Making Our Home in the Works of God: Lutherans on the Civil Use of the Law

Marie A. Failinger  
*Mitchell Hamline School of Law, marie.failinger@mitchellhamline.edu*

Patrick R. Keifert  
*Luther Seminary, pkeifert@luthersem.edu*

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Marie A. Fallinger and Patrick R. Keifert

If anyone attempted to rule the world by the gospel and to abolish all temporal law and sword on the plea that all are baptized and Christian and that, according to the gospel, there shall be among them no law or sword—or need for either—pray tell me, friend, what would he be doing? He would be loosing the ropes and chains of the savage wild beasts and letting them bite and mangle everyone, while insisting that they were harmless, tame, and gentle creatures.

—Martin Luther, “On Temporal Authority”

The fact is that in the sight of God those who are most devoted to the works of the law are farthest from fulfilling the law, because they lack the Spirit that is the true fulfiller of the law, and while they may attempt it by their own powers, they achieve nothing.

—Luther, “The Bondage of the Will”

In the past two centuries, the Lutheran witness has focused so critically and incessantly on grace, for which the law’s condemnation merely prepares us, that Luther’s “first” or “civil” use of the law is often
overshadowed. Indeed, Luther's insight that salvation cannot be a human work—that recognition of one's need for salvation is itself a gift of God—is so radical and extreme as to lead a careless reader to believe that in the moment of faith, the law vaporizes like a Romulan warrior into the ions of space. Or Christians might imagine salvation as jurisdictional: for a Christian to pass over into grace is to leave behind a godless country for a new land overflowing with love and all good virtues. The Lutheran insight into law's civil or political use in God's creative governance offers a very different vision, one that startles modernity. Modern culture offers two stark choices: the optimistic view of law as dynamic means toward a good society and human perfection (a view shared by liberals, utopians, and Marxists, among others); or law as an evil embodiment of oppressive power that should be, but is not, governed by equality and relationality (as some in the critical legal studies movement, for example, would argue). The Lutheran vision is perhaps more fitting to a matured pluralistic culture, whose hope in a new land of (material-political) milk and honey has been shaken by limitation, the end of the frontier and uncomplicated civilization, and dashed prospects of a universal formula for peace. For the Lutheran insight into law is at once darkly realistic that evil is inevitable even within law and blithely optimistic that law can do good in this world; it imagines law as wrathful and loving, punishing and nurturing, restraining and freeing. It is fully egalitarian in its condemnation; fully inclusive in its demand for justice and care.

1. The underlaying of the first, "civil" use of the law is a profound effect of the Enlightenment. Luther's premodern doctrine that the grace of law is an expression of creation and human reason has collided with (especially American) modernism, which substitutes secular for "sectarian" theological categories: in modernism, creation becomes nature, reason becomes science, and law claims to be less human—"not of men but reason [alone]."

2. Alister E. McGrath argues that Luther's distinctive breakthrough was to reject the claim of the "via moderna" that humans played a limited but crucial part in their own salvation by recognizing their need for salvation and appealing to God to bestow God's covenantal offer of salvation on them. Luther denied that human beings played any part at all in their own salvation. Alister E. McGrath, Luther's Theology of the Cross 88–90, 128–36 (Cambridge, 1999). See Martin Luther, The Bondage of the Will, in Martin Luther's Basic Theological Writings 181 (Timothy Lull ed., Fortress 1989). This anthology is cited throughout because of its availability. Because this essay is a contemporary interpretation rather than a history of Lutheran doctrine, our sources are primarily Luther or late-twentieth-century Luther scholarship. As shorthand, we will refer to "Lutheran" claims as though they were uniform, even though Lutheran thought is very diverse, and others within various Lutheran communities and in other Protestant traditions read Luther differently.
For Luther, to receive the gift of grace is not to pass, as it were, from the country of law to the new and very different country of loving freedom. Nor do mainstream Lutherans view the world as dualist, an untransformable world of law in which Christians must serve within fixed, static systems of authority and a completely separate faith-kingdom where they are obligated to live out Christian principles, a common Protestant interpretation of the two-kingdoms doctrine. To be a Christian in the world is more like being the salt in a bland meal, the yeast in a loaf of bread. The salt and yeast are distinctive and yet not separate; for the world to be fully what it is, that Christian spice, that leavening is required. Christians have no need of the law, Luther writes, and in the very same moment, they are unrepentant lawbreakers, needing law to order and nurture human relationship. They participate simultaneously within the grace of the law and the grace of the promise of life in Jesus Christ. Or as Luther also claimed, there are so few true Christians who live purely out of grace among so many sinners (even those who profess to be Christian) that the law is vitally necessary to restrain evil and demand good. Even these few true Christians who have no need of the law must obey the law for the sake of others who do need it, just as sinners are justified by grace through faith, not just for their own sake but for the sinner’s “neighbors”—that is, for all creatures.

PRINCIPLES FOR UNDERSTANDING THE POLITICAL USE OF LAW

Because Lutheran understandings about law are complex and deliberately open-ended, they offer guidance about the making, interpretation, and administration of law mostly by preclusion: they can rule out some claims altogether and act as a corrective to any jurisprudence demanding to be embraced as ultimate, flawless, or final justice. Yet although Lutheran doctrine does not definitively point to a particular school of legal thought as most theologically correct, it yields some important principles for understanding the political use of law.

3. See, e.g., supra this volume, David Smolin, A House Divided? Anabaptist and Lutheran Perspectives on the Sword.
5. See Martin Luther, On Temporal Authority, in Martin Luther's Basic Theological Writings, supra note 2, at 663, 665, 668–69 (hereinafter On Temporal Authority).
Formation and Justification of Law

In its civil use, law is the demand of God for preservation and re-creation of the world, expressed through such orders of creation as the family and the state. In the Lutheran view, aligned in a distinctive way with the natural-law tradition, law is largely the product of human reason, which is itself a gift of God to all human beings. Luthers reject both the concept that human law is divinely spoken word for word, a narrative continuous with the Giving of the Law at Sinai; and a Deist view that because God's creative activity is over, law is fully the work of created beings capable of managing their own affairs. Mainstream Lutheran theology rejects the notion that the world's evil makes it untransformable or obliges Christians to separate themselves to follow the way of Jesus as some Christian traditions believe. For Lutherans, through the continuing creative activity of human beings, every moment of which God makes possible and makes new, law comes forth, and Christians participate on virtually the same footing as others in that activity. Lutherans affirm the natural-law view that human beings are endowed with the inherent ability to determine right from wrong by reasoning from their own experience and surroundings, and thereby to make law that will both nurture human life and punish and deter wrong. Yet they would argue that human will and demonic forces often obscure the right.

Central Focus of Law

In the Lutheran view, law, like any other human enterprise, must be theocentric, but it is neither salvific nor theocratic. That is, in its civil use, law does not

6. B. A. Gerrish, *Grace and Reason: A Study of the Theology of Luther* 22, 25-26 (Oxford 1962) (quoting Luther's Sermon on the Seventh Sunday after Trinity, on Romans 6:19-23). Luther likened reason to a tool that, properly used, makes things clear, but in itself "do[es] not guarantee sound results." *Id.* at 22. Although Luther repudiated a nominalist doctrine of justification, he remained a nominalist on creation and law, believing that God was daily creating the world and changing its orders in relation to His purpose, by stark contrast to realist natural lawyers like Thomas Aquinas.


9. In fact, Luther argued that original sin was so deep a corruption of nature that reason cannot understand it. Martin Luther, The Smalcald Articles, in *Martin Luther's Basic Theological Writings*, *supra* note 2, at 516 (hereinafter *The Smalcald Articles*); George Forell, *Faith Active in Love: An Investigation of the Principles Underlying Luther's Social Ethics* 143 (Augsburg, 1954).
establish a relationship between human beings and God that can result in their perfection or salvation; there is no set of laws that, if kept, would result in humans' repair of the breach they have caused with God. Nor can humans form a set of laws that fully captures God's will for humankind, or look to God's Word for an immediate "yes" or "no" to resolve a particular justice conflict. Because God can make good things from God's creation, even creation corrupted by evil or unbelief, Lutherans have always claimed that justice can come from those who do not accept God as the center of their understanding. Still, God's will for the good of creation is an ever-present reality even in lawmakers and application; law that pretends otherwise is a distortion of the truth.

**Purpose of Law**

The law's purpose is to serve the neighbor in a way that reflects our situatedness in particular contexts. The debate about what serves the neighbor, though, is clearly open-ended, meant for the application of human reason. Lutherans accept that the law can and must be both wrathful and nurturing. As David Smolin observes in his essay in this volume, the Lutheran tradition is not "pacifist": law must be used to restrain, deter, and punish, by physical force if necessary, those who evilly destroy the neighbor. Yet law also has a constructive role in nurturing that same neighbor, by empowering and limiting human institutions so that they serve human need. In particular, law helps to preserve the world by recognizing, defining, and critiquing historical social relations critically at the core of human community, identified by Luther in the sixteenth century as the church, the household (oeconomia), and the state. The Lutheran tradition, however, has always recognized that, as God's co-creative work, new orders will come into existence as human need demands, and even the traditional orders must be adapted to human need as it changes over time.

**Legal Interpretation and Jurisdiction**

Following a central Lutheran insight, legal interpretation must account for the complex reality that human reason is both good and flawed, and that human imperfection and evil will always distort reason as law is formed, interpreted, and applied. This fundamental reality suggests a division of legal power that insists that civil authority must seek to correct other agencies of human community while it is continually self-critical, watching for signs that its own delusions masquerade as public good.
THE WORK OF OUR HANDS: FORMATION OF LAW

In American academic circles, the justification of law by process has been a recurring theme. Any number of legal theorists have suggested that majoritarian process is an essential condition of making law morally valid because it is wrong for people to be governed by those laws to which they cannot consent. Yet “pure” majoritarians are difficult to find, though many qualified majoritarians would prefer pure democracy if it could be practiced under ideal conditions.

Recognizing law as a gift that is yet accursed, Lutherans stand almost outside of these efforts to describe an ideal majoritarianism because they recognize both the important insights and the equally significant flaws in this discussion. First, Lutherans must applaud the instinct of majoritarianism, which is to recognize the conscience of the individual person, one critical location of God's creative activity along with communities and institutions. Lutherans accept that human beings have been endowed with tremendous powers to reason about their own situation in the world, to find a way to nurture, preserve, and extend all of creation. Humans’ ability to imagine themselves metaphorically in those worlds that they cannot physically observe (from an atom’s composition to the reaches of space) and to make the world into usable processes and objects seems almost limitless in many areas; and this vast power, harnessed to tackle the problems of human social relations, must inspire and deserve awe. Thus each person's conscientious ethical and practical reasoning, as trained upon a problem of justice in our society, deserves the respect of any political order. For Lutheran theorists, the majority's views, which represent a multiplicity of such judgments, and the conscientious claim of the dissenting individual are both entitled to the respect due the activity of a creature of God, a view that recognizes the inherent goodness of creation's diversity.

Yet the magnificent power of human reason is put to the test by the awesome strength of human evil and demonic power in the world, powers that lie both within and without the heart and soul of every human person. There is no pure reason; it is always corrupted by the human will. Or as Luther would put it, "Satan has blinded reason to the natural law and has covered this law with a veil." 10 In more psychological terms, self-interest, self-justification, and self-

delusion are at every moment present in the formation and application of the law. Citizens must thus simultaneously rejoice in those aspects of democratic governance that encourage the development of community through human reason and still reject the claim that any democratic decisionmaking process makes law morally right per se, or that process criteria dispositively decide the law's moral validity. With Tocqueville and others, Lutherans recognize that majorities no less than individuals can make law blind to the needs of the other, and that they can use the power of reason to make evil law seem morally right or even morally responsive to a set of "facts" about human need that exist only in the mind of the majority. Thus democratic majorities can as easily as dictators imagine that children do not starve in their society, or argue that they should starve for many perfectly plausible reasons, not the least of which is that the majority has decided they should.

From a Lutheran perspective, however, modern proposals to recognize the "tyranny of the majority," which may relocate political power to oppressed groups or even reconfer it on individuals and private institutions, are not necessarily better solutions. No one can avoid the sins of the will: it is as likely (perhaps more likely) that one individual claiming in conscience to be exempt from positive law is driven by the sins of self-interest and self-delusion as it is that the majority's decision is so flawed; it is as likely that an oppressed minority will use power corruptly as will a self-satisfied majority.

Luther himself generally expressed a preference, among two evils, for some amount of organized tyranny in the person of the ruler (or majority) over the chaotic tyranny of individual choice. Although we cannot know how much of that preference is context driven, coming out of the political chaos of the later Reformation period, Luther often demanded that Christians accept the created order of government until its activities were no longer tolerable, though he did not hold a consistent position on rebellion throughout his life. His conclusions driven by practical realities he observed, Luther once suggested that Christians should not revolt against a clearly evil ruler unless the ruler was so insane that he could not listen to reason, for while there was the chance to change the ruler's mind toward good, a short-term tyranny was preferable to destruction of society through political chaos. On another occasion, Luther chided rebel leaders about the widespread human suffering caused by the rebellions of his time, suggesting that revolt more often brings evil in the form of human pain

11. George Forell, Luther's Theology and Domestic Politics, in Martin Luther: Theologian of the Church 113–14 (Word and World, 1994).
and death than does living under the yoke of a tyrant. Luther regarded with suspicion rebels' claims that revolt was necessary to secure human liberty, because he believed that freedom as humans understood it was largely illusory. Perhaps because he saw that the sins of rebellions are too often visited upon the innocent rather than the guilty, Luther strongly urged his followers not to destroy the foundations of authority; and yet he almost gleefully lobbed grenades against its walls and roof.

Following Luther, most Lutherans have expressed fairly conservative views on the right to overturn authority through rebellion, while many have fiercely challenged particular laws and decisions of the authority. Thus even though Christians should stand against the authority of a particular government (itself part of God's design) only when that authority has jeopardized the preaching of the Gospel (in statu confessionis), they are in every time and place obliged to demand justice for the neighbor, no matter how pure or democratic the "process" of lawmaking has been. Although Lutheran doctrines of the two kingdoms and the orders have been distorted in some times and places to justify quietism (as in some American Lutheran settings) or even cooperation with evil regimes (as in Nazi Germany), the central tradition is equally adamant that citizenship is a mandatory human vocation, whether citizens exercise the authority as the democratic equivalent of "princes" or live under nondemocratic authority. Far from authorizing passivity in the face of authority, Lutheran doctrine demands active participation in law; every adult must view his or her citizenship as a calling, just as he or she would view a role as a parent, or a worker, or a church member. As to government service, Luther taught, "you should esteem the sword of governmental authority as highly as the estate of marriage, or husbandry, or any other calling that God has instituted. Just as one can serve God in the estate of marriage, or in farming or a trade, for the benefit of others—and must so serve if his neighbor needs it—so one can serve God in government, and should serve if the need of his neighbor demands it."13

Thus Christian participation in the formation and reformation of law must be respectful of authority; supportive of those who try valiantly to carry out the law; and equally, incessantly and frankly critical of any moment when the law is designed, interpreted, or enforced unjustly. A Christian, then, can be respectful of the office of policing necessary for community protection, cog-

12. Luther noted that God would punish the tyrannical ruler, and if God chose not to do so, it might be because of sins that we are not prepared to admit. Id. at 114–15.
13. On Temporal Authority, supra note 5, at 674.
nizant of the difficult task each officer faces, while protesting every instance in which the police selectively enforce the law, brutalize vulnerable citizens—even those who are not innocent—or overlook evil that should be addressed.

THEOCENTRICITY AND THE PURSUIT OF POLITICS WITHOUT IDOLS

Lutheran theology originated in a historical context in which God's creative activity and sovereignty were unquestioned, at least in political arguments. Contemporary Lutherans face serious conceptual challenges in a pluralistic culture that has no such consensus, rejecting any theology as a possible basis for political justification. American Lutherans have recognized—indeed would have to recognize—our particular form of government with its modern gloss on church and state as a form of blessing, and must applaud its role in eradicating civil violence wrongfully justified by religious belief. Yet it would be impossible for Lutherans to accede to the "common sense" that God is no longer continuously involved in the creation and re-creation of human society (though finding a metaphor to describe that involvement, both direct and through human action and institutions, is difficult). For God's creating and sustaining activity is not restricted to some human realms, not lost in the past or waiting in the future. It is embedded in each judge's decision, each legislator's vote, and each administrator's enforcement of the law.

Other Christian and non-Christian alternatives proposing to resolve this dilemma obscure or deny one critical aspect of God's creative activity. The separatist move, requiring Christians to withdraw as much as possible from the affairs of the world so that God's work can be more fully expressed in a "purer" community of belief and action, leaves behind a part of the created world to which Christians are called to minister. The secularist move, to confine religious worldviews and expressions to a private or at least nonpolitical sphere, similarly denies the sovereignty of God over all creation. The theocratic move, demanding that law recognize and swear allegiance to a theocratic understanding of social life through coercion, not only risks the God-given conscience of the religiously other. It also pretends to an idolatry backed by force: for humans to be God by demanding allegiance of mind and heart to a particular interpretation of God's will, as they are likely to do according to Lutheran doctrine, is almost worse than to allow the forces of the Devil to have free rein over part of the given world.

So the Lutheran conundrum. For a Lutheran to stand mute about God's cre-
ative activity in "secular" discussions about law and government is not ethically (theologically?) possible any more than it should be possible for a Lutheran to bracket his understanding about God's action in the world when he thinks through problems of justice and care with other Christians. Yet to demand that law precisely reflect their particular theological beliefs is equally problematical for Lutherans because of the ethical demand to care for the neighbor, a demand that includes respect for his difference and his different conscience. At the very least, however, Lutherans can stand in prophetic critique of the pretensions of anthropocentric lawmaking, even if they cannot find a simple substitute; the Lutheran claim that law is made for the ordering of human society is critically different from the claim that human beings are the center of the universe. As merely the most obvious illustration, Lutherans must be deeply and vocally disturbed by environmental law that considers uses of the earth solely according to human desires, needs, and material aspirations, while equally rejecting fanciful projects that "preserve" nature with a pristine aestheticism that diminishes those human beings whose suffering (famine, disease, impoverishment) can be alleviated through careful management of resources.

Lutheran recognition of the pretension that human knowledge or values constructed from the past, a present consensus or an anticipated ideal future, are the primary, infallible material from which law is created opens a space for political dialogue with others of differing beliefs. Lutherans believe that Christians can make distinctive theological arguments for the justice of particular legal measures or structures while joining theologically differing citizens to reach consensus or even compromise on practical outcomes. They do so recognizing that Christian confession is no predicate or indispensable condition to judicial or legislative virtue: those who are "secular" or other-religious, and even evil rulers, can be instruments of justice in the world. Thus Christians can fight over the message without rejecting the messenger; they can recognize the competence and virtue of an other-believing judge or legislator or executive—and even the rightfulness of that lawmaker's decisions—while disagreeing with her justifications for law.

Third, Lutherans can deny the power of "isms" that create legal structures around them, particularly those that pretend to perfectionism. Even if they accept the insights on the human condition that have given rise to some of these "isms," Lutherans must unalterably oppose any juridical strategy that promises the salvation or ultimate perfection of individual human beings or human community. Thus although Lutherans can, for instance, accept the Marxist recognition that modern society has alienated human beings from their own
work, they cannot accept the ultimate conclusion that humans can, by them-
selves, achieve reunification of the spiritual and material by a political pro-
gramme, whether it is the dictatorship of the proletariat or unfettered capital-
ism.

THE NEIGHBOR’S GOOD IN THE WORK
OF THE LAW

Simply put, the central focus of the civil law is to serve the neighbor. Lutherans
view the responsibility to love one’s neighbor as the critical insight of the nat-
ural law, not as a “Christian duty.” It is a seeming paradox of Lutheran theology
that Christians do make a loving response to the neighbor because they are
saved by grace, while at the same time they with others are bound by the natural
law to respond in love. Thus for Lutherans the “law of love” is neither distinctly
Christian nor a form of obligation imposed on one by virtue of one’s salvation.
As an insight of natural law, loving service is a demand upon all persons who
can exercise reason and a call to which all humans are accountable, irrespective
of their religious beliefs or salvation, irrespective of whether they are virtuous
or thoroughly evil, rulers or ruled.

Thus civil law is not only permitted but required to reflect God’s demand
that the neighbor be served. That this prescription is exceedingly general does
not suggest its complexity. First, Lutheranism accepts the paradox that law is
situated as well as universal: to do justice, law must always reflect the circum-
stances of those who demand justice and the historical, cultural, and political
setting in which justice is dispensed. Second, Lutheranism imagines “doing jus-
tice” as a complex relation driven by virtues, not rules. Third, the notions of
both “service” and “neighbor” are broadly defined to embrace a strong ethic of
responsibility to the whole world.

Although Lutherans understand justice to be contextual, the situatedness of
law does not imply the partiality of justice, nor justify the use of power to es-
cape justice or to exclude any groups from its protection. Luther described a
radical egalitarianism in the application of the law, although its application to
Christians is complicated. Thus Luther could say, “All who are not Christians
belong to the kingdom of the world and are under the law,” while demanding
that even those few who are Christians in faith and deed obey the law. They
must obey, not only as a loving example to the ungodly but also because “no
one is by nature Christian or righteous; but altogether sinful and wicked, [so]
God through the law puts them all under restraint so they dare not wilfully im-
plement their wickedness in actual deeds.” Moreover, the “neighbor” to whom both government and individuals owe the duty of care is not defined by relationship or history; he or she is identified only by need, for “a man does not live for himself alone in this moral body to work for it alone, but he lives also for all men on earth; rather, he lives only for others and not for himself.” Thus Luther could counterintuitively call for exercise of the sword on behalf of others even while one should not be prepared to defend oneself.

In addition, Luther rejected relativism on justice: he accepted that the natural law is the foundation for our reasoning about justice. Yet Lutherans have not imagined natural law as a set of fixed, universal principles, objectively separate from the world to which they apply and static from age to age. Rather, they have understood natural law as a dynamic, ever-changing source of knowledge about God’s demand of, and concern for, human well-being, a source for correction of human short sightedness and self-interest, but reliant on human reason to apply natural law to particular controversies in particular periods.

Second, justice is the fruit of legislative and judicial virtue, not arid application of abstract principles to the facts; it is the result of the natural call to love the neighbor, expressed as “I should do as I would be done by.” As Luther claimed, “For when you judge according to love you will easily decide and adjust matters without any lawbooks. But when you ignore love and the natural law you will never hit upon the solution that pleases God, though you have devoured all the lawbooks and jurists. Instead, the more you depend on them, the further they will lead you astray.”

Third, though the concept of service to the neighbor may seem “soft,” in fact, Lutherans have explicitly articulated how the law preserves, including Luther’s well-known, seemingly pessimistic emphasis on its restraint of the wicked. Luther’s writings particularly stress the use of law in incapacitating and generally deterring wrongdoers: “The unrighteous do nothing that the law demands; therefore, they need the law to instruct, constrain and compel them to do good. . . . [If the law did not restrain them], men would devour one an-

14. Id. at 664.
16. Id. Luther’s description of the lawmaker’s tasks reflects his ambivalence at times on whether Christians are particularly suited to govern: he demands “true confidence [in God] and earnest prayer,” love and Christian service toward those ruled, “untrammeled reason and unfettered judgment” toward subordinates; and “restrained severity and firmness” toward evildoers. On Temporal Authority, supra note 5, at 700, 702.
other, seeing that the whole world is evil.... No one could support wife and child, feed himself and serve God. The world would be reduced to chaos.... [God] has subjected [those who are not true believers] to the word so that, even though they would like to, they are unable to practice their wickedness, and if they do practice it they cannot do so without fear or with success and impunity."17 Luther’s primary focus here is the protection of citizens who fall prey to the wrongdoer’s harm, though retribution plays a minor chord in Luther’s work: while exhorting Christians to let themselves be “despoiled and slandered” if necessary, he demands that they seek “vengeance, justice, protection and help” on behalf of others.

Positive law also serves to correct human behavior and to teach those who have not been transformed by grace what is expected of them under the natural law. Luther was fairly realistic about the fact that citizens have different intellectual, moral, and spiritual capabilities for discerning what natural law requires, and viewed positive law as one way of teaching those who could not think deeply about questions of natural justice, or whose other duties did not permit sustained reflection on these issues.

One function of the civil law that has been most overlooked in some American Lutheran communities is its role in nurturing individuals and the community. Luther believed that government had an affirmative responsibility to care for public needs, anticipating that governments might provide not only police protection and criminal justice but also fire protection, medical care, and public education.18 In some cases, such as education, Luther saw these responsibilities as a public function because the family was unable or unwilling to do its duty: parents were not always competent to educate, and many lacked time to spare from meeting the basic material needs of the family.19 In other areas, such as medical care, he considered it efficient for cities and states to care for those who needed it, noting that governmental hospitals and nursing homes

17. Id. at 665, 664.
18. Martin Luther, Whether One May Flee from a Deadly Plague, and Martin Luther, To the Councilmen of All Cities in Germany That They Establish and Maintain Christian Schools, in Martin Luther’s Basic Theological Writings, supra note 2, at 711–12, 738, 743 (hereinafter referred to as Plague and To the Councilmen, respectively).
19. Luther noted that even if some parents “lack the goodness and decency to educate their children,” they should not be neglected merely because their parents were ne’er-do-wells. In fact, Luther pointed out that such uneducated children, the product of cruel homes, would “poison and pollute other children until at last the whole city is ruined.” To the Councilmen, supra note 18, 711–12.
would be "a fine, commendable, and Christian arrangement to which everyone should offer generous help and contributions, particularly the government." \[20\]

It is important to reemphasize, however, that Lutherans have traditionally distinguished the civil use of the law from spiritual uses of the law. Most important, these distinctions have emphasized that obedience to the law cannot repair the breach between human beings and God and, in terms of one's salvation, is virtually beside the point, because even the perfect keeping of the law, were it possible, is not a sufficient work in God's sight.

Within a discussion of the civil use of the law, moreover, this clear distinction between God's spiritual realm and God's earthly realm would make Lutherans skeptical of political movements, legal structures, or programs that purport to provide a complete answer to the ills of society, or even to the needs of a particular individual. To suggest, for instance, that a criminal-corrections program or a set of welfare regulations will "reform" an individual in both heart and mind is to deny the spiritual aspects of human existence and to brashly pretend to a competence that is God's alone. Luther did respect the power of law to encourage positive patterns of behavior, if not internal reformation, both by teaching what is expected and by threatening sanctions if those expectations were not met. Moreover, he believed that children could be taught what moral activity was expected of them and, to a limited extent, schooled in moral virtues. Yet Luther was skeptical about the role of education in changing the heart and will of sinful human beings, who knowing what they should do refuse to accept or do it. And because Luther saw that sinful human beings would create flawed social systems, the agencies of social and economic life could be also expected to reflect self-aggrandizement, dishonesty, and distortion of the common good, even as they could nurture, sustain, and protect human community.

The Lutheran focus on human responsibility as defined by an individual's office, a concept that rejects the former primacy of priestly and religious callings, drives this constructive understanding of the law. Luther uses the term office or station (Stand) to define the life-place into which all people are put to make their contribution to the need of the neighbor. \[21\] The focus of moral

20. Plague, supra note 18, at 743.

21. There is some inconsistency in the way Lutheran writers use these terms. The noted Lutheran ethicist Paul Althaus suggests that Luther used the terms station, orders, duties, institutions, offices, functions, or hierarchies somewhat interchangeably, especially after 1522. Paul Althaus, The Ethics of Martin Luther 36, 39 (trans. Robert C. Schultz, Fortress, 1972). Others might distinguish between the great orders or governances, such as family, and the
judgment in shaping law must be on the unique and multiple offices one occupies as a worker, parent, spouse, or citizen. These offices must be exercised diligently by the person who occupies them so that certain critical human orders that make it possible for human beings to flourish may be maintained. Thus the office of parent is vital to the flourishing of the age-old order of the household (oeconomia) or family; the office of pastor to the order of the church; the office of judge to the functioning of the state. Individuals occupy these orders not primarily by personal choice but rather by being found where they are, though Lutherans would not understand by this that people are “fated” into orders and have no control over their destiny.

The concept of office both constrains and permits freedom, as understood by moderns. The constraints of an office are those responsibilities that the person who holds this office is bound to meet diligently and do well, even if his immediate choice would be to escape them. On the other hand, the orders are shaped by the ongoing co-creative activity of God, so that definition and contours of these orders may change from age to age, because the key principle defining the orders is whether they meet human need as reflected in God’s will for God’s creation. As a simple example, the fact that the state was aristocratic in medieval times does not settle the question of what form of state best meets human needs in modern times. Similarly, the fact that women and men held certain responsibilities in the family in Luther’s time does not forever lock them into “natural” and unchanging roles.

Modern law defines with some complexity those orders and institutions believed to be essential for the flourishing of human community. For instance, corporate forms are largely dictated by the states; marriage is a statutory contract embracing defined responsibilities of spouses toward each other and their children; and vast bodies of rules define even the constraints on government. Because for Lutherans the orders are constantly being created and revised, the state bears a heavy responsibility in trying to think through how these orders should be continuously restructured to preserve human community. Extremely individualistic or static conceptions of orders would be incompatible with both the form and the fluidity characteristic of these orders. On one hand, traditional Lutherans would not accept a state in which all responsibilities were designed by individual contract, so that moral and legal accountability would ap-

specific role or office, such as father, that the person occupies within those orders; or between office or station (Stand), those places where we are to obey God, and a person’s vocation (Beruf), to which he knows God has called him.
ply only to those duties that one "chooses," because they do believe that individuals are called into offices by God and the neighbor's need. Moreover, they would be skeptical about whether an individual, given the power to "choose" the terms of his engagement with others, would order his responsibilities fully to serve his neighbor. For instance, it is likely, Lutherans would suggest, that most individuals, if permitted to "choose" their marital responsibilities, would look to their own self-interest before considering the interests of even a beloved spouse.

On the other hand, law must structure these critical human institutions in a sufficiently flexible way that people can meet the varied offices they occupy or vocations to which they are called. Thus marriage law that utilized a monolithic and static concept of gender or parentage to define women's and men's obligations so rigidly that it did not account for conflicting callings of particular individuals would be wrong. For instance, legal regulation of family roles or economics that would make it difficult for a spouse to practice her vocation as a healer, or for a father to support children from his first marriage, would be problematical.

OFFICE, JURISDICTION, AND INTERPRETATION:
THE CONSEQUENCES OF RESTRAINT

The concept of office or vocation within these orders of creation also sets boundaries on the extent to which the state should be involved in forming and regulating human institutions, and how it should be structured to do so. The central anthropological paradox, that human beings are a good creation of God and at the same time deeply sinful, self-trusting, and self-regarding creatures, must necessarily be at the heart of good-faith attempts to define the diverse responsibilities of those who occupy various offices within the order of the state. Those who define offices and those who hold them must be other-critical, willing to hold accountable other office holders who exceed their trust and their competence, while self-critically ensuring that they themselves do not venture beyond either their duties or their gifts because of arrogance, greed, or delusions that they alone have properly understood the good.

Thus the Lutheran view of legal authority would not only be concerned about limiting power, as we usually contemplate when we discuss separation of powers or protection of the press as a check on the excesses of other branches of government. It would also demand the development of an affirmative understanding of the competencies and weaknesses of different branches and offices.
in government, and would expect them to create structures that account for their weaknesses and exercise their competencies. Indeed, Luther even allowed that some offices are simply intrinsically evil: though the office of "soldier" is "a ministry of love and a vocation," the office of "torturer" is still morally wrong.22

To take the most debated example in American constitutional jurisprudence—the limits of judicial review—Lutheran conceptions of the orders and the realities of human sin would counsel simultaneously for robust judicial review and careful, reflective judicial restraint. In matters in which reason suggests that the state has exceeded its bounds under natural law, by ignoring the needs of its citizens, by protecting power of those officeholders who are abusing them, or by excluding the vulnerable from the human community, a judge would be duty-bound to use the power of his office to counter the state's action, even if positive law supported it. Similarly, in the Lutheran view, majorities and institutions can be just as corrupt as individuals, so a legal regime that put its entire faith in majoritarian decisions or individual rights, neglecting the sin inherent in both individuals and institutions, would be soon corrupted. Conversely, even a morally insightful Lutheran judge would be careful about substituting his personal judgment for the legislature, whether democratic or not, if the legislature were acting within the appropriate boundaries of its office to restrain and protect, and the process of deliberation reflected lawmakers' careful exercise of their unique competence and consideration of what the need of the neighbor requires.

A Lutheran judge might similarly, for example, express the need for judicial restraint in overturning laws whose effectiveness requires broad democratic input, while rejecting the power of the majority to define without challenge what rights of citizenship and respect are due those groups excluded by our society. Such a judge would have a developed theory of the limits and gifts of executive (as opposed to legislative) decisions, of the federal government as opposed to a state or local government, of government regulation at all compared to social constraints leveled by public institutions other than the state.

Rather than viewing the problem of jurisdiction solely as a problem of balancing power or restoring the hegemony of one branch of government over another, a Lutheran would ask about where the officeholder or the branch of government is situated; and what resources it has at its disposal. A debate about the

respective powers or “rights” of the state and federal governments under the Constitution might be transformed into a debate about what decisions each branch of government is uniquely situated to make and to enforce due to its ability to understand context, its historical contributions to a well-ordered and just society, its resources (including human ones), and its historical tendencies toward oppression of various kinds.

Internal to each branch of government, the problem of creating and interpreting the law would be similarly viewed in the context of conflicting demands that would rule out absolute positions of interpretation. A strict positivism or textualism that rejected the role of human reason and compassion in determining the need of the neighbor in a particular case would be equally as unappealing to Lutherans as a jurisprudence of unreflective personal prejudices or instincts not geared to the search for earthly well-being from within the tradition of natural principles of justice. A Lutheran interpretive scheme would be marked by flexibility, for God can make things new in the world, and yet respect for the text and tradition as the embodied wisdom of others who have fought different evils and made the same—or other—mistakes.

For Lutherans, the ambiguous terrain of the postmodern world is familiar territory. To turn one’s face toward God is to escape neither the darkness of the present world nor its possibility. It is not, indeed, to turn one’s face at all, but to find the abruptly and momentarily unmasked hiddenness of God in the most daily of difficult tasks, the making of law for the good of the neighbor. In this territory of law, hope acknowledges its own powerlessness, wrath is love, and those who stand placed in God’s world burst into a future they have made and unmade with their own hands, crafted and yet crippled. Lutherans stand against every attempt to define the civil law as salvation or soulless, as paramount or irrelevant, for they see the preserving hand of God moving imperceptibly in the human debate about the law for the neighbor’s welfare. For Lutherans, law is bound authority, creative restraint, suspicious passion for life. It is not an “either” to the “or” of the gospel, but makes its own home in the works of God.