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0521781329 - Law and Protestantism: The Legal Teachings of the Lutheran Reformation

John Witte

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LAW AND PROTESTANTISM

The Lutheran Reformation catalyzed immense and far-reaching change in both Church and state and in both religious and secular ideas. This book investigates the transformation of law and theology born of Lutheran teachings of the sixteenth century. Profound changes in legal theory, political organization, marriage, education, and social welfare were inscribed in the legal and confessional systems of that period and have had an enduring effect on the modern Protestant world and beyond.

John Witte, Jr. uses the “binocular” of law and theology to present a panoramic picture of the Lutheran Reformation as an integrated legal and theological movement that continues to influence modern institutions of public and private law, and modern ideas of liberty, equality, and dignity. His book should be essential reading for scholars and students of Church history, legal history, Reformation history, and in adjacent areas such as theology, ethics, law, anthropology, and history of ideas.

JOHN WITTE, JR. is the Jonas Robitscher Professor of Law, Director of the Law and Religion Program, and Director of the Center for the Interdisciplinary Study of Religion at Emory University. A specialist in legal history and religious liberty, he has published 100 articles and twelve books, including *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (1997) and *Religion and the American Constitutional Experiment* (2000).

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LAW AND PROTESTANTISM

The Legal Teachings of the Lutheran Reformation

JOHN WITTE, Jr.

Emory University

With a foreword by

MARTIN E. MARTY

University of Chicago



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To Harold J. Berman

Mentor, colleague, and friend

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Illustrations

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Foreword

Millions of people have only one eye, and still can see rather well. Some of them wear an eye-patch over the blind orb. Others with only one good eye in rare instances choose to work an effect by wearing a monocle to improve their vision and express style. For all the adjustments such improvisers make, it is hard to picture any of them – any of you, because you may be a reader of this book – preferring monocular to binocular vision.

If what I have just described is the case in the literal world of seeing, so it often is in the figurative or metaphorical world that John Witte inhabits. It is a world he would have readers share on the pages that follow. Borrowing the concept of “binocular vision” from historian of doctrine Jaroslav Pelikan, Witte asks not so much *what* are we to see but *through what lenses* should we look.

In the present case, his subject combines the two determinative subjects of “law” and “theology” in the case of sixteenth-century reformers within the Christian community in the lands that make up much of modern Germany. Too many historians, he notes, look through only the lens of law *or* the lens of theology when dealing with these conjoined topics. Fine, in some circumstances, but when a scientist looks through a microscope, only one eye gets put to work.

What happens, however, when a person wants to look at a panorama painted by figures who were in a situation where they could make few important legal moves without connecting them with theology? And *vice versa*: how should we regard the same persons, whether they were jurists or theologians, who were in circumstances where they were not in a position to make any theological moves without also seeing their legal implications?

Now Witte himself is painting a panorama. As a scholar he is equipped to include both law and theology on the vast scene he surveys in this volume. No, his scope is not vast in the global or cosmic sense. The

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German territories whose legal and theological records he has plumbed and brought to view with such vigor and accuracy were themselves quite small. They remain remote from most of our experience most of the time. Yet they loom large in respect to their effect on later European and, yes, world history.

We need perspective on the choice of topics such as these. So: people in Sri Lanka or Cape Town or Boise, let us agree, are not likely to wake up in the morning thinking about the reform of law and theology. If they are, it is hard to conceive of them applying this thought to the judicial system and the ecclesiastical framework of Germany half a millennium ago. Would the latter subject *ever* come up in the ordinary course of their lives? Not likely, at least not in any direct way, unless one or another of them were a graduate student in the history of law who had been assigned an apparently irrelevant and certainly uncongenial topic having to do with theology.

In these paragraphs we have been looking at the larger world through binoculars turned around the wrong way. Such reversing effectively miniaturizes the topics of this book. In that case we will find perspective on them ever harder to gain. Witte's Germany in the sixteenth century was small, chaotic. The place to which he invites readers to pay attention was not the modern German state, patented in 1870. It was not the ominous giant that was capable of being a party to the generating of two horrible "world wars" in the century just past. His Germany had not yet become the ambitious place, imperial in outlook, and culturally ready to show off its glories: think Goethe and Beethoven and Heisenberg and Barth.

Now, it did have *some* claim to grandeur back in the 1500s because its territories made up a significant part of the Holy Roman Empire. Yet this collection of petty jurisdictions also can be seen as an archipelago of fiefdoms, principalities, and duchies, ruled by dukes and princes and bishops who might at times form coalitions and at other times make war on each other. Why pay attention to them in our century when nations like China and India use the word "billion" when speaking of their populations, not "thousands" as they did in sixteenth-century Germany? And why turn from them to Europe when the policies of the modern titans can immediately affect the whole world, directly? Why not study Chinese law and Indian religious thought to get our bearings and directions in the West?

Further risking reduction of the topic to the microscopic, notice that Witte is not even talking about all that went on in those German

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territories so long ago. Law and theology; theology and law; legal reform and church reform; church edict and legal adjustment: these are his topics. Aware as he is of what social historians write about, he does not have the burden or pleasure here of examining the details of home life, street lighting and waste disposal, such as they were, or changes in weaponry. He is not even being the intellectual historian writing simply about Catholicism, which was stronger and more organized then than were Witte's Lutherans, and is at home today in so many parts of our world as it summons the loyalty of a thousand million souls.

Over against the Catholicism of that day were poised two emerging forces that called themselves "evangelical" or, thanks to a minor event in 1529, often came almost accidentally to be called "Protestant" and, by their enemies, "Lutheran." It is these movements that Witte subjects to binocular vision. (Even that term "Lutheran" did not encompass the whole evangelical reality of the time. In other writings past, and still more promised, the author has turned and will turn to other Protestant themes marked "Reformed" or "Calvinist.")

While Lutherans are at home in many places of the globe and, by some reckoning, they remain the largest Evangelical or Protestant communion, their political, social, and cultural influence is dwarfed by many other religious and secular forces. Quick, now: name a Lutheran president of the United States. Answer: there have been none. It would seem easy to pass Lutherans by and therefore to strand Professor Witte somewhere amid the pages of this superbly researched and elegantly written work.

Philosopher Alfred North Whitehead did not help Witte's cause when he spoke some decades ago of not just the Lutheran but also the whole Catholic, Anglican, Reformed, and Anabaptist ventures in reform as being nothing but a domestic quarrel of northwest European peoples. New styles of scientific thought were emerging concurrently, and the reformers hardly noticed. Even the Orthodox Christians of the East tended to ignore what looked to them to be squabbles though, I think Witte demonstrates, they turned out to be of epochal significance.

Whitehead also pointed out that in many respects the once-dominating voice of Protestantism had become muffled. Its doctrines were no longer defined. Its divisions were no longer the sundering ones. Think Muslim/Jewish, rich/poor, nonwhite/white, straight/gay, women/men, if you want to find the defining and dividing issues that matter now. Not "justification by grace through faith," the Lutheran issue. You won't find it ranked high in contemporary culture.

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Stop all this! John Witte is not the sort of scholar to make immodest claims, so he does not make too much of his themes by constantly stressing their relevance, their universal appeal, their urgency. But he *does* have an important story, and we do well to notice it from the beginning, though he waits until the closing pages to state the case for seeing some of the long-range and the wide-scope implications of his story.

It is not the purpose of writers of forewords to do the work of the authors whose pages they forward to readers, so I will not anticipate those modern implications that Witte draws out. But even the secular, Jewish, Roman Catholic, other-religious or other-Protestant citizens of the twenty-first century, if they bother to track back through history here, can come to see that some ideas about freedom and individuality, nursed in Lutheran Germany, are taken for granted in battles about freedom and the person today. Their origins deserve to be understood. Indeed, they demand it.

As for the potential universal character of Witte's story: Muslims, Hindus, and Buddhists alike have been on the receiving end and eventually have come into the zones of regular interaction with the Europeans who, after the times about which Witte writes, went into all the world with guns, products, missions, notions. How different these moves would have been had the Europeans made all their imperial and market moves of recent centuries as expressions of united Catholicism, reformed or not. How significant, we add, was the break-up of Christendom that started to become so evident in Martin Luther's day, long before the development of the Enlightenment in the West or before modern revolutions there and elsewhere completed the task of breaking up the world as it had been in 1500.

To speak in such sweeping terms does not do justice to the subtlety with which Witte traces themes and effects. The best case in what follows has to do with the reform of marriage laws by Luther, as well as by the theologians and jurists around him, and their immediate successors. To medieval Catholic eyes, what these leaders effected in respect to marriage looked like mere secularization. These Lutherans, however, *did* de-sacramentalize marriage and *did* make it a matter of civil law. So they *did* work to break the hold of hierarchical Catholicism on that most intimate and profound zone of life. How and why they did so are key elements in the Witte story; he is the master of this topic, and he handles it here masterfully.

Binocular vision, which in this case means using the two lenses of law and theology as Witte's main characters did, has not led him to isolate

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the German reformers and see them apart from the stirrings toward renewal of other Christians of the time. He makes clear that for him Luther is not a lonely heroic David who gets credit or blame for taking on the Goliath of imperial Catholicism. Yes, Witte uses a wide-angle lens on Luther, the professor of Old Testament, Wittenberg burgher, Bible translator, preacher, family man, robust raconteur uttering his “table talk,” and more. But to treat the subject fairly, Witte has to bring on stage a larger cast – jurists, moralists, political figures, and others, many largely unknown today to nonspecialists, but of critical importance to the sixteenth-century Lutheran Reformation.

It becomes clear that for Witte, and in reality, the Reformation was not a single, focused event. From some angles it looks like a ruckus that erupted among the junior faculty at a new, small, backwater university in Wittenberg. It was only one locale, pitifully small when compared with Oxford and Geneva and Paris and Bologna, where law and theology became subjects of reform and new resolution. From all other angles, however, it did have world-historical significance.

While it is now high time for me to stop standing in front of the curtain of the drama that is about to unfold on these pages, I cannot resist urging readers to look for nuances that Witte, with his binocular vision, is equipped to discern and which he does then report on to us. An example that will influence me, for instance, has to do with the way he notices that the Lutheran “order,” if it was hierarchical, was so not on a vertical but on a horizontal axis. The Lutherans did not do away with distinctions between ordained clergy and laity. Both belonged to “the priesthood of all believers.” Yet pastors were necessary for the administration of the sacraments and the preaching of the word in that world where “everybody’s job” would have been “nobody’s job” had there not been some such definition. But, unlike the situation in the Catholic world, the pastors and bishops were not “above” the lay people. All the orders, replacing ranks, appear side by side.

Brilliantly, Witte spells out what the particular vocations of these sets of believers meant and mean. To do this, he has to explain the always complicated and hard to describe “two-kingdoms theory” of Luther, something Witte does as well here as I have ever seen it done. “Luther’s two-kingdoms theory turned [the] traditional ontology onto its side. . . . 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. . . . Luther’s earthly kingdom was a flat regime, a horizontal realm of

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being. . . .” To the extent that this was his intention, and despite the fact that it was worked out only partially at times and frustrated or forgotten at other, often later times, this ontology and the practices based upon it have to be described as revolutionary reform.

Note also what those Evangelicals called Lutheran did *not* achieve, at least with any theological or ecclesiastical finesse. The Catholic bishops of the day would not ordain new “Lutheran” clergy, law and theology both being at stake in the situation. In any case, ordination by such bishops would have made Lutheran bishops and other pastors into “princes” or functionaries of the Holy Roman Empire. The Lutherans started ordaining clergy on their own with the prayers to the Holy Spirit and the laying on of hands by other pastors. Well and good, theologically. But remember those binoculars and keep in mind the lens of law: they had to appoint someone to run the show, to administer the Church in that late-feudal world. So, fatefully, they selected the secular princes, the “first members” of the Church. Picture in today’s United States having the governor of the state or the county commissioner – depending on how one conceives the governmental analogues to those German jurisdictions – serving to administer the Church. Not only the heirs of those Lutherans have mixed heritages on which to draw.

Heritages there are, however, and here John Witte opens the trunk in which their treasures have been stored. He brings light to and then from the dusty and dark archives of law and theology, and, never deserting his role as fair-minded, disinterested, but always interesting, historian, he engages the reader in a story whose outcomes are still developing, whose plot is still unfolding.

Martin E. Marty

Fairfax M. Cone Distinguished Service Professor Emeritus
The University of Chicago

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This volume is dedicated to my great mentor, friend, and colleague Professor Harold J. Berman. Nearly twenty years ago, when I was a fledgling law student, Hal Berman took me under his wing and patiently began teaching me to fly. For the past fifteen years, we have worked together as colleagues at Emory Law School and in the Law and Religion Program at Emory University, sharing a deep common interest in the weightier matters of the law. Whatever I have become as a scholar and a teacher owes much to his noble instruction and example. I dedicate this volume to him with unbounded admiration, appreciation, and affection.

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Standard English translations are marked *. Unless otherwise noted and stated, I have used these translations.

<i>AFR</i>	<i>Archiv für Reformationsgeschichte</i>
Brecht	Martin Brecht, <i>Martin Luther</i> , trans. James L. Schaaf, 3 vols. (Philadelphia/Minneapolis, 1985–1993)
Bucer, <i>DS</i>	Robert Stupperich, ed., <i>Martin Bucers Deutsche Schriften</i> , 7 vols. (Gütersloh, 1960)
Bucer, <i>RC</i>	Martin Bucer, <i>De Regno Christi</i> (1550), in <i>Martini Bucerii Opera Latina</i> (Paris, 1955), vol. 15, partly translated in Wilhelm Pauck, ed., <i>Melanchthon and Bucer</i> (Philadelphia, 1969), 174–394*
Coing	Helmut Coing, ed., <i>Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte</i> (Munich, 1973–77), vols. 1–2/2
<i>Comm. Sent.</i>	Thomas Aquinas, <i>Scriptum super Libras Sententiarum Petri Lombardierensis</i> , in <i>Opera Omnia Sancti Thomae Aquinatis Doctoris Angelici</i> (Rome, 1882–), vol. 7.2
<i>CR</i>	G. Bretschneider, ed., <i>Corpus Reformatorum</i> (Brunswick, 1864) (vols. 1–28 = <i>Melanchthons Werke</i>)
Köhler	K. Köhler, <i>Luther und die Juristen: Zur Frage nach dem gegenseitigen Verhältnis des Rechtes und der Sittlichkeit</i> (Gotha, 1873)
Kunkel	Wolfgang Kunkel, Hans Thieme, and Franz Beyerle, eds., <i>Quellen der neueren Privatrechtsgeschichte Deutschlands</i> (Weimar, 1936), vols. 1–2/2
<i>LC</i> (1521)	Philip Melanchthon, <i>Loci Communes Theologici</i> (1521), translated in Wilhelm Pauck, ed., <i>Melanchthon and Bucer</i> (Philadelphia, 1969), 18–152*

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- LC* (1555) Philip Melanchthon, *Melanchthon on Christian Doctrine: Loci Communes 1555*, trans. and ed. Clyde L. Manschreck (New York/Oxford, 1965)*
- LW* Jaroslav Pelikan and Helmut T. Lehmann, eds., *Luther's Works*, 55 vols. (Philadelphia, PA, 1955–68)*
- MW* Robert Stupperich, ed., *Melanchthons Werke in Auswahl*, 6 vols. (Gütersloh, 1951)
- Richter Amelius L. Richter, ed., *Die evangelischen Kirchenordnungen des sechszehnten Jahrhunderts*, repr., 2 vols. (Nieuwkoop, 1967)
- SCG* Aquinas, *Summa Contra Gentiles*, trans. V. J. Bourke (Notre Dame, IN, 1975)
- Sehling Emil Sehling, ed., *Die evangelischen Kirchenordnungen des 16. Jahrhunderts* (Leipzig, 1902–13), vols. 1–5, continued under the same title (Tübingen, 1955–), vols. 6–16
- ST* Thomas Aquinas, *The Summa Theologiae*, English trans. by English Dominican Fathers (London, 1912–36)
- Stintzing Roderich von Stintzing, *Geschichte der deutschen Rechtswissenschaft, Erste Abteilung* (Munich/Leipzig, 1880)
- Stobbe Otto von Stobbe, *Geschichte der deutschen Rechtsquellen*, repr., 2 vols. (Aalen, 1965)
- Stölzel Adolf Stölzel, *Die Entwicklung des gelehrten Richtertums in den deutschen Territorien*, 2 vols. (Berlin, 1901, 1910),
- TC* Triglott Concordia: *The Symbolic Books of the Ev. Lutheran Church German–Latin–English* (St. Louis, MO, 1921)
- WA* *D. Martin Luthers Werke: Kritische Gesamtausgabe*, repr., 78 vols. (Weimar, 1883–1987)
- WA Br* *D. Martin Luthers Werke: Briefwechsel*, 17 vols. (Weimar, 1930–1983)
- WA TR* *D. Martin Luthers Werke: Tischreden*, 6 vols. (Weimar, 1912–)
- Wieacker Franz Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd rev. edn. (Göttingen, 1967)
- Wolf Erik Wolf, *Grosse Rechtsdenker der deutschen Geistesgeschichte*, 4th edn. (Tübingen, 1963)
- ŽSS KA *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung*