The Protestant Revolution in Theology, Law, and Community

Introduction

The Protestant Reformation has been cited by scholars of European history as contributing to the rise of nationalism, individualism, capitalism, and secularism but not to the development of law, institutions, and legal science (23).1 Contrary to the current scholarship, Berman contended that these phenomena—nationalism, individualism, capitalism, and secularism—emerged after the decline of Protestant (and Roman Catholic) Christianity in the nineteenth and twentieth centuries. It was “national interests, individual responsibility and opportunity, a market economy, and public spirit” rather than the Protestant Reformation that contributed to the rise of these ideologies. Berman argued that a close and detailed examination of Luther’s role in Germany and Calvinist influences in England reveals a religion that was corporate in character, religious in nature, and communitarian in its politics.

The theory that the Protestant Reformation was primarily responsible for the materialization of these various ideologies stems from Max Weber’s The Protestant Ethic and the Spirit of Capitalism. Specifically, Weber cited that seventeenth-century English Calvinism possessed the spirit that later would emerge in bourgeois industrial capitalism. The paradox of the Calvinist acquiring wealth while denouncing such a desire as sinful was resolved in the doc-

1. Berman, Harold. Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition (Cambridge, MA: Harvard University Press, 2003). Unless otherwise identified, all subsequent citations in the article will be in reference to this work.
trine of predestination: God, for His own inscrutable reasons, selected only a few to salvation and condemned the rest to damnation. For Weber, the Calvinist was terrified at this state of uncertainty of whether he was one of the elect; therefore, he carried out his vocation, to which he believed God had called him, in the hope that God might grant him worldly success as a sign that he was one of the elect. It was this belief that motivated the Calvinist entrepreneur to acquire great wealth (24–25).

Besides the problem that it was eighteenth-century American deists and not seventeenth-century Puritans that embodied the spirit of capitalism, Berman pointed out that both Calvinism and Lutheranism were not individualist but communitarian religions in their belief of the unity and fellowship of a congregation that had a covenant with God. Luther made the distinction between the “private person” and the “public person” in his theology; and Calvin stressed the importance of community as one that has a solemn and sacred covenant with God who was a God not of individual conscience but of law which bound the community together. For both Luther and Calvin, law was essentially normative, so they integrated divine, natural, and positive law into the governance of their new Protestant communities (25–26).

My analysis of Berman’s argument is merely to supplement it with a closer examination of the problem of community formation for Luther, Calvin, and the Puritans. With the theological doctrine of justification by grace through faith alone, Protestants must discover some social principle to organize their communities. I contend these principles are found in the doctrines of predestination and the covenant with God. These theological beliefs, in turn, have an influence on the relationship between natural and positive law, which makes the latter still integrated with the former but not as tightly as in scholastic theology. Although the Protestant Revolution was able to forge a new community from their new theology, and thereby is not responsible for the emergence of individualism, secularism, and capitalism, it did ultimately pave the path toward nationalism with the destruction of a universal church, empire, and history, as started by Luther.
Luther’s Law and Conscience

The underlying significance of the Ninety-five Theses was not Luther’s attack on the practice of indulgences but his call for the abolition of ecclesiastical authority: the removal of the Roman Catholic Church’s legislative, judicial, and administrative power. According to Luther, the role of a third party to mediate between the believer and God was not needed, for the true church was not a lawmaking institution, but rather it was the invisible community of all believers with each person responding directly to the Bible and God. The Gregorian two swords theory—separate spiritual and secular powers that interacted with each other—was replaced with Luther’s two kingdoms theory: the heavenly kingdom was governed by the Gospel and concerned itself with matters of grace and faith, while the earthly kingdom was governed by law and was preoccupied with matters of sin and death. This revolutionary doctrine relegated the church to a purely spiritual community, in which social, political, and legal authority was replaced by the earthly kingdom (40–41).

This withdrawal of the church from its visible role in the world was justified by Luther’s reconceptualization of the church as a spiritual community of believers who were righteous according to God. Luther denied a person could merit salvation because of man’s total depravity: his fallen nature from original sin affected everything he did; therefore, the only salvation possible was God’s direct grace, which was bestowed on only those who had faith. Thus for Luther the church was a spiritual community of those justified by grace through faith alone. This account of human nature as totally depraved was in marked contrast to the Roman Catholic’s position that, in spite of original sin, human will and reason were capable of natural—but not supernatural—perfectibility and that through faith, good works, and receiving the sacraments, humans could receive some divine forgiveness (41).

Of course for Luther this account was full of folly, if not downright heretical: only God—neither a priest nor individual merit—could purge sins and bestow salvation to man full of original sin. But if justification by grace through faith alone were correct, what would be the role of the earthly kingdom with its laws and politics? Why should anyone participate in good works? Luther’s call for his
followers to participate in good works, the law, and politics rested on his doctrine of the hidden and present God: God was present but remained hidden in the earthly realm. Despite its embodiment of sin, the earthly realm nonetheless was ordained by God for humans to use their reason and will to understand and do as much good work as possible. Although individuals cannot merit salvation through good works, those with faith may be able to uncover a glimpse of the hidden God in their present works. Every individual consequently was called by God to do good works as part of the priesthood of all believers (42).

Because mediators were not necessary for salvation, every individual was a priest in the sense that everyone had a duty to minister to others in prayer, instruction, and charity. This priesthood of all believers was buttressed by the doctrine of universal calling. Unlike the Catholic conception of vocation for the “spiritually perfect” of priests, monks, and nuns, Lutherans believed that all people were called by God to be responsible in their faith and in service of others. Public officials were particularly pointed out by Luther for serving the community. For these people, especially the Christian prince, a distinction was required between their ethics as a “private person” and as a “public person”: the former was to love God and his enemy, while the latter was required to prevent injustice, even if at the price of violence. But being no nearer to God than his citizens, the prince should rule with his counselors, officers, and magistracy for the common good. In return for his rule, citizens were required to obey the prince. The biblical basis for the prince’s rule was the Fourth Commandment, “Honor thy father and thy mother”: citizens were required to show the same obedience to the prince as children to their parents. The prince, in turn, was called to be just in his governance of the state. Although the Christian prince may lapse into tyranny, civil disobedience was not permitted as it would be a violation of the divine law (42–44).

With respect to the law itself, Luther retreated from his initial position that faith alone would replace the law and instead offered his two kingdoms doctrine. Although permanently sinful, the earthly kingdom was one where God remained hidden within it and thereby allowed positive value to be assigned to political institutions
and laws. According to Berman, this reconceptualization of the law allowed an alliance between Lutheran theology and civil authority to create a new legal science. Protestant princes could justify their assumption of jurisdiction originally possessed by the Roman Catholic Church, such as marital and familial relations, moral offenses, education, and welfare services (63–64). However, “the abolition of Roman Catholic jurisdiction in Protestant principalities also left substantial gaps in German criminal law, civil law, and other related branches of the legal system as well as in legal philosophy and legal science” (67). In this new systemization of law, legal positivism replaced natural law to fill these gaps. Because humans were fundamentally fallen due to original sin, precise laws with coercive sanctions were required to deter misconduct: natural laws were too general to be of any use to guide human behavior. Lutheran theology therefore influenced the rise of legal positivism to justify the Protestant princes’ new jurisdictions (68).

Paradoxically, Lutherans also emphasized general legal principles as the beginning point of legal analysis, leading to the practice of applying rather than finding law. What Protestant theologians and jurists did was to apply Aquinas’s moral conception of conscience—“an aspect of practical reason through which general moral principles are applied to concrete circumstances”—to legal practice (92). For Aquinas, conscience was a moral instead of a legal concept, whereas the Protestants like Oldendorp transformed conscience from a moral category into a legal one. By transforming conscience into a legal concept, the Protestant jurist was able to decide which general legal principles to apply to particular cases. As Berman summarized, the Protestant jurist decided which principles to apply after “having exercised his civil reason to the maximum degree, must study the Bible, pray to God, and search his conscience” (92). Christian conscience therefore was the ultimate arbiter of both moral and legal decisions.

Luther had made reason the handmaiden of conscience, whereas Roman Catholics had made conscience subordinated to reason. For scholastics, reason was the faculty to apprehend principles of natural law and conscience was the faculty to apply those principles to concrete circumstances. For Luther, conscience was a superior faculty
to reason because it was the root of man’s relationship with God that included both his rational apprehension of natural and divine laws and their applications. Although his conscience was fallen due to original sin, thereby making his reason defective, man, once redeemed, will find his rational faculty enhanced by his renewed relationship to God. Conscience consequently was not only the application of natural and divine laws to particular cases but the source of the general principles of these laws. This was the crux of the paradox that permitted Lutheran jurists to start from general moral and legal principles as well as to write precise and written laws (75).2

The precise and written laws—what Luther called civil or political law—were to maintain order for a fallen human race that included not only lawbreakers but public officials who may lapse into tyranny. Precisely written laws were better guarantors of order and stability than the generalities found in natural law. With these specific laws sanctioned by coercive measures and governed by conscience, Lutheran jurisdiction became an important source of legal positivism where the law is the will of the state. Of course, Lutheran jurisdiction differed from legal positivism in that the law’s purpose was not merely to maintain order but it was also to make people conscious of their duty and service to God and their neighbors. Citing Saint Paul, Luther explained that the law was to make man seek God, as the Ten Commandments had made Christians aware of their own sinfulness and therefore incited them to seek forgiveness. Civil and political law consequently was not entirely positivist, for they had a theological function as well, which was due to their integration with divine and natural law (76).3

Natural law for Lutherans was rooted not in man’s reason but in biblical faith. Because man’s reason was defective as caused by original sin, he could not rely upon natural law as a guide for civil

2. Oldendorp elaborated on this principle of conscience to fill the gap between rule and application with respect to equity (91–92). It also should be noted that Luther did not believe man’s conscience guaranteed him salvation. As the source of general moral and legal principles and their application to particular cases, conscience remained only part of the earthly kingdom. It was not essential to the nature of God.

3. Besides the civil and theological use of law, Luther briefly mentioned a pedagogical use of law that guided the willing to virtue (81, 89–90).
and political law. Instead, the ruler must rely upon his faith, with its access to divine law, and subordinate his reason, with its access to natural law, to his conscience. The divine law was articulated in the Bible, and the natural law was summarized in the Ten Commandments (with later Lutheran jurists adding portions of the New Testament). These passages from the Bible thus became the source and summary of natural law, to which the prince’s conscience had access. Thus, natural law was superior to civil and political law but access to natural law was through conscience instead of through reason (79–80, 89–90).

It also should be remembered that the emphasis of the divine and natural laws’ supremacy over civil and political law did not equate into a doctrine of civil disobedience. Lutheran jurists stressed that the state was ordained by God and therefore commanded unconditional obedience of its subjects. Although Lutheran jurists disagreed about whether there were exceptions and what those exceptions were to a subject’s unconditional obedience, they did not advocate any form of active civil disobedience. In exchange for the subject’s obedience, Lutheran jurists called for Christian princes to make their laws to conform to divine law—a conformity that was accompanied by a new legal science that identified and systematized general legal principles in order for the state to consolidate its power and jurisdiction over urban, feudal, mercantile, and other types of laws. Eventually all law became understood in terms of its legislative character that resided in the prince’s will and conscience (93–94, 127–28).

**Germanic Civilization and Nationalism**

Although I agree with Berman that the underlying significance of the Ninety-five Theses was Luther’s call for the abolition of ecclesiastical authority and jurisdiction of the Roman Catholic Church, I will supplement his argument with an analysis of Luther’s *Address to the Christian Nobility of the German Nation*.4 In this treatise Luther offered a reform program of how to improve the Christian estate that no longer recognized the distinction between the laity

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and the clergy: to reform the practice, theology, and governance of the universal Christian church; to reform the German national church; to reform German social and economic policies. Undergirding this reform program was Luther’s nationalism that sought Germanic independence from Rome, for which his theology provided a usable outlet.

In reforming the practice, theology, and governance of the universal Christian church, Luther invoked his doctrine of the priesthood of all believers: “All Christians are truly of spiritual estate; and there is no other difference between them than of office alone . . . that is so because we have one baptism, one gospel, and one faith, and are all equally Christian (Eph. 4:5). For baptism, gospel, and faith make all spiritual and one Christian people.” There was no distinction of believers, especially between the clergy and public officials, for the “temporal power is baptized just as we are, and it has the same faith and gospel.” With respect to rulers, the prince was “ordained by God to punish evildoers and to protect the pious; hence, it should exert its office unhampered throughout the body of Christianity to whomsoever it may apply, be it pope, bishop, priest, monk, or nun.” For Luther, the ecclesiastical jurisdiction of church became subsumed by the state.

Since every person belonged to the priesthood of all believers, every person also was universally called. Not only princes were called by God to rule but also “the shoemaker, the smith, and the peasant” have their own “office and work of their craft and are all the same priests and bishops.” Furthermore, this universal calling did not make one profession superior to another: “Though we are all equal as priests, nobody must push forward and undertake to do (what we have all equal power to do) without our approval and election. For what is common, nobody must arrogate to himself without will and command of the community.” The theological basis for the doctrine of universal calling was the notion that the body of Christ consisted of a single unit: “Christ does not have two bodies, or two kinds of body, the one temporal, the other spiritual. There is one head; and it has one body.”

Thus in the first section of the Address, Luther elucidated two principles: the priesthood of all believers; and the universal calling
that made every office in Christian society of equal importance. The obvious conclusion from these two principles was the worthlessness of the clerical office of the Roman Catholic Church. But also implicit was the corollary of individual authority in interpreting the Bible, which potentially could lead to anarchy, as demonstrated by the Radical Reformation. Figures like Zwickau, who claimed that he had communicated directly with God and no longer needed the Bible because of God’s grace bestowed upon him, were a serious political and social threat to Christian society. However, Luther was so preoccupied with the faults in Roman Catholic education and practice that he had ignored this problem of anarchy in the Address.

In the second series of reforms, Luther wanted to create a German national church that was independent of Rome. To accomplish this feat, Luther proclaimed that states should prohibit clerical payments to Rome, prevent foreign appointments to German offices, confirm bishops by neighboring dioceses rather than from Rome, decide cases within the state instead of ecclesiastical courts, halt Rome’s seizure of property, reduce mendicant monasteries to 10 percent of their present number, put an end to papal authority over the emperor except for spiritual matters, and so on. Luther also catalogued specific religious practices that should be abolished in the German national church because of their corrupt nature. In articles thirteen to twenty-three, Luther abolished the practice of indulgences, pilgrimages to Rome, holidays (except Sunday), fasts, masses dedicated to the dead, and other such rituals and practices. He concluded this section with attacks on Aristotelian education, papal authority, and the Holy Roman Empire, the last article which deserves some attention.

According to Luther, Rome had been irrelevant to world politics, with France, Spain, Venice, and Turkey then playing a significant role. Furthermore, the historical and legal authority invested in the pope was fraudulent, for the title of the emperor originally belonged to Constantinople, so that the pope had no authority to transfer the title to the current emperor. As a result, the western empire of Christendom was a legal fiction based on an illegal transaction. In spite of this fraud, the existence of a western empire based on the Germanic nation was a historical fact, and the em-
pire’s authority should be based on this fact rather than anything that was associated with Rome; consequently, the Germans and not the pope should have control over the title of emperor as well as the land.

It is clear from the list of concerns that Luther cited that they have more to do with the protection of German civilization from Roman intervention and exploitation than ecclesiastical reform. If there were any doubt on this matter, article twenty-six focused solely on reforming social and economic policies: luxury food imports and sumptuary laws should be stopped; usury should be curtailed, if not outright banned; land should be cultivated more efficiently for the livelihood of the people; overconsumption of food and drink should be discouraged not only for moral reasons but for economic ones. From the Address it would seem that Luther was more concerned about social, economic, and political reform for the Germanic people than ecclesiastical reform.

**Protestant Faith, Works, and Love**

From the scholastic perspective, Luther’s doctrine of justification by grace through faith alone was problematic for two reasons: it attacked the doctrine of justification by grace through good works; and it attacked Aquinas’s doctrine of faith formed by love (\textit{fides caritate formata}). Luther was able to partially counter the first criticism with his doctrine of the universal calling; but he failed to address the second. In his \textit{Summa contra gentiles}, Aquinas defined the essence of faith as the friendship between God and man, a friendship which required an intellectual apprehension of the beatific vision, towards which man’s life, will, and reason were oriented (C.116). The relationship of friendship therefore was mutual in nature, with the presumption of God’s love for man as an act of grace through which man’s nature became “supernaturally” formed by God. Faith therefore was an experience of God’s grace that formed man’s orientation towards love. By lacking a necessary intellectual component, Luther’s attack of Aquinas’s formula of faith formed by love made Lutheran faith conceptually undistinguishable from sentimental feelings of pseudo-grace, whether liberal utilitarianism, messianic romanticism, or modern Gnosticism. Without a required intellec-
tual content, Luther’s faith raised the question about the nature of faith itself.

In his *On the Freedom of a Christian*, Luther tackled this very question, when he asked: “A Christian is a free lord over all things, and subject to no one. A Christian is the serf of all things, and subject to everyone.”

Luther examined this antinomy by organizing the treatise into two parts: the first explored the soul’s escape from the world through faith; the second probed into man’s subservience to temporal and bodily existence. The Christian was “a free lord over all things and subject to no one” when he had been offered and accepted God’s grace, after the experience of his failure to live according to the Ten Commandments and the Gospels. By having accepted God’s grace, the Christian united his soul with the words of his promise: “As the word is, so will become the soul through it.”

Faith has liberated the Christian from the consequences of an impossible assignment, i.e., living a life according to the Old and New Law, due to his fallen nature. What was holy and just of Christ now has become the property of the Christian’s soul, while what was evil and sinful of the Christian’s soul has now become unburdened onto Christ.

The second part of the treatise inspected how the Christian was also “the serf of all things, and subject to everyone.” For Luther this was true in the sense that God’s grace through faith did not redeem his fallen nature—such redemption existed for the Christian but only in the afterlife. If all this were true—that the Christian were justified by grace through faith alone and that his nature could not be redeemed in temporal reality—then Luther was confronted with the problem of moral indifferentism: why should anyone follow the Old and New Law if he had not received grace? Luther overcame this obstacle by reintroducing good works but not connecting them with God’s grace. According to Luther, regardless of whether one was justified by grace through faith alone, man must still “gov-


6. Although this exchange transpired between the Christian and Christ, it must be remembered that in Lutheran theology the Christian’s fallen nature was not redeemed once he had accepted God’s grace.
ern his body and have commerce with other people” out of a love for God, Who may save him. This love of God included following such biblical commandments as working the earth and serving his fellow neighbor. The Christian thus did not live a solitary existence but was “in Christ and with his neighbor” through faith and love: “Through faith he rises above himself to God; from God he then descends below himself through love; and thus remains forever in God and godly love.”

Luther’s division of man into his body and soul was not only a forecast of modern philosophy’s dichotomy of body and mind; but, more importantly, it abstracted the soul from the conditions of human existence. According to Luther, the soul could be redeemed but the body was forever condemned. There was no orientation for the human body in temporal and spatial existence for man to follow. What would be the purpose of good works, if the soul were abstracted from the body and the body were unredeemable? Whereas in Aquinas’s formula of faith formed by love, the Christian’s body became supernaturally formed by God, Luther’s theology did not offer any such possibilities. Thus, to overcome moral indifferentism, Luther had to reintroduce good works but at the price of theoretical consistency.

Luther’s doctrine of good works was best articulated in his Commentary on Galatians, where “if our faith is formed by love, then God would take into consideration our works.” The reintroduction of good works was not only to avoid moral indifferentism but to present a constructive principle of social order based on love. Through love, all works became good, which encompassed the sphere of all social relations because all righteousness’s works “become equal, and one is like the other; all distinctions between works fall away, whether they be great, small, short, long, few, or many. For the works are acceptable not only for their own sake, but because of the faith which alone is, works, and lives in each and

7. To his credit, Luther did not suggest that a transfiguration of reality could occur in human existence. Fundamentally fallen, human nature was not capable of any redemption in human existence.
every work without distinction.” Justified by grace through faith alone, the Christian’s efforts became transfigured into good works which supported Luther’s Christian state: all works were equally transfigured into God’s love. This was the doctrine of the universal calling—all human occupations from lowest to highest were equal after its members had accepted God’s grace through faith—and became the great driving force behind Protestant civilization, especially in its Calvinist variety, for the realization of God’s love.

Thus Berman was correct in pointing out that justification by grace through faith alone was the theological basis for Luther’s doctrine of universal calling; however, he did not explore how Luther reintroduced good works back into his theology, which, in turn, became the basis for the new Lutheran community. In fairness, this was not the aim of his book on law, institutions, and legal science, but Luther’s abandonment of theoretical consistency may have repercussions in these fields. For example, is it really true that only the justified by grace through faith alone do good works? What about evil works making an evil man? And what about the salvation and virtue of pagans and non-Protestant Christians? All these questions would seem to raise ethical (although not necessarily legal) questions for Luther, who either was silent or had dismissed them: “everyone can note and tell for himself when he does what is good or what is not good; for if he finds his heart confident that it pleases God, the work is good, even if it were so small a thing as picking up a straw. If confidence is absent, or if he doubts, the works is not good.” But the question is whether we should accept such a dismissal on faith?

Predestination as the Principle of Community
The transfiguration of the Christian’s efforts into good works created not only a community of invisible believers but also shaped the new Protestant state and law. In On Secular Authority, Luther reiterated his position on political authority from his Address by referencing Rom. 13:1ff.: “Every soul is subject to governmental authorities; for there is no authority except from God; the existing authorities are constituted by God. Hence, who resists authority, resists the ordinance of God; and those who resist will bring judgment
on themselves.” Originally, Paul’s letter was addressed to the Roman Christian community who were subjected to pagan authorities. Luther updated this passage by using Augustine’s ideas of the city of God and city of man, where the former was the community of invisible believers and the latter was the community of visible pagans. If the governmental authorities were Christians, then members of the city of God would need neither “temporal sword nor law”; but, if the governmental authorities were not Christian, or the Christians were a minority in society, then non-Christians would need to be restrained by the state. The nonviolent Christian otherwise would not survive. Both the Christian and non-Christian were restrained by governmental authority in order to protect and to secure their “body and property, and all external things on this earth.”

The next question that confronted Luther was how to distinguish between those who belonged to the city of God and those that were members of the city of man, given a theology of justification through grace by faith alone. For Augustine, the salvation of souls was knowable to God alone, with the church as the empirical representative (but not identical) with the city of God and the empire representative of the city of man. But in Luther’s time, it was not clear what corresponded empirically to the city of God. Luther himself understood this problem when he saw that “evil men under the Christian name would misuse evangelical freedom; they would indulge in their rascalities and say that they are Christian and not subject to law or sword—as even now quite a few are raving.” Luther tried to solve this problem by making the distinction between true Christians and others—“for the world and the mass are and will be non-Christians however much they are baptized and called Christians”—for which secular authority will provide restraint. In the event secular authority were to act against the true Christian, then the true Christian must resist according to his own conscience. This situation ultimately resulted in every person examining his own conscience to see whether he was a true Christian.

The political problem was fairly obvious: a society where individual conscience was without traditional or institutional restraint was no society at all. To escape this anarchy required the emergence of the secular state with its underlying rationale of legal posi-
tivism for its power. This was why the Christian did not need to engage in either politics or the law, since they achieved salvation through faith alone. But to prevent the Christian from being entirely socially isolated from the community, Luther must add that the Christian was required to submit to secular authority not out of salvation but out of utility and charity. Utility in the sense that discussion about Christ may endanger order and stability and put his fellow men at risk; charity in the sense that obeying secular authority was akin to assisting the poor, sick, and hungry: “he should serve those who have not yet risen as high as he has, and hence still need it.” But if the situation were to require it, the Christian would be permitted to assume secular authority, as Luther stated, “when you see that there is need for an executioner, constable, judge, lord, or prince, and you are fit for the function, you should offer yourself for it so that the necessary power would not be despised and weakened or perish.”

The price of community from a doctrine of justification of grace by faith alone was the secular state with its rationale of legal positivism tempered by Christian teaching as interpreted by Luther. However, the question of why one should accept Luther’s interpretation over Aquinas’s, Calvin’s, or Müntzer’s was passed over. For example, when Müntzer claimed that history had entered the Last Days, when the corruption of Christianity had reached its ultimate peak, and that it was time for the elect to rise up and separate themselves from both ecclesiastical and secular rulers, what was Luther’s answer to this differing interpretation of the Bible? His response was that such an interpretation was unjustified: “For the slave can be a Christian and have Christian liberty, in the same way that a prisoner or a sick man is a Christian, and yet not free. This Article [III of the 1525 peasants’ rebellion] would make all men equal, and turn the spiritual kingdom of Christ into a worldly, external kingdom; and this is impossible, for a worldly kingdom cannot stand unless there is in it an inequality of persons, so that some are free, some imprisoned, and some lords, some subjects, etc.”

thing” that could be corrected only by teaching and not violence, Luther had changed his position when those who disagreed with his interpretation took arms against him.

Given Luther’s theology, particularly his doctrine of justification by grace through faith alone, legal positivism—although tempered by Christian teaching—became a source of legitimacy for the secular state. As Berman had stated throughout his work, as the state appropriated functions originally reserved for the church, the spiritual law became secularized and secular law became spiritualized: natural law became accompanied by positivism in the creation of a new Protestant community (197, 369, 375). Luther was able to complete this conception of the new Protestant community with the reintroduction of good works and the ideas of Augustine’s cities of God and man. But as the 1525 peasant rebellion had demonstrated, the reintroduction of these two concepts was not enough to solidify, on theological grounds, the formation of a new Protestant community. A new doctrine would be required: predestination.

Berman correctly identified the corporate aspect of Calvinism that Weber had strangely neglected (10, 264, 341–43, 380). According to Weber, Calvinists’ dedication to self-discipline, austerity, and hard work created an “inner loneliness,” for which individuals compensated by proving to themselves and their communities that they were part of the elect in their entrepreneurial economic activities (342). For Berman, the theory was incorrect: Calvinism had a “communitarian ethic and spirit” that was supported by the legal institutions and the development in law, particularly in England with the development of the joint-stock enterprise that required not an individualist but a communitarian ethic (342). In the second half of his project, Berman meticulously demonstrated how Calvinism had influenced English law and legal science, which, in turn, affected the formation of English communities. Of this I have no disagreement except again to supplement Berman’s argument with an analysis of Calvinist theology, particularly the doctrine of predestination.

Calvin’s doctrine of predestination provided the theological substance to make Protestant communities socially effective. The doctrine itself was relatively clear—all men were fallen with original sin, from which God for His impenetrable reasons elected some
to salvation and condemned the rest to damnation—but its role in Calvin’s theology progressively became placed in the position of prominence as revisions to the *Institutes of the Christian Religion* continued throughout Calvin’s own life. Predestination became the social organizing principle of the new Protestant community: the fallen as well as the elect were to submit to Calvin’s discipline and sacraments because both groups sought the “second degree of election” with its “special call” that assured the elect of their status. As Calvin wrote:

> We are not commanded here to distinguish the reprobate from the elect, which is not our province but that of God alone; we are only required to be assured in our minds, that all those who by the mercy of God the Father, through the efficacious influence of the Holy Spirit, have attained to the participation of Christ, are separated as the peculiar possession and portion of God; and that being numbered among them, we are partakers of such grace . . . we must leave to God alone the knowledge of his Church, whose foundation is eternal election.11

The elect were to be content with their status but should not try to distinguish between the reprobate and themselves, for that was God’s province alone, while the reprobate, in spite of his record of sin, was unsure whether he would receive the call tomorrow. Predestination thus became the principle which organized the visible church of both the elect and the damned in a new community. The elect were not only called for salvation but also were to be the ecclesiastical foundation for the new, universal Christian church. In his commentary on the prayer, “That the Kingdom of God may come,” Calvin wrote for the elect that “it is our duty to

11. Ibid., 4.i.2–3.
descend to the impious, by whom his authority is resisted with the perseverance of obstinacy and the fury of despair,” for “it ought to be the object of our daily wishes, that God would collect churches for himself from all the countries, that he would enlarge their number, enrich them with gifts, and establish a legitimate order among them.” But when prayer was not sufficient, action was demanded of the elect to “overthrow all the enemies of the pure doctrine and religion,” while God “raises up some of his servants as public avengers, and arms them with his commission to punish unrighteous domination, and to deliver from their distressing calamities a people who have been unjustly oppressed.” But like Luther, Calvin only permitted passive resistance to unjust magistrates except for those prophets, presumably like himself, who were called by God.

Prophets, from time to time, had been called forth by God “in taking arms against kings” because they had the “authority from heaven, they punished an inferior power by a superior one, as it is lawful for kings to punish their inferior officers.” Besides prophets, another protection for the elect was estates that had the right to actively resist a tyrant’s rule: “I am so far from prohibiting [the estates] in the discharge of their duty to oppose the violence or cruelty of kings, that I affirm, that if they connive at kings in their oppression of their people, such forbearance involves the most nefarious perfidy, they know that they have been appointed protectors by the ordination of God.” And, finally, there was a confederation of Christian princes who protected the elect from foreign attack: “if any disturbance arise in their [allied princes’] territories, they will render each other mutual assistance, and will unite their forces together for the common resistance of the common enemies of mankind.” In short, Calvin’s theology provided an arsenal of weapons for the elect to protect themselves from heretics as well as to establish a new universal church.

12. Ibid., 3.xx.42.
15. Ibid., 4.xx.12.
The Elect in England

The Calvinist challenge to the English church and state became known as the Puritan Revolution, with Puritans defined as those members who sought to purify the Church of England’s rituals, practices, and governance. Included in this category were Presbyterians, who advocated local control of churches, and a variety of sects, such as Independents and Congregationalists, who rejected the external authority of a national church (210–11). The Puritan Revolution was prompted by an array of factors: the aristocracy resisting rising state administration over parliament; the Stuarts’ political blunders, especially in introducing new theological doctrines that were closely identified with Roman Catholicism and were severely opposed by Puritans; and concessions granted to Presbyterians and Independents in order to enlist the support of the middle class (215–17). The tyranny of Charles I ended in his beheading and the establishment of a new Christian commonwealth for England. The question thus confronting the victors was on what principle should this new realm be organized?

In a debate with William Goffe, Oliver Cromwell argued that man must wait for God to reveal Himself in his conscience; and if God did not, then he must act when he can no longer resist the pressures of circumstances and interpret such action as a sign from God. After an examination of conscience revealed no internal evidence—“I am one of those whose heart God hath drawn out to wait for some extraordinary dispensations”—Cromwell inspected the external evidence of the world and found contradictory facts.16 Some may interpret God sincerely wanted the destruction of the monarchy and aristocracy and a refusal to execute this decision would be against God’s will, while others, like Cromwell, were not convinced this was God’s will. As Cromwell stated, “Though God have a purpose to destroy them, and though I should find a desire to destroy them—though a Christian spirit can hardly find it for itself—yet God can do it without necessitating us to do a thing which is scandalous, or sin, or which would bring a dishonor to his name.”

The question of whether to behead Charles I crystallized the difficulties of organizing a new community on the principle of justification by grace through faith alone.

The conflict between the Rump, those who wished to maintain the regime, and the New Model Army, those who wished to secure the gains of the Revolution, became a public one, with the army emerging victorious by dissolving parliament on April 22, 1653. In his declaration of the dissolution of parliament, Cromwell concluded “that as we have been led by necessity and Providence to act as we have done, even beyond and above our own thoughts and desires, so we shall and do in that part of this great work which is behind, put ourselves wholly upon the Lord for a blessing . . . , and therefore do solemnly desire and expect that all men . . . should wait for such issue as He should bring forth.” Although he was compelled by God to dissolve parliament, Cromwell was not confident what to do next. This oscillation between indecisive waiting and decisive action was characteristic of Cromwell’s reign—from the toleration of religious dissent in England to the terrible massacres in Ireland—and was the fundamental reason for the bankruptcy of his legitimacy and the inability to find a successor rather than, as Berman claimed, the illegality of the Barebone and succeeding parliaments under Cromwell’s reign (219). The theology of justification by grace through faith alone not only made the sustainable social and political organization of the Commonwealth impossible but created incoherence in Cromwell’s own leadership decisions.

Although his rule was ineffective in both political and religious policies, Cromwell did make a lasting contribution to the eventual supremacy of the English parliament over the monarch and the toleration of religious dissent at the local level. Moreover, certain aspects of Cromwell’s theology did become part of English political and religious thought, with the most important being that England conceived of itself as an elect nation that was predestined for God’s greatness and glory (218–22). As Berman argued, these ideas of Cromwell would resurface in the Glorious Revolution’s own political and religious settlements as well as influence the development of law and legal science in England (225–30). Specifically, Berman cited six Puritan beliefs that had jurisprudential consequences:
1. The belief that “history is a revelation of divine providence, a spiritual story of the unfolding of God’s own purposes, and, more particularly, that God works in history, in part, through his elect nation, England, which is historically destined to reveal and incarnate God’s mission for mankind.”

2. The belief that “the reformation of the world is a religious commitment, commanded by God,” which prompted an ethic of “public spirit and civic virtue” among the English aristocracy.

3. The belief that “God is a God of law, who inspires his followers to translate his will into legal precepts and institutions.”

4. The belief of the covenant and its “corporate character of the local community of the faithful,” which later would influence the development and importance of common law and contract.

5. The belief that “hard work, austerity, frugality, reliability, discipline, and vocational commitment” were demanded by God.

6. The belief that man was fallen raised questions about the magistrate’s own judgment, thereby requiring a high threshold of evidence for conviction (264–65).

The great English legal scholars, such as Sir Matthew Hale, integrated the theology of Puritanism—and recent scientific discoveries—with their knowledge of the law. English law consequently had a historical, moral, and political character associated with it that made common law able to preserve its legal tradition, act for legal justice, and maintain legal order (269).

The two dominant legal philosophies of the sixteenth and seventeenth centuries were natural law, “which treats law essentially as
the embodiment in legal rules and concepts of principles derived from reason and conscience,” and positivism, “which treats law essentially as a body of rules laid down (‘posited’) and enforced by the supreme lawmaking authority, the sovereign” (251). Positivists were not concerned with the normative aspects of the law, while natural law theorists contended that morality was implicit in any law and therefore law should be interpreted, analyzed, and applied with this purpose in mind. As discussed earlier, both Roman Catholics and Lutherans subscribed to natural law in spite of their disagreement about the roles of, and relationship between reason and conscience. The Calvinist contribution to legal philosophy was the introduction of a third approach to law that reflected the Puritan belief of history as a spiritual story of the unfolding of God’s own purposes in His elect nation England. This historical philosophy of law was perhaps best articulated by the aforementioned Hale.

Hale’s legal philosophy integrated natural and positive law into his historical approach. Natural, divine, and positive law was binding upon the state, but natural and divine law was reduced in scope: what may have been appropriate for one nation may not be suitable for another people. This gap was to be filled by positive law, which must be understood in terms of its historical development. Whereas divine and natural law was universally binding, positive law was subject to the discretion of the lawgiver; however, this discretion should follow the historical development of positive law. Thus, there was a historical logic or consistency that could be uncovered in the history of positive law that provided a normative guide for lawgivers. Hale believed that the constitutional framework of England was consistent, although the particular contents of that constitution had changed and evolved over time. The role of the magistrate and scholar therefore was to discover this consistency in positive law and balance it against the change in the content of the law itself (253–57).

Hale singled out common law as possessing an internal, coherent logic consisting of the “reasoned experience of the lawyers and judges and legislators who have made it in the course of many centuries” (257). This reasoned experience was the reasonable faculty that all men possessed but applied to a variety of fields. For ex-
ample, the faculty of reason applied to medicine was different than the faculty of reason applied to music. Law was the most difficult subject for the faculty of reason, since it dealt “with the regulation and ordering of civil societies and with the measurement of right and wrong, when it comes to particulars” (258). It was impossible for any man to determine which law to apply to every particular case, yet certainty was required in matters of law to provide legitimacy, stability, and order in society. To remedy this situation, Hale invoked Coke’s “artificial reason”: “And upon all this that hath been said it appears that men are not born common lawyers, neither can the bare exercise of the faculty of reason give a man a sufficient knowledge of it, but it must be gained by the habituating and accustoming and exercising that faculty by reading, study, and observation to give a man a complete knowledge thereof” (259). Besides the belief of God as a God of law and the virtues of hard work, Hale directly appealed to the historical experience of England as the basis to know what law to apply to which case. Artificial reason for Hale consequently was “the combination of the reason inherent in the law itself and the reasoning of experienced students and learned practitioners of the law” (260). The law’s essence therefore was its history.

It was true that the sovereign possessed numerous powers, but these powers were inherited, which consequently limited the nature and extent of his power. For example, the king has to take a solemn oath at his coronation to observe the constitutional or fundamental law of the land; and the law itself contained an invalidating power (potestas irritans) when the king were to act contrary to the law. Attacking the positivism in Hobbes’s hypothetical Leviathan, Hale cited that the English historical experience and legal framework was the best criteria for the truth or falsehood of a regime: “the best measures of truth or falsehood are not imaginary notions or reasons at large, but the laws and customs of this kingdom which have determined reason at large and bound it up within the bounds of such laws and usages” (262). Furthermore, the experience of natural and positive law supported that history was the best guide for the faculty of reason rather than Hobbes’s hypothetical mental exercises. Simply put, history, as revealed in
God’s law, became the theological and legal basis of the Calvinist community in England.

Berman’s argument about the communitarian character of Calvinism as rooted in its theology and practiced in its law corrects Weber’s Protestant “work ethic” thesis. In their belief in predestination and desire to reform the world through law, along with their belief in the history of the elect nation, Puritans were able to form a community out of their conscience and introduce a new approach to law through the lens of history. However, the cost was the abandonment not only of a universal community, whether secular or spiritual, but also a universal history from which legal scholars could draw. If God were to reveal Himself only to His elect nation in history, the possibility of a universal history could not exist. Such theological beliefs can easily be translated not only in adopting precedent and analogy as methods to analyze law but also by contributing to feelings of nationalism. As Luther sought the independence of Germanic civilization from Rome, so did the Puritans seek autonomy from the Church of England and other outside influences. From the perspective of international politics, the cost of the Protestant Revolution in law was the breakup of the universal empires of church and state for fragmentary nations in constant rivalry with one another in war, commerce, and empire.

**Conclusion**

In his Conclusion Berman urges his reader to consider the historical approach to law, whose origins resided in the Roman Catholic and Protestant Revolutions. Although Roman Catholics and Protestants differed in their theological beliefs, both camps were preoccupied with the basic question about “the nature of the divine law and of natural law and their relationship to the positive law of the state” (374). Because of the value placed on conscience and a de-emphasis on reason, Lutherans were more receptive to a positive law than their Roman Catholic counterparts. Likewise, Calvinists’ theological beliefs of an elect nation that made a covenant with God in the flow of history influenced their approach to law as a matter of experienced history with its own internal logic and coherence. For Protestants, the law was the device to form, forge, and govern
themselves into a new community. Underlying this new conception of law were new theological beliefs, of which the most important one was predestination that justified uniting both the elect and reprobate together in a new society.

Berman’s inclusion of the Roman Catholic and Protestant Revolutions is a much-needed correction to the traditional understanding of law as medieval and modern. Furthermore, Berman’s approach to the study of law—to demonstrate how theological beliefs, along with political, social, and economics factors, influence the development of western law—is a refutation of both the Marxist and Weberian approach by placing law and religion as the base of historical change:

It differs especially from Marxism in viewing the princes and high magistracy, the secular Obrigkeit, as the class that drew power away from the Roman Catholic clergy in the sixteenth century, and the landed gentry, not the capitalist bourgeoisie, as the class that drew power away from king and court and nobility in the seventeenth. It differs from Weberian theory in deriving fundamental change in political power in the sixteenth and seventeenth centuries from fundamental change in the belief systems and changes in law, rather than deriving fundamental changes in the belief system and changes in law from fundamental changes in political power (380).

As demonstrated with the abundance of evidence presented, beliefs, law, and legal institutions matter as much, if not more, than political, social, and economic factors to explain historical change.

Berman finished his book with an appeal to recover the historical approach to law that included the components of conscience and reason as well as an integration of positive and natural law, as was accomplished in the Protestant Revolution. The recommendation is made because such an approach would not only transcend the futile and continuous debate between positivist and natural law theorists but also infuse a new vitality and energy into our present study of law to address the new problems that confront us today. In a sense, Berman seemed to be calling for another revolution in to-
day’s study of law: “a fundamental change, a rapid change, a violent change, a lasting change, in the political and social systems of a society, involving a fundamental change in the people themselves—in their attitudes, in their character, in their belief systems” (3).

In his Introduction, Berman reviewed the six great revolutions—Papal, Lutheran, Calvinist, American, French, and Soviet—but later lamented the current state of American legal scholarship, when he wrote, “[a]s of the beginning of the twenty-first century, there seemed to be no objective basis for systematizing American law as a whole; that is, there seemed to be no generally shared belief inborn elements of knowledge constituting fundamental principles from which all legal institutions can be rationally derived” (130; 4–21). Likewise, among American legal scholars, “there seemed to be . . . no generally shared belief in, or at least no analysis of, the capacity of the individual conscience to reach just results in actual cases on the basis of reasoned compassion” (130). Thus, a study of the past revolutions in law and belief could provide us a guide and remedy for our current impasse in the study of law; but such a study must include a thorough analysis of our present beliefs, particularly theological and religious ones, that predominant our society today in order for us to escape our current confusion.

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