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. Mendicancy 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

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

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.

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 as a whole. "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

[2] *LW* 36:70. [3] *LW* 44:203–4.
[4] *WA TR* 3, No. 2809b; see also *WA TR* 6, Nos. 7029–30. [5] *WA TR* 3, Nos. 2837, 3027.
[6] *WA* 49:302. See many further such sentiments below pp. 119–20.

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, as well as various religious revolutionaries (*Schwärmer*).

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 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.

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 the 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 original 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 possible further radical theological reforms. From 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 assertions by 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." People 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 in 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 were 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

[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 below, pp. 70–2, 76–7, 89–94, 97–9, 107–13, 136–8, 151–2, 161–4, 217–32.

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 their 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 the same time. 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 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 linguist, 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 man and God. The Second Table laid out the cardinal principles of civil law and morality that governed the basic relationships among individuals. 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.

Secondly, 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.