

..... GARRETT EPPS

WRONG AND DANGEROUS

..... TEN

★ RIGHT-WING MYTHS ★

..... ABOUT OUR CONSTITUTION



Article 1.

Wrong and Dangerous

***Ten Right-Wing Myths
about Our Constitution***



ROWMAN & LITTLEFIELD PUBLISHERS, INC.

Lanham • Boulder • New York • Toronto • Plymouth, UK

Published by Rowman & Littlefield Publishers, Inc.
A wholly owned subsidiary of The Rowman & Littlefield Publishing Group, Inc.
4501 Forbes Boulevard, Suite 200, Lanham, Maryland 20706
www.rowman.com

10 Thornbury Road, Plymouth PL6 7PP, United Kingdom

Distributed by National Book Network

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British Library Cataloguing in Publication Information Available

Library of Congress Cataloging-in-Publication Data

Epps, Garrett.

Wrong and dangerous : ten right-wing myths about our constitution / Garrett Epps.

p. cm.

Includes bibliographical references and index.


ISBN 978-1-4422-1676-1 (cloth : alk. paper) — ISBN 978-1-4422-1678-5 (electronic)

1. Constitutional law—United States—Interpretation and construction.
2. Constitutional law—United States—Popular works.
3. Constitutional amendments—United States—Popular works.
4. Conservatism—United States.
5. Law—United States—Interpretation and construction. I. Title.

KF4550.E66 2012

342.7302—dc23

2012012355

™ The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI/NISO Z39.48-1992.

Printed in the United States of America

This book is for all my students—young and old; left and right; past, present, and future. Have fun storming the castle!

A little patience, and we shall see the reign of
witches pass over, their spells dissolve, and the
people, recovering their true sight, restore their
government to its true principles.

—Thomas Jefferson, 1798

Acknowledgments

Katrina Vanden Heuvel, editor of *The Nation*, commissioned me to recount my day in “Constitution school” under the title “Stealing the Constitution,” which began my work on far-right “constitutionalism.” Steve Farley (D-28) of the Arizona House of Representatives invited me to speak to a group of legislators at the Arizona State Capitol in March 2011. It was for that speech that I first came up with the (now much altered) “Ten Myths” list. Bob Cohn and John Gould of atlantic.com, superb editors, published the myths list as a series of columns in the summer of 2011. Kit Rachlis, editor of *The American Prospect*, patiently helped me turn my thoughts on campaign finance and civic equality into a longer essay. Josh Swanner and Taylor Novak, students at the University of Baltimore School of Law, served as research assistants, proofreaders, editors, and joke providers for this book. Bob Deans, an old comrade from Southern politics and journalism, offered not only encouragement but also genuine help, and introduced me to Jonathan Sisk, the patient editor at Rowman & Littlefield who undertook to publish the book. Rafe Sagalyn graciously provided general counsel on book contracts. My colleague Elizabeth Samuels was a sounding board, offered encouragement, and was a general force for good, as was David Ignatius. Kent Greenfield, Tamara Piety, and Adam Winkler read sections of the book and offered suggestions. Ian Millhiser of the Center for American Progress, whose columns monitoring the follies of the Right are a constant inspiration, underscored the urgency of the task by inviting me to take part in a panel at CAP on “What Happens

if the Tea Party Wins?” Finally, my writing buddy for forty years, on and off, Lynn Darling, helped me meet my deadlines. Little birds are writing interesting books.

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Introduction: Stealing the Constitution

In October 2012 I spent a full day in a windowless church basement in Northern Virginia, as a student at a seminar on “The Substance and Meaning of the Constitution.” My day job is constitutional scholar. I have spent the last twenty years studying the text and history of the Constitution, and teaching students about the ways in which courts have applied our fundamental law to the practical problems of our society. But I have to confess I knew nothing about the history I learned at Constitution school.

The “truth” about the Constitution is this: God wrote it. He handed it down to Moses, who applied it to govern the people of Israel. This divine law was carried from ancient Israel to Northern Europe after the Assyrian Conquest in 720 BCE by the famous “lost tribes” of Israel. After much wandering, these chosen people settled in the British Isles, where they took the name “Anglo-Saxon.” They ruled their medieval kingdom by the law of Moses, but its purity was lost after the Norman Conquest in 1066 CE. The Founding Fathers of the new United States, inspired by the Lord of Hosts, wrote the Constitution to restore His Anglo-Saxon kingdom.

Since it is God’s will that Americans live like medieval Saxons, it shouldn’t surprise anyone that virtually all of modern American life and government is unconstitutional: Social Security, the Federal Reserve, the Environmental Protection Agency, the Civil Rights Act of 1964, hate crime laws—illegal inventions of a people who have been led astray by false prophets. The trouble began with the Civil War, a needless conflict in which the wrong side won. Slaves were happy and carefree in slavery.

Racism was caused by pushy Northern abolitionists. State governments are not required to observe the Bill of Rights. The very idea of separation between church and state is a pernicious myth; the First Amendment's religion clauses establish "nondenominational" Christianity as "the religion of America."

The seminar I attended was organized by the National Center for Constitutional Studies, nestled securely in the metropolis of Malta, Idaho (2010 Census population: 177, 98 percent of them white). The center is the brainchild of the late W. Cleon Skousen, a former Salt Lake City police chief (he once raided the mayor's regular poker game) and FBI agent.

Students paid \$50 each for the seminar. They received a carefully prepared workbook with fill-in-the-blank questions such as "Events since 1913 have demonstrated that the original *intent* of the Founders in setting up the Senate as a legislative guardian has been largely emasculated by the Seventeenth Amendment." Students also had the chance to buy the Center's expensively produced textbook, *The Making of America: The Substance and Meaning of the Constitution*, which explains Skousen's ideas in greater detail. The long section on slavery in this textbook has been amended since the 1980s, when the Center attempted to persuade California to adopt it as an official high school textbook. They abandoned the attempt after news reports alerted people that the book referred to black children as "picaninnies." Now it carefully indicates where the word once appeared by the use of brackets: "If [negro children] ran naked it was generally from choice, and when the white boys had to put on shoes and go away to school they were likely to envy the freedom of their colored playmates."¹

The instructor was Lester Pearce, an Arizona justice of the peace. Pearce is the brother of former Arizona state senator Russell Pearce, author of Arizona's notorious anti-immigrant law, SB 1070. Lester tended to wander off into discussions of how he refuses to comply with court rules requiring him to allow defendants in his court to speak Spanish. Arizona's "open carry" weapons laws, which permit citizens to strap pistols to their hips and stroll downtown, would, he predicted, save Arizona when the United Nations sent its blue-helmet troops into the state to enforce bogus "human-rights" laws. Pearce admitted that much of what he does in Justice Court doesn't exactly follow the law as laid down by higher courts, whose decisions he is technically supposed to follow. But those court decisions are just other judges' opinions, he said. He doesn't really need

to pay attention; he has his own views. Pearce got rapt attention from the fifty people in the audience, although one boy near me spent his time on a detailed sketch of an assault rifle.

My ordeal would have little importance if the seminar I attended were an isolated gathering of cranks. Many of the myths Pearce was purveying have floated around in the American unconscious for years. I used to run across them in the hills and hollows of rural Oregon back in the heyday of the militia movement. But the NCCS “school” is actually part of a growing movement. Every weekend, NCCS instructors fly around the country to teach the glories of the Anglo-Saxon Constitution. The *Washington Post* estimated in 2009 that the Center sponsored as many as 180 classes around the country, not counting the one-day public events conducted by NCCS on patriotic holidays. The session I attended was sponsored by local Tea Party groups and by the county Republican committee.

The NCCS is far from the only source of far-right mythology about the Constitution. Turn on any AM radio talk station, or Fox News Channel, or C-SPAN. The far-right myth of the Constitution is being systematically mainstreamed.

Americans today are frightened and disoriented. Since 2000, our society has been through a series of shocks: the misfire and ham-fisted resolution of the 2000 presidential election; the September 11 attacks; the disastrous war in Iraq; the erosion of civil liberties at home; the economic collapse of 2008; the cynical bailout of America’s richest banks and corporations; unemployment and widespread foreclosures for ordinary Americans.

What has gone wrong?

In the midst of uncertainty, people are turning to the Constitution for tools to deal with crisis. The Constitution is what makes Americans who we are. All federal and state officials—from the president to state JPs like Lester Pearce—swear an oath to support and defend it. Americans hope that the document will show them the way out of the dangerous thicket we find ourselves in. The Far Right—the toxic coalition of Fox News talking heads, radio hosts, angry “patriot” groups, and power-hungry Tea Party politicians—is feeding them mythology and lies.

Take the rise of NCCS: The Center’s crazed ideology leapt into national prominence when Glenn Beck began touting its “educational” programs on his TV show and his online “Beck University.” Civic groups, school districts, and even some city governments across the country have

been persuaded to sponsor daylong seminars by the “nonpartisan” NCCS; its speakers are visiting high schools to distribute pocket copies of the Constitution. NCCS is mounting a major drive to have its materials adopted as official curriculum in schools around the country—roughly the equivalent of requiring the Book of Genesis as a biology textbook. Skousen’s massive “guide” to the Constitution, *The Making of America: The Substance and Meaning of the Constitution*, has ranked as high as No. 4 in the past year on Amazon’s list of best-selling titles on the Constitution.

NCCS is far from alone in peddling far-right constitutional mythology as fact. A broad, energetic campaign is underway to do for our understanding of the Constitution what the Right has done to global warming and evolution—that is, to wipe out the facts and substitute a partisan myth.

We’ve all heard conservative orators denouncing the Affordable Care Act, the new health insurance law. They claim it’s unconstitutional to require taxpayers either to buy health insurance or to pay a tax penalty. To most constitutional lawyers, that position would have seemed radical only a few years ago. But by comparisons with some of the new claims conservatives are advancing, it’s positively timid.

In fact, it’s difficult to understate how extreme this emerging right-wing picture of the Constitution is. Popular authors Thomas Woods Jr. and Kevin Gutzman, in their book *Who Killed the Constitution?*, argue that racial segregation in schools was perfectly constitutional, and that *Brown v. Board of Education*, which struck down the Southern “separate but equal” school system, is illegitimate. Newly elected Senator Mike Lee of Utah has endorsed state “nullification” of the health care law—a doctrine that until now was associated with Southern racist resistance to desegregation. Representative Ron Paul demands that “we end all the unconstitutional federal departments including the Department of Energy, Education, Agriculture, Commerce, Health and Human Services, Homeland Security, and Labor.”² Fox News Channel commentator Andrew Napolitano attacks Democrats for supporting “federal child labor laws, the Clean Air Act, the EPA, and the Department of Transportation . . . none of them is even arguably authorized by the Constitution.”³

At the beginning of the 112th Congress, far-right Republican Representative Michele Bachmann set up a “Constitution school” for new members of Congress. She invited Napolitano to lecture to the students.

Justice Antonin Scalia (in other contexts a stickler for the separation of powers) also agreed to join Bachmann's faculty.

Scalia's injudicious involvement with House Republicans underscores another disturbing fact. Conservative federal judges are increasingly adopting the rhetoric and ideas of the hard Right; in the process, they are casting aside the traditional ethics of judging that required them to at least act nonpartisan. Scalia, in fact, is an old duck-hunting partner of former vice president Dick Cheney. In his public appearances, he sounds more and more like a conservative politician and less and less like a mere judge. Citizens who resent the Court's clumsy intervention in the 2000 election should "get over it," he once said.⁴ He managed to find himself in South Carolina on the eve of the 2012 Republican primary, and told citizens offended by the damage the *Citizens United* decision has done to politics that all they have to do is "turn off the TV."⁵

Scalia is the soul of modesty compared to his fellow conservative, Clarence Thomas. Thomas tells conservative audiences that he and his wife Virginia—a Tea Party activist who was outspoken against the health care law—"believe the same things," and that his liberal critics are trying to undermine the Supreme Court by even questioning his impartiality.⁶ Both Scalia and Thomas have spoken to secret conferences of far-right fat-cat donors. Thomas has accepted an all-expense-paid trip to address a Koch brothers conference, and has accepted lavish gifts from far-right Texas millionaire Harlan Crow, a funder of "Swiftboat Veterans for Truth" in the 2004 election cycle. Thomas and Scalia appeared as guests at a dinner hosted by two corporate law firms—on the same day that the justices had met in secret to decide whether to hear those firms' challenge to overturn the Patient Protection and Affordable Care Act.

Justice Samuel A. Alito has been a speaker at fundraising events for the virulently right-wing *American Spectator*. Until the rise of the conservative Court, any of these activities would have been considered a shocking violation of a judge's duty to refrain from political activity and to refrain from any behavior that would raise questions about his or her objectivity. Increasingly, they are the norm for justices who no longer hide their partisan views.

It's easy to understand why conservative politicians and judges are trying to align their political program with a strained reading of the Constitution: it's the only way they can achieve their political goals. Senate Republican leader Mitch McConnell recently demanded a balanced-budget

amendment to the Constitution, designed to cripple the federal government, because, he said, “We’ve tried persuasion. We’ve tried negotiations. We’ve tried elections. Nothing has worked.”⁷ Conservative politicians like to claim that America is a center-right country, but in fact, people want the good things an energetic government can do. Social Security and Medicare; environmental protection; consumer safety regulation—all these things are popular. The people, those idiots, keep voting for programs they like.

The people must be stopped.

So the Right is seeking to win by changing the rules. A growing number of conservative lawmakers and commentators claim that the “original intent” of the Constitution’s framers and the views of the right wing of the Republican Party are one and the same. Progressive, democratically enacted policy choices are unconstitutional. In their radical new reading, the Constitution does not set down the rules for running a government, but instead decides all questions of policy. If something is not mentioned in the Constitution, it’s unconstitutional. “Nowhere in the Constitution do we read the words, ‘the government shall provide for health care,’” complains Representative Virginia Foxx (R-NC). “In fact, the words ‘health care’ are nowhere in the Constitution.” Senator Tom Coburn (R-OK) echoes this wrong-headed argument.⁸ Yes, “health care” doesn’t appear in the constitution, but the Right’s astonishment at this is entirely pretended. The words “Centers for Disease Control,” “cancer research,” “space program,” “American flag,” and “interstate highway system” are also missing. That’s because the men who wrote the Constitution had never heard those words; beyond that, it’s because they spent their time laying out a system of government, and left the question of what *policies* that government would follow to future generations. That’s what they would have called self-government.

Today’s “constitutionalists” aren’t even content to distort the words of the Constitution. They want to amend it in many places to subvert the system it has created. The Right is determined to write a federal marriage amendment into the Constitution, making it impossible for any state to allow same-sex marriage. A human life amendment is also on their wish list. Many Tea Party groups are demanding a new constitutional convention to strip Congress of its current powers. House majority leader Eric Cantor supports a constitutional amendment to permit the state legislatures to repeal federal laws. Most Republicans support a “balanced-budget” amend-

ment that would permanently cripple our ability to finance an adequate federal budget.

Why has the Right done such a good job of projecting its invented “Constitution”? The past decade has done much to shake the public’s faith in our institutions. Under President George W. Bush, the federal government began to conduct surveillance, eavesdrop on private conversations, intercept email, and imprison foreigners and citizens in military prisons. It was Bush, not liberals, who most aggressively created an overreaching federal government. Bush lied to the public about the threat from Iraq and bungled the war he started. Finally, his economic policies wrecked the economy, and when the structure began to fail, his government made sure the suffering would fall only on ordinary people.

Economic inequality, which has been on the rise since the 1980s, has gone into overdrive with the recession that began in 2008. The bank and corporate bailouts of that year have been one of the most corrosive events in American history: they crystallize perfectly the ordinary person’s sense that the system is rigged against them and in favor of the wealthy elite. Because of the timing of the bailouts—just before the inauguration of a new administration—Barack Obama has become identified in the public mind with bailouts and banks as well. At the same time, the pace of social change has disoriented ordinary Americans. The Far Right has come up with a proposed solution to the problem: it wants to abolish the twentieth century.

One unifying theme of the diverse Tea Party groups is their opposition to immigration; their fear of foreigners has been worsened, I think, by the election of an American president with black skin and a foreign-sounding name. And the president has failed to put forward an alternative economic or social vision that would offer confidence and hope to those hit hardest by the recession.

Truly, the center in America has not held. As Ian Millhiser of the Center for American Progress has explained,⁹ the failure of the Bush administration discredited the conservative elites. Traditional pro-business Republicans now carry the stain of the bailout; the “neo-conservatives” who staffed the Bush foreign policy and defense apparatus were the architects of the war in Iraq. America has always had a strain of conservatism that was thoughtful, grounded in history, and respectful of tradition. As a progressive, I often disagree with these conservatives about the nature of democracy, the wisdom of economic regulation, the proper extent

of the Commerce Power, and the proper role of equality. But I seldom thought—as I do more and more often today—that when engaging conservative arguments I was talking to people who simply did not live on the same planet as the rest of us.

Since 2008, lunatics have taken over the conservative asylum. The traditional conservatives have found themselves talking to the air—witness the defeat of a conservative figure like Utah senator Robert Bennett by Tea Party darling Mike Lee. Dozens of the new Tea Party Caucus House Members showed they were perfectly willing to risk worldwide economic collapse by allowing the United States to default on its debt. Republican presidential candidate Rick Perry attacked Republican Fed chairman—and former Bush staffer—Ben Bernanke as “almost treasonous” for his efforts to prevent a double-dip recession.¹⁰ In the absence of sane, experienced leadership, what is called “movement conservatism” has been hijacked by a distinctly motley crew of far-right mouthpieces.

The NCCS, for example, clearly springs out of a certain kind of conservative religious politics. It blends those with the old-style Cold War ultraconservatism of groups like the John Birch Society, which regarded all postwar American history as the triumph of Communist treason. (The society’s founder, Robert Welch, once called Dwight Eisenhower “a conscious, dedicated agent of the Communist conspiracy.”)

But note the legend about Anglo-Saxons and the Ten Lost Tribes. That doesn’t come from ordinary Christian conservatism, or from Mormon fundamentalism. It ought to set off a warning announcement: “You are now entering deepest Crazy Town.” The Anglo-Saxon legend is the remnant of a movement called “British Israelism,” which arose in the nineteenth century to argue that the people of Britain, not the world’s Jews, were the “chosen people” of the Christian Bible. “Israelism” arose at the same time as the burgeoning of the worldwide British Empire. Not surprisingly, the idea that white Britons were God’s chosen people made it okay for them to rule nonwhite people around the world: that was the divine plan.

But it also was a strong justification for virulent anti-Semitism. Jews, in the “Israelite” literature, weren’t actually descended from the Hebrews of the Old Testament; they were fraudulent interlopers. Some “Israelists” claimed they were actually “Khazars,” descendants of a Turkic people whose ruling elite converted to Judaism in the eighth century BCE. Things got worse when “Israelism,” as is documented by scholar Michael Barkun