

themes which are the genesis of the writ's flourishing; for these, ultimately, are shared by our modern public law.

Two principal themes appear and re-appear in the book. The first is the nature of the writ's source—the royal prerogative. The second is the part played in its history by a series of pre-eminent judges from the early seventeenth to the late eighteenth century: Popham, Fleming, Coke, Hale, Holt and Mansfield. Being a prerogative writ, habeas corpus was issued primarily (not exclusively) by the Court of King's Bench, the king's court, whose power was pre-eminent. The prerogative may be said to have given the writ its generality—"for the king ought to have an account why any of his subjects are imprisoned". Halliday describes what is the core principle, that "the court might inspect imprisonment orders made at any time, anywhere, by any authority" (p.160). It meant not only that the writ ranged as far and wide as family disputes and prisoners of war, but also that it went to territories outside England, provided only that they were subject to the king's jurisdiction; Ch.8 takes us to Barbados, Québec, Calcutta and the South Pacific. Habeas corpus was first issued in India in July 1775. Long before, its sinew had been felt in Berwick-on-Tweed and the Channel Islands.

The great judges whose work Halliday describes—the second principal theme—exerted a direct and tangible personal influence. So much is perhaps most clearly shown by the writ's relative decline from 1790, when Lord Kenyon was Chief Justice of the King's Bench, Lord Mansfield having retired in 1788. The effects of the Habeas Corpus Acts, notably of 1679 and 1816, are well described (though lawyers and no doubt other readers would have appreciated at least excerpts from the statutory texts in an appendix); but this is the judges' story.

These two themes, the writ's prerogative foundation and the judges' pivotal role, are what link this history with our modern law. They are why the book's appeal is not only antiquarian. At least they are the biggest reason; another is the human pageant of individual tales, some dramatic, some funny, to be found throughout the book. There was Margaret Symonds, the lady who laughed in church (p.99); John Lilburne, "the most public and persistent habeas corpus litigant of any age" (p.193), who to my eye has all the makings of a vexatious litigant; the "Hottentot Venus" (p.207); and "Magna Farta" (p.233). They all have lessons to teach. And other more famous personages walk among them: the Earl of Clarendon, the Earl of Shaftesbury, Titus Oates—and President Abraham Lincoln, who suspended habeas corpus during the American Civil War, with the later approval of Congress (p.308). And there is much else besides. The use made of the return to the writ, and the practice of issuing orders nisi, have much to say about the development of legal procedures. The relations between the King's Bench and the Privy Council, and later Parliament, are of real importance for our constitutional history, as is the extent to which aliens might have access to the writ.

The book is distinguished by Halliday's method. He has examined "the writs, rolls and rulebooks" of the King's Bench in order to undertake a quadrennial survey of the use of habeas corpus from 1500 to 1800. He calculates that over that period habeas corpus was deployed or sought to be deployed by over 11,000 people. Details of the survey are given in a comprehensive appendix. It includes, for example, a table showing the release rates following issue of the writ grouped by reference to the periods of office of individual Chief Justices. Thus in Lord

Mansfield's time (1756–1788) just over 80 per cent were bailed or discharged; from 1788 to 1802, when Lord Kenyon was Chief Justice, about 35 per cent.

This is patient scholarship indeed. Are there any criticisms? The discussion of liberty in Ch.6 is a little weighed down by theology. And the language is occasionally overblown. The statement "[i]f narrative is like a tone poem, then this book has been written as a fugue" surely belongs in *Private Eye*. But this is nothing set against the book's sustained high quality and the vigour of its fascinating narrative.

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Constitutional Theocracy, by Ran Hirschl, (Cambridge, Mass.: Harvard University Press, 2010), 306pp, hardback, £33.95.

Behold constitutional theocracy! A new apparition on our accustomed maps of political/legal regime-types, still taking shape (or, rather, sundry variant shapes) but by now a clearly distinct general class: "CT", let us call it. In Ran Hirschl's persuasive telling, CT arrives on the world scene as an outcome of an "uneasy intersection" of two tracks of current historical development (pp.2–3). Along one track, ever-increasing numbers of countries around the globe seem drawn to a "constitutional" model for civic rule, standardly marked by entrenched institutional differentiations, bills of individual rights, and judicial review. Along another track lie spreading and intensifying waves of demand for civic ordering according to the tenets of a religious faith, perhaps even under direct administration by religious notables. A regime-form devised to carry out both impulses would appear, as Hirschl says, to be a potentially "explosive" (p.5) brew of non-compatibles, and so one main effort of his book is to explain how CT might be or be made a stable compound.

By his own first cut (of which *Constitutional Theocracy* largely consists) at classification, description, exemplification, explanation, and diagnosis of the varieties of regime-form adaptations to encounters around the world between constitutionalist and theocratic impulses, Hirschl builds a hands-down convincing case for close attention by comparative constitutional scholars to this family of political developments. For that reason, undergirded by the evident breadth of Hirschl's knowledge, the shrewdness of his practical-political intelligence, and the verve and wit of his writing, his book will and ought to be widely welcomed and read.

Beyond its rich and telling contribution to empirical/explanatory political studies, Hirschl's book tenders something on the theory side. "Constitutional Theocracy"—the very title itself (is it also a riff on Carl Schmitt?)—represents a "challenge to conventional constitutional theory" (p.40), packaged in the terms of a somewhat combative proposition of political-conceptual possibility. "Constitutional Theocracy," says Hirschl (p.40), is *not*, as it might at first strike you, an "oxymoronic" notion. Seemingly at cross-purposes to views advanced by political theorists and philosophers such as Walter Murphy, Jürgen Habermas, and John Rawls, Hirschl treats constitutionalism as a type of political "hardware" (p.42)

that need not come out of the box already laden with proto-liberal substantive ideas. As Hirschl maintains, the “constitutional” idea of an entrenched institutional framework of rights, powers, and limitations, including “a formal distinction between political ... and religious authority” (pp.3, 42), can exert its own distinctive attractions as hardware, untethered from the “software” of a rationalist-liberal conception of the sources of political norms and values (say, in a common human reason or a universal pragmatics). A question remains, though, about the sense in which, and the extent to which, Hirschl’s work in this book might support a claim for the freestandingness of the constitutional hardware model from liberal substantive rationality.

Suppose we set sail with a naively idealistic take on the two historical developments that intersect to generate CT. We cast them both in the terms of motivations within society to do the really right thing about government, to line up the scheme and practice of government with true considerations of rightness, goodness, and fitness for humankind at our time and place. Certain genuinely humanitarian attractions—“human rights,” “popular sovereignty” (p.4)—of a post-enlightenment (modernist, rationalist) constitutional model for civic legal ordering meet up with a powerful resurgence in society of widespread, no less humanely motivated belief in a need to reconnect the regnant public conception of civic right and wrong with the more-or-less counter-modern, tradition-based normative system of a religious faith. It would be especially when we view the colliding rational-modern and pious-traditional impulses through such strongly idealist-tinted motivational lenses that the seeming “explosiveness” of their putative combination in a CT hits its zenith.

But suppose you were aiming, even so, to build a case for the practical viability of regime-forms that can, with apparent denotative aptness, be called both “constitutional” and “theocratic”. It seems you might be best advised to work around suspicions of the compound’s ideal-based incoherence, rather than confront them directly. So you shift to the “realist” ground of a gravitation of self-servingly motivated political forces, mutually opposed and more-or-less equally empowered, toward a CT “deal” between them, which might exert so strong an attraction *as deal* as to stave off or suppress any merely ideological contradictions. No student of constitutional politics would be better equipped than Ran Hirschl to steer an exploration down that path. But nor, on the other hand, would any have a keener eye for the possible play of ideological vectors within the overall realist-minded, developing account. Both proclivities are evident in *Constitutional Theocracy*.

A centre-piece of Hirschl’s book is its taxonomic array—attended by richly drawn-from-life illustrations—of nine regime-types in ascending order of allowance or promotion of religious penetration of the civic space (pp.26–39). But also strongly, if implicitly, at work in the book is another typology, composed of two cross-cutting, dichotomous classifications—one for general models of institutional setups for governance and one for the sources and substance of the policies and pursuits of governance. Institutional setups are “constitutional” or, oppositely, “pure”; sources and substance are “theocratic” or, oppositely “liberal”.

A Typology of Regimes

	model of governance			
	Constitutional		simple	
source and substance of legitimate law	<i>liberal/modernist</i>	liberal democracy	constitutional democracy	liberal majoritarian democracy
	<i>Religious/traditional</i>	constitutional theocracy (“CT”)	“pure” theocracy	

The table is not Hirschl’s invention but mine; it represents my own explication of Hirschl’s implicit conception. On the “model” side (the columns), what distinguishes “constitutional” from “simple” (“pure”) is the former’s resort to a distancing of the forms and institutions of legitimate civic rule from publicly acknowledged, ultimate sources of that rule’s legitimacy. Thus, while “theocratic” governance is distinguished from “liberal” (the rows) by the former’s reversal of the latter’s aversion to the infiltration of civic rule by religious doctrine or authority (thus, church-state separation, privatisation of religion), what distinguishes “constitutional” from “pure” theocracy (the columns) is the former’s attachment to a formal separation of civil-governmental from religious authority and authorisation.

In a constitutional (as opposed to a “pure”) theocracy, civil power neither flows directly from divine revelation nor rests institutionally in divinity’s appointed earthly vicariate. To the contrary, in Hirschl’s understanding as I read it, the key to what makes a CT “constitutional” is its interposition of distinctly civil authority and authorisation between religious guides and sources and the law in force. In a “constitutional” order, civil authority rests in “political figures operating within the bounds of a [civil] constitution” (pp.2–3). But—and here’s the point—a civil constitution might possibly itself prescribe for the country a *de jure* subjection of civil law and civil jurisdiction to norms and values drawn from religious sources. In that way, “divine authority and holy texts” might possibly be *civilly* constituted as “the supreme governing law of the state” (pp.5–6). A CT is a regime that substantially realises on such possibilities.

Now that has been, as I said, my own ideal-typical reduction of Hirschl’s presentation. In Hirschl’s actual pages, neither the “model” nor the “source” classification is cleanly abstracted in the manner of my rendition. Rather, each designation —“constitutional” (model) and “theocratic” (source)—represents a polar valence on a complex and messy continuum. But still the point remains: It is the idea of the conceptual distinctness of these two valences, the idea of their separate and independent lifelines that supplies the punch to Hirschl’s claim of the (unexpected) viability of the product of their historic, unprecedented meeting at the CT corner. Just as, Hirschl says, a set of theocratic-not-liberal policies and pursuits may have its values and attractions for some given population, so, for that same population, the constitutional hardware model may have its values and attractions *and the two sets of values and attractions will not (or need not) be mutually repellent*. Just as the constitutional model can be (and characteristically has been) fitted to liberal substantive policies and pursuits, so can it—if such be the need and the choice—be fitted to theocratic policies and pursuits *and still remain distinctly the constitutional model*.

Hirschl's defence for these claims of the possible coherence of the CT compound certainly does make its bow to normative-idealist concerns. On the one hand, as he writes (p.41), the particular religious outlook inhabiting a given theocratically inclined constitution will sometimes itself be receptive (think Rawlsian overlapping consensus) to liberal-constitutionalist ideals. On the other hand (pp.41–42), many undoubtedly "constitutional" regimes in the world today, which no one would think to classify as overall "illiberal" or "theocratic", do themselves observably underwrite various kinds and degrees of intolerance of religious difference and promotion of religious pecking-orders.

These gestures by Hirschl toward ideal-normative reconciliation occur mainly at the outset of his defence of the possible viability of a CT. The rest of the defence, though—by far the major share of it—proceeds not on that level but on the decidedly "realistic" level of a circumstantially contingent balance of self-seeking secular and religious factional forces.

To illustrate: CT might represent a stable stand-off between secularist and religious factions where the following conditions obtain: First, the religious contingent have reasons of their own—their own culturally inbred likes and dislikes, their own yearnings for ease and at-homeness in the civic space—for favouring a religious takeover of that space. Secondly, the secular contingent have their own comparably self-serving stakes in secularism (pp.46–47), not least including secularism's easy receptiveness to commercialism (pp.63–64).

Thirdly, the secular contingent, knowing themselves engaged in an on-going struggle with pro-theocratic forces, feeling bolstered by an expectation of retention of control over certain levers of guidance built into the constitutional hardware, calculate on a longish-term strategic benefit to their side's vital interests from a waiver of objection now to certain palpable theocratic encroachments on the public space. (Hirschl assembles the relevant strategic considerations and tactical devices—including "co-optation", "jurisdictional advantages", "strategic delegation", "constitutional delegitimation of religious association", and "political control of constitutional courts and judges"—in a chapter on "The Secularist Appeal of Constitutional Law and Courts" (pp.50–102).)

Fourthly, and crucially, the balance of forces on the ground is such as to allow the secularists to pull it off, thus achieving not a suppression but—to the contrary—a satisficing (to them) reception and containment of the theocratic drive.

By far the major share of Hirschl's explanatory work does, in fact, at least roughly fit that sort of pattern. Just to make the pattern a bit more concrete: The model constitutional hardware conventionally includes some substantial measure of government by judges; so where, circumstantially and contingently, secularists can expect to remain in control of judicial recruitment, training, and selection, that gives secularists a self-serving reason to push for the constitutional model (pp.85–101).

"Circumstantially and contingently", I wrote just above. Is that correct? Hirschl includes, in his account of constitutionalism's secular appeal, a compelling exposition (pp.72–83) of how the "very logic ... structure, predisposition, and epistemology" of contemporary constitutional legal discourse render the modern constitutional model more "hospitable" to "secularist worldviews" than to "religious ideology" or "rule-of-God-based perceptions of the good." Hirschl persuasively

situates that discourse deep within a "modernist narrative" (and humanist, too), not only of the primacy of individual moral freedom and responsibility but also of the rational controllability, by institutional design and higher-law guarantees, of passions and events. The point being that if the constitutional model is thus itself, out of the box, already fraught with a pro-secularist bias, then that ideological fact would give a party of would-be satisficing secularists a further tactical reason to yield some ground to theocratic encroachment as long as it occurs on the watch of the constitutional model. All told, a fine example of Hirschl's knack for weaving ideological threads into the fabric of an overall, decidedly realist-style account of the possible stability of a CT regime in certain sorts of not unheard-of real-world settings.

Of course, the suggestion of an indwelling pro-secular tilt in constitutional-legal discursive practice may not sit so easily with a suggestion (remember Hirschl's challenge to conventional theory) of the indifference of the constitutional hardware to choices between liberal and theocratic software. Ought such a tension to trouble Hirschl? In the end, as I think—and see Hirschl's own fine concluding reflection (pp.245–49)—his argument is not that the constitutional and theocratic ideals, as pure ideals, are ultimately fully compatible. It is rather that these ideals can be expected, in some circumstances, under realist pressures, to bend and morph sufficiently to accede to a CT. In the play of idealist and realist explanations in *Constitutional Theocracy*, there is no doubt which kind is in the driver's seat. Ran Hirschl has done a masterful job of explaining CT as (I nod again to John Rawls) not a moral consensus but a *modus vivendi*.

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