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Protestantism, Law and Legal Thought

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Abstract

This Article analyzes the distinct legal contributions of the Lutheran, Calvinist, Anglican, and Anabaptist traditions from the sixteenth century to the twentieth. All four Protestant movements triggered massive shifts of jurisdiction from the church to the state, and engineered striking legal reforms of marriage and family, education and schooling, charity and social welfare. Calvinist reformers made important contributions to theories and laws of democratic revolution, constitutional order, and rule of law. Anglican reformers developed important traditions of Parliamentary sovereignty and freedom of speech. Later Anabaptist and Evangelical reformers pressed hard for religious freedom, separation of church and state, the abolition of slavery, and the moral reform of public life.

Keywords: Protestantism; Lutheranism; Calvinism; Anglicanism; Western law; Legal Theory; Legislative Power; Judicial Power; Religious Freedom; Separation of Church and State; Slavery and Abolition

Introduction

Most Western nations today are dedicated to the rule of law and have constitutions that define the powers and provinces of political authorities and the rights and duties of their political subjects. Most nations make formal distinctions among the executive, legislative and judicial powers of government and functions of law. Most distinguish among bodies of public law, private law and criminal law, each with its own forms and norms of due process of law. Most have sophisticated rules and procedures to facilitate the legal transactions and interactions of their citizens and subjects and to resolve disputes between and among citizens and the government. Most recognize multiple sources of law – international treaties and conventions, national constitutions, statutes, regulations, judicial precedents, customary practices and more. Protestantism has made signature contributions to a number of these Western legal ideas and

institutions – particularly during the Protestant Reformation era in Europe and in later Reformed and Evangelical movements on both sides of the Atlantic.

Reformation Era

The sixteenth-century Protestant Reformation was, in part, an attack upon the legal power and political structure of the medieval Catholic Church. Since the twelfth century, the Western Christian Church had been organized as an autonomous political authority in Western Christendom holding the legal power of the spiritual sword. The medieval church claimed a vast jurisdiction – power to make and enforce laws governing doctrine, liturgy, clergy, church property and polity, marriage, family, inheritance, trusts, education, charity, contracts, moral crimes and more. The church developed a system of canon laws that was enforced by a hierarchy of church courts and clerical officials spread from Italy to Ireland, from Portugal to Poland.

The Protestant Reformation began as a call for freedom from this regime – freedom of the individual conscience from canon laws, freedom of political officials from clerical power and privilege, freedom of local clergy from centralized papal and conciliar rule. “Freedom of the Christian” was the rallying cry of the early Reformation. Catalyzed by Martin Luther’s posting of the Ninety-Five Theses in 1517 and his burning of the canon law books in 1520, Protestant leaders denounced canon law and clerical authority with unprecedented alacrity and urged radical legal and political reforms on the strength of the new Protestant theology.

All the early Protestant leaders – Martin Luther, John Calvin, Thomas Cranmer, Menno Simons and others – taught that salvation comes through faith in the Gospel, not by works of the Law. Each individual was to stand directly before God, to seek God's gracious forgiveness of sin and to conduct life in accordance with the Bible and Christian conscience. To the Reformers, the Catholic canon law administered by the clergy obstructed the individual's relationship with God and obscured simple biblical norms for right living.

All the early Reformers further taught that the church was at heart a community of saints, not a corporation of law. Its cardinal signs and callings were to preach the Word, to administer the sacraments, to catechize the young and to care for the needy. The Catholic clergy's legal rule in Christendom obstructed the church's divine mission and usurped the state's role as God's vice-regent called to appropriate and apply divine and natural law in the earthly kingdom. To be sure, the church needed internal rules of order to govern its own polity, teaching and discipline. Church officials and councils needed to oppose legal injustice and combat political illegitimacy. But, for most Protestants, law was primarily the province of the state not of the church, of the magistrate not of the minister.

These new Protestant teachings helped to transform Western law in the sixteenth and seventeenth centuries. The Protestant Reformation broke the international rule of the Catholic Church and the canon law, permanently splintering Western Christendom into competing nations and regions, each with its own religious and political rulers. The Protestant Reformation triggered a massive shift of power and property from the church to the state. State rulers now assumed jurisdiction over numerous subjects previously governed by the church and its canon law – marriage and family life, property and testamentary matters, charity and poor relief, contracts and oaths, moral and ideological crimes and more.

In Lutheran and Anglican polities, the state also came to exercise considerable control over the clergy, polity and property of the church, forcibly divesting the Catholic Church and its clergy of huge property holdings and periodically subjecting Catholic and Protestant dissenters to severe repression. In Calvinist polities, church and state officials shared power and property more evenly, though often with no less severe consequences to traditional Catholic institutions or to new Protestant non-conformists. Most Anabaptist communities withdrew from civic life into small self-sufficient communities that were governed internally by biblical principles of discipleship, simplicity, charity and non-resistance and that set their own standards of worship, discipline and education.

These massive shifts in legal power and property from church to state in Protestant lands did not break the ties between law and Christianity. For all of the Reformation's early anti-canonism, many Protestant magistrates and jurists eventually transplanted Catholic canon law rules and procedures directly into their new state laws. Protestant authorities trimmed these canon laws of Catholic theological accretions that they found obsolete or offensive. But they retained many canon law norms and forms that were grounded in Scripture and Christian tradition, applying them in many of the new civil statutes and court decisions.

Moreover, Protestant leaders brought some of the new Protestant theology to direct and dramatic legal expression. For example, Protestant theologians replaced the traditional Catholic idea of marriage as a sacrament of the Church with new ideas of the marital household as a social estate, covenantal bond, or little commonwealth of the earthly kingdom. On that basis, Protestant jurists developed a new state law of marriage, featuring requirements of parental consent, state registration, church consecration and peer presence for valid marital formation and introducing absolute divorce on grounds of adultery, desertion and other faults, with subsequent rights to remarry at least for the innocent party.

Protestant theologians replaced the traditional understanding of education as a teaching office of the church with a new understanding of the public school as a "civic seminary" for all persons to prepare for their Christian vocations. On

that basis, Protestant magistrates replaced clerics as the chief rulers of education, state law replaced church law as the principal law of education and the general callings of all Christians replaced the special calling of the clergy as the *raison d'être* of education.

Protestant theologians introduced a new theology of the "three uses" of the moral law set out in the Bible, particularly the Ten Commandments. On that basis, Protestant jurists developed arresting new biblical theories of natural law and equity, introduced sweeping changes in civil laws of social welfare and moral discipline and developed an integrated theory of the retributive, deterrent and rehabilitative functions of criminal law and of ecclesiastical and domestic discipline.

Protestant theologians, particularly Anabaptists, emphasized the voluntary qualities of the Christian faith – that an adult individual must make a conscientious choice to accept Christ, to scale the wall of separation between the fallen world and to enter into the garden of religion. Though initially rejected, this idea eventually became an important cornerstone for later Western legal theories of liberty of conscience and free exercise of religion.

Later Reformed Accents.

While each of the four main branches of the Reformation and the sundry denominations that grew from them, continued to influence discrete legal and political institutions in the following centuries, it was the Reformed and Evangelical movements that eventually translated these early Protestant teachings into the most influential legal and political reforms in the West.

Various Reformed writers converted Martin Luther's famous doctrine that a person is at once sinner and saint (*simul iustus et peccator*) into a firm anthropological foundation for later Western theories of democracy and human rights. On the one hand, these Reformed Protestants argued, every person is created in the image of God and justified by faith in God. Every person is called to a distinct vocation, which stands equal in dignity and sanctity to all others. Every person is a prophet, priest and king and responsible to exhort, to minister and to rule in the community. Every person thus stands equal before God and before his or her neighbor. Every person is vested with a natural liberty to live, to believe, to love and serve God and neighbor. Every person is entitled to the vernacular Scripture, to education, to work in a vocation. On the other hand, these Reformed Protestants argued, every person is sinful and prone to evil and egoism. Every person needs the restraint of the law to deter him from evil and to drive him to repentance. Every person needs the association of others to exhort, minister and rule her with law and with love. Every person, therefore, is

inherently a communal creature. Every person belongs to a family, a church, a political community.

These social institutions of family, church and state are divine in origin and human in organization. They are created by God and governed by godly ordinances. They stand equal before God and are called to discharge distinctive godly functions in the community. The family is called to rear and nurture children, to educate and discipline them, to exemplify love and cooperation. The church is called to preach the word, administer the sacraments, educate the young and aid the needy. The state is called to protect order, punish crime and promote community. Though divine in origin, these institutions are formed through human covenants. Such covenants confirm the divine functions, the created offices and of these institutions. Such covenants also organize these offices so that they are protected from the sinful excesses of officials who occupy them. Family, church and state are thus organized as public institutions, accessible and accountable to each other and to their members. Particularly the church is to be organized as a democratic congregational polity, with a separation of ecclesiastical powers among pastors, elders and deacons, election of officers to limited tenures of office and ready participation of the congregation in the life and leadership of the church.

From the later sixteenth to the later eighteenth centuries, various Reformed groups recast these theological doctrines into democratic norms and forms. Protestant doctrines of the person and society were cast into democratic social forms. As all persons stand equal before God, they must stand equal before God's political agents in the state. As God has vested all persons with natural liberties of life and belief, the state must ensure them of similar civil liberties. As God has called all persons to be prophets, priests and kings, the state must protect their constitutional freedoms to speak, to preach and to rule in the community. As God has created persons as social creatures, the state must promote and protect a plurality of social institutions, particularly the church and the family.

Protestant doctrines of sin, in turn, were cast into democratic political forms. The political office must be protected against the sinfulness of the political official. Political power, like ecclesiastical power, must be distributed among self-checking executive, legislative and judicial branches. Officials must be elected to limited terms of office. Laws must be clearly codified and discretion closely guarded. If officials abuse their office, they must be disobeyed. If they persist in their abuse, they must be removed, even if by revolutionary force and regicide. These Protestant teachings were among the driving ideological forces behind the revolts of the French Huguenots, Dutch Pietists and Scottish Presbyterians against their monarchical oppressors in the later sixteenth and seventeenth centuries. They were crucial weapons in the arsenal of the Puritan revolutionaries in seventeenth-century England and eighteenth-century America.

They remained important sources of inspiration and instruction during the great modern age of democratic construction on both sides of the Atlantic.

New Evangelical Accents

While Reformed legal and political thought continued to influence the Western tradition until the twentieth century, Evangelical accents became increasingly prominent in the nineteenth and early twentieth century, particularly in America.

The rise of American Evangelical legal and political influence was, in part, a function of simple demography. American Evangelicals had their roots in small colonial Baptist and Anabaptist communities, many clustered in Roger Williams' Rhode Island. Their small size and separatist leanings kept them from exercising much political influence at first. The First Great Awakening (c 1720-70), however, divided many Protestant denominations into traditional Old Light and evangelical New Light groups. It also sparked the rise of Baptist and Methodist churches, whose leaders joined others to secure constitutional guarantees of religious liberty for all. The Second Great Awakening (c 1810-60) splintered and stunted traditional Reformed, Anglican and Lutheran denominations still further and led to the explosive growth of Baptists and Methodists.

The rise of Evangelical legal and political influence was also, in part, a function of theological innovation. While nineteenth-century American Evangelicals did not work out a detailed new political theology or theological jurisprudence, they added accents to the Protestant inheritance that helped shape American law and politics until well into the twentieth century. For example, Evangelicals emphasized Christian conversion, the necessary spiritual rebirth of each sinful individual. On that basis, they strongly advocated the liberty of conscience of each individual and the free speech and press rights and duties of the missionary to proselytize, both on the American frontier and abroad. Evangelicals had a high view of the Christian Bible as the infallible textbook for human living. On that basis, they celebrated the use of the Bible in public school classrooms, military, prisons and elsewhere while they castigated Jews, Catholics, Mormons and others for their use of partial, apocryphal, or surrogate Scriptures. Evangelicals emphasized sanctification, the process of each individual becoming holier before God, neighbor and self. On that basis, they underscored a robust ethic of spiritual and moral progress, education and improvement of all.

Many Evangelicals coupled this emphasis on personal conversion and sanctification with a concern for social reform and moral improvement of the community. Great numbers of Evangelicals eventually joined the national campaign and Civil War to end slavery – though this issue permanently divided Methodists and Baptists, as well as Presbyterians and Lutherans. Nineteenth-century Evangelicals were more united in their support for successive and

sometimes successful, campaigns for new laws against dueling, freemasonry, reserving Indians, lotteries, drunkenness, Sunday mails, Sabbath-breaking and more. In the later nineteenth century, many Evangelical leaders also joined the struggle for the rights and plights of emancipated blacks, poor workers, women suffragists and labor union organizers – none more forcefully and successfully than Walter Rauschenbusch, the leader of the Social Gospel Movement. But on these issues, too, Evangelical camps were often bitterly divided.

On occasion, nineteenth-century Evangelicals became actively involved in national party politics, such as in the three unsuccessful presidential campaigns of William Jennings Bryant at the turn of the twentieth century. Most American Evangelical groups, however, were suspicious of the national government and were staunch believers in the virtues of federalism and the prerogatives of state and local government. Many Evangelicals further believed that the individual congregation and the voluntary association were the most essential sources of governance and improvement. They regarded churches, schools, clubs, charities, businesses, unions, corporations, learned societies and other voluntary associations as essential buffers between the individual and state and essential brackets upon state power and essential instruments of law and authority in their own right.

Modern Pathways

After World War II, Reformed and Evangelical Protestantism diminished as a legal and political force in America. Individual Protestant luminaries such as Reinhold and Richard Niebuhr did chart provocative new pathways. Various Protestant ethicists and theologians did continue to develop important new themes, particularly relating to just war theory, the environment and biotechnology. But modern American Protestantism did not develop an authentic political model or program of legal reform on the order of Roman Catholicism after the Second Vatican Council. Some Protestants repeated old legal and political formulas, often nostalgically (and selectively) recounting Protestant progress and prowess in American history. Other Protestants focused their attention on single political issues – the restoration of prayer in public schools, the eradication of abortion, the protection of the traditional family – often mobilizing ample political support and securing occasional legal victories for these causes. Still others, particularly in the World and National Council of Churches, threw their support behind ecumenical and inter-religious programs. But a comprehensive Protestant political and legal platform, faithful to the cardinal convictions of historical Protestantism and responsive to the needs of an intensely pluralistic modern polity, did not emerge in the twentieth century.

A notable exception to the recent pattern of Protestant political and legal quietism in America was the civil rights movement of the 1950s-1960s that helped to bring greater political and civil equality to African-Americans in a series of landmark statutes and cases. Another exception was the rise of the Moral

Majority and Christian Coalition in the 1980s and early 1990s as a broad political and cultural campaign to revitalize public religion, restore families, reform schools, reclaim unsafe neighborhoods and support faith-based charities. A still further exception has been the very recent coalition of Protestant and other religious academics who have led campaigns for the greater protection of religious freedom in the world and the cultivation of the interdisciplinary field of law and religion. Whether these movements are signposts for a vibrant new Protestant mission and ministry to law and politics remains to be seen.

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