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The Lineaments of the Ancient Constitution

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WE KNOW ALL ABOUT THE STAMP ACT AND THE TEA ACT and the duties imposed on the British colonies in the late eighteenth century. These are central to the lore and the myth that most Americans learned in grade school regarding the causes of the so-called American Revolution. But the patriots of that time fought for high principles and venerated customs, not merely economic incentives. They recognized, most of them, that their cause involved an inheritance of liberty under the law and an unwritten constitution that had been evolving since time out of mind.

The Declaration of Independence, the U.S. Constitution, and the Bill of Rights restated and reflected the practical wisdom embedded in an enduring textual network that included Glanvill's *Treatise on the Laws and Customs of England*, Magna Carta, Bracton's *On the Laws and Customs of England*, the Virginia Charter of 1606, the Petition of Right, Sir Edward Coke's *Institutes of the Laws of England*, Locke's *Second*

Treatise, and the English Bill of Rights. U.S. Independence was, in that sense, a restoration, not a revolution.

The Roots of Liberty, edited and with an introduction by Ellis Sandoz, traces this inheritance of the common-law system, social contract theory, representative government, constitutionalism, and the rule of law deep into the historical soil from which modern English and American government sprouted. The book is the product of a symposium held at Windsor Castle in 1988. Sandoz directed the proceedings and led the discussions there and, eventually, encouraged the participants to contribute essays on the subject for this volume, which was first published in 1993 by the University of Missouri Press and reissued in 2007 by Liberty Fund. The contributors are J. C. Holt, Christopher W. Brooks, Paul Christianson, John Phillip Reid, and Corinne Comstock Weston—historians of the Anglo-American legal order.

These essays all have, in Sandoz's words, "an eye on the rise of liberty and rule of law as these came to maturity." You might call this a genealogy of ordered liberty, a concept broad enough to encompass both customary and natural law. The scholarship of J. G. A. Pocock—*The Ancient Constitution and the Feudal Law* in particular—looms large in these chapters, which, in different ways, settle on the conclusion that something happened during the sixteenth and seventeenth centuries in England that shifted the discourse about law to emphasize constitutionalism. Pocock was a historiographer of immense scope—a historian of ideas attuned to language and rhetoric. His *Ancient Constitution and Feudal Law* excavated English legal history with special attention to those idioms and vocabularies nested in the transmissible, communal records and reports that engendered the "common law mind."

J. C. Holt's opening chapter is a study in lexical semantics that investigates the meaning, current and historical, of words such as "conventions," "customs," and "charters," but principally of "constitution." He contends there was no ancient constitution in England, strictly speaking, because sixteenth- and seventeenth-century jurists, harkening back to the Domesday Book, Magna Carta, and the Charter of the Forest, affixed that label to long-ago happenings that preceded the advent of constitutions or theories about constitutionalism. Put

differently, the meaning of "constitution" that developed in the seventeenth century and found its way into our etymology did not exist when rebellious barons turned against King John in the First Barons' War. The construct "ancient constitution" is, therefore, an anachronism, he suggests.

Holt is correct that an Englishman living in, say, the High Middle Ages would not have thought of "constitutionalism" in a modern sense. But sometimes distance and hindsight are necessary for the classification of concepts that are only inchoate, amorphous, or embryonic during some earlier period. Someone living in 1200 wouldn't have thought of himself as representing "medieval thought," nor would he have thought of certain views about law and the king and sovereignty as "ancient." A paradigm of "constitutions" had to arise before they could constitute a conspicuous, nameable phenomenon. Holt is alive to this reality, stating that "[p]robably no one at the time recognized these hybrid characteristics in the documents of 1215 to 1225" (i.e., these different legal concepts in two iterations of Magna Carta).

Perhaps this seeming dissonance explains Sandoz's reaction to Holt's piece: "The initial question posed by J. C. Holt is whether any such thing as the ancient constitution really existed in the early Middle Ages, and he responds with a straightforward *no* that then, however, opens into a masterful discussion of the setting and significance of Magna Carta for English constitutionalism that ends up sounding very much like *yes*."

Coke and John Seldon were instrumental to the elevation of constitutionalism as a cardinal element of English law. They figure prominently in this volume because of their role in shaping the culture and mindset about the law and of their influence, tacit or expressed, on subsequent legal documents and institutions. Christianson, in fact, devotes the bulk of his chapter to surveying competing versions of the "ancient constitution" posited during "the age of Coke and Selden."

Coke was a Cambridge-educated jurist who held numerous political offices, prosecuted seminal cases, and sought to restrict certain powers of the monarch. What Madison was to the U.S. Constitution, one could

argue, Coke was to the Petition of Right. Seldon, also Cambridge-educated, was a jurist, polymath, scholar, historian, and politician known for his vast library, tireless research, and learned approach to politics. Coke and Seldon made their mark during the tumultuous conflicts between the early Stuart monarchy and the English Parliament.

Brooks links "the notion of the common law mind" to Coke. He argues that a prevailing "legal mentality" among the English during the sixteenth and seventeenth centuries was not uniquely English but mirrored the wider concerns of the European Renaissance, and also that "ancient constitutionalism" was but one thread woven into the larger fabric of England until it gained credence under thinkers like Coke.

Before the influence of Coke and his followers, English "legal ideology" harmonized with European jurisprudence. Sir John Fortescue, for instance, was a medievalist who drew from Aristotle, Brooks points out. Fortescue's analyses and findings paralleled those of the scholastics and the humanists and meditated on a wide range of thinkers from Plato to Aquinas to Calvin. Prior to Coke, English lawyers who contemplated high-minded theory and not just everyday practice studied divine law and divine right and celebrated the civilizing force of law on advanced societies. Magna Carta and ancient constitutionalism were not on the tips of their tongues. The rule of James VI and I, the son of Mary, Queen of Scots who filled the Scottish throne before succeeding the last Tudor monarch, Elizabeth I, to the English throne, occasioned the popularization of Coke's commendation of the common law and ancient constitutionalism.

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James's absolutist writings gave fodder to his opponents, as Christianson documents in his chapter. Yet James moderated his discourse out of political necessity. "Within a few years of becoming king of England," says Christianson, "James VI and I tentatively had come to understand the affinity of the common law for the initiatives of princes and had fashioned traditional common law discourse into a cogently argued interpretation of constitutional monarchy which retained the initiative for governing in the hands of the crown." The disputes between the Crown and Parliament during James's reign intensified, with lawyers on all sides presenting their perspective on "ancient constitutionalism" to validate political claims.

Reid and Weston, while focusing on England, map ancient constitutionalism onto the New World, and in particular the American Revolution (which, again, is something of a misnomer). "The operative concept," submits Reid, whose emphasis is the eighteenth century, "was of a timeless constitution of unchanging principles" that proved that the people enjoyed rights and representation. That concept was, of course, key to the colonial propaganda and circular letters, to say nothing of the Declaration of Independence or the various state constitutions. Yet how could a "timeless" or "unchanging" constitution be adapted to the American experience, which, of course, was different from the British experience? Because political exigencies and urgencies necessitated the reaffirmation of historic liberties that were themselves asserted and reasserted amid political strife, and because the rule of law and its attendant principles were sufficiently general to suit disparate settings, transcend transitory particulars, and harmonize with new conditions.

The lengthy accounts in these fascinating histories present too many names, events, and interpretations for succinct summarization, so here's

a takeaway.

The legal order of England, historically, prioritized prudence and gradualism over fanaticism and ideology. Long usage and workable conventions helped rules and principles survive political crises, monarchical successions, tyrannies, wars, and upheavals. The American Founders recognized that, although they were separating from England, they were also extending an English past that had withstood trials and tribulations, establishing sound institutions that affirmed and protected prescriptive rights and liberties. These institutions were characterized by living and reasonable traditions rather than abstract theory, extravagant dogma, or utopianism. They did not spring up suddenly or unexpectedly but were modified by incremental descent over centuries as circumstances required. Their commonsense adaptations and adjustments were moderate rather than extreme or total, conserving fundamental freedoms rooted in self-evident precepts and precedents.

The Roots of Liberty is about this unbroken continuity in the law and the deep-seated, preservative principles that reify a common experience of consensual governance. This theme would have been familiar to many generations of sophisticated Americans. Today, perhaps, only certain historians, literate lawyers, and a shrinking pool of educated adults could recognize and articulate the notion of an immemorial constitution or the cultural and institutional heritage that flowed from it. Tis a shame! History is always at work, however, even when we cannot tell what we're making—or unmaking.

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