



would stand up and give on oath testimony as to the truthfulness of the accused's own oath – which comes in for criticism in the book, part of a distinct canon law or Roman tradition or was it just a continuation of a practice from feudal times that had been done away for criminal cases by the Constitutions of Clarendon in 1164? Or a mixture of the two perhaps. He wonders why the courts persisted in carrying on with this practice when the punitive enforcement of oaths had been done away with in 1661 and when secular courts were doing so nicely with juries. In such cases, it might be helpful to consider the extent to which the consistory courts were applying distinctively canonical or civilian principles which were part of the DNA of the church courts in England or not, and how easily it would have been for the courts to abandon such practices and then go over to something like evidence before a jury.

In the appendix to the book are lots of useful tables with the data from the three courts of the breakdown in the different charges over the decades, sanctions imposed, the guilt rate, and so forth. The book is an excellent study and while it could be described as 'local history' by its being rooted in its case studies, it pans out and makes one of the most valuable studies of ecclesiastical justice in the seventeenth century that there is.

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## Christianity and Constitutionalism

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Constitutions are crucial to the flourishing of human communities, whether in state or church. Concerns have recently been expressed by a constitutional watchdog about the erosion of integrity in British public life, partly through a casual attitude to constitutional norms.<sup>1</sup> Constitutions are the matrix of order and liberty which together make for human happiness. In their aspect as political communities the churches require constitutions. Richard Hooker (d. 1600), not mentioned in this book, showed how the church was not only 'a body mystical', but also 'a politic society'. Constitutions underpin the moral integrity of institutions and should be adhered to, especially by leaders in

1 See the Fourth Report from the United Kingdom Constitution Monitoring Group (March 2023), *The Constitution in Review*. <<https://consoc.org.uk/publications/>>, accessed 1 June 2023.

church and state. But sound constitutions may be undermined or even overthrown, of which history provides many examples, from Hitler's Germany to Putin's Russia.

Constitutions are concerned with the exercise of power and authority in a political community, whether of state or church. By means of constitutions the scope and limits of authority in an institution are laid down as a protection against the exploitation of those under that authority. Laws that transgress natural and divine law lack validity and are no law. The conscience revolts against unjust laws; they will not be obeyed, except under coercion. Constitutions often recognize that office-holders operate under a superior authority and a higher law. Consequently, the historically troublesome concept of sovereignty, which wreaked havoc at the hands of the late medieval papacy, is cut down to size.

This volume of scholarly essays is a major contribution and resource for the study of this pivotal concept of political philosophy. The work is divided into three sections: historical, conceptual and theological. Part 1 expounds selected aspects of the influence of Christianity on the development of constitutional ideas and practice, beginning with essays on the Old and New Testaments. Jonathan Burnside draws out the foundational insights of the Hebrew Bible (the focus is on Deuteronomy) with regard to law, authority and governance. He does not engage with the prophetic books and his section on 'Biblical Constitutionalism as Wisdom' does not expound the Hebrew Wisdom literature. His account seems to lack awareness of the historical-critical study of the Hebrew Bible: he attributes the writing of Deuteronomy to the generation after Moses (p. 39; cf. p. 53). Much modern scholarship attributes at least the formation, if not the invention, of Deuteronomy to a benign priestly conspiracy to prompt King Josiah's reforms of Jewish worship in 622–3 BC. Dorothea H Bertschmann offers three New Testament models of the relation of Christian communities to the Roman state. She interprets St Paul's term *politeuma* ('citizenship', Phil. 3.19) to refer to the 'way of life' of the early Christians, although not without a political dimension. Her approach, while unduly narrowing the concept of constitutionalism to relations between church and state, suggests that it is not simply about theories and structures, but also about collective *practice*.

Peter Leithart finds great significance in the Emperor Constantine's embrace of Christianity as paving the way for religious freedom and the autonomy of the church. Leithart believes that Constantine's act was logically incompatible with the concept of sacral kingship, although he admits that sacral kingship continued unabated, especially in the Byzantine church. Leithart assumes that a sacral monarch was a rival power-centre to the church, rather than being held within the church. Richard H Helmholz notes that constitutionalism has two main components: recognition of a superior law to positive law and the

principle of a division of powers within governance. Both principles serve to prevent arbitrary and oppressive rule. Helmholz points out that there were canonical constraints on arbitrary papal rule and that all parties resorted to the canon law for ammunition.

John Witte Jr has previously shown how Protestant states rebuilt their civil institutions after the disruption and destruction of the sixteenth century. Witte is, however, mistaken in ascribing to Martin Luther a doctrine of the 'invisible church', which Witte puzzlingly equates with a 'heavenly kingdom' (p. 128). For Luther the true church was hidden from profane gaze, but it was not invisible because it could be identified in faith by its visible marks (*notae*), principally of word and sacrament. Also, I question whether the Calvinistic Puritans in England advocated the separation of church and state (p. 147). Until the Civil War period most Puritans were within the Church of England. During and after it, whether they were Presbyterians or Independents, they wanted freedom for the church, but with state recognition and support. Only a few congregations of radical Separatists rejected the state, regarding it as godless. Joan Lockwood O'Donovan draws out the salutary implications of Cranmerian theology as an antidote to the 'secular liberal' tenor of modern democracy. She presents the public theology of the Reformation as 'the historical foundation of constitutional law throughout the royal dominions' (p. 150). Her approach is intellectually refreshing, but I wonder what it adds to her case to sprinkle the essay so freely with the pejorative adjective 'liberal'. I would like to see what the argument looks like without it.

The first chapter of the Christian perspectives section, by Joel Harrison, examines the concept of sovereignty—individual absolute authority. Harrison draws on Augustine, Aquinas, Gierke, Maitland, Figgis and more recent writers to advocate a pluralist polity of distributed authority informed by complementarity and cooperation. Li-Ann Thio analyses 'the rule of law'. We all want to live under the rule of law, not the arbitrary diktats of a despot. But what kind of law should it be and by what criteria do we decide that? Thio postulates a 'higher law' as the foundation of justice and shows how this has been defended by writers ancient, modern and biblical. Next Richard Ekins expounds 'democracy', self-government by the people, which is premised on the notion that a nation or people is a natural society, like the family. The primary aim of state action, he rightly insists, is the common good of the people. Carlos Bernal argues that the Bible (in fact the Old Testament) provides a foundation for the separation of powers as a system of checks and balances, an essential element in constitutionalism. However, I think that the divisions between kings and priests, prophets and judges, which he adduces, were more a matter of unique divine election and calling than a constitutional arrangement. Julian Rivers' is the only contribution which considers the relevance of the thought of Edmund Burke for constitutionalism, so let us be

thankful for small mercies. Ian Leigh, one of the editors, explores freedom of conscience. In looking for early examples, he does not mention that Martin Luther, at the Diet of Worms in 1521, is said to have claimed, 'My conscience is captive to the Word of God' – thus free to be bound. Leigh's co-editor Nicholas Aroney discusses federalism, presenting it as much more than a pragmatic compromise between entities that fail to come closer together, but as a form of association structured by covenant.

In the third section, David VanDrunen argues that Scripture shapes constitutionalism through the concept of covenant, a matrix for biblical interpretation. The covenantal influence effectively enlarges constitutionalism from a negative function (the restraint of power) to a positive one (holding parties together in unity). He is not ashamed to advocate a 'liberal polity' whose aim is to establish a just order, based on a measure of tolerance, among those who are different (p. 341). Jonathan Chaplin's essay on justice, claiming – doubtfully – to represent a Reformed perspective, advises against the idea that deeper ethical, philosophical and theological justifications for upholding public justice should be enshrined in constitutions. In a pluralist society, he argues, these claims have to be fought over in the rough and tumble of civil society. This is surely a false antithesis: axiomatic claims will always be contested – his is equally an axiomatic claim – but that fact need not exclude a constitution resting on deep principles. The alternative to principled, as opposed to pragmatic, functional, constitutions, is to jettison any ontological foundations for justice and freedom. I agree with Tracey Rowland that the ideal of a morally neutral state is both incoherent and terrifying. John Milbank on natural law is, of course, on the same page and is absolutely correct to say that justice sits above rights and that rights must be adjudicated in the context of justice (p. 431). Iain T Benson's exposition of subsidiarity needs to be heeded when some still assume that subsidiarity means delegation from above. The final chapter, by Douglas Farrow, is a profound examination of the theological grounds of constitutionalism in the light of the prevailing cultural ideology of the West, that of the self-creating autonomous individual. An index of names and topics and of biblical references follows. This work overall is a treasure-house of needful wisdom and merits widespread serious attention.

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