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## What Is Constitutional Intolerance?

Is justice, then, variable and changeable? No, but the times over which she presides are not all alike because they are different times.

—St Augustine

## 1.1 INTRODUCTION

What does it mean “to tolerate” in a post-Christian and post-secular state? Coexistence is not possible without a measure of tolerance, the forbearance of certain differences, or without holding tensions that may arise from differences in values and practices. This capacity for tolerance – which was long ascribed to the classical liberal tradition – has been meaningfully challenged by nationalist and populist movements, many of which have selectively embraced some version of anti-liberal communitarianism, and which have driven the so-called culture wars to a new momentum.<sup>1</sup> New forms of intolerance pertain to the position of religious, ethnoreligious, and sexual minorities in public life, echoing the concerns over the public visibility of minorities inhering in historical Christendom. The political articulation of certain groups as “other” to “the nation” is increasingly mediated through constitutional repertoires, such as constitutional revision and amendment, developments in constitutional hermeneutics, or pseudo-constitutional behaviour. This book demonstrates that antecedents of contemporary conflicts over diversity in Europe can be found in early modernity, specifically in early modern practices of toleration, which impacted both the belonging and the visibility of minorities.

This book offers a documentation and a comparative theoretical reflection on the rise of constitutional intolerance in Europe: the use of constitutions and constitutional repertoires to express the othering of religious, ethnoreligious, and sexual identities vis-à-vis the political community. This book presents four iterations of

<sup>1</sup> Stephen Holmes, “The antiliberal idea,” in *The Routledge Handbook of Illiberalism*, ed. András Sajó, Renáta Uitz, and Stephen Holmes (Abingdon: Routledge, 2022), 3–15.

constitutional intolerance, based on case studies on France, the Netherlands, Hungary, and Poland: (1) France's leveraging of the broad concept of *laïcité* (i.e. strict separation of church and state) and reliance on the *living together* doctrine, such as in the penalisation of the full-face veil; (2) the liberties that the Dutch legislature has taken in the substantiation of the concept of *public order*, inscribing underspecified social norms into a principle that aims at objective concerns of security and good order, such as to penalise the full-face veil; (3) Hungary's discrimination against religious organisations that are critical of the Orbán government, with reference to constitutional amendments and defiance of the courts; and (4) the (in)visibility of Law and Justice (lesbian, gay, bisexual, and transgender) identities in Poland, mediated through pseudo-constitutional anti-LGBT resolutions, declarations, and Family Charters, also known as the "LGBT-free zones".

Europe faces significant challenges regarding the future of liberal democracy as its structures need to contain increasingly complex forms of identity and diversity: sometimes these challenges are expressed in widely criticised changes to the law and sometimes in seemingly inconsequential shifts.<sup>2</sup> Whereas there is a vast literature on the rise of illiberalism and critique of secularism, few scholarly works integrate the challenges of modern constitutional democracies in Europe across the liberal and illiberal spectrum. This comes at a political cost: that the protection of Muslim and LGBT identities become feuds of the political left, whereas the issue of religious freedom is increasingly claimed by right wing movements.

Contrary to popular conceptions of tolerance as referring to certain preferences and allowances, this book develops an analytical framework around practices of coexistence rooted in the pre-constitutional practices of toleration. Central to toleration is a fundamental conception of otherness, which is ascribed to minorities, who may coexist in space and in time, but without fully belonging to the political community and whose citizenship may or may not be contested. This designation of otherness is the reason that we can consider religious, ethnoreligious, ethnic, and sexual minorities in one conversation, also called the *tertium comparationis*. In stepping out of familiar binaries that pit religion and LGBT identities against each other, one might discern how the power dynamics inhering in constitutional law may change perspective as governing majorities come and go; and they remind us why it is important to protect "favoured" and "unfavoured" identities alike.

This comparison is facilitated by methods that transcend traditional approaches to comparative constitutional law. One of the strengths of European constitutionalism is its historical commitment to legal positivist methods: the detailed study of written law and judicial decisions. This study engages those traditional legal methods, such as the analysis of constitutional and legal texts and their Parliamentary history.

<sup>2</sup> Compare Renáta Uitz, "Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary," *International Journal of Constitutional Law* 13, no. 1 (2015): 279–300.

This method is particularly relevant in the cases of France and the Netherlands, where the discernment of constitutional intolerance relies on a relatively technical analysis of the transformation of legal concepts such as public order and *laïcité*. This book brings to this technical analysis a further normative reflection integrating historical, sociological, and theological perspectives – perspectives that can bring further normative depth to the field of constitutional studies.<sup>3</sup> The first part of the book elaborates on theoretical dimensions of othering as non-belonging, such as the place of the other in public space and the understanding of the other in time. These chapters facilitate the normative integration of the case studies, enabling a deeper understanding of the cultural and normative significance of what otherwise might seem quite specific legal issues.

The guiding argument of the book is that intolerance is not simply a potential undercurrent of illiberalism or indeed of liberalism, even though their manifestation is entangled in their political contexts. There is, of course, a risk that writing about liberal and illiberal leaning states might be perceived as contributing to the mainstreaming of illiberalism in Europe, but the gains of this comparison outweigh this concern. This comparison contributes to understanding the significance of constitutional repertoires in enabling right wing interests in both liberal and illiberal contexts. The vulnerability of these repertoires to political expressions of intolerance is not to be underestimated. They are not mere aberrations of otherwise functional constitutional systems, rather, they are embedded in constitutional structures that need to be supported by a sound conception of the rule of law. The blatant disregard for the rule of law by the Orbán administration in Hungary and the Law and Justice party in Poland certainly distinguishes the cases of Hungary and Poland from the Netherlands and France but also brings to the fore why shifting concepts of public order and *laïcité* in the Netherlands and France are so problematic. If such developments are accepted in liberal states, it will become more difficult to critique and contain the threats to constitutionalism that arise in Hungary and Poland, and indeed elsewhere.

Several chapters in this book build on previous doctoral work on the place of religious and ethnoreligious minorities in France, Germany, and the Netherlands, titled “Politics of Religious Diversity: Toleration, Religious Freedom and Visibility in Public Space”.<sup>4</sup> This thesis, which was written at the Department of Politics and International Studies at the University of Cambridge, comprised a comparative legal-historical study of early modern practices of toleration, their relationship to

<sup>3</sup> Ran Hirschl, *Comparative Matters. The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014); Kim Lane Scheppele, “Constitutional ethnography: An introduction,” *Law & Society Review* 38, no. 3 (2004): 389–406.

<sup>4</sup> Mariëtta D. C. van der Tol, “Politics of religious diversity: toleration, religious freedom and visibility of religion in public space,” PhD thesis, University of Cambridge (2020), <https://doi.org/10.17863/CAM.64125>.

political thought,<sup>5</sup> and the echoes of historical practices of toleration in the governing of religious difference in emerging “nation-states”. This thesis was oriented to the expression of religious differences in public space and the role of constitutions in mediating continuities and discontinuities in the governing of religious diversity from pre-Revolutionary states to modern constitutional states. Sources consulted for this analysis derived from a number of languages, including English, French, Dutch, German, Spanish, and Latin, which gave further insight into the reception of the idea of “toleration”,<sup>6</sup> “moderation”,<sup>7</sup> publicness,<sup>8</sup> and “neutrality”<sup>9</sup> in different languages and jurisdictions, as partially expounded in the *Geschichtliche Grundbegriffe*. The variety in the reception of these ideas shows that secularisation, the separation of church and state, and a concept such as *laïcité* tend to be too readily equated in Anglophone literature, to the detriment of our understanding of the development of such ideas within specific political contexts, especially with regard to demography, the presence or absence of a single dominant church, the range of minorities present, and the historical relationships between them.

This book has taken a slightly different direction in that it presents Hungary and Poland as two very different exponents of illiberal politics. Research content derives primarily from desk-based study of legal documents and secondary literature, which in this case includes a number of sources in Polish and Hungarian. The challenges of this research are vast, not least because of the language barriers and the availability of pro-Orbán publications in English; this has been partially overcome through conversations with legal practitioners, political activists, and dissidents. While none of them were the “object” of this study, their insights assisted in the interpretation of the source materials. The same is true for research visits across Hungary and

<sup>5</sup> Compare Glen Newey, *Toleration in Political Conflict* (Cambridge: Cambridge University Press, 2013); Rainer Forst, *Toleration in Conflict* (Cambridge: Cambridge University Press, 2013).

<sup>6</sup> Gerhard Besier, “Toleranz,” in *Geschichtliche Grundbegriffe. Historisches Lexicon zur politisch-sozialen Sprache in Deutschland*, Band 6, ed. Otto Brunner, Werner Conze, and Reinhart Koselleck (Stuttgart: Klett-Cotta, 1990), 445–523, 492; István P. Bejczy, “Tolerantia: a medieval concept,” *Journal of the History of Ideas* 91, no. 4 (1997): 365–384, 375; Otto Busch, *Toleranz und Grundgesetz. Ein Beitrag zur Geschichte des Toleranzdenkens* (Bonn: H. Bouvier und Co Verlag, 1967).

<sup>7</sup> Ethan H. Shagan, *The Rule of Moderation: Violence, Religion and the Politics of Restraint in Early Modern England* (Cambridge: Cambridge University Press, 2011).

<sup>8</sup> Lucian Hölscher, “Öffentlichkeit,” in *Geschichtliche Grundbegriffe. Historisches Lexicon zur politisch-sozialen Sprache in Deutschland*, Band 4, ed. Otto Brunner, Werner Conze, and Reinhart Koselleck (Stuttgart: Klett-Cotta, 1978), 413–467; Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Cambridge, MA: MIT Press, 1989).

<sup>9</sup> Michael Schweizer, “Neutralität,” in *Geschichtliche Grundbegriffe* Band 4, 317–337; Heinhart Steiger, “Neutralität,” in *Geschichtliche Grundbegriffe* Band 4, 337–370; Andrea Pin, “Does Europe need neutrality? The old continent in search of identity,” *Brigham Young University Law Review* 3 (2014): 605–634; Andrew M. M. Koppelman, “Ronald Dworkin, religion, and neutrality,” *Boston University Law Review* 94, no. 4 (2014): 1241–1253.

Romania, including visits to “memory sites” and museums,<sup>10</sup> and attendance at the political festival *Tusványos* in 2022,<sup>11</sup> where Viktor Orbán spoke about the consolidation of illiberalism beyond his own generation, claiming that ‘there are things which are eternal’ (*van, ami örök!*). This book has certainly benefitted from time spent in the company of those who support (or ambivalently support) the Orbán administration. While specific conversations remain confidential, these conversations have shaped my impressions and interpretations of politics beyond the news headlines, and I remain grateful for the trust I received as a foreign and critical researcher.

### 1.2 WHAT IS TOLERATION?

This book introduces pre-constitutional toleration as a governmental technique, to be distinguished from tolerance as referring to popular sensibilities, although the two have often been fellow travellers. Toleration derives from early modern practices of coexistence, of both legal and social significance, and refers to the action or inaction of civil authorities with regard to religious “others” within a political community.<sup>12</sup> Toleration is reminiscent of Ethan Shagan’s understanding of English moderation as a governmental technique, which could serve as an argument for either wielding or restraining the sword.<sup>13</sup> The distinction between toleration and tolerance is instructive, although not all European languages have the vocabulary to express the nuances between them.<sup>14</sup> Toleration is part of a family of words which signify permission, forbearing, long-suffering, licensing, and impunity.<sup>15</sup> It could be understood as a disposition or *une direction de la volonté*, a direction

<sup>10</sup> Sites visited include the Budapest History Museum, the Great Dohány Synagogue and its Memorial yard and the Jewish Museum, the Visegrad Citadel and Museum, Budapest Liberty Square, the Esztergom Basilica and Museum, the Cathedral of Saint Stephen, the Great Church on Kossuth Square Debrecen, the chapel of Debrecen Reformed Theological University, the Castle and Museum of Csókakő, and the monument for Miklós Horthy in Csókakő; Compare Natalia Krzyżanowska, “Politics of memory, urban space and the discourse of counterhegemonic commemoration: a discourse-ethnographic analysis of the Living Memorial in Budapest’s ‘Liberty Square,’” *Critical Discourse Studies* 20, no. 5 (2023): 540–560.

<sup>11</sup> Tusványos is an annual political festival held in Băile Tușnad or Tuszánfdörd as it is known in Hungarian, in Transylvania (Romania); senior politicians, clerics, and public intellectuals appear in a number of public and livestreamed panels, speeches, and discussions. Interpretation from Hungarian into English and German were provided by the organisation of the festival, and these will be treated as primary sources in this book.

<sup>12</sup> Julia Costa Lopez, “Beyond Eurocentrism and Orientalism: revisiting the othering of Jews and Muslims through medieval canon law,” *Review of International Studies* 42, no. 3 (2016): 450–470.

<sup>13</sup> Shagan, *The Rule of Moderation*.

<sup>14</sup> Jeffrey R. Collins, “Redeeming the Enlightenment: new histories of religious toleration,” *The Journal of Modern History* 81, no. 3 (2009): 607–636, 613.

<sup>15</sup> William H. Huseman, “The expression of the idea of toleration in French during the sixteenth century,” *The Sixteenth Century Journal* 15, no. 3 (1984): 293–310, 299–301.

of the will.<sup>16</sup> Theologically, toleration has often been anchored in an Augustinian hermeneutic of the parable of the wheat and the chaff (Matthew 13). Augustine applied this image primarily to the unity of the church, arguing that the church should be tolerant of minor errors in order to maintain its unity and peace, and only exert intolerance to “persisting” heretics.<sup>17</sup> The undercurrent of this toleration is the restraint of power, whether grounded in a personal direction of the will or in a form of civil power. But this restraint is a response to a prior recognition of difference or otherness, which is not self-evidently compatible with a community’s theological or social self-understanding.

Toleration was first developed as a legal concept within the context of canonical law, in which the possibility of toleration was expressed through phrases like *tolerare potest*, signifying that this possibility was offered as a discretionary power.<sup>18</sup> It was mirrored by the phrase *dissimulare poteris*.<sup>19</sup> Dissimulation referred to the historical practice of concealing one’s religious allegiance and this could occur as a result of external pressure or personal discretion. María Roca emphasises that neither toleration nor dissimulation implied normative endorsement, but instead were the outcome of personal and prudential decision-making.<sup>20</sup> Those who practised dissimulation were often seen as cowards and traitors, or otherwise dishonest.<sup>21</sup> This indicates a fundamental interconnection between the visibility of difference and toleration. This dependence of toleration on visibility has been documented by Benjamin Kaplan who analyses visibility in relation to public and private expressions of confessional allegiance in his book *Divided by Faith*.<sup>22</sup> It is relevant to note here

<sup>16</sup> François Olivier-Martin, *Le régime des cultes en France du Concordat de 1516 au Concordat de 1801* (Paris: Loysel Editions, 1988), 401.

<sup>17</sup> Edward L. Smither, “Persuasion or coercion: Augustine on the state’s role in dealing with other religions and heresies,” *Faculty Publications and Presentations* 14 (2006), [http://digitalcommons.liberty.edu/its\\_fac\\_pubs/14](http://digitalcommons.liberty.edu/its_fac_pubs/14) (consulted 31 October 2017), 25, 34; Adam Ployd, *Augustine, the Trinity, and the Church: A Reading of the Anti-Donatist Sermons* (Oxford: Oxford University Press, 2015), 53.

<sup>18</sup> María J. Roca, “El concepto de tolerancia en el derecho canónico,” *Ius Canonicum* 41, no. 82 (2001): 455–473, 460, 465, 472–473; R. Scott Appleby cites David Little in *The Ambivalence of the Sacred: Religion, Violence, and Reconciliation* (New York: Rowman & Littlefield, 2000), 14; Compare Elizabeth Shakman Hurd discussing David Scott in “The political authority of secularism in International Relations,” *European Journal of International Relations* 10, no. 2 (2004): 235–262.

<sup>19</sup> Stefania Tutino, “Between Nicodemism and ‘honest’ dissimulation: the Society of Jesus in England,” *Historical Research* 79, no. 206 (2006): 534–553, 535; Alexandra Walsham, *Charitable Hatred: Tolerance and Intolerance in England 1500–1700* (Manchester: Manchester University Press, 2006).

<sup>20</sup> Roca, “El concepto de tolerancia en el derecho canónico,” 458.

<sup>21</sup> Roca, “El concepto de tolerancia en el derecho canónico,” 466. Filomena Viviana Tagliaferri, *Tolerance Re-shaped in the Early-Modern Mediterranean Borderlands: Travellers, Missionaries and Proto-journalists 1683–1724* (New York: Routledge, 2018), Introduction; Tutino, “Between Nicodemism and ‘honest’ dissimulation,” 534–553.

<sup>22</sup> Benjamin J. Kaplan, *Divided by Faith: Religious Conflict and the Practice of Toleration in Early Modern Europe* (Cambridge, MA: Harvard University Press, 2007).

that the minority religion was often tolerated only in private spaces, and that increased levels of toleration tended to imply a greater visibility of othered religion in public space. This has pertinence to contemporary discussions over the visibility of religion in public space, ranging from the contestation of religious symbols in public space to the normative weight attached to the privatisation of religion since the second half of the twentieth century.

Crucial to toleration is the distinction between differences that are or are not fundamentally challenging the societal order. This distinction is, of course, relevant in today's legal context: the law still makes a distinction between different kinds of "errors": ranging from administrative penalties to criminal offences which carry the temporary suspension of one's electoral rights. Sometimes, the law is more indifferent, usually with regard to the observation of particular religious rules and conventions. The law is, however, not altogether indifferent to religion, the matter of which is more complex than a mere institutional separation of church and state. The case studies on France, the Netherlands, Poland, and Hungary show how deeply constitutional, administrative, and criminal law can be entangled in questions of culture and coexistence. Sometimes, othering is not dependent on explicit "errors", but social sensibilities which condition belonging: for example, when those of different origin, race, religion, or sexuality may face additional expectations about their behaviour, their dress, their political preferences, or the renunciation of foreign allegiances in order to be socially accepted. Whereas such differences might appear irrelevant from the perspective of formal citizenship, one's economic and social status remains dependent on the de facto inclusion in local as well as national communities, while unrelated events in the world can trigger new waves of intolerance and exclusion.

Toleration must be understood against the backdrop of Europe's principal political imaginary in early modernity: the *corpus christianum*, which translates as the political expression of the body of Christ. This political imaginary gained prominence in a period of social, political, and ecclesial disintegration, when the *corpus christianum* transformed into multiple *corpora christiana*.<sup>23</sup> The *corpus* (one body) symbolised a sacred interconnectedness of territory, people, and teleology and retained its meaning throughout early modernity in various forms of religious and proto-secular political thought. This did not imply religious uniformity across Europe; in fact, a great measure of difference was considered part of a fractalised Christian unity: a unity that was constituted and sustained by a plurality of sacred spaces, in which the secular sometimes collapsed into the sacred.<sup>24</sup> It follows that not all differences were subject to the discretion of toleration, rather, that toleration

<sup>23</sup> William T. Cavanaugh, "'A fire strong enough to consume the house': wars of religion and the rise of the state," *Modern Theology* 11, no. 4 (1995): 397–420.

<sup>24</sup> Mariëtta D. C. van der Tol and Philip S. Gorski, "Secularisation as the fragmentation of the sacred and of sacred space," *Religion, State, Society* 50, no. 5 (2022): 495–512.



concerned the fringes of (im)permissible differences. It must be noted that the imaginary of the *corpus christianum* figured within a layering of temporalities: the idea that chronological time can have multiple different ascriptions of meaning to it.<sup>25</sup> An example of this is the notion of the eschaton, the idea that the present time must be viewed in relation to eternity, the return of Christ, and the Last Judgement, *sub specie aeternitatis*. Toleration was a governmental technique to protect Christian hope: hope of conversion and redemption, and progression in the economy of salvation. Alexandra Walsham terms this “Charitable Hatred”, or the hatred that serves the redemption of the accused.<sup>26</sup>

The layering of temporalities has, however, become much less prominent in questions of coexistence today: not that secular time would not allow for layered temporalities, but they usually emanate from the immanent and the secular, *sub specie secularitatis*. Moreover, the acceleration of time has squeezed the “now” between the demand not to “lose time”, nor to tarry in pressing change into the future, echoing the sense of urgency familiar from historical Christendom.<sup>27</sup> Similarly, liberal constitutional traditions have identified values of liberty and non-interference, the freedom of conscience and conceptions of the common good – ideas that can be hardly disentangled from cultural Christianity and a Western European emphasis on the individual.<sup>28</sup> These values, however, came with expectations about the rational engagement of differences, and the modernist optimism that truth would eventually, *sub specie aeternitatis*, triumph. Such expectations are not uncommon in the classical liberal tradition, which places great value on education, information, and the autonomous interpretation of thereof and the tacit assumption that education leads to the liberalisation of the mind and society. This presumed a willingness and capacity for engagement, as well as a measure of time available to undertake lengthy disputations – conditions that are not necessarily met in a time of headlines, tweets, statements, and fleeting attention and engagement. How can secular conceptions of time, which are relatively speaking narrower to historical Christendom, harness resources that allow for the passing of time in which meaningful differences can be tolerated?

The contemporary focus on differences that pertain to one’s identity, such as race, ethnicity, religion, gender, and sexuality, has facilitated a more precise understanding of ways in which structures like the law facilitate disadvantage, sometimes over the course of generations. Though readily dismissed as an instance of leftist

<sup>25</sup> Reinhart Koselleck, *Future’s Past: On the Semantics of Historical Time*, transl. Keith Tribe (New York: Columbia University Press, 2004).

<sup>26</sup> Walsham, *Charitable Hatred*.

<sup>27</sup> Hartmut Rosa, ed., *High-Speed Society: Social Acceleration, Power, and Modernity* (University Park, PA: Penn State Press, 2010).

<sup>28</sup> Compare John Witte and Frank Alexander, eds., *The Teachings of Modern Protestantism on Law, Politics, and Human Nature* (New York: Columbia University Press, 2007); Tine Stein, *Himmelsche Quellen und irdisches Recht. Religiöse Voraussetzungen des freiheitlichen Verfassungsstaates* (Frankfurt: Campus Verlag, 2007), 336.



“wokism” by some, this awareness has also offered alternative vantage points within time and within a post-secular framework. This is perhaps an opportunity for widening our sense of temporality within (and beyond) the immanent, taking stock of different ways in which time has been experienced by the structurally disadvantaged and disenfranchised. As democratic capital has impoverished under the influence of individualisation, de-institutionalisation, and digitalisation, this heightened social awareness may be as much a blessing as it is a curse.<sup>29</sup> Conservative critiques of diversity signal that the outburst of vantage points needs a reliable repertoire for fruitful negotiation within constitutional democracies, some of which may need to be newly developed, and which can bridge the liberal–illiberal divide. One dimension to this repertoire is the ability to compromise and to live in the “now” and in the “future” with unfulfilled as well as not yet fulfilled desires. It is the essence of tolerance.

### 1.3 THE THEORETICAL INCOMPATIBILITY OF (RELIGIOUS) INTOLERANCE AND CONSTITUTIONALISM

The secularisation thesis that was *en vogue* in the second half of the twentieth century is perhaps one of liberalism’s unfulfilled desires.<sup>30</sup> The idea of privatisation of religion bears the resemblance of profound concerns over public visibility of religious difference under regimes of toleration.<sup>31</sup> Early modern distinctions between public and private helped to contain tensions in public and political life stemming from a double order: the power of the state and the power of the church. By designating religion as something that belongs “behind the front door” or through Rawlsian theorisations on religious content-free discursive practices, ‘secularism arrogates itself the right to define the role of religion in politics’, as Elizabeth Shakman Hurd puts it.<sup>32</sup> Whereas this “arrogance” is often associated with liberalism’s approach to religion, anti-liberal attitudes to Muslim and LGBT

<sup>29</sup> Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon and Schuster, 2000); Robert D. Putnam, Robert Leonardi, and Rafaella Y. Nanetti, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, NJ: Princeton University Press, 1992).

<sup>30</sup> Van der Tol and Gorski, “Secularisation as the fragmentation of the sacred and of sacred space,” 496–497.

<sup>31</sup> Thomas Luckmann, *The Invisible Religion: The Problem of Religion in Modern Society* (New York: Macmillan, 1967); Peter L. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Garden City: Doubleday, 1969); Bryan R. Wilson, “Secularization: the inherited model,” in *The Sacred in a Secular Age*, ed. P. E. Hammond (Berkeley: University of California Press, 1985), 9–20.

<sup>32</sup> Hurd, “The political authority of secularism in International Relations,” 237; However, Rawls’ ideas developed during his lifetime, compare John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); and John Rawls, “The idea of public reason revisited,” *The University of Chicago Law Review* 64, no. 3 (1997): 765–807.

identities show their colours in their insistence on integration, assimilation, dissimulation, and decreased visibility – colours that are shared with both liberalism and with historical Christendom, even as its sources are communitarian rather than individualistic in character. The supposed “return” of religion has made the tensions inherent to the double order more apparent and possibly urgent. The reflex to rely on constitutional repertoires to curb these tensions (at least for some), mediated through majoritarian politics, is little short of a knee-jerk response to what are complex questions of coexistence.

Constitutions tend to be understood as the legal expression of a social contract. As the proclamation of sovereignty, it is a foundational ‘form of social power’.<sup>33</sup> Nineteenth-century constitutions embodied the recognition that peace and order are not self-evident and that people with different convictions and interests need to coexist within frameworks of accountability. States emerging (again) after the Enlightenment,<sup>34</sup> the ravages of the French Revolution, and the military campaigns of Napoleon Bonaparte vested the hope for peace and order in the idea of nationhood, which transcended immediate religious differences modern states inherited from early modernity. Constitutions also create a double order: a constitution constitutes one political body which binds all its members, irrespective of their religious differences. The constitutional order often coexists with religious (or non-religious) commitments that require compliance with a different order, often a kind of religious order.<sup>35</sup> Expectations that emanate from the constitution and those that emanate from religious life may or may not always be compatible. As alternatives to fundamentalist theocratic political thought, both Catholic and Protestant traditions have produced ideas about subsidiarity and the possibility to maintain spaces of distinctiveness and autonomy within society. Either approach signals an awareness of the potential and perhaps inevitable incongruity between the two orders, but this incongruity predates the modern state by centuries despite and because of historical Christendom.

The incongruity of this double order continues to exist in the modern state and is held in balance by the fundamental rights and freedoms that are inscribed in these constitutions, as well as in other documents, such as the European Convention on Human Rights and UN Charters. This balance is not given; it is tested and

<sup>33</sup> Daniel Philpott, *Revolutions in Sovereignty. How Ideas Shaped Modern International Relations* (Princeton, NJ: Princeton University Press, 2001), 71.

<sup>34</sup> Some scholars prefer to refer to “Enlightenments” rather than “the Enlightenment”. I will refer to the Enlightenment as inclusive of Catholic, Protestant, and Jewish Enlightenments, see further: James E. Bradley and Dale K. Van Kley, *Religion and Politics in Enlightenment Europe* (Notre Dame, IN: University of Notre Dame Press, 2001), 2; Jonathan I. Israel, “Enlightenment! which Enlightenment?” *Journal of the History of Ideas* 67, no. 3 (2006): 523–545, 528.

<sup>35</sup> Compare the double ordering in late medieval theological and political thought, see Walter Ullmann, *Law and Politics in the Middle Ages: An Introduction to the Sources of Medieval Political Ideas* (Ithaca, NY: Cornell University Press, 1975), 271.