all or virtually all questions presented to the Court have right legal answers, meaning that there is a correct interpretation of the constitutional law of the question, or that this is true only some of the time or only occasionally.

The point is that most people most of the time hold the view that it is at least possible on some occasions to make correct and incorrect interpretations of constitutional law, and that these times are likely to be very important. This view coexists with the view that it is often or sometimes if not always all "statecraft," and the view that it is a matter of the conflict of the ethical, of ideals and principles, with tawdry reality, in each case with the judges' claims about the legal correctness of their interpretations best understood as convention or mystification, especially in the very important cases.

Now let us return to the perspective of divination. What might have happened in Aulis (treating the story as history)? The priestly corps interpreted the auguries to mean that the reason why there was no wind was that the Gods were angry but could be appeased by the sacrifice of Iphigenia. We believe in neither the cause nor the cure proposed by the diviners. But it does seem plausible that they did an interpretation, that they and others believed in its correctness, and that they acted accordingly, sacrificing Iphigenia, and then concluding that the ensuing wind was caused by the gods' response to the sacrifice.

If this is what happened, there is a sense in which it was all a "mistake." If they had understood (i.e. believed as we believe) that sacrificing her would not in fact bring the wind, then they might not have done it (there could well have been other motives for sacrificing her) or, almost certainly, would have done it in some other way.

What emerges is a discontinuity between their way and our way of understanding their history. We all agree that divination played a major role in the events, and that as a practice and an institution it was in some sense responsible for Iphigenia's death. Their explanation of this role, let us suppose, was that a correct interpretive practice revealed a tragic conflict between loyalty to the needs of the league of cities and those of the family. Through divination Agammemnon acquired the information he needed to make the painful choice to get the show on the road, instead of having to sit puzzled until the energy for war had dissipated itself.

The structure of the argument by which the diviners claim to be taken seriously is quite clear: 1) There are awesomely powerful gods. 2) They

have intentions that are causally efficacious with regard to human affairs. 3) They are responsive to human gestures intended for them. 4) The gods express themselves through natural phenomena like the flight of birds and the arrangements of entrails. 5) We have a technique that will allow us to determine their intentions and also what human gestures will modify those intentions. 6) Any idiot can see that if we are right in what we have just said, you had better pay attention to divination. 7) It would not be at all surprising if you were to reverence us as well as paying attention to the information we provide, since we are a lot closer to the gods than you are, and what we do is pretty wonderful in itself.

We can imagine a spectrum of critical attitudes toward this piece of diviner's history, some focussed on the gods and some on the diviners' interpretive practices.

The critical move that denies the existence of the gods has a devastating impact on the whole system of thought. Is constitutionalism, treated as analogous to divination, vulnerable to a similar move? I think not, that it is indeed quite well protected. We all agree that there was a framing process and a ratification process that were historical events. It is hard to imagine that anyone will shake our faith in the existence of the framers or of the ratifying people in the way nineteenth century skeptics shook people's faith in the existence of God.

On the other hand, as Peter Gabel points out, the psychological structure of reverence and obedience seems to depend somewhat on a fantasy. People seem to believe it is meaningful to talk about, and to identify with a trans-temporal mythic People, so that they feel that the text of the Constitution is an emanation of a totality in which they participate in a way that somehow simultaneously binds and ennobles them. This looks to me like The Nation or The Chosen People, entities that might have sometimes for some people just lost their facticity. That might happen to the Constitutional People as well.

While the Constitution looks like the Bible and the People like the God of a fundamentalist religion, the situation is actually quite different. Constitutionalism as a religion weathered, during the New Deal or legal realism period, a crisis of belief in the possibility of understanding interpretation as carrying out the Original Intent of the Framers, and came back strong in the post-World War II period, with adherents of all political tendencies.

Constitutional fundamentalism, though vulnerable to crises of belief in the People or in Original Intent, seems destined to endure. But it coexists with versions of constitutional faith that have achieved varying degrees of autonomy from the Creation Myth. One such idea is that the judges are

bound not just by the Constitution but by the whole corpus of materials, including all previous un-overruled judicial interpretations. Others are that the Constitution "evolves," and that the "general clauses" simply call on the judge to interpret "society's fundamental values." Although these ideas are controversial, and experienced by fundamentalists as sophistical or airily intellectual or dangerous, they are also probably stabilizing, somewhat in the manner of the reduction of modern mainstream protestantism to liberal humanist pieties.

We are now in a position to define constitutional atheism. It is the conviction that there is no human collectivity, The People, that authors and consents to constitutional law as laid down by the Supreme Court. Note that atheism is perfectly consistent with the belief that there are correct and incorrect interpretations of constitutional law.

The written document is in existence, along with the other conventionally accepted materials preceding and superseding it. These documents do not directly refer to The People in ways that would require the atheist to believe in It in order to be able to figure out what the various human authorities meant for her to do in the case before her. The interpretive process may therefore generate even in the atheist the experience of closure. A constitutional atheist could take the oath of office as a judge and promise to abide by the Constitution, even though she thought that the underlying beliefs that sustain the institution of constitutional interpretation are deluded. Contrast the far more problematic situation of a diviner who has lost his faith in the existence of the gods.

Now let us turn to the question of interpretive technique. There are a variety of critiques that we might want to direct at the diviners' claim that they read the flight of birds correctly, as was confirmed when the wind came up after the sacrifice. We can begin with criticisms that are consistent with believing that the gods exist in the way the Greeks apparently believed they did, and that divination is possible, and then move to interpretations of what happened that presuppose atheism.

1) In fact, the diviners did it wrong. The true interpretation was that the gods were busy, not angry, and the wind would come up if the army just waited. Iphigenia was sacrificed to no good purpose, since the wind would have come up in any case. Perhaps it was an issue of skill, or of bad faith manipulation of the auguries, or of diligence. Harvard trained diviners would have done better.

2) This was an instance in which the auguries were undecidable. Applying the best possible technique, the correct answer to the question propounded was "we do not know why there is no wind and we do not know what to do about it." The priests made a mistake in thinking they had

come up with a correct answer, and Iphigenia was sacrificed quite possibly in vain, though it is also possible that the gods were in fact angry and in fact assuaged. But if that is what happened, it was dumb luck rather than correct divining that caused it.

3) Although divination is a valid procedure, it cannot be used on just any old question. This was one of the class of cases in which, according to the correct theory of divination, divination cannot work. It cannot explain lack of wind or what to do about it. The priests were mistaken even to try to apply their procedures in this case, because it was outside their institutional competence, although of course it might in fact have been true that the gods were angry and that they were assuaged by the sacrifice. But again, if that is what happened, it was just luck rather than an outcome attributable to correct divining.

If we try to understand divination as based on a delusion about the existence of gods, or about the relationship of divine to mortal existence, a parallel set of possibilities emerges.

4) Divination was a determinate but arbitrary procedure, just as in critique number 1 above (the case where the issue is getting it right or wrong). There was a right way and a wrong way to do it, but since the bird flights or entrail arrangements interpreted were random natural events, unrelated to any will of any divinity, if you believe in a divinity or divinities, the divining process gave answers much like a coin flip, or trial by battle or by torture in medieval criminal procedure. The necessity of sacrificing Iphigenia was (let us suppose) correctly read by the diviners, but they were doing something like correctly reading a coin as coming up "heads" after it has been agreed that something will be decided by chance. (Of course, in this hypothesis the power to frame the question to be decided by chance would be extremely important.)

5) Divination was not arbitrary but rather manipulable, because the questions posed were undecidable with the technique used (as in critiques numbered 2 and 3 above). The diviners constantly and consciously manipulated the interpretive technique to validate the results they wanted on other grounds. If they said Iphigenia had to die, there was doubtless a reason, but it certainly was not that they believed they had correctly read the entrails or bird flight patterns. They did that after the fact, and given the ambiguities, gaps and conflicts within the canons, were able to do it perfectly correctly whichever way they wanted to come out.

6) Yet another possibility is that divination was not arbitrary but rather manipulable, in what I will call the naive mode. Naive manipulation occurs when the interpreter imposes a meaning on the materials without experiencing her own creative part in the process. This occurs in cases of

undecidability, like critiques 2 and 3 above. From the point of view of the outside observer, it appears that there were two possible valid interpretations within the canons, so that someone had to choose according to non-interpretive criteria which way to go. But what occurs is more complex and important than conscious manipulation, because the critic asserts that the diviners experienced interpretive closure or compulsion in deciding between the options, rather than choice.

The necessity they produced through interpretive technique was routinely false, though not experienced as such. For this reason, it is hard to see Iphigenia as the victim of a "simple error of interpretation." The interpretive practice was systematically prone to the error of deciding the undecidable. But as stated the theory does not explain why the experience of closure emerges on one side of the choice rather than the other.

This last option, naive manipulation, is the one that strikes me as most useful in understanding the role of the United States Supreme Court, although I concede that it is sometimes useful to understand the justices as proceeding in the modes of statesmanship, of the ethical and of the technical. I think that the justices are constantly engaged in naive manipulation. I am not going to try to prove this. I base it on my personal experience as a law clerk to Potter Stewart in the 1970-1971 Term, and on twenty years of studying Supreme Court opinions. Let us just pretend I have shown it to be true. What would be the consequences for our understanding of the role of the court in our society?

Let us call the combination of constitutional atheism and the belief that naive manipulation is at least common if not omnipresent CONSTITUTIONAL SKEPTICISM. If constitutional skepticism is valid, our usual understandings of American political history and culture are problematic.

The problem is if the Constitution cannot be understood as the will of The People, but rather of the humans who wrote it and got it ratified, and if naive manipulation has been common in interpreting it, then what intelligible order has the judicial process of imposing the indicated outcomes through state force brought to our political history, and how has it contributed to the warp and woof of our political culture? Big questions, but here goes.

First, it is important to see what answers are undermined through the hypothesis of skepticism. So long as we believe in the constitutional people and that the interpretive process was done correctly or incorrectly, in good faith or through conscious manipulation, we could understand our constitutional history in the modes of patriotism and morality.

Patriotism. Our Constitution expresses our particular qualities as a people, and its interpretation and enforcement against conflicting norms

sustain those qualities. Constitutional interpretation is therefore a mode of national self-determination. We can distinguish two ways in which we have a national identity that sets us apart from other nations: 1) Constitutionalism itself is peculiarly American—others do not engage in our particular form of self-determination through interpretation, preferring either violent or merely political modes instead. 2) The particular constellation of civil and personal rights and liberties we enjoy derive from our particular constitutional scheme adapted through time to our changing values. If we have been, are and, God willing always will be the freest people in the world, we achieved this by adopting a freedom-guaranteeing constitution and then interpreting and enforcing it as cases arose.

Morality. Our Constitution embodies the moral commitments of our highest, most idealistic selves. Politics is fallen Earth in relation to the Heaven of constitutional aspirations. True constitutional interpretation is therefore a kind of angelic intervention into the affairs of everyday life. We submit to it in actual, coercive fact to attain a virtue that we would not have the strength or imagination or resources to achieve if left to our normal political practices. False interpretation may be mistaken, in which case we lose this benefit, or consciously manipulative, in which case the profane invades the divine sphere, corrupting it. Constitutional history is that of the gradual extension of heavenly sway, as the court has protected but also expanded basic civil and human rights in the face of the aggressions and resistances of politics.

I will not develop the point that constitutional skepticism is pretty devastating for both the patriotic and the moralistic version of what the interpretive process does for us. Here I will simply list what seem to me some hypothetical contributions of constitutionalism that we could believe in even as skeptics.

1) Constitutionalism has had a disordering or randomizing effect on our political history. This occurs because naive manipulation is an activity open to influence by all kinds of agendas, including, obviously the political agenda of the judge. The political process puts judges in office and leaves them there, possessed of this stock of legitimacy or mana or religious plausibility for the mass of believers, and no way to avoid, while engaged in naive manipulation, the use of it to keep dead programs alive or create new ones. A useful analogy may be the British civil service, or the corps of prefects in France. The difference may be the bizarre impact of self-delusion on the implementation of the political agenda by the judge, and the irrational, non-dialogic, almost mechanical translation of constitutionalist faith into popular obedience. All this can be good or bad, depending on who is in charge and what he or she is trying to accomplish.

2) Constitutionalism has been a constitutive element of our political culture, not as the form for our collective self-determination but by providing one of the discourses through which actors pursue their political and ethical projects. These projects can be good or bad, depending on who is pursuing them and what they are after. Different discourses, different cultures has got to be our maxim as soon as we lose faith in the possibility of transparent language. We might very loosely analogize constitutionalism to the Sun Dance of the Sioux, which is both a ritual and the site of a discourse as well. Naive manipulation then becomes just another of the utterly culturally specific ways in which people are in bad faith.

3) Constitutionalism made legal realism possible. Conservative control of the Supreme Court in the late nineteenth century, in a context of naive manipulation, created a vested interest for the progressives in demystifying legal reason. Because the stakes were higher than in Europe, where all the roots of realism lay, the enterprise was taken much further. Just as fascism and stalinism were making the realist impulse look positively obscene in Europe, the American realists reaped the reward of their general critique of Classical legal thought, epitomized by the work of Holmes, Hohfeld, Hale, the Cohens, Arnold, and Llewellyn. The essence of this critique was that because the private law issue of how to define property rights was undecidable given the extant interpretive techniques, conservatives must renounce public law power to strike progressive legislation as unconstitutional. And of course legal realism made critical legal studies possible.