German Political Philosophy

The metaphysics of law

Chris Thornhill

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1 The Reformation and the loss of law

Against natural law

The philosophical background of Luther's theology was shaped by a series of debates about the law, so that his religious ideas necessarily evolved, in part, within a set of legal references and discussions. The prevailing philosophical controversy in German universities in the latter part of the fifteenth century was the debate between the realists and the nominalists, in which realists, or the Thomists, represented the so-called *via antiqua,* and the nominalists, or Ockhamists, represented the *via moderna.* The increasingly influential nominalist view in these controversies was founded in the belief that God is essentially *will,* and that God's redeeming freedom in human history is an act of divine will, and is not tied to rational normative preconditions. The nominalists opposed the intellectualist claims of Thomism, they negated the Thomist presupposition that there exists an eternal metaphysical law in nature, or that the universe is an 'organic whole' in which all things are connected ultimately to the divine mind,[1] and they rejected the central Thomist assumption that the church and the state form an insoluble legal unity.[2] The *via moderna,* therefore, contained an attack on the ideas of divinity as an intellectual essence promoted by medieval scholasticism and an attack on the legal and institutional doctrines rising from medieval ius-naturalism, which presupposed that the laws of the world exist in continuity with God's will and God's reason, and that human action and human politics can be evaluated by their proximity to this will and this reason. Underlying the philosophical environment from which Luther emerged there was thus an increasing willingness to construe God's freedom in volitional terms, and to question whether God might be construed as a juridical presence in the world, accessible to human reason and manifest in clear prescriptions for individual moral and collective political order.

The influence of Ockhamist nominalism on Luther was perhaps rather vague and indirect.[3] However, in certain respects Luther's early writings contain an intensification of ideas associated with late medieval nominalism and the *via moderna.* Fundamental to Luther's first writings is the claim that there exists an opposition between faith and law, and that conformity

with law cannot bring salvation. Indeed, at the heart of these works is a rejection of the defining view of medieval Thomism: namely, that God's will is evident in the positive legal order of the world, and that human beings can use their rational powers to understand the foundations of this originary metaphysical order and shape their own wills in accordance with it. Instead, Luther saw God as removed and remote, as absolutely free, and so as evident only in faith, not demonstrable or manifest in any metaphysical scheme or any stable system of law. In this, he extended the voluntaristic conceptions of the *via moderna,* and he argued that God exercises his will with absolute freedom in the world, and inhabitants of the world, where they do not have faith, can only despair over their inability to appreciate and obey God's will and God's law. No element of worldly ordinance can, in consequence, be placed on a continuum with God's will, and there is no necessary or intellectual unity either between God's will and human reason, or between God's will and the laws used to govern human societies. No law, Luther indicated simply, can begin to form an adequate reflection of God; no action or works in conformity with law can lead to justification before God; and human reason cannot obtain laws that unite it, in metaphysical knowledge, with God's will.

Luther initially elaborated this opposition between faith and law in his very early interpretation of what was ultimately to become the one of the central texts of Reformation theology: St Paul's *Epistle to the Romans.*[4] Commenting on this Epistle, he explained that obedience to the law cannot lead to human salvation. In fact, obedience to the law leads to pride and 'self-glorification', and it obstructs true faith by promising salvation as the entitled reward for outward human activity.[5] Justification can only occur as a passive experience of grace, which God 'enacts by acting upon us', without any concern for our 'works and deserts'.[6] The path to salvation is through faith alone, not through works demonstrating compliance with law.

In this argument, Luther addressed one of the fundamental problems in the history of Christian doctrine: that is, the problematic relation between the Old Testament and the New Testament, and the relation of Mosaic law to faith in Jesus Christ. In his treatment of this, he followed Augustine's anti-Pelagian approach, and he insisted on the primacy of the New Testament and faith over the Old Testament and law, and he stated that only a direct reading of the New Testament, and the faith that this might inspire, can make salvation possible. This argument referred primarily to the salvation of souls: it claimed that no external displays of devotion or righteousness can lead to justification before God, and that the religious orders that confuse law and faith or place law before faith threaten the souls of their adherents. In addition, however, this argument also contained implications for wider legal and political concerns: it implied that true law is not expressed as natural or material ordinance, but that the true law is the *new law,* the invisible law of a community united in Christian faith alone, and only this law can bring salvation. Unlike purely antinomian or Gnostic theologians, Luther did not entirely reject the Old Testament, or the elements of Christian

natural law founded in the Decalogue. He claimed that the moral codes in the Old Testament might be accepted as long as they serve interests of public order and help to protect Christians from the evil deeds of the ungodly. Indeed, his teaching also intermittently expressed a minimal conception of natural law, and he was prepared to accept as natural those laws preserving outer conditions of stability and reflecting a general human interest in peace and security. He, therefore, saw the Old Testament as expressing a natural law of practical utility, which is 'written in the hearts of all men', and contains certain universally acceptable precepts.[7] Nonetheless, he viewed 'natural law' as, by definition, a limited law, and he saw the validity of such law as restricted to the human person in its natural condition, without relevance to the person as a bearer of faith. Moreover, he argued that natural law is the law of the Jews: he described the Decalogue as 'the common law [*Sachsenspiegel*] of the Jews'.[8] Such law is contaminated by worldly pride and false piety, and it is the law of those who 'boast about the law which they have received and brag that they are its adherents and followers.'[9] Above all, natural law is the law of those who cannot ascend to the *new law* of faith and whose legal compliance is limited to outward things, and obedience to this law does not elevate the person to the level of a true Christian.[10] Natural law, in short, cannot express an embracing continuity between divine and human law. It is essential to natural law that it applies to all people, Christians, Jews and heathens, and it cannot be viewed as a medium of grace, which is offered only to Christians.[11] Natural law applies to that realm of natural life where there is no faith.

Luther's early attack on natural law was specifically designed as an attack on Roman Catholicism and on the scholastic orthodoxy of Aquinas, and it immediately touched at the nervous centre of Roman Catholic orthodoxy.[12] Aquinas also argued that compliance with the law of the Old Testament cannot confer grace without faith. However, Thomism assumed a partial continuity between the law of the Old Testament and the faith of the New Testament; it argued that the natural law of the Old Testament anticipates and foreshadows the salvation eventually to be brought by Christ, and that even ceremonial laws bring humanity close to God. Moreover, Aquinas also saw the pope as a privileged interpreter of the eternal law, and he viewed the church as the primary custodian of the law.[13] For Aquinas, in short, God's grace possesses a juridical nature; he saw obedience to laws, sanctioned by the church, as a primary means of obtaining grace, and he saw the church as responsible for guiding people towards legal obedience and towards salvation. Luther, in contrast, argued that faith is corrupted by the law, that belief in natural law exaggerates the extent of human knowledge and allows people to assume salvation without true faith. The belief in natural law, therefore, persuades people that they can be saved without faith, and it dilutes the urgency with which each person seeks salvation through faith. A 'Christian person', Luther explained, 'has enough in faith, so that he does not need works to be pious', and whoever has faith is 'delivered from all

commandments and laws.'[14] The institutions of the Roman Catholic Church, he concluded, are founded on the false precondition that the administration of law facilitates salvation, and that God's will can be made legally apparent as a certain path to salvation, and, in offering indulgences and dispensations for sins, they assert their own legal order to the detriment of Christian souls. In his polemics on this matter, he demanded a complete segregation of faith and law, arguing that the church should have power only in the resolution of spiritual questions,[15] and that matters of secular law should be left to 'worldly judges'.[16] 'There is', he concluded, 'no power in the church', except the power of spiritual improvement,[17] and the claim that representatives of the church might possess any legal authority is a Pelagian heresy, which endangers the souls of the members of the church.[18]

The *Gemeinde* and the two kingdoms

Central to the practical implications of Luther's theology is the belief that the church only exists as a pneumatic community, or as a pure community of believers, not as a hierarchical, legally ordered or metaphysically *representative* institution. He saw the church as an invisible community, whose offices are restricted to teaching and biblical interpretation, whose members are united by faith alone, not by law, as *a universal priesthood.* All Christians, he explained, are 'the brothers of Christ' and all are 'consecrated as priests'.[19] In this respect, Luther took the charismatic communes of the early church as the model for a reorganization of ecclesiastical life, and he argued that the principle of universal priesthood meant that the parish or commune (*Gemeinde*) should be seen as the centre of all religious life and should replace the hierarchical order of the Roman Catholic Church. The episcopate and the ordained priests of the Roman church do not truly constitute a *Gemeinde,* he argued.[20] The bishops and the priests of the papacy, he explained, have corrupted the New Testament through the representative legal order that they have imposed upon the church. It is only where it divests itself of law that a church becomes a true *Gemeinde,* founded in faith and truth. In an authentic church, Luther concluded, members of the *Gemeinde* give laws in accordance with the scriptures alone, without reliance on natural laws or any laws external to the common unitary experiences of faith.[21]

In its original articulation, the concept of the *Gemeinde* was not focused solely on the church, and it envisaged an ideal of the self-organizing community, which implicitly expanded beyond religious life and administration. In fact, Luther's early anti-legal strictures reflected a wider attitude, which attacked the concentration of power in both ecclesiastical and secular jurisdiction. The conflation of law and faith in the church, he claimed, had created a realm of 'priestly tyrants', who distortedly interpreted Christianity as a doctrine of 'worldly authority'.[22] In secular life, then, the law served to bolster the standing of the outwardly 'powerful and the wise', whose claims to social dignity were based on illusions of virtue, obtained through law.[23]

In his earliest works, Luther questioned the right of 'worldly princes and rulers' to take common goods from their subjects; he opposed the emerging hierarchical government under Roman law; and he suggested that 'the law and morals of the land', not the newly received Roman law, should act as the basis for legal ruling. God had ordained, he concluded, that 'every land has its own manner and talents, and should be governed by its own simple laws'.[24] The early doctrine of the *Gemeinde* integrated in faith alone was thus first conceived as a radically egalitarian doctrine, which condemned the authority of law in both religious and worldly contexts, which denounced false piety and socially instituted displays of esteem and worth, and which sought to bind all people under shared laws. In this respect, therefore, Luther used his broad anti-legalism as a vehicle for criticizing secular law, and for demanding that all law should draw from a common source. In the *Gemeinde,* he stated, people are bound by internally held laws: 'each is the judge of the other, and in turn also subject to the other', and faith places all people on equal legal footing.[25] Moreover, the members of the *Gemeinde* are, in so far as they are guided by the scriptures, entitled to assume authority for themselves and to organize their communities as they see fit.[26]

Despite this, however, Luther's account of the *Gemeinde* remained highly equivocating in the political role that it imputed to the community united in faith. His idea of the *Gemeinde* was primarily concentrated on questions of religious organization, teaching and appointment, not on the formation of secular or worldly power. Indeed, despite the critical aspects of his earliest reflections on worldly law, in his later theoretical career he was unwilling to accept that the religious community could produce laws for worldly organization. The *Gemeinde,* he argued, has power and freedom only in religious matters, and it only obtains this power and freedom because of its objective inspiration by the New Testament. In all other matters, the *Gemeinde* is obedient to worldly laws. 'Christ speaks' in the *Gemeinde,* Luther stated. But in the world 'the authorities command what they want, and the subjects accept it.'[27] At the heart of his mature idea of the *Gemeinde* is the claim that the realm of the inspirited community, integrated under new laws, cannot determine the realm of natural or objective authority: indeed, it is constitutive of new law that it does not have objective or material force.

In this light, the conception of the law in the early Reformation appears as a complex and dialectical form. At one level, Luther identified the religiously inspired community, divested of the legal, hierarchical and metaphysically representative order of the Roman Catholic Church, as the locus of human freedom and integrity – as the congregation of the universal priesthood. He saw this as a community of equals, bound only by very rudimentary forms of external law and internally united by the invisibly experienced regime of faith. At the same time, however, he saw this community, to a large extent, as the community of faith alone, largely defined by the fact that it is not political. Central to the idea of the *Gemeinde,* therefore, is the belief that worldly power and spiritual power form two quite

distinct areas of human existence, or two separate kingdoms, that each of these kingdoms should acknowledge that it is limited by the other, and that neither of these realms can provide laws to organize the other. Worldly power, Luther concluded, should always be free to 'use its office without hindrance', and all attempts to impose 'spiritual law' on worldly authority or to distill maxims for government from religious teaching belong to the quasi-Pelagian legal ideas that characterize the Roman church.[28] To assume that the *Gemeinde* can provide laws for worldly governance presupposes that there is a natural legal unity binding God and the world and that those who have faith also necessarily have knowledge of law. For Luther, however, those who have faith are above the law, and their freedom is determined precisely by the fact that it is not captured in law.

On this basis, then, in the 1520s Luther argued that the freedom from tyrannical law offered by the *Gemeinde* is an inner freedom, or a freedom under the shared inner law of faith. Although his reflections on the *Gemeinde* at times extended into more critical pronouncements on worldly law, he did not consistently see freedom in the *Gemeinde* as a freedom to make laws, and the *Gemeinde* did not provide an expressly positive or natural basis for worldly laws. Indeed, it is specific to Luther's thinking that faith cannot legislate and that new laws cannot be applied to outer nature. Natural law, such as it exists, is defined precisely by the fact that it does not originate in faith or divine reason and that it only applies to the functional necessities of the worldly kingdom. Worldly power, therefore, has a necessary independence from faith and it obtains natural sanction as an order that maintains stability and authority in the world. Luther in fact concluded that 'worldly law and the sword' constitute an 'order in the world' that is specifically ordained by natural law,[29] and he claimed that 'authority, regiment and power' must remain 'as long the world continue to stand'.[30] The order and the authority of the world, however, are distinguished by the fact that they are only supported by very limited laws of nature and have no origin in faith or in the new laws of faith. As two distinct kingdoms, the state must take responsibility for maintaining 'external peace', and the church must help 'make people pious' and oversee spiritual well-being.[31] However, there is no natural link between these kingdoms, and natural law can only apply to the worldly kingdom.

In separating the two kingdoms, Luther's primary ambition was to liberate the church – the *Gemeinde* – from all legal control, to consolidate the church as a place of faith alone and to ensure that members of the church were not deflected from faith by law. This meant, first, that the church had to be protected from worldly rulers. The 'worldly regiment', he explained,

> has laws which stretch no further than over body and goods and the external things on earth. For God cannot and will not let anyone else but himself alone rule over the soul. Therefore, wherever worldly power is brazen enough to give laws to souls, it pulls God into its regiment and seduces and ruins the souls.[32]

Second, however, this argument was also intended to counteract the expansion of ecclesiastical influence beyond questions of faith, and so to protect the church from leaders, such as those in the Roman Catholic Church, who contaminate the church with political ambitions. Representatives of the Roman Catholic Church, Luther claimed, 'have become worldly princes, and rule with laws which are only applied to the body and to goods. [{.. .}] They are supposed to rule souls, internally, through God's word, but they rule externally.'[33] Such conflation of the two regiments, he argued, necessarily obstructs human salvation. Worldly power that assumes spiritual power fails to understand that 'Christians must be governed in faith', and that no worldly authority can rule in this way.[34]

A further motive for Luther's separation of the two kingdoms was simply that he considered worldly power immeasurably less important than religion. Worldly power, he explained, does not have power over souls, and therefore it 'can do no damage'. Worldly power is 'a small thing before God': it is far too small for people to become 'disobedient or disunited' because of it.[35] Religious power, in contrast, causes great damage when it exceeds its limits, where it conflates faith and law, or where it loses sight of its obligation to the human soul. For this reason, in fact, Luther indicated that those who are truly Christian need not concern themselves with matters relating to worldly authority, and they need not devote time properly devoted to the care of their souls to questions of worldly law. The 'worldly regiment', he concluded, is only necessary for those who do not have faith; it is only the unbelievers who 'belong beneath the law'. Those who have faith are obedient to the law if the law is good, because they too are good. And they are also obedient to the law if the law is bad, because they recognize that the law cannot either bring or deny them their salvation.[36] Law, therefore, is not finally necessary for those who are, out of free choice and faith, Christians. For Christians, the only virtue of law is that it might offer them protection from the evil actions of those who are not Christians. Otherwise, law is not of essential importance, and matters falling beneath the law's jurisdiction are relatively incidental.

In addition, however, Luther's idea of the two kingdoms also reflected a great anxiety about *theocracy.* Luther saw all theocratic outlooks as lapsing into the Jewish religious knowledge of the Old Testament and as falsely assuming that precepts for external obedience can bring salvation. Above all, in indicating that God's rule can be instituted on earth, theocracy, for Luther, arrogantly integrates God's freedom into worldly law and it removes the obligation of faith from the individual soul and so distracts the soul from the cause of its salvation. This anxiety was originally expressed as a condemnation of the assertion of worldly authority by the Roman Catholic Church, which Luther saw as a particularly crude manifestation of theocratic monarchy. At the same time, though, through the evolution of his thought he also became intent on differentiating his own stance from the more febrile millenarian movements that attached themselves to the Reformation,

and some of his harshest polemics were reserved for those who interpreted Reformation theology as a doctrine of religious self-governance or divinely legitimized insurrection. It is for this reason, primarily, that Luther suppressed the early natural-legal elements in his idea of the *Gemeinde,* that he refused to allow this concept to found a political doctrine, and that he concluded that the new laws of faith are invalidated where they are transformed into laws of government or worldly politics. Indeed, against the more radical millenarianism of the early Reformation, he argued that those united in faith must not use faith for political ends and that they must not refer to faith when opposing political regimes which they perceive as illegitimate. Faith cannot provide principles that authorize objective political order, and, conversely, it cannot provide principles that validate resistance to it. No 'rebellion is justified',[37] he simply concluded, and later he added: 'We cannot resist authority with violence, but only by confessing the truth.'[38]

Natural law, in sum, only exists for Luther as an extremely limited natural law, which justifies worldly order as order, and which entitles worldly order to use coercive force to uphold conditions of stability. No higher or transcendent element of natural law can be summoned to oppose this order: higher or transcendent law is the *new law* of faith in the New Testament, which cannot be politically applied or even made positively manifest. Therefore, whilst Luther dissolved the metaphysical order of scholastic natural law by identifying the *Gemeinde,* not the representative church and its legal apparatus, as the essential expression of human life, he refused to replace the legal metaphysics of Roman Catholicism with any alternative type of theocracy. Indeed, he placed himself firmly against all attempts to reinstate theocratic natural law, or to repair the fractured unity of law under Roman Catholicism. His theology thus left law as a matter of relative indifference, which cannot institute true freedom and in fact impedes the true freedom of faith and the soul.

The idea of the *Gemeinde,* consequently, describes the dialectical core of Luther's legal theology, and it also describes the dialectical core of the legal debates initiated by the Reformation. At one level, Luther actively promoted a positivization of the law; he saw both God and humanity as authentically free of invariably metaphysical law, he claimed that law is a matter of human freedom, whose authority is not authenticated by absolute essences or absolutely external principles of reason. Law, therefore, is a law of freedom: it is a *new law.* At the same time, however, he also expressly diminished the positive authority of the law; he announced that true law, the new law, is only in faith, that objective law has only limited application and, indeed, that the particular freedom offered by the Reformation is undermined by law. This evolved as the main problem in the legal theologies of the Reformation, and controversies on the law during and after the Reformation concentrated on the endeavour to resolve the antinomies arising from Luther's legal attitude and to explain how freedom from metaphysics

might also be constructed as a positive human freedom. For this reason, moreover, most of the contemporary debates in which Luther participated were also tied to debates about the law, as the theologians around him recognized the problems in his legal thought, and tentatively configured his teachings to include more reliable legal principles.

Radical theocracy and antinomianism

Luther's views on the two kingdoms marked a move away from the more critical legal implications of his very earliest works. Indeed, it has often been pointed out that the political aspects of Luther's theology underwent a striking transformation in the first half of the 1520s. During these years, Luther consciously dissociated himself from the more radical theologians of the early Reformation, and he hardened his thought into a set of more considered attitudes regarding law and political authority. This was caused, first, by the fact that the Evangelical movement became increasingly volatile whilst he was imprisoned in the Wartburg in 1521–22; this period witnessed feverish outbreaks of iconoclasm and violent reforms of church order in Wittenberg. Then, more pressingly, it was caused by the emergence of the radical Reformation, one strain of which was reflected in the revolutionary ius-naturalism of Thomas Müntzer, and which culminated in the Peasants War of 1524–25.

On the first issue, during the iconoclastic interlude in Wittenberg Luther was deeply concerned that his denial of representative authority to the church could be seen as a mandate for violent acts against ecclesiastical property, and he was alarmed at the idea that his teachings should seen to vindicate lawlessness and insurrection. For this reason, after his release from captivity he turned with particular vehemence on his lapsed disciple, Andreas Bodenstein von Carlstadt, who had played a leading role in the events of 1521–22. During this time, Carlstadt set out a distinctive interpretation of Luther's teachings, which intensified Luther's assault on the canon law, declared the scriptures as the sole basis of legitimate political authority,[39] and insisted that true faith entitled its adherents to act against the law where the law was demonstrably unjust.[40] Carlstadt, who was trained as a lawyer, differed from Luther in that he accentuated the possibility of a metaphysical convergence of the divine law and the human law.[41] He, therefore, rejected the doctrine of the two kingdoms, and he proposed a radical-theocratic theology which directly contradicted Luther's relative legal indifferentism. 'God rules us', Carlstadt claimed, and 'God's kingdom' demands that 'law and regiment' should be established for all things.[42] More emphatically still, he argued that the 'spirit of the law is the will of God', and that God's will must be made manifest in worldly law.[43]

In addition to this, Carlstadt's theology contained an intensely spiritualistic account of ecclesiastical power in which he insisted that the church is founded only in spiritual unity, not in any monopoly of ceremony, and

that the laws of the church originate in spirit alone. To a greater extent even than Luther, he saw the church as an invisibly integrated community, and he derided all material or institutional tokens of ecclesiastical authority. For this reason, Carlstadt's invectives focused on Roman Catholic teachings concerning the Eucharist, and he denied that the church could act as a custodian of Christ's real presence in the administration of the Eucharist. The bread and wine of the Eucharist, he claimed, do not contain the flesh and blood of Christ: they are nothing more than 'signs of God's promises',[44] or signs of God's 'word',[45] and it is only possible to partake 'spiritually' in these signs.[46] Elsewhere, he modified this interpretation of the Eucharist and argued that drinking the wine is an act of symbolic 'memory', so that those who drink 'recollect the Lord'.[47] Nonetheless, central to these reflections was the belief that inherited views of the Eucharist serve to consolidate institutional power in the Roman Catholic church and to stabilize the church as a legal administrator of grace. In fact, however, the Eucharist is a symbolic event, which is not tied to any one location, but which integrates all believers equally, independently and invisibly. For similar reasons, he also denounced the use of imagery in churches; images, he explains, 'have no origin in God', and, as they detract from the internally unifying process of spiritual recollection, they should be forcibly removed or thrown down.[48]

It is of the greatest importance for Luther's intellectual trajectory that he deplored Carlstadt's activities in Wittenberg and that he chose to refine his own political views in critical reference to Carlstadt's work.[49] In his debates with Carlstadt, he protested, first, against 'storming the images and breaking the churches'.[50] With still greater consternation, he noted that some of his early followers seemed to interpret his teaching as a rejection of all scriptural orthodoxy and as a purely spiritualist doctrine.[51] This, he warned, might lead to a dereliction of all 'divine order', and might appear to provide justification for insurrection. Indeed, Luther was especially threatened by Carlstadt's view of the Eucharist as a justification for an entirely spiritual or personal interpretation of the Bible, and he was deeply exercised by the sense that the spiritualist denial of Christ's real presence in the Eucharist might lead to the final abolition of the church as an institutional form.[52] In his discussion of the Eucharist, therefore, Luther opposed the fully spiritualistic or symbolist doctrines set out by his fellow Reformers, especially Carlstadt and Huldrych Zwingli, and he set out a doctrine of *consubstantiation* in the Eucharist, which contained a modified version of the Roman Catholic idea that Christ is really present in the bread and wine. Luther's doctrine stated that Christ is omnipresent and universal, thus inspiring a universal church. Yet he saw Christ's presence as especially concentrated in the Eucharist, and so as manifest in the institutional order of an established church, commanding orthodoxy in teaching and worship. This treatment of the Eucharist was shaped by a reluctance fully to accept the reality of the universal and invisible church, and it remained attached to

the traditional notion of the church as the custodian of mystery and grace and as the primary receptacle of divine presence.

In these respects, Luther's criticism of Carlstadt turned against the aspects of antinomian thought in Carlstadt's work, and he sought to qualify the idea that a religious community with no institutional order could assume accountability for doctrine and teaching. More fundamentally, however, Luther's opposition to Carlstadt was also affected by the suspicion that Carlstadt's theocratic vision exaggerated the significance of worldly law, that it was excessively influenced by the Old Testament, and that it falsely assumed that faith and law could be united in worldly order. Measures to be taken against the Catholic church, he explained, should be executed by 'worldly authority and the nobility', and the community united in faith should not assume any power of law.[53] During this critical period in the development of the Reformation, therefore, Luther showed himself, in his legal ideas, to be an increasingly conservative thinker, who was clearly unnerved by the prospect that the religious communities liberated from the old ecclesiastical order might assume far-reaching authority for themselves. In his opposition to the antinomian and the legal-theocratic aspects of Carlstadt's work, in fact, Luther's idea of freedom as freedom above law moved perceptibly towards a defence of worldly authority, and an assumption that inner freedom is best preserved under a strong outer state.

Luther's debates with Carlstadt also show certain similarities with his debates with Zwingli. Zwingli shared certain basic principles of political theology with Luther. Like Luther, he endorsed a doctrine of two kingdoms, which separated 'divine justice' from 'human justice' and assigned inferior status to human justice. Like Luther, he described human justice as 'poor' and 'weak' in contrast to divine justice.[54] He too argued that human salvation is only brought by the new law, represented in Christ in the New Testament, and it cannot be measured in legal terms or obtained through legal acts.[55] These arguments led Zwingli to conclude that religious power is based solely in 'the divine scripture', and those who officiate such power do not possess 'authority' in the worldly sense.[56] The church, he explained, is nothing more than the 'community of all pious Christians', and all legal-constitutional ideas of church authority corrupt its invisibly inspiriting character: the 'statutes' of ecclesiastical authority, most especially, are the cause of 'all disturbance' in the church.[57] Nonetheless, echoing Luther's doctrine of the two kingdoms, he also insisted that the sphere of human justice commands obedience as mandated by 'God's ordinance', although the 'poor justice' of this sphere can do little more than create rudimentary conditions of peace and order.[58]

Despite these shared preconditions, however, Zwingli was far closer to theocratic ideas than Luther. The divine word, he argued, must 'rule over all people', and it should, by implication, always limit and determine human justice. All laws, in short, should be 'formed in accordance with the divine will',[59] and the best mode of government is one which 'rules with God'.[60]

Zwingli's doctrine of the two kingdoms also differed perceptibly from Luther's thought in that he insisted on a more integral and metaphysically constitutive relation between the regiments, and he ascribed an important role to divine law as the originating foundation of human law. He stated, for example, that Christ 'forbade all wealth',[61] that Christians should not 'govern like princes',[62] and that worldly 'government and authority', where it is not exercised by 'tyrants', should hold to the word of Christ's teaching.[63] If the 'laws of princes' are against the divine will, he concluded, it is essential to be 'more obedient to God than to men', and resistance to worldly law is fully justified.[64] On these grounds, Zwingli also proposed a doctrine of natural law which is far stronger than the simple utilitarian ideas implied by Luther; he argued that all 'laws connecting us to fellow men' should be 'founded in the law of nature',[65] and that, crucially, the experience of faith provides insights into the laws of nature. Unlike Luther, therefore, he argued that natural law is not peculiar to Jewish or heathen cultures, it is not founded in the merely natural or positive element of human existence, and it in fact coexists with and gives expression to faith. Natural law originates in divine law, and human conduct according with natural law also accords with divine law. Natural law, therefore, can only be 'known through God', and knowledge of 'the law of nature comes solely from the holy spirit'.[66] Zwingli consequently asserted that worldly power should be exercised by 'believing and God-fearing' leaders, and authority should be placed in the hands of judges, who interpret all things 'after the word and ordinance of God'. Under such political conditions, laws can 'become like the divine will', and they possess something of the character of divine law and divine will, for the justice imparted by judges and magistrates is a shadow of true justice.[67]

On these foundations, Zwingli argued that the Bible provides a legal basis for the entire community, so that in a Christian community no one should ever be 'without law', or without legal protection. Law should only be administered by secular courts, not by church authorities, for the proper limits of the church would be exceeded if it assumed duties under civil law: it is the responsibility of the church to help ensure that 'fair courts of law' are established, not actually to preside over these courts.[68] However, Zwingli clearly indicated that the church should play a fully integrated role in the political community, and it should provide a foundation of legal principle on which the wider political community can evolve. He was thus far more emphatic than Luther in his claim that religion should form the substructure of all law, and he moved close to advocating a model of communal or local theocracy, which argued that the Gospel should be applied by secular powers and judges, and which saw the inspirited 'commune' (*Gemeinde*) as the bearer of responsibility for both political and religious decisions.[69]

Zwingli's doctrine of the Eucharist was also directly opposed to that set out by Luther. Whilst Luther's notion of consubstantiation still endorsed

aspects of the ceremonial structure of the Roman church, and still espoused a doctrine – albeit diluted – of the real presence, Zwingli, like Carlstadt, argued that the bread and wine of the Eucharist have a merely symbolic content, and simply enact a 'recollection' of Christ's death.[70] He saw the Eucharist as a symbol of Christian communion with Christ's spiritual nature, and he saw participation in this communion as extending beyond the custody of appointed representatives of the church. For this reason, he claimed that the assumption of Christ's 'corporeal' presence in the Eucharist devalues Christ's divine nature and falsely restricts Christ's spirit to one particular place. Like Carlstadt, in fact, he expressly associated the Catholic doctrine of transubstantiation with the corrupting political ambitions of the papacy; he saw the assumption of real presence in the Eucharist as creating a ceremonial order around the church that was designed to sustain the church as a worldly power, asserting a false monopoly over spiritual goods.[71] Indeed, it is generally notable that theologians who supported a spiritualist interpretation of the Eucharist – including Johannes Oecolampadius,[72] and, to a far greater degree, Caspar Schwenckfeld – usually opted for more communal theocratic ideas of law and politics, and they opposed the relative indifferentism of Luther's political theology.[73]

Luther's reluctance to embrace the politically constitutive aspects of the Evangelical movement can also be discerned in the transformation of his attitude towards princely authority through the 1520s. In his earliest writings, as discussed, Luther spoke out against the legal concentration of princely power through the period of imperial reform, and he especially criticized Roman law as an instrument of princely coercion and advocated a simplification of legal procedure. In this regard, he had certain similarities with the leaders of the peasants' uprisings of 1524–25, whose grievances also concentrated on the new legal processes in the post-feudal German territories, and on the erosion of traditions of oral or common law-finding.[74] The peasants protested fervently against the increasing use of Roman law, and they articulated their protests either as a demand for a return to the old common law, or for the establishment of a regime based in divine law.[75] As in the earlier outbursts of iconoclasm, however, in the Peasants War of 1524–25 Luther encountered what he perceived as a distortedly militant or theocratic interpretation of his teachings, culminating in a denial of obedience to princely authority, and after this time his attitude to princely authority changed markedly.

In his writings on princely power, Luther's great antipode (at least in recent historical representations of this era) was Thomas Müntzer, who had originally been influenced by Luther, but who soon transformed Evangelical doctrine into a theocratic programme of political resistance. Müntzer rejected Luther's doctrine of the two kingdoms and his separation of faith and law; he claimed that it is impossible 'to serve two lords, both of whom strive against each other', and he denied that worldly power could be judged by any law other than the pure law of the scriptures.[76] Christ, Müntzer concluded,

urges that the 'will of God and his work should be carried out on earth through observation of the law'. Indeed, compliance with divine law on earth is the most necessary sign of faith, and it is only possible to 'distinguish belief from unbelief' by observing outward compliance with the law.[77] This teaching on divine law was intended firstly to provide a justification for resistance against all who exercise power in ungodly manner.[78] However, it also provided the foundation for a communal theocracy that assumed that all people should participate in law-finding and implementing the divine will. The spirit of Christianity, Müntzer argued, can only be fulfilled if the 'whole commune has the power of the sword', and if 'the good old custom of the people' is used as the basis for legal finding and for interpreting 'God's law'.[79] Müntzer thus moved towards a radical-theocratic variant on natural-law ideas, which saw a direct relation between faith and law, and which viewed the peasant commune as the natural manifestation of God's will in law.

Luther's response to Müntzer's ideas was vehemently to condemn the insurrections of the peasants and to support the princes in the violent suppression of the peasant armies.[80] To support this, he denounced all people seeking to 'enact God's scriptures on earth', and he denied that the Bible could be employed to justify any act of political resistance. If the 'worldly regiment' is overthrown, he explained, this leads not to a political order founded in 'God's word' but rather to 'eternal destruction'.[81] It is only heathens, not Christians, he argued, who 'struggle against authority', for only heathens attach such importance to worldly rule. Christians, in contrast, fight only through the cross and through suffering. Their 'victory' lies not 'in governing or in power', but in 'vanquishment and powerlessness'.[82]

Through all these political controversies of the first years of the Reformation, it is evident that Luther's theology was most deeply troubled by the question of theocracy and by the relation between theocracy and natural law. At a most obvious level, like other Reformers he reacted against the quasi-theocratic claims of Roman Catholicism, which, like other Reformers, he reviled as a Pelagian monarchy, unable to maintain the care of souls. However, whilst other Reformers saw this reaction as an opportunity for instituting a different theocracy or a new natural law, Luther's teaching remained fixed on the separation of faith and law and on the disjuncture between absolute reason and worldly power. He consequently refused to replace the metaphysics of scholasticism with a new metaphysics of law, based in the *Gemeinde,* and he insistently stated that law merely pertains to matters of practical regulation under a worldly regime, guided only by limited ideas of utility. In each of the defining controversies of the earliest years of the Reformation, Luther's position turned on the same point. This was, namely, the belief that faith is not politically constitutive, that the new law of faith is a spiritual law, not a secular law, and that natural law is only a limited law, not a metaphysical law founded in faith. Müntzer specifically identified this point in his tirades against Luther; he denounced Luther's

purely scriptural, and anti-theocratic idea of faith, and he proposed instead a theology of 'testimony', in which scriptures give witness for worldly action and political upheaval.[83]

Antinomianism and the third use of the law

A more exposed flank in Luther's theology emerged in his debates with the antinomian theologians of the early Reformation, most especially with Johann Agricola. Whilst other Reformers saw the Reformation as providing an opportunity for genuine theocratic governance, Agricola saw the Reformation as leading to an entirely spiritual community, in which all law, but most especially the laws derived from the Old Testament, are abrogated and rendered invalid. Unlike other early Reformers, therefore, Agricola intensified the opposition between faith and law in Luther's own thought, and he denied categorically that any preaching of law can be based in the Christian faith or that any regiment can be supported by God's will.[84] The religion of law in the Old Testament, he argued, is a tyrannical religion, which induces a devastating alienation between humanity and God. Such law cannot 'make people just'; it is 'an office of death', which reduces people to despair and misery over their own inability to fulfil it. It is the law itself, not those who cannot fulfil it, in consequence, which must be 'damned and condemned.'[85] The faith revealed in the New Testament thus stands in full contradiction of the laws of the Old Testament: faith can have no relation to law, it marks the *end of the law,* and the faith disclosed in the New Testament cannot be manifested in any law, either in the law of the church or in the laws of the state.[86] Roman Catholicism, with its ceremonies and masses, is an eminently corrupt religion of law, whereas the Evangelical faith, based in the New Testament, is a religion of 'grace and truth', founded not in a God which issues commandments to humanity, but in a God offering reconciliation through faith and love.[87]

Antinomianism was an element of Evangelical doctrine that shadowed the entire early history of Lutheranism; this was no coincidence, for antinomian elements were surely ingrained in Luther's early works and Luther never unambiguously distinguished his own theology of law from antinomian attitudes. However, in his controversies with Agricola, he set out a nuanced theory of law, through which he placed himself delicately between antinomian views and views susceptible to theocratic interpretation. In these controversies, he maintained his earlier view that law is 'not necessary for justification'; indeed, he described the law as 'truly useless' in helping people obtain salvation. Not enough could be said, therefore, 'against the impotence of the law' and against 'the most pestilential faith in the law' which sees law as a means of ensuring justification.[88] However, he also argued, reinforcing a point in his earlier writings, that law remains necessary because it shows to people that they cannot be virtuous by their own means, and it at least makes people conscious of the need for faith and for grace.[89]

It is impossible 'to know sin without law', Luther concluded, and knowledge of sin is the first precondition of grace.[90] As a consequence, although law is not operative in securing justification, it is essential for creating despair and humility in the human soul, and so for allowing the soul to recognize that it cannot be justified without faith. It is only 'the pernicious' who espouse the fully antinomian claim that 'law should be removed from the church', or that legal obedience is irrelevant for faith.[91] Law cannot replace faith; to argue that law reflects faith, for Luther, is to argue theocratically and to threaten the soul. Nonetheless, law has the power that it stimulates a desperate openness for faith. Faith, therefore, cannot exist where there is no law to be fulfilled, and where there has been no despair over human inability to fulfil the law.[92]

Debates on the role of law in obtaining salvation persisted long after Luther's death, and they only approached a conclusion with the publication of the *Concordia* of 1580, which sought to unify the different strands of Evangelical faith by resolving major points of doctrinal doubt and dispute. Until that time, however, antinomianism remained a constant undercurrent in the Evangelical movement, and Luther's responses to Agricola did little to quell controversy on these questions.[93] In fact, Agricola remained at the centre of confessional disputes in the Evangelical camp, and his work and political ideas continued to act as a powerful irritant to more orthodox Lutherans.[94] It was partly as a consequence of their provocation by Agricola that many of the most influential theologians of the generation after Luther, particularly Matthias Flacius Illyricus and Nicolaus Gallus, dedicated themselves to clarifying Luther's teaching regarding the law.[95] As a result, whilst opposing all compromise with Roman Catholicism and with the Evangelical theologians supporting partial accommodation with the papacy and the empire, Flacius elaborated a distinctively Lutheran doctrine of the third use of the law (*tertius usus legis*). Central to this doctrine was the belief that the law has a pedagogic function in bringing people to salvation, and that those who receive grace are not punished and tormented by the law to the same extent as those who do not receive it.[96] This doctrine, clearly influenced by Melanchthon's earlier ideas, ultimately became a central tenet in the consolidation of Lutheran doctrine in the *Concordia*.[97] Through this doctrine, the later Evangelical theologians agreed on the principle that, although law can surely not bring salvation, those who are saved – or born anew – through faith will naturally behave in accordance with law, and so, by fulfilling the law, they will demonstrate in their own lives that they are saved or reborn.[98] This allowed the later Evangelical theologians to reconnect law and faith, and to show how faith and law are correlated in right action.[99] This, in turn, provided a foundation for a clarification of Evangelical legal ethics, and for a more systematic rebuttal of legal conceptions in the Roman Catholic Church.

Luther's debate with antinomianism, however, was motivated by the disconcerted suspicion that the early Evangelical movement had unwittingly

stimulated two distinct radical interpretations of his own doctrine, one of which construed the *Gemeinde* as a source of a new natural law, and one of which denied all law, and so entitled the community of faith to place itself above all legal statute. Indeed, if theocratism and antinomianism appeared to Luther as closely correlated (and equally misguided) responses to his own initial anti-legalism, these responses also marked the weaknesses and the limits of Lutheran accounts of law, and they formed plausible solutions to the problems to which Luther's expulsion of natural law gave rise. It was not until the idea of the *tertius usus legis* was elaborated that the Lutherans finally stabilized a new conception of natural law. In this idea, they argued that law does not fulfil the task of faith and that works under law do not bring salvation, or effect compliance between human acts and divine law. However, they also obtained means to demonstrate that compliance with law is still a necessary signifier of justification, and it indicates a factual unity between human actions and divine will.

Resistance, law and the Holy Roman Empire

As discussed, in the first period of political upheaval after his first rise to prominence in 1517, Luther distanced himself from possible radical and theocratic readings of his work. Central to this was the concept of the two kingdoms, through which he sought to sever the thread of natural law that traditionally attached questions of political order to matters of religious faith. However, a second stage in Luther's reflections on law commenced after 1526, by which time a sizeable group of princes and towns had decided to support the Reformation and had begun to form a proto-constitutional league, united in defiance both of papal power and of Karl V, the Holy Roman Emperor. At this point, Luther also began to ally himself more closely with the early Evangelical princes, and he even altered his teachings to suit the interests of the emerging anti-imperial faction.

Luther's attitude to the constitution of the Holy Roman Empire is not always easy to assess. After Luther's theological disputations with representatives of the papacy and the empire in 1518 and 1521, Karl V made clear his conviction that the Evangelical attack on the juridical ecclesiasticism of Roman Catholicism also entailed an attack on the constitution of the empire. In justifying the excommunication of Luther and the proscription of Lutheran teaching in 1521, he underlined that as Holy Roman Emperor he was obligated to protect the 'sacred ceremonies, laws, ordinances and holy customs' of the Roman Catholic Church,[100] and to maintain the laws of the one universal church through all dominions of the empire.[101] Even after this event, however, Luther was reluctant to question the legitimacy of the empire, at least in the estate-based constitutional form that it had obtained in the late Middle Ages. His attitude towards the consolidation of territorial power against the empire and the increasingly volatile challenges presented by the princely estates to the empire also remained highly circumspect.[102]

As late as 1523, for instance, he derided princes who felt entitled to 'command their subjects as they wish' and to govern like emperors in the German lands.[103] It is, therefore, important to remember that, in their attack on the church, it was not a strategic intention of the early reformers to undermine the constitution of the empire. It might, of course, be argued that their hostility to all conflation of ecclesiastical and worldly law necessarily involved a confrontation with the empire, as the empire derived its symbolic legitimacy through its (albeit factually highly precarious) connection with the Roman Catholic Church. At various points, moreover, the reformers clearly identified the fusion of church and empire effected by Emperor Constantine as one main cause of the impurity of the church, opening the church to heathen political influences.[104] Nonetheless, even at moments of most intense conflict with the empire, the early reformers remained committed to a universal church and they continued to support an imperial constitution.[105]

Despite this, however, Luther's view of the empire was discernibly modified by a number of events in the later 1520s. Following Luther's excommunication, the empire, challenged on other fronts by pressing military threats, began to adopt a more pragmatic approach to the growing religious dissent, and it even showed tolerance towards the freedoms claimed by Evangelical princes. In 1526, most notably, the Diet of Speyer ruled that each prince was entitled to exercise freedom of worship in accordance with his own judgement and conscience. The Evangelical princes viewed this as an important sanction for their own regional authority, and many began at this point to reorganize their churches and to integrate the Evangelical church into the jurisdictional order of their territories. In 1529, however, this strategy of relative tolerance was reversed, and the empire began to pursue a far more repressive policy towards the reformers and their adherents. The Diet of Speyer in 1529 consequently marked a crucial caesura in the relation between the reformers and the empire, and this was directly reflected in the theologies of law promulgated by the reformers. In 1529, the tolerant ruling of 1526 was rescinded, the prohibition of Lutheran teaching was reaffirmed, and 'Imperial fullness of power' was reasserted as the sole authority in legal decisions concerning ecclesiastical politics in the empire.[106] The Evangelical party responded to this by submitting the so-called 'Protestation of Speyer', requesting reconsideration of these decisions, and by intensifying their plans to form a league of Evangelical, or now properly *Protestant,* resistance to protect both the Evangelical cause and the material and territorial advantages which the princes had obtained because of it. These conflicts came to a head at the Diet of Augsburg in 1530, where the Evangelical theologians presented to the imperial executive the *Confessio Augustana,* the articles of faith forming the doctrinal basis of Lutheranism, only to see this refuted shortly afterwards. The aftermath of this diet saw the formation of the League of Schmalkalden, and the beginning of a period of sporadically acute confessional conflict, which had short interludes in 1532, 1548, 1552

and 1555, but which was not fully resolved until 1648. Against this background, Luther's increasing reliance on the protection of territorial princes necessarily meant that he became involved in discussions on validity of the imperial constitution, and that he was called upon to devise theological justification for political opposition to the Emperor and the empire. This, in turn, created the problem that, in order to satisfy the needs of his princely supporters, he was required to revise some of his earlier views on the separation of the two kingdoms and on the sacred duty of outward obedience.

Luther's reluctance to contribute to debates concerning political resistance is apparent in the caution that he exercised in writing on this subject.[107] He stressed repeatedly that his inclination was 'vehemently against rebellion', and that his teachings had always demonstrated his belief that 'one should suffer even the evil deeds of tyrants and not defend oneself'.[108] Moreover, where he did offer a defence of disobedience or resistance, he tried to articulate this in legal terms, so as not to compromise his broader religious ideas. On the concrete question of how far opposition to the empire might be legitimate, he observed simply that such matters should be referred 'to the lawyers', and could not be decided by principles of religious debate.[109] His qualified support for resistance was thus not – or not principally – driven by religious dictates, but, as far as possible, by analysis of legal and constitutional principles. Despite this, however, in his reflections on political obedience after the deterioration of relations between princes and empire, Luther proposed three express and distinct justifications of princely opposition to the empire. First, he argued that, whereas rebellion is never acceptable, there might under some circumstances be cases of legitimate protest or of 'acting against the law', which do not constitute rebellion and possess legal justification. 'A rebel', he explained, is not a person who opposes specific laws on specific grounds, but a person who 'will not suffer' any kind of 'authority and law'.[110] Whoever 'defends himself against the murderous and bloodthirsty papists should not be accused of rebellion', he thus concluded, but should be seen as acting in self-defence, and so as legally in the right.[111] Second, he argued that the decision of the Emperor to suppress free religious worship was itself in contravention of the imperial constitution. Such suppression was 'contrary to imperial and natural law' and to the 'oaths and duties' by which the Emperor is obligated.[112] Refusal to comply with imperial law on this point was consequently fully justified under worldly law, even under the terms of the constitution itself. Third, however, he also asserted that those who adhere to the Evangelical faith have sworn in their baptism 'to abide by Christ's Gospel', and this baptismal obligation must prevail over duties comprising only worldly obligations.[113] On this last point, therefore, Luther clearly invoked a religious justification for opposition to the Emperor. However, even here his argument was worded in a highly circumspect manner, and he indicated that religion authorizes resistance only because of the legal burden that it places

on the human being in its worldly actions, and he was careful not to propose a full doctrine of natural law to settle this question.

Despite his caution, however, Luther's willingness to set out a doctrine of religiously founded resistance provided a dynamic legal and constitutional touchstone for the subsequent course of the Reformation. The first constitutions of the Evangelical alliances in the early 1530s, for example, were supported by the conviction, sanctioned by Luther, that resistance to the Emperor was legitimate because such resistance was a defence of the true faith. Similarly, this evolution of Lutheranism into a doctrine of possible resistance also provided legal principles that expedited the spread of the lay Reformation. By 1530, for example, Lazarus Spengler, a leader of the lay Reformation in Nuremberg, was able to declare quite simply that those who 'disobey the edicts of authority which are in accord with divine truth' should be subject to legal punishment, but that those who oppose 'the laws and edicts of authority which are contrary and repugnant to the divine will' should be viewed as laudable and morally upstanding. Tellingly, Spengler also formulated these ideas on the basis of a doctrine of natural law and divine-natural law, which defined the Emperor himself as constitutionally 'subject to divine law'.[114]

In the early 1520s, in sum, Luther had refused to see the uprisings of the peasants against the princes as justified under divine law. In the later 1520s, however, he grudgingly accepted that the uprisings of the princes against the empire were valid under law, even under divine law. By 1530, consequently, the Reformation was beginning to revise its earliest legal stances, and even to enunciate cautious ideas of natural law to provide justification for new conceptions of legal validity, obligation and princely authority. In this, however, it is of the greatest importance that Luther's theoretical reorientation in this matter was grudgingly obtained, and his vacillations show that he opposed the deployment of his doctrine as a basis for legal formation. Moreover, it is also of the greatest significance that the Reformation articulated ideas of natural law, not as aspects of a consistent account of law's status and function, but as exceptional rights, providing a sporadic and precarious foundation for legal order. The first formative or constitutional premise for legal positivization in the early Reformation, therefore, was an exceptional principle, and the *right to reform* (the *ius reformandi*) was first enunciated as a right determined outside the normalcy of law, or as a right deriving from uttermost duress.

Philippism and the godly prince

In Evangelical controversies on the role of law, both in worldly and spiritual order, it was ultimately not Luther, but Melanchthon, who formulated the most systematic and cogent doctrines and who consequently did most to transform Evangelical teaching into a framework for secular legal analysis. Like Luther, Melanchthon first elaborated his ideas in a commentary on

Romans, and he too saw the sense of this epistle as residing in the intimation that 'God's justice' is revealed not through legal conformity in works, but only 'in faith'.[115] Law, therefore, is not able to bring salvation and should be obeyed only through 'force of reason'.[116] Even the 'works of the just, however good they are, do not help bring justice', and law 'can only make people pious in appearance, not in their hearts.'[117] Like Luther, therefore, Melanchthon saw law as obstructing faith, and he saw religious institutions based in law as jeopardizing the souls of Christians.

Melanchthon used this analysis of law to develop an anthropological account of human existence. He argued that human life exists on three levels: human life can exist in *sin,* it can exist beneath the *law,* or it can exist in *grace.* Each of these levels reflects a distinct point in human evolution: *Heathens* exist at the level of sin or nature, *Jews* exist at the level of the law, and *Christians* exist in the realm of faith or grace.[118] The true Christian, therefore, exists only in faith, not under law, and law distracts from faith.[119] For this reason, Melanchthon's attack on the use of law in the church was hardly less emphatic than that of Luther.[120] He rejected all claims that the church might act as a secular legislator,[121] and, like Luther, he saw the legal rituals of dispensation and absolution under the canons as signs of the contamination of the church by the spirit of Pelagianism.[122] The corruption of Roman Catholicism, he argued, was primarily caused by the fact that it defines the church as a 'supreme monarchy', or as the 'highest most powerful majesty in the entire world.'[123] Against this, Melanchthon aspired to a 'common Christian church', which, unlike any 'external polity', is not bound to 'this or that country, kingdom or estate', and he saw the 'mass of people' as the 'true church'.[124] Melanchthon also echoed aspects of Luther's doctrine of the two kingdoms, and he too tended to relativize the significance of the realm of worldly power. The 'preachers of the word', he explained, have direct authority and 'express commandment' from God, whereas the 'realm of the sword and of worldly power' exists without 'express commandment', and it clearly has a subsidiary status.[125] Nonetheless, like Luther again, he insisted on the importance of 'external discipline and morality', and he argued that 'worldly authority' is ordained by God in order to 'keep the peace' and maintain tranquillity in the world. All people, consequently, are 'subject to the sword' by God,[126] and it is categorically forbidden 'to set oneself violently against authority'.[127]

The greatest distinctions between Luther and Melanchthon, however, are evident in their ideas about law, both religious and worldly. As early as the early 1520s, Melanchthon, whilst accepting Lutheran ideas of spiritual justification, became preoccupied with the paradoxes in Evangelical legal ideas, and he set himself the task of resolving these. He ultimately identified a special role for the law in ensuring salvation; indeed, the main principles of this account were later adopted by Luther in his own controversies with the antinomians. Law, Melanchthon explained, has the function that it engenders humility in the soul, that it demonstrates to people that without God

they can never fulfil the law and can never be saved, and that it consequently creates a receptiveness for God in an attitude of self-loathing and acute despondency. 'Justification', he explained 'does not occur through the law, but where there is no law there is no transgression, and where there is no transgression there is no fear of the law.' This fear of the law then stimulates 'hatred for the law' and despair over the law; in so doing, it engenders a spiritual craving for freedom from the law, and freedom from the law can only be obtained through faith.[128] In a soteriological inversion of Roman Catholic doctrine, therefore, Melanchthon argued that the law does not 'remove sin'. In fact, the law acts to 'multiply' sin, and so also to multiply the cause of despair.[129] As it multiplies despair, however, law also enlarges the need for faith, for faith follows on the heels of despair. Knowledge of the law, in consequence, is 'vastly important' because it is only through the 'power of the law', which 'terrifies and frightens the conscience', that people can 'experience the Gospel' or feel faith in their hearts.[130] The law, in short, 'shows us the sickness', and the Gospel shows us 'the medicine'.[131]

Even in his early writings, therefore, Melanchthon attributed two distinct positive uses to the law. First, the law exists to maintain outward conditions of peace, discipline and order in the world. Second, it makes people conscious of their sins, so that they despair of themselves, they seek to escape the shackles of the law, and they become open for faith. In this, Melanchthon already gave greater weight to law than Luther was willing to do, and he clearly felt little of Luther's hostility towards legal reasoning in theology. In addition to this, however, the later Melanchthon also proposed an early account of the third use of the law (*tertius usus legis*), which stated that those who have faith fulfil the law because they feel no temptation to do otherwise, and they require law at most to remind them of the duties of faith. By the time the *Concordia* was drafted, this doctrine was taken for granted as a central, although perennially controversial, aspect of Evangelical teaching.[132] It was, however, Melanchthon, not Luther, who formulated this point most comprehensively. He argued that those who have true faith are above the law, and, because they are above the law, they also necessarily behave in accordance with law. Through their faith, in fact, the law is 'written' in their 'mortal hearts' and their inner faith is outwardly reflected in fulfilment of law.[133] Although surely not constitutive of redemption, therefore, Melanchthon saw the law as an important index of faith. We do not 'cancel out the law through faith', he concluded. On the contrary, 'we establish the law' and the law is always both a precondition and a sign of salvation in faith.[134]

As a corollary of these points, Melanchthon, especially after 1522, was also much more engaged than Luther in debate regarding the conditions of legal rule in the secular sphere, and he began to propose a fusion of Evangelical teaching and Aristotelian ius-naturalism. Unlike Luther he did not denounce 'jurists and legal experts' as corrupters of true faith.[135] Rather, he

argued that lawyers have a specifically religious function in helping create good laws, and all 'learned people' who serve the cause of worldly law clearly assist in the enforcement of God's will, and in the creation of a world which is transparent to God's will.[136] In fact, after the mid-1520s, Melanchthon set out an unqualified argument for political ius-naturalism, and his account of the first use of the law (the *usus politicus* or *civilis*) far exceeded Luther's understanding of law's functions.[137] He defined law as the 'voice of God',[138] he argued that the 'law of God' is 'inscribed in the minds of men, so that they obtain a rule from God which governs worldly laws',[139] and he explicitly defended a 'law of nature', which 'God has buried in each mind'.[140] Unlike the more fervently theocratic reformers, Melanchthon did not claim that natural law legitimizes common or communal rights in the political community, and his view of natural law was not tied to any early republican ideals. Instead, he saw natural law as a set of norms serving to stabilize human society, to impose regular constraints across society and to promote civil education in moral decency and convention. He viewed Roman law, most especially, as the legal order that is most appropriate for fulfilling such functions. The 'law of the Romans' is superior 'to the laws of all other peoples',[141] and, as a means of guaranteeing universal order, it draws its source directly 'from nature'.[142]

Melanchthon's notion that Christians are naturally law-abiding ultimately became the foundation for perhaps the most far-reaching claim of the Philippist Reformation: the claim, that is, that true Christians inevitably act in unity with the law, that Christian princes pass and abide by good laws, and that states governed by Christian princes have a specific legitimacy under divine-natural law and specifically contribute to the institution of divine law in the world. It is the 'calling of kings', Melanchthon stated, to 'set laws', to 'create peace, and to reinforce the civil regiment with laws and arms'.[143] This calling of kings, moreover, is not restricted to the outward protection of the peace, but also contains spiritual obligations. God makes the king 'a protector of the law',[144] and the 'policies and moral ordinances' that a king enforces demonstrate 'God's marvellous wisdom', and they make all subjects of the king compliant with God's law. The laws passed by a virtuous king therefore allow God to 'be correctly recognized in human society and community', and they enable the pursuit of 'eternal goods' in the worldly polity.[145] If Luther's work intended to dissolve the relationship between ius-naturalism and religion and to justify government on relatively minimal preconditions, consequently, Melanchthon's later writings reunited religion and natural law to form a specifically Evangelical strain of political ius-naturalism. Indeed, whilst Luther's work strongly opposed the normative universality of natural law, Melanchthon set out a compromise between universal-normative and more positive or voluntaristic accounts of the law. He argued on hand that the prince is accountable for passing laws, and that the decision of the prince gives authority to law. Yet, on the other hand, he asserted that the will of the Christian prince is also bound to God, and, as

it is bound by God's laws, it contains within it a universal legal order: the decisions of the prince thus stand in for God's decisions, and the prince himself is bound by the norms which these decisions incorporate.

In this respect, Melanchthon's thought assumed seminal importance in the evolution of post-Reformation Evangelical political thought, as it offered a clear practical justification for princely power without papal support, and it created a normative horizon in which princely power could be viewed as legitimately enacting or even replacing metaphysically construed legal ideas. If Luther's work had led to an exceptional view of positive law, therefore, Melanchthon endeavoured to resolve the political problems caused by Lutheranism and to allow the legal antinomies and the exceptionality of Lutheranism to be reconciled in the concept of the *confessional state:* that is, the worldly state governed by a godly and divinely authorized regent. Indeed, in its Philippist expression, the Reformation ultimately transformed natural law from a metaphysical doctrine, which originally weighed against the emergence of positive law and independent statehood, into a set of principles that facilitated the positivization of law and the formation of independent and positively self-justifying states. After Melanchthon, the Evangelical movement abandoned its earlier unreserved critique of theocracy; it allowed the prince to assume the legislative duties formerly allocated by the Roman Catholic Church and sanctioned under the semi-theocratic natural law of this church; and it allowed the princely will, at once bound by and distinct from God's will, to engender law and to define this law as absolutely valid. Indeed, if Luther's first justification of Evangelical law had resulted from an exceptional gesture, recognizing princely law as originating outside normalcy, Melanchthon's natural law converted early Evangelical exceptionalism into an endlessly fraught paradox of legal order, in which the princely will, acting outside inherited natural law, proclaimed itself, like the scholastic God, as both the author and the addressee of natural law, uniting reason and freedom in a set of positive legislative acts. In these early steps towards an Evangelical theocracy, therefore, Melanchthon allowed the discredited paradox of God's legal authorship momentarily to reappear in the state, not as a full theocracy, but as a state that owed its genesis to the abolition of theocracy, but whose laws were still sanctioned by the personally embodied will of God.

The idea of the prince as God's legal representative on earth became increasingly prominent through the early decades of the Reformation. Although Melanchthon first formulated this idea, it was Martin Bucer, the leading reformer in Strasburg and the major influence on the dissemination of Evangelical ideas in England, who gave fullest expression to the belief that the power of the prince should extend beyond the outward preservation of the peace, and so includes powers of divine representation. Bucer claimed that princely rule is 'ordained by God',[146] and that princes contribute to the establishment of 'true religion and to the establishment of God's realm'.[147] To a greater extent even than Melanchthon, therefore, he argued that there

is a necessary divine order in the worldly state, and this order is most effectively instituted when pious princes hold office.[148] The natural order of the state is concentrated in the will of the prince, and, as a source of absolute law, the prince possesses control over a specific territory, with full power to regulate preaching, religious instruction and organization of the church.[149]

These early Evangelical doctrines of natural law also stimulated the evolution of legal thought in other areas of legal inquiry. Johannes Oldendorp, for instance, pioneered an early line of Evangelical ius-naturalism, which paved the way both for a revival of private-law teaching in Germany and for a doctrine of public law underpinned by concepts of Evangelical natural law. Oldendorp argued that there exists an 'immutable' natural law, which is observable in all societies, and which forms a uniform basis for the principles of civil law.[150] The spirit of this natural law, he claimed, is most effectively expressed in Roman law, especially in the principle of equity in Roman law: in fact, he viewed 'natural law and equity' as 'one and the same thing',[151] and he argued that the principle of equity constitutes a normative framework in which all laws, both written and unwritten, can be applied and modified.[152] For this reason, Oldendorp also identified ways in which natural law might assist the jurisdictional interests of individual states, and he argued that natural law can act as a powerful foundation for the introduction of new laws and for positive acts of legislation. He stressed that new laws are always necessary, depending on the customs and needs of the republic. Where circumstances change, then, magistrates are entitled to use considerations of 'utility' to decide which new laws should be introduced, and new laws obtain justification through their convergence with principles of natural law.[153] Natural law, he concluded, has its great public value in the fact that it enables reliable and just laws to be introduced with relative facility, and it ensures that new laws are likely to enjoy a high degree of common consent. Indeed, Oldendorp even expanded this argument to demand that legal application throughout Germany should be consistently organized and that uniform and regulated courts should be instituted by imperial command.[154] As in the works of the more legally minded reformers, therefore, natural law acted here as an idea of the law which introduced an element of flexibility into law, and which provided for the consolidation of secular power around accountable judicial explanations of its own authority.

On these grounds, then, it can be concluded that, despite the original anti-legal position of the reformers, the Reformation eventually cleared the terrain for the emergence of positive accounts of legal order, both in state law and in civil law. However, it is also necessary to emphasize, first, that the reformist teachings on law that offered a constructive analysis of natural-legal validity directly contradicted the earliest ideas of Reformation teaching. Second, moreover, it is also important to see that the Evangelical accounts of natural law that reintroduced aspects of theocratic thought into political discourse used elements of theocracy to provide intensely paradoxical

accounts of political legitimacy. At the heart of Melanchthon's confessional state, most strikingly, is the abiding paradox that this state invoked metaphysical or universal laws to justify a process through which law was factually detached from metaphysical or universal preconditions, and in which law was gradually reconstructed as a positively constituted and interpretable set of facts and norms. Evangelical natural law was thus founded in the paradox that it allowed the state to *appear* metaphysically valid, yet it practically organized its functions on positive principles. Even in their most abiding normative consequences, therefore, the legal teachings of the Reformation retained an aspect of exceptionalism, and they inflated their quasi-theocratic ius-naturalism, in part, as recognition of their own origin in the end of theocracy and in the end of natural law.

The ecclesiastical constitution

The legal problems and paradoxes of the Reformation are also evident in the debates during the Reformation period concerning the constitutional order of the Evangelical church. As discussed, the constitutional form of the church began to assume concrete contours after the settlement of 1555. This settlement recognized the legal status of the Evangelical church under the Imperial Constitution, it transferred jurisdiction in spiritual matters to the princely estates in territories whose princes had abandoned the Roman church, and it created a legal basis for the eventual evolution of the famous principle of '*cuius regio eius religio*' – that is, that the prince can decide what his people ought to believe, and then impose religious uniformity in his territory. The year 1555, therefore, saw the beginnings of the territorial constitutional system (*Staatskirchenrecht*), in which the prince of an Evangelical state ultimately obtained, under *ius reformandi,* supreme responsibility for all ecclesiastical matters in that state.[155]

Before 1555, however, and especially before the promulgation of the *Confessio Augustana* in 1530, princely control of church was not established, and there was no accepted model of ecclesiastical jurisdiction. In his earlier works, Luther took a latitudinarian approach to questions of church order, arguing that legal and ceremonial questions should not be permitted to burden the Christian conscience or spirit.[156] However, owing to the often eccentric proliferation of religious teaching in the first years of the Reformation, the leading reformers soon decided that they needed consistent instruments of legal control over the church and over the doctrines preached in the church, and they began to design constitutional mechanisms or orders of visitation to oversee orthodoxy in teaching and in services in the church. However, these issues had a number of highly sensitive religious and constitutional implications for the reformers. They raised the question of how the Evangelical Church should relate to worldly power, of how law might be applied in this church, and of how precisely the Evangelical Church was institutionally distinct from the Roman Catholic Church.

In addition, then, the suggestion that princes might govern churches also touched on the constitutional nerve of the relation between princes and empire, and of the extent to which princes could legitimately act against the empire in ecclesiastical politics.

Melanchthon played a leading role in the debates on the institution of a church constitution, and the very earliest models of supervision for the church, for instance the *Order of Visitation* introduced in 1527–28, were largely the product of Melanchthon's ideas. In these documents he expressed the conviction that, although the laws regulating the church could not help bring justification before God, a 'human order of the church' was essential, and the authorities ordained by God in the world should help preserve this order.[157] He therefore concluded that the *external* order of the church necessarily falls under the legal responsibility of the prince, although the *internal* practices of religion are not subject to princely jurisdiction. Article 28 of Melanchthon's *Confessio Augustana* then clearly stated that the inner corpus of the church should be devoted only to teaching and preaching and is thus governed by God's word alone, but that 'worldly authorities' are 'authorized by God' to oversee maintenance of civil peace and 'outward order'.[158] A first ecclesiastical constitution was subsequently proposed in 1538: this was the work of a number of theologians, primarily of Justus Jonas, but also of Melanchthon.[159] This constitution, although never fully enforced, foresaw the establishment of territorial consistories to supervise all ecclesiastical matters and to assume the legislative competences previously accorded, in the Roman Catholic Church, to courts applying the canon law. These consistories drew their jurisdictive power directly from 'the immediate command of the territorial prince',[160] and they initiated a process of legal organization in which the prince ultimately assumed formal rights of *cura ecclesiastica* or final jurisdiction in the church. Indeed, in addition to this, Melanchthon also presided over a short-lived experiment with Evangelical episcopacy in the early 1540s. In his correspondence of this time, he stated that the optimal church order is one which incorporates a consistory and a bishop, both subject to the authority of a 'regional prince', who acts as 'Patronus' of the church.[161] He ultimately urged the appointment of Nicolaus von Amsdorff as Evangelical bishop of Naumburg, and he pressed the claim that episcopal order and princely control were mutually supportive.[162]

Under the influence of Melanchthon's concept of princely natural law, therefore, the Evangelical Church was rapidly integrated into the early territorial states. Luther himself, although not without equivocation, was also complicit in this transfer of power over the church from the papacy to the territorial princes. His willingness to countenance princely custody of the church was already evident in his claims in the 1520s that princes possessed rights of political resistance and independence in religious questions: these arguments implicitly meant that princes could present themselves as *defenders of faith.* Later, he followed Melanchthon in acceding to the recreation of an

episcopate in the Evangelical regions, and he endorsed Amsdorff's appointment in Naumburg. He justified this by saying that he had never had the ambition to 'tear down the monasteries'; his Reformation had intended, instead, to 'set an example for how the monasteries should be reformed and governed'.[163] He, therefore, approved the appointment of Evangelical bishops, provided that these had nothing to do with 'worldly goods or power', but were responsible solely for matters pertaining to spiritual order.[164] Despite this, however, Luther's enthusiasm for territorial organization of the church was never more than circumspect, and he saw this as an exceptional solution, pending a resolution more in keeping with Evangelical principles. In the early debates on the territorial constitution, for example, he commented acerbically on the increasing tendency towards territorial regulation of the church in the 1520s and 1530s. Whilst before the Reformation the pope had confused the office of the preacher with the worldly regiment, he argued, the Reformation had now imposed a consistorial constitution that confused the office of worldly power with the office of preaching. Under this constitution, he claimed, 'evil lawyers' tried to 'tell preachers what they are to preach.' He consequently attacked all those 'worldly lords want to run the spiritual regiment', and who wish to be 'transformed into popes and bishops'.[165] Indeed, even in agreeing to the reintroduction of episcopacy, Luther argued that 'worldly powers' could only act as 'bishops of necessity' (*Not Bischove*),[166] exceptionally required to protect the Evangelical Church from its Roman Catholic adversaries. He thus never fully abandoned his earlier scepticism towards the legal organization of the church, and his main intention remained to simplify the church as a place of faith. As in other respects considered above, therefore, in discussions concerning the legal administration of the Evangelical church, a set of legal forms emerged which often contradicted the initial visions of the first Reformers, which assimilated elements of legal order which they had initially reviled, and which expressly justified themselves as exceptional points of law. The evolution of Evangelical church law and church constitutions especially demonstrates how the Reformation struggled to absorb the legal crises that it stimulated and how it maintained itself only by rapidly generating responses to the collapse of legal order in both church and state.

In conclusion, therefore, it can be argued that the Lutheran Reformation responded to a deeply complex legal situation, and it bequeathed a no-less-complex legal legacy. At the very centre of Lutheranism was a rupture between reason and freedom: that is, between God's law and God's freedom, but also between metaphysical ideas of natural law and the human will. Indeed, both practically and theoretically the Reformation undermined the unitary foundation of the law: practically, it allowed newly powerful interests to take possession of the law, to bring division into the inherited legal order and to eliminate the last traces of religious justification from the law; theoretically, it defined all law as other than eternal law, and it restricted

the principles valorizing law to a narrow set of functional or utilitarian considerations, which could be positively invoked by many sites of authority. The defining legal implication of the Reformation, consequently, was that law is free, that law is exercised in positive form by positive wills, and that debate about the law must be conducted in positive terms. Indeed, as a corollary of this, the Reformation also contained the necessary implication that statehood in Germany must be a free statehood, and this statehood must explain its legitimacy as other than all metaphysically structured ideas of natural law. In instituting this metaphysical rupture in the law, however, Luther did not provide for a model of legal foundation, and he only allowed for law's value and for freedom under law in highly exceptionalist or contradictory terms. Generally, in fact, he denied that positive acts of human will can create fully valid laws. Valid law, he claimed, is neither human law nor natural law nor divine law: it is the *new law,* and this law exists only in the church and the *Gemeinde,* integrated under faith. Evangelical legal theorists after Luther, therefore, were confronted with a dual problem of positivization. They encountered law as divested of its metaphysical unity with reason and so as requiring positive validation. Yet this positive or this human law, as they encountered it, could not articulate itself as fully valid, because it remained shadowed by the inferiority of law to faith and by its devaluation in the first pronouncements of the Reformation. In the first stage of their theoretical formation, therefore, laws evolving from the Reformation existed on precarious ground, they were forced constantly to negotiate with their own paradoxicality, and most laws explained their positive authority either as exceptionally justified principles, through a parasitic borrowing of legal constructs from models of law which they opposed, or through paradoxical acts of self-validation. It was only in the longer wake of the Reformation that theorists began to reconstruct an integral relation between reason and will and law and power on Evangelical foundations, and to explain how human law could be valid, and how the freedom of statehood could be imagined, after metaphysics, without paradox.