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Abstract

"Westphalia" is often used as shorthand for a system of equal and sovereign states; and the peace treaties of Westphalia are sometimes said to have established the modern concept of sovereign statehood. This paper seeks to shift the focus from this popular conception of the Westphalian treaties, and instead to treat them as constitutional documents. I argue that the Westphalian constitutional treaties successfully solved the problem of deep religious disagreement by imposing proto-liberal religious liberties on the estates of the Holy Roman Empire, which left the subjects with exclusively secular duties towards their authorities. The Westphalian constitution also addressed the issue of compliance with its religious provisions by establishing a secular procedure to adjudicate religious disputes that excluded religious reasoning from the courts. This account of Westphalia yields important implications for our view of sovereignty in the Holy Roman Empire. It is argued that Westphalia established a secular order by taking sovereignty over religious affairs away from the discretion of territorial princes and by establishing a proto-liberal legal distinction between private and public affairs. Westphalia must thus be seen as a very successful constitutional experiment in dealing with deep religious disagreements.

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The Peace of Westphalia (1648) as a Secular Constitution

Introduction

"Westphalia" is often used as shorthand for a system of equal and sovereign states; and the peace treaties of Westphalia, concluded in 1648 at Münster and Osnabrück and ending the Thirty Years' War, are sometimes said to have established the modern concept of sovereign statehood. The distinguished international relations scholar Stephen Krasner, while commenting that this model "had virtually nothing to do with the Peace of Westphalia," nonetheless defines as "Westphalian" an "institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures." According to Krasner, "Westphalian sovereignty is violated when external actors influence or determine domestic authority structures." Krasner explains that he chooses to use this terminology because the "Westphalian model has so much entered into common usage, even if it is historically inaccurate."[1]

As Krasner notes, among the possible meanings of "sovereignty" there is a further, closely connected yet slightly different meaning he refers to as the "international law definition" of sovereignty. International legal sovereignty is concerned with "establishing the status of a political entity in the international system," i.e. a state is regarded as sovereign when it possesses international legal personality and is a subject of international law, a necessary condition for entering into treaty agreements with other entities.[2] This is a notion of sovereignty that is based on an analogy between states and individuals, deriving its force from the application of liberal political theory to the international realm. It is obvious that "Westphalian" sovereignty and international legal sovereignty are conceptually independent from each other—it is conceivable that one can be had without the other. Indeed, sovereigns in the international law sense can voluntarily compromise features of their "Westphalian," domestic sovereignty, and sovereigns in the so-called Westphalian sense need not necessarily have international legal personality.[3] However, much scholarly literature on the history of international law and international relations

[1] Krasner (1999), 20. See the review by Kingsbury (2000). For an excellent, historically accurate account of Westphalia by an international relations scholar, see Osiander (1994).
[2] Ibid., 14ff.
[3] Ibid., 19.

claims that both the "Westphalian" and the international law notion of sovereignty have their origin in the Peace of Westphalia.[4]

In this paper I seek to shift the focus from this popular conception of the peace treaties of Osnabrück and Münster, and instead to treat them as constitutional documents, relevant to the historiography of international law and international affairs in a different way from the more established usage. In this I join a small but growing body of work on constitutional aspects of the Peace of Westphalia, research thus far conducted more by lawyers and political scientists than by historians.[5]

A significant example of recent public law scholarship in this vein is Roderick Hills' stimulating essay "Federalism as Westphalian Liberalism."[6] Hills, a prominent American public law scholar, sets out to claim the constitutional arrangements of the Peace of Westphalia for the liberal tradition. His essay adduces Westphalia as a model and successful historical example for one particular kind of federalist constitutional structure. There is a normative implication in Hills' argument, namely that Westphalia serves as an experiment well worth emulating.

In what follows, I will approach the Peace of Westphalia in a similar way, presenting it as a model of how to deal successfully with deep religious disagreements on a constitutional plane. However, both my historical claims and consequently their normative upshots will be quite different from Hills', as I will explain below. Moreover, although my main concern in this paper will be the constitutional, domestic aspects of the peace treaties, the hybrid nature of the treaties, which contained constitutional norms for the Holy Roman Empire as well as international legal norms for Europe, have inevitable implications for the international legal aspects of Westphalia.

Given that both the conception of "Westphalian," domestic sovereignty and the notion of international legal sovereignty continue to be lauded on one side[7] and blamed for all sorts of

[4] See, e.g., for the international law notion Bobbitt (2002), 118ff.; Nussbaum (1954), 115f.; Philpott (2001), 75ff.; Ziegler (1994), 177: "Durch den Westfälischen Frieden verlor das Heilige Römische Reich Deutscher Nation weitgehend seinen Charakter als Staat: Die grösseren deutschen Fürstentümer genossen praktisch die Souveränität […]."

[5] But see Schröder (1999) and Wilson (2006).

[6] Hills (2006); see also, e.g., Bobbitt (2002), 120, who is however even more concerned with the international dimension.

[7] The recent book by Jeremy Rabkin is an example in point; see Rabkin (2005).

flaws on the other,[8] it is worthwhile to examine the historical claims that can be made about the putative origin of these conceptions, the Peace of Westphalia. Such an examination may, in turn, provide a basis for eventually rethinking each of these conceptions.

In the following pages I will first deal with a set of issues leading up to the Peace of Westphalia, namely issues as to how the religious disagreements in the Holy Roman Empire were managed. This had been a fundamental legal question since the Reformation. Section two will give an account of the terms of the Westphalian treaties relevant to the religious disagreements in the Empire and apt to support my claim that Westphalia should indeed be described as a secular constitution. Section three will draw some conclusions from the historical claims made in the earlier sections.

I. Religious Issues in the Public Realm: The Way to Westphalia

The deep denominational disagreements sparked by the Reformation were one of the crucial causes of the Thirty Years' War (1618-1648). The Thirty Years' War was a highly complicated contest, of course, and not exclusively a religious war; it was waged over religious and constitutional issues in the Holy Roman Empire as much as over the strategic aims of the great European powers, namely the Habsburg dynasty, Sweden, and France.[9] However, it is safe to say that both the constitutional issues over the respective powers of emperor and imperial estates within and the Europe-wide power struggle beyond the Empire were tightly connected with the stark denominational tensions that had arisen as a consequence of the Reformation. The connection could be described as a conditional one, with the religious collisions constituting a necessary condition for the outbreak of hostilities in 1618. It was the substantive religious disagreements that revealed the deficiencies of the Empire's constitution in terms of religious affairs which led to the Thirty Years' War and made it possible for Spain, Denmark, Sweden, and France to intervene in the conflict.

[8] See especially the literature by international lawyers on human rights, where attempts have been made to give more weight to individuals in the international legal system; in these writings, oftentimes the presumably empirical claim that "sovereignty is on its way out" is coupled with a normative outlook that wishes for the claim to be true. See, e.g., Damrosch (1993); see also Higgins (1994), 48-55 for the argument that there is no *inherent* reason preventing individuals from having rights under international law.

[9] See Asch (1997); Burkhardt (1992); Parker (1997).

What did the Empire's constitution in the period leading up to 1618 look like and how was it supposed to work? Made up primarily of customary law and of several written so-called fundamental laws (*leges fundamentales*), which covered different aspects of the constitutional set-up, the constitution had been crucially amended[10] in 1555 with the passing of a settlement by the Diet of the Holy Roman Empire at Augsburg.[11] This so-called Peace of Augsburg was the first attempt to reconcile the hitherto religiously universal, catholic constitution with the rise of Lutheranism in the territories of the Empire. Although Luther and his followers had been outlawed at the imperial Diet of Worms (1521) in an attempt to preserve the unity of the Empire, the Lutheran movement was gaining strength and soon counted imperial princes and electors among its adherents.

The religious settlement at Augsburg, a new *lex fundamentalis*, tried to get to grips with the claims put forth by the imperial estates that had become protestant, a daunting task given the religious foundation of the Empire, which was conceived as *Sacrum Imperium* under the universal church and, according to Daniel's prophecy, the fourth and last empire, built to last "forever." Most importantly, the religious disagreement did have the profoundest impact on legal doctrine concerning the validity of most legal rules; since the whole legal order was predicated, both for Protestants and for Catholics, upon theological doctrine (for example, the rules concerning church property, tithes, benefices, the legal authority of clergymen, heresy, excommunication, marriage, family, and the role of the secular authorities with regard to all these things, to name but a few examples). Both denominations adhered to theologically defined legal theories, qualifying legal rules running counter to their own denomination *ipso iure* as void.[12] This created enormous problems: monks would leave their monasteries and marry, looking upon their once-sacred vows as Satan's work; huge endowments held by the church for soul-saving purposes would lie idle; wills and gifts containing denominational provisos were seen as void by the other party. The reformed estates aggressively secularized church property, i.e. confiscated it, and transferred title to secular authorities in accordance with Lutheran doctrine about the proper scope of the spiritual and secular realms. These were the highly contentious

[10] Of course, this is an anachronistic way of describing the process; innovations and amendments were equally frowned upon among the lawyers of the Empire, and had to be presented as the reinstatement of ancient customary or positive law. See Roeck (1984).
[11] For the constitution and the role of customary law, see Roeck (1984); for the Augsburg settlement, see Heckel (1959).
[12] Heckel (1988), 113.

matters dealt with at Augsburg, most prominent among them of course the quarrels concerning the church's title to property in imperial estates that had become protestant.

Far from being an actual religious peace—there was no agreement concerning the theological issues whatsoever—the Augsburg settlement was merely about the legal aspect of these quarrels over church property and the validity of certain legal rules. The question was of a constitutional nature: Did the territorial sovereigns, the imperial estates, have the authority within the constitutional framework of the Empire to intervene in ecclesiastical matters and determine the faith of their subjects as well as the legal rules associated with religion within their territories?[13] This authority, called the "right of reform" (*ius reformandi*), was without precedent in church or imperial law before the Reformation, when no choice of confessions existed.[14] The *ius reformandi* was the result of its *de facto* exercise by protestant sovereigns—who had invented the right, as it were—in their territories during the decades leading up to the Peace of Augsburg, and had presumably at some point assumed the character of customary law.[15] For catholic rulers the right of reform did have much less meaning because of their subordination in ecclesiastical matters to the church, but it did give them the right to enforce religious uniformity in their territories.

One very important aspect of the Peace of Augsburg that bears emphasis and needs to be kept in mind is the fact that there took place a *juridification* of the theological conflict. By extending the provisions of the public peace to religious conflicts, the settlement of Augsburg integrated to a degree the denominational split into the imperial constitution.[16] This explains why the religious settlements of Augsburg and Westphalia are exceptionally well-suited for, or rather require, a legal historical treatment—the religious disagreements were being expressed in a legal way and framed in legal language, with both sides depicting their ultimate aims as the maintenance of the constitutional order of the Holy Roman Empire and the assertion of their legitimate constitutional rights. Nor can this simply be dismissed as mere rhetoric: due to the *sui generis* constitutional order of the Empire,[17] all of the most important religious points of contention had a

[13] Dickmann (1998), 9-13, 347f.; Heckel (1983), 33-66; Heckel (1988), 108ff.
[14] For the right of reform, see Schneider (2001).
[15] Dickmann (1998), 10.
[16] See PA § 13.
[17] An order that had been described, famously, as an "*irregulare aliquod corpus et monstro simile*" by Samuel Pufendorf in his *De statu imperii Germanici* (1667), available in a modern edition by H. Denzer, *Die Verfassung des deutschen Reiches*, 2nd ed. (Stuttgart, 1994), 105f. This view can be traced back to the great fourteenth-century

constitutional counterpart. Such a constitutional settlement absent the reunification of the denominations constituted of course a theological problem for both sides; the key argument in overcoming it was that the settlement had emergency character, being acceptable only as the lesser evil (*minus malum*).[18]

While no single section of the Augsburg settlement contained the prescription, let alone a definition, of the right of reform, the *ius reformandi* and its content can be inferred from several provisions of the Augsburg settlement. Section 15 secured the religious status of the protestant imperial estates, which were being protected against any interference for denominational reasons.[19] The same liberty was granted to the catholic electors, princes, and counts in the following, parallel section.[20] It is important to note that the right of reform was granted only to Lutheran Protestants, while Calvinists and other protestant denominations—let alone Jews and other non-Christians—were explicitly excluded from the Augsburg regime.[21] Section 19 of the Augsburg settlement is the most important with regard to the right of reform's consequences for church property. It stipulated that ecclesiastical endowments, monasteries, and other church property secularized by the protestant estates, to the extent that the property had not been in the catholic clergy's possession on August 2nd 1552 or since then, was to remain in the protestant estate's property.[22] This held only for so-called "mediate" church property, i.e. church property

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commentator Bartolus, who held that the constitution of the Holy Roman Empire was "monstrous" and represented the worst constitutional order possible; Bartolus, 152. For a fresh look on the constitutional set-up of the early modern Empire with a brief survey of the literature, see Wilson (2006); for a treatment of Pufendorf's *De statu imperii Germanici* and his contribution to political theory, see Schröder (1999).

[18] PA § 10 states: "*So ist durch die Stände, Bottschaften und Gesandten aus jetzterzehlten Bedencken und erheischender Noth für rathsam, fürträglich und nothwendig angesehen, […] daß die Tractation dieses Articuls der Religion auf andere gelegene Zeit einzustellen.*" See also Heckel (1983), 55ff. Pope Pius XII, in 1955 on the occasion of the 400th Augsburg anniversary, still justified the recognition of the settlement as founded upon emergency rules; see ibid., 56; id. (1988), 123.

[19] PA § 15: "*Und damit solcher Fried auch der spaltigen Religion halben […] aufgericht und erhalten werden möchte, so sollen die Kayserl. Maj., Wir, auch Churfürsten, Fürsten und Stände des H. Reichs keinen Stand des Reichs von wegen der Augspurgischen Confession und derselbigen Lehr, Religion und Glaubens halb mit der That gewaltiger Weiß überziehen, beschädigen, vergewaltigen oder in andere Wege wider sein Conscientz, Gewissen und Willen von dieser Augspurgischen Confessions-Religion, Glauben, Kirchengebräuchen, Ordnungen und Ceremonien, so sie aufgericht oder nochmals aufrichten möchten, in ihren Fürstenhumen, Landen und Herrschafften tringen oder durch Mandat oder in einiger anderer Gestalt beschweren oder verachten […]*."

[20] See PA § 16.

[21] PA § 17: "*Doch sollen alle andere, so obgemelten beeden Religionen nicht anhängig, in diesem Frieden nicht gemeynt, sondern gäntzlich ausgeschlossen seyn.*"

[22] PA § 19: "*Dieweil aber etliche Stände und derselben Vorfahren etliche Stiffter, Klöster und andere geistliche Güter eingezogen und dieselbigen zu Kirchen, Schulen, Milten und andern Sachen angewendt, so sollen auch solche eingezogene Güter, welche denjenigen, so dem Reich ohn Mittel unterworffen und Reichsstände sind, nicht zugehörig und dero Possession die Geistlichen zur Zeit des Passauischen Vertrags oder seithero nicht gehabt, in diesem Friedstand mit begriffen und eingezogen seyn und bey der Verordnung, wie es ein jeder Stand mit obberührten eingezognen und allbereit verwendten Gütern gemacht, gelassen werden und dieselbe Stände*

that was not held by ecclesiastical "immediate" imperial estates, but was subordinate to some immediate estate. The immediate ecclesiastical territories, i.e. imperial dioceses, were exempt from the right of reform through a device called the "ecclesiastical proviso" (*geistlicher Vorbehalt*). The proviso made it impossible for bishops ruling imperial estates to exert the right of reform in case they seceded from the "old religion,"[23] thereby effectively protecting immediate church property from secularization.

Except for the caveat of the ecclesiastical proviso, however, the Peace of Augsburg thus codified the right of reform for the secular estates of the Holy Roman Empire. As a consequence, the comparative constitutional weight of the imperial estates was greatly strengthened—we might actually say, in slightly anachronistic terms, that the sovereignty of the secular princes of the Empire was enhanced at Augsburg. By giving the secular estates the *ius reformandi*, and therewith the authority to determine the rules governing religion within their territories, we can say that "Westphalian" sovereignty was extended to the estates in all matters concerning the religious constitution; indeed, the crucial features of the right of reform are precisely "territoriality and the exclusion of external actors from domestic authority structures," living up to the very definition of "Westphalian" sovereignty.[24] A further observation is in order: While the constitution of the Holy Roman Empire as amended by the Augsburg settlement could be described as having taken a turn towards increased secularization, the constitutional provisions in the territories, as far as they concerned religion, were bound to become highly denominational. Necessity had made it unavoidable for the Empire to acknowledge the religious split in its constitution, pushing the imperial constitution necessarily towards a denominationally more neutral standpoint. This was achieved, however, by devolving the authority to determine religious life to the imperial estates.[25] Individual subjects living in a territory controlled by the opposing denomination were guaranteed the right to emigrate, which constituted the only provision addressed to individuals, as opposed to estates.[26]

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derenthalb weder inn- noch ausserhalb Rechtens zu Erhaltung eines beständigen, ewigen Friedens nicht besprochen noch angefochten werden. […]"

[23] PA § 18.

[24] Krasner (1999), 20.

[25] A process neatly captured by the language used by Hills (2006), 770, to describe what he calls "Westphalian liberalism": "The essence of this form of liberalism is that […] the […] [c]onstitution devolves decisions about these [irreconcilable religious or ideological] differences to an intermediate level of government—states, provinces, cantons, etc."

[26] PA § 24: "*Wo aber unsere, auch der Churfürsten, Fürsten und Stände Unterthanen der alten Religion oder Augspurgischen Confession anhängig, von solcher ihrer Religion wegen aus Unsern, auch der Churfürsten, Fürsten*

During the more than sixty years between the Peace of Augsburg until the outbreak of the Thirty Years' War, the religious disagreements found their constitutional expression in competing interpretations of the Augsburg settlement. The single most contentious issue concerned church property confiscated and secularized by protestant estates after 1552. On the catholic interpretation of the Augsburg provisions, put forth forcefully by the Emperor, such property had to be restituted to the church. On the protestant reading of the settlement, the confiscations were covered by the *ius reformandi* as stipulated in the treaty. The legal conflict turned upon the ecclesiastical proviso, which was contested by the Protestants, the question whether the right of reform could be exerted even after 1555, and upon the right of reform in imperial cities, where the Protestants tried to exert it even in cities with mixed denominations, which probably were exempt from the right according to the Augsburg terms. Of these, the question whether there was a temporal limit to the right of reform was the least clear; was it legal to secularize church property in estates that only after the Peace of Augsburg had become protestant?[27] The estates were quick to create facts on the ground, especially during the first two decades after Augsburg when the protestant side found itself in the stronger position. By the 1566 imperial Diet at Augsburg, in the electoral palatinate, Baden, Württemberg, and elsewhere, mediate church property had been confiscated and secularized. Ignoring the secular proviso, Brandenburg and Saxony started secularizing dioceses whose rulers had changed their denomination.[28] More interestingly, corresponding to the juridification of the religious disagreements this went along with legal arguments, on both sides, which seized upon the many provisions in the settlement that, vague and fraught with lacunae, lent themselves to such disputes.

For example, trying to undermine the ecclesiastical proviso, the protestant estates argued that not only did the proviso run counter to the very purpose of the settlement agreed upon at Augsburg and was therefore void, but it was also taken to lie outside the scope of the provisions mutually agreed upon in 1555. An alternative argument acknowledged the validity of the ecclesiastical proviso but interpreted it differently: seizing upon the unclear language of the ecclesiastical proviso, it was maintained that the whole provision, passed in the interest of the chapter (*in*

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und Ständen des H. Reichs Landen, Fürstenthumen, Städten oder Flecken mit ihren Weib und Kindern an andere Orte ziehen und sich nieder thun wolten, denen soll solcher Ab- und Zuzug […] unverhindert männiglichs zugelassen und bewilligt […] seyn."

[27] For the arguments, see Heckel (1959).

[28] See Heckel (1983), 71ff.; id. (1988).

favorem Capituli) was of a permissive rather than a prescriptive character, thus leaving it to the individual chapters of dioceses, monasteries or abbeys to decide whether to chose a Protestant or rather an adherent of the old religion as successor of a cleric who had apostatized from Catholicism.[29] Needless to say, the catholic side would not have any of this and tried to uphold the protection of the *reservatum ecclesiasticum*.[30]

A further important *gravamen* or point of contention was the right to emigrate guaranteed in section 24 of the Augsburg settlement. This can be seen as the only inroad into the "Westphalian" right of reform of the territorial sovereign as agreed upon at Augsburg, and was indeed increasingly interpreted on the protestant side as a right not only to leave but also to stay and practice the Lutheran denomination without being harassed by the (catholic) territorial sovereign. Such an interpretation of the provision was being fought vigorously by the catholic estates, which insisted on their *ius reformandi*.[31]

Contributing to the juridification of the conflict was the fact that the Emperor—although acknowledging in principle his duty to uphold the religious peace against violations—at the Diet of 1559, when many of the mentioned grievances (*gravamina*) concerning church property and ecclesiastical proviso were voiced, referred the parties to the Imperial Chamber Court (*Reichskammergericht*). The court, although impartial in its organization since the Peace of Augsburg, where parity between the two denominations within the court had been prescribed,[32] was ultimately unable to address the lacunae in the settlement of Augsburg which had given rise to the grievances in the first place and which were, of course, the result of an incomplete political process. This led to the court asking the Emperor and the estates in dubious cases for binding decisions.[33] The authority of the court in terms of amending provisions of the Augsburg text that were either unclear or left obvious gaps was at the very least dubious—the Protestants correctly maintained that such closing of lacunae could only be done according to the same procedure that

[29] See Burkhardt (1992), 159f.; Heckel (1983), 72.
[30] The wording of the relevant section does seem to be permissive rather than restrictive, on the other hand there can be no doubt that the underlying intention favored the catholic standpoint; see PA § 18: "*[W]o ein Ertzbischoff, Bischoff, Prälat oder ein anderer Geistliches Stands von Unser alten Religion abtretten würde, und Einkommen, so er davon gehabt, alsbald ohn einige Verwiderung und Verzug, jedoch seinen Ehren ohnnachtheilig, verlassen, auch den Capituln, auch den Capituln, und denen es von gemeinen Rechten oder der Kirchen und Stifft Gewohnheiten zugehört, ein Person, der alten Religion verwandt, zu wehlen und zu ordnen zugelassen seyn […]*."
[31] See Heckel (1983), 73f.
[32] See PA §§ 32, 104ff.; see also Heckel (1993), 28-30.
[33] See Rabe (1976), 275; Lehmann, 89f., 114, 429ff., 437f.; Heckel (1993), 30f.

had established the settlement itself in 1555, namely a treaty between the parties concluded in the framework of a Diet, and not by the Imperial Chamber Court.[34]

In short, the inherently unstable provisions of the Peace of Augsburg provided ample cause for the continuation of faith-based civil strife. It is important to see that the very high stakes that gave the interpretation of the settlement enormous weight resulted from the inbuilt "winner takes all" principle codified at Augsburg. With the right of reform, the territorial sovereign was given the constitutional power to enforce religious uniformity in his territory (what later was to be captured with the formula *cuius regio, eius religio*). This made the question whether the right of reform existed only up to the Peace of Augsburg (or even only up to 1552, as some on the catholic side maintained) or rather indefinitely into a question upon which not only the salvation of a lot of subjects but also legal title to huge chunks of mediate church property hinged. In the following pages, I shall explore the 1648 treaties of Westphalia, taking for granted the view, which is not an original one,[35] that the flaws of the Augsburg settlement were among the main causes for the Thirty Years' War and that it was not until the Westphalian settlement that the issues of religious disagreement in the Holy Roman Empire were satisfactorily solved.

II. The Religious Provisions in the Peace Treaties of Westphalia

On 24 October 1648, two peace treaties were signed in Westphalia that ended the Thirty Years' War: one between the Holy Roman Empire and Sweden at Osnabrück, the other between the Empire and France at Münster.[36] The treaties had been negotiated since 1644, when the various delegations of the Empire, Sweden, France, Spain, and the Netherlands first convened, with the Spaniards, the Dutch and the French assigned to Münster and Sweden to Osnabrück. The Empire was represented at both places by delegations of the Emperor as well as the estates, which effectively meant that the Westphalian congress was not purely an international one, but had an imperial constitutional element built in. In fact, the presence of the estates amounted to the presence of the Empire's parliament, the Diet (*Reichstag*), at the peace negotiations:[37] the

[34] See Heckel (1988), 120.
[35] It is the prevailing view in almost all of the literature dealing with the Thirty Years' War; to name but a very few examples, see Burkhardt (1992), 154f.; Dickmann (1998), XIIIf.; Heckel (1983), 198ff.; id., (1993), 40.
[36] In what follows, exclusive reference is made to the Osnabrück treaty (IPO), which was the primary instrument and, in terms of the provisions relevant for this paper, was identical with the Münster treaty.
[37] Osiander (1994), 18.

three *Reichstag* councils, comprising six of the seven electors,[38] the nearly two hundred other princes, lord and prelates, and the more than fifty free imperial cities took part at the negotiations from July 1645 onwards, the *Reichstag* in all but name.[39]

This constellation obviously complicates matters considerably when trying to differentiate between matters constitutional and international in the Westphalian treaties—indeed it seems to call into question the very usefulness of those terms when applied to Westphalia. With the hard-fought participation of the estates in the peace negotiations,[40] the most celebrated outcome of the congress (the view of Westphalia that is instilled in almost every international lawyers' mind) with regard to the estates' external sovereignty—their international legal sovereignty, to stick with the terminology introduced earlier—was a foregone conclusion. The estates participated with the right to vote (*ius suffragii*) and the attending *ius pacis et belli*. What is conventionally seen as one of the major results of the Westphalian process, therefore, was in reality one of its inbuilt preconditions. The *travaux préparatoires* for the relevant Article of the treaty show in fact that the estates, with French support, had tried to achieve more during the negotiations; but whereas the French treaty draft included a clause that established the estates' "rights of sovereignty," this clause was not accepted in the final version.[41]

By the same token, the participation of the estates and therewith of a quasi-*Reichstag* in the peace congress meant that the negotiations could accurately be described as a constitutional Diet, at least insofar as they dealt with the religious *gravamina*. The difficulty of making the distinction between international and constitutional aspects of Westphalia, however, should not distract us from applying the concepts, as long as we are not making the mistake of anachronistically conflating imperial *constitutional* issues concerning the status of the estates—their *ius pacis et belli*, or their right to participate and vote at Westphalia, for example—with international issues.[42] It was precisely by virtue of the imperial *constitution* that the estates had their status and the authority to participate in the Empire's international treaty making with

[38] Without the Bohemian vote.
[39] See Dickmann (1998), 187f.
[40] See ibid., 163-189.
[41] The French draft included the following sentence relevant to the issues dealt with in IPO Art. VIII, § 1: *Quod omnes dicti [Sacri Imperii] Principes ac Status, generatim et speciatim, manutenebuntur in omnibus […] suis Souveranitatis iuribus*. Cited in Moser, 18. See for this issue the recent article by Asch (2004), with further literature.
[42] This is the international lawyers' preferred historiographical approach; see, e.g., Randelzhofer (1967), 257ff., *passim*.

France and Sweden, an authority, furthermore, which had existed under the imperial constitution way before 1648.[43] One could say, therefore, that, in terms of the alleged novelty of international legal sovereignty with which Westphalia is usually credited, there was nothing novel, nor anything particularly international about it.

Quite distinct from this is the question of the constitutional impact of the Westphalian treaty making concerning the Empire's religious constitution, which was indeed huge and, as we shall see, apt to further undermine the traditional account of Westphalia as the origin of state sovereignty. In this respect Westphalia can be described as the making of treaties that contained, among other things, a considerable amount of constitutional provisions which were self-executing, as it were, and would directly become the most important part of the Empire's constitution. Again, the fact that this was the case was due to the intention of the Empire's authorized organs in negotiating the treaties to allow them to have this constitutional effect. The international dimension of Westphalia must be seen in France's and Sweden's guaranteeing the treaties and therewith the constitutional provisions for the Empire contained therein. This was the consequential outcome of a Europe-wide war that had been caused mainly by the deficiencies of the Holy Roman Empire's constitutional order with regard to religious disagreement.

Article 5 of the treaty that was concluded between the Empire and Sweden at Osnabrück acknowledged in its introductory paragraph this causal relationship between the constitutional deficiencies and the Thirty Years' War:

> Since the grievances [*gravamina*] of the one and the other religion, which were debated amongst the electors, princes and estates of the Empire, have been for the most part the cause and occasion of the present war, it has been agreed and transacted in the following manner with regard to the *gravamina*.[44]

[43] See IPO Art. VIII, § 1, where the "ancient rights" of the estates were said to be "codified and confirmed." See also Dickmann (1998), 8, 142ff., 332.

[44] IPO Art. V: *Cum autem praesenti bello magnam partem gravamina, quae inter utriusque religionis electores, principes et status Imperii vertebantur, causam et occasionem dederint, de iis prout sequitur conventum et transactum est[.]*

The next section of Article 5 proceeds by first seemingly acknowledging and renewing the provisions of the 1555 Augsburg settlement.[45] This section and related passages[46] have caused a lot of strained interpretations of the Westphalian treaties, affecting especially the views of scholars interested in Westphalia mainly as the origin and paradigmatic example of "Westphalian" sovereignty, whether their interest stemmed from the purpose of enriching present-day normative public law theories[47] or from the historiographical goal of establishing the origins of "Westphalian" sovereignty at Westphalia in 1648.[48] The language of the treaty thus far seems to cover the authority of the estates to exercise the right of reform in their territories, as established in the Peace of Augsburg, leading to problematic historical judgments in the scholarly literature about Westphalia. For example, Roderick Hills asserts that with the Peace of Westphalia "[t]he constituent imperial estates [of the Holy Roman Empire] were given the power to determine the religion of their subjects,"[49] a view that leads him to the following conclusion about the allegedly "liberal" solution to religious disagreement found at Westphalia: "[B]y devolving the question of controversial rights to subnational governments, Westphalian liberalism ensure[d] that different conceptions of the right can prevail in different jurisdictions."[50] This might be a correct rendering of the principles of the Peace of Augsburg, but not of Westphalia. Hills acknowledges, it is true, that the principles adopted at Westphalia constituted a "*modification* of the Peace of Augsburg's old principle that the sovereign prince or

[45] IPO Art. V, § 1: *Transactio anno millesimo quingentesimo quinquagesimo secundo Passavii inita et hanc anno millesimo quingentesimo quinquagesimo quinto secuta pax religionis, prout ea anno millesimo quingentesimo sexagesimo sexto Augustae Vindelicorum et post in diversis Sacri Romani Imperii comitiis universalibus confirmata fuit, in omnibus suis capitulis unanimi Imperatoris, electorum, principum et statuum utriusque religionis consensu initis ac conclusis rata habeatur sancteque et inviolabiliter servetur.* ("That the treaty settled at Passau in the year 1552 and followed in the year 1555 with the [Augsburg] Peace of Religion, according as it was confirmed in the year 1566 at Augsburg, and afterwards in various other Diets of the Holy Roman Empire, in all its Articles agreed and concluded by the unanimous consent of the Emperor and electors, princes and estates of both religions, shall be maintained in its force and vigor, and sacredly and inviolably observed.")

[46] Especially IPO Art. VIII, § 1: *Ut autem provisum sit, ne posthac in statu politico controversiae suboriantur, omnes et singuli electores, principes et status Imperii Romani in antiquis suis iuribus, praerogativis, libertate, privilegiis, libero iuris territorialis tam in ecclesiasticis quam politicis exercitio, ditionibus, regalibus horumque omnium possessione vigore huius transactionis ita stabiliti firmatique sunto, ut a nullo unquam sub quocunque praetextu de facto turbari possint vel debeant.* ("But in order to prevent for the future all controversies in the political realm, all and everyone of the electors, princes, and estates of the Roman Empire shall be so codified and confirmed in their ancient rights, prerogatives, liberty, privileges, free exercise of their territorial right both in ecclesiastical and temporal matters, dominions, regalia, and in the possession of all these things, by virtue of the present treaty, that they cannot and may not in fact be molested by anybody at any time in any manner, under any pretext whatsoever.")

[47] Such as Hills (2006).

[48] See the examples mentioned above, nn. 1-3.

[49] Hills (2006), 782.

[50] Ibid., 788.

prelate should determine the religion of his people."[51] However, as we shall see, Westphalia amounted to the wholesale *abolition* of Augsburg's principle, rather than some slight modification. It is therefore misleading to qualify the statement that the princes and estates had the "power to determine the religion of their subjects" by adding "so long as they provided certain minimal protections to all members"[52] of the recognized sects—the duty to respect said protections was, I submit, tantamount to an *abrogation* of the estates' power, bestowed by Augsburg, to control religious matters in their territories. This will become clear through an examination of the constitutional principles adopted at Westphalia.

After paying lip service to the treaty of Augsburg, the Westphalian treaties do away with the Augsburgian religious provisions quite explicitly:

> But what has been established by the present treaty with the common agreement of the parties touching certain controversial Articles in the said [treaty of Augsburg] shall be considered as a perpetually valid interpretation [*perpetua declaratio*] of the said peace [of Augsburg], which must be observed in court and otherwise, until the matter of religion can, with the grace of God, be agreed upon, irrespective of the objection or protest of anyone whatsoever, clergyman or layperson, either within or without the Empire, at any time whatsoever; all such objections are by virtue of the present provisions declared null and void.[53]

The Peace of Westphalia, offering a new "interpretation" of the Peace of Augsburg, made it clear that its own rules would henceforth abrogate the older Augsburg rules in the religious domain. Most remarkably, the cited passage contained an anti-protest clause, which was very obviously directed against the Pope—member of the clergy "without the Empire"—and invalidated from the outset any objections put forward against the treaties by Rome.[54] The catholic side, which had resisted the adoption of the anti-protest clause, agreed to it during the negotiations in 1647 as

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[51] Ibid., 782 (emphasis added).
[52] Ibid.
[53] IPO Art. V, § 1: *Quae vero de nonnullis in ea articulis controversis hac transactione communi partium placito statuta sunt, ea pro perpetua dictae pacis declaratione tam in iudiciis quam alibi observanda habebuntur, donec per Dei gratiam de religione ipsa convenerit, non attenta cuiusvis seu ecclesiastici seu politici intra vel extra Imperium quocunque tempore interposita contradictione vel protestatione, quae omnes inanes et nihili vigore horum declarantur.*
[54] A protest did indeed ensue on November 20th 1648, with the *Breve* "*Zelo domus Dei*"; see Dickmann (1998), 337f., 456-458; on the anti-protest clause see ibid., 342f.

a consequence of a compromise that the Emperor had concluded with Sweden and that allowed the first secularizations of certain immediate church property.[55]

The anti-protest clause constitutes without any doubt a complete triumph of secular politics, which for the first time in centuries had broken away explicitly from ecclesiastical guardianship.[56] It also substituted secular guarantees—namely the guaranteeing powers France and Sweden—for ecclesiastical ones, both with regard to the peace between the Empire and other European powers and, more importantly for our present purposes, in terms of the constitution of the Holy Roman Empire. The Empire's constitution, not allowing for any outside or internal objections to its provisions on religious grounds, thus effectively excluded religious convictions and theological arguments forever from the range of reasons that could be put forward in debates on the constitution's interpretation (at least in absence of the reunification of the Christian denominations; *donec per Dei gratiam de religione ipsa convenerit*).

Concerning the substance of the rules dealing with religious disagreement, the treaties of Westphalia had to devise a compromise between the stance of the catholic side, including the Emperor, and the protestant side. The former standpoint was clearly expressed in the Edict of Restitution, passed on March 6, 1629, when the Emperor and the catholic party were at the height of their military power and aimed to establish the catholic interpretation of the Augsburg settlement. The edict, passed only with the consent of the catholic electors and princes, decreed the restitution of all church property that had been secularized since 1552 and the *ius reformandi* of the ecclesiastical estates; furthermore, a default rule was formulated according to which everything that had not explicitly been allowed to the protestant side in the Augsburg treaty was to be interpreted as prohibited.[57] The protestant side, on the other hand, maintained the legality of their secularizations under the Augsburg settlement and postulated some autonomy and freedom of conscience for Protestants in catholic territories, all the while insisting on a very far-reaching right of reform for their own estates.

The Westphalian treaties cleared the gridlock by abolishing the principle of the right of reform altogether for most territories of the Empire, and by establishing a certain protection for subjects

[55] Ibid., 342.
[56] Ibid., 343.
[57] Ibid., 15f.

of different faiths vis-à-vis their territorial authorities. The extent of the protection was determined through the principle of the so-called "normal year." All the controversial religious issues and *gravamina* were dealt with by freezing, as it were, in place the conditions as of January 1, 1624, a date embodying a compromise between the protestant demand (1618) and the catholic request (1627).[58] That meant that church property, both immediate and mediate, insofar as it had been secularized by protestant estates or restituted by catholic territories after 1624, had to be returned to whoever had had title to it as of January 1, 1624.[59] For individuals it meant that their right to emigrate as established at Augsburg was supplemented with far more extensive rights to practice their religion to the extent they had practiced it in 1624, regardless of whether they had done so publicly or privately, and regardless of any future conversion of the territorial prince. The *ius reformandi* was thus abolished, any language to the contrary notwithstanding.[60] This transpires with exceptional clarity from the famous section 31 of Article 5 of the Osnabrück treaty:

> Yet notwithstanding this, the *Landsassen*, vassals and subjects of the catholic estates, of whatever kind, who have had the public or private exercise of the religion of the confession of Augsburg [i.e. Lutherans] at any time of the year 1624, either by a certain settlement or privilege, or by long usage, or finally just by observing [*sola observantia*] the said religion in that said year, shall retain the same for the future, with all the attending rights thereof, inasmuch as they have or can prove they have practiced [their religion] in that said year.[61]

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[58] For the negotiations concerning the date, see Dickmann (1998), 358f.; Burkhardt (1992), 171.

[59] IPO Art. V, § 2: *Terminus, a quo restitutionis in ecclesiasticis et quae intuitu eorum in politicis mutata sunt, sit dies prima Januarii anni millesimi sexcentesimi vicesimi quarti. Fiat itaque restitutio omnium electorum, principum et statuum utriusque religionis, comprehensa libera Imperii nobilitate ut et communitatibus et pagis immediatis, plenarie et pure, cassatis omnibus interim in istiusmodi causis latis, publicatis et institutis sententiis, decretis, transactionibus, pactis seu dedititiis seu aliis et executionibus, reductione ad statum dicti anni dieique in omnibus facta*. ("The term from which restitution in ecclesiastical matters is to begin, as well as in political matters changed as a result of them, be the first day of January 1624. Therefore the restitution of all the electors, princes and estates of both religions, including the free nobility of the Empire, as well as the communities and towns immediate to the Emperor, shall fully and without restriction commence from that day, whereas all judgements, decrees, treaties and settlements that have been passed, published and implemented in the meanwhile with regard to these matters, either at discretion or otherwise made, and all executions done, remain null and void, and everything is to be reduced to the state they were in the aforesaid day and year.")

[60] IPO Art. V, § 1 (implicitly) and § 30 (explicitly) reaffirm the estates' *ius reformandi*; however, the right of reform is explicitly being abolished in the following sections, especially § 31, on which see below; for an excellent interpretation, see Burkhardt (1992), 175. See also Burkhardt (1985), 243ff. for misinterpretations of the Westphalian treaties in the eighteenth century.

[61] IPO Art. V, § 31: *Hoc tamen non obstante statuum catholicorum landsassii, vasalli et subditi cuiuscunque generis, qui sive publicum sive privatum Augustanae confessionis exercitium anno millesimo sexcentesimo vicesimo quarto quacunque anni parte sive certo pacto aut privilegio sive longo usu sive sola denique observantia dicti anni habuerunt, retineant id etiam inposterum una cum annexis, quatenus illa dicto anno exercuerunt aut exercita fuisse probare poterunt*.

It is important to note that even just factual observance of the religion in question was sufficient for the protection extended by the normal year, without knowledge let alone consent of the territorial ruler, which made the section applicable to subjects who claimed to have exercised their religion secretly.[62] Section 32 goes on to extend the principle of the normal year to situations, where people had lost the status they had had in 1624, and where ecclesiastical property had changed hands since. Such vassals or subjects who

> have been molested or in any manner deprived [of their property rights], shall fully be restored to the legal condition wherein they were in the year 1624, without any exception. The same shall be observed with regard to the catholic subjects of the protestant estates, where they had the public or private use and exercise of the catholic religion in the said year 1624.[63]

Finally, even subjects who as of 1624 did not have the right to practice their religion or who after the concluding of the Westphalian treaties would convert to a denomination other than the territory's, would still enjoy a certain amount of tolerance and legally guaranteed protection against the control exercised by their public authorities:

> It has moreover been found good that those of the confession of Augsburg [i.e. the Lutherans] who are subjects of the Catholics and the catholic subjects of the Lutheran estates who had not the public or private exercise of their religion in any time of the year 1624, and those who in the future, after the publication of the peace, shall profess and embrace a religion different from that of the ruler of their territory shall be patiently tolerated [*patienter tolerentur*], and shall not be prohibited to attend privately [*privatim*] with liberty of conscience [*conscientia libera*] their services in their houses free from any inquisition or molestation, even to assist in their neighborhood, wherever and as often as they want, at the public exercise of their religion, or to send their children to external schools of their denomination, or to have them instructed at home by private teachers.[64]

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[62] This was the result of Swedish requests; see Dickmann (1998), 462.

[63] IPO Art. V, § 32: *Turbati aut quocunque modo destituti vero sine ulla exceptione in eum, quo anno millesimo sexcentesimo vicesimo quarto [1624] fuerant, statum plenarie restituantur. Idemque observetur ratione subditorum catholicorum Augustanae confessionis statuum, ubi dicto anno millesimo sexcentesimo vicesimo quarto usum et exercitium catholicae religionis publicum aut privatum habuerunt.*

[64] IPO Art. V, § 34: *Placuit porro, ut illi catholicorum subditi Augustanae confessioni addicti ut et catholici Augustanae confessionis statuum subditi, qui anno millesimo sexcentesimo vicesimo quarto publicum vel etiam*

Clearly the treaties of Westphalia established a distinction between the public and the private, carving a sphere of purely private concern out of the public authority of the territorial ruler (*Landesherr*). Whatever sovereignty the electors, princes and estates of the Holy Roman Empire enjoyed in their territories, the private exercise of religion was no longer subject to this sovereignty but had effectively been taken out of the sovereign domain. This is the reason why it is utterly plausible to claim the religious provisions of the Peace of Westphalia—i.e. about half of its rules—for the liberal tradition: the public-private distinction curtailed the legal power of disposal of the territorial rulers in the Empire and gave subjects legal rights against their rulers' encroachment on their private sphere. It is however precisely in drawing a line between private and public that the Westphalian treaties reveal proto-liberal traits, and not in "devolving the question of controversial rights to subnational governments,"[65] as Roderick Hills claims. The line drawn was of course completely arbitrary to the extent that the normal year served as the criterion, being simply the outcome of bargaining during the peace negotiations rather than the result of normative justification. Yet however arbitrary, this does not detract from the fact that the distinction established through the normal year was removed from the legislative and dispositional power both of the estates and the Empire and was not justified by reference to religious reasons. It was thus both constitutional—in the sense of entrenched—and secular.

Moreover, and most importantly, as far as the public-private distinction was carried beyond the principle of the normal year and applied to estates and their subjects regardless of their respective status in 1624, as in the passage just cited above, the distinction did presuppose some almost Millian concept of the private that could be applied to subjects of different faiths in order to define their rights vis-à-vis the authorities. The successful solution to the problem of deep religious disagreements seems to have lied in the protection of some proto-liberal religious liberties imposed by the Westphalian constitutional treaties on the estates of the Empire, leaving the subjects with exclusively secular duties towards their authorities, as the last sentence of section 34 of Article 5 of the Osnabrück treaty makes very clear:

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privatum religionis suae exercitium nulla anni parte habuerunt nec non qui post pacem publicatam deinceps futuro tempore diversam a territorii domino religionem profitebuntur et amplectentur, patienter tolerentur et conscientia libera domi devotioni suae sine inquisitione aut turbatione privatim vacare, in vicinia vero, ubi et quoties voluerint, publico religionis exercitio interesse vel liberos suos exteris suae religionis scholis aut privatis domi praeceptoribus instruendos committere non prohibeantur[.] Admittedly, the protection for subjects changing their denomination after 1648 might have been weaker than it seems in this section; cf. IPO Art. V, § 36.

[65] Hills (2006), 788.

> But *Landsassen*, vassals and subjects shall fulfill their duty in all other things [*in caeteris*] with due compliance and subjection, without giving occasion to any disturbances [*nullae turbationes*].[66]

The constitutional treaties of Westphalia also addressed the issue of compliance with its religious rules by establishing a secular, denominationally neutral procedure to adjudicate religious disputes that only allowed secular arguments based on the treaties' rules in the adjudication process, excluding religious reasoning from the courts. The authors of the *Federalist Papers*, who had a rather dim view of the Holy Roman Empire's constitution,[67] held that "a federal government capable of regulating the common concerns and preserving the general tranquility" must "carry its agency to the persons of the citizens," "must stand in need of no intermediate legislations," and crucially, the "majesty of the national authority must be manifested through the medium of the courts of justice," in order to be able to "address itself immediately to the hopes and fears of individuals."[68]

This was something the Holy Roman Empire after 1648 arguably had achieved, at least in matters concerning the religious provisions of its constitution, through the two imperial courts, the Imperial Chamber Court (*Reichskammergericht*) and the Imperial Aulic Council (*Reichshofrat*). The two courts had overlapping jurisdiction and were both concerned, among other things, with the adjudication of disputes arising out of the religious provisions of the imperial constitution. Both courts had direct jurisdiction over the subjects of the estates in two ways: as appellate courts exercising jurisdiction after local remedies in the estates' courts had been exhausted, and as courts of first instance with the authority to hear suits brought by subjects against their territorial authorities, and it was this latter capacity which was crucial in terms of the adjudication of disputes that concerned the religious provisions of the imperial constitution. The parallels with modern-day judicial review are hard to overlook: for example, subjects who were being deprived of the private exercise of their religion by their authorities had a remedy based on Art. 5 of the Osnabrück treaty and could bring a claim before either the Imperial

[66] IPO Art. V, § 34: *sed eiusmodi landsassii, vasalli et subditi in caeteris officium suum cum debito obsequio et subiectione adimpleant nullisque turbationibus ansam praebeant*.
[67] See, e.g., Federalist XIX, where Madison dwells on the alleged "deformities of this political monster," echoing Samuel Pufendorf. *Federalist*, 166.
[68] Federalist XVI (Hamilton); *Federalist*, 154.

Chamber Court or the Aulic Council (the first court being appealed to having jurisdiction); the court in turn had the authority to issue orders addressed to the authorities of the estate in question. In eighteenth century textbooks on imperial constitutional law this did not go unnoticed and was rightly seen as quite remarkable and laudable an institution—August Ludwig von Schlözer in his *Allgemeines StatsRecht* (1793) praised the courts as the only institution worldwide where subjects could bring claims against their rulers.[69]

By allowing individuals to bring claims against their own territorial governments, the constitution of the Holy Roman Empire maximized the compliance pull of its religious provisions and created an enforcement mechanism for these rules. Albeit concluded in a constitutional manner with the participation of the estates, the treaties of Osnabrück and Münster finalized the abrogation of the estates' right of reform by taking the interpretation of the religious rules away from the estates' jurisdiction, and thus making it possible for the constitution to "address itself immediately to the hopes and fears of individuals," in a way rather sympathetic to Hamilton's concerns.

III. Conclusion: Westphalia as a Constitutional Experiment

The abolition of the estates' right of reform bespeaks the important consequences that the present examination into the Peace of Westphalia's religious provisions yields for our view of sovereignty in the Holy Roman Empire. If the account provided here is true, then neither the view of Westphalia as the origin of international legal sovereignty nor as the epitome of "Westphalian" sovereignty is correct. In order to get a flavor of how this kind of sovereignty was understood in the first half of the seventeenth century, consider the influential definition Hugo Grotius (1583-1645) put forth in 1625 in his *De iure belli ac pacis libri tres*:

> That power [*potestas*] is called sovereign [*summa potestas*] whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will.[70]

[69] Schlözer III, § 8.
[70] *IBP* 1, 3, 7, 1: *Summa autem illa [potestas] dicitur, cuius actus alterius iuri non subsunt, ita ut alterius voluntatis humanae arbitrio irriti possint reddi*.

On the international plane, the subject of this sovereignty according to Grotius is the state (*civitas*); the subject of domestic sovereignty, however, is a matter of the constitutional arrangements of each state. It can be "one or more persons, according to the laws and customs of each nation."[71] What has been called "Westphalian" sovereignty in the narrower sense, that is to say the exclusive legal authority over territory to the exclusion of outside actors, is therefore on Grotius' account a domestic, constitutional category.

Both kinds of sovereignty cannot be said to have arisen with the Westphalian peace treaties. Neither externally did the estates gain sovereignty in 1648, but rather retained whatever authorities they already had had under the imperial constitution before the Thirty Years' War. With regard to exclusive legal authority over territory, the judicial enforcement mechanism for the religious provisions of the Westphalian constitution shows clearly that the estates were "subject to the legal control of another," their actions susceptible to being "rendered void" by the operation of the imperial courts enforcing the constitutional provisions throughout the Empire[72] through judicial review. The Peace of Westphalia, far from devolving any authority to deal with questions of deep religious disagreements to a sub-imperial level, removed both rules and jurisdiction with regard to these issues from the estates' authority. At Augsburg, the estates had been given the *ius reformandi* and therewith far-reaching sovereign prerogatives to foist their religious convictions upon their subjects, with any differentiation between public and private sphere being dependent upon the individual ruler's mercy. Westphalia, by contrast, established a secular order by taking sovereignty over religious affairs away from the discretion of territorial princes and by establishing a proto-liberal legal distinction between private and public affairs.

Of course, for all its constitutionally guaranteed secularity, the Peace of Westphalia's neutrality towards denominations only extended to Catholics, Lutherans, and Calvinists. Adherents of any other sect were still subject to the rulers' public authority. However, this should not distract us from Westphalia's substantial innovation of barring, as a matter of law, some religious reasons from being used in the public realm to justify action, and of relegating these reasons to the sphere of the subjects' private decision-making. The Peace of Westphalia does not give us much in the way of normative justification, it is true, although considerations of justice and equality are not absent from its language. Quite apart from the underlying, more or less implicit political theory

[71] Ibid.: *Subiectum proprium est persona una pluresve pro cuiusque gentis legibus ac moribus […]*.
[72] With some exceptions, such as the Habsburg domains.

however, Westphalia must be seen as a most successful constitutional experiment in dealing with deep religious disagreements.[73]

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[73] This is presumably the reason why Westphalia has drawn so much scholarly interest; for example, for Hills to base his idea of a liberal federalism on the historically much more deserving Peace of Augsburg would expose his argument to the obvious objection that Augsburg was hardly a success.

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