Draft

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Introduction

The Reformation that Martin Luther unleashed in Germany in 1517 began as a loud call for freedom--freedom of the church from the tyranny of the pope, freedom of the laity from the hegemony of the clergy, freedom of the conscience from the strictures of canon law. "Freedom of the Christian" was the rallying cry of the early Lutheran Reformation. It drove theologians and jurists, clergy and laity, princes and peasants alike to denounce church authorities and legal structures with unprecedented alacrity. "One by one, the structures of the church were thrust into the glaring light of the Word of God and forced to show their true colors," Jaroslav Pelikan writes.[1] Few church structures survived this scrutiny in the heady days of the 1520s. The church's canon law books were burned. Church courts were closed. Monastic institutions were confiscated. Endowed benefices were dissolved. Church lands were seized. Clerical privileges were stripped. Mendicant begging was banned. Mandatory celibacy was suspended. Indulgence trafficking was condemned. Annates to Rome were outlawed. Ties to the pope were severed. The German people were now to live by the pure light of the Bible and the simple law of the local community.

Though such attacks upon the church's law and authority built on two centuries of reformist agitation in the West, it was especially Luther's radical theological teachings that ignited this movement in Germany. Salvation comes through faith in the Gospel, Luther taught, not through works of the Law. All persons stand directly before God; they are not dependent upon clerics for divine mediation. All believers are priests to their peers; they are not divided into a higher clergy and lower laity. All persons are called by God to serve in vocations; clerics have no monopoly on the Christian vocation. The church is a communion of saints, not a corporation of law. The consciences of its members are to be guided by the Bible, not governed by human traditions. The church is called to serve society in love, not to rule it by law. Law is the province of the magistrate, not the prerogative of the cleric. When put in such raw and radical terms, these theological doctrines of justification by faith, the priesthood of believers, the distinction of Law and Gospel, and others were highly volatile compounds. When sparked by Luther's pugnacious rhetoric and relentless publications, they set off a whole series of explosive reforms in the cities and territories of Germany in the 1520s and 1530s, led by scores of churchmen and statesmen attracted to the Reformation cause.

[1] Jaroslav Pelikan, Spirit versus Structure: Luther and the Institutions of the Church (New York, 1968), 5.

In these early years, Luther's attack on the Church's canon law and clerical authority sometimes ripened into an attack on human law and earthly authority altogether. “Neither pope nor bishop nor any other man has the right to impose a single syllable of law upon a Christian man without his consent," Luther wrote famously in 1520.[2] The Bible contains all the law that is needed for proper Christian living, both individual and corporate. To subtract from the law of the Bible is blasphemy. To add to the law of the Bible is tyranny. “Wise rulers, side by side with Holy Scripture, [are] law enough.”[3] When jurists of the day objected that such radical biblicism was itself a recipe for blasphemy and tyranny, Luther turned on them harshly. “Jurists are bad Christians,” he declared repeatedly.[4] “Every jurist is an enemy of Christ.”[5] When the jurists persisted in their criticisms, Luther reacted with vulgar anger: “I shit on the law of the pope and of the emperor, and on the law of the jurists as well.”[6]

The rapid deconstruction of law, politics, and society that followed upon such shrill rhetoric soon plunged Germany into an acute crisis--punctuated and exacerbated by the peasants' war, the knights' uprising, and an ominous scourge of droughts and plagues in the 1520s and early 1530s. On the one hand, the Lutheran reformers had drawn too sharp a contrast between spiritual freedom and disciplined orthodoxy within the church. Young Lutheran churches, clerics, and congregants were treating their new liberty from the canon law as license for all manner of doctrinal and liturgical experimentation and laxness. Widespread confusion reigned over preaching, prayers, sacraments, funerals, holidays, and pastoral duties. Church attendance, tithe payments, and charitable offerings declined abruptly among many who took literally Luther’s new teachings of free grace. Many radical egalitarian and antinomian experiments were engineered out of Luther’s doctrines of the priesthood of believers and justification by faith--ultimately splintering the German Reformation movement into rival Evangelical, Anabaptist, and Free Church sects.

On the other hand, the Lutheran reformers had driven too deep a wedge between the canon law and the civil law. Many subjects traditionally governed by the canon law of the Catholic Church remained without effective civil regulation and policy in many of the cities and territories newly converted to Lutheranism. The vast Church properties that local magistrates had confiscated lingered long and longingly in private hands. Prostitution, concubinage, gambling, drunkenness, and usury reached new heights. Crime, delinquency, truancy, vagabondage, and mendicancy soared. Schools, charities, hospices, and other welfare institutions fell into massive disarray. Requirements for marriage, annulment, divorce, and inheritance became hopelessly confused. A generation of orphans, bastards, students, spinsters, and others found themselves without the support and sanctuary traditionally afforded by monasteries, cloisters, and ecclesiastical guilds. All these subjects and many more, the Catholic canon law had governed in detail for many centuries in Germany. The new Protestant civil law, where it existed at all, was too primitive to address these subjects properly.

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[2] LW 36:70.
[3] LW 44:203-204.
[4] WA TR 3, No. 2809b; see also WA TR 6, No. 7029-7030.
[5] WA TR 3, No. 2837, 3027.
[6] WA 49:302. See many further such sentiments below pp. __.

In response, the Lutheran reformation of theology and the church quickly broadened into a reformation of law and the state as well. Deconstruction of the canon law for the sake of the Gospel gave way to reconstruction of the civil law on the strength of the Gospel. Castigation of Catholic clerics as self-serving overlords gave way to cultivation of Protestant magistrates as fathers of the community called to govern on God's behalf. Old rivalries between theologians and jurists gave way to new alliances, especially in the new Lutheran universities. In the 1530s and thereafter, Lutheran theologians began to develop and deepen their theological doctrines in sundry catechisms, confessions, and systematic writings, now with much closer attention to their legal, political, and social implications. Lutheran jurists joined Lutheran theologians to craft ambitious legal reforms of church, state, and society on the strength of this new theology. These legal reforms were defined and defended in hundreds of monographs, pamphlets, and sermons published by Lutheran writers from the 1530s to 1560s. They were refined and routinized in hundreds of new reformation ordinances promulgated by German cities, duchies, and territories that converted to the Lutheran cause. By the time of the Peace of Augsburg (1555)--the imperial law that temporarily settled the constitutional order of Germany--the Lutheran Reformation had brought fundamental changes to theology and law, to spiritual life and temporal life, to church and state.

Critics of the day, and a steady stream of theologians and historians ever since, have seen this legal phase of the Reformation as a corruption of the original Lutheran message. For some, it was a bitter betrayal of the new freedom and equality that Luther had promised. For others, it was a distortion of Luther's fundamental reforms of theology and church life. For others, it was a simple reversion to traditional canonical norms dressed in new theological forms. For still others, it was a naked seizure of power by the magisterial reformers eager to canonize their formulations and to guarantee their control of the Reformation movement.

My argument in this volume is that it was the combination of theological and legal reforms that rendered the Lutheran Reformation so resolute and resilient. The reality was that Luther and the other theologians needed the law and the jurists, however much they scorned them. It was one thing to deconstruct the framework of medieval Catholic law, politics, and society with a sharp theological sword. It was quite another thing to reconstruct a new Lutheran framework of law, politics, and society with only this theological sword in hand. Luther learned this lesson the hard way in the crisis years of the 1520s, and it almost destroyed his movement. He quickly came to realize that law was not just a necessary evil but an essential blessing in this earthly life. Equally essential was a corps of professional jurists to give institutional form and reform to the new theological teachings. It was thus both natural and necessary for the Lutheran Reformation to move from theology to law. Radical theological reforms had made possible fundamental legal reforms. Fundamental legal reforms, in turn, would make palpable radical theological reforms. In the course of the 1530s onwards, the Lutheran Reformation became in its essence both a theological and a legal reform movement. It struck new balances between law and Gospel, rule and equity, order and faith, structure and spirit.

Contrary to Luther's critics, this move from theology to law was not a corruption of the original Lutheran message but a bolstering of it. It was not a betrayal of the founding ideals of liberty and equality, but a balancing of them with the need for responsibility and authority. It was not a distortion of Luther's reforms of theology and church life but a grounding of them in a deeper constitutional order. It was not a seizure of power by the theologians, but a sharing of power with the jurists and the law-makers. It was not a reversion to traditional canon law norms, but a conversion and convergence of old canon law and new civil law norms in the service of the Reformation cause.

Such is the main argument of this book. What follows in the next section is a summary of the high points of the argument, with some attention to the medieval context in which the Lutheran Reformation was situated. The section thereafter compares this argument briefly with the modern historiography of the Lutheran Reformation.

Law and Theology in the Lutheran Reformation

The Two-Kingdoms Framework. The starting point of the revamped Lutheran Reformation was Luther's complex theory of the two kingdoms, which came together in the later 1520s and 1530s. In this two-kingdoms theory, Luther repeated much of his original theological message. But he wove his early more radical doctrines into a considerably more nuanced and integrated theory of being and order, of the person and society, of the church and the priesthood, of reason and knowledge, of righteousness and law.

God has ordained two kingdoms or realms in which humanity is destined to live, Luther argued, the earthly kingdom and the heavenly kingdom. The earthly kingdom is the realm of creation, of natural and civil life, where a person operates primarily by reason and law. The heavenly kingdom is the realm of redemption, of spiritual and eternal life, where a person operates primarily by faith and love. These two kingdoms embrace parallel heavenly and earthly, spiritual and temporal forms of righteousness and justice, government and order, truth and knowledge. These two kingdoms interact and depend upon each other in a variety of ways, not least through biblical revelation and through the faithful discharge of Christian vocations in the earthly kingdom. But these two kingdoms ultimately remain distinct. The earthly kingdom is distorted by sin and governed by the Law. The heavenly kingdom is renewed by grace and guided by the Gospel. A Christian is a citizen of both kingdoms at once and invariably comes under the distinctive government of each. As a heavenly citizen, the Christian remains free in his or her conscience, called to live fully by the light of the Word of God. But as an earthly citizen, the Christian is bound by law, and called to obey the natural orders and offices that God has ordained and maintained for the governance of this earthly kingdom.

Luther's two-kingdoms theory was a rejection of traditional hierarchical theories of being, society, and authority. For centuries, the Christian West had taught that God's creation was hierarchical in structure--a vast chain of being emanating from God and

descending through various levels and layers of reality. In this great chain of being, each creature found its place and its purpose, and each human society found its natural order and hierarchy. It was thus simply the nature of things that some persons and institutions were higher on this chain of being, some lower. It was the nature of things that some were closer and had more ready access to God, and some were further away and in need of greater mediation in their relationship with God. This was one basis for traditional Catholic arguments of the superiority of the pope to the emperor, of the clergy to the laity, of the spiritual sword to the temporal sword, of the canon law to the civil law, of the church to the state.

Luther's two-kingdoms theory turned this traditional ontology onto its side. By distinguishing the two kingdoms, Luther highlighted the radical separation between the Creator and the creation, and between God and humanity. For Luther, the fall into sin destroyed the original continuity and communion between the Creator and the creation, the organic tie between the heavenly kingdom and the earthly kingdom. God is present in the heavenly kingdom, and is revealed in the earthly kingdom mainly through "masks." Persons are born into the earthly kingdom, and have access to the heavenly kingdom only through faith. Luther did not deny the traditional view that the earthly kingdom retained its natural order, despite the fall into sin. There remained, in effect, a chain of being, an order of creation, that gave each human being and institution its proper place and purpose in this life. But, for Luther, this chain of being was horizontal, not hierarchical. Before God, all persons and all institutions in the earthly kingdom were by nature equal. Luther's earthly kingdom was a flat regime, a horizontal realm of being, with no person and no institution obstructed or mediated by any other in relationship to and accountability before God.

Luther's two-kingdoms theory also turned the traditional hierarchical theory of human society onto its side. For centuries, the medieval Church had taught that the clergy were called to a higher spiritual service in the realm of grace, the laity to lower temporal service in the realm of nature. The clergy were accordingly exempt from many earthly obligations and foreclosed from many natural activities, such as marriage. For Luther, clergy and laity were both part of the earthly kingdom, and were both equal before God and before all others. Luther’s doctrine of the priesthood of all believers at once “laicized” the clergy and “clericized” the laity. Luther treated the traditional clerical office of preaching and teaching as just one other vocation alongside many others that a conscientious Christian could properly and freely pursue in this life. He treated all traditional lay offices as forms of divine calling and priestly vocation, each providing unique opportunities for service to God, neighbor, and self. Preachers and teachers of the church must carry their share of civic duties, pay their share of civil taxes, and participate in their share of earthly activities just like everyone else.

Luther's two-kingdoms theory also turned the traditional hierarchical theory of authority onto its side. Luther rejected the medieval two swords theory that regarded the spiritual authority of the cleric and the canon law to be naturally superior to the temporal authority of the magistrate and the civil law. In Luther’s view, God has ordained three basic forms and forums of authority for governance of the earthly life: the domestic,

ecclesiastical, and political authorities, or, in modern terms, the family, the church, and the state.[7] Hausvater, Gottesvater, and Landesvater; paterfamilias, patertheologicus, and paterpoliticus: these were the three natural offices ordained at creation. All three of these authorities represented different dimensions of God's presence and authority in the earthly kingdom. All three stood equal before God and before each other in discharging their natural callings. All three were needed to resist the power of sin and the Devil in the earthly kingdom. The family was called to rear and nurture children, to teach and discipline them, to cultivate and exemplify love and charity within the home and the broader community. The church was called to preach the Word, to administer the sacraments, to discipline its wayward members. The state was called to protect peace, to punish crime, to promote the common good, and to support the church, the family, and various other institutions, such as schools and charities, that are derived from them.

Not only were these three natural estates of family, church, and state created equally, rather than hierarchically. Only the state, in Luther's view, held legal authority--the authority of the sword to pass and to enforce positive laws for the governance of the earthly kingdom. Contrary to medieval Catholic views, Luther emphasized that the church was not a law-making authority. The church had no sword, no jurisdiction. To be sure, church officers and theologians must be vigilant in preaching and teaching the law of God to magistrates and subjects alike, and in pronouncing prophetically against injustice, abuse, and tyranny. But formal legal authority lay with the state not with the church, with the magistrate not with the cleric.

Luther regarded the magistrate as God's vice-regent called to elaborate divine law and to reflect divine justice in the earthly kingdom. The best source and summary of divine law, in his view, was the Ten Commandments and its elaboration in the moral principles of the Bible. It was the Christian magistrate's responsibility to cast these general principles of divine law into specific precepts of human law, designed to fit local conditions. This was to be an exercise of faith, reason, and tradition at once. The magistrate was to pray to God earnestly for wisdom and instruction, yielding when apt to the homiletic and prophetic directions of Lutheran theologians and ministers. He was to maintain an untrammeled reason in judging the needs of his people and the advice of his counselors. He was to consider the wisdom of the legal tradition--particularly that of Roman law, which Luther called a form of "heathen wisdom" as well as that of early Christian canon law once freed from its medieval papalist accretions and distortions.

Luther also regarded the magistrate as the "father of the community" (Landesvater, paterpoliticus). He was to care for his political subjects as if they were his children, and his political subjects were to "honor" him as if he were their parent. Like a loving father, the magistrate was to keep the peace and to protect his subjects in their persons, properties, and reputations. He was to deter his subjects from abusing themselves through drunkenness, sumptuousness, prostitution, gambling, and other vices. He was to nurture his subjects through the community chest, the public almshouse, the state-run

[7] The terms family (Familie; Stamm) church (Kirche; Geistlichkeit), and state (Staat; Obrigkeit), while used as shorthand expressions herein, were highly loaded and plastic terms that shifted considerably in the sixteenth century, in part under the influence of the Reformation. See respectively below, pp.__, __, and __.

hospice. He was to educate them through the public school, the public library, the public lectern. He was to see to their spiritual needs by supporting the ministry of the local church, and encouraging attendance and participation through civil laws of Sabbath observance, tithing, and holy days. He was to see to his subjects' material needs by reforming inheritance and property laws to ensure more even distribution of the parents' property among all children. He was to set an example of virtue, piety, love, and charity in his own home and private life for his faithful subjects to emulate and to respect.

These twin metaphors of the Christian magistrate--as the lofty vice-regent of God and as the loving father of the community--described the basics of Lutheran political theory. Political authority was divine in origin, but earthly in operation. It expressed God's harsh judgment against sin but also his tender mercy for sinners. It communicated the Law of God but also the lore of the local community. It depended upon the church for prophetic direction but it took over from the church all jurisdiction--governance of marriage, education, poor relief and other earthly subjects traditionally governed by the Church's canon law. Either metaphor of the Christian magistrate standing alone could be a recipe for abusive tyranny or officious paternalism. But both metaphors together provided Luther and his followers with the core ingredients of a robust Christian republicanism and budding Christian welfare state.

Law, Politics, and Society. A whole coterie of sixteenth-century jurists and moralists built on Luther's core insights to construct intricate new Lutheran theories of law, politics, and society. Foremost among these were: (1) Philip Melanchthon, the great moral philosopher, systematic theologian, and Roman law scholar at the University of Wittenberg, known in his day as the "Teacher of Germany"; (2) Johannes Eisermann, a student of Melanchthon, the founding law professor of the new Lutheran University of Marburg, and counselor to one of the strongest Lutheran princes of the day, Landgrave Philip of Hesse; and (3) Johann Oldendorp, Melanchthon's correspondent and Eisermann's colleague at the University of Marburg, and the most original and prolific jurist of the Lutheran Reformation. These three legal scholars, and scores of other German jurists and moralists who worked under their influence, brought many of Luther's cardinal theological teachings to direct and dramatic legal application.

Most sixteenth-century Lutheran jurists started their theories with Luther's two-kingdoms framework, and the legal, political, and social implications that Luther had drawn from the same. But while Luther tended to emphasize the distinctions between these two kingdoms, most Lutheran jurists tended to emphasize their cooperation. While Luther tended to view the domestic, ecclesiastical, and political orders as natural and equal in their governance of the earthly kingdom, most Lutheran jurists gave new emphasis and power to the political order of the magistrate, and paradoxically placed new limitations on that power as well.

First, the Lutheran jurists emphasized, more than did Luther, that the Bible was an essential source of earthly law. Luther was all for using the Bible to guide life in the earthly kingdom. But for all his early radical biblicism, he was ambivalent about the Bible's precise legal role. He tended to use the Bible as a convenient trope and trump in arguing

for certain legal reforms, without spelling out a systematic theological jurisprudence. By contrast, Lutheran jurists of the day viewed the Bible as the highest source of law for life in the earthly kingdom. For them, it was the fullest statement of the divine law. It contained the best summary of the natural law. It provided the surest guide for positive law.

The jurists laid special emphasis on the Ten Commandments. The First Table of the Ten Commandments, they believed, laid out the cardinal principles of spiritual law and morality that governed the relationship between persons and God. The Second Table laid out the cardinal principles of civil law and morality that governed the basic relationships among persons. The Commandments against idolatry, blasphemy, and Sabbath-breaking undergirded the new religious establishment laws of Lutheran communities—-laws governing orthodox doctrine and liturgy, ecclesiastical polity and property, local clergy and church administrators. The Commandment "Thou shalt not steal" was the source of the law of property, as well as a source of criminal law alongside the Commandment "Thou shalt not kill." The Commandments requiring one to honor parents and to forgo adultery and coveting another's wife were the source of a new civil law of sex, marriage, and family. The Commandment "Thou shalt not bear false witness" was the organizing principle of the law of civil procedure, evidence, and defamation. The Commandment "Thou shalt not covet" undergirded a whole battery of inchoate crimes and civil offenses. Not all positive law, of course, fit under the Ten Commandments. But the Ten Commandments provided the Lutheran jurists with a useful framework for organizing a good number of the new legal institutions of the Lutheran state.

Second, the Lutheran jurists adduced, more readily than did Luther, Catholic canon law as a valid source of Protestant civil law. Luther eventually made his grudging peace with some of the early canon law, acknowledging its utility for defining the disciplinary standards of the church and the equitable norms for the state. But Luther remained firmly opposed to the use of later medieval papal legislation either in law-making or in legal education. The Lutheran jurists were less reticent. They made ready use of the whole Corpus Iuris Canonici in their texts, courses, consilia, judicial opinions, and legislative drafting.

The Lutheran jurists grounded their more ample use of the canon law in innovative theories of both the church and the state. The invisible church of the heavenly kingdom, they argued, might well be able to survive on the Bible alone, freed from the accretions of the canon law. But the visible church of the earthly kingdom, filled with both sinners and saints, required both biblical and canonical rules and procedures to be governed properly. Medieval canon law, insofar as it extended biblical norms, was a proven law for the governance of the visible church, and should be used. The magistrate, as God's vice-regent and father of the community, they further argued, was required to attend to both the civil and spiritual needs of his subjects. He was to rule using Christian and equitable laws. The canon law was viewed as a valid and valuable source of Christian equity and justice, grounded as it often was in the Bible and in the early apostolic constitutions. Canon law was thus a valuable prototype on which the Protestant Christian magistrate could call. This new ecclesiology and jurisprudence, together, provided a sturdy rationale for the

ample conversion and convergence of the medieval Catholic canon law and the new Lutheran civil law.

Third, the Lutheran jurists emphasized, more than did Luther, the three uses of the law in the governance of the earthly kingdom. Luther had developed the "uses of the law" doctrine as part of his theology of salvation, and as part of his answer to the radical antinomians. Legal works played no role in the drama of salvation, he continued to insist. Yet, the law itself was still useful in the earthly kingdom. It had a "civil use" of restraining sin and a "theological use" of driving sinners to the repentance that was necessary for faith in Christ and thus entrance into the heavenly kingdom. Lutheran jurists repeated these two uses of the law, but stressed a third, "educational use" of the law. When properly understood and applied, they argued, law not only coerced sinners, it also educated saints. It yielded not only a basic civil morality, but also a higher spiritual morality. This was a further argument that the jurists used to insist on positive laws that established religious doctrine, liturgy, and morality in each polity. The positive law was to teach not only the civil morality of the Second Table of the Decalogue, but also the spiritual morality of the First Table. It was to teach citizens not only the letter of the moral law, but also its spirit. The law thereby was useful in defining and enforcing not only a "morality of duty" but also a "morality of aspiration."[8]

Fourth, the Lutheran jurists emphasized, more than did Luther, the need to establish an overtly Evangelical[9] order of law, society, and politics in the earthly kingdom. Luther certainly had something of the same aspiration. But the Lutheran jurists were less reserved than Luther about building bridges between the two kingdoms, even rendering the earthly kingdom an approximation of the heavenly kingdom. The Marburg jurist Johannes Eisermann provided the most expansive argument. Eisermann acknowledged that the precise form and function of every Christian commonwealth will differ, for each community will strike its own balance among the norms of "nature, custom, and reason" and have its own unique interpretation of the Commandments of Scripture and tradition. But certain features of a Christian commonwealth will be inevitable. Eisermann repeated the notion that the positive law of each such polity must reflect and project the natural law, particularly as summarized in the Decalogue and the Gospel. He also repeated the notion that the positive law was to support a higher spiritual morality, through establishment by law of the right doctrine, liturgy, confession, canon, and church structure that should prevail in that polity. A true Christian commonwealth, he further argued, should seek to be the very body of Christ on earth—-a miniature corpus Christianum. It should seek to follow St. Paul's image that all are "individual members one of another." This meant that each person and each vocation must count and must be supported in a Christian commonwealth. Each person must respect the dignity, property, and privacy of the other, and discharge the charity, care, and priestly service that become the Christian faith. A true Christian commonwealth should also follow St. Paul's image that some members of

[8] The phrases are from Lon L. Fuller, The Morality of Law, rev. ed. (New Haven, CT, 1964), passim.
[9] Throughout this volume, I shall be using the term "Evangelical(ism)" as a synonym for "Lutheran(ism)." The term "Lutheran," though now common, was historically a term of opprobrium that Catholics used to describe those who followed Luther rather than Christ. Luther preferred to call himself and his followers an "Evangelical," one who followed the Gospel (evangelium in Latin). WA 8:685.

the body are greater and some are lesser. This, for Eisermann, supported an intricate hierarchy of estates, orders, and professions within the local polity, each with its own distinctive callings in serving the common good and reforming the commonwealth. Eisermann's early formulation of an overtly Protestant republicanism gave rise to a whole series of later Lutheran commonwealth theories, most notably those of the Strasbourg reformer Martin Bucer and the Württemberg reformer Johannes Brenz.

Fifth, the Lutheran jurists developed an intricate theory of both political power and of limitations on political power. Luther had endorsed a robust theory of political authority, calling the magistrate the vicar of Christ, the father of the community, and the only law-making authority of the earthly kingdom. But Luther had put strong limits on political power with his emphasis on the inherent limitation of the magistrate's jurisdiction to earthly matters, the internal checks provided by the magistrate's civil retinue (called the Obrigkeit), and the external checks provided by the concurrent orders of the family and the church.

The jurists often repeated Luther's teachings, but they also undercut them. By granting the magistrate the power over religious doctrine and liturgy, they effectively extended his power at least partly into the heavenly kingdom. By glorifying the magistrate as the highest legal authority within the earthly kingdom, they severely compromised the checks and balances of the lower Obrigkeit. By giving the magistrate exclusive power to define the legal form and function of the church and the family, they jeopardized the institutional checks and balances these orders might have provided on the political order. This theory seemed to provide magistrates with all that was needed for absolute power.

But the Lutheran jurists also placed a number of safeguards against tyranny—-the need for written, published laws that the magistrate himself obeyed, the responsibility of the clergy to preach and prophesy against injustice, the need for civil disobedience against positive laws that openly violated the Bible and the Christian conscience. Moreover, the Lutheran jurists' arguments for enhancing the power and prestige of the political office also paradoxically put safeguards on it. One safeguard lay in their theory of the Ten Commandments as the source of positive law. This enhanced the magistrate's power to reach both civil and spiritual matters. But it also restrained the magistrate in the use of his power. For the Ten Commandments were best interpreted by the church and its theologians, not by the state and the Obrigkeit. The magistrate was thus obligated to draw on theologians and clergy to understand the moral and religious dimensions of the law. He was to appoint them to the legislature. He was to request their opinions on discrete questions. He was to consult the whole theology faculties on difficult cases. A second safeguard lay in the jurists' flattering descriptions of the magistrate as the paragon of Christian virtue. This enhanced the splendor and glory of the political office. But it also held its occupant to a very high moral standard. Those officials who defied this description should not and could not serve, and risked resistance or all-out revolt if they persisted. When this view came to be coupled with a theory of election to office, it provided a critical restriction on tyranny. A third safeguard lay in the intense pluralism of Germany, with its 350 plus separate and often very small polities. The small size of these polities did allow for the ready realization of a unitary local Lutheran commonwealth under

the plenary legal authority of the Lutheran magistrate. But the small size of these polities also made it easier for people to leave—-taking with them their labor, their expertise, their taxes, their services, and other essential contributions to the local commonwealth. The sterner the local tyranny, the smaller the local population was the theory. When the right of a dissenter to emigrate was guaranteed by the Peace of Augsburg (1555), this became a further strong impediment to tyranny.

Sixth, Johann Oldendorp led the Lutheran jurists in the development of an innovative theory of Christian equity that built on Luther's understanding of the Christian conscience. Every law was, by its nature, a strict law, Oldendorp argued, and every law, by definition, thus required equitable application. To do equity was an exercise of both the mind and the soul of the judge. It required the judge to apply civil reason, to separate salient from superficial fact, to reason from precedent and analogy. It also, however, required the judge to use natural reason, to consult the natural law inscribed on his conscience, to meditate prayerfully on Scripture, and so decide on the right application or reformation of the rule. Such conscientious application of rules was required not only in exceptional cases but in all cases. It was concerned not only with being just and merciful to the party in the particular case, but also serving the letter and the spirit of the law itself. Oldendorp's theory of equity was a unique form of Christian practical reasoning, on the one hand, and pious judicial activism on the other.

Traditionally, equity was considered to be a unique quality of the canon law and a unique ability of the ecclesiastical judge. Thus in medieval Germany, most cases that required formal equity were filed in or removed to Catholic Church courts for resolution. Oldendorp's theory effectively merged law and equity. Every law required equity to be just, and all equity required a law to be applied. Law and equity belonged together and completed each other. The legislator had to build equity into each new law that was passed. The judge had to do equity in every case. Oldendorp's theory had direct implications for legal reform in evangelical Germany. It helped to support the merger of church courts and state courts in Lutheran Germany; separate church courts of equity were no longer required. It helped to support the convergence of canon law and civil law in Lutheran Germany; the canon law as a source of equity was an invaluable resource for the civil law. And it helped to support the growing professionalization of the German judiciary in the sixteenth century, and the requirement that judges be educated both in law and in theology, in civil law and in canon law.

Lutheran Reformation Laws. These new Lutheran theories of law, politics, and society did not remain confined to the lectern or the letter desk. They came to direct and dramatic application in sixteenth-century Lutheran Germany. Building on a century-long German tradition of issuing "legal reformations" often in defiance of local Church leaders, the Lutheran reformers translated this new theological jurisprudence directly into new legal terms. Many leading Lutheran jurists sat on local courts as judges and notaries, or on local urban or territorial councils as secretaries and legal advisors, and thereby took a direct hand in shaping the new laws. Lutheran jurists and theologians issued formal opinions (consilia) on legal questions on request from courts, councils, or individual litigants. Civil courts regularly consulted the law faculties and sometimes also the

theology faculties of local Lutheran universities to help them resolve cases raising difficult legal and moral issues. These were important channels for translating the new Lutheran gospel into law.

More directly influential were the hundreds of new "legal reformations" issued by cities and territories that had converted to the Lutheran cause. Initially, these legal reformations were simple statements of the new Lutheran faith of the local polity and simple declarations of the new subjects that Lutheran magistrates had taken over from the church. After two or three decades of amendment and reformulation, however, many of these local Lutheran laws had become sophisticated legal documents that set out the new faith and the new legal order in copious detail, and instituted learned executive and judicial mechanisms for the implementation and enforcement of these laws.

Many of the leading Lutheran theologians and jurists helped to draft and enforce these new reformation laws. The reformers whose names we have encountered already were among the most active in this effort--Luther, Melanchthon, Oldendorp, Eisermann, Bucer, and Brenz, as well as the Wittenberg reformers Johannes Bugenhagen and Justus Jonas, among several others. The reformers made ample use of scissors and paste in crafting these new reformation laws. They regularly duplicated their own formulations and those of their closest co-religionists in drafting new laws. They corresponded with each other about the laws, and frequently circulated draft laws among their inner circle for comment and critique. They referred to and paraphrased liberally the writings of the leading reformers in crafting the legal provisions. This close collaboration led to considerable uniformity among the new reformation laws and considerable legal appropriation of the reformers' cardinal theological ideas.

While these Lutheran reformation laws were very wide-ranging in subject matter, they typically had lengthy provisions on: (1) religious dogma, liturgy, and worship; (2) public religious morality; (3) sex, marriage, and family life; (4) education and public schools; and (5) poor relief and other forms of social welfare.

The first two sets of legal provisions, on dogma and morality, were less innovative in form. Sometimes they approximated the caricature of simply being traditional canon laws wrapped in new Lutheran forms and now administered by Lutheran civil authorities. The actual changes especially to the theology were substantial, but the forms of law used to enforce them were largely familiar. In theology, the new civil laws reflected the Lutheran resystematization of dogma, the truncation of the sacraments, the reforms of liturgy and the religious calendar, the vernacularization of the Bible, the expansion of catechesis and religious instruction, the revamping of corporate worship and congregational music, the reforms of ecclesiastical discipline and local church administration, and more. In morality, new Sabbath-day laws prohibited all forms of unnecessary labor and uncouth leisure on Sundays and holy days, and required faithful attendance at services. Other new laws prohibited blasphemy, sacrilege, witchcraft, sorcery, magic, alchemy, false oaths, and similar offenses. New sumptuary laws proscribed immodest apparel, wasteful living, and extravagant feasts and funerals. New entertainment laws placed strict limits on public drunkenness, boisterous celebration,

gambling, and other games that involved fate, luck, and magic. Neither the Lutheran magistrates' emphasis on these moral offenses, nor their definition of them strayed far from the formulations of the medieval canon law. What was new was that these new subjects now fell primarily under civil law rather than under canon law.

The new Lutheran laws on marriage, education, and social welfare involved far greater theological and jurisprudential innovation. Each of these subjects had been at the heart of medieval theology and canon law. Each was at the heart of the new Lutheran theology and jurisprudence, and among the first pressing subjects that early Lutherans sought to reform. Lutheran theologians took the lead in critiquing the traditional lore and law and developing innovative theories that skillfully interwove some strands of older Catholic theology and canon law into a new Lutheran tapestry of theology and law. Lutheran jurists took the lead in working out the legal implications of these theological reforms, sometimes with ample revisions and reservations. On these three subjects, provisional legal reforms were on the books very early in Reformation, and then greatly expanded in the new wave of legal reforms in the 1530s and thereafter.

The institution of marriage, as one of the three great estates of the earthly kingdom, attracted a great deal of theological and legal attention. Prior to the sixteenth century, marriage was regarded as a sacrament of the Church. It was formed by the mutual consent of a fit man and a fit woman in good religious standing. When properly contracted, this union of husband and wife symbolized the enduring union of Christ and His Church, and conferred sanctifying grace upon the couple and their children. The parties could form this union in private, but once properly formed it was an indissoluble bond broken only by the death of one of the parties.

As a sacrament, marriage was subject to the jurisdiction of the Church. A whole network of canon law and confessional rules governed sex, marriage, and family life. The Church did not regard the family as its most exalted estate, however. Though a sacrament and a sound way of Christian living, marriage and family life were not considered to be spiritually edifying. Marriage was a remedy for sin, not a recipe for righteousness. Marriage was considered subordinate to celibacy. Clerics and monastics were required to forgo marriage as a condition for ecclesiastical service. Those who could not, were not worthy of the church's holy orders and offices.

Lutheran theologians treated marriage not as a sacramental institution of the heavenly kingdom, but as a social estate of the earthly kingdom. Marriage, they taught, was a divinely-created institution that served the goods and goals of mutual love and support of husband and wife, mutual procreation and nurture of children, and mutual protection of both spouses from sexual sin. All adult persons, preachers and others alike, should pursue the calling of marriage, for all were in need of the comforts of marital love and of the protection from sexual sin. Moreover, the marital household served as a model of authority, charity, and pedagogy in the earthly kingdom and as a vital instrument for the reform of church, state, and civil society. Parents served as "bishops" to their children. Siblings served as priests to each other. The household altogether, particularly the

Christian household of the married minister, was a source of evangelical impulses in society.

Though divinely created and spiritually edifying, however, marriage and the family remained a social estate of the earthly kingdom. All parties could partake of this institution, regardless of their faith. Though subject to divine law and clerical counseling, marriage and family life came within the jurisdiction of the magistrate, not the cleric. The magistrate was to set the laws for marriage formation, maintenance, and dissolution; child custody, care, and control; family property, inheritance, and commerce.

Lutheran magistrates rapidly translated this new Protestant gospel into civil law, in some polities building on late medieval civil laws that had already controlled some aspects of the marital institution. These new civil marriage laws shifted primary marital jurisdiction from the church to the state. They strongly encouraged the marriage of clergy, discouraged celibacy, and prohibited monasticism. These new civil laws further denied the sacramentality of marriage and the religious tests and impediments traditionally imposed on prospective marital couples. They modified the doctrine of consent to betrothal and marriage, and required the participation of parents, peers, priests, and political officials in the process of marriage formation and dissolution. They sharply curtailed the number of impediments to betrothal and to putative marriages. And they introduced absolute divorce, in the modern sense, on proof of adultery, desertion, and other faults, with a subsequent right to remarriage at least for the innocent party.

The school, as a platform for the transmission of Lutheran lore and as a preparation for each person’s Christian vocation, was also the subject of intense theological and legal reform. Prior to the sixteenth century, the Church had established a refined system of religious education for Germany and beyond. Cathedrals, monasteries, chantries, ecclesiastical guilds, and large parishes offered the principal forms of lower education, governed by general and local canon law rules of the Church. Young students were trained in the trivium and quadrivium, and taught the creeds, catechisms, and confessional books. Gifted graduates were sent on to Church-licensed universities for advanced training in the core faculties of law, theology, and medicine. The foundation of this Church-based educational system lay in Christ's Great Commission to his apostles and their successors "to teach all nations" the meaning and measure of the Christian faith. The vast majority of students were trained for clerical and other forms of service in the Church.

The Lutheran Reformation transformed this pan-Western system of church-based education into sundry local systems of state-based education in Germany. Luther, Melanchthon, Bugenhagen, Brenz, and other leading Protestant reformers castigated the Church leadership both for its professional monopolization of education and for its distortions of religious and humanistic learning. They introduced a system of public education that leveled traditional social distinctions between clergy and laity in defining the goods and goals of education, and gave new emphasis to civil officials and civic concerns in the organization and operation of the schools. In the reformers' view, the magistrate, as "father of the community," was primarily responsible for education. Education was to be

mandatory for boys and girls alike, fiscally and physically accessible to all, and marked by both formal classroom instruction and civic education through community libraries, lectures, and other media. The curriculum was to combine biblical and evangelical values with humanistic and vocational training. Students were to be stratified into different classes, according to age and ability, and slowly selected for any number of vocations.

The theological reformers of the sixteenth century built on the work of the legal reformers of the fourteenth and fifteenth centuries. The system of state-run public education that they established built squarely on the Latin and vernacular schools already established in larger medieval cities in Germany. The system of state-run charities and guilds to support poor students built on the prior practice of princes, estates, and monasteries to maintain educational endowments. The curricula of the lower schools kept religion at their core, and retained the seven liberal arts as well as a number of texts prescribed by the Catholic canon law.

The reformers, however, cast these traditional pedagogical principles and practices into their own distinctive ensemble, grounded in the two-kingdoms theory. Over time, the Protestant magistrate replaced the Catholic cleric as the chief protector and cultivator of the public school and university. The state's civil law replaced the church's canon law as the chief law governing education. The Bible replaced the scholastic text as the chief handbook of the curriculum. German replaced Latin as the universal tongue of the educated classes in Germany. The general callings of all Christians replaced the special calling of the clergy as the raison d'être of education. Education remained fundamentally religious in character. But it was now subject to broader political control and directed to broader civic ends.

Social welfare institutions, many of which had been confiscated or destroyed during the radical Reformation period, also demanded the reformers' immediate attention, particularly given the explosion of poverty and vagabondage in Germany in the 1520s and 1530s. Prior to the sixteenth century, the Church taught that both poverty and charity were spiritually edifying. Voluntary poverty was a form of Christian sacrifice and self-denial that conferred spiritual benefits upon its practitioners and provided spiritual opportunities for others to accord them their charity. Itinerant monks and mendicants in search of alms were the most worthy exemplars of this ideal, but many other deserving poor were at hand as well. Voluntary charity, in turn, conferred spiritual benefits upon its practitioner, particularly when pursued as a work of penance and purgation in the context of the sacraments of penance or extreme unction. To be charitable to others was to serve Christ, who had said, "Inasmuch as you have done it unto one of the least of these my brethren, you have done it unto me" (Matthew 25:40).

These teachings helped to render the medieval Church the primary object and subject of charity and social welfare. To give to the Church was the best way to give to Christ, since the Church was the body of Christ on earth. The Church thus received alms through the collections of its mendicant monks, the charitable offerings from its many pilgrims, the penitential offerings assigned to cancel sins, the final bequests designed to expedite purgation in the life hereafter, and much more. The Church also distributed alms

through the diaconal work of the parishes, the hospitality of the monasteries, and the welfare services of the many Church-run almshouses, hospices, schools, chantries, and ecclesiastical guilds. A rich latticework of canonical and confessional rules calibrated these obligations and opportunities of individual and ecclesiastical charity, and governed the many corporations, trusts, and foundations of charity under the Church's general auspices.

The Lutheran reformers rejected traditional teachings of both the spiritual idealization of poverty and the spiritual efficaciousness of charity. All persons were called to work the work of God in the world, they argued; they were not to be idle or impoverished. Voluntary poverty was a form of social parasitism to be punished, not a symbol of spiritual sacrifice to be rewarded. Only the worthy local poor deserved charity, and only if they could not be helped by their immediate family members, the family being the "first school of charity." Charity, in turn, was not a form of spiritual self-enhancement; it was a vocation of the priesthood of believers. Charity brought no immediate spiritual reward to the giver; it was designed to bring spiritual opportunity to the receiver. Luther's doctrine of justification by faith alone undercut the spiritual efficacy of charity for the giver. But Luther's doctrine of the priesthood of all believers enhanced the spiritual reward for the receiver. It induced him to see the good works brought by faith, and so be moved to have faith himself.

The Lutheran reformers also rejected the traditional belief that the Church was the primary object and subject of charity. The church was called to preach the Word, to administer the sacraments, and to discipline the saints. For the local church to receive and administer charity beyond its immediate congregation distracted from its primary ministry. For the church to run monasteries, almshouses, charities, hospices, orphanages, and more detracted from its essential mission. The local parish church should continue to receive the tithes of its members, as biblical laws taught. It should continue to tend to the immediate needs of its local members, as the apostolic church had done. But most other gifts to the church and the clergy were, in the reformers' view, misdirected. Most other forms of ecclesiastical charity, particularly those surrounding pilgrimages, penance, and purgation, were, for the reformers, types of "spiritual bribery," predicated on the fabricated sacraments of penance and extreme unction and on the false teachings of purgatory and works righteousness.

In place of traditional ecclesiastical charities, the reformers instituted a series of local civil institutions of welfare, centered on the community chest, administered by the local magistrate, and directed to the local, worthy poor and needy. The community chest was usually comprised of the Church's endowments and other properties that had been confiscated. These community chests were eventually supplemented by local taxation and private donation. In larger cities and territories, several such community chests were established, and the poor closely monitored in the use of their services. At minimum, this system provided food, clothing, and shelter for the poor, and emergency relief in times of war, disaster, or pestilence. In larger and wealthier communities, the community chest eventually supported the development of a more comprehensive local welfare system featuring public orphanages, workhouses, boarding schools, vocational centers, hospices,

and more, administered or supervised by the local magistrate. These more generous forms of social welfare, the Lutheran reformers considered to be an essential service of the Christian magistrate, the father of the community called to care for his political children. As with education, so with social welfare, the Lutheran reformers built on some two centuries of experimental civil regulation of the poor and private administration of charity in some of the stronger cities and territories of the German Empire. But again it was Lutheran theology that brought these legal reforms into common focus and common practice in later sixteenth-century Germany.

State, church, family, school, and charity--these were the five subjects where the Lutheran Reformation effected the most dramatic institutional changes in the first half of the sixteenth century. These five areas attracted the most searching theological critique. These five areas promoted the most sustained legal reforms. In these five laboratories, Lutheran theologians and jurists, together, forged the most original political theology and theological jurisprudence.

It must be emphasized that these were not the only legal changes born of the Lutheran Reformation. There were many other changes in sixteenth-century German private laws of defamation and slander, primogeniture and inheritance, foundations and trusts, and more. There were several sweeping changes in German legal science--in the resytematization of private law, in new styles of legal pedagogy and legal rhetoric, in new theories of precedent and judicial reasoning, in new hermeneutical approaches to ancient law, in new collations and syntheses of Roman law, canon law, and customary law. There were also major reforms of public law—-in the reorganization and growing sophistication of the civil courts and their rules of procedure, evidence, and appeal, in the many new codes of criminal law, territorial law, and public policy law. These and other legal changes in Germany are usually associated with the “reception of Roman law” and the “rise of legal humanism” –-movements which clearly had a landmark influence on sixteenth-century German law. Some of these legal changes were also related to changes born of the Lutheran Reformation, and to the work of Lutheran jurists and theologians.

It must also be emphasized, however, that the Lutheran Reformation did not entirely eclipse the medieval canon law tradition in sixteenth-century Germany. Several German cities and territories remained Catholic, preserved the traditional Roman faith and liturgy, and continued to administer the canon law in traditional Church courts. These German Catholic polities were ultimately protected in their faith and in their law by the Peace of Augsburg (1555), whose principle of cuius regio, eius religio established in each German principality the preferred religion of the prince, whether Catholic or Lutheran.

Even in many avowedly Lutheran polities of Germany, the break with the medieval legal tradition was not so radical as some of the reformers had envisioned. Despite the fiery anti-papal and anti-canonical rhetoric of their early leaders--symbolized most poignantly in Martin Luther's burning of the canon law and confessional books in 1520--Lutheran theologians and jurists eventually accepted and appropriated a good deal of the traditional canon law. This could only be expected. After all, the canon law had ruled German spiritual life and temporal life for many centuries before the Reformation, and late

medieval Germany was considerably more faithful to Rome than most other nations at the time. Indeed, the canon law, along with Roman law and customary law, was considered to be part of an integral common law (jus commune) of Germany. Most of the jurists and theologians who had joined the Reformation cause were trained in the canon law; several, in fact, held the doctor iuris canonici or doctor iuris utriusque. In the heady days of revolutionary defiance in the 1520s, it was easy for Protestant neophytes to be swept up in the radical cause of eradicating the canon law and establishing a new Evangelical order. When this revolutionary plan proved unworkable, however, theologians and jurists invariably returned to the canon law that they knew. Theologically offensive ecclesiastical structures and legal provisions, such as those directly rooted in notions of papal supremacy or spurned sacraments, were still critiqued and avoided. But a good deal of what remained was put to ready use in service of the new Protestant theology and law.

The Lutheran Reformation is thus best seen as a watershed in the flow of the Western legal tradition--a moment and movement that gathered several streams of German, Roman, and Roman Catholic legal ideas and institutions, remixed them and revised them in accordance with the new Lutheran norms and forms of the day, and then redirected them in the governance and service of the German people. The legal influence of Lutheran theology varied significantly over time, across jurisdictions, and among subject matters. Numerous other factors, besides Lutheran theology--economics, politics, psychology, sociology, and technology prominent among them--worked a formidable influence on the development of law. But the Lutheran theological reformation had a formidable legal influence. Such is the main story of this volume.

Ernst Troeltsch and the Historiography of the Lutheran Reformation

Some readers will recognize that the subtitle to this volume --"The Legal Teachings of the Lutheran Reformation"--is a variation on the classic title of Ernst Troeltsch, The Social Teachings of the Christian Churches (1911). Troeltsch was one of the great polymaths of Germany at the turn of the twentieth century, professionally trained as a theologian but also deeply learned in history, philosophy, ethics, law, and cultural science.[10] He wrote in the grand panoramic style of nineteenth-century German intellectuals, a style made famous by G.W.F. Hegel nearly a century before and by Max Weber in his own day.[11] Troeltsch's writings are a banquet for the mind, filled with all manner of delicious interpretations that have nurtured theologians, philosophers, ethicists, historians, and jurists to this day. Troeltsch had a special gift for seeing the big picture, for crafting the clever dialectic, for tracing ideas across vast expanses of cultural space and time. These gifts were on full display in his massive two-volume work on The Social

[10] See discussion and sources in Sarah Croakley, Christ without Absolutes: A Study of the Christology of Ernst Troeltsch (Oxford, 1988); Robert Morgan, "Introduction" to Robert Morgan and Michael Pye, eds., Ernst Troeltsch: Writings on Theology and Religion (Louisville, KY, 1977), 1-53.

[11] See Ernst Cassirer, The Problem of Knowledge: Philosophy, Science, and History Since Hegel, trans. William H. Woglom and Charles W. Hendel (New Haven, CT, 1950), 217-325; George J. Yamin, Jr., In the Absence of Fantasia: Troeltsch's Relation to Hegel (Gainesville, FL, 1993).

Teachings of the Christian Churches and several other works that amplified parts of this story. Even the casual student of Troeltsch will know of this remarkable tour of nearly two millennia of Christian theology and social ethics, organized in part around the dialectic of "church-type" versus "sect type" movements, of "world-avertive" versus "world-embracing" Christian theologies.[12]

When it came to describing the sixteenth-century Lutheran Reformation, however, Troeltsch's trademark gift of generalization tended to obscure if not ignore the sources, particularly the legal sources. Troeltsch recognized full well the power of the original Protestant critique of the Catholic tradition, and noted several changes to Catholic dogma, liturgy, and sacramental life that Luther and his followers introduced in Germany. He also took note of the Lutheran reformers' new emphasis on the Decalogue as a source and summary of natural law and political morality. And he allowed that, with regard to such "legal relations" as marriage and education, the Lutheran Reformation "has not been without influence"--albeit a rather mixed influence, since in Troeltsch's judgment the reforms largely served to consolidate the power of the paterfamilias over the family and the dominance of the Protestant magisters over German learning.[13]

The heart of Troeltsch's argument, however, was that in law the Lutheran Reformation "simply continued the medieval conditions."[14] Lutheranism, Troeltsch argued, was fundamentally a "church-type" movement with little interest in, or theological capacity to engage, matters of law, politics, and society. Given its founding dualism of Law and Gospel, Troeltsch argued, Lutheranism tended to make law and theology mutually irrelevant. Luther and his followers developed only a "crude, raw, and aphoristic" understanding of law that departed little from the commonplaces of scholastic and patristic jurisprudence.[15] In criminal law, the Lutheran Reformation simply "carried on the traditions of the old barbaric justice, and further, on its own part, based it on the thought of original sin and of civil authority as the representative of the retributive justice of God."[16] "In Civil Law, also, it is impossible to speak of any kind of innovations of principle," save perhaps the reformers' support for the "adoption of Roman law," which even so subtle a thinker as Philip Melanchthon simply equated with the Decalogue.[17] Rather than change the medieval law, Troeltsch concluded, the Lutheran reformers simply took over the medieval law unreflectingly, and used it to consolidate their power in Germany. "[D]espite its anti-Catholic doctrine of salvation," sixteenth-century Lutheranism was "a thoroughly ecclesiastical culture in the medieval sense of the term. It sought to regulate the state and society, education and science, economics and law, according to the supernatural

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[12] Ernst Troeltsch, The Social Teachings of the Christian Churches, trans. Olive Wyon, 2d impr. (London, 1949).
[13] Ernst Troeltsch, Protestantism and Progress: A Historical Study of the Relation of Protestantism to the Modern World, trans. W. Montgomery (New York, 1912), 93-99, 145-148.
[14] Ibid., 100-101
[15] Ernst Troeltsch, "Das Christliche Naturrecht—-Ueberblick," in id., Gesammelte Schriften (Tübingen, 1922-1925), 4:156-165, at 161-164; id., "Das stoisch-christliche Naturrecht und das moderne profane Naturrecht," in id. Gesammelte Schriften, 4:166-190, at 180-183. See also Troeltsch's first book, Vernunft und Offenbarung bei Johann Gerhard und Melanchthon (Berlin, 1891).
[16] Troeltsch, Protestantism and Progress, 97.
[17] Ibid., 98-100.

standards of revelation." Like medieval Catholics, sixteenth-century Lutherans "incorporated the concept of natural law into their general understanding by equating it with the law of God," whose interpretation they monopolized.[18]

This deprecation of sixteenth-century Lutheran reforms of law and theology was part and product of Troeltsch's broader ambition to show that the Lutheran Reformation was no watershed moment in the Western tradition, and certainly was not the font of modernity. It was the eighteenth-century Enlightenment, Troeltsch wrote repeatedly, that was "the beginning and foundation of the intrinsically modern period of European culture and history, in contrast to the hitherto regnant ecclesiastically and theologically determined culture."[19] The "dominant ideas" of the sixteenth-century Reformation grew "directly out of the continuation and impulse of the medieval idea" and were only "new solutions [to] medieval problems."[20]

On the one hand, Troeltsch's arguments were a tacit plea for Christian ecumenism—-an attempt to show the fundamental continuity between Catholic and Protestant thought, even at the greatest flashpoints of confessional difference in the sixteenth century. One happy consequence of such thinking is that an impressive school of historiography has emerged in the past century to reveal the many medieval Catholic antecedents to the Protestant Reformation—-in nominalism, conciliarism, humanism, monastic pietism, and other movements. Accordingly, a good deal of the sixteenth-century Protestant Reformation is now understood to be a veritable "harvest of medieval theology," in Heiko Oberman's famous phrase.[21] And these same medieval movements inspired their own sundry reforms in sixteenth-century Catholic circles--in the great canons and catechism of the Council of Trent (1545-1563), and in the reformist writings of Luther's Catholic contemporaries Thomas More, Erasmus of Rotterdam, Francisco de Vitoria, among others.[22]

On the other hand, Troeltsch's arguments were a direct rejoinder to the new Lutheran triumphalism of his day—particularly that of his teacher Albrecht Ritschl as well as the German philosopher and historian Wilhelm Dilthey whom Troeltsch had read

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[18] Quoted by Toshimasa Yasukata, Ernst Troeltsch: Systematic Theologian of Radical Historicality (Atlanta, 1986), 50-51. See elaboration in Troeltsch, Social Teachings, 2:523-539.

[19] Ernst Troeltsch, "Die Aufklärung," in Gesammelte Schriften, 4:338-339. See further id., "Luther, der Protestantismus und die Moderne Welt," in Gesammelte Schriften, 4:202-253, esp. 207ff.; id., Religion in History, James Luther Adams and Walter F. Bense trans. and ed. (Minneapolis, 1991), 3-4, 216-218, 226-227.

[20] Quoted by Yasukata, Ernst Troeltsch, 54.

[21] Heiko Oberman, The Harvest of Medieval Theology: Gabriel Biel and Late Medieval Nominalism (Cambridge, MA, 1963). See also id., Forerunners of the Reformation: The Shape of Medieval Thought (New York, 1966); id., The Dawn of the Reformation: Essays in Late Medieval and Early Reformation Thought (Edinburgh, 1986); Alister McGrath, The Intellectual Origins of the European Reformation (Oxford, 1987).

[22] See sources and discussion in John W. O'Malley, Trent and all That: Renaming Catholicism in the Early Modern Era (Cambridge, MA, 2000); Guido Kisch, Erasmus und die Jurisprudenz seiner Zeit: Studien zum humanistischen Rechtsdenken (Basel, 1960); Francisco de Vitoria, Political Writings, Anthony Pagden and Jeremy Lawrance, eds. (Cambridge and New York, 1991); Brian Tierney, The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625 (Atlanta, 1997), 207ff.

closely while a student. These and several other German intellectuals had set out to reform the pietistic, socially-avertive Lutheranism of later nineteenth-century Germany. Armed with a new critical edition of Luther's Werke, and a growing body of historical evidence of the "cultural significance" of the Lutheran Reformation, these German intellectuals pressed their Evangelical co-religionists to count Luther and his followers among the greatest prophets and founders of modernity, and to restore his influence in modern German culture.[23] Parallel movements were afoot in European Calvinist communities, yielding Abraham Kuyper's sterling Lectures on Calvinism (1898) that argued for the Calvinist origins of modern politics, science, and aesthetics. More famous still was Max Weber's Protestant Ethic and the Spirit of Capitalism (1904-1905), a robust apologia for the Calvinist origins of modern capitalism and democratic economy.

Troeltsch worked assiduously to undercut this Protestant triumphalism, especially with respect to German Lutheranism.[24] The social anemia, political acquiescence, and legal quietism of modern-day Lutheranism, he argued, was not a betrayal of the sixteenth-century Lutheran Reformation but a fulfillment of it. Luther and his followers may have reformed theology and the church, but in legal and political matters they did rather little but accept the status quo. The later tragedies of World War II, and the relative quietness of the Lutheran churches in the face of the same, seemed a grim vindication of Troeltsch's thesis. A whole industry of writing began to emerge in the mid-twentieth century drawing direct and easy lines from Luther to Hitler, from Reformation sermons against the Jews to the horrors of the Holocaust.[25]

Troeltsch's interpretation of the law and theology of the Lutheran Reformation anticipated if not shaped a good deal of more recent historiography. Church historians, legal historians, and social historians alike have echoed and elaborated various parts of his thesis.

Like Troeltsch, many church historians have tended to deprecate the legal contributions of the Lutheran Reformation. They have tended to focus their analysis on the writings of Luther, Melanchthon, and other magisterial reformers and found therein only a rudimentary legal understanding--haphazardly arranged and sometimes bombastically proclaimed. They have tended to neglect the legal elaboration and the political reification of Lutheran teachings by dozens of influential German jurists in the course of the sixteenth

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[23] Karl Holl, Die Kulturbedeutung der Reformation (1911), in id., Gesammelte Aufsätze zur Kirchengeschichte (Tübingen, 1948), 1:468. See analysis in Heinrich Bornkamm, Luther im Spiegel der deutschen Geistesgeschichte (Heidelberg, 1955); Steven Ozment, The Age of Reform, 1250-1550: An Intellectual and Social History of Late Medieval and Reformation Europe (New Haven, CT, 1980), 260ff.; id., Protestants: The Birth of a Revolution (New York, 1992), 1-7, 119ff.; Helmut Walser Smith, German Nationalism and Religious Conflict: Culture, Ideology, Politics, 1870-1914 (Princeton, 1995); James Stayer, Martin Luther, German Saviour: German Evangelical Theological Factions and the Interpretation of Luther, 1917-1933 (Montreal, 2000).

[24] See detailed sources and discussion in Brent W. Sockness, Against False Apologetics: Wilhelm Herrmann and Ernst Troeltsch in Conflict (Tübingen, 1998).

[25] See, e.g., William M. McGovern, From Luther to Hitler: The History of Fascist-Nazi Political Philosophy (Boston, 1941), and a summary and evaluation of more recent literature in James D. Tracy, ed., Luther and the Modern State in Germany (Kirksville, MO, 1986); Heiko Oberman, The Roots of Anti-Semitism in the Age of Renaissance and Reformation, trans. J.I. Porter (Philadelphia, 1984).

century. Furthermore, many church historians have tended to confine their attention to the Lutheran reforms of dogma, liturgy, and church polity, and have thus treated Lutheranism primarily as a spiritual, sometimes even a mystical, movement. "Luther's Church," writes Hajo Holborn, "was confined exclusively to the Word and to the spiritual comfort of the individual.... Luther [was] wary of attaching any significance to the details of a secular order."[26] Reinhold Niebuhr wrote similarly, and castigated Luther and his followers for their "quietist tendencies" and "defeatism." For Luther, "no obligation rests upon the Christian to change social structures so that they might conform more perfectly to the requirements of brotherhood."[27]

Like Troeltsch, many legal historians have tended to deprecate the sixteenth century in general, and Lutheran theology in particular. Most standard legal history texts today treat the sixteenth-century Reformation era as a mere transition period in the Western legal tradition, if they treat it at all.[28] "Sixteenth-century jurists," a leading jurist writes, "were merely the doorkeepers to the modern age" of Western law and legal thought. Sixteenth-century legislators and judges "performed a few of the experiments necessary to prepare for the great codification movements of the modern age" but they "were largely incapable of entering new legal ideas of their own." At best, sixteenth-century law was an open conduit by which the West moved from medieval canon law to modern civil law. At best, sixteenth-century legal theory provided a transition between the legal communitarianism of Gratian, Aquinas, and Ockham and the legal individualism of Grotius, Hobbes, and Locke. When legal historians do treat the sixteenth century, they tend to emphasize other themes--the rise of legal humanism, the reception of Roman law, the emergence of Machiavellian politics, and the like--leaving Lutheran theological contributions largely untouched.[29]

Even more than Troeltsch, some social historians today have dismissed the "Reformation" altogether as a historian's fiction and an historical failure. Martin Luther and other sixteenth-century figures certainly called for reforms of all sorts, recent interpretations allow. But they inspired no real reformation. Their ideas had little impact on the beliefs and behaviors of common people. Their policies perpetuated elitism and chauvinism more than they cultivated equality and liberty. Their reforms tended to obstruct nascent movements for democracy and market economy and to inspire new excesses in the patriarchies of family, church, and state. As the editors of the Handbook of European History 1400-1600 put it, "the Reformation" must be now be viewed as an ideological category of "nineteenth century Protestant historical belief," which served more

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[26] Hajo Holborn, A History of Modern Germany: The Reformation (New Haven, CT, 1959), 188, 190.
[27] Reinhold Niebuhr, The Nature and Destiny of Man (New York, 1964), 2:192-193, with further quotations and analysis in Carter Lindberg, Beyond Charity: Reformation Initiatives for the Poor (Minneapolis, 1993), 161ff.
[28] See critique of the legal literature in Harold J. Berman and John Witte, Jr., "The Transformation of Western Legal Philosophy in Lutheran Germany," Southern California Law Review 62 (1989): 1573-1660, at 1575-1579, 1650-1660; Harold J. Berman, Faith and Order: The Reconciliation of Law and Religion (Atlanta, 1993), 86-103.
[29] Herman Dooyeweerd, Encyclopaedie der Rechtswetenschap (Amsterdam, 1946), 1:93. See similarly Wieacker, 189ff.; Ernst Cassirer, The Myth of the Modern State, Charles W. Hendel, trans. (New Haven, CT, 1946), 116ff.

to defend the self-identity of modern mainline Protestants than to define a cardinal turning point in Western history. Recent historiography, the editors continue, has brought "changes of sensibility" that have now "robbed" the term "Reformation" of any utility and veracity. Particularly, "the rise of economic and social history tended to carve the boundary between modern and older Europe ever more deeply into the era between 1750 and 1815." Moreover, "the ebbing prestige of individualism and Christianity in European high culture undermined the [Reformation] concept's explanatory power."[30]

This volume invites historians, among many others, to look afresh at the Lutheran Reformation, now through the "binocular" of law and theology.[31] It invites church historians to look more closely at the legal dimensions of the Reformation, where a good deal of the new theology was cast in its most enduring forms. It invites legal historians to look more closely at the religious dimensions of the Reformation, where a good deal of the new law found its most enduring norms. And it invites social historians to take more seriously both the theology and the law of the Reformation, sources of ideas and institutions that were much more than simply the totems of the elite or the bludgeons of the powerful. The binocular of law and theology, I submit, brings into focus a considerably wider and fuller picture of the Lutheran Reformation than can be seen through the monocular of law or the monocular of theology alone--let alone through naked modern eyes focused primarily on sixteenth-century social particulars. When viewed through this binocular the Lutheran Reformation is hardly the ideological concept or idle category that some recent historiography suggests.

By running counter to traditional lines of historical analysis, this volume will invariably draw criticisms from those whose favorite arguments have been traversed or avoided. By rummaging anew through the desks of many sixteenth-century theologians and jurists, it will invariably draw fire from specialists who have organized these desks in a particular way. By adducing and combining afresh historical arguments and concepts, and showing their enduring influence on the Western legal tradition, this volume will invariably draw charges of both historicism and iconoclasm. This is the bane of any serious work of interdisciplinary scholarship.

Such methodological grumbling, however, is generally as transient as it is inevitable. After these inevitable grumbles of discontent have been raised, the question that will remain is whether specialists will look up from their favorite formulas and see in this volume a glimpse of a new way to understand law and the Reformation, law and theology, law and history, law and ideology. Will students and new readers gain from this volume fresh historical inspiration and instruction that is not afforded either by the traditional accountings of first one thing happening and then another, or by the new vogue of flattening all past texts and traditions into particularistic narratives? Will theologians and churchfolk, politicians and public policy analysts, sociologists and anthropologists see in this story theological and legal methods and lessons that have pertinence for our day?

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[30] Thomas A. Brady, et al., eds., Handbook of European History, 1400-1600 (Leiden/New York, 1994), xiii-xvii.

[31] The phrase is from Jaroslav Pelikan, Foreword to John Witte, Jr. and Frank S. Alexander, eds., The Weightier Matters of the Law: Essays on Law and Religion (Atlanta, 1988), xii.

Will Protestants and Catholics see in these early confluences and convergences of canon law and civil law useful sources and resources for a deeper Christian ecumenism and political activism?

This is the broader challenge of this book. I have tried to press the case as forcefully as the data allow. I have adduced ample evidence for my thesis from many sixteenth-century theological and legal sources that are not much known or used today. I have tried, in the conclusion, to draw out a few of the modern implications of this story while trying to avoid the sins of both chronological snobbery and "winner's history."[32]

[32] The phrase is from R.H. Helmholz, Canon Law and English Common Law (London, 1983), 15.