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The Reformation Suits: Litigation as Constitution-Making  
in a German Imperial Court, 1521-1555

By

Sarah M. Ludin

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

Jurisprudence and Social Policy

in the

Graduate Division

of the

University of California, Berkeley

Committee in charge:

Professor David Lieberman, Chair  
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Professor Jonathan Sheehan  
Professor Winnifred Fallers Sullivan

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## Abstract

### The Reformation Suits: Litigation as Constitution-Making in a German Imperial Court, 1521-1555

by

Sarah Monira Ludin

Doctor of Philosophy in Jurisprudence and Social Policy

University of California, Berkeley

Professor David Lieberman, Chair

Martin Luther was declared a heretic and outlaw in 1521. In the years that followed, dozens of city councils and princely rulers nevertheless undertook changes in their domains to reform church and polity in the Lutheran manner. In practice, introducing reformation in a particular place involved violations of local customary law, canon law, civil law, or imperial law. Thus, reformation spawned litigation. Attempts throughout the first half of the sixteenth century to resolve disputes that had arisen out of local reformations through arbitration, imperial-level negotiations, religious colloquies, and a church council did little to stop “old-faith” (*altgläubig*) clergy and church authorities from suing proto-Protestant princes and cities. The most consequential litigation of this period took place in the Imperial Chamber Court, a Roman civil law court that had been established in 1495. With a stable location (that did not travel with the Emperor), and judges appointed by both Emperor and Estates, the Imperial Chamber Court was the first Empire-wide judicial forum that aspired to be independent of the personal justice of the Emperor. In this relatively new, and initially unstable, Roman law court, old-faith litigants sued princes and cities for violating the Land-Peace, confiscating church property, seizing jurisdiction, and other illegal acts. Because its first-instance litigants were primarily princes and cities directly subject to the Emperor, the litigation also had the character of public law.

This dissertation is a socio-legal history of Reformation-related litigation that appeared in the Imperial Chamber Court prior to the 1555 Augsburg Religion-Peace. It offers a new kind of legal history of the Reformation. The legal history of the early German Reformation has primarily been the territory of intellectual historians, theologians, and scholars of public law. Their focus on political negotiations, watershed treaties, theological writings, and top-down legislative output, while invaluable, tell us only part of the story. My work, by contrast, elevates the importance of civil litigation as a distinctly important forum in which the Reformation unfolded. I show that legal praxis—the work of classification, of performative speech acts, and of experimentation in high-stakes contexts—are just as important, if not more important, than politics and doctrine for understanding the legal significance of the Reformation.

The Reformation holds a particular potency in the historiography of the Christian West as an originary moment for forms of political arrangement and social life that would recognize and acknowledge internal Christian difference, and, eventually, an ever-expanding circle of worldviews. In particular, historians have tended to look to the Augsburg Religion-Peace of 1555 as the headwaters variously of modern secularism, religious freedom, the rule of law, and

sovereignty. I argue that we need to look to the early decades of the Reformation to understand what precisely the Peace was aiming to settle and contain. A careful examination of civil litigation can help us account for the most consequential legal transformation of the early Reformation period: while in 1521 Lutheranism was outlawed as a heresy (in the Edict of Worms), in 1555 it was recognized as a legal confession (in the Augsburg Peace). Put another way, we cannot understand how the Holy Roman Empire got from Worms to Augsburg without understanding the Reformation cases.

This dissertation also provides a new genealogy for “religion” as a secular legal category. While historians have tended to look to the Enlightenment for a point of origins of “religion” as an academic category, or to the Augsburg Peace as its origins as a political-legal category, in fact, the question of what counted as a “matter of religion” was a key issue as early as the 1520s in the context of Reformation litigation. My research shows how the deep ambiguity of the term “religion” in these cases was decisive in shaping the Augsburg Peace and imperial public law.

Finally, my dissertation offers a new way of understanding the impact of Protestantism on modern law. Rather than examining how Protestant rulers reformed law in their domains, or the writings of theologians like Luther and Melancthon on law, my dissertation analyzes the ways in which Protestant litigants experimented with imperial law in the context of high-stakes litigation. I identify certain patterns of usage that can help explain some of the features of the post-1555 imperial system—including its recognition of multiple “religious parties,” its increased investment in the consolidation of state institutions to manage agonistic difference, and the formation of two distinct legal interpretive universes along confessional lines which eventually destabilized the Augsburg system in the seventeenth century.

For readers interested in law and legal history, they will find an exposition of fundamental questions of lawmaking in the Holy Roman Empire, and the way this legal culture shaped how the Reformation unfolded in the German lands. For readers interested in the Reformation, they will find a new approach to considering the role of law in this period, and its consequences on modern law. For readers interested in secularism, they will find a fresh scene in which the religion category gets re-invented, and a detailed examination of the role of the Reformation in producing the particular intractability of “religion” as we have inherited it in late modernity.

In memory of Matthew Lander Yannutz

Thank you for sharing with us your blue eyes, flannel, and curls, your gentle voice and warm smile, your sense of adventure, your intellect, and your empathy.

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What a tremendous privilege and blessing it has been to write this dissertation, the capstone and culmination of my formal education. Throughout the years of study, research, and writing that this dissertation represents, I was repeatedly taken aback by the generosity, curiosity, and wisdom of family, advisors, friends, colleagues, and strangers—many of whose names I have forgotten and neglect to include here.

To my dissertation committee, David Lieberman, Christopher Tomlins, Winnifred Fallers Sullivan, and Jonathan Sheehan, I give my warm and hearty thanks. Each one of you has influenced me—as a scholar and a human—in so many ways. David, you took me under your wing when my disciplinary proclivities turned from philosophy to history and you have brought presence and attention to every single one of our interactions. Your capacity to help me bring order and clarity to a jumble of thoughts has proven to be the pivot at critical points over the years. Your humane kindness, at the most difficult and the most beautiful times that life gives us, has been an inspiration to me. Chris, from your earliest advice to write “gobbets” on sources, to your editorial care in the final stages of dissertation writing, I have benefitted so greatly from your mentorship. I have valued your encouragement in my attempts to bring theory and history together in this project, and your passionate guidance on the craft of writing. Winni, you took me and this project seriously before it was deserved, since the day I tentatively emailed you in 2013. When I needed help reining in my research, you read “ugly drafts” on a weekly basis with care. You have generously connected me with numerous people who I now consider colleagues and mentors, and have modeled how to undertake important scholarship with genuine joy and curiosity. Jonathan, what I have loved most about working with you is your frank realism (“you will need Latin!”), which often delivered the jolt I needed to refocus, recalibrate, or reframe. Your comments on my writing gave me much-needed traction when revision began to feel slippery, when I began to lose sight of what I was saying, and when I needed to know what the value in my research was. Thank you all.

Many other professors and scholars played an outsized role in my doctoral studies. To Sarah Song, my initial Ph.D. advisor, thank you for having the insight and generosity of spirit to see my budding passion for history. To Marianne Constable, thank you for showing me how to find my own way in academia, for being a constant source of support, encouragement, and guidance, and for reading long sections of the dissertation with such care. To Anette Baumann, thank you for making a “soft landing” for me when I arrived in Germany; your help in orienting me in the archives, in the literature, and in the case files has proven to be invaluable. I would also like to thank many others at Berkeley and beyond, whose conversations with me between conference panels, over email, in office hours, or over coffee have had a significant impact on my doctoral studies, though probably registering barely a blip on their radars. I will not endeavor to list their numerous names here.

The Jurisprudence and Social Policy program has proven, time and again, to have been the perfect academic home for me—with its obsessive focus on law, combined with disciplinary diversity. Thank you to the deans, graduate advisors, and staff who have come and gone during my time there for all of the small and big questions and issues that you patiently attended to. A special thanks goes to Margo Rodriguez, for confidently shepherding me through all the twists and turns of my Ph.D. career. To all of my fellow graduate students, seminar participants, and reading group enthusiasts—too numerous to name—thank you for your companionship over these precious years of my life. I will treasure the countless coffee dates and conversations on the



law school rooftop. Thank you to the faculty whose seminars I had the pleasure of participating in; the value of your carefully curated courses continues to call me back to my readings and notes. As part of my doctoral studies, I had the opportunity to be a Graduate Student Instructor for a number of classes: Charles McClain's American Legal and Constitutional History as well as European Legal History; Laurent Mayali's Comparative Perspectives on Norms and Legal Traditions; and Christopher Kutz's Foundations of Legal Studies. Thanks to you all for your mentorship and training, and for all the ways you went above and beyond to help me in my studies. Thank you to the students in these classes who challenged me in the best possible ways. I know it is a cliché, but I truly learned so much from you.

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This project would not have been possible without support from a Graduate Student Fellowship at the University of Cologne, administered by the Institute of European Studies at U.C. Berkeley; a Research Grant from the Berkeley Center for the Study of Religion; a Methodology Grant from the Jurisprudence and Social Policy Program; and a Research Grant from the Religion and Diversity Project at the University of Ottawa. Thank you.

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in 2018; and the Politics of Religion At Home and Abroad Project Capstone Workshop at Indiana University Bloomington in 2019.

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Many, many others have had a hand in bringing this dissertation to fruition and guiding me through my education from childhood, college, post-graduate education, and the Ph.D. I hold you all in my mind and heart with gratitude. Thank you to Anna-Maria Balbach for tirelessly tutoring me in Early New High German, and for your friendship. Thank you also to Maryam Kashani, Farah El-Sharif, Maariyah Lateef, Saman Khalid, and Amina Nawaz for your sisterhood.

To my parents, Monir and Linda Ludin, thank you for the gifts of *deen*, upbringing, language, travel, heritage, intellect, safety, and home. I will never know all that you have done for me, but I thank you deeply for every bit of it. To my grandparents, Maria and Bashir Ludin, and Donna and Ralph Yannutz; my dear sisters Nadia, Adina, and Zarlashtah; my brothers-in-law, Ben and Nick; my nephew Grant and my niece Donna; my mother-in-law Catherine; my father-in-law Martin; my uncles, aunts, cousins and all members of my extended family and family-in-law all around the world, thank you for being sources of joy, comfort, conversation, and identity.

For my husband Adnan Adrian Wood-Smith, thank you for the prayers, the dissertation dance, the unflinching emotional, spiritual, and material support, and for reminding me that it was all already written. For my son Layth Muhammad George, the coolness of my eyes, thank you for reigniting my intuition, restoring my confidence, and soundly napping on my chest as I tapped away on the keyboard.

## USAGES

The most common monetary denomination used in the case files is “*marks lötigen golds.*” “*Mark*” is a unit of weight for valuable metals.<sup>1</sup> “*Löthig*” means unmixed, having the full weight.<sup>2</sup>

The transcriptions and translations of case files contained in footnotes are my own, and are not completed to editorial standard. Some of my notations and abbreviations include:

- g.h. = gnediger Herr
- e.g. = euer Gnaden
- f.g. = fürstliche Gnaden
- e.f.g. = euer fürstliche Gnaden
- key. or kay. mt. = kaiserliche Majestät
- # indicates illegible in case file
- (?) indicates a transcription I was not certain about

I often refer to the “*litis contestatio*” stage as “settling the *litis.*” Though “*lites*” (accusative) would be a more accurate translation, I decided to use “*litis*” to facilitate reader recognition.

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<sup>1</sup> Beginning in the sixteenth century, “*Mark*” began to be used as a denomination of currency. *Deutsches Rechtswörterbuch Online*, s.v. “*Mark*,” definition 3, accessed July 2, 2019, <https://drw-www.adw.uni-heidelberg.de/drw-cgi/zeige?index=lemmata&term=Mark-3&darstellung=u#Mark-3-1.0>.

<sup>2</sup> *Deutsches Wörterbuch von Jacob Grimm und Wilhelm Grimm*, s.v. “*löthig*,” accessed July 2, 2019, <http://www.woerterbuchnetz.de/DWB?lemma=loethig>; *Deutsches Rechtswörterbuch Online*, s.v. “*lotig*,” accessed July 2, 2019, <https://www.rzuser.uni-heidelberg.de/~cd2/drw/e/lo/lotig.htm>. On the variety of currencies and measures in the German lands, see Whaley, *Germany*, xiv, and the literature cited there; and Brady, *German Histories*, xv, for equivalents

# CHAPTER ONE

## SITUATING THE STUDY: LITERATURE, METHODOLOGY, AND SOURCES

### Introduction

Martin Luther was declared a heretic and outlaw in 1521.<sup>1</sup> In the years that followed, dozens of city councils and princely rulers nevertheless undertook changes in their domains to reform church and polity in the Lutheran manner. Local reformations were sometimes spurred by clergy (like the monks in Lindau in 1522),<sup>2</sup> sometimes by popular or powerful lay will (like the guilds in Goslar in 1528),<sup>3</sup> sometimes by city councils whose majority favored the new teachings (like Ulm's in 1530),<sup>4</sup> and sometimes by individual princes (like the Landgrave of Hessen, who began reforming his territory by appointing a Lutheran preacher in 1523).<sup>5</sup> Embedded in long-standing and complex feudal, dynastic, and constitutional relations with the Church, the Emperor, nearby rulers, and imperial estates, each locality produced a unique “negotiated reformation.”<sup>6</sup>

In practice, introducing reformation in a particular place involved violations of local customary law, canon law, civil law, or imperial law. For example, the assignment by a prince or city council of Lutheran preachers to clerical posts violated the canon law duty (*cum right*) of a bishop to appoint.<sup>7</sup> The endowment, in turn, that funded that clerical office's incomes might have come with conditions attached, such as performing the mass at certain times of year on behalf of the benefactor. If those conditions were neglected (or outlawed, as the case may be) the benefactor's relations, or the church institution away from which that endowment was directed, might sue for breach of the terms of the endowment.<sup>8</sup> Using church incomes from tithes, feudal

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<sup>1</sup> On the Edict of Worms and the Papal Bulls of 1521, see Chapter 2.

<sup>2</sup> Karl Wolfart, “Lindau im Zeitalter der Reformation,” in *Geschichte der Stadt Lindau im Bodensee*, vol. 1, ed. Karl Wolfart (Lindau: Kommissionsverlag von Joh. Thomas Stettner, 1909), 251-6.

<sup>3</sup> Gundmar Blume, *Goslar und der Schmalkaldische Bund 1527/31-1547* (Goslar: Selbstverlag des Geschichts- und Heimatschutzvereins, 1969), 10-11.

<sup>4</sup> Theodor Keim, *Die Reformation der Reichsstadt Ulm: ein Beitrag zur schwäbischen und deutschen Reformationsgeschichte* (Stuttgart: C. Belser, 1851), 33-152.

<sup>5</sup> Friedrich Wilhelm Hassencamp, *Hessische Kirchengeschichte seit dem Zeitalter der Reformation*, vol. 1 (Marburg: Elwert, 1852), 36-64.

<sup>6</sup> Christopher W. Close, *The Negotiated Reformation: Imperial Cities and the Politics of Urban Reform, 1525–1550* (New York: Cambridge University Press, 2009), 3-8. The term “Imperial Estates” (*Reichstände*) refers to the various status groups that had a voice in the imperial constitutional order. The most important Estates were the Electors (the Holy Roman Empire had been an elective monarchy since the thirteenth century), a clearly defined group of seven secular and ecclesiastical princes. Other princes, prince-bishops, and lower rulers also constituted Estates. Hence, the constitutional order of the Empire is conventionally called “dualistic” referring to the way in which both Emperor and Estates had a role in its governance. See Joachim Whaley, *Germany and the Holy Roman Empire. Volume I: Maximilian I to the Peace of Westphalia, 1493-1648* (Oxford: Oxford University Press, 2012), 26; Barbara Stollberg-Rilinger, *The Emperor's Old Clothes: Constitutional History and the Symbolic Language of the Holy Roman Empire*, trans. Thomas Dunlap (New York, Oxford: Berghahn, 2015), 32.

<sup>7</sup> e.g. Landeshauptarchiv Sachsenanhalt Standort Wernigerode Rep. A 53 (RKG) H71 [“Wernigerode H71”]: case in which Magdeburg city council was sued by St. Peter monastery for having appointed a preacher at St. Jacob church and paying him with incomes of the parish, 1529-1538.

<sup>8</sup> e.g. Bayerisches Hauptstaatsarchiv (RKG) 14233 [“Munich 14233”]: case in which the Bishop of Würzburg sued the city of Schweinfurt for using an endowment—that had a condition that the preacher who received the incomes be appointed by the Bishop—for a Lutheran preacher that the city appointed, 1543-1544.

profits, or wealth-yielding properties to support Lutheran clergy and institutions (including hospitals and schools managed by worldly rulers) amounted to confiscation, dispossession, or conversion of church property.<sup>9</sup> Criminally trying and punishing clergy for moral infractions violated the jurisdictional competence of spiritual authorities, and clergy immunity privileges.<sup>10</sup> Prescribing evangelical liturgy, permitting clergy marriage, and mandating communion “under both kinds” transgressed long-standing canon law maxims, as did prohibiting the mass and proscribing other traditional religious rites.<sup>11</sup> Destroying monasteries and sacred objects, imprisoning or banishing clergy, and plundering church institutions amounted to a violation of the Land-Peace.<sup>12</sup> Over the course of the first half of the sixteenth century, a number of Recesses promulgated by imperial assemblies continually modified yet another layer of imperial law that cities and princes might overstep.<sup>13</sup>

Thus, reformation spawned litigation. Attempts throughout the first half of the sixteenth century to resolve disputes that had arisen out of local reformations through arbitration, imperial-level negotiations, religious colloquies, and a church council did little to stop “old-faith” (*altgläubig*) clergy and church authorities from suing evangelical princes and cities.<sup>14</sup> The most consequential litigation of this period took place in the Imperial Chamber Court, a Roman civil law court that had been established in 1495.<sup>15</sup> With a stable location (that did not travel with the

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<sup>9</sup> e.g. Hauptstaatsarchiv Stuttgart C3 (RKG) 4524 [“Stuttgart 4524”]: case in which the Provost of a collegiate church in Ulm sued the city of Ulm when the city refused to cease payments out of the church’s tithes and incomes towards salaries of convent members who had abandoned the old faith, 1532-1533.

<sup>10</sup> e.g. Frankfurt Stadtarchiv (RKG) 1035 (M1b/213) [“Frankfurt 1035”]: case in which the Archbishop sued the city of Frankfurt for promulgating a mandate that threatened to punish clergy for blasphemy, adultery, and excesses, 1529-1535. In another case, Bayerisches Hauptstaatsarchiv (RKG) 14217 [“Munich 14217”], a Bishop sued a Count for having executed an Anabaptist, as this violated his spiritual jurisdiction.

<sup>11</sup> e.g. Bayerisches Hauptstaatsarchiv (RKG) 1476 [“Munich 1476”]: case in which one Count sued another Count for his having ordered a servant to confiscate the keys of the parish church in Öttingen, locked the doors of the church, and forbade any practices of the old faith therein, resulting in, among other things, newborns being denied baptism, 1540-1541.

<sup>12</sup> e.g. Hauptstaatsarchiv Stuttgart C3 (RKG) 1732 [“Munich 1732”]: case in which sisters of the Franciscan order in Heilbronn along with the imperial prosecutor sued the city of Heilbronn for plundering the house and garden there, confiscating its effects, and expelling the sisters out of the city; and for forbidding town residents from testifying against the town council in the hearing.

<sup>13</sup> The term “recess” refers to the document produced at the end of an Imperial Diet; “*Abschied*” means departure, i.e. the document produced at departure (Stollberg-Rilinger, *Old Clothes*, 62-3). For more, see Chapter 2.

<sup>14</sup> It is anachronistic to use the names “Protestants” and “Catholics” in this period, as confessions were still in formation. Throughout the dissertation, I use a variety of terms to refer to these proto-formations, including “old-faith,” “the majority of estates,” or “proto-Catholic” and “evangelical,” “protesting estates” or “proto-Protestant.” See Armin Kohnle, *Reichstag und Reformation: kaiserliche und ständische Religionspolitik von den Anfängen der Causa Lutheri bis zum Nürnberger Religionsfrieden* (Heidelberg: Gütersloher, 2001), 20. On the perils of naming, see Axel Gotthard, *Der Augsburger Religionsfrieden* (Münster: Aschendorff, 2004), 124-6 and 247-9.

<sup>15</sup> Reformation cases appeared in other courts such as church courts, city, territorial, and regional courts, among others. See Christopher Ocker, *Church Robbers and Reformers in Germany, 1525-1547: Confiscation and Religious Purpose in the Holy Roman Empire* (Leiden; Boston: Brill, 2006), 114. For an example of scholarship that looks at Reformation cases at a variety of judicial levels, see Hermann Buck, *Die Anfänge der Konstanzer Reformationsprozesse: Osterreich, Eidgenossenschaft, und Schmalkaldischer Bund 1510/22-1531* (Tübingen: Osiandersche Buchhandlung in Kommission, 1964). There were two competing “supreme courts” in the Empire at this time: the *Reichshofrat* (Aulic Council) in Vienna and the *Hofgericht* at Rottweil. The Aulic Council was established in 1497 by Emperor Maximilian I in order “to safeguard the judicial aspects of his imperial prerogatives” (Wilson, 627). It was the court tied to the personal justice of the Emperor and its judges were all Habsburg appointees, operating as a counterpoint to the primarily Estates-led Imperial Chamber Court. It was not functioning between 1519 and 1559. The *Hofgericht* at Rottweil was established in the thirteenth century as a patrimonial court

Emperor), and judges appointed by both Emperor and Estates, the Imperial Chamber Court was the first Empire-wide judicial forum that aspired to be independent of the personal justice of the Emperor. In this relatively new, and initially unstable, Roman law court, old-faith litigants sued princes and cities for violating the Land-Peace, confiscating church property, seizing jurisdiction, and other illegal acts. Because its first-instance litigants were primarily those directly subject to the Emperor, the litigation also had the character of public law.<sup>16</sup>

This dissertation is a socio-legal history of Reformation-related litigation that appeared in the Imperial Chamber Court prior to the 1555 Augsburg Religion-Peace. This is the first study in the English language to use these court records as a primary source. It offers a new kind of legal history of the Reformation. The legal history of the early German Reformation has primarily been the territory of intellectual historians, theologians, and scholars of public law. Their focus on political negotiations, watershed treaties, theological writings, and top-down legislative output, while invaluable, tell us only part of the story. My work, by contrast, elevates the importance of civil litigation as a distinctly important forum in which the Reformation unfolded. I suggest that historiographical focus on legal declaration—in the form of legislation such as the Worms Edict and the Augsburg Religion-Peace—over quotidian aspects of legal practice is the consequence of law’s tendency to conceal the messy, contingent, performative aspects that in fact constitute its authority.<sup>17</sup>

To the extent scholars have studied the Reformation cases, they have tended to focus on the political backdrop, who wins and who loses, or the Court’s developing jurisprudence. My work, by contrast, shows that legal praxis—the work of classification, of performative speech acts, and of experimentation in high-stakes contexts—are just as important, if not more important, than politics and doctrine for understanding the legal significance of the Reformation.

The Reformation holds a particular potency in the historiography of the Christian West as an originary moment for forms of political arrangement and social life that would recognize and acknowledge internal Christian difference, and, eventually, an ever-expanding circle of worldviews.<sup>18</sup> In particular, historians have tended to look to the Augsburg Religion-Peace of 1555—however imperfect and incomplete—as the headwaters variously of modern secularism, religious freedom, the rule of law, and sovereignty. I argue that we need to look to the early decades of the Reformation to understand what precisely the Peace was aiming to settle and

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over Habsburg domains and subjects in the south and southwest. Over time it came to be spoken of as an “imperial court,” adjudicating disputes involving direct imperial subjects well beyond this region into the eighteenth century. Though not in direct competition with the Imperial Chamber Court, as the Aulic Council was, the Hofgericht at Rottweil represented a potent judicial alternative and became one of the most important instances from which litigants would appeal to the Imperial Chamber Court. See Ulrike Schillinger, “Die Neue Rottweiler Hofgerichtsordnung von 1572,” in *Prozessakten, Parteien, Partikularinteressen: Höchstgerichtsbarkeit in der Mitte Europas vom 15. bis 19. Jahrhundert*, ed. Alexander Denzler et al. (Berlin: De Gruyter, 2015), 55-59; Edgar Liebmann, “Reichskammergericht und Reichshofrat in der historischen Forschung von 1866 bis zur Gegenwart,” *Jahrbuch der juristischen Zeitgeschichte* 6 (2004/2005): 81-103; Scheurmann, *Frieden durch Recht*,” 184-7.

<sup>16</sup> On the personal jurisdiction of the Imperial Chamber Court, and the relationship between public and private law, see Chapter 2.

<sup>17</sup> Justin B. Richland, “Jurisdiction: Grounding Law in Language,” *Annu. Rev. Anthropol.* 42 (2013): 212-214.

<sup>18</sup> This focus on Western Christianity can come at the expense of understanding long-standing arrangements of coexistence and the range of hybrid affiliations that have existed historically throughout other parts of Europe, and the world. See e.g. Peter Brown, *The Rise of Western Christendom: Triumph and Diversity, A.D. 200-1000* (Chichester: John Wiley & Sons, 2012). For early modern central Europe, see e.g. Howard Louthan, Gary B. Cohen, Franz A.J. Szabo, eds., *Diversity and Dissent: Negotiating Religious Difference in Central Europe, 1500-1800* (New York: Berghahn Books, 2011).

contain. A careful examination of civil litigation can help us account for the most consequential legal transformation of the early Reformation period: while in 1521 Lutheranism was outlawed as a heresy (in the Edict of Worms), in 1555 it was recognized as a legal confession (in the Augsburg Peace).<sup>19</sup> Put another way, we cannot understand how the Holy Roman Empire got from Worms to Augsburg without understanding the Reformation cases.

This dissertation also provides a new genealogy for “religion” as a secular legal category. While historians have tended to look to the Enlightenment for a point of origins of “religion” as an academic category, or to the Augsburg Peace as its origins as a political-legal category, in fact, the question of what counted as a “matter of religion” was a key issue as early as the 1520s in the context of Reformation litigation. My research shows how the deep ambiguity of the term “religion” in these cases was decisive in shaping the Augsburg Peace and imperial public law.

Finally, my dissertation offers a new way of understanding the impact of Protestantism on modern law. Rather than examining how Protestant rulers reformed law in their domains, or the writings of theologians like Luther and Melancthon on law, my dissertation analyzes the ways in which Protestant litigants experimented with imperial law in the context of high-stakes litigation. I identify certain patterns of usage that can help explain some of the features of the post-1555 imperial system—including its recognition of multiple “religious parties,” its increased investment in the consolidation of state institutions to manage agonistic difference, and the formation of two distinct legal interpretive universes along confessional lines which eventually destabilized the Augsburg system in the seventeenth century.

For readers interested in law and legal history, they will find an exposition of fundamental questions of lawmaking in the Holy Roman Empire, and the way this legal culture shaped how the Reformation unfolded in the German lands. For readers interested in the Reformation, they will find a new approach to considering the role of law in this period, and its consequences on modern law. For readers interested in secularism, they will find a fresh scene in which religion gets re-invented, and a detailed examination of the status of the Reformation in producing the particular intractability of “religion” as we have inherited it in late modernity.

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On Sunday January 8, 1531, after attending an early sermon for Three Kings’ Day and sharing breakfast, Ludwig Vogelmann, the lay administrator of the Antonier monastery in Memmingen, heard a scream.<sup>20</sup> The stewardess, who happened to be his sister, had responded to a knock at the door and was met by a large group of official-looking men. Having quietly and secretly climbed the steps to the preceptory, their sudden appearance caused her enough alarm that she “screamed woefully” at the sight of them.<sup>21</sup>

Perhaps Vogelmann understood what the scream signaled; he quickly closed two inner doors—those to the parlor and bedchamber—barricading himself in.<sup>22</sup> When the officials finally broke through the doors with the use of axes and other instruments, they arrested Vogelmann. Witness testimony, gathered several years later, described a telling moment:

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<sup>19</sup> On the definition of “confession,” see Jaroslav Pelikan, Jaroslav, *Credo: Historical and Theological Guide to Creeds and Confessions of Faith in the Christian Tradition* (New Haven, CT: Yale, 2003), 1-5.

<sup>20</sup> Bayerisches Hauptstaatsarchiv (RKG) 5657 [“Munich 5657”].

<sup>21</sup> Munich 5657, Q30, Kommissionrotulus, 1538. Laurentz Stoffel’s testimony regarding article 22: “jemerlich geschrihen.”

<sup>22</sup> Munich 5657, Q30, Kommissionrotulus, 1538. Laurentz Stoffel’s testimony.

The ninth witness from Dillingen testifies that he himself heard Vogelmann demand his satchel from the officials and, holding a pearl *pater noster* in his hand, say to them: “by imperial rights, you shall leave me alone.”<sup>23</sup>

One of them responded: “dear father, do not fear, we will do nothing to you that is against the law.”<sup>24</sup>

By the next afternoon, Vogelmann had been publicly executed in the Memmingen market square. The events that preceded, and the litigation in the Imperial Chamber Court that followed Vogelmann’s arrest and execution would span a 25-year long period (1523-1548) that coincided with the twists and turns of the early decades of the Reformation in the German lands.<sup>25</sup> This brief exchange between Vogelmann and one of the city officials at the time of his arrest captures some of the legal complexity that reform unleashed.

One is the image of Vogelmann, a lay administrator of a monastery, holding a *pater noster* (rosary)—a quintessential symbol of old-faith piety—while demanding that imperial law be obeyed. The “imperial rights” that Vogelmann referred to had come up that morning over breakfast with the farmhand Paul Kutter.<sup>26</sup> Vogelmann had recently returned to Memmingen for the first time since the Augsburg Imperial Diet of 1530, where he had succeeded in persuading the Emperor to give him an imperial safe passage letter because he felt in danger from the city officials of Memmingen.<sup>27</sup> Kutter warned Vogelmann of rumors that the city planned to arrest him after his return from Augsburg, but Vogelmann did not seem worried:

The witness [Paul Kutter] says that he, on that Sunday on which Vogelmann was arrested, ate breakfast with him, Vogelmann, in the preceptory, when, among other things, one came to speak about the city servants (*Stattknecht*) wanting to capture/arrest him, to which Vogelmann said “for that, the imperial safe passage in my bosom (*im puesen*) is good for me,” and with the hand he tapped on the bosom.<sup>28</sup>

Vogelmann was depicted here as blending old-faith piety with noble confidence in the imperial legal order, in the idea that the imperial safe passage letter would protect him. Gripping his *pater noster* and barricading himself into the room also indicated the precariousness of imperial law. The ambiguity of Kutter’s last sentence was also suggestive—was Vogelmann tapping the actual

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<sup>23</sup> Munich 5657, Q44, Probation unnd in eventum conclusion schriftt, 1540. Summary of witness testimony, as to article 24, how the Memmingers handled Vogelmann: “bringt des 9. Thillingischen zeugen sag myt sich, dem er Vogelmannn seynen Wetschkar befolhen und eyn corallen pater noster inn der handt halttendt zu den schergen gesagt, ir werdt mich doch bey key. rechtenn bleiben lassenn, hatt solchs der zeug selbs gehort.”

<sup>24</sup> Munich 5657, Q30, Kommissionsrotulus 1538, Laurentz Stoffel’s testimony regarding article 24: “Auff den vierundzwanzigsten beweiß articul geantwurt, Nit one, eines Raths verordnete diener, haben den Burggraven, aus der preceptorei heraus fur ine ge- zeugen vancklich gefuert, alda er Burggraf ime seinen wetzger bevolhen, und zu denen so ine gefurt gesagt, ir werdet mich doch bei kayserlichen Rechten beleiben lassen, hab ainer aus inen, geantwurt, lieber vatter, erschreckend nit, wir wollen euch nit wider recht thun. Ob solhs, wie oblaut wider Recht und unbewart irer Ehren beschehen, sei im nit wissendt.”

<sup>25</sup> More on this case in Chapters 3, 4, and 5.

<sup>26</sup> Munich 5657, Q30, Kommissionrotulus, 1538. Paul Kutter’s testimony, listed as a *Pawknecht* (*Bauknecht*).

<sup>27</sup> For more on this case, see Chapter 4.

<sup>28</sup> Munich 5657, Q30, Kommissionrotulus, 1538. Paul Kutter’s testimony.



letter of imperial safe passage stored near his chest? Or was he indicating the spiritual site of a higher form of safety?

The response by the city official—“dear father, do not fear, we will do nothing to you that is against the law”—combined a strangely endearing consolation with the heightened ambiguity that at this historical moment was carried within that phrase “to go against the law.” Local reformations had entailed breaking all kinds of existing laws, norms, and customs; whose law would they not violate? Imperial law? Local law? God’s law? It was precisely the meaning of law-breaking, and the impact of that law-breaking on the coherence of the constitutional order, and of the Empire as *corpus mysticum*, that was at stake in the Reformation.

The excerpt also draws our attention to the discursive aspect of the case file itself. What counted as a legal event? Did the record of this brief exchange between Vogelmann and the city official carry any legal significance for the commissioner who gathered witness testimony, or for the judges who would weigh it? Or was the significance something altogether different? Indeed, the excerpt above about the pater noster is taken from a 1540 document in which the lawyers for Vogelmann’s family provided a summary of the witness testimony for the judges. It referred to the testimony of the ninth witness from Dillingen, Laurenz Stoffel (Lorenz Stoeffel), Priest at the Antonier monastery chapel. But Stoffel’s original testimony, recorded in 1538, and on which the 1540 document was based, reads:

In response to the twenty-fourth article, the witness answered that he saw the official appointed by the city council arrest the Burggrave [Vogelmann] and lead him out of the preceptory, when the Burggrave demanded from him his satchel, and said to those who were so leading him: “by imperial rights, you shall leave me alone.”<sup>29</sup>

There is no mention here of a pearl pater noster, and I have been unable to find any reference to a pater noster anywhere else in the 400-page document. Did the lawyers for Vogelmann’s family insert this object into the story? If so, why? Like so much of the litigation that emerged from Reformation-related disputes, the legal issue in the case was the rather narrow question of whether the city violated the imperial safe passage letter when it executed Vogelmann. It was the defendant city of Memmingen that sought to recast the legal issue as one “concerning the religion,” and therefore not subject to the civil jurisdiction of the Imperial Chamber Court. But perhaps the lawyers for Vogelmann’s family wanted to use the pater noster in order to highlight the context of the religious controversy, without sacrificing the narrow legal issue that would ensure they would win the case. Or perhaps the lawyers for Vogelmann’s family were trying to settle the depiction of Vogelmann’s character, and to fix his motivations for speaking out against the city at the Augsburg Diet of 1530; the pater noster signaled that it was pious zeal and loyal conservatism that led Vogelmann to transform from one of the city’s most trusted city officials prior to its introduction of the Reformation, to its seditious enemy after. The pater noster clarified, perhaps, that Vogelmann was not a public criminal, but a martyr.

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<sup>29</sup> Munich 5657, Q30, Kommissionrotulus, 1538: “Auff den vierundzwanzigsten beweiß articul geantwurt, Nit one, eines Raths verordnete diener, haben den Burggraven, aus der preceptorei heraus fur ine gezeugen vancklich gefuert, alda er Burggraf ime seinen wetzger bevolhen, und zu denen so ine gefurt gesagt, ir werdet mich doch bei kayserlichen Rechten beleiben lassen, hab ainer aus inen, geantwurt, lieber vatter, erschreckend nit, wir wollen euch nit wider recht thun.”

## Brief Chapter Summary

Cases like the one involving the family of Ludwig Vogelmann and the city of Memmingen are at the heart of this dissertation. A close look at Reformation-related litigation changes the familiar ways in which we have understood the legal history of the Reformation as a whole.

Following this introductory chapter, Chapter 2 provides the legislative backdrop for the litigation story that will follow. In the first part of the chapter, I track the events surrounding the *causa Lutheri* with a special focus on three legal frameworks that emerged as a result—the Papal Bull, the Edict of Worms, and the lesser-known Regiment Mandate. Historians have tended to focus on the trials against Luther and the judgments and legislation of 1521 as decisive for the creation of a legal regime that aimed to snuff out the new heresy. Yet none of them were particularly effective in doing so. I show the conditions in which the unilateral nature of the Bull, the Edict, and the Mandate ensured their ineffectiveness. I also explain why the legal category of “heresy” was not particularly effective in this moment. In the second part of the chapter, I describe the constitutional conditions and decision-making culture to which legislation was subject. Not the unilateral forms, but those that were the subject of negotiations and deliberations involving Estates, in and outside of imperial assemblies, proved to be touchstones in the first half of the sixteenth century. I elevate the importance of courts in this context as another kind of forum for deliberating the Reformation, through the proxies of specific disputes; in other words, these civil law disputes took on the character of public law. This leads into a discussion about the founding of the Imperial Chamber Court and the fortuitous timing of its formative years with the early Reformation. In the process, readers will learn about the legal culture of the Holy Roman Empire and the relationship between constitution, legislation, and litigation in this moment.

Chapter 3 builds upon this description of the legal culture of the Holy Roman Empire, by describing the main jurisprudential regimes that were called upon and tested in the Reformation cases. With rare exception (such as one case that cites the Worms Edict, discussed in the chapter) the Reformation cases in the Imperial Chamber Court made hardly any reference to the three sources of law of the early 1520s—the Bulls, the Worms Edict, and the Regiment Mandate. Instead, plaintiffs sued for violations of laws concerning property, jurisdiction, and peace. I discuss the varied sources of the laws underneath these broad headings. Together these, along with imperial recesses, formed a patchwork jurisprudence to deal with the realities of the Reformation. Moreover, I show the varied calculations involved in making the Reformation context of a dispute legible in the course of litigation. Reasons for eliding the Reformation context changed over the course of our period. Nonetheless, litigants often found ways to bring the Reformation context of a dispute to the surface through pious rebuke—sometimes subtle, sometimes vivid in its language. I show the kinds of arguments and description litigants used to talk about the Reformation within the confines of the Court’s substantive jurisdiction and procedures.

In Chapter 4, I track a shift in the way proto-Protestant litigants were approaching these cases. Whereas in the previous chapter, I considered the ad hoc thematization of the religious controversy, which nonetheless kept stable the original legal issue of property, peace or jurisdiction, in this chapter, we see proto-Protestant litigants experimentally translating this backdrop into a matter of legal classification and jurisdiction. In particular, they argued that a given property, jurisdiction, or land-peace dispute was a “matter of religion” (*Religionssache*) and therefore did not belong within the jurisdiction of the Court. In the sixteenth century,

notwithstanding the use of “religion” in Roman law sources, the term was used generically, standing outside of the centuries-old jurisdictional binary of “spiritual” (*geistlich*) and “worldly” (*weltlich*). Thus, it was the intention of the proto-Protestants in saying that something was “a matter of religion” to place it in a jurisdictional no-man’s-land, requiring the extraordinary forum of a Christian Council to resolve the core disagreements that, they said, gave rise to these disputes in the first place. In this chapter, I scrutinize moments of articulation in which parties offered more language on the meaning of “matter of religion,” from a variety of sources, including case files, correspondences, and judges’ notes. I track the claims of the protesting estates; the responses of opposing litigants; the responses of the judges; the involvement of the Emperor and King; and disagreements among the protesting estates themselves about what counted as a matter of religion. These moments did not yield reflective, second-order deliberation or debate. Rather, the meaning of the phrase “matter of religion” was being worked, reworked, and reworked again by interested parties in high-stakes disputes. I argue that we cannot understand the facets of this emergent legal category, and its status as a *terminus technicus* in the Augsburg Religion-Peace, without understanding its bricolage character.

In Chapter 5, I shift from a focus on substantive law to a focus on legal procedure. I advance the argument that experimental uses of mundane, formulaic legal instruments of Roman law civil procedure operated as unexpected proxies for the most pressing constitutional questions of the early Reformation. I do this by closely analyzing the repeated use, especially by proto-Protestant litigants, of several legal instruments in the Reformation suits—namely, the power of attorney, the protestation, and the recusation—as “performative” and “passionate” legal speech acts.<sup>30</sup> I show that, first, the evangelical estates’ usage of the protestation instrument was drawing on centuries worth of customary legal practice, while at the same time mobilizing it in order to articulate a new way of relating law and conscience. The protestation instrument became a mode of “veridiction,” a kind of bearing truth about the event and about oneself in a high-stakes context. Second, the protesting estates’ usage of the “power of attorney” document was drawing on a legal culture of combination and corporatism, and in the process proposing a new form of legally legible group identification and belonging in terms of confession—the beginning of the idea of a “religious party” as a legal category. Finally, the recusation instrument, though tapping into familiar principles and doctrines against judge bias, became a means of making accusations of confessional partisanship, and making legible a whole set of suspicions linked to questions of authority and legal validity, paving the way for confessionally-distinct jurisprudences within the imperial legal system—an instability that contributed to the wars of the seventeenth century.

In Chapter 6, I closely read the first Imperial Chamber Court case in which the Augsburg Religion-Peace was the ruling law. Even in the pre-trial stage of this case, the first that tested the meaning of a “violation of the Religion-Peace,” parties were debating the most fundamental doctrinal questions of the relationship between the “two powers”—spiritual and temporal—citing authoritative texts from the Church fathers to Justinian.<sup>31</sup> One does not see this level of debate and citation in the pre-1555 cases. I embed the Augsburg Peace in its litigative context, and highlight the ways in which it was crafted with future litigation in mind. I show that, far from clarifying the boundaries of this new jurisdictional category, the Peace at once opened up, ossified, and indexed all of the paradoxes and conundra that had characterized the pre-1555 litigation. I link this containment move with the legal culture and juridical technique of

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<sup>30</sup> Marianne Constable, *Our Word is Our Bond: How Legal Speech Acts* (Palo Alto, CA: Stanford University Press, 2014), 21, 34-36.

<sup>31</sup> Bayerisches Hauptstaatsarchiv (RKG) 264 [“Munich 264”].

dissimulation. I argue that the character of the Peace as essentially dissimulative and ambiguous shaped the way that this new category of legal issue, this newly justiciable object, was conceptualized at its conception. In other words, “religion” as an imperial civil law category did not have a simple noun-like referent (like faith, worship, or confession), rather, it gestured to a certain “problem-space.”<sup>32</sup>

In summary, while Chapters 1 and 2 provide background, Chapter 3 describes the ad hoc, patchwork jurisprudence under which Reformation disputes were litigated; Chapter 4 describes the experimentation especially by proto-Protestant litigants to create new categories and use conventional instruments in unconventional ways; and Chapter 5 describes the containment of these disputes in imperial law under the “religion” category. In the conclusion, I consider how this study revises conventional historiographies of secularism and religious freedom, that treat the Reformation as its headwaters.

### **What is “the Reformation”?**

The study of the Reformation has generated a vast literature, which has undergone transformations in line with general trends of historical writing over the past five centuries. The most notable relatively recent shifts have involved a move away from approaches that attribute historical change to a single causal engine (such as materialist or idealist accounts), or oriented to a single telos (such as the nation-state). These grand narratives have given way to accounts that favor the complexity of factors, and the contingency of outcomes; causality is thought of not in terms of long arcs of human change or divine purpose, but as a mechanism whereby one event follows another in a chain of possibilities, and where the turn or preference towards one possible path over another is contingent, inviting “thick description” rather than systematic explanation.<sup>33</sup>

For centuries, “the Reformation” has been a term used to refer to a Europe-wide event that spanned the first half of the sixteenth century, and had lasting consequences at the level of ideas, faith, society, law, economy, and government. At its core, it was a revolution of the institution of the Church, its theology and practices, that resulted in the splintering of Western Christendom into a variety of confessions. It began with the “Luther affair” in 1517, represented symbolically through the image of Martin Luther posting his ninety-five theses to the Wittenberg castle church door,<sup>34</sup> and ended in the 1550s, as the Catholic Church’s response took a more intensive and coherent form in the period conventionally called the Counter-Reformation. This chronology represents a dialectical pattern in which the progressive Reformation (thesis) evoked a reactionary Counter-Reformation (antithesis), the contradiction of which led to destructive violence in the Thirty Years War, which produced, as a consequence, the absolutist early modern

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<sup>32</sup> David Scott, *Conscripts of Modernity: The Tragedy of Colonial Enlightenment* (Durham: Duke University Press, 2004), 4.

<sup>33</sup> Clifford Geertz, “Thick Description: Toward an Interpretive Theory of Culture,” in *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973): 3-30.

<sup>34</sup> “In fact, it is unlikely that such an event ever took place. The contents of the theses became known with astonishing speed to a wider public in the Reich [Empire] during November 1517, but it seems clear that Luther himself was not responsible” (Whaley, *Germany*, 143). See Erwin Iserloh, *The Theses were Not Posted: Luther Between Reform and Reformation* (Boston, MA: Beacon Press, 1968), 76-97.

state (synthesis), and in turn the nation-state, “the culmination point of world history.”<sup>35</sup> This account tells either a story of progress or one of decline—depending on the historian’s leanings.

Reformation historiography was—and, in some cases, still remains—highly polemical.<sup>36</sup> These polemics reflected not only confessional lines, but also the politics of the moment. For instance, in the eighteenth and nineteenth centuries, the historiography was dominated by debates about whether the Reformation facilitated the full expression and emancipation of the German Spirit, or fractured specifically Germanic forms of communalism that Romantics idealized.<sup>37</sup> Later, Cold War historiography emphasized the ways in which the Reformation intertwined with the Peasants’ War of 1525, which some saw as together constituting a failed early bourgeois revolution, the “final stage of a revolutionary situation, which arose from the disintegration of the feudal mode of production.”<sup>38</sup>

Though mostly evacuated of heavy-handed teleology, the nation-state remained a powerful organizing category in the discipline, as historians continued, by and large, to approach the study of the Reformation from within the boundaries of, and at the scale of, future nation-states. In the 1960s, however, scholars began to study urban settings as the heart of the Reformation, seeing in them the earliest sites of conflict, preaching, and reform. These studies inaugurated the sociohistorical study of the Reformation, constituting the earliest attempts to “resolve ‘the Reformation’ into its various forms and find the social and political principles which seem to have determined the proliferation of forms of Reformation thought and religion.”<sup>39</sup> Some newer work looks at developments across these boundaries by identifying faithful networks that crossed conventional borders,<sup>40</sup> or by situating the Reformation within anti-Turkish polemics<sup>41</sup> and the emerging global consciousness created through the encounter with “the New World.”<sup>42</sup>

In the 1970s, scholars began to question the inherited periodization of the Reformation. Where an earlier historiography saw epoch breaks, the newer historiography began to see

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<sup>35</sup> Wolfgang Reinhard, “Reformation, Counter-Reformation, and the Early Modern State a Reassessment,” *The Catholic Historical Review* 75, no. 3 (1989): 383-4.

<sup>36</sup> See series of essays on this subject in *Archiv für Reformationsgeschichte* 97 (2006): Philip Benedict “What is Post-Confessional Reformation History,” 277-83; Scott Hendrix “Post-confessional Research and Confessional Commitment,” 284-8; Lyndal Roper “Allegiance and Reformation History,” 289-97; Ethan Shagan “Can Historians End the Reformation?” 298-306.

<sup>37</sup> Roland H. Bainton, “Interpretations of the Reformation,” *American Historical Review* 66, no. 1 (Oct. 1960), 75-6. See also Thomas A. Brady, *Protestant Politics: Jacob Sturm (1489-1553) and the German Reformation* (Atlantic Highlands, NJ: Humanities Press, 1995), 3-4; and Whaley, *Germany*, 3.

<sup>38</sup> Brady, *Protestant Politics*, 8.

<sup>39</sup> Thomas A Brady, *Communities, Politics, and Reformation in Early Modern Europe* (Leiden: Brill, 1998), 2. See also Susan C. Karant-Nunn, “Changing One’s Mind: Transformations in Reformation History from a Germanist’s Perspective,” *Renaissance Quarterly* 58, no. 4 (Winter 2005): 1104-5.

<sup>40</sup> On Anglo-German Lutheran relations in the sixteenth century, for instance, see: Rory McEntegart, *Henry VIII, the League of Schmalkalden, and the English Reformation* (Woodbridge, Suffolk: Boydell Press, 2002); also David Scott Gehring, “From the Strange Death to the Odd Afterlife of Lutheran England,” *The Historical Journal* 57, no. 3 (September 2014): 825-44. For work on the birth of the Jesuits in the 1540s, see: John O’Malley, *The First Jesuits* (Cambridge, MA: Harvard University Press, 1993). See also Brady, *Protestant Politics*, 150ff.

<sup>41</sup> See e.g. Hartmut Bobzin, *Der Koran im Zeitalter der Reformation* (Stuttgart: In Kommission bei Franz Steiner Verlag, 1995); and Gregory J. Miller, *The Turks and Islam in Reformation Germany* (London: Routledge, 2017).

<sup>42</sup> See e.g. Lee Palmer Wandel, *The Reformation: Towards a New History* (Cambridge, UK: Cambridge University Press, 2011), 39-62.

continuities.<sup>43</sup> Scholars increasingly excavated the late medieval conditions in which reform found fertile ground, such as humanism,<sup>44</sup> print culture,<sup>45</sup> anticlericalism,<sup>46</sup> and territorialization.<sup>47</sup> They showed that certain developments hitherto associated with the Reformation had been taking place already decades before—such as secularization of church property, local forms of church communalism, and rivalries between Rome and the “liberties of German princes.” Where an earlier historiography drove their accounts on the basis of a rarefied theory of change over time, the newer historiography reveled in the discovery of empirical evidence of exceptions, counter-examples, and anomalies. In 1989, for instance, Reinhard argued against the dialectical periodization described above, in part by drawing together a literature that provided evidence that “the labels ‘Reformation’ and ‘Counter-Reformation’ simply did not correspond, either chronologically or materially, to the images of ‘progressive action’ and ‘reactionary reaction’ that once seemed so self-evident.”<sup>48</sup> Where an earlier historiography saw singularity, the newer historiography saw plurality. In 2004, for instance, Brady identified a long “age of Reformations” that spanned roughly 1450-1650. He argued that insofar as “reform” had been a watchword across multiple domains of life in the German lands—religious, legal, social, political, and economic—since at least the mid-fifteenth century, the Protestant Reformation represented just one in a “complex amalgam of parallel movements.”<sup>49</sup> Across lines of confession, estate, and geography, persons of all walks of life were imbricated in the very same set of processes. In Brady’s view, “the narrative of the German Reformation becomes a cluster of interrelated stories, played out by different sorts of actors on different stages, connected at some levels, but not all, by a common religious tradition, common traditions of governance, and at least some elements of a common language.”<sup>50</sup>

Some scholars go even further to pull apart what they regard as a monolithic view of the Reformation by thinking about it as a period that produced not new confessions, but a new outlook on religious revision. It would be wrong, they argue, to think of the varieties of churches

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<sup>43</sup> See e.g. Constantin Fasolt, “Hegel’s Ghost: Europe, The Reformation, and the Middle Ages,” *Viator* 39 (2008): 345–86; also Steven Ozment, *The Age of Reform, 1250-1550: An Intellectual and Religious History of Late Medieval and Reformation Europe* (New Haven: Yale University Press, 1980).

<sup>44</sup> See e.g. Brian Cummings, *The Literary Culture of the Reformation: Grammar and Grace* (Oxford: Oxford University Press, 2002); also Anthony Levi, *Renaissance and Reformation: The Intellectual Genesis* (New Haven, CT; London, UK: Yale University Press, 2002).

<sup>45</sup> See e.g. Lee Palmer Wandel, *The Reformation*, 63-86; also Whaley, *Germany*, 117-121; and Elizabeth L. Eisenstein, *The Printing Revolution in Early Modern Europe* (Cambridge, UK: Cambridge University Press, 2005); also Adrian Johns, *The Nature of the Book: Print and Knowledge in the Making* (Chicago, IL: University of Chicago Press, 1998).

<sup>46</sup> See e.g. Peter A. Dykema and Heiko Augustinus Oberman, eds., *Anticlericalism in Late Medieval and Early Modern Europe* (Leiden: Brill, 1993); also R. Po-Chia Hsia, “The Structure of Belief: Confessionalism and Society 1500-1600,” in *Germany: A New Social and Economic History. Vol. I: 1450-1630* (London: Arnold, 1996).

<sup>47</sup> See e.g. William Bradford Smith, *Reformation and the German Territorial State: Upper Franconia, 1300-1630* (Rochester, NY: University of Rochester Press, 2008); and Jörn Sieglerschmidt, *Territorialstaat und Kirchenregiment: Studien zur Rechtsdogmatik des Kirchenpatronatsrechts im 15. und 16. Jahrhundert* (Cologne: Böhlau, 1987).

<sup>48</sup> Reinhard, “Reformation,” 390. See John W. O’Malley, *Trent and All That: Renaming Catholicism in the Early Modern Era* (Cambridge, MA: Harvard University Press, 2002); and Robert Bireley, *The Refashioning of Catholicism, 1450-1700: A Reassessment of the Counter Reformation* (New York: St. Martin’s Press, 1999).

<sup>49</sup> Whaley, *Germany*, 63.

<sup>50</sup> Brady, *Protestant Politics*, 7. See Klaus Fitschen, et al., eds., *Kulturelle Wirkungen der Reformation / Cultural Impact of the Reformation*, Leucorea-Studien zur Geschichte der Reformation und der lutherischen Orthodoxie 36, 2 vols. (Leipzig: Evangelisches Verlagshaus, 2018).

and forms of Christianity that have developed globally since the sixteenth-century as outgrowths of early modern German Protestantism. Rather, the sheer variety among these churches indicates that what was set in motion in that period was not “one tradition” but instead “permanent processes of adaptation, development, consolidation, and the questioning of religious practices and ideas which we actively discover and interpret from our particular position in the present.”<sup>51</sup> The 2016 Oxford handbook on the Reformations, for instance, “traces processes rather than fixed identities and points to rather more eclectic intellectual trajectories.”<sup>52</sup> This newer scholarship explores “how past legacies—which include a broad spectrum of ideas and practices ranging from mysticism to millenarianism—link to contemporary Protestantisms, or how they are constructed in memory cultures.”<sup>53</sup> When “Reformation” is used not simply as a demarcation of a certain period, but rather as a particular kind of genealogy or discourse containing a particular ethos vis-a-vis the divine, spiritual authority, and spiritual knowledges, then the historiography of the Reformation moves far beyond early modern Europe, and includes “questions about continuities and change in relation to much larger chronologies and geographies.”<sup>54</sup> On these accounts, “Reformation” denotes the emergence of particular ideational possibilities that transcend the historical specificity and lineages of sixteenth-century Europe.

Notwithstanding these newer, more multi-faceted articulations of “Reformation,” few, if any, historians have been willing to abandon the Reformation as a meaningful term by dissolving it within the broader transformations characteristic of that other contentious period with which it is largely coincident: the Early Modern.<sup>55</sup> Rublack writes, for instance: “The early modern period was characterized by renewed demographic growth, state building and new forms of popular politics, the beginnings of a ‘global age,’ areas of significant economic expansion and diversified material cultures, new technologies, such as printing, the expansion of learning, and proliferation of new intellectual trends as well as new challenges to the status of women and distinct languages of self-awareness. The religious transformations interlinked with these huge and varied political, social, economic, and mental changes across the globe.”<sup>56</sup> This excerpt illustrates that, notwithstanding the historiography’s push towards continuities, contingencies and complexities, the study of the Reformation continues to have as its core differentiating quality something that is “irreducibly religious,” entailing transformations at institutional, intellectual, and doctrinal levels that impacted the Church and Christianity in the sixteenth century.<sup>57</sup> Hence, some scholars embrace this periodization because it signifies a point of origin in the history of Protestantism, giving rise to new confessions and churches.<sup>58</sup> One strand of this

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<sup>51</sup> Ulinka Rublack, *The Oxford Handbook of the Protestant Reformations* (Oxford, UK: Oxford University Press, 2017), 5.

<sup>52</sup> Rublack, 5.

<sup>53</sup> Rublack, 5.

<sup>54</sup> Rublack, 14.

<sup>55</sup> For an interesting treatment of how Renaissance, Reformation, Late Medieval, and Early Modern relate in relation to the period 1400-1600, see Thomas A. Brady, Heiko Augustinus Oberman, and James D. Tracy, eds., *Handbook of European History, 1400-1600: Late Middle Ages, Renaissance, and Reformation* (Leiden: Brill, 1994), xiii-xxi.

<sup>56</sup> Rublack, 8.

<sup>57</sup> Daniela Blum, *Multikonfessionalität im Alltag: Speyer Zwischen Politischem Frieden und Bekenntnisernst (1555-1618)* (Münster: Aschendorff Verlag, 2015), 11.

<sup>58</sup> “[W]e can still have a Renaissance and a Reformation—more accurately, Renaissances and Reformations—providing that we no longer force them to serve us as the turning points from medieval to modern times. The concepts retain their value for designating respectively the literate, classicizing, urban-based culture of the lay elites and the great upheaval in the Christian church. Today, one speaks of Renaissance and Reformation as

historiography that was especially popular in the first half of the twentieth-century—which some have disparagingly described as a period of “Luther-mania”<sup>59</sup>—orients the Reformation period entirely around the writings of leading theological reformers, placing them “above and beyond mortal time.”<sup>60</sup> While newer intellectual historians of the Reformation contextualize these thinkers, and reflect on their situatedness in a particular political, social, and cultural landscape, they nonetheless take it as self-explanatory that the Reformation period is defined by the writings of this group of mostly men.<sup>61</sup>

Others embrace this periodization because they see in the sixteenth century a certain acceleration, a specific intensity or breadth to the reform efforts, as opposed to other periods in which “reform” operated as something of a cliché. For yet others, the original periodization has tended to stick as a matter of disciplinary organization, convenience, or shorthand. John Bossy, for instance, advocates using the term ‘Reformation’ “as sparingly as possible.” First, because “it goes along too easily with the notion that a bad form of Christianity was being replaced by a good one.” Second, because the term itself is too narrow, having been adopted “from the vocabulary of ecclesiastical discipline,” and meaning “the restoration to some ideal norm, by the action of superiors, of the conduct of institutions and persons.” Reformation, he says, is a concept that gets at “the history of the Church as an institution,” but what does it describe “in the history of Christianity,” at the level of “actual social behaviour, [...] thought, feeling, or culture”? The term “sits awkwardly across the subject without directing one’s attention anywhere in particular.” Still, he says, “something important happened to Western Christianity in the sixteenth century” and “the term ‘Reformation’ is probably as good a guide as any to investigating” what happened; “I,” Bossy concludes, “certainly have no superior alternative to propose.”<sup>62</sup>

Inevitably, embedded within a given study are historical judgements about the kinds of events and factors that matter. Some of these judgments are simply disciplinary, some are rooted in ethical or political commitments, such as those linked to the growth of social history in the 1960s and 1970s, and some are “metaphysical.”<sup>63</sup> For political historians, for instance, it would be impossible to tell a story about the Reformation without attending to the power-political constellations that existed between the Pope, the Emperor and his dynastic ambitions; estates and their leveraging of money to pay for wars as a bargaining tool; and various foreign powers such as the Ottoman Empire or the French.<sup>64</sup> Other historians point to the material, demographic, intellectual, and technological conditions that made the spread of certain kinds of ideas thinkable

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movements—the influence of social history—but they are no longer grand categories of periodization” (Brady, *Handbook*, xvii).

<sup>59</sup> Thomas Kauffman, introduction to *Reichstadt und Reformation, Neue Ausgabe*, by Bernd Moeller, ed. Thomas Kauffman (Tübingen: Mohr Siebeck, 2011), 8.

<sup>60</sup> Brady, *Communities*, 3.

<sup>61</sup> At worst, authors “employed the image of Martin Luther as a kind of metahistorical drill bit” (Brady, *Handbook*, xvii and. The literature cited there. Also see biographies cited in Karant-Nunn, “Changing,” 1102 footnote 4.

<sup>62</sup> John Bossy, *Christianity in the West* (Oxford, UK: Oxford University Press, 1985), 91.

<sup>63</sup> Brad S. Gregory, “The Other Confessional History: On Secular Bias in the Study of Religion,” *History and Theory* 45, no. 4 (2006): 132-149.

<sup>64</sup> “[...] reform as a response to imperial requests for money contributed to the emergence of a distinct ‘national’ identity of the Reich” (Whaley, *Germany*, 29). See e.g. James Tracy, *Charles V: Impresario of War* (Cambridge, UK: Cambridge University Press, 2002); also Paula Sutter Fichtner, *Terror and Toleration: The Habsburg Empire Confronts Islam, 1526 -1850* (London: Reaktion Books, 2008).



and formations possible.<sup>65</sup> Yet others excavate storylines from the “common” lives of peasants, preachers,<sup>66</sup> and women<sup>67</sup> who represent the blend of aspirations, interests, conditions and discourses that constituted the most subaltern expression of the Reformation.<sup>68</sup>

Many historians also explore the motivations of the Reformation’s various actors, wading sometimes into evaluative or polemical arguments about the “authenticity” of the Reformation, a debate about what the tumult of these decades “really” was about. Did the peasants rally around the reformed teachings because they saw it as their best hope for attaining freedom from serfdom? Did the princes support Luther because they saw it as their best chance for securing territorial sovereignty and expropriation of Church property? These approaches sometimes rely on the unstated assumptions that it is possible to accurately identify, or disambiguate, the purposes of historical actors, and that any purposes other than those deemed purely pious are automatically suspicious.<sup>69</sup>

Many scholars of the Reformation make some version of a “but for” argument as a tool of explanation: but for German political decentralization, or but for the theologies articulated by Luther, Zwingli or Calvin, or but for popular mobilization after a period of plague and intense economic hardship, or but for the powerful princes who protected Luther, or but for the “already shattered” status of late medieval Catholicism, or but for the spread of vernacular Bibles in the fifteenth century—the Reformation might not have happened. Reformation historians who incline towards sociological theory have offered heuristics to account for these blends of coincident factors in terms of a larger process or unifying dynamic, such as “normative centering,”<sup>70</sup> “revolution,”<sup>71</sup> “confessionalization”<sup>72</sup>—not to mention, “modernization” and “secularization.”

One of the reasons the Reformation as a period of historical study has persisted is because of the powerful links that historians, political theorists, and social theorists, beginning with the likes of Thomas Hobbes and Max Weber, have made between Protestantism and key

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<sup>65</sup> Lee Palmer Wandel, for instance, writes of late medieval developments: “Without the fusion of a deep feel for language as living and vital with the capacity of the technology of print to put into the hands of thousands the Word of God, there could have been no Reformation. Without print, the lessons of philology would not have had their power to move thousands to change their lives. Without philology, the printed page would have been but fixed black marks on paper” (Wandel, *Reformation*, 73-74). Susan Karant-Nunn, “What Was Preached in German Cities in the Early Years of the Reformation? Wildwuchs versus Lutheran Unity,” in *The Process of Change in Early Modern Europe: Essays in Honor of Miriam Usher Chrisman*, eds. Phillip N. Bebb and Sherrin Marshall (Athens, OH: Ohio University Press, 1988), 81-96.

<sup>66</sup> See Karant-Nunn, “Changing,” 1111 footnote 45 and the literature cited there.

<sup>67</sup> See e.g. Lyndal Roper *The Holy Household: Women and Morals in Reformation Augsburg* (Oxford, UK: Oxford University Press, 1991); and Merry E. Wiesner, “Beyond Women and the Family: Towards a Gender Analysis of the Reformation,” *The Sixteenth Century Journal* 18, no. 3 (1987): 311–21; also Olwen Hufton, *The Prospect Before Her: A History of Women in Western Europe, 1500-1800* (New York: Knopf, 1996); and Kirsi Stjerna, *Women and the Reformation* (Malden, MA: Blackwell, 2009).

<sup>68</sup> See e.g. Kat Hill, *Baptism, Brotherhood, and Belief in Reformation Germany: Anabaptism and Lutheranism, 1525-1585* (Oxford, UK: Oxford University Press, 2015).

<sup>69</sup> See Scott H. Hendrix, “Loyalty, Piety, or Opportunism: German Princes and the Reformation,” *The Journal of Interdisciplinary History* 25, no. 2 (1994): 211–24.

<sup>70</sup> Berndt Hamm, “Normative Centering in the Fifteenth and Sixteenth Centuries: Observations on Religiosity, Theology, and Iconology,” trans. John M. Frymire, *Journal of Early Modern History* 3, no. 4 (Jan. 1999): 307-354.

<sup>71</sup> Harold J. Berman, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, MA: Belknap Press of Harvard University Press, 2006).

<sup>72</sup> See discussion of confessionalization below.

elements of “modernity” such as secularism, capitalism, freedom of conscience, sovereignty, social welfare, and human rights. The legal historiography of the Reformation, in particular, has been oriented around these hallmarks; it is to that subject we now turn.

## The Legal Historiography of the Reformation

The study of law and the German Reformation has yielded as multi-faceted a set of approaches as the study of the Reformation as a whole. Oriented to their own sub-disciplines and different objects of historical inquiry, historians who look at law and Reformation together often speak past each other. Scholars who specialize in Luther’s writings on law, for instance, find little reception among historians interested in the jurisdictional politics of a multi-confessional city. Those interested in tracing the doctrinal origins of Germany’s public law on religion (*Staatskirchenrecht*) do not typically engage those who closely read the output of the Peasants’ movement on “godly law.”

As much as the sub-disciplinary homes of these scholars inform the sources they use and how they think and write about law and Reformation together, their approaches are also deeply shaped by their understandings of the relationship between law and society, and what accounts for legal transformation. These underlying premises are often implicit, revealed through their choice of sources, and their reliance on apparently self-explanatory mechanisms.<sup>73</sup>

If Reformation history begins with the publication of Luther’s 95 Theses, we might say its legal history begins with Luther’s trial in Rome. The account of the disciplinary and legal proceedings that followed Luther’s public letter to the Archbishop of Mainz in 1517, which had outlined the problematic theological implications of the sale of indulgences, provides a useful vantage point from which to think about the structural relationship triangle of Pope (and papal Curia), Emperor, and Imperial Estates. Kohnle, for instance, shows how university synods, monastic disciplinary proceedings, arbitration attempts, imperial assemblies, papal trials, and other legal and quasi-legal mechanisms together—though often in competition with one another, or working at cross purposes—shaped the unfolding of events.<sup>74</sup> Collectively, these forums “forced Luther to clarify his ideas. His aim throughout was to prove his orthodoxy. The result was a basis for a new theology.”<sup>75</sup>

A subject of sustained attention has been what Luther said and wrote about law.<sup>76</sup> “All of Luther’s major doctrines contain decisive judicial elements.”<sup>77</sup> Skinner, for example, looks

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<sup>73</sup> For a summary of these debates from legal history more generally, see Robert W. Gordon, “Critical Legal Histories,” *Stanford Law Review* 36 (1984): 57-125. On socio-legal positivism, see Marianne Constable, *Just Silences: The Limits and Possibilities of Modern Law* (Princeton, NJ: Princeton University Press, 2005). See also Christopher Tomlins and John Comaroff, “‘Law As...’: Theory and Practice in Legal History,” *U.C. Irvine Law Review* 1, no. 3 (2011): 1039-79.

<sup>74</sup> Armin Kohnle, *Reichstag und Reformation: kaiserliche und ständische Religionspolitik von den Anfängen der Causa Lutheri bis zum Nürnberger Religionsfrieden* (Heidelberg: Gütersloher, 2001).

<sup>75</sup> Whaley, *Germany*, 149. More details of Luther’s trial, as it is relevant for understanding the legal regime that followed the Edict of Worms, will be discussed in the next chapter.

<sup>76</sup> See e.g. parts of Martin Heckel, *Martin Luthers Reformation und das Recht* (Tübingen: Mohr Siebeck, 2016); also W.D.J. Cargill Thompson, “The ‘Two Kingdoms’ and the ‘Two Regiments’: Some Problems of Luther’s Zwei-Reiche-Lehre” *The Journal of Theological Studies* 20 (1969): 164-85; and Harro Höpfl ed. and trans., *Luther and Calvin on Secular Authority* (Cambridge, UK: Cambridge University Press, 1991).

<sup>77</sup> Gerald Strauss, *Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany*

carefully at Luther's view on the relationship between law and salvation, and the premises underlying what some describe as an antinomianism. Beginning with the premise of "man's complete unworthiness,"<sup>78</sup> Luther argued that man could never, through his powers of reasoning, understand how God wanted him to act. Two implications followed. The first was that, insofar as our reasoning powers are utterly defective, we cannot hope to understand God's nature and will. God's commands "appear entirely inscrutable," so the best we can do is obey them, not because we think them to be just, but because they are God's commands.<sup>79</sup> The second implication of this conception of human nature was that "since all our actions inexorably express our fallen natures, there is nothing we can ever hope to do which will justify us in the sight of God and so help us to be saved."<sup>80</sup> This agonistic bind, and its resolution, were represented through Luther's description of the progression from the Old to the New Testament. The Old Testament's law, both mandatory and impossible to follow, "teach[es] man to know himself," to see his inability to achieve salvation through his own work. The New Testament catches the Christian in that moment of despair and reassures him that salvation comes not through adherence to law but through faith alone.<sup>81</sup> The Christian's aim, then, is "to achieve *fiducia*—a totally passive faith in the righteousness of God and in the consequent possibility of being redeemed and justified by His merciful grace."<sup>82</sup> For Luther, the freedom of the Christian meant his freedom from the law, that is, from all pretensions that salvation is achieved through works.

Unlike authors who study Luther's writings *sui generis*, Skinner and other intellectual historians closely read him alongside contemporary and prior sources to identify influences. Much of this scholarship is concerned with the set of ideas Skinner raises: the separation of law and Gospel; the doctrine of justification through faith alone; the concomitant devaluing of 'works,' whether by way of Judaic legalism or the human-made canon law; the meaning of Christian freedom; the status of worldly government as the only rightful authority to constrain human inherent sinfulness; the abolition of ecclesiastical jurisdiction; the end of the Gelasian two swords doctrine; variations on the two kingdoms doctrine; the rationale for obedience to worldly authority if law is not tied to salvation; the status of resistance to authority; the relationship between scripture, conscience, and law's legitimacy; the meaning of natural law; and the inability of reason to access God's will, among others.

Another related area of research investigates how Lutheran theology translated, in practice, into the laws of Lutheran territories, including in the areas of criminal law, marriage and family law, church administration, welfare systems, education systems, laws on usury, property, and commerce, among others.<sup>83</sup> They ask: how did Lutheran rulers and theologians develop legal systems that reflected the Lutheran confession, given the apparent antinomianism of its founder? Witte, for instance, describes the "move from theology to law" in the Reformation not as "a corruption of the original Lutheran message, but a bolstering of it [...] not a betrayal of the founding ideals of liberty and equality, but a balancing of them with the need

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(Princeton, NJ: Princeton University Press, 1986), 201, quoting Johannes Heckel.

<sup>78</sup> Quentin Skinner, *The Foundations of Modern Political Thought, Volume 2: The Age of Reformation* (Cambridge, UK: Cambridge University Press, 1978), 3.

<sup>79</sup> Skinner, 5.

<sup>80</sup> Skinner, 6.

<sup>81</sup> Skinner, 9.

<sup>82</sup> Skinner, 8.

<sup>83</sup> See e.g. Paula Sutter Fichtner, *Protestantism and Primogeniture in Early Modern Germany* (New Haven, CT: Yale University Press, 1989); and Thomas Max Safley, ed., *The Reformation of Charity: The Secular and the Religious in Early Modern Poor Relief* (Boston, MA: Brill, 2003).

for responsibility and authority” in that moment.<sup>84</sup> Berman discusses the “three uses of law” envisioned by Lutheran theologians: civil/political, theological, and pedagogical.<sup>85</sup> Some scholars, in studying the laws of Lutheran domains, draw our attention instead to the heavy adoption of canon law in the evangelical territories, indicating that, to the extent there were legal innovations, theology alone does not account for them.<sup>86</sup>

These studies on the relationship between Lutheran theology, Lutheran legal philosophy, and the kinds of laws and legal systems they gave rise to, also lead into the literature about the formation of the territorial state, and its relationship to confession-formation. Zeeden’s 1965 study on confession-formation—the intellectual and organizational stabilization of the Christian confessions after their division, that led to stable church forms with distinct dogmas and conceptions of religious virtue—launched the field.<sup>87</sup> When, in the 1970s, Reinhard and Schilling developed his thesis, they added the dimension of state formation, arguing that confession-formation was in part a social disciplining process for purposes of *Staatsräson*.<sup>88</sup> In the voluminous confessionalization literature that has followed, law features as an essential tool in the social disciplining, confession formation, and state-building processes.<sup>89</sup>

Many subjects within the study of the Reformation touch on matters of law indirectly, or as a small part of their overall study. Local Reformation histories, for instance, often provide rich legal and constitutional context.<sup>90</sup> Studies on multiconfessional cities provide details of the unique arrangements that made coexistence possible.<sup>91</sup> Scholars on the Peasants’ War investigate lay writings on godly law; the forms of legal life envisioned by its leaders; and the consequences

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<sup>84</sup> John Witte, *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge, UK: Cambridge University Press, 2002), 4.

<sup>85</sup> Berman, 77.

<sup>86</sup> See e.g. Joel F. Harrington, “Legal Courts,” in *The Oxford Handbook of the Protestant Reformations*, ed. Ulinka Rublack (Oxford, UK: Oxford University Press, 2017), published online October 2015, <https://doi.org/10.1093/oxfordhb/9780199646920.001.0001>; and R. H. Helmholz, *Canon Law in Protestant Lands* (Berlin: Duncker & Humblot, 1992).

<sup>87</sup> Ernst Walter Zeeden, *Die Entstehung der Konfessionen. Grundlagen und Formen der Konfessionsbildung im Zeitalter der Glaubenskämpfe* (Munich: Oldenbourg, 1965).

<sup>88</sup> Heinrich Richard Schmidt, “Sozialdisziplinierung? Ein Plädoyer für das Ende des Etatismus in der Konfessionalisierungsforschung” *Historische Zeitschrift* 265, no. 3 (Dec. 1997): 639-41. See e.g. Philip S. Gorski, *The Disciplinary Revolution: Calvinism and the Rise of the State in Early Modern Europe* (Chicago, IL: University of Chicago Press, 2003).

<sup>89</sup> See Reinhard, “Reformation”; and Heinz Schilling, “Confessionalization in the Empire: Religious and Societal Change in Germany between 1555 and 1620,” in *Religion, Political Culture, and the Emergence of Early Modern Society: Essays in German and Dutch History* (Leiden: Brill, 1992), 205-45; also see A.G. Roeberg, “The Law, Religion, and State Making in the Early Modern World: Protestant Revolutions in the Works of Berman, Gorski, and Witte” *Law & Social Inquiry* 31, no. 1 (Winter 2006): 199-227; also Joel Harrington and Helmut Walser Smith, “Confessionalization, Community, and State Building in Germany, 1555-1870,” *The Journal of Modern History* 69, no. 1 (March 1997): 77-101.

<sup>90</sup> See e.g. Joachim Whaley, *Religious Toleration and Social Change in Hamburg 1529-1819* (Cambridge, UK: Cambridge University Press, 1985).

<sup>91</sup> See e.g. David Martin Luebke, *Hometown Religion: Regimes of Coexistence in Early Modern Westphalia* (Charlottesville: University of Virginia Press, 2016); and Thomas Max Safley, ed., *A Companion to Multiconfessionalism in the Early Modern World* (Leiden: Brill, 2011); also Daniela Blum, *Multikonfessionalität im Alltag: Speyer zwischen politischem Frieden und Bekenntnisernst (1555-1618)* (Münster: Aschendorff Verlag, 2015).

of the War at the level of territorial and imperial law.<sup>92</sup> Historians who study the subalterns of Reformation history—such as Jews and Anabaptists—often describe the legal backdrop.<sup>93</sup>

## Historiography of the Reformation Cases

Though the basic contours of the Reformation cases (*die Reformationsprozesse*) is widely known among German historians, its study constitutes a niche historiography and, to date, no English-language study engages closely with them. This dissertation was initially inspired by two tantalizing references, made separately by Joachim Whaley and Thomas Brady.<sup>94</sup> On the one hand, notes Whaley, “the all too obvious fact that the process of reformation (especially reformation from above) had involved acts that were illegal under the law of the Reich [Empire] led Protestants to claim that their actions were justified by the higher laws of God.” The Imperial Chamber Court, on the other hand, “refused to regard cases involving secularizations or abrogation of ecclesiastical jurisdictions as religious, and simply treated them as breaches of the public peace.”<sup>95</sup> According to Brady, “the very definition of ‘religious matters’ lay at the heart of the struggle,” to the extent that the Protestants would eventually argue that “the mere existence of a difference in religion [...] made all suits into matters ‘concerning the religion.’”<sup>96</sup> These brief but suggestive depictions of these legal disputes indicate an area of the history of the Reformation that was high stakes in concrete matters, while at the same time deeply consequential for the major theological and constitutional questions of the day.

The beginning of the modern study of the Reformation cases coincided with the modern study of the Imperial Chamber Court. Rudolf Smend, whose 1911 book *Das Reichskammergericht: Geschichte und Verfassung* (The Imperial Chamber Court: History and Constitution) inaugurated the modern institutional historiography of the Imperial Chamber Court, regarded the Reformation cases as among the most consequential in the history of the Court, shaping the constitution of the Holy Roman Empire and the religio-political topography of the German lands for centuries to come.<sup>97</sup> Smend continued a familiar trope of Protestant historiography that these cases constituted a “legal war” against the Protestants. On this view, the Court was instrumentalized and its original aspiration, to be an independent judicial forum, remained incomplete in this period as negotiations between Estates and the Emperor continued to color the Court’s jurisprudence. Not only the Emperor and litigants, but the judges themselves were participants in this “legal war,” transparently biased in favor of old-faith litigants, and

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<sup>92</sup> See e.g. Peter Blickle, *From the Communal Reformation to the Revolution of the Common Man*, trans. Beat Kümin (Leiden: Brill, 1998), especially Chapter 7; and Malte Hohn, *Die rechtlichen Folgen des Bauernkrieges von 1525: Sanktionen, Ersatzleistungen und Normsetzung nach dem Aufstand* (Berlin: Duncker & Humblot, 2004).

<sup>93</sup> See e.g. Horst Schraepler, *Die Rechtliche Behandlung der Täufer in der deutschen Schweiz, Südwestdeutschland und Hessen, 1525-1618* (Tübingen: Dr. Ekkehart Fabian-Verlag, 1957); and Christine Magin, *“Wie es umb der iuden recht stet”: der Status der Juden in spätmittelalterlichen deutschen Rechtsbüchern* (Göttingen: Wallstein Verlag, 1999); also Debra Kaplan, *Beyond Expulsion: Jews, Christians, and Reformation Strasbourg* (Palo Alto, CA: Stanford University Press, 2011).

<sup>94</sup> Whaley, *Germany*, 300-5; Brady, *Protestant Politics*, 162-9.

<sup>95</sup> Whaley, *Germany*, 303.

<sup>96</sup> Brady, *Protestant Politics*, 165.

<sup>97</sup> Rudolf Smend, *Das Reichskammergericht* (Weimar: Böhlau, 1911), 160; Martin Heckel, “Die Religionsprozesse des Reichskammergerichts im konfessionell gespaltenen Reichskirchenrecht,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung* 77 (1991): 288.

captured by the political interests of the Estates who had appointed them. Others highlight the radical instrumentalization of law by the evangelical estates in order to postpone the consequences of their illegal acts, and to destabilize the judicature.

As both Brady and Whaley point out, however, the “legal war” thesis is too simplistic. For one, these cases show “how clearly [the Protestants] understood the necessity of their illegality to the survival of their faith.”<sup>98</sup> Their systematic prosecution could hardly, then, be seen as partisan targeting. For another, judges’ notes that date back to the 1530s and 1540s show that a variety of motives were at play, and that judges had apparently good faith disagreements and debates in which it was not always a foregone conclusion that the proto-Protestants would lose.<sup>99</sup>

The debate about whether the Reformation cases constituted a “legal war” against the Protestants or not has lost steam, as Reformation historiography as a whole has become more aware of how little we gain by attempting to settle motivations in this fraught context. Still, historians use the term as a shorthand to indicate the politicized nature of the cases,<sup>100</sup> while sometimes acknowledging the caveats indicated above.<sup>101</sup> Even more importantly, it has become clear that the instrumentalization of the Court was not so efficacious, and that the proto-Protestants were strategically involved in this litigation, too, not just its victims.

The 1960s saw a burst of interest in the Reformation cases, corresponding to the beginning of a collaborative effort to create repertories for Imperial Chamber Court case files held in dozens of archives.<sup>102</sup> A series edited by Ekkehart Fabian in that decade accounts for a large number of these works. The ambition of Fabian and the scholars who wrote for his series was systematic comprehensiveness in their use of archival materials to tell the many stories of Reformation cases. Some of the books in the series were composed entirely of edited transcriptions of key source texts.<sup>103</sup> These authors were committed to creating complete accounts of these cases based on all archival sources that were available to them; the introductions to these books stress comprehensiveness and a systematic approach to tackling the challenge of creating a total account of the Reformation cases based on the sources. This ambitious publication agenda, however, fizzled out by the end of the decade.<sup>104</sup>

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<sup>98</sup> Brady, *Protestant Politics*, 165.

<sup>99</sup> See R. M. Sprenger, *Viglius van Aytta und seine Notizen über Beratungen am Reichskammergericht, 1535-1537* (Nijmegen: Gerard Noodt Instituut, 1988), 61-97; and Steffen Wunderlich, *Das Protokollbuch von Mathias Alber: zur Praxis des Reichskammergerichts im frühen 16. Jahrhundert* (Cologne: Böhlau, 2011). On the other hand, Dolezalek uses judges’ notes to show that in some cases, the views of judges corresponded to the opinions and confessional leanings of the respective estates who appointed them, not as a matter of blind obedience, but as a matter of selection criteria: Gero R. Dolezalek, “Die Assessoren des Reichskammergerichts und der Nürnberger Religionsfriede vom 23. Juli 1532” in *Recht, Gericht, Genossenschaft und Policey* (Berlin: Schmidt, 1986): 84–96.

<sup>100</sup> See e.g. David M. Luebke, “A Multiconfessional Empire,” in *A Companion to Multiconfessionalism*, ed. Thomas Max Safley (Leiden: Brill, 2011), 133.

<sup>101</sup> See e.g. introductory summary of Reformation cases and religion cases by Bernhard Ruthmann, “Religionsprozesse als Folge der Glaubenspaltung,” in *Frieden durch Recht: Das Reichskammergericht von 1495 bis 1806*, ed. Ingrid Scheuermann (Mainz: Verlag Philipp von Zabern, 1994), 231-40.

<sup>102</sup> See Sources section below.

<sup>103</sup> Such as: Ekkehart Fabian, ed., *Urkunden und Akten der Reformationsprozesse*, vol. 1 [Documents and Files of the Reformation Cases, “UARP I”] (Tübingen: Osiander, 1961). Though listed as the first volume, there were no subsequent volumes. See “Published Primary Sources” section below.

<sup>104</sup> In 2015, I enlisted the help of some archivists to see if I could learn why the project ended, and to get advice on whether Fabian’s papers might be found. I tried several angles, including reaching out to a professor who had worked with him, writing a letter to his son, and contacting the publisher—without results.

Wilhelm Jensen's 1961 book on two reformation cases involving the Cathedral Chapter of Hamburg earned the criticism of Fabian, because most of his book is an edited transcription of the witness testimonies from the cases. Jensen's stated ambitions were simply to "shed new light on that great turn" in Hamburg called the Reformation.<sup>105</sup> Fabian said that Jensen's efforts did not do much to build upon a preliminary treatment of the Hamburg Reformation cases already done in a 1903 essay by Spitzer.<sup>106</sup> Still, works like Jensen's were important because they were an attempt to return to the legal cases themselves as primary sources in order to move away from reliance on the one-sided narratives of these events contained in city chronicles.

Hermann Buck's 1964 book on the Constance Reformation cases was part of Fabian's series. Buck was not only interested in Reformation cases that appeared in the Imperial Chamber Court, but also those that occurred in local worldly and spiritual courts.<sup>107</sup> Another key dimension of Fabian's series was its focus on the Schmalkaldic League, and the specific position of individual localities—with a special focus on imperial cities—with respect to that League. Buck began with Constance, for instance, because it was the southwest cities, which leaned towards Zwingli's teachings, that were the earliest targets of Reformation litigation.

In his 1965 book on the Strassburg Reformation cases, Robert Schelp called his work a "parallel study" to those already undertaken by Fabian and Buck.<sup>108</sup> Schelp followed their approach by aspiring to archival comprehensiveness, and by having a focus on the relationship of Strassburg to the Schmalkaldic League. But unlike Buck's inclusion of local court cases, Schelp was interested in the imperial constitutional factor, considering how the cases shed light on the nature of the juridical relationship between Strassburg as its own political entity (a free imperial city) and imperial courts and jurisdiction.<sup>109</sup>

Gundmar Blume's 1969 book on Goslar likewise sought to make a link between the Reformation cases, the Schmalkaldic League, and the city of Goslar. He noted the lack of anything more than a cursory mention of the League in previous histories of the city's Reformation, and in some cases, he said, those accounts got the facts wrong. He stressed not only the importance of membership in the League for the unfolding of the Reformation cases pending at the Imperial Chamber Court against Goslar during the 1530s and 1540s, but also the outsized impact of Goslar's Reformation cases on imperial level matters.<sup>110</sup>

Sigrid Jahns' 1976 book on Frankfurt offered a similar corrective to the historiography of that city's Reformation. In particular, she investigated Frankfurt's motives for refusing to join the Schmalkaldic League until 1536, ten years after the city council began undertaking reforms. Her book, like others before it, points to the "tight interweaving of politics, religion and law in this time, the interdependencies between political and reform events, and between city and imperial history."<sup>111</sup> Jahns argued that the cases launched against the city as a result of their reforms eventually pushed the city to join the Schmalkaldic League for the legal protection it

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<sup>105</sup> Editor's Preface in Wilhelm Jensen, *Das Hamburger Domkapitel und die Reformation* (Hamburg: F. Wittig, 1961), 10.

<sup>106</sup> Hermann Buck, *Die Anfänge Der Konstanzer Reformationsprozesse, Österreich, Eidgenossenschaft Und Schmalkaldischer Bund 1510/22-1531* (Tübingen: Osiandersche Buchhandlung, 1964), 9.

<sup>107</sup> Buck, 31.

<sup>108</sup> Robert Schelp, *Die Reformationsprozesse der Stadt Strassburg am Reichskammergericht zur Zeit des Schmalkaldischen Bundes (1524) 1531-1541 (1555)* (Kaiserslautern: Buchhandlung Schmidt in Kommission, 1965), 23.

<sup>109</sup> Schelp, 23.

<sup>110</sup> Blume, 2-4.

<sup>111</sup> Jahns, 11.

offered, though doing so compromised their special standing as an imperial city that hosted large trade fairs. Like Blume, Schelp, Buck, and others, she provided a detailed account of the cases of that locality using the case files themselves. Other similar, though shorter, accounts followed for other localities.<sup>112</sup> A more recent treatment of the Frankfurt Reformation cases by Friedrich discusses larger questions on the relationship between the politics of territorialization and imperial justice.<sup>113</sup>

Not all authors who have studied the Reformation cases since the 1960s have focused on the local, however. Dommasch (1961), Schlütter-Schindler (1986), and Haug-Moritz (2002) used the Reformation cases to better understand the Schmalkaldic League as an institution, a political formation, and a decision-making body. Dommasch, for instance, made a causal argument that the persistence of Reformation litigation despite the proto-Protestants' 1534 Recusation of some of the Court's judges (on the accusation of bias) led to the renewal of the Schmalkaldic League in 1536.<sup>114</sup> Dommasch's project helped settle the idea that the Schmalkaldic League was at basis a protective league against anti-Reformation decisions especially at the Imperial Chamber Court—rather than first of all a military alliance.<sup>115</sup>

In the 1970s and 1980s, with ever greater numbers of Imperial Chamber Court case files recorded in standardized archive repertories, a new scholarly agenda began to take shape.<sup>116</sup> In 1973, the Sources and Research on the Highest Jurisdiction in the Old Empire series (*Quellen und Forschungen zur höchsten Gerichtsbarkeit im Alten Reich*) was established, and it continues to publish path-breaking work on the Court and other high courts of the Holy Roman Empire.<sup>117</sup> In 1985, the Center for the Study of the Imperial Chamber Court (*Gesellschaft für Reichskammergerichtsforschung*) was established in Wetzlar, facilitating such research.<sup>118</sup>

In this literature, though the Reformation cases continue to be regarded as an inflection point in the history of the Imperial Chamber Court, overall, the historiography of the Court has seemed to move on without the Reformation cases. Instead, the Reformation cases are regarded as partaking in larger processes having to do with the boom of litigation in the sixteenth

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<sup>112</sup> See e.g. Oskar Kühn, "Westfälische Religionsprozesse vor dem Reichskammergericht" in *Recht und Staat im sozialen Wandel: Festschrift für Hans Ulrich Supin zum 80. Geburtstag*, ed. Norbert Achterberg (Berlin: Duncker & Humblot, 1983), 103-121; also Werner Kundert, "Der Basler Dompropsteihandel (1537-1574): Ein Reformationsprozeß um gemeines Recht," *Basler Zeitschrift für Geschichte und Altertumskunde* 79 (1979): 91-124; and Christian Vajen, *Die rechtliche Anerkennung reformierter Reichsstände durch den Religionsfrieden vor Abschluß des Westfälischen Friedensvertrages: eine Darstellung auf der Basis lippischer Reichskammergerichtsprozesse* (Aachen: Shaker, 2006).

<sup>113</sup> Wolfgang Friedrich, *Territorialfürst und Reichsjustiz: Recht und Politik im Kontext der hessischen Reformationsprozesse am Reichskammergericht* (Tübingen: Mohr Siebeck, 2008).

<sup>114</sup> Gerd Dommasch, *Die Religionsprozesse der rekusierenden Fürsten und Städte und die Erneuerung des Schmalkaldischen Bundes, 1534-1536* (Tübingen: Osiandersche Buchhandlung, 1961), 12-13; Gabriele Schlütter-Schindler, *Der Schmalkaldische Bund und das Problem der Causa Religionis* (Frankfurt am Main: P. Lang, 1986).

<sup>115</sup> Dommasch, 14; discussion on Schlütter-Schindler below.

<sup>116</sup> See Bernhard Diestelkamp, "Das Reichskammergericht im Rechtsleben des 16. Jahrhunderts," in *Rechtsgeschichte als Kulturgeschichte*, ed. Hans-Jürgen Becker et al. (Aalen: Scientia Verlag, 1976), 435-80; Anette Baumann, *Prozessakten als Quelle: neue Ansätze zur Erforschung der Höchsten Gerichtsbarkeit im Alten Reich* (Cologne: Böhlau, 2001).

<sup>117</sup> "Quellen und Forschungen zur höchsten Gerichtsbarkeit im Alten Reich," Böhlau Verlag, accessed June 26, 2019, [http://www.boehlau-verlag.com/Quellen\\_und\\_Forschungen\\_zur\\_hoechsten\\_Gerichtsbarkeit\\_im\\_Alten\\_Reich.htm](http://www.boehlau-verlag.com/Quellen_und_Forschungen_zur_hoechsten_Gerichtsbarkeit_im_Alten_Reich.htm).

<sup>118</sup> "Gesellschaft für Reichskammergerichtsforschung," accessed June 26, 2019, <https://grkg.wordpress.com>.



century,<sup>119</sup> the professionalization of jurists,<sup>120</sup> the judicialization of social conflicts,<sup>121</sup> and studying early modern courts in terms of the social function, especially as a tactic for forcing or motivating negotiations out of court.<sup>122</sup>

While the study of religion and litigation has remained of interest, most of these studies focus on the period after 1555. Ruthmann's study of thirty Imperial Chamber Court cases between 1555 and 1648 are explicitly about cases that have as the legal referent point the Augsburg Peace of 1555.<sup>123</sup> In Peter Oestmann's study of litigation in which worldly and spiritual jurisdictions are under dispute, he explicitly avoids the Reformation cases, saying that, being highly politicized, they cannot tell us much about law.<sup>124</sup> Dietrich Kratsch's book is about church property cases after 1555.<sup>125</sup>

More recent work has looked at the Reformation cases in order to understand important doctrinal developments in public law. Most recently, Anette Baumann analyzed judges' notes and visitation records to identify the legal elements of the Land-Peace and Religion-Peace, and what constituted a violation of these.<sup>126</sup> Tobias Branz's dissertation scrutinized case files in order to identify the legal elements of Religion-Peace law.<sup>127</sup> In the 1990s, Martin Heckel refreshed the historiography of the Reformation cases in terms of constitutional significance for what would become the public law on churches (*Staatskirchenrecht*). Many of these scholars' work will be cited throughout the dissertation.

In summary, the use of the court records of Reformation cases has focused on three areas of scholarship: (1) attempts to piece together important legal doctrines such as the meaning of a Land-Peace or Religion-Peace violation; (2) the Schmalkaldic League and its role in the Reformation cases and the political negotiations surrounding them; and (3) the ways in which the Reformation cases were an inflection point in the history of the Court, and how they contributed to or undermined the constitutional status of the Court.

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<sup>119</sup> See e.g. Filippo Ranieri, *Recht und Gesellschaft im Zeitalter der Rezeption. Eine rechts- und sozialgeschichtliche Analyse der Tätigkeit des Reichskammergerichts im 16. Jahrhundert* (Cologne: Böhlau, 1985).

<sup>120</sup> See e.g. Anette Baumann et al., eds., *Reichspersonal: Funktionsträger für Kaiser und Reich* (Cologne: Böhlau, 2003); and Anette Baumann, "Reichskammergericht und Universitäten in der zweiten Hälfte des 16. Jahrhunderts," *Historische Zeitschrift* 292 (2011): 365-396.

<sup>121</sup> Winfried Schulze, "Die veränderte Bedeutung sozialer Konflikt im 16. und 17. Jahrhundert" in *Der deutsche Bauernkrieg, 1524-26*. ed. Hans-Ulrich Wehler (Göttingen: Vandenhoeck & Ruprecht, 1975), 277-302.

<sup>122</sup> Diestelkamp, "Reichskammergericht im Rechtsleben," 476 and the literature cited there.

<sup>123</sup> Bernhard Ruthmann, *Die Religionsprozesse am Reichskammergericht (1555-1648): Eine Analyse anhand ausgewählter Prozesse* (Cologne: Böhlau, 1996).

<sup>124</sup> Peter Oestmann, *Geistlichen und weltlichen Gerichte im alten Reich: Zuständigkeitsstreitigkeiten und Instanzenzüge* (Cologne: Böhlau Verlag, 2012), 9. See also Horst Rabe "Der Augsburger Religionsfrieden und das Reichskammergericht 1555-1600" in *Festschrift E.W. Zeeden*, ed. Horst Rabe et al. (Münster: Aschendorff, 1976), 260-80; and on parity in Court personnel after the Peace, see Heinz Durchhardt, "Der Kampf um die Parität im Kammerrichteramt zwischen Augsburger Religionsfrieden und Dreißigjährigem Krieg," *Archiv für Reformationsgeschichte* 69 (1978): 201-18.

<sup>125</sup> Dietrich Kratsch, *Justiz, Religion, Politik: Das Reichskammergericht und die Klosterprozesse m ausgehenden sechzehnten Jahrhundert* (Tübingen: Mohr Siebeck, 1990).

<sup>126</sup> See Anette Baumann, "Die Tatbestände Landfriedens- und Religionsfriedensbruch am Reichskammergericht im 16. Jahrhundert," in *Landfrieden—epochenübergreifend: neue Perspektiven der Landfriedensforschung auf Verfassung, Recht, Konflikt*, ed. Hendrik Baumbach and Horst Carl (Berlin: Duncker & Humblot, 2018).

<sup>127</sup> Tobias Branz, *Reformationsprozesse am Reichskammergericht: zum Verhältnis von Religionsfriedens- und Landfriedensbruchtatbeständen und zur Anwendung der Tatbestände in reichskammergerichtlichen Reformationsprozessen* (Herzogenrath: Shaker, 2014).

## The Holy Empire

How did the Holy Roman Empire survive the Reformation intact? In particular, if it is the case that the basis of the imperial order was its mythology as *corpus mysticum*, which relied on a unity of religion, how did that order survive when confessional unity fell apart? While the Knights' Uprising of 1522, the Peasants' War of 1524-25, the Schmalkaldic War of 1547, and the Prince's Rebellion of 1552 certainly threatened the existing order, their durations were relatively short, and the winners and losers were clear within an overall system in which violence, on its own, did not necessarily signal constitutional collapse.<sup>128</sup> It was not until a century later, in the Thirty Years War (1618-1648) that the Empire saw extended internal war. Put another way, what constituted precisely the continuity of "the Empire" over the course of the sixteenth century; what was "it" that "survived" the Reformation?

The claim of the Empire to be "holy" has its origins in evolving Christian formulations of the relationship between secular and spiritual authority. Just as the human combines soul and body or spirit and flesh, wrote St. Augustine in *The City of God* (426 C.E.) so the universal Christian empire combines the spiritual and the worldly to form one body, with Christ as its mystical head. By the ninth century, secular imperial powers were treated as a reflection or effusion of papal power, acted out in the coronation ceremony in which the Pope lent the sword of public authority to the Emperor.<sup>129</sup> While the legitimacy of the Emperor was bolstered and secured through this consecration, the Church, in turn, benefitted from and depended upon the coercive power of secular authority.<sup>130</sup> But the practical relation of the leaders of this Christian Empire—kings and bishops, Emperor and Pope—was left imprecise in these formulations, so "disputes about hierarchy were inevitable."<sup>131</sup> This mutual dependence became particularly unstable in the late medieval period.<sup>132</sup>

Whatever the precise relationship between secular and spiritual authority—theoretically, practically, and historically—the view that imperial authority was on some level sacred and divine was never in doubt. Since the Middle Ages, contemporaries believed that the Holy Roman Empire had "a key role in the divine plan of salvation" and that the Emperor embodied the Empire's holiness.<sup>133</sup> As Stollberg-Rilinger succinctly summarizes it:

The Redeemer had been born under the Roman Empire; the Roman Empire had been the framework for the spread of the Gospel; the Roman Empire was the last of the global empires revealed to the prophet Daniel in a dream; and at the fall of the Roman Empire the eschatological return of the Redeemer was expected.<sup>134</sup>

This was especially prescient during a time of increasing Ottoman power; a crusade against the Turks was best led by the universal ruler of western Christendom.

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<sup>128</sup> See Otto Brunner, *Land and Lordship: Structures of Governance in Medieval Austria*, trans. Howard Kaminsky and James Van Horn Melton (Philadelphia: University of Pennsylvania Press, 1992).

<sup>129</sup> Eduard Eichmann, *Acht und Bann im Reichsrecht des Mittelalters* (Paderborn: Schöningh, 1909), 9-10.

<sup>130</sup> Eichmann, 11, 13-14.

<sup>131</sup> Eichmann, 6.

<sup>132</sup> Eichmann, 37-8, 40.

<sup>133</sup> Stollberg-Rilinger, *Old Clothes*, 80. See also Peter Burke, "Presenting and Re-presenting Charles V" in *Charles V 1500-1558, and His Time*, eds. Hugo Soly and Willem P. Blockmans (Belgium: Mercatorfonds, 1999).

<sup>134</sup> Stollberg-Rilinger, *Old Clothes*, 79; Heckel, *Luther und Recht*, 74.

While the scope of this claim was never actualized in concrete political or territorial terms, when Charles V became Emperor in 1519, the extent of his dynastic holdings was unprecedented. But rather than evoking pious consent to his worldly rulership over all of Christendom, the courts of Europe were deeply concerned by this development, seeing in it not the confirmation of a prophecy but the dynastic superiority of a competing family.<sup>135</sup>

Indeed, within the German lands of the Empire, the Electors and Estates saw the Habsburgs as a threat to their own “liberty,” for a variety of reasons: because he was foreign, because his interests seemed aimed at expansion and consolidation at the expense of maintaining unity and peace within the German lands as its lordly protector, and because of demands upon them to pay into Habsburg war coffers for dangerous and costly dynastic ventures. The Electoral Capitulation (*Wahlkapitulation*) was just the first expression of this concern to limit his power over them.<sup>136</sup> Drawing on arguments that had been developing since the twelfth century, it was within the imaginary of these rulers to argue that the Emperor was not the supreme ruler of the world, that in some cases resistance to his authority was justified, and that they should have the same kind of authority in their domains that the Emperor had with respect to his Empire. These theories developed further in the sixteenth century.<sup>137</sup>

Despite all of this, the Estates of the German lands of the Holy Roman Empire benefitted from the myth not only of the Empire being Holy, but of the Emperor being an embodiment of that holiness. “Whoever participated in the Empire could feel like and represent himself as a member of an overall hierarchical order whose sanctity and dignity radiated from the top down into the smallest branches.”<sup>138</sup> Until the late 1520s, Estates collectively participated in the “all-encompassing symbolic universe” that followed from this belief.<sup>139</sup> The substance, form, and procedures of the constitutional order in many ways relied on this myth. In substance, the entire political system was “symmetrically doubled,” reflecting the temporal and spiritual dimensions of this corpus mysticum: “alongside secular electors stood ecclesiastical electors, alongside worldly princes stood religious princes, alongside counts and lords stood princely abbotts and abbesses and provosts.”<sup>140</sup> They were even arranged symmetrically in assembly sessions, with the Emperor seated at the head. Images, objects, and official solemnities all confirmed and exhibited the sacredness of the Empire. Imperial regalia were treated as sacral objects.<sup>141</sup> Every ritual of rulership, like coronation, investiture, homage, and oaths of office was accompanied by liturgical acts, during which “divine authority itself was being invoked as the third element in the covenant to authenticate the obligation and sanction potential violations.”<sup>142</sup>

What would become of a political community that was so reliant on the myth of the corpus mysticum when a substantial portion of this community challenged the very meaning of holiness in substance, form, and procedure?

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<sup>135</sup> Heckel, *Luther und Recht*, 74.

<sup>136</sup> See discussion of electoral capitulations in Chapter 2 of this dissertation.

<sup>137</sup> See Julian Franklin, *Constitutionalism and Resistance in the Sixteenth Century: Three Treatises by Hotman, Beza, and Mornay* (New York: Pegasus, 1969); Skinner, chapters 4 and 5.

<sup>138</sup> Stollberg-Rilinger, *Old Clothes*, 81.

<sup>139</sup> Stollberg-Rilinger, *Old Clothes*, 82.

<sup>140</sup> Stollberg-Rilinger, *Old Clothes*, 82.

<sup>141</sup> Stollberg-Rilinger, *Old Clothes*, 81.

<sup>142</sup> Stollberg-Rilinger, *Old Clothes*, 81.

Scholars have long attempted to answer this question.<sup>143</sup> For polemical confessional historiography, the structures in the Empire that made theological and ecclesiological unity impossible indicated a dysfunction. For liberal historiography, the constitutional, legal and political mechanisms of the Empire that made peaceful disagreement possible are seen as praiseworthy, and indications of proto-rule of law, or proto-secularization. More recent historiography has moved away from these evaluative and teleological approaches, instead trying to excavate the internal logics of the Empire through which the conflicts thrown up by the Reformation found expression and organization, if not resolution.

We can divide this historiography into three clusters of arguments. First, there is an argument that the political fragmentation of the Empire played a key role not just in making agonistic division possible, but also in containing it peacefully. The layered constitutional geography of the Holy Roman Empire had in the nineteenth century been regarded primarily as a hindrance on Germany's pathway to nation-statehood.<sup>144</sup> More nuanced, if not affirmative, views of this fragmentation have developed in recent years. Whaley for instance, writes that the "fragmented territorial structure of the Reich [...] turned out to provide mechanisms [...] for dealing with the [confessional] conflict and ultimately for institutionalizing the differences that caused it."<sup>145</sup> In other words, it was this fragmented political landscape that both facilitated the rise of confessional difference, and had the capacity to contain and institutionalize it.

Heckel also regards the uniquely segmented political landscape as central to understanding how the early outcomes of the Reformation unfolded as they did—for better or worse.<sup>146</sup> It was this landscape that made it possible for there to develop, on the one hand, two sets of territorial church law (*Landeskirchenrecht*), Catholic and Lutheran, in which the traditional unity of faith, law, and authority was able to play out, and, on the other hand, an imperial church law (*Reichskirchenrecht*) the primary aim of which was securing the peace among these confessionally-defined territories.<sup>147</sup> As he points out, this segregation and layering of legal orderings came with inherent tensions, because the territorial church laws, though operating from a theologically-grounded claim to absolute truth and authority within their territories, were at the same time participating in an overall imperial church constitution that relegated each confession to a particularistic "religious party" (*Religionspartei*).<sup>148</sup> Thus, Heckel articulates one of the key characteristics of the imperial constitutional order that made such an inherently unstable arrangement nonetheless possible, namely its ability to conjoin many

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<sup>143</sup> Most recently: Josef Bongartz et al., eds., *Was das Reich Zusammenhielt: Deutungsansätze und integrative Elemente* (Cologne: Böhlau, 2017).

<sup>144</sup> See Leopold von Ranke, *Deutsche Geschichte im Zeitalter der Reformation* (Berlin: Duncker & Humblot, 1852).

<sup>145</sup> Whaley, *Germany*, 61.

<sup>146</sup> Heckel sometimes uses language that suggests a negative opinion of these developments. For instance, he writes that insofar as the spiritual events of the Reformation were both subject to the limits of law and carried forward through law's creative power, they were ultimately bound within juristic structures, ordered through its internal dynamics. Heckel sees in this a certain "tragedy" (*Tragik*). Debates about theology, Church, and praxis were "adulterated" (*verfälscht*) through the demands of legal context and political interest. He indicates that, but for the juridification and politicization of these disputes, the confessions might yet have found a conciliar, unifying solution (Heckel, *Luther und Recht*, 4-5, 91). He says that in neutralizing these competing, agonistic claims to religious supremacy, the imperial order made it so that ever after, the freedom and the limitation of religion by worldly authority would always be tightly coupled in a dialectic (Heckel, *Luther und Recht*, 19).

<sup>147</sup> Heckel, *Luther und Recht*, 9-12.

<sup>148</sup> Heckel, *Luther und Recht*, 5-7, 8.

antagonistic traits without rationally harmonizing them.<sup>149</sup> Nonetheless, he suggests that these tensions had a corrosive effect over time. Another dimension Heckel points to is that two great reform movements separated by a generation—the 1495 imperial reforms, and the Lutheran Reformation—in turn created two dualisms that operated in structurally linked ways. While the 1495 reforms strengthened the status of Estates in the overall constitutional order vis-a-vis the Emperor (dualism 1), the Reformation, and in particular its legal containment in 1555, established two legal confessions, Catholic and Lutheran (dualism 2). The constitutional transformations engendered by these two dualisms mutually cleared a pathway for and strengthened the other in ways that could not have been anticipated. The Eternal Land-Peace of 1495, for instance, ended up playing a key role in the Reformation, and was extended in 1555 to govern the hairy matter of the confessional agonism; in other words, a reform originally made in favor of Estate power ended up eventually also making the existential survival of multiple confessions possible.<sup>150</sup> The Reformation, in turn, undermined the concentration of power in the Emperor, and relocated divine legitimacy of rulership of churches within territories to secular rulers—thus bolstering the 1495 reform efforts to strengthen Estates.<sup>151</sup> Finally, Heckel argues that the “federalism” of the Holy Roman Empire, and in general the dispersal of power among many hands,<sup>152</sup> made it possible for there to be a spatial separation of confessions into distinct territories.<sup>153</sup> This, in turn, made it possible to avoid a war for absolute religious supremacy in the Empire, because rulers were able to secure religious supremacy in their domains.<sup>154</sup>

The second cluster of arguments regarding what kept the Empire together despite the Reformation stresses the role of symbolic-cultural acts in both indexing and smoothing over Reformation-related conflicts and schisms. These scholars contend that the continuity of the Empire and its resilience was bound up with enactments of its unity through ritual. Stollberg-Rilinger for instance argues that pre-modern constitutionalism must be understood in terms of the ways in which the symbolic and the substantive operated together—breaking through the modernist binary of symbolic-ceremonial, and technical-instrumental functions.<sup>155</sup> In her close analysis of the events surrounding the 1530 Augsburg imperial diet, for instance, Stollberg-Rilinger considers the ways in which symbolic forms made the religious division visible, while at the same time integrating it into the symbolic order and its political processes.<sup>156</sup> Certain institutionalized rituals of imperial diets, though having lost their salvific capacity for the early Protestant movement, came to be seen as sites of disparagement and public disengagement. In acting out these attitudes towards certain rituals, ceremonies, and objects throughout the imperial assembly, though intending to “disenchant” these as “purely the work of man,” they also acted out their difference, their being set apart constitutionally. As for the Emperor, these ceremonies and objects became means through which he could both display his traditional authority, and at

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<sup>149</sup> Heckel, *Luther und Recht*, 81.

<sup>150</sup> Heckel, *Luther und Recht*, 8.

<sup>151</sup> Heckel, *Luther und Recht*, 8.

<sup>152</sup> Heckel, *Luther und Recht*, 82. He says here that the uniqueness of the imperial constitution and the working-together of multiple powers that mutually bound each other, was an essential reason why the emperor and the Catholic majority were unable to overcome the Reformation movement.

<sup>153</sup> Heckel uses the term “federalism” without qualification; others may accuse him of anachronism for this.

<sup>154</sup> Heckel, 19. This same principle informs the doctrine of *Religionsgesellschaften* post-1919 (Heckel, 20). More on the federative principles of “leagues” and their role in the Reformation in Chapter 5.

<sup>155</sup> Barbara Stollberg-Rilinger, ed., *Vormoderne Politische Verfahren* (Berlin: Duncker and Humblot, 2001), 9.

<sup>156</sup> Stollberg-Rilinger, *Old Clothes*, 80-120.

the same time “force the Protestants to participate ceremonially in their own marginalization.”<sup>157</sup> Collectively, these changed the Empire without breaking it apart.

Third, yet others argue that post-1495 imperial institutions provided a framework for normalizing conflict. Some call this a proto-*Rechtsstaat* (rule of law) framework. Others stress the importance of courts in particular as channeling potentially explosive conflict. Some scholars suggest that the reforms of the late fifteenth century had established a robust constitutional order that was based in proto rule of law principles. Heckel, for instance, writing in the 1980s, says that “the *Rechtsstaat* has a proud tradition in Germany, already established in the Old Empire.”<sup>158</sup> In his newest work on law in the Reformation, Heckel does not use the anachronistic term “*Rechtsstaat*” to describe this, but instead “*Friedens- und Rechtsverband*” (a union of peace and law).<sup>159</sup> On this account, the Reformation variously strengthened these institutions and procedures through crucible, proved their effectiveness, and called some of them into being.<sup>160</sup>

Courts have been regarded as one of the key institutions through which this normalization of conflict happened, a process often called judicialization or juridification (*Verrechtlichung*).<sup>161</sup> In the case of early modern Germany, much of this literature has focused on the role of courts in managing “socioeconomic conflicts between rulers and subjects.”<sup>162</sup>

Otto Brunner argued that in the late medieval period, there were two ways to seek justice: either the feud or the court of law. The legal, social, and moral meaning of friendship and enmity played out in courtrooms well into the sixteenth century.<sup>163</sup> The logics that undergirded the feud—that bound individuals together in peace associations of friendship, in which members had duties to each other in situations of rights violations by others—were channeled into a law court. The conditions for the decline of the feud was that there would be “structures that would make the feud superfluous [...] while at the same time satisfying the prevailing sense of right.”<sup>164</sup> This was effected through the relocation of many of these disputes into the domain of public jurisdiction which, he says, was largely achieved by 1555.<sup>165</sup> Luebke makes this argument for the post-1555 period. Speaking of the Augsburg Peace he writes, “the fundamental achievement of the Religious Peace [...] was to ‘judicialize’ religious conflict. Concretely, judicialization meant that conflicts over religion were transformed into legal battles over the proper interpretation of

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<sup>157</sup> Stollberg-Rilinger, *Old Clothes*, 93.

<sup>158</sup> Martin Heckel, “Die Religionsprozesse des Reichskammergerichts im konfessionell gespaltenen Reichskirchenrecht,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung* 77, no. 1 (1991): 285.

<sup>159</sup> Heckel, *Luther und Recht*, 81-2.

<sup>160</sup> Others stress the mentality and practices of imperial jurists and personnel in providing a kind of unity and functionality in the Empire; see e.g. Stephan Wendehorst und Siegrid Westphal, “Einleitung: Reichspersonal in der Frühen Neuzeit? Überlegungen zu Begrifflichkeit und Konturen einer auf Kaiser und Reich bezogenen Funktionseelite,” in *Reichspersonal: Funktionsträger für Kaiser und Reich*, ed. Anette Baumann et al. (Cologne: Böhlau, 2003), 1-20.

<sup>161</sup> See Peter H. Wilson, *Heart of Europe: A History of the Holy Roman Empire* (Cambridge, MA: Belknap Press of Harvard University Press, 2016), 610-3. The study of the role of courts in normalizing conflict or channeling self-help is not unique to the study of early modern Germany, nor to the study of history. See e.g. Daniel Smail, *The Consumption of Justice: Emotions, Publicity, and Legal Culture in Marseille, 1264-1423* (Ithaca, NY: Cornell University Press, 2003); Austin Sarat and Thomas Kearns, eds., *Law's Violence* (Ann Arbor: University of Michigan Press, 1995) 2-4; among others.

<sup>162</sup> See e.g. Schulze, “Die veränderte Bedeutung sozialer Konflikt.” For Ranieri’s attempt to corroborate this with quantitative research, see Ranieri, *Recht und Gesellschaft*.

<sup>163</sup> Brunner, 28-30. On “friendship” and “enmity” see Brunner, 17-21.

<sup>164</sup> Brunner, 29.

<sup>165</sup> Brunner, 30.

the 1555 settlement,”<sup>166</sup> “blunt[ing] the violent edge of religious conflicts by transforming them into objects of diplomatic negotiations and legal wrangling.”<sup>167</sup>

Others have shown that peace was delivered by the Court not necessarily by rendering a verdict; indeed, many cases were left unresolved. The pacifying effect followed from the way in which the prospect of litigation encouraged parties to seek resolution out of court, or in other epiphenomenal factors, like the slow pace of litigation.<sup>168</sup> Luebke, for instance, writes that “in functional terms, judicialization neutralized religious conflicts by subjecting them to the slow, deliberate pace of litigation. Indeed, for many litigants, the appeal of imperial tribunals lay not in their consistency, but in the fact that lawsuits could attenuate the status quo for years, even decades.”<sup>169</sup>

Some scholars have seen judicialization at work in the channeling of confessional conflict through legislative, rather than litigative, disagreement.<sup>170</sup> Heckel, for instance, shows how interpretive wrangling about imperial legislation was the core framing for religious disputes throughout the early Reformation and beyond.<sup>171</sup> Kratsch likewise highlights the ways in which Reformation-era divisions were often framed in terms of interpretive differences of a common set of laws.<sup>172</sup>

Notably, the Reformation cases are often treated within this historiography as a blip, a temporary failure of those mechanisms of judicial channeling. It was a failure, on this view, because the Court was instrumentalized and politicized: either the Court was instrumentalized by the Emperor and the majority of Estates to prosecute the evangelical estates in a “legal war,” or it was misused by the evangelical estates to make radical and a-legal claims, to postpone the consequences of their illegal acts, and to destabilize the judicature. On this view, it was precisely this failure that had indirect constitutional consequences. Heckel writes that to the extent that the Reformation cases led to a suspension of both extra-judicial and judicial mechanisms, they represent the failure of the old Empire’s rule of law: “Not the luster (*Glanz*) but rather the misery (*Elend*) of rule-of-law-ness (*Rechtsstaatlichkeit*) in the Old Empire is evident in them.”<sup>173</sup> Heckel tellingly does not discuss the Reformation cases at any length in his almost 1000-page magnum opus on the Reformation and law, only mentioning it in the context of listing other executive actions by imperial authority, indicating his gloss of the cases as a “legal war.”<sup>174</sup> Diestelkamp, in an essay discussing the impact of the Imperial Chamber Court on the imperial constitution, writes that in order to update our knowledge of the Court in the sixteenth century, we must identify the moments in which it operated as an “independent factor in the historical process.”

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<sup>166</sup> Luebke, “Multiconfessional Empire,” 136.

<sup>167</sup> Luebke, “Multiconfessional Empire,” 131.

<sup>168</sup> Ocker, *Church Robbers*, 109; Ruthmann, *Religionsprozesse*, 12; Diestelkamp, “Reichskammergericht im Rechtsleben,” 474-7.

<sup>169</sup> Luebke, “Multiconfessional Empire,” 136.

<sup>170</sup> Heckel, *Luther und Recht*, 78. For a later period, see Patrick Milton, “The Early Eighteenth-Century German Confessional Crisis: The Juridification of Religious Conflict in the Reconfessionalized Politics of the Holy Roman Empire,” *Central European History* 49 (2016): 39-68.

<sup>171</sup> See e.g. Heckel, “Autonomia und pacis Compositio: der Augsburger Religionsfriede in der Deutung der Gegenreformation,” in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung* 45 (1959): 156ff, 161ff.

<sup>172</sup> Kratsch, 3.

<sup>173</sup> Martin Heckel, “Die Religionsprozesse des Reichskammergerichts im konfessionell gespaltenen Reichskirchenrecht,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung* 77 (1991): 288-9.

<sup>174</sup> Heckel, *Luther und Recht*, 18.

Even during the “legal war” against the Protestants, when, he says, the Court became an explicit instrument of the Emperor’s interests, we can nonetheless identify the Court’s constitutional significance in this period by identifying moments in which the Court sought to maintain its independence from the Emperor.<sup>175</sup> Thus, for Diestelkamp, the Reformation cases posed an extreme challenge to judicial independence. This challenge elicited a set of responses that aimed to secure judicial independence and therefore the rule of law—and therein lies the constitutional significance of the Reformation cases.

This dissertation contributes to this long-standing debate about how to account for the Holy Roman Empire’s weathering of the Reformation by adding to this mix of factors the unique context of litigation and legal procedure. The experimental ad hoc use of familiar and apparently nondescript legal instruments and juridical techniques of litigation that pre-dated the Reformation formed one level of the substantive, ideological, symbolic, constitutional, and civil life of the Holy Roman Empire since at least the thirteenth century; in many ways, these exceeded the Christian basis that was so central to its constitutional identity. These instruments and techniques were not static, and were not legislated top-down suddenly in the sixteenth century as part of a secularization trajectory. Rather, they were continuous with a legal culture characterized by play with these ubiquitous, formulaic legal instruments. Civil litigation in the messy years between 1521 and 1555 was a distinctly important forum in which the Reformation unfolded. We cannot fully understand the Reformation as an event in the history of law without understanding civil litigation, like that which took place in the Imperial Chamber Court.

### **Many Ways to Read a Case File: Uses of Imperial Chamber Court Records**

Scholars who have studied the Reformation cases tend, ironically, to keep the case files themselves at arm’s-length.<sup>176</sup> Typically, the Reformation cases are studied as an object of political negotiations. The standard view is that the Reformation cases are so evidently political in their nature that scholars assume that they can reveal much less to us about law than cases that are more routine. Oestmann, in the introduction to a book in which he demonstrates the value of closely reading Imperial Chamber Court case files for a later period, states specifically that the case files of Reformation litigation can tell us so little because the actions that gave rise to them were “politically spectacular,” instigated precisely to push forward political conversations outside of the courtroom.<sup>177</sup> Indeed, it is the political nature of the Reformation cases, rather than their legal attributes, that has captured the attention of scholars.<sup>178</sup>

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<sup>175</sup> Diestelkamp, “Reichskammergericht im Rechtsleben,” 457.

<sup>176</sup> Most recently, an illuminating essay about the Reformation cases by Gabriele Haug-Moritz nonetheless did not require the use of case file materials to elaborate her arguments. See Gabriele Haug-Moritz, “Religionsprozesse am Reichskammergericht,” in *Speyer als Hauptstadt des Reiches: Politik und Justiz zwischen Reich und Territorium im 16. und 17. Jahrhundert*, ed. Anette Baumann and Joachim Kemper (Berlin: de Gruyter, 2016), no page numbers in eBook, accessed May 20, 2019, <https://books.google.com/books?id=Vw6yDQAAQBAJ&lpg=PT29&ots=r2ZXrGoq-A&dq=haug-moritz%20religionsprozesse&pg=PT29#v=onepage&q=haug-moritz%20religionsprozesse&f=false>.

<sup>177</sup> Oestmann, 9.

<sup>178</sup> A telling illustration of this: the finding aid for the Frankfurt City Archive’s collection of Imperial Chamber Court case files categorizes the case files under four headings; the Reformation cases are listed as the exemplary set of cases categorized under “political events.” See Inge Kaltwasser, *Inventar der Akten des Reichskammergerichts 1495-1806: Frankfurter Bestand* (Frankfurt: Waldemar Kramer Verlag, 2000), 37-8.



To the extent historians have considered the case files of Reformation-related litigation a source for probing the Reformation's legal history, certain methodological habits regarding the use of case files as a source dominate the field. Most scholars use Reformation case files to corroborate a chronology in the political history of a certain locality; the Reformation cases are discussed briefly as one event in a local political saga.<sup>179</sup> Most historians give just a sentence or two to the facts of the cases, and turn totally to their reception and political framing, as documented in city protocols and other documents external to case files. Even where authors outline the cases in great detail, discussion of the cases remains formal, elaborating the order of historical events alongside other sources including materials from the personal archives of various rulers embroiled in the conflict, or from the archives of church institutions that were involved in the cases.<sup>180</sup>

Another use of case files for the history of the Reformation cases focuses on reconstructing the Court's jurisprudence—a positivist approach to the use of court records, according to which the rulings of judges, as delegates of sovereignty, are an authorized and authentic expression of what constitutes “the Law.” A positivist historiography tends to use case files and court records in order to understand law at the level of jurisprudence and doctrine. The work of reconstructing the Court's jurisprudence, especially in the sixteenth century, is not so clear-cut, not least because the reasoning behind the judges' decisions was supposed to remain secret, and all pre-1684 Court decisions were lost in a fire.<sup>181</sup> Thus, in his dissertation Branz relied on the Mandates and Summons produced by the Court at the beginning of a proceeding, documents that reproduced almost verbatim the language of the plaintiff's petition, to piece together the elements of an important legal doctrine.<sup>182</sup>

Another use of case files that has contributed to our understanding of the history of the Reformation cases relies on case file repertories to code for quantitative analyses along variables like length of case, type of issue, location of dispute, or status of litigants. This method aims to say something about the priorities of the Court, about patterns in litigation across space and time in terms of issues, geographies, and types of litigants, and the relevance of the Court in broader society.<sup>183</sup>

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<sup>179</sup> See e.g. Wilhelm Jensen, *Das Hamburger Domkapitel und die Reformation* (Hamburg: F. Wittig, 1961); Hermann Buck, *Die Anfänge der Konstanzer Reformationsprozesse: Osterreich, Eidgenossenschaft, und Schmalkaldischer Bund 1510/22-1531* (Tübingen: Osiandersche Buchhandlung in Kommission, 1964); Robert Schelp, *Die Reformationsprozesse der Stadt Strassburg am Reichskammergericht zur Zeit des Schmalkaldischen Bundes (1524) 1531-1541 (1555)*, (Kaiserslautern: Buchhandlung Schmidt in Kommission, 1965); Gundmar Blume, *Goslar und der Schmalkaldische Bund, 1527/31-1547* (Goslar: Selbstverlag des Geschichts- und Heimatschutzvereins, 1969); Sigrid Jahns, *Frankfurt, Reformation und Schmalkaldischer Bund: die Reformations-, Reichs-, und Bündnispolitik der Reichsstadt Frankfurt am Main, 1525-1536* (Frankfurt am Main: Kramer, 1976).

<sup>180</sup> See e.g. Kratsch, *Justiz*.

<sup>181</sup> Peter Oestmann, “Die Rekonstruktion der reichskammergerichtlichen Rechtsprechung des 16. und 17. Jahrhunderts als methodisches Problem,” *Prozessakten als Quelle: Neue Ansätze zur Erforschung der Höchsten Gerichtsbarket im Alten Reich*, ed. Anette Baumann, et al. (Cologne: Böhlau, 2001): 15-54. For a different perspective on how to reconstruct the Court's jurisprudence, see Peter Arnold Heuser, “Zur Bedeutung der Vor- und Nachkarrieren von Reichskammergerichtsjuristen des 16. Jahrhunderts für das Studium ihrer Rechtsauffassungen. Eine Fallstudie,” in *Juristische Argumente—Argumente der Juristen*, ed. Albrecht Cordes (Cologne: Böhlau, 2006), 153-218.

<sup>182</sup> Branz, *Reformationsprozesse*. See Baumann, *Visitationen*, 137-8 and the literature cited there.

<sup>183</sup> See e.g. Filippo Ranieri, “Die Tätigkeit des Reichskammergerichts und seine Inanspruchnahme während des 16. Jahrhunderts,” in *Forschungen aus Akten des Reichskammergerichts* ed. Bernhard Diestelkamp (Cologne: Böhlau Verlag, 1984): 41-74; and Anette Baumann, “Die quantifizierende Methode und die Reichskammergerichtsakten,” in *Prozessakten als Quelle: Neue Ansätze zur Erforschung der Höchsten*

As methods for using Imperial Chamber Court case files in general proliferate, these methods have not been used to increase our understanding of the Reformation cases. In recent decades the cultural and social historical uses of Court case files has blossomed.<sup>184</sup> Scholars use the various sorts of documents in the case files—especially litigant narrations, which often make reference to the things of everyday life, and the contents of the evidentiary proceedings, which can include maps, lists of possessions, and even artifacts—to access aspects of early modern German life outside of the courtroom, such as economic landscapes, familial patterns, and technologies.<sup>185</sup> Often social historians use case files to write “histories from below,” because it is in the paper trail of everyday legal disputes that the lives of ordinary people—who otherwise would be lost to history—leave their traces.

Scholars also use Court records to extract prosopographical details of judges, procurators, and other court personnel, to understand their training, social status, and intellectual bearing at various points in the Court’s history, and something like a sociology of knowledge of the Court at its intersection with other imperial and educational institutions.<sup>186</sup> Others study the social history of the Court as an institution, including its impact on the cities in which it was at various points in its history based.<sup>187</sup>

Less common in the study of Imperial Chamber Court case files have been methodologies informed by insights from the “hermeneutic turn” in legal studies. One of the central insights of this approach is that all texts are shot through with the choices of authors; legal texts, in particular, are produced in a power constellation that always filters and distorts “social facts.” On this view, one must learn to read case files without becoming a “prisoner” to the text. One way for example is to look for “ruptures” in the text—moments in which the action of the case file seems to go off script: when an inquisitor, for example, begins to ask questions that stray from the targeted legal issue, we can glimpse, by means of the inquisitors’ raw curiosity, past the filters of an admittedly heavily conditioned legal text.<sup>188</sup>

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*Gerichtsbarkhet im Alten Reich*, ed. Anette Baumann, et al (Cologne: Böhlau, 2001), 55-68.

<sup>184</sup> Alexander Denzler, Ellen Franke, and Britta Schneider, eds., *Prozessakten, Parteien, Partikularinteressen: Höchstgerichtsbarkeit in der Mitte Europas vom 15. bis 19. Jahrhundert* (Berlin: de Gruyter, 2015); Friedrich Battenberg and Bernd Schildt, eds., *Das Reichskammergericht im Spiegel seiner Prozessakten: Bilanz und Perspektiven der Forschung*, (Cologne: Böhlau Verlag, 2010). In general, the QFHGAR series provides numerous examples of creative uses of case files; see footnote 116 above.

<sup>185</sup> See e.g. Anette Baumann, *Die Gesellschaft der Frühen Neuzeit im Spiegel der Reichskammergerichtsprozesse: eine sozialgeschichtliche Untersuchung zum 17. und 18. Jahrhundert* (Cologne: Böhlau, 2001); Robert Riemer, *Frankfurt und Hamburg vor dem Reichskammergericht: Zwei Handels- und Handwerkszentren im Vergleich* (Cologne: Böhlau, 2012); Anette Baumann, Anja Eichler, Stefan Xenakis, eds., *Augenscheine – Karten und Pläne vor Gericht, Katalog zur gleichnamigen Ausstellung im Reichskammergerichtsmuseum Wetzlar vom 22. November 2014 bis 15. Februar 2015* (Wetzlar: Gesellschaft für Reichskammergerichtsforschung, 2014).

<sup>186</sup> Sigrid Jahns, *Das Reichskammergericht und seine Richter. Verfassung und Sozialstruktur eines höchsten Gerichts im Alten Reich. Teil 1: Darstellung* (Cologne: Böhlau, 2011); Sigrid Jahns, *Das Reichskammergericht und seine Richter. Verfassung und Sozialstruktur eines höchsten Gerichts im Alten Reich. Teil 2: Biographien* (Cologne: Böhlau, 2003); Anette Baumann, “Die Prokuratoren am Reichskammergericht in den ersten Jahrzehnten seines Bestehens,” in *Das Reichskammergericht: Der Weg zu seiner Gründung und die ersten Jahrzehnte seines Wirkens (1451-1527)*, ed. Bernhard Diestelkamp (Cologne: Böhlau, 2003), 161–96; Wolfgang Prange, *Vom Reichskammergericht in der ersten Hälfte des 16. Jahrhunderts: die Urteile in Christian Barths Edition: Kammerboten und Zustellung der Gerichtsbriefe* (Cologne: Böhlau, 2002).

<sup>187</sup> See e.g. Anette Baumann and Joachim Kemper, eds., *Speyer als Hauptstadt des Reiches: Politik und Justiz zwischen Reich und Territorium im 16. und 17. Jahrhundert* (Berlin: de Gruyter, 2016).

<sup>188</sup> See e.g. Carlo Ginzburg, *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller*, trans. John and Anne C. Tedeschi (Baltimore, MD: Johns Hopkins University Press, 2013).

Another central insights of this approach is that in texts we can detect conceptual and epistemic patterns that can tell us something about the thought world of the people involved in the production of a case file: what counted as a believable narrative, what counted as an authoritative form of keeping track of past events, and what constituted a human, and their place in a community, for example.<sup>189</sup> By moving away from a functionalist, positivist view of law, to a phenomenological, socio-linguistic view of law, we can see law as “meaning, not machinery.”<sup>190</sup>

Thus, the value of a case file is not just to provide evidence of, or to corroborate, or to tell a story about something else—economic conditions, political chronologies, social life, a particular institution or person, for example—but rather, its value is internal to the case file itself. The case file—both as a material object and as legal discourse—is the site of worthwhile historical examination.<sup>191</sup> The result is a study in the history of legal ideas that, while born close to the ground of social action (in the form of litigation), prioritizes the “content and internal structure of legal thought,”<sup>192</sup> and sees the ways in which law is constitutive of consciousness,<sup>193</sup> the ways in which legal relations are constitutive of social life,<sup>194</sup> variously constraining people, shaping their desires, and channeling the expression of those desires.<sup>195</sup>

Legal historians have shown that stable legal orders can take shape not just through legal rationality, or through the legislation of a sovereign, or the authoritative jurisprudence of a court, but through conflict, even by those who do not have any claim to sovereignty. In her study on the origins of international law, for instance, Lauren Benton argues that while the conventional historiography has seen its origins in the writings of sixteenth and seventeenth century jurists or in legislation and interimperial agreements, her work shows that international law derived from “proliferating practices and shared expectations about legal processes” in the context of “anomalous legal zones.” She calls this view of the formation of law in the context of jurisdictional conflict, “modified positivism.” While the conventional, command theory of positivism claims that law is the command of the sovereign, in Benton’s modified positivism, the positing agents are multiple and contradictory, and what sticks does so for many historically specific reasons.<sup>196</sup>

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<sup>189</sup> See Natalie Zemon Davis, *Fiction in the Archives: Pardon Tales and their Tellers in Sixteenth-Century France* (Stanford, CA: Stanford University Press, 2003); also David Warren Sabean, *Power in the Blood: Popular Culture and Village Discourse in Early Modern Germany* (Cambridge, UK: Cambridge University Press, 1984).

<sup>190</sup> Clifford Geertz, “Local Knowledge: Fact and Law in Comparative Perspective, in *Local Knowledge: Further Essays in Interpretive Anthropology*, ed. Clifford Geertz (New York: Basic Books, 1983), 232.

<sup>191</sup> See e.g. Cornelia Vissman, *Files: Law and Media Technology* (Stanford, CA: Stanford University Press, 2008).

<sup>192</sup> Duncan Kennedy, “The Structure of Blackstone’s Commentaries,” *Buffalo Law Review* 28 (1979), 220-221.

<sup>193</sup> Robert W. Gordon, “Critical Legal Histories,” *Stanford Law Review* 36 (1984), 109: “lawmaking and law-interpreting institutions have been among the primary sources of the pictures of order and disorder, virtue and vice, reasonableness and craziness, Realism and visionary naivete and of some of the most commonplace aspects of social reality that ordinary people carry around with them and use in ordering their lives. To put this another way, the power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.”

<sup>194</sup> Gordon, 104.

<sup>195</sup> Gordon, 74.

<sup>196</sup> Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge, UK: Cambridge University Press, 2009), 159.

In this dissertation, I rarely triangulate the case file with other primary sources. I do not go into great detail about the local backdrop of a case, or the biographies of those involved. And rarely does it matter to my analysis what the outcome of the case was. Instead, I focus on the case file as a text; what kinds of laws and authorities were cited? What kind of argumentation was made? What went without saying? While the particularism of the disputes that underlie each case file pulls one into their specificity, the uniformity of form imposed by the legal context in terms of materiality, narrative, and procedure invites one to see repetitions and patterns, but also ruptures and surprising usages. I show that while outcomes that are significant for the history of law may have been highly contingent, emerging in a context of great indeterminacy, repetition and patterns are clues to us of legal significance. Though the process I describe is contingent and ad hoc, it was happening according to especially legal logics of classification, debates about which facts, persons, causes of action, and moral issues should be included and excluded in this highly specialized form of social discourse, disciplining, and dispute-resolution we call law.<sup>197</sup>

Language—“as both an empirical and hermeneutic phenomenon”<sup>198</sup>—is central to this story. I attend to “the details of legal practice” and to the ways in which law is “spoken into existence not only through foundational legal speech acts” such as decrees, edicts, and recesses “but also in more mundane moments,” such as standard litigant petitions and the boilerplate language of summons, mandates, powers of attorney, and other workaday documents. To understand law’s social force in these moments, we have to see the “reflexive, metalinguistic qualities” of even the most technical and formalistic legal practices, and to not reproduce the artificial divide between “constitutional moments and the quotidian practices of everyday legal language.”<sup>199</sup> The legal and constitutional significance of the Reformation is not only to be found in landmark legislation, but in the “unfolding, unstable pragmatics” of litigation.<sup>200</sup> Language uttered in courtroom contexts, even by those unauthorized to “decide,” can become a way of performing into existence the authority of one’s view and interpretation, while at the same time reinscribing the logic of sovereignty that makes that courtroom a space of authority in the first place.

I also attend to the performative and passionate dimensions of legal speech acts. The “performative” aspect gets at the circumstances of an utterance, the conventions and formal rules that make it so that something is effected precisely in being said.<sup>201</sup> The “passionate” dimension is an extension of the performative.<sup>202</sup> It gets at the unruly and imaginative dimensions of a legal speech act, the aspect that appeals not to formal authority and rules but to others whom one singles out as standing with one in meaningful relation.<sup>203</sup> The passionate dimension gets at the way in which speakers make “claims on their hearers to acknowledge their truth or their right,” and the measure of their effectiveness is not whether they are invalid or valid, but rather whether they are persuasive, or whether they stick.<sup>204</sup> In a passionate utterance, “I declare my standing

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<sup>197</sup> See Paul Dresch and Hannah Skoda, eds., *Legalism: Anthropology and History* (Oxford, UK: Oxford University Press, 2012).

<sup>198</sup> Richland, 221.

<sup>199</sup> Richland, 213.

<sup>200</sup> Richland, 214.

<sup>201</sup> Constable, 21; J.L. Austin, *How to Do Things With Words*, 2nd ed. (Cambridge, MA: Harvard University Press, 1975) 4-6.

<sup>202</sup> Stanley Cavell, *Philosophy the Day After Tomorrow* (Cambridge, MA: Harvard University Press, 2006), 176ff.

<sup>203</sup> Constable, 34-5.

<sup>204</sup> Constable, 36.

with you and single you out, demanding a response in kind from you, and a response now, so making myself vulnerable to your rebuke, thus staking our future.”<sup>205</sup>

I show that litigation was a highly generative discursive space of legal and constitutional creativity. In particular, I argue that litigants and lawyers mobilized certain aspects of the Roman law trial form, and fused these with long-standing aspects of the legal culture of the Empire, such that mundane procedural instruments could operate as unexpected proxies for some of the most pressing constitutional questions of the early Reformation—about who or what “we” are; about legally legible forms of belonging; about the relationship between law, conscience, and authority; and about the future of constitutional and legal unity in the context of confessional division.

Methodologically, my focus on language also involves issues of scale and scope.<sup>206</sup> Law demands that particularistic stories become “facts” recognizable as a certain legal-narrative type. It also demands that the dimensions of a case that render it comparable with another, or that deliver it within the parameters of a certain category, be elevated across cases with diverse, origins. In this way, “instances of legal language use are [...] linked or sundered across moments of their production.”<sup>207</sup> By analyzing these links and splits, we can observe the ways in which law organizes its own social world and its own social force at the hands of multitudes of actors with a wide range of motivations and interests. By looking closely at the language of litigation and case files, we access “a way of analyzing law in both its microlinguistic details and its macrosociological effects without sacrificing to questions of scale either the observational rigor afforded by the former or the broader interpretive interventions implied by the latter.”<sup>208</sup> By interpreting case files both empirically and hermeneutically, we can see the “macrosociological force” of law within the “microlinguistic details”<sup>209</sup>—put another way, we can see the constitution-making in litigation.

## **On Sources: Case File Production and Judicial Procedure of the Imperial Chamber Court**

Over the course of its three centuries-long existence, from 1495-1806, it is estimated that around 100,000 cases were processed in the Court, and of those over 70,000 files still exist. In the early nineteenth century, a federal commission was formed to manage the archive, sending relevant materials to courts in which pending cases would be adjudicated, since no single central court served the same function that the Imperial Chamber Court had.<sup>210</sup> Between 1847 and 1852, the commission delegated the management of case files to localities, distributing tens of thousands of case files among 39 local archives. Some archives received just over 100 case files, while others received several thousand. In general, the cases were sent to the residence of the plaintiffs or to the location of the lower court in appeals cases. Starting in the 1960s, various state and federal commissions were created to index the archives of the Imperial Chamber Court in a consistent manner. Most of about 100 volumes of these inventories and finding aids are published.<sup>211</sup>

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<sup>205</sup> Cavell, 185.

<sup>206</sup> See Christopher Tomlins, “After Critical Legal History: Scope, Scale, Structure,” *Annual Review of Law and Social Science* 8 (2012): 31-68.

<sup>207</sup> Richland, 210.

<sup>208</sup> Richland, 211.

<sup>209</sup> Richland, 221.

<sup>210</sup> Lorenz, 198.

<sup>211</sup> One effort from 2013 combined 26 inventories, totally almost 40,000 case files, into a single database,

In the course of my research, I visited fifteen archives, and gathered around 100 cases, not all of which are cited in this dissertation.<sup>212</sup> My selection procedure consisted of three methods. First, I worked backwards from references in secondary sources. Sometimes, these leaned on the lists created by the protesting estates themselves, either formally to be submitted to the Emperor and the Court, or informally discussed in correspondences and protocols. Second, I scoured the finding aids produced by archives; my research was thus mediated by the description choices made by archivists. If the finding aid had an index, I would begin by using it to look for key terms such as “Reformation” or “protesting estates.” To be thorough, though, I would also use the chronology guide to identify all cases held in that archive that occurred in the period 1521 to 1555, and would read the description of each one to identify potential Reformation-related subjects. Through this method, I gathered many cases that were not regarded as “matters of religion” by the protesting estates and therefore appeared on none of the lists I mentioned above, nor in the extant Reformation cases historiography. Some of these cases are discussed in chapter 3. Finally, I benefitted from suggestions made by archivists and historians of the Court.<sup>213</sup>

There are certain features of an Imperial Chamber Court case file which are useful to know before reading later chapters. To understand these features of the case file, it is necessary to understand the basics of the court's legal procedure, as well as the process of the collation of a case file.

First, the entire proceeding was mediated by writing, in accordance with the doctrine *quod non est in actis non est in mundo* (what is not in the file does not exist in the world).<sup>214</sup> Second, the Court operated according to a system of appointments (*Terminsystem*) such that each relevant action in a proceeding was assigned a distinctive date; thus, there was an orderly rhythm of mutual response, in which litigants took turns making claims, and responding to claims. The dispersal of the dates in this regular way was linked to the imperative of text, as each stage required the written response from the relevant litigant, in order for the next stage to come about. Third, key documents were to be “articulated,” or put into article form. That is, litigants would write facts, claims, and allegations in the form of a numbered list to which parties would respond one by one with “true” or “not true” and a corresponding explanation. The idea was that in the processual responses of the parties to each other, the important facts and perhaps evident outcome would reveal themselves.<sup>215</sup> This “articulated” form was also a pillar of witness testimony gathering, which was designed simply to elicit “true” or “not true” responses from witnesses, as well as a brief statement as to how the witness knows. For instance, did the witness have first-hand knowledge, having witnessed the act him- or herself? Did the witness hear this from someone else? Or was it common knowledge, a general rumor? The construction of the list

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though I am not sure it is being maintained, as one encounters technical difficulties in attempting to access it; I was unable to make use of it. See “Forschungsprojekt Datenbank Höchstgerichtsbarkeit,” accessed July 11, 2019, <https://www.jura.uni-wuerzburg.de/lehrstuehle/amendtraut/forschung/forschungsprojektdatenbankhoechstgerichtsbarkeit/>

<sup>212</sup> For archives visited, see Acknowledgments.

<sup>213</sup> Especially helpful in this regard were Manfred Hörner of the Bayerisches Hauptstaatsarchiv in Munich and Anette Baumann of the University of Giessen and the Society for the Study of the Imperial Chamber Court in Wetzlar.

<sup>214</sup> See Bernhard Diestelkamp, “Beobachtungen zur Schriftlichkeit im Kameralprozeß,” in *Zwischen Formstrenge und Billigkeit: Forschungen zum vormodernen Zivilprozess*, ed. Peter Oestmann (Cologne: Böhlau, 2009), 105-16.

<sup>215</sup> Lorenz, 195-6.

of questions was therefore central to the testimony procedure, mostly relying on the Positions and Articles document submitted by the plaintiff.

These features of Roman-canonist procedure meant that the chancery of the Court played an essential role in the proceeding, and these procedural features are reflected in the case files themselves.<sup>216</sup> A case began in one of two ways: either when the imperial prosecutor (Fiscal) sued, or when a private party sued. The Fiscal was an agent of the Emperor in his capacity as protector of the Peace.<sup>217</sup> It was not until the 1555 reforms of the Court that the Fiscal became increasingly separate from the person of the Emperor, regarded as a member of the Imperial Chamber Court personnel, rather than an appointee of the Emperor.<sup>218</sup>

There were three kinds of pleading that could launch a proceeding in the Court. First, a normal suit, in which the Imperial Chamber Court had original, first-instance jurisdiction. Second, a request for a Mandate, if there was an urgent danger of activity on the part of the defendant that the complainant sought to prevent.<sup>219</sup> Third, an appeal, if there was an existing case pending elsewhere, or a ruling from another court.

The pleading (called a *petitio summaria*) would be drafted by a notary in the litigant's own chancery, or by a secretary, or a public notary, to whom he would dictate his plea. The pleading was in folded letter form, with a seal on the outside. Sent along with it was the power of attorney document (*mandatum constitutionis generalis*), naming the procurators and advocates who would represent the plaintiff in the case. There was a public shelf (*Regal*) at the entrance of the chancery where such submissions were made. There, the Chancery Administrator (*Kanzleiverwalter*) would receive the document. The Administrator had to be legally educated and occupied the top rung of the chancery hierarchy, on the same level as the judges; indeed, some sixteenth-century judges took this role. Until 1530, he was appointed by the Emperor; after 1530, when the Court chancery became independent of the imperial chancery (*Reichskanzlei*), it was the Archchancellor (the Elector of Mainz) who appointed him.<sup>220</sup>

The *Taxator* (assessor) would determine how much the plaintiff would need to pay for the production of the required documents.<sup>221</sup> Depending on the type of pleading, and the number of defendants, the cost and form could vary. A normal suit would require the production of a

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<sup>216</sup> *Handwörterbuch zur deutschen Rechtsgeschichte*, s.v. "Gerichtsverfahren," by G. Buchda, vol. 1, 1551-1563.

<sup>217</sup> Dick, 79.

<sup>218</sup> See Björn Rautenberg, *Der Fiskal am Reichskammergericht: Überblick und exemplarische Untersuchungen vorwiegend zum 16. Jahrhundert* (Frankfurt am Main: P. Lang, 2008), 1-49; and Dick, 101.

<sup>219</sup> Scheurmann, *Frieden durch Recht*, 131. Branz argues that mandates were used in order to bolster one of the pillars of the Imperial Chamber Court, which was its aim to prevent violations of the Land-Peace through self-help. The point of a mandate was to allow someone who feared an imminent land-peace violation to ask the Court to demand that the other person cease their land-peace violating actions or threats. But there was no legal basis for these kinds of preventative mandates; it seems it was inherited from earlier iterations of kingly courts. Over time, it became an independent cause of action if someone ignored one of these mandates; so their actions were in violation not only of the common law and the Land-Peace but also the mandate. It was first in the 1529 Imperial Recess, and again in the 1530 Recess that a legal basis for the preventative mandate was legislated, and it was done explicitly within the context of the Reformation cases. In particular, the Recesses said that if a party ignored a preventative mandate, he would be prosecuted by the imperial Fiskal. Thus, Branz argues that it was by way of Reformation cases that preventative Land-Peace mandates found their way into the law of the Empire (Branz, 115).

<sup>220</sup> Smend, 321. See also Oswald von Gschliesser, "Das Beamtentum der hohen Reichsbehörden (Reichshofkanzlei, Reichskammergericht, Reichshofrat, Hofkriegsrat," in *Beamtentum und Pfarrerstand 1400-1800*, ed. Günther Franz (Limburg/Lahn: C.A. Starke Verlag, 1972), 1-26.

<sup>221</sup> Not to be confused with *Beisitzer* or *Assessor*, the title for judges. For more on finances of the Court, Smend 334-339.

Summons (*Ladung*); a request for a mandate would require the production of a *Mandatum Executorialis*; and an appeal would require both a summons for the original plaintiff, as well as an order from the Imperial Chamber Court for the original court to deliver all relevant documents to the case (*Kompulsorialbrief*). It was the Chancery Administrator—not a judge or the Court President—who would set the deadline by which the recipient had to respond or appear in public audience, and who would determine the penalty for failure to respond.<sup>222</sup> It is not exactly clear on what basis the Administrator made these determinations. Some of the variation we see in the cases in terms of stakes is difficult to comprehend—similar fact patterns might have as their threatened consequence simply a financial penalty, or something as severe as declaration in the *Acht* (outlawry). In most respects, as the case files bear out, these summons and mandates simply reproduced the claims and requests of the *petitio summaria*, almost word for word.

The Chancery Administrator assigned the drafting of the summons, mandate, or order for lower court documents to a notary (*Notar* or *Protonotar*).<sup>223</sup> A basic formula governed the structure of these documents. It began with the *Intitular*, indicating it was written in the name of the Emperor, and listing the lands over which he had dominion. It then stated who the document was directed towards; who was bringing the suit, mandate, or appeal; and on what grounds. Then, it stated what the recipient must do (for example, respond and appear in Court, and, if it was a mandate, to cease the alleged actions), by what deadline, and the threatened penalty or consequences of not doing so. A copy was produced for the chancery's files. The original document was then sealed, and given to the Delivery Master (*Botenmeister*), the person in charge of court document delivery. He would select a court messenger (*Kammerbote*) to deliver. Most court documents would be delivered within a few weeks of production. The messenger would hand the original to the person or persons summoned, and he would write a brief report about what happened at the time of delivery on the back of a copy of the summons or mandate, noting when, where, and who received the document, and anything unusual about the encounter, including behaviors that could indicate recalcitrance.<sup>224</sup> This copy was then returned to the Chancery Administrator.

These, as well as all other documents, were then archived in chronological order in the Court's archive (*Leserei*). That is, the documents were not immediately organized according to dispute, but according to date. Compilation of a case file did not happen until it came time for the judges to discuss the case. Until compilation, all documents relevant to all pending cases were filed chronologically. An index of all of these documents was kept in books called *Repertorien*, organized by year and alphabetically ordered according to the name of the plaintiff.

In addition to the documents produced in the chancery and stored in the court archive, court clerks (*Gerichtsschreiber*) maintained a running protocol of all proceedings of the court sessions (*Audienz*), in chronological order called the Session Protocol (*Audienzprotokoll* or *Sitzungsprotokoll*). Most of what was recorded in the protocol had a corresponding document that would later be collated in the case file. These were documents that, rather than being submitted and produced in the chancery, like the *petitio summaria*, the summons, the mandate, or the *Kompulsorialbrief*, would instead be submitted and presented in public audience in the course of litigation. The oral statements of these submissions were called *Rezesse*. The oral

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<sup>222</sup> Smend, 321.

<sup>223</sup> Smend, 322.

<sup>224</sup> See Prange 113-24; and Wolfgang Sellert, "Die Ladung des Beklagten vor das Reichskammergericht: eine Auswertung von Kammerbotenberichten," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung* 84 (1967): 202-35.



statements would be recorded in the Session Protocol, and the corresponding documents would be copied, and collected for filing in the court archive in chronological order. A production notation (*Produktionsvermerk*) would be written on the verso of each document, indicating the names of the parties involved, the location and date of submission.

The Session Protocol also, however, recorded courtroom speech that had no corresponding document in the case file. Because of the imperative of writing, there were restrictions on what kinds of speech could be made without a corresponding document; therefore, the nature of courtroom speech as we see it recorded in the protocol were tied to matters of procedure. As we will see, especially in Chapters 4 and 5, sometimes matters of procedure and substance were linked; in those cases, exchanges recorded in the protocol can become very illuminating. “The *Audienz* was much more than simply a forum for the delivery of judgments and the quick submission of case documents. It was the central, public venue of disputed imperial matters in front of an empire-wide public.”<sup>225</sup> Another type of courtroom speech recorded in these Session Protocols were the administrative judgments (*Beurteile* or *Zwischenurteile*) of the judges. These were decisions that settled matters of court procedure.

A case file would not be compiled until a request for compilation was submitted to the chancery. These requests came from the judges when they required the case file in order to have a deliberation meeting (*Plenum*) about it. All requests were recorded in a register, called the *Submissionsregister*.

A notary would begin the process of compilation by creating a Special Protocol (*Spezialprotokoll*). This was a new protocol that was specific to this case file. It was the core organizing feature of a case file, placed at the front, and functioning much like a table of contents. The Special Protocol was created through the inspection of two sources. First, the notary would examine the Session Protocol, and excerpt those parts relevant to the particular case. Second, the notary would examine the indexes (*Repertorien*) for all of the years that the proceeding had been pending in the court. Since the indexes were in alphabetical order, the notary would look under the name of the plaintiff, and identify all of the documents relevant to the case that were listed there, and therefore all of the corresponding documents that had been held in the court archive. To each document, he would attach a number, which he would write in the margins of the Special Protocol, next to the *Rezesse* excerpt that corresponded to the date of submission. The number is called a quadrangle, because it was embellished with a square around it for quick identification. The quadrangling numbering system was another key organizing principle of the case file. With the special protocol complete and in hand, the notary would search for the documents stored in the court archive. He would then mark each one with its corresponding quadrangle number, placing it above or below the production notation (which, as noted before, recorded the names of the litigants, and the date and location of submission).

The complicated and convoluted nature of this process can be explained by the fact that the mechanisms of the chancery’s functioning took forms based on the custom of the imperial chancery (*Reichskanzlei*), rather than being created to suit the procedure of the Court.<sup>226</sup> The process gives a sense of the passive relationship the judges had to pending matters; without any way to orient themselves, it was impossible for the Court to exercise any influence over the progress of a case; litigants and their lawyers were responsible for moving matters forward. The convoluted process also led inevitably to errors. The court archive was chaotic and brimming;

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<sup>225</sup> Baumann, *Visitationen*, 143.

<sup>226</sup> Smend, 311, 325.

very often, individual documents were lost.<sup>227</sup> Nonetheless, the predictable sequence of court sessions, and the documents that would correspond to each stage of a trial, facilitated the collation of a case file.

Before litigating the substance of a dispute, parties had to “settle the legal issue” (*Kriegsbefestigung, litis contestatio*). The *litis contestatio* was a formal, verbal act in which a defendant party confirmed that the legal issue identified by the plaintiff was, in fact, the object of dispute.<sup>228</sup> Before the legal issue was settled, the defendant party could raise objections of all kinds—about the forum, the truthfulness of the plaintiff’s description of the facts, and whether the plaintiff had correctly identified the legal issue—and could submit counter-claims, thereby protracting the length of a case greatly.<sup>229</sup> These acts constituted the pre-trial stage of the proceedings.<sup>230</sup> Many Reformation cases never moved past the *litis contestatio* stage. Or if they did, it was done in contumacy (*in contumaciam*); that is, because the defendant party refused to settle the legal issue, the Court announced an administrative judgment stating that the case would proceed on the basis of the legal issue identified by the plaintiff.<sup>231</sup>

Once the *litis contestatio* stage had passed, the first document submitted to the Court was a complete account by the plaintiffs of their claims against the defendant. These would often include new accusations based on the behavior of the defendant in the pre-trial stage, especially if the defendant had failed to comply with a mandate, had undertaken new justiciable actions, or had been contumacious by failing to respond to Court instructions within the allotted time. This document was called the Positions and Articles (*positiones et articulata*).

The defendant’s response was called the *Replik*. The plaintiff’s response to that was called the *Duplik*; followed by the *Triplik*, and so forth, until a party would write a proposed conclusion to the case, adding to the title of the document “*et in eventum Conclusiones*.”

A variety of other kinds of documents, procedural in nature, are sprinkled throughout a case, such as a letter of excuse (*Entschuldigung*) which usually requested time extensions, or petitions that nudged the judges to declare a particular administrative judgment. Other procedural documents include substitutions, which replaced one attorney for another, as well as protestations and recusations, which will be discussed more closely in Chapter 5.

Another major category of documents found in a case file are evidentiary in nature. In appeals cases, the entire case file of a local, territorial, or ecclesiastical court would be contained in the file, as well as relevant correspondences between lower courts, territorial regimes, and faculties of law.<sup>232</sup> In addition, it is very common in case files that a given document will cite to an appended official document (*Urkunde*) labeled with a letter (A, B, C, and so forth) to prove the existence, for instance, of a certain imperial privilege, or a past agreement of which the other party was in violation. Often, these were written on vellum.

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<sup>227</sup> Smend, 328.

<sup>228</sup> See Dick, 144-6; Steffen Schlinker, “Die Litis Contestatio im Kameralprozeß,” in *Zwischen Formstrenge und Billigkeit: Forschungen zum vormodernen Zivilprozess*, ed. Peter Oestmann (Cologne: Böhlau, 2009), 139-64.

<sup>229</sup> On various kinds of objections in the pre-trial stage, see Dick, 154-6.

<sup>230</sup> Also called *extrajudizial* and *ante iudicium*. See Dick, 148-150.

<sup>231</sup> Dick notes that the ability settle the legal issue in contumaciam secured the status of *litis contestatio* as a legal fiction, a formulaic but necessary procedural stage (Dick, 146). On contumacy, see *Handwörterbuch zur deutschen Rechtsgeschichte*, s.v. “Contumacia,” by G. Buchda, vol. 1, 636-637. See also Smail, 173; Joanna Carraway, “Contumacy, Defense Strategy, and Criminal Law in Late Medieval Italy,” *Law and History Review* 29, no. 1 (2011): 99–132.

<sup>232</sup> Ralf-Peter Fuchs, “The Supreme Court of the Holy Roman Empire: The State of Research and the Outlook,” *Sixteenth Century Journal* 34, no. 1 (Spring 2003): 21-3.

Witness testimony was gathered through an entirely separate procedure.<sup>233</sup> A commissioner was appointed by the Court, often on the recommendation of one or both litigating parties, who would be responsible for summoning witnesses, interviewing, and recording their responses, among other things. The list of questions was usually closely based on the plaintiff's Positions and Articles.<sup>234</sup> All of this was recorded in an often very lengthy document contained in the case file called a *Zeugenrotulus*. This document may contain not only witness testimony but also maps, sketches, drawing of buildings, genealogical charts, caricatures of nobles, and even artifacts such as the knife used in a crime--though nothing so interesting appears in the case files used in this dissertation.

## Judges' Notes

Though the majority of this dissertation leans on the case files themselves, in some cases I use judges' notes. The minutes of judges' deliberation sessions were not part of the case file. Nor were the final judgments, the votes of judges, or their reasoning included in a case file. Nonetheless, there are certain kinds of records left over that indicate the views of judges.

A deliberation (*Plenum*) began with the appointment of one judge as the speaker (*Referent*). It was he who received the case file of the pending litigation, read it, and made notes about it. Some of the documents of a case file contain marginalia made by the *Referent* judge. These Latin notations were almost always abbreviated summaries of the salient points made. We also see underlining, that can be useful indications of the arguments that stood out to the *Referent* judge. The judge then wrote a summary (*Relation*), which consisted of a narration of the alleged facts, an examination of formalities and procedure, the legal argumentation of both sides, and his recommended decision (*Votum*). The judge would present his summary to the subset of judges who had been appointed to the case, and they would begin deliberations.<sup>235</sup> All *Relation* documents prior to 1711 have been lost, except for those belonging to a few cases in the late sixteenth and seventeenth centuries, contained in the Federal Archive in Berlin-Lichterfelde, that were serendipitously discovered by Ruthmann in the 1990s,<sup>236</sup> as well as those that happened to be preserved in the form of excerpts in published cameral literature, of which there are only a handful of sixteenth century entries.<sup>237</sup>

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<sup>233</sup> For a discussion of witness depositions of the Imperial Chamber Court for a later period as a matter of popular agency, see Matthias Bähr, "The Power of the Spoken Word: Depositions of the Imperial Chamber Court: Power Resistance, and 'Orality,'" in *Spoken Word and Social Practice: Orality in Europe (1400-1700)*, ed. Thomas V. Cohen et al. (Leiden, Boston: Brill, 2015), 115-138.

<sup>234</sup> Lorenz, 196-7.

<sup>235</sup> See Filippo Ranieri, "Entscheidungsfindung und Begründungstechnik im Kameralverfahren," in *Zwischen Formstrenge und Billigkeit: Forschungen zum vormodernen Zivilprozess*, ed. Peter Oestmann (Cologne: Böhlau, 2009), 165-90; and Filippo Ranieri, "Entscheidungsfindung und Technik der Urteilsrelation in der Tradition des deutschen Usus modernus: das Beispiel der Aktenrelationen am Reichskammergericht," in *Case Law in the Making: The Techniques and Methods of Judicial Records and Law Reports*, ed. Alain Wijffels (Duncker & Humblot: Berlin 1997), 277-97.

<sup>236</sup> Ruthmann, 204n553. At the time, they were in the Federal Archive in Frankfurt.

<sup>237</sup> In 2004, Baumann published a finding aid in which she attempted to piece together all published reproductions of judges' Relations and Votes that she had found on particular pages in about twenty-two publications of various genres from the seventeenth and eighteenth centuries, with cross-references to their relevant case files. The finding aid extracts only those parts that are quotes of Relations or Votes, which are buried in these large texts devoted to interpretation and analysis. See Anette Baumann, ed. *Gedruckte Relationen und Voten des*

Judges would often take notes in these sessions, some of which have been preserved in archives. There are two published works on the notebooks of two Imperial Chamber Court judges from the first half of the sixteenth century—Viglius van Aytta and Mathias Alber.<sup>238</sup> They are structured as registers, providing detailed summaries of the individual notebook entries, and cross-referencing those entries with relevant case files, cameral literature, and modern secondary literature.

In 2009, a previously untapped cache of judges' notes was discovered at the Federal Archive in Berlin. These notes were highly idiosyncratic showing wide variation both in substance and in the comprehensibility of the handwriting.; many words are illegible, bouncing between abbreviated Latin and German, reflecting the personal style of the judge, and whatever stood out to him as useful or necessary to jot down for his reflection and notes. The finding aid produced for these notes contains approximately 250 pages from the sixteenth century that indicate discussion of Reformation cases.<sup>239</sup>

The judgments for a case would be recorded in a judgment book (*Urteilsbuch*), which simply recorded the final judgment, along with identifying information such as litigant names, years, and the legal issue. These recorded in effect the information that the Court would make public regarding its final judgments in a case, and did not discuss the judges' reasoning. All judgment books produced prior to 1684, however, were destroyed in a fire.<sup>240</sup>

Beginning in the late sixteenth century, retired judges began to publish compilations of judges' discussions in committee, including their Relations and Votes, and final judgments (*Endurteile*). The first to do so was Joachim Mynsinger von Frundeck, judge in the Imperial Chamber Court from 1538 to 1556. At first, he kept a record of judge deliberations for his own reference. After he retired, though, other judges asked to use his writings. Though it was illegal to publicize, he nonetheless decided to publish his writings, marking the birth of a new genre of professionalizing and pedagogical legal text, called cameral literature.<sup>241</sup> These texts are massive, some (like Frundeck's) are mostly in Latin, but with quotations from original case files in German, while others (like Gail's) are mostly in German. Some are anonymized, focused on extrapolating general rules from the disputes, but others include litigant names and years.<sup>242</sup>

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*Reichskammergerichts vom 16. bis 18. Jahrhundert: ein Findbuch* (Cologne: Böhlau, 2004). See also Friedrich, *Territorialfürst*, 8n28.

<sup>238</sup> R.M. Sprenger, *Viglius van Aytta und seine Notizen über Beratungen am Reichskammergericht (1535-1537)* (Nijmegen: Gerard Noodt Instituut, 1988); Steffen Wunderlich, *Das Protokollbuch von Mathias Alber: zur Praxis des Reichskammergerichts im frühen 16. Jahrhundert* (Cologne: Böhlau, 2011).

<sup>239</sup> Anette Baumann, *Die Gutachten der Richter—Ungedruckte Quellen zum Entscheidungsprozess am Reichskammergericht (1524-1627)*, Schriftenreihe der Gesellschaft für Reichskammergerichtsforschung, 43, June 22, 2014, [http://data.rg.mpg.de/rkg/2014-06-22\\_Richterprotokolle\\_gesamt.pdf](http://data.rg.mpg.de/rkg/2014-06-22_Richterprotokolle_gesamt.pdf)

<sup>240</sup> Lorenz, 198. See footnote 180 above.

<sup>241</sup> See Heinrich Gehrke, *Die privatrechtliche Entscheidungsliteratur Deutschlands: Charakteristik und Bibliografie der Rechtsprechungs- und Konsiliensammlungen vom 16. bis zum Beginn des 19. Jahrhunderts* (Frankfurt am Main: Vittorio Klostermann, 1974); Sabine Schumann, *Joachim Mynsinger von Frundeck (1514-1588). Herzoglicher Kanzler in Wolfenbüttel—Rechtsgelehrter—Humanist. Zur Biographie eines Juristen im 16. Jahrhundert* (Wiesbaden: Harrassowitz, 1983).

<sup>242</sup> See e.g. Andreas von Gail, *Camerae Imperialis Observationes* [...], 2 vols. (Hamburg: Mollerus, 1601); Joachim Mynsinger von Frundeck, *Singulares Observationes Iudicij Imperialis Camerae* (Basel: Gemusaeus, 1563); Joachim Münsinger von Frundeck, *Responsorum Iuris* [...] (Basel: Gemusaeus, 1596); Raphael Seiler and Christian Barth *Urtheil und Beschaydt am hochlöblichen Kayserlichen Cammergericht* [...], 3 vols [1495-1530; 1531-1547; 1548-1561] (Speyer: Ruland, 1604); Christoph Lehmann, *De pace religionis acta publica et originalia* [...] (1631). On cameral literature, see references throughout Oestmann, "Die Rekonstruktion."

## Published Primary Sources

Finally, there are several volumes of edited primary source materials that came out in the 1960s that had to do with the Reformation cases. Most prominent here was Ekkehart Fabian's 1961 *Urkunden und Akten der Reformationsprozesse*.<sup>243</sup> He also published in 1967 sources relevant to the Constance Reformation cases (1529-1548).<sup>244</sup> His other volumes were all documents and correspondences surrounding the Schmalkaldic League (*Die Beschlüsse der Oberdeutschen Schmalkaldischen Städtetage*, 3 vols, 1530-36;<sup>245</sup> and *Die schmalkaldischen Bundesabschiede*, 2 vols, 1530-36).<sup>246</sup> Another useful primary source compilation contains political correspondences of the city of Strassburg during the Reformation (1517-1545).<sup>247</sup>

## Conclusion

So far, we have reviewed the literature on “the Reformation,” the legal history of the Reformation, and the historiography of the Reformation cases. We discussed the various methodologies scholars have used in reading case files, and those that have influenced this project. And we outlined the structure of the case file by reviewing the basics of the Court's procedure. In the next chapter, we will begin to gain an understanding of the legal culture of the Holy Roman Empire by analyzing the case of Martin Luther and the high-profile legislation that grew out of it.

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<sup>243</sup> Fabian, *UARP I*; Ekkehart Fabian, *Die Abschiede der Bündnis- und Bekenntnistage Protestierender Fürsten und Städte zwischen den Reichstagen zu Speyer und zu Augsburg, 1529-1530* (Tübingen: Osiander, 1960).

<sup>244</sup> Ekkehart Fabian, *Quellen zur Geschichte der Reformationsbündnisse und der Konstanzer Reformationsprozesse, 1529-1548* (Tübingen: Osiander, 1967).

<sup>245</sup> Ekkehart Fabian, *Die Beschlüsse der Oberdeutschen Schmalkaldischen Städtetage*, 3 vols. (Tübingen: Osianders) *Part 1: 1530-31* (1959); *Part 2: 1531-32* (1959); *Part 3: 1533-36* (1960)

<sup>246</sup> Ekkehart Fabian, *Die schmalkaldischen Bundesabschiede*, 2 vols. (Tübingen: Osiander, 1958) *Part 1: 1530-32* (1958); *Part 2: 1533-36* (1958)

<sup>247</sup> *Politische Correspondenz der Stadt Strassburg im Zeitalter der Reformation*, 3 vols. (Strassburg: Trübner) *Part 1: 1517-1530* ed. Hans Virck (1882); *Part 2: 1531-1539* ed. Otto von Winckelman (1887); *Part 3: 1540-1545* ed. Otto von Winckelman (1898).

## CHAPTER TWO

### LEGISLATION, DELIBERATION, AND LITIGATION: LEGAL CULTURE AT THE BEGINNING OF THE REFORMATION

In 1521, Pope Leo X declared Luther's teachings heretical and excommunicated him from the Church. In the same year, Charles V outlawed Luther, his followers, and his teachings from the Holy Roman Empire. In 1522, the Imperial Regiment, a short-lived central imperial government, promulgated a Mandate calling on rulers to forbid the new worship in their domains.<sup>1</sup> These high-profile legislative events might suggest a clear enforcement mechanism; in fact, the story is much more complicated. The first part of the chapter tracks the events surrounding the so-called *causa Lutheri*, and the legislation that aimed to snuff out the new heresy, namely: the Papal Bulls, the Edict of Worms, and the lesser-known Regiment Mandate. Ultimately these laws, though promulgated by the most authoritative offices of Western Christendom, proved ineffective in carrying out their stated aims. Indeed, heresy proved to be a relatively peripheral category. One purpose of this chapter is to explain the conditions in which this was so. The analysis here accounts for the ineffectiveness of these laws and legal regimes by elaborating the legal culture of the Holy Roman Empire in this moment.

The second part of the chapter describes the constitutional conditions in which these measures failed to create a unified legal regime of anti-Lutheran enforcement, by looking at two other law-making modalities: imperial assemblies, and courts. Not the unilateral forms of legislation and law-making but those that were the subject of negotiations involving Estates proved to be touchstones in the first half of the sixteenth century. As we will see in the next chapter, it was not the Worms Edict on its own, but the imperial recesses that either confirmed or relativized it that were among the key sources of law tested in the Reformation cases. I discuss the deliberative as well as performative methods of law- and constitution-making in imperial assemblies that made its Recesses perhaps not more effective than edicts, bulls, and mandates, but at least more central to debate and negotiations, and certainly more central in Reformation litigation.

Finally, I propose that we elevate the importance of courts as a site of constitution-making in the sixteenth-century Holy Roman Empire. I show that there are good reasons to do this, beyond the methodological benefits discussed in the last chapter. First, the wide range of courts in the German lands meant that questions of jurisdiction—and therefore questions of the distribution of authority—were always on the table at the start of litigation, whatever the subject matter. Second, courts were one place in which such jurisdictional disputes, themselves, were addressed. Courts stood in an important relationship to the institution of feuding among sovereigns and its inherited logics in the sixteenth century. Third, the procedures of courtrooms were not hermetically sealed from the broader context; strategies and instruments familiar within judicial proceedings often had counterparts in forums such as assemblies that were more explicitly about constitution-making, and vice versa.

These discussions will supply helpful background for the final section, in which I describe the specific role of the Imperial Chamber Court. To understand the Imperial Chamber

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<sup>1</sup> The Imperial Regiment (*Reichsregiment*), also translated as “Governing Council” (see Brady, *German Histories*, 208) was a short-lived (1521-1531) central imperial institution based in Nuremberg with certain executive and legislative functions. See Heinz Angermeier, *Das alte Reich in der deutschen Geschichte: Studien über Kontinuitäten und Zäsuren* (Munich: Oldenbourg Verlag, 1991), 283-340.

Court's importance, we must first understand the importance of courts overall in the constitutional order of the Holy Roman Empire. It also places its emergence in the context of the so-called "reception" of Roman law. By understanding its founding context and impetus, we can understand the varieties of legal sources that would contribute to its jurisprudence, which we will explore in Chapter 3.

Thus, the chapter moves from questions of unilateral legislation, to inquisitorial prosecution, to deliberation, and finally to litigation in order to survey and scrutinize the legal culture of the Holy Roman Empire in this moment, and to provide an account of the socio-legal conditions in which a range of laws and legal forums could be so differentially effective. This chapter invites us to decenter the Worms Edict and the Papal Bull in the legal historiography of the Reformation, and to investigate instead the constitutionally productive context of courtrooms, and the way in which imperial assemblies were often responding to and legislating with *litigation* in mind.

### **The Causa Lutheri and the Legal Status of Reform post-1521: the Papal Bulls, the Edict, and the Mandate**

On October 31, 1517, Luther—then a monk and university professor at Wittenberg—sent a letter to the Archbishop of Mainz. His "criticism of indulgences was initially formulated [...] as a pastoral problem"; the letter in 1517 laid out a "warning that people were being led astray in the belief that they could buy their salvation." Soon after, Luther's ninety-five theses "elaborated on their theological implications." Luther's statements had been the outcome of several years of teaching, preaching and writing, which had already drawn him a large following locally. But this letter to one of the most powerful secular rulers in the German lands was a very public defiant act. Though it is not clear how Luther's theses became publicized, "the fact that they did [...] illustrates how the medium of print transformed a clerical dispute that might have played itself out in a local disciplinary procedure into a major issue that soon plunged both the Church and the Reich [Empire] into a profound crisis."<sup>2</sup> The theses contained "provocative and even moderately heretical" ideas but the significance they assumed has to do more with the frenzied reaction, first because of the publicity and the public anticipation of how the Church—in particular the Pope, his delegates, and the Curia—would respond, and second, because the Dominican friar (Johann Tetzel) named in the theses for heavily pushing these indulgences immediately went on the offensive and called Luther a heretic. "This furious reaction [...] forced Luther to clarify his ideas. His aim throughout was to prove his orthodoxy. The result was a basis for a new theology."<sup>3</sup>

The Church itself was slow at first to deal with Luther. The Pope anticipated that the normal disciplinary proceedings of Luther's Augustinian order would be sufficient. In fact, Luther enjoyed protection from his monastic order, and soon after, by the powerful Elector of Saxony. As publicity escalated, the Pope's delegates made a series of informal attempts to get Luther to recant his views. But when these did not work, they pursued formal proceedings.<sup>4</sup> The formal accusation of heresy, or even the claim to be proceeding against Luther or punishing or

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<sup>2</sup> Whaley, *Germany*, 148.

<sup>3</sup> Whaley, *Germany*, 149.

<sup>4</sup> Whaley, *Germany*, 151.

disciplining him for specifically heretical teachings, was not immediate. The key challenges to Luther's teachings early on were that they limited papal authority, spread unauthorized new teachings, and hindered promulgation of indulgences in the Electorate of Saxony.<sup>5</sup>

It was first in early 1518 that the issue escalated in the eyes of the Pope and Curia to one of heresy, based on the expert opinion of a committee of jurists and bishops convened to consider the matter.<sup>6</sup> On August 7, 1518 Luther received a summons from Rome accusing him of heresy, including a general response to his ninety-five theses. It ordered that he come to Rome within sixty days or else face excommunication.<sup>7</sup> Luther requested that the Elector of Saxony work to ensure that Luther have a trial in a German forum, because he believed Roman judges would be biased.<sup>8</sup> In late August 1518 the Pope declared Luther a notorious heretic.<sup>9</sup> In October 1518, Emperor Maximilian I arranged a meeting between Luther and the papal legate Cajetan in Augsburg. The papal legate's expectation was that Luther would recant. But Luther did not recant; in fact, he wanted to debate.<sup>10</sup> So Cajetan again ordered that the Elector send Luther to Rome for trial, or expel him; and that the process against Luther would continue in Rome.

Throughout all of this, the Elector of Saxony did not defend his protection of Luther on the basis of supporting his theological views—indeed, he never became a follower of Luther's teachings. Rather, he attempted to carve out the position that Luther deserved a fair hearing, stating that though he did not count himself as a follower of Luther, neither was he equipped to judge Luther's statements. Indeed, he said, some of the most learned men in the universities of his lands rejected the notion that Luther's ideas constituted heresy. They also rejected, he said, the way in which the Church simply declared him a notorious heretic; to do so required process, argumentation, and proof.

Then, in November 1518, a decretal fixed the Church's teachings about indulgences, rendering Luther's statements and theses a clear heresy.<sup>11</sup> In early 1519, a papal delegate, Miltitz, came to negotiate with the Elector of Saxony. Eventually they agreed to appoint the Archbishop of Trier to be an arbitrator in Luther's case at the next imperial assembly.<sup>12</sup> All the while, the Pope and Curia were pursuing a trial of Luther in Rome, in absentia. It may seem remarkable that at the same time that Rome was undertaking a trial against Luther, a papal delegate was negotiating an alternative resolution procedure involving the Archbishop of Trier as arbitrator. Yet Kohnle notes that these two paths were not seen as contradictory, because at any moment the Pope could call the case to himself; the Pope's ultimate authority relative to the work of the papal delegate Miltitz, or the papal court, was never in question,<sup>13</sup> though there were a variety of mechanisms for resolution, debate, and settlement available to those involved.

### ***The Papal Bulls***

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<sup>5</sup> Kohnle, 22-3.

<sup>6</sup> Kohnle, 24.

<sup>7</sup> Kohnle, 25.

<sup>8</sup> Kohnle, 27. On "notoriety" in canon law, see Joanna Carraway Vitiello, *Public Justice and the Criminal Trial in Late Medieval Italy: Reggio Emilia in the Visconti Age* (Leiden; Boston: Brill, 2016), 104-13.

<sup>9</sup> Kohnle, 26.

<sup>10</sup> Kohnle, 29.

<sup>11</sup> Kohnle, 33.

<sup>12</sup> Kohnle 34-5, 39.

<sup>13</sup> Kohnle, 42.



These attempts at a negotiated pathway fell through when in June 1520, the Papal Bull *Exsurge Domine* was promulgated. The *Exsurge Domine* listed 41 sentences of Luther's writings that the Church deemed heretical, scandalous, in error, violating, and misleading. Any books, it said, containing these errors were to be publicly burned. It ordered Luther to appear before the Pope within sixty days of the Bull's publication in Rome, otherwise he and his followers would be declared notorious and stubborn heretics.<sup>14</sup> Three weeks later, the Elector of Saxony received a letter from the Curia saying that they considered his protection of Luther support of heresy.<sup>15</sup> The Elector's embrace of an allegedly neutral position in the matter had lost its value; any acknowledgment of the perspectives of learned persons or theologians who viewed Luther's teachings as potentially Christian would now directly contradict the Pope's clear declaration.<sup>16</sup>

Two papal nuncios (Aleander and Eck) were tasked to spread the word of this Papal Bull in the German lands, to punish violations of the Bull, to absolve those who renounced the heresy, to publicly burn books, and to work against their authors. The Bull was to be distributed to archbishops, prince-bishops, universities and down through the hierarchy.<sup>17</sup>

To be effective, the efforts of these nuncios presupposed readiness to cooperate on the part of the German episcopacy. In fact, what they encountered was passivity, some obstruction, and very little active cooperation.<sup>18</sup> It is difficult to generalize about the motivations for these various reactions. As Kohnle notes, a well-defined position regarding Luther and his teachings was the exception among the German episcopacy at this time. Though no bishop expressed doubt about the authority of the Pope's heresy judgment, very few had really considered Luther's substantive views and their theological implications before 1520, and when they began to do so, their reactions reflected the specificity of their individual circumstances and views. Some blended parts of Luther's teachings with older visions of reform that presumed loyalty to the Church. Indeed, over time, a significant portion of the German clergy would come to adopt the Lutheran teachings. The *Exsurge Domine* was really only the beginning of the process of the clergy considering where they stood on Luther.<sup>19</sup>

In terms of acting on the Bulls, the bishops tended only to act with direct pressure from above; until the papal nuncios directly demanded it, the *Exsurge Bull* was not actually publicized anywhere.<sup>20</sup> This is only in part explained by the mixed attitudes towards Luther's teachings. There were also political, legal, and practical considerations that led to a "politics of conflict avoidance": they had concerns about disturbing stable church order and pastoral care, and a general timidity in the face of potential conflicts with worldly princes, cities, and cathedral chapters.<sup>21</sup> Beyond just announcing the Bull, the episcopacy was subdued about carrying out its terms in concrete measures, while bearing a general respect for papal representatives, and an awareness that members of the German episcopacy could themselves be disciplined for disobedience.

In December 1520, Luther publicly burned the Papal Bull *Exsurge Domine*, along with texts of Canon Law.<sup>22</sup> This defiant act was made possible in part through a glut of publicity in

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<sup>14</sup> Kohnle, 45. Whaley, *Germany*, 151.

<sup>15</sup> Kohnle, 43.

<sup>16</sup> Kohnle, 44.

<sup>17</sup> Kohnle, 45.

<sup>18</sup> Kohnle, 47.

<sup>19</sup> Kohnle, 82.

<sup>20</sup> Kohnle, 83.

<sup>21</sup> Kohnle, 83.

<sup>22</sup> Whaley, *Germany*, 143.

previous months. While political energies were absorbed by the tense electoral politics following Emperor Maximilian I's death in 1519, reform propagandists capitalized on the opportunity to popularize Luther and render him a hero.<sup>23</sup> Luther also wrote three consequential tracts in 1520 that circulated widely: "Address to the Christian Nobility of the German Nation Concerning the Reform of the Christian Estate"; "Of the Babylonian Captivity of the Church"; and "Of the Freedom of a Christian."

In January 1521, another Papal Bull (*Decret Romanum Pontificem*, It Pleases the Roman Pontiff) formally excommunicated Luther. Yet this papal bull faced the same barriers that *Exsurge Domine* had, and it barely circulated.<sup>24</sup> As we will see below, by the early sixteenth century, though papal bulls would have seriously raised the question of outlawry in imperial law, it did not lead to it automatically.

### *The Edict of Worms*

The Electors and Estates initially exercised pressure towards the Emperor in an entirely different direction.<sup>25</sup> The election of Charles V in 1519 was an unusually intense and public affair.<sup>26</sup> In part, this was due to the Electoral Capitulation (*Wahlkapitulation*) "that the Electors negotiated as a precondition of his election." The 1519 capitulation was the first of its kind in the Empire, and it "set a lasting precedent, for all subsequent emperors were obliged to subscribe to such a document" that "summarize[d] the constitutional position as it had developed over the last few decades, naturally with a strong bias towards the interests of the Electors."<sup>27</sup> The main aims of the documents were to "tie royal prerogatives to the consent of the Electors and Estates, and to minimize the possibility of non-German influence on the Reich."<sup>28</sup> It stipulated, for instance, that no Estate or subject may be tried before a foreign court.<sup>29</sup> This included the papal court. Although Luther was not an Estate, there was a generalized discomfort among the Estates of the German lands regarding the trial of Luther in absentia in Rome, as well as the activism of papal legates and nuncios to ensure the enforcement of the terms of the papal bulls. Thus, negotiations led to an agreement with the Emperor that Luther would have a hearing at an imperial assembly; in other words, it was an "attempt at a German solution to the Luther affair."<sup>30</sup>

While for bishops, the publication of the Papal Bull in 1520 was their first contact with the Luther question, for most worldly princes, the 1521 Worms Diet was their first contact. While a very small number of princes came to Worms with fully developed ideas for or against Luther,<sup>31</sup> most Estates thought of Luther as falling somewhere on the familiar spectrum of anti-

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<sup>23</sup> Whaley, *Germany*, 168.

<sup>24</sup> Whaley, *Germany*, 152.

<sup>25</sup> On the status of Electors, see Gross, 14-6.

<sup>26</sup> Whaley, *Germany*, 158. On electoral capitulations generally, see Gross, 42-7.

<sup>27</sup> Whaley, *Germany*, 160.

<sup>28</sup> Whaley, *Germany*, 160.

<sup>29</sup> Whaley, *Germany*, 161. See "Wahlkapitulation Karls V.—1519, Juli 3" in *Quellensammlung zur Geschichte der Deutschen Reichsverfassung in Mittelalter und Neuzeit*, ed. Karl Zeumer (Tübingen: Mohr Siebeck, 1913), 309ff, accessed June 14, 2019, [https://de.wikisource.org/wiki/Wahlkapitulation\\_Karls\\_V](https://de.wikisource.org/wiki/Wahlkapitulation_Karls_V): "§ 15. Auch die Kurfürsten, Fürsten, Prelaten, Grafen, Herren vom Adel, auch ander Stende und Underthan des Reichs mit rechtlichen oder gutlichen Tagleistungen außerhalb Teutscher Nation und von iren ordenlichen Richtern nit dringen, erfordern noch furbescheiden, sonder si alle und jeden insonders im Reich laut der Guldin Bullen, auch wie des Heiligen Reichs Ordnungen und ander Gesetz vermugen, beleiben lassen."

<sup>30</sup> Whaley, *Germany*, 171.

<sup>31</sup> Kohnle, 85.

Roman and anti-clerical sentiment, in line with the *Gravamina* of the Estates.<sup>32</sup> Even the Emperor came to Worms not having declared a clear political path forward; he was committed to following the Pope's decision as to the substance of Luther's heresy, but maintained some flexibility at the level of politics.<sup>33</sup> Not everyone wanted to discuss the Luther issue, but eventually it was put on the agenda.<sup>34</sup>

Debates among the Estate groups and in the larger assembly produced many proposals about how to proceed with Luther, and the expression of a variety of concerns. There were concerns about taking too strong measures against Luther, whose popularity might instigate an uprising of the common man.<sup>35</sup> Also there were concerns that a German forum—whether a council, or colloquy of theologians and jurists—should convene to hear his case, that the matter should not be left to Roman authority, or to the Emperor's unilateral decision.<sup>36</sup>

When Luther's appearance before the Emperor and Estates failed to lead to resolution, Luther left Worms on April 26, 1521 and remained in hiding in the Wartburg Castle for ten months under the protection of the Elector of Saxony.<sup>37</sup> The Emperor's secretaries and councilors got to work drafting an edict; the Emperor wanted to have it presented before the Estates before the assembly adjourned.<sup>38</sup> On May 25, the few remaining estates and delegates heard a public reading of the Edict. This was not an official sitting of the assembly, however; key electors, worldly princes, and bishops were already gone. But the "edict" as a legal typology was a unilateral legal order from the Emperor that did not require the consensus of Estates to be legally valid.<sup>39</sup> Furthermore, declaring someone in the *Acht* counted in the legal tradition of the Empire without question among the competences of the Emperor and the Imperial Chamber Court alone.<sup>40</sup> The Edict of Worms was not an ordinary decision of the assembly, and therefore did not need to conform to the requirements of Estate involvement; it was promulgated according to the exclusive prerogative of the Emperor, though with the advice of Aleander (a papal nuncio) and the imperial chancery. The Edict began with an extensive *narratio*. In it a mix of purposes

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<sup>32</sup> The *Gravamina* movement was led by German princes who, beginning in the late fifteenth century, expressed a set of grievances regarding the role of the Pope in the German lands. See Brady, *German Histories*, 136. Even as late as 1522-23, at the Nuremberg Diet, the Estates produced a list of "one hundred grievances of the German nation." See Charles Hastings Collette, ed., *One Hundred Grievances: A Chapter from the History of Pre-Reformation Days; Being the 'Centum Gravamina' of the German Princes Assembled at the Diet of Nuremberg, A.D. 1522-1523, Including the 'Ten Grievances' of 1511* (London: S.W. Partridge and Co., 1869). It is a matter of historical debate, the extent to which Luther's rise was facilitated by the *Gravamina* movement. See Albrecht Pius Luttenberger, *Glaubenseinheit und Reichsfriede: Konzeptionen und Wege Konfessionsneutraler Reichspolitik 1530-1552 (Kurpfalz, Jülich, Kurbrandenburg)*, (Göttingen: Vandenhoeck & Ruprecht, 1982), 12. On the way in which the constellations of the *Gravamina* and reform movements shifted after 1523 see Whaley, *Germany*, 172, 180.

<sup>33</sup> Kohnle, 86.

<sup>34</sup> See Kohnle, 87-90, on who did not want it discussed there and why, and how it was eventually put on the agenda.

<sup>35</sup> Kohnle, 91.

<sup>36</sup> Kohnle, 96-9.

<sup>37</sup> On Luther at Worms, see De Lamar Jensen, *Confrontation at Worms: Martin Luther and the Diet of Worms* (Provo, UT: Brigham Young University Press, 1973); also Christopher Ocker, *Luther, Conflict, and Christendom: Reformation Europe and Christianity in the West* (Cambridge, UK: Cambridge University Press, 2018), 30-1; and Brady, *German Histories*, 152-6.

<sup>38</sup> Kohnle, 99-100.

<sup>39</sup> Kohnle, 12, and the literature cited there.

<sup>40</sup> Kohnle, 101; Smend, 47. One of the terms of the *Wahlkapitulation* of 1519 (see footnote 29 above) declared that the Emperor could not declare any estate or subject in the *Acht* without an orderly proceeding according to the Holy Empire's laws (section 22).

and authorial voices was evident. While the text stressed the enormities of Luther's actions leading up to and including the Worms Diet, it also strove to exhibit that the Emperor's reasons for acting were not simply to conform with the Pope's wishes, but rather, to align with the desires of the Estates and the procedures of the Empire. At the same time, the document underlined the Emperor's ambition to expand the Empire through extermination of nonbelievers and his supreme protective status vis-à-vis the Church against heretics.<sup>41</sup>

After the narrative portion, the Edict then listed several grounds for the punishment: to preserve praise of the Almighty; to protect the Christian faith; to honor the Pope; to preserve the power, dignity, majesty and authority of the imperial office; as well as that of the unified council and will of the Estates; and finally, in order to execute the Papal Bull. The Emperor called Luther a public heretic who instigated violence, disobeyed authority, and caused war, murder, plunder and arson in the Empire—though interestingly there was no explicit mention of a “Land-Peace violation” in the Edict.<sup>42</sup> The Edict applied not only to Luther but also to anyone who “houses, feeds, gives drink, maintains, or in any way, with word or deed, secretly or openly aids or gives encouragement to Luther.” All who did so would be punished for a crime against the crown with outlawry (*Acht*), superior outlawry (*Aberacht*), and removal of all imperial privileges.<sup>43</sup> Luther was to be imprisoned and delivered to the Emperor—though it was left open what would happen after imprisonment. His followers were to be imprisoned if they could not provide evidence of papal absolution, and their goods were to be confiscated, though no physical extermination of Luther or his followers was called for.<sup>44</sup>

The third major part of the Edict was the order of censorship. It called for the destruction of all heretical writings. No one would be allowed to buy, sell, read, own, or spread his writings. No agreement with Luther or public defense of him was allowed—even if it was to defend something that was true or good in his writings, because everything true in his writings could also be found in writings of the Holy Christian Church.<sup>45</sup>

In some ways, “the Edict of Worms was a dead letter.”<sup>46</sup> The only places where any action was taken against Lutherans was in the Netherlands, where Charles V was direct overlord; and in Bavaria, Albertine Saxony, and Brunswick.<sup>47</sup> Before the galvanizing events of the 1530s, most princes had a “neutral stance, who remained personally loyal to the old religion but who took no action against evangelical teaching in their territories as long as law and order were not threatened.”<sup>48</sup> Indeed, in conformity with the broader political and legal culture of specific privileges, the Elector of Saxony was “granted exemption from having to execute the edict in his

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<sup>41</sup> Kohnle, 101-2.

<sup>42</sup> Kohnle, 102n129.

<sup>43</sup> This formulation that promised punishment for anyone who aided someone declared in *Acht* was in line with long-standing tradition. Also, by the sixteenth century, the distinction between *Acht* and *Aberacht* was lost, though the formulation remained. On *Acht* formulations, see Friedrich Battenberg, *Reichsacht und Anleite im Spätmittelalter: ein Beitrag zur Geschichte der höchsten königlichen Gerichtsbarkeit im Alten Reich, besonders im 14. und 15. Jahrhundert* (Köln: Böhlau, 1986), 356ff for *Acht*formeln; and Matthias Weber, “Zur Bedeutung der Reichsacht in der Frühen Neuzeit,” in *Neue Studien zur frühneuzeitlichen Reichsgeschichte* (Berlin: Duncker & Humblot, 1997), 89.

<sup>44</sup> Kohnle, 102-3.

<sup>45</sup> Kohnle, 103.

<sup>46</sup> Whaley, *Germany*, 174.

<sup>47</sup> Whaley, *Germany*, 174.

<sup>48</sup> Whaley, *Germany*, 256.

own Ernestine Saxon lands.”<sup>49</sup> Other territories ignored it.<sup>50</sup> The Elector was able therefore to maintain Luther in the Wartburg Castle within Saxony; removed from public life, he continued writing extensively.<sup>51</sup>

Because of the top-down, unilateral form of the Edict, its effectiveness relied upon a relationship of order and obedience; that is, that the Emperor’s order would be met with obedience by the Estates. But in practice, it required the acceptance of the Estates, who actually had the ability to enact the terms of the Edict. What the Edict in fact unleashed were a series of constitutional questions about (1) the extent to which the Emperor could demand obedience of the Estates; (2) the status of the laws of a territorial ruler with regard to his own subjects, when those laws conflicted with the Emperor’s Edict;<sup>52</sup> as well as (3) the status of the efforts of Estates to seek solutions to the problem in the context of deliberative assemblies and negotiations, which would take the form of imperial recesses, rather than imperial edicts.

### *The Regiment Mandate*

In addition to the Papal Bull and the Worms Edict, another, lesser-known, legal basis for prosecuting Luther and his followers was the *Regimentsmandat* of 1521.<sup>53</sup> According to section 3 of the Regiment Ordinances of 1521, one of the competences of the Imperial Regiment (*Reichsregiment*) was to proceed against impugners of the Christian faith.<sup>54</sup> This was not linked explicitly with the Worms Edict.<sup>55</sup> This shifted in early 1522, when the Regiment came under new leadership—Duke Georg von Sachsen, a prominent opponent of Luther. On January 20, 1522, the Regiment promulgated a mandate that provided an independent legal basis for the prosecution of heteropraxy.<sup>56</sup> This mandate cited neither the papal excommunication (Bull) nor the imperial declaration of outlawry (Edict). It read:

It has come to be known that some priests celebrate the mass in lay clothing, consecrate the sacrament in the German language, and give the sacrament into the hands of lay people, who may eat before confession and do not need to do confession. They hand wine to the lay people in other containers than a chalice. Children also receive the sacrament. It has come about that there are assaults on priests who want to read the mass, monks are leaving the monasteries and getting married. All of this leads to error and fickleness of faith, especially among the common people. These innovations against church custom may not become rooted before those acts are given sufficient hearing regarding whether they are proper, decent, good and according to faith or not. They are still not widespread and therefore easy to suppress. Therefore, they should be stopped until the

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<sup>49</sup> Kohnle, 104.

<sup>50</sup> Whaley, *Germany*, 174. The Elector of Saxony, Frederick the Wise, “remained loyal to the old Church to his death in 1525,” but “his policy of non-intervention and non-coercion in fact led to him protecting Luther and thus promoting the evangelical cause generally” (Whaley, 256). In 1526, his successor formally adopted the new teachings (Whaley, *Germany*, 255).

<sup>51</sup> Whaley, *Germany*, 175.

<sup>52</sup> Kohnle, 12.

<sup>53</sup> On the *Reichsregiment*, see footnote 1 above.

<sup>54</sup> Brady, *German Histories*, 210-1.

<sup>55</sup> Kohnle, 105.

<sup>56</sup> Kohnle, 105.

imperial estates arrange a Christian assembly or council concerning such matters and a thoughtful, well-considered, reasoned and certain declaration is made about it. The innovators are at first to be pointed to the right way amicably, but should that not help, then with seriousness, and if necessary with proper punishment.

It is noteworthy that the preaching of Lutheran teachings was not explicitly forbidden; in other words, dogmatic questions were bracketed out. The focus was on outward acts and ceremonies.<sup>57</sup> Unlike the Bull or Edict, this Mandate in theory left the possibility open that these new practices could be approved in practice through an imperial assembly of the German nation, or a church council.<sup>58</sup>

The Mandate was sent only to those directly relevant, that is, the Elector of Saxony and other Saxon princes, as well as their neighbors. Some of these rulers ignored the mandate, others simply responded that they, too, were concerned about the innovations, but took no action.<sup>59</sup> Yet others took concrete steps on the basis of the mandate.<sup>60</sup>

Thus, there were several legal bases upon which clergy who converted to the new teachings, rulers and city councils who sought to reform their domains in the evangelical manner, and regular subjects who adopted the new faith, might have been prosecuted. The Papal Bull, the Worms Edict, and the lesser-known Regiment Mandate all deemed Luther a “reviver of the old and condemned heresies and inventor of new ones” and all of his followers of the same. Luther was outlawed under imperial law and excommunicated under canon law and the same was promised for anyone spreading his writings or views. The Bull, Edict, and Mandate portended a large-scale inquisition. Yet nothing like that followed.

### **The Non-Stakes: Heresy, Excommunication, and Outlawry**

As we will see, heresy and excommunication played little role in the Reformation cases. The threat of a declaration in the *Acht* (outlawry) was one possible consequence for a violation of the Land-Peace, but more frequently the stakes of a legal dispute were the restitution of property, the returning of conditions to their former state, or the payment of a penalty or damages.<sup>61</sup> Indeed, in the Reformation cases, one encounters evangelical litigants not only openly acknowledging Lutheran and Zwinglian reforms in their domains, but even underlining the Reformation context by arguing that it was a “matter of religion” outside of the Court’s jurisdiction.<sup>62</sup> One might wonder: could not imperial and Church authorities have targeted evangelical estates under heresy law, if not under the terms of the Edict, Bull, and Mandate? Why was heresy law so peripheral in these early Reformation disputes?

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<sup>57</sup> Kohnle, 106.

<sup>58</sup> Kohnle, 107.

<sup>59</sup> Kohnle, 107.

<sup>60</sup> Kohnle, 108-9.

<sup>61</sup> The *Acht* was a form of legal punishment in which one’s person and property was declared violable, outside of the protection of any lord; one was declared civilly dead, i.e. the loss of any legal personality or rights. See *Handwörterbuch zur deutschen Rechtsgeschichte*, s.v. “Acht,” by D. Landes, vol. 1, 25-36.

<sup>62</sup> See Chapter 4.

In the German-speaking lands, only a few anti-Lutheran or anti-Zwinglian heresy trials took place, with a small number of those ending in execution.<sup>63</sup> As Moeller writes: “there were hardly any inquisition cases in the early Reformation period in Germany. [...] They were on the fringes of German Reformation history [...] which stood in glaring disproportion to the extent of the crisis that the Church found itself in.”<sup>64</sup>

However, heresy prosecutions were happening. Where and to whom they were happening illuminates three important contexts of this period: first, the reliance of the Emperor upon the Estates to enforce a law in domains where he was not direct overlord; second, the reliance of spiritual authorities on worldly authorities to enforce excommunication; third, the differential status of rulers and subjects, and of different kinds of reformed Christianity, in successfully taking on new teachings without the threat of loss of life, property, and legal standing.

One place in which inquisition processes were “unceasing” since the 1520s was the Netherlands, most parts of which were directly subject to Emperor Charles V.<sup>65</sup> The inquisition there was led by an inquisitor appointed by the Emperor, with most processes taking place in municipal and land courts, with assistance from theological experts, and rulings based on a series of increasingly tough imperial edicts, rather than canon law.<sup>66</sup> There, the prosecution program was in the hands of worldly authorities, and the Emperor had direct lordship there and was able to enforce the terms of the Worms Edict on his own authority. This was in contrast to the German lands, which required the enforcement authority of the Estates and cities. The fractured political landscape of the German lands prevented the emperor from carrying out a top-down inquisition as he could in his domains in the Netherlands.

In theory, an order of excommunication automatically implied a duty on the part of secular rulers to outlaw that person; hence the ubiquitous pairing in legal discourse of *Acht* and *Bann* (outlawry and excommunication).<sup>67</sup> Since at least the eighth century, excommunication had been accompanied by certain secular punishments, such as exclusion from kingly courts and assemblies, civil death (inability to undertake any legal action), and loss of feudal protection.<sup>68</sup> These were derived from an evolving set of doctrines and metaphors that envisioned spiritual and temporal authority in complementary relation with one another. In the twelfth and thirteenth centuries, this automatic linking became the norm with respect to an ever-wider set of crimes.<sup>69</sup> But beginning in the fourteenth century, as hierocratic theories waned in salience, and with the

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<sup>63</sup> Moeller presents five cases, and cites references to two more: Bernd Moeller, “Inquisition and Martyrdom in Pamphlets of the Early Reformation in Germany,” in *Ketzerverfolgung im 16. und frühen 17. Jahrhundert*, ed. Silvana Seidel Menchi et al. (Wiesbaden: In Kommission bei Otto Harrassowitz, 1992), 30. On heresy prosecutions throughout Europe in the Reformation period, see Ocker, *Luther*, 130-46; and John Marshall, *John Locke, Toleration and Early Enlightenment Culture* (Cambridge, UK: Cambridge University Press, 2010), Chapter 7. See also Brady, *German Histories*, 327-36.

<sup>64</sup> Moeller, 29.

<sup>65</sup> Cornelis Augustijn, “Die Ketzerverfolgungen in Den Niederlanden von 1520-1545,” in *Ketzerverfolgung im 16. und Frühen 17. Jahrhundert*, ed. Silvana Seidel Menchi et al. (Wiesbaden: In Kommission bei Otto Harrassowitz, 1992), 53.

<sup>66</sup> Often “the charge of heresy alone was not considered sufficient” legal grounds for execution, requiring an additional basis in imperial law. See Claus-Peter Clasen, *Anabaptism: A Social History, 1525-1618* (Ithaca, NY: Cornell University Press, 1972), 382, 386.

<sup>67</sup> More on the meaning of *Acht und Bann* in Chapter 3.

<sup>68</sup> Eduard Eichmann, *Acht und Bann im Reichsrecht des Mittelalters* (Paderborn: Schöningh, 1909), 15-25.

<sup>69</sup> Eichman, 32-3.

gradual relocation of ecclesiastical and executive authority to the territorial level, as both Church and Emperor dispersed ever greater privileges to local rulers, the link was no longer automatic.<sup>70</sup>

Anabaptists were the most targeted in this period for heresy. Within the German-speaking lands, there were a high number of executions of Anabaptists, with the years 1527-1533 seeing the greatest number,<sup>71</sup> including at the hands of rulers of newly reformed Lutheran and Zwinglian domains, and most occurred without a trial. In 1528, an imperial mandate cited not only canon law but also a code from Justinian's compilations that declared rebaptism a heresy punishable by death.<sup>72</sup> The 1529 Imperial Recess called for the execution of Anabaptists without a preceding trial (article 6) and that no ruler should tolerate the subjects of another ruler who had fled due to prosecution of Anabaptism (article 7). In their protestation of the 1529 Recess, the evangelical estates nonetheless declared their commitment to carrying out these anti-Anabaptist articles. When the Anabaptist Kingdom was briefly established in Münster in 1534-1535, old-faith and evangelical estates combined forces to suppress it.<sup>73</sup>

One case from the Imperial Chamber Court provides an illustrative example of the license to prosecute and execute Anabaptists that some rulers believed they had in this period. In 1529, the Bishop of Würzburg sued Count Wilhelm von Hennenberg for violating its jurisdiction over the people and goods in the village of Sendelfeld, including in criminal matters and in the execution of punishments, when the Count imprisoned and then executed nine Anabaptists.<sup>74</sup> "Nine persons living in Sendelfeld," the Bishop wrote, "who made themselves part of the unchristian Anabaptists were baptized again and also rebaptized several others. It is public law that Anabaptists are to be punished with death." After the Count took the nine Anabaptists and held them in prison, the Bishop asked him to return the prisoners, but he did not. Instead, after interrogating them under torture, he had them executed.<sup>75</sup> The Count responded in his *Exceptiones* document that, among other things, the 1528 imperial edict "extends to magistrates and rulers in general"; in other words, the Anabaptists can be prosecuted and punished not only before their ordinary judge in the first instance, but by other forums and rulers. Also, he wanted to act in such a way that the Anabaptists would not have forewarning to leave the land. The matter of the Anabaptists is so clear and notorious, he said, that it is not necessary to hold a trial such as the one the Bishop claims he had the right to hold.<sup>76</sup> The Bishop argued in response that he had the authority and right to execute the Anabaptists as their original judges in the first instance. Moreover, though Anabaptism is a public crime, still an ordinary court process was

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<sup>70</sup> Eichmann, 62.

<sup>71</sup> Gottfried Seebaß, "Der Prozeß Gegen Den Täuferführer Hans Hut in Augsburg 1527," in *Ketzerverfolgung im 16. und Frühen 17. Jahrhundert*, ed. Silvana Seidel Menchi et al. (Wiesbaden: In Kommission bei Otto Harrassowitz, 1992), 213. According to Clasen, "certain evidence exists of the execution of 715 Anabaptists in 123 towns and villages in Switzerland, south and central Germany, Austria, Bohemia, and Moravia during the years 1525-1618" (Clasen 370); "679 executions, that is 80 percent of all executions, took place during [the years 1527-1533]" (Clasen, 371).

<sup>72</sup> Marshall, *John Locke*, 246-7.

<sup>73</sup> See R. Po-chia Hsia, "Münster and the Anabaptists," in *The German People and the Reformation*, ed. R. Po-chia Hsia (Ithaca: Cornell University Press, 1988), 51-70; and Ralf Klötzer, *Die Täuferherrschaft von Münster: Stadtreformation und Welterneuerung* (Münster: Aschendorff, 1992).

<sup>74</sup> Bayerisches Hauptstaatsarchiv (RKG) 14217 ("Munich 14217), Q5, "Positiones at Articuli," 1529. Count Hennenberg introduced the Reformation in his domain in 1544. More on Count Hennenberg's efforts to gain lordship over Sendelfeld in Hillary Zmora, *State and Nobility in Early Modern Germany: The Knightly Feud in Franconia, 1440-1567* (Cambridge, UK: Cambridge University Press, 1997), 108.

<sup>75</sup> Munich 14217, Q5, "Positiones at Articuli," 1529.

<sup>76</sup> Munich 14217, Q6, "Exceptiones contra Articulos," 1530.



necessary to ensure that they had indeed rebaptized, for their actions were not *notorium*, having occurred not in public places but in secret, and usually at night; furthermore they made no confession.<sup>77</sup> The back and forth of this case continues, and the case file contains witness testimony; the contents give us a glimpse of the distinctive legal precarity of Anabaptists in this moment.

The question remains why Lutherans and Zwinglians were not prosecuted for heresy, or treated as heretics like the Anabaptists.<sup>78</sup> There are a number of things that made the Anabaptists' and Lutherans' situations different. For one, there were many fewer Anabaptists, and among them, dozens of sub-groups.<sup>79</sup> In addition, Anabaptists were not powerful; they were primarily subjects, unlike Lutherans who counted among their ranks some of the most powerful cities and princes in the Empire. Anabaptists were thus more vulnerable to heresy trials or to prosecutions. Unlike the Lutherans whose reforms were based on the idea of a universal Church, Anabaptists in general called for independent, local, voluntary congregations—a subversive, even seditious sectarian idea. Thus, Anabaptists and Lutherans each posed a different kind of problem for imperial and territorial sovereignty. Anabaptists “condemned government itself as being unchristian,” and “rejected the very concept of state church.”<sup>80</sup> Also, the Anabaptists were mainly prosecuted in connection with the Peasants' War of 1525 and its aftermath, and sustained suspicions that they would wage apocalyptic rebellion. To the extent that their beliefs and practices aligned, or were perceived to align, with the anti-feudal revolt, they were regarded as a threat to all authorities—both proto-Catholic and proto-Lutheran.<sup>81</sup>

By contrast, rulers and cities were adopting Lutheran views as a matter of public, governmental concern.<sup>82</sup> “Theological heresy [was] for all practical purposes extinct” or at least “had become a rarity” reserved for the most egregious cases of outright atheism.<sup>83</sup> These rulers were pressing a set of questions that long preceded Luther, namely, the constellation of duties and rights of a ruler or patron to protect, manage and if necessary reform the church in his domain, and the liberties of the estates of the “German nation” vis-à-vis the emperor and the pope. The different fates of the Anabaptists and the Lutherans is another reminder of the extent to which the Reformation was less about individual freedom than it was about sovereignty.

Thus, Anabaptists “posed a direct and serious challenge to the social order; they undermined the body politic both by their intrinsic beliefs and by their outward separatism.”<sup>84</sup>

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<sup>77</sup> Munich 14217, Q7, “Replik,” 1530.

<sup>78</sup> While the Anabaptists were the most persecuted in this period, it is important to note the differential security of Lutherans and Zwinglians in this moment; the latter were in a more precarious position. By the end of our period, in 1555, it was the Lutherans (those of the Augsburg Confession), not the Zwinglians (those of the Tetropolitan Confession) who were given legal recognition, a status the Zwinglians did not gain until 1648.

<sup>79</sup> Clasen, 28-29, 32.

<sup>80</sup> Clasen, 359. The short-lived Anabaptist Kingdom of Münster, 1534-35, was an important exception. See footnote 72.

<sup>81</sup> See Peter Blickle, *From the Communal Reformation to the Revolution of the Common Man*, trans. Beat Kümin (Leiden; Boston: Brill, 1998).

<sup>82</sup> In other words, confessional differences were not the only things that mattered in this period; identifiers such as estate status, geography, and demographic variations were just as important in dividing and bringing proto-Protestants together in a variety of constellations. See Clasen, Chapter 1, on conflicts between anti-infant-baptism radicals and Zwinglian reformers, and Chapter 5 on Anabaptist rejection of Lutheranism. Often, historians refer to Lutheran, Zwinglian, and Calvinist reform as “the magisterial reformation,” and to Anabaptist and other kinds of governance-eschewing forms of reformation as “the radical reformation.”

<sup>83</sup> Tom Scott, “The Problem of Heresy in the German Reformation,” in *The Early Reformation in Germany: Between Secular Impact and Radical Vision* (Farnham, UK: Ashgate, 2013), 195.

<sup>84</sup> Scott, “Heresy,” 194.

By contrast, “in those areas where the Reformation received political sanction and protection, its followers ceased to be sectaries and became members of officially recognized and institutionally established territorial churches. Not only were they no longer clandestine, their profession of faith ceased to be entirely a matter of individual conscience or witness, or at best of group solidarity, and became a matter of public and political concern.”<sup>85</sup> Put another way, heresy was a legal tool suited to dealing with “subjective commitment” not with new forms of “objective regulation” of religion in Lutheran territories in the form of new church ordinances.<sup>86</sup>

Luther’s heresy trial and excommunication, and subsequent hearing before the imperial Diet at Worms and outlawing, revealed that even some of the heaviest instruments available to papal and imperial authorities had limited effectiveness, and this variously tempered efforts at prosecution and emboldened reforms. Popular support and the aid and protection of the powerful Elector of Saxony, the Landgrave of Hessen, and economically important free imperial cities exposed the instruments not only as weak, but even perversely elevating Luther’s popularity. In the case of magisterial reforms, there was a mismatch of the instrument with its slow-moving pace, layered personnel, procedural stages, and costs to the scope, pace and volume of the Reformation movement.<sup>87</sup> “In short, the very success of the Reformation in certain German and Swiss territories removed it from the realm of medieval heresy and sectarianism.”<sup>88</sup>

In addition, there were structural, customary, and constitutional elements that made heresy prosecutions against certain individuals, rulers, and domains unthinkable, impossible, or ineffective. There were customary and constitutional limitations on prosecuting estates, or subjects of estates, under the legal regime of heresy that would not have been approved even by old-faith estates. There was a strongly developed sense among all estates of their liberties vis-a-vis the Emperor and the Pope, and these took expression in the form not only of custom, but also in more concrete terms such as the prohibition of trying estates in a “foreign court,” including a papal one, in the Emperor’s 1519 *Wahlkapitulation*.<sup>89</sup>

Reforming rulers were breaking a range of laws, and the nature of these violations had a material and worldly dimension that may have felt more immediate to church authorities than concern about the salvation of souls, or their basis in heretical teachings. The heresy trial was at the scale of the individual, and the salvation of his or her soul, while the kinds of issues that were coming up in relation to the evangelical movement were about systemic change, about the way in which matters of faith redounded on jurisdiction, property, and peace. It may have made existential sense for church authorities to deal with unauthorized appointment of Lutheran preachers in terms of jurisdiction, or with iconoclasm in terms of property destruction, for instance. As we will see in the next chapter, monastic and church litigants were practiced in litigating such matters before secular authorities even before the Reformation.

## **The Dualism of the Imperial Constitution and its Significance for Imperial Assemblies**

The imperial constitutional regime brought together a wide variety of rulers; questions of the distribution of authority was a perennially open question. In this context, unilateral decisions,

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<sup>85</sup> Scott, “Heresy,” 185.

<sup>86</sup> Scott, “Heresy,” 185.

<sup>87</sup> Moeller, 32.

<sup>88</sup> Scott, “Heresy,” 185-6.

<sup>89</sup> On the *Wahlkapitulation* of 1519, see footnote 29 above.

such as those embodied in the Bull, Edict, and Mandate, were less valued. Indeed, that the Worms Edict was “confirmed” by the Estates at the Nuremberg Diet of 1524—and that in several Diets thereafter its content was either confirmed or conditioned—indicates that the Edict on its own was insufficient as a legal instrument.<sup>90</sup> In order to understand the conditions in which this was the case, we must understand the dualistic quality of the imperial constitution, which refers to the shared authority between the Emperor and the Estates.

The Estates of the Empire became direct subjects to the Emperor in the twelfth century. The Concordat of Worms (1122 C.E.) gave the Emperor the right to grant Bishops secular authority; these ecclesiastical princes, or prince-bishops, now feudal subjects to the Emperor, technically received their land and office from the Emperor as a fief. In 1180, a new estate was formed—that of territorial princes—which likewise positioned certain lay princes as direct feudal subjects to the Emperor. This enfeoffment of both clerical and lay princes in the twelfth century was central to the imperial constitution, but had a paradoxical quality. On the one hand, it stabilized the uniform subject position of princes to the Emperor. On the other hand, it “strengthen[ed] the autonomy of the territorial rulers” because it “created a legal bond with the Emperor which no [other] imperial prince could ever shake off” through war, occupation, or otherwise.<sup>91</sup> While these twelfth century moves stabilized the idea of the Emperor as the source of all political and legal authority, it reconciled this with “the political reality that most of Germany was not directly governed by the Emperor himself but by royal dynasties.”<sup>92</sup> Although the Estates were directly subject to the Emperor, the vast majority of nobles became vassals of princes; they were “indirect or mediate subjects” of the Emperor.<sup>93</sup>

In this context, it made little sense to attempt to pursue political authority outside of the Emperor’s orbit; “authority [was] imparted by the Emperor’s legitimation.”<sup>94</sup> Thus, the means by which individual rulers gained independence and autonomy were processes of “integration in a system of imperial law and orientation toward the Emperor and the circle of imperial princes.”<sup>95</sup> At the same time, this arrangement could “only survive as long as [the princes] accepted the system,” and this made it somewhat fragile.<sup>96</sup> “This form of feudal nexus remained the only outward juridical bond that held together the Emperor and the princes in subsequent centuries.”<sup>97</sup>

The nature of the authority of those individual rulers, however, was historically determined; “the local prince exercised a patrimonial or personal rule based on a bundle of separate rights rooted in either local custom or private law.”<sup>98</sup> In this world, “law was particular”; one’s status was a “concretely defined, locally recognized condition to which rights, privileges and obligations adhered.”<sup>99</sup> These fragile arrangements were in constant play, as forms

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<sup>90</sup> Branz, 74.

<sup>91</sup> Dietmar Willoweit, “The Holy Roman Empire as a Legal System,” in *Legislation and Justice*, ed. Antonio Padoa-Schioppa (Oxford; New York: Clarendon Press, 1997), 127.

<sup>92</sup> Willoweit, 127.

<sup>93</sup> Hanns Gross, *Empire and Sovereignty: A History of the Public Law Literature in the Holy Roman Empire, 1599-1804* (Chicago; London: University of Chicago Press, 1973), 12.

<sup>94</sup> Willoweit, 127.

<sup>95</sup> Willoweit, 127.

<sup>96</sup> Willoweit, 126.

<sup>97</sup> Gross, 13. For more on the constitution of the Holy Roman Empire, see Whaley, *Germany*, Chapters 2, 3, and 4.

<sup>98</sup> Gross, 13.

<sup>99</sup> Gerald Strauss, *Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany* (Princeton, NJ: Princeton University Press, 1986), 112.

of symbolic claims-making and legal speech acts set off chain reactions in the dense constitutional machinery of the Empire.<sup>100</sup> The mechanisms for stabilizing these often implicit or contested rights, privileges, customs, and freedoms proliferated between the thirteenth and sixteenth centuries, reflecting the increasing authority of text and writing, the growing focus on the discovery of facts as critical for the settlement of law, and the material authority of documents in legal and constitutional life, among other things.<sup>101</sup> In the late medieval period, the Emperor secured his centrality through the distribution of privileges and grants; “while the grants gave the appearance of the exercise of a royal prerogative beyond the usual constitutional limitations, basically they represented a transfer of competence to the recipient of the privilege out of the king’s own reservoir of rights.”<sup>102</sup> Beginning in the fifteenth century and into our period, “under the influence of the academic jurists,”<sup>103</sup> these notions of rule began to shift towards one of territorial lordship—of “uniform public authority endowed with a set of inalienable rights and duties of government.”<sup>104</sup>

At the end of the fifteenth century the term *Reichstag* (Imperial Diet) was used to describe the regular assemblies of Emperor, Electors, and Estates, instead of the term *Hoftag* (Emperor’s Court Diet).<sup>105</sup> The *Hoftag* had been an assembly designed to establish publicly personal ties between the Emperor as overlord and his immediate subjects: the Electors, prince-bishops, and other Estates. 1495 has been regarded as the first *Reichstag* because it was the first time that the Estates treated the assembly as an instance of their own collective action in the name of “the Empire.”<sup>106</sup> For instance, for the first time, deliberations among Estates were held in a distinct location from where the Emperor held court.<sup>107</sup>

Diets took place in a variety of locations, so ceremonial demonstration was essential to “lift [the Diet] demonstratively out of the flow of daily activity, [...] symbolically marked in space and time.”<sup>108</sup> A Diet was much more than deliberations. It included all of the performative labor required to transform a gathering or social event, the meaning of which was “sometimes initially open,” into a rationalized context of decision-making.<sup>109</sup> All of these rulers or their delegates were living for weeks or months at a time in the same location, participating in other kinds of events, performances and ceremonies: the Emperor “held court, celebrated masses, sat as a judge, acted as conciliator and mediator, granted privileges and other demonstrations of royal favor, performed enfeoffments and knightings, hosted banquets and tournaments,” and more.<sup>110</sup>

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<sup>100</sup> Stollberg-Rilinger, *Old Clothes*, 2.

<sup>101</sup> Strauss, 110ff. Also see Simon Teuscher, *Lords’ Rights and Peasant Stories: Writing and the Formation of Tradition in the Later Middle Ages* (Philadelphia, PA: University of Pennsylvania Press, 2012), Chapters 4 and 5; and Cornelia Vismann, *Files: Law and Media Technology*, trans. Geoffrey Winthrop-Young (Stanford University Press, 2008), Chapter 3.

<sup>102</sup> Gross, 24.

<sup>103</sup> Gross, 13.

<sup>104</sup> Gross, 14.

<sup>105</sup> Gross, 20-3

<sup>106</sup> Stollberg-Rilinger, *Old Clothes*, 16 and the literature cited there.

<sup>107</sup> Stollberg-Rilinger, *Old Clothes*, 33.

<sup>108</sup> Stollberg-Rilinger, *Old Clothes*, 18.

<sup>109</sup> Barbara Stollberg-Rilinger, *Cultures of Decision-Making* (London: German Historical Institute, printed and bound by Page Bros. Norwich, 2016), 7.

<sup>110</sup> Stollberg-Rilinger, *Old Clothes*, 33. For an excellent and thorough discussion of Imperial Diets in the early sixteenth century, including on matters of procedure, see Thomas Felix Hartmann, *Die Reichstage unter Karl V.: Verfahren und Verfahrensentwicklung 1521–1555* (Göttingen: Vandenhoeck & Ruprecht, 2017).

All of these public actions contributed to the definition of the constitution; “the fundamental questions—who was really part of the Empire, how participants dealt with one another, what rank they held vis-a-vis one another, and above all how decisions binding on all could arise out of their joint actions—could not be answered in the abstract. The answers were sometimes put down authoritatively in writing, but primarily they emerged out of concrete praxis.”<sup>111</sup> Imperial assemblies were densely inflected with legal purpose; its literal staging had constitutional significance. Like a tableau, the arrangement of bodies in space actually embodied, in a legally meaningful way, the constitution of the Empire.<sup>112</sup> Every motion, object, or word had the ability to create legally meaningful presumptions. Thus, the imperial assembly was thick with legal and constitutional implications; almost nothing could be left without some registering of stances, some mapping of pathways for future action.

In addition to all of this performative constitutional production, Diets produced Recesses at the end.<sup>113</sup> The “imperial recess” (*Reichsabschied*) was a form of legislation born of consensus. Unlike an Edict, the theoretical basis of its authority was not the Emperor’s sovereignty but the agreement of those who took part in the decision-making procedure. The validity and effectiveness of a Recess hinged not on a prior commitment to obedience, but on the perception by those involved that consensus or compromise had been achieved. A Recess thus had less the character of a law than that of a compromise.<sup>114</sup> “The Emperor, however powerful he may have been portrayed in theory, never was able to make or change laws of the Empire on his own.”<sup>115</sup>

Another change in the 1495 reforms was a move toward majority decision-making.<sup>116</sup> However, this rule had a hard time asserting itself into the decision-making culture of the Empire. Until 1495, majority decisions did not have a generally recognized validity; those in the minority would not be bound to observe that Recess as a matter of course.<sup>117</sup> There was high value placed on social harmony and unanimity. This meant that there were costs to dissent; public articulations of disagreement when a decision seemed to be going in a different direction could mean loss of honor, or escalation into violence. Nonetheless, there were no abstract principles that required the acceptance of a decision based on commitment to a process, in which one submitted to a decision in advance, regardless of the outcome. Therefore, it was almost impossible to force a minority to accept a decision. In these cases, mechanisms developed to endure open contradiction, contingency, and ambiguity.<sup>118</sup>

At the first imperial assembly after the promulgation of the Worms Edict, at Nuremberg in 1522, the Estates did not discuss the religion question. “At first, the majority seemed inclined to leave matters unresolved” as the common concerns of governance continued to serve as ground for solidarity.<sup>119</sup> When the religion question was discussed two years later at the

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<sup>111</sup> Stollberg-Rilinger, *Old Clothes*, 17.

<sup>112</sup> Stollberg-Rilinger, *Old Clothes*, 2.

<sup>113</sup> The word for Recess is “*Abschied*,” which means departure, i.e. the document produced at departure (Stollberg-Rilinger, *Old Clothes*, 62-3).

<sup>114</sup> Branz, 79. Gross, 23.

<sup>115</sup> Gross, 23.

<sup>116</sup> Klaus Schlaich, “Die Mehrheitsabstimmung im Reichstag zwischen 1495 und 1613,” *Zeitschrift Für Historische Forschung* 10, no. 3 (1983): 301.

<sup>117</sup> Kohnle, 13; Branz, 79.

<sup>118</sup> Stollberg-Rilinger, *Cultures of Decision-Making*, 24. We will explore some of these in later chapters (such as protestations in Chapter 5, and dissimulation in Chapter 6).

<sup>119</sup> Whaley, *Germany*, 176.

Nuremberg Diet of 1524, the Estates requested in the Recess produced at the end that the Emperor advocate to the Pope for a Christian Council, or else that he convene a National Assembly for resolving the division in the religion. They also in 1524 renewed the Edict of Worms, its enforcement reliant on the Estates. Each elector, prince, prelate, count and estate, it said, should ensure for himself that the Worms Edict was obeyed with respect to his subjects “as far as possible” (*so viel ihnen möglich*).<sup>120</sup> This caveat effectively removed the teeth of this recommitment to the Worms Edict, licensing princes and cities to do as much—or as little—as they wanted to enforce its terms. In practice, this “effectively allowed princes or magistrates to protect their Lutheran preachers against attempts by bishops to exercise discipline in their dioceses as well as their territories.”<sup>121</sup> In July 1524, the Emperor promulgated the Edict of Burgos in which he not only rejected the Estates’ resolution for a national Church Council, but he also ordered all Estates to enforce the Edict of Worms unconditionally, even removing an earlier exemption he had made for the Elector of Saxony. Again, far from resulting in its stated aims, the Edict made it clear to the Empire that “a general settlement was now impossible”; it hardened boundaries as Estates continued to disagree not only about “the legality of Charles’s insistence on the Edict of Worms,” but also “the practicality of its execution.”<sup>122</sup>

## Courts and Constitutionalism

In the previous section, we learned about the relationship between the Emperor and the Estates. While the Estates were direct feudal subjects to the Emperor, so that all authority orbited around his office, governance of the Empire was mediated by the Estates, so that nothing could be accomplished without the willing participation of princes and cities. This structure of authority meant that imperial assemblies and the legislation produced from them—Recesses—already registered a consensus position, unlike imperial edicts and other forms of unilateral legislation. Inasmuch as the 1521 edicts, bulls and mandate were unilateral forms of legislation, this may account for their ineffectiveness in stopping the spread of Lutheranism.

In this section, I propose that we begin to think of courts as a forum of constitution-making alongside imperial assemblies—and to do so not just on the basis that court cases were politically important, and therefore the subject of negotiations at imperial assemblies.<sup>123</sup> In the previous chapter, I showed the potential value of looking at case files as a matter of historiographical methodology. Here, I argue that courts are an important place to look for the legal history of the Reformation because of the importance of courts within the overall constitutional order of the Empire. There are at least three ways in which courts were important for the constitutional order. First, courts were an important forum of constitution-making in the Holy Roman Empire of the sixteenth century because the juridical pluralism and wide range of courts in the German lands meant that questions of jurisdiction were always on the table, and questions of jurisdiction inevitably touched on constitutional issues of the distribution of authority. That is: because there were so many courts, and because the proper forum for this or

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<sup>120</sup> See Heinrich Christian von Senckenberg, *Neue und vollständigere Sammlung der Reichs-Abschiede, Zweyter Theil, 1495-1551* (Frankfurt am Main: Koch, 1747), 258.

<sup>121</sup> Whaley, *Germany*, 177.

<sup>122</sup> Whaley, *Germany*, 180.

<sup>123</sup> On the question of courts in legal history, see Peter Oestmann, *Wege zur Rechtsgeschichte: Gerichtsbarkeit und Verfahren* (Cologne: Böhlau, 2015).

that party, or this or that dispute, was not always self-explanatory, questions of who had the right to adjudicate were perennially on the table, and those questions inherently touched on the broader question of authority that was constitutional in nature.

The very same history that produced the fragmented political landscape of the Holy Roman Empire, and that shaped the consensus-based decision-making culture of assemblies and recesses discussed in the previous section, also produced this plural juridical landscape: beginning around the thirteenth century, “in order to purchase loyalty and support from German nobles and prelates, [kings] showered them with grants of immunity from royal control and distributed the power of government among many eager hands.”<sup>124</sup> This included the judicial function. Courts unmoored from any kind of centralized imperial government were transformed as their horizon of accountability and salience became more localized. The drift was uneven and multifarious, as status group, subject matter, and space became the diverse determinants of jurisdiction, and legalities developed internal to these variously delimited arenas. Throughout the medieval period, judicial forums proliferated.<sup>125</sup> Law everywhere reflected the unique set of privileges, obligations, freedoms, and loyalties that particular status groups had worked out over time through a dense set of historically settled relationships. These privileges and obligations had as their referents sometimes highly tangible and immediate aspects of local existence, such as access to hunt in this forest, or to fish in that stream, as well as less tangible but highly consequential arrangements on matters of exclusive jurisdiction and imperial office.<sup>126</sup> As a result, “all law took on the character of private law.”<sup>127</sup> The distinction between public and private law was not effectively delineated in the legal traditions of the German lands until the seventeenth century,<sup>128</sup> until then, a certain class of ostensibly private law disputes, especially those involving estates and nobility, had public law implications. Put another way, because of the ways in which jurisdictional arrangements were tightly tied to personal status, the boundary between public and private law was not strongly delineated.

Local legalities cohered in different ways.<sup>129</sup> Courts varied in terms of the expanse of their jurisdiction, their enforcement authority, the elaboration of procedure, and the

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<sup>124</sup> John P. Dawson, *The Oracles of the Law* (Westport, CT: Greenwood Press, 1978), 150.

<sup>125</sup> Dawson cites a twentieth-century study showing that Saxony alone had over 2,000 trial courts in the sixteenth-century (Dawson, 203-4).

<sup>126</sup> Strauss points to several legal compilations produced in the sixteenth century, “handsomely written and stoutly bound volumes, obviously produced with great care, exhibiting above all the bewilderingly rich profusion of particular arrangements made—centuries earlier in most cases—for the special local, historical, and personal circumstances defining each place and body. The very prolificacy of these singular arrangements—targets for the exasperation and derision of jurists—made them relatively safe from tampering. Remote from the theoretical constructs and tidy categorizations of bureaucratic innovators, and deeply rooted in the everyday lives of real people, this world of petty rules and time-bound conventions was historical actuality to nearly everyone in the Holy Roman Empire. What most people wanted was to be confirmed in their place in this familiar world” (Strauss, 110-1).

<sup>127</sup> Otto von Gierke, *Community in Historical Perspective*, ed. Anthony Black, trans. Mary Fischer (Cambridge, UK: Cambridge University Press, 1990), 17.

<sup>128</sup> Gross, xiii-xxx.

<sup>129</sup> The question of how to identify “law” in a plural context is well-trodden territory in the fields of anthropology, sociology, and legal history. Do we call “law” any form of social ordering that involves rules backed by coercive sanction, or procedures such as trials? Does any normative order count as in some sense “legal”? The literature on this subject is vast, but see e.g. John L. Comaroff and Simon Roberts, *Rules and Processes* (Chicago, IL: University of Chicago Press, 1986); Sally Engle Merry, “Legal Pluralism,” *Law & Society Review* 22, no. 5 (1988): 869-896; Bruno Latour, *The Making of Law: An Ethnography of the Conseil D’Etat*, trans. Marina Brilman

systematization of the law by which they judged. Some courts (*Hofgerichte*) became fused to the personal authority of higher nobles, princes, and feudal lords, and adjudicated various civil and non-capital criminal cases that originated in their locality. There were also independent peasant courts, often convened in taverns, over which local elders presided, that served as both arbitral bodies as well as a space for managing various aspects of communal governance.<sup>130</sup> Commercial towns and cities developed their own municipal courts and were quicker than other places to employ and professionalize university-trained jurists, and to develop structures and powers of self-legislation.<sup>131</sup> However, guilds and clergy maintained jurisdiction over their own members within a given city.<sup>132</sup> Jews of the Empire were dealt with as a distinct status group in customary legal compilations and in courts, and they also had laws internal to their own community.<sup>133</sup> Most courts of the Empire maintained the form inherited from an earlier period, in which a panel of lay judges (called *Schöffen*) adjudicated according to local customs (written accounts of the customs of a community). Particularly functional and influential *Schöffen* courts became sources of law for courts in neighboring communities; though in no sense politically subordinate, and linked in no hierarchy of appeal, lesser courts sent requests of information to these superior courts (*Oberhöfe*).<sup>134</sup> The *Oberhof* was tasked both with the work of hearing and deciding cases in its locality, and responding to requests made by court officials and litigants in neighboring communities.<sup>135</sup> Though these written responses were case-specific, as early as the fourteenth-century some were compiled and systematized to serve as a non-binding way to keep track of past judgments.<sup>136</sup> Also, courts and rulers began to issue declarations regarding “how these overlapping and competing laws should be reconciled in court practice.”<sup>137</sup> It was not until after 1500 that higher nobility aspiring to territorial consolidation established appellate courts in order to capture the lower courts within the domains of their political authority, cutting through these loose networks of courts that had developed over the centuries.<sup>138</sup>

Yet well into the sixteenth century, the various judicial forums of the Empire’s “layered structure—village, city, province, region, and Empire” stood in no self-evident relation to one another, hanging together through the accrual of highly specific settlements that were always in

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and Alain Pottage (Cambridge, UK: Polity Press, 2010); Lauren Benton and Richard Ross, *Legal Pluralism and Empires, 1500-1850* (New York: New York University Press, 2013).

<sup>130</sup> Strauss, 121.

<sup>131</sup> Dawson, 157.

<sup>132</sup> Strauss, 122.

<sup>133</sup> See Debra Kaplan, *Beyond Expulsion: Jews, Christians, and Reformation Strasbourg* (Palo Alto, CA: Stanford University Press, 2011); Christine Magin, *Wie es um der iuden recht stet": der Status der Juden in spätmittelalterlichen deutschen Rechtsbüchern* (Göttingen: Wallstein Verlag, 1999); Joachim Whaley, *Religious Toleration and Social Change in Hamburg 1529-1819* (Cambridge, UK: Cambridge, 1985); and Brady, *German Histories*, 320-7.

<sup>134</sup> Dawson, 157.

<sup>135</sup> Dawson, 158-69. The *Lex Carolina*—a codification of criminal law and procedure, promulgated by Emperor Charles V—“one of the few examples of general legislation applying to the whole population empire-wide that the imperial Reichstag was ever able to pass” (Dawson, 197)—in addition to substantive rules and procedure, instructed judges to seek advice from *Rechtsverständigen* (“those who know the law”), which included *Oberhöfe*, other “superior authorities,” and university law faculties. By the second half of the sixteenth-century, courts would sometimes send the entire documentary record to a law faculty for its opinion, which was often adopted without question (Dawson, 199-203).

<sup>136</sup> Dawson, 172.

<sup>137</sup> Strauss, 122.

<sup>138</sup> Dawson, 170.



flux.<sup>139</sup> Overlaid on top of this bustling jurisdictional geography was the Empire's ecclesiastical organization, its division into archbishoprics, bishoprics, dioceses, and lesser units established around the year 1000.<sup>140</sup> This system contained another layer of courts, a hierarchy grounded in local parish modes of pastoral care and discipline, answerable to the highest instance, the Pope. In the medieval period, ecclesiastical courts had jurisdiction over all crimes and offenses committed by or involving clerics (a doctrine referred to as *privilegium fori*). Vis-a-vis the laity, the canon law had authority on matters of heresy, blasphemy, sacrilege, marriage, legitimacy of children, poor relief, certain kinds of commercial and financial behavior such as usury, and immoral behavior, including sex offenses. "Canon law permeated the entire medieval social order"; it touched the lives of everyone.<sup>141</sup>

The diversity of relationships between and among these legalities engendered "jurisdictional politics" as a normalized feature of late medieval life.<sup>142</sup> While litigants "court-shopped" within the particular possibilities that their status, location, and subject matter afforded, competing authorities haggled—and fought—over both the authority to adjudicate a matter, and the particular structure of political and police authority that this authority to adjudicate implied. Since at least the fifth century, courts had been used as one forum in which to settle such jurisdictional conflicts<sup>143</sup>—this is the second way in which courts were significant sites of constitution-making. A key part of the early modern constitution of the Holy Roman Empire was "a continuation of that medieval policy which aimed at the pacification of large settlement areas beyond the limits of rulers and clans, by establishing judiciary procedures."<sup>144</sup> There were three principles on which the imperial constitution rested by the time of the Reformation: first, the "cooperative decision-making process" of the Imperial Diet; second, the defensive military alliance as against external aggressors; and third, the court system for the maintenance of public peace.<sup>145</sup> As Wilson describes it, "the Empire's legal history is essentially a story of delineating these responsibilities [whether a case should be heard before civil, ecclesiastical, feudal or some other kind of tribunal] and aligning them with the evolving status hierarchy, whilst sustaining consultative processes and collective enforcement decisions."<sup>146</sup> While in the rest of Europe at this time, courts were becoming a means for establishing the sovereignty of the emerging territorial nation-state, in Germany, courts were one of a few mechanisms that held together this loose consortium of polities; the constitutional system that this court system implied was one of arbitrating among sovereigns, rather than claiming sovereignty to itself.

Until it was outlawed in 1495, feuding was a normalized method of resolving disputes about the bundles of rights and privileges that belonged to competing rulers. "The medieval state lacked both the means and the ability to supply every man with justice against any real or imagined wrong he might have suffered. Therefore, the legitimate use of legal self-help, which

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<sup>139</sup> Brady, *Protestant Politics*, 8; Whaley, *Germany*, 40-1.

<sup>140</sup> Brady, *German Histories*, 16.

<sup>141</sup> James A. Brundage, *Medieval Canon Law* (London; New York: Longman, 1995), 96. See Chapter 3 of this dissertation for a brief discussion of the jurisdictional relationship between secular and spiritual authority.

<sup>142</sup> On "jurisdictional politics" see Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge, UK: Cambridge University Press, 2001), 4, 10.

<sup>143</sup> Willoweit, 124.

<sup>144</sup> Willoweit, 125-6.

<sup>145</sup> Whaley, *Germany*, 38.

<sup>146</sup> Peter H. Wilson, *Heart of Europe: A History of the Holy Roman Empire* (Cambridge, MA: Belknap Press of Harvard University Press, 2016), 611.

was called *Fehde*, became an integral part of local law.”<sup>147</sup> Beginning with Brunner, scholars have shown that feuding was not the absence of law, nor were courts simply an alternative to feuding; rather, feuding was its own kind of legal modality that operated within the broader legal culture, sometimes in competition with, but often in reliance on courts for its effectiveness.<sup>148</sup> Courts were often involved in legitimating a dispute as a feud, and sometimes became one forum in which a feud was pursued.<sup>149</sup> “A Fehde was not simply any kind of feud. A legitimate Fehde was the prerogative of the noble class to realize a legal claim. It was a solely aristocratic means of self-help.”<sup>150</sup>

Beginning in the late eleventh century, emperors brokered “peaces” (*Königsfriede*), agreements to cease fighting for a limited time, in a certain area, among certain people.<sup>151</sup> These agreements had “the character of a contract, which gave it the force of law.”<sup>152</sup> Then, in the thirteenth century, we begin to see emperors issuing public peaces “in the active role of a legislator.”<sup>153</sup> Central to these enactments was the assertion that the emperor had supreme judicial authority and would be able to provide for an “effective royal tribunal which would be reasonably accessible and reliable for those who sought justice.”<sup>154</sup> In practice, in the medieval period, the emperor’s judicial authority and enforcement capacity was limited; “the preservation and execution of the Public Peace fell into the hands of autonomous and local associations.”<sup>155</sup> Feuding reached its climax in the fifteenth century.<sup>156</sup> It was first in late fifteenth century reforms that we see the resurgence of the idea of the public peace as a matter of imperial concern in the form of the declaration of the Eternal Land-Peace and the establishment of the Imperial Chamber Court. These were attempts to contain feuding in the form of institutions and procedures governed now not by the Emperor alone but by “the totality of the estates.”<sup>157</sup>

Thus, it was this implicit acceptance of the Empire’s jurisdictional claims to resolve disputes and feuds among its members through litigation (judicial procedures) and legislation (land-peaces) that constituted two of the primary modes of imperial constitutionalism. Law, and the guarantee of the Emperor, the collectivity of the Estates, and imperial institutions to deliver justice and peace, were central to the Empire’s legitimacy. “The concept of the Empire as a legal order and the Emperor as the dispenser of justice [...] lay at the root of so much German sentiment.”<sup>158</sup>

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<sup>147</sup> Gross, 25.

<sup>148</sup> See Otto Brunner, *Land and Lordship: Structures of Governance in Medieval Austria. Translated from Fourth, Revised Edition.*, trans. Howard Kaminsky and James Van Horn Melton (Philadelphia, PA: University of Pennsylvania Press, 1992), 1-91. See also Christine Reinle, “Legitimation und Delegitimierung von Fehden in juristischen und theologischen Diskursen des Spätmittelalters,” in *Frieden schaffen und sich verteidigen im Spätmittelalter*, ed. Gisela Naegle (Munich: de Gruyter, 2012), 83-120.

<sup>149</sup> Alexander Patschovsky, “Fehde im Recht. Eine Problemskizze” in *Recht und Reich im Zeitalter der Reformation* (Frankfurt am Main: P. Lang, 1996), 151-3.

<sup>150</sup> Gross, 25.

<sup>151</sup> Willoweit, 124. On public peaces, see Wilson, 620-2.

<sup>152</sup> Gross, 26.

<sup>153</sup> Gross, 26.

<sup>154</sup> Gross, 26-7.

<sup>155</sup> Gross, 28.

<sup>156</sup> Dawson, 151; Whaley, *Germany*, 28-9.

<sup>157</sup> Gross, 28. Already by 1526 in the Speyer Recess, feuding specifically was no longer listed as something that would violate the Land-Peace; indicating that the feud was already losing meaning as a legal institute in the first half of the sixteenth century; see Branz, 21n1.

<sup>158</sup> Gross, xxx.

Third, to the extent parties saw courts as a mode of settling matters of constitutional significance by way of proxy private law disputes, they were conditioned to approaching this forum with the same logics of performativity, the same expectations of maintaining peace through “workable compromises,”<sup>159</sup> and even some of the same procedural instruments that characterized the broader legal culture of the Empire, including at imperial recesses. In other words, the legal culture and its implicit and ubiquitous constitutional stakes were brought into courtrooms through the legal consciousness of litigants, lawyers, and judges.<sup>160</sup> This is not to deny the specificity of the courtroom context; indeed, this dissertation aims to highlight just that. Especially with the founding of the Imperial Chamber Court, the heavily conditioning forms of Roman-canonical civil procedure created certain demands and limits on narrative, performance, sources of authority, standards of evidence, among other things, to be discussed more in the coming chapters. In turn, these demands and limits produced certain possibilities that were not present outside of courts.<sup>161</sup> Rather, the point is simply that the broader legal culture of the Empire was such that parties were conditioned to seeing the constitutional stakes of things extending into all domains of life, including and in some cases especially into courts and ostensibly private civil law disputes.<sup>162</sup>

## The Imperial Chamber Court

The Imperial Chamber Court (*Reichskammergericht*) was established in 1495 at the Imperial Diet of Worms. Serious efforts to establish a new kind of Court began at least as early as 1486, as part of a wave of late fifteenth century reforms.<sup>163</sup> Scholars widely regard 1495 as “a milestone of German constitutional history, the turning point from the Middle Ages to the early modern era.”<sup>164</sup> Some identify in this period an institutional corollary to a shift from the Empire in its “medieval configuration as a polity bound together by feudal and personal bonds, to an

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<sup>159</sup> Wilson, 603. “The significance of juridification lay in opening formal channels of communication and encouraging acceptance that clear, simple answers were unlikely to resolve complex problems. The courts recognized that absolute verdicts could escalate violence [...]. This helps explain the length of many cases, in which the imperial and territorial superior courts acted more as mediators than as institutions seeking to determine guilt or innocence” (Wilson, 634).

<sup>160</sup> Arguably, this was a continuation of early medieval patterns: “At all social levels, most disputes involved posturing, as the interested parties mixed symbolic assertions of the legitimacy of their case with demonstrations of their material power, including the controlled use of violence.” When king or lord acted, he did so cautiously, encouraging parties to accept his mediation. “Rebellions were not about lords resisting the creation of a centralized monarchy, but personal disputes amongst the Empire’s ruling elite. Royal justice was thus not ‘neutral’, but part of a dynamic process by which the elite resolved contentious issues” (Wilson, 613).

<sup>161</sup> *Handwörterbuch zur deutschen Rechtsgeschichte*, s.v. “Gerichtsverfahren,” by G. Buchda, 1551-1563.

<sup>162</sup> “It is characteristic of the Empire that the transition to written law consolidated a decentralized form of conflict resolution, rather than a centralized judiciary deciding right from wrong according to abstract principles. In doing so, it ‘juridified’ much earlier forms of conflict resolution by reshaping them along more bureaucratic and institutional lines without losing the emphasis on preserving peace through workable compromises” (Wilson, 610). This nuances the view that the Imperial Chamber Court represented a decisive shift away from the cooperative model of imperial institution towards a model of the court as a sovereign institution, governed by abstract principles and written law. See Smend, 67.

<sup>163</sup> Brady demonstrates that though institutional innovations reached a peak at the turn of the sixteenth century, discourses of reform had continued since the fourteenth century; see Brady, *German Histories*, 71-126.

<sup>164</sup> Stollberg-Rillinger, *Old Clothes*, 16. See e.g. Peter Moraw, *Von offener Verfassung zu gestalteter Verdichtung: das Reich im späten Mittelalter 1250-1490* (Frankfurt/Main: Propyläen, 1989).

association of principalities under territorialized lordship (*Landesherrschaft*).<sup>165</sup> The Emperor came increasingly to be seen less as a feudal lord than as the “elected head of a voluntary fellowship for peace and Right, based on the union of the estates.”<sup>166</sup> Others note the ways in which these reforms coincided with a stronger distinction being made between the “Empire of the German Nation,” on the one hand, and the wider Holy Roman Empire, on the other, that included the totality of Habsburg holdings including Bohemia, the Netherlands, and parts of Italy.<sup>167</sup> Stollberg-Rilinger shows that the Diet of 1495 which resulted in these reforms itself was significant; “a milestone not only because of the substantive results, but also because of its form,” which would shape future assemblies in a number of ways.<sup>168</sup>

The three core elements of reform were: a court, coinage, and the peace.<sup>169</sup> At the 1495 Imperial Diet, the Emperor Maximilian I (r. 1493-1519) and the Estates had come to an agreement on the need for a “perpetual Land-Peace” (*ewige Landfriede*), the achievement of which would be guaranteed through a Court: “We have established,” reads the preamble, “a general land-peace and since it can hardly last without the necessary law, we have ordained that our and the Reich’s *Kammergericht* [Empire’s Chamber Court] be established and maintained, as follows [...]”<sup>170</sup>

In principle, the Court’s spatial jurisdiction covered the whole Empire—including lands that lie in modern-day Belgium, Latvia, Poland, and Austria, among others.<sup>171</sup> In terms of subject, its primary task was to maintain the terms of the Land-Peace. In terms of personal jurisdiction, in its posture as a court of first instance, the Court had competence to adjudicate in disputes involving subjects directly subordinate to the Emperor (*reichsunmittelbar*)—including free imperial cities and certain princes and prince-bishops.<sup>172</sup> Non-imperial subjects were also permitted to sue their rulers in the Court under Land-Peace law, which the historiography calls Subject Litigation (*Untertanenprozesse*).<sup>173</sup>

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<sup>165</sup> Tom Scott’s comment in “An Empire for Our Times? A Discussion of Peter Wilson’s *The Holy Roman Empire: A Thousand Years of Europe’s History*,” *Central European History* 50, no. 4 (2017), 558-9.

<sup>166</sup> von Gierke, 72. “Out of the chaos of lordships, fellowships and mixed associations, which after the dissolution of the graduated structure of the feudal Empire were only linked to each other, and to the emperor, by a diverse complex of fortuitous legal connections, intersecting feudal associations, the fluctuating circumstances of stewardship and privately owned jurisdiction and privileges – out of all these, the territorial domination of individual members of the aristocracy had been ever more securely elevated, from the thirteenth century onwards, as a unified power over a delimited territory” (von Gierke, 72).

<sup>167</sup> Barbara Stollberg-Rilinger’s comment in “An Empire For Our Times?”, 556.

<sup>168</sup> Stollberg-Rilinger, *Old Clothes*, 15-8.

<sup>169</sup> Whaley, *Germany*, 32-35.

<sup>170</sup> Dawson, 187. This function of maintaining the Land-Peace did not give the Court prosecutorial powers, rather, its judicature was understood as indirect and preventive (Smend, 65). Smend argues that the name *Reichskammergericht* (Imperial Chamber Court) was an eighteenth-century innovation by Protestant publicists. In the case files themselves and in sixteenth century documents referring to the Court, it is called “our (the emperor’s) and the empire’s chamber court” or sometimes simply the “emperor’s chamber court” (Smend, 48-9).

<sup>171</sup> Sönke Lorenz, “Das Reichskammergericht: ein Überblick für den angehenden Benutzer von Reichskammergerichts-Akten über Geschichte, Rechtsgang und Archiv des Reichsgerichtes mit besonderer Berücksichtigung des südwestdeutschen Raumes,” *Zeitschrift für Württembergische Landesgeschichte* 43 (1984): 192-4. But not Italy or Switzerland (Wilson, 626).

<sup>172</sup> A *reichsunmittelbar* party, i.e. a party not directly subject to the Emperor, did not have standing to sue a *reichsunmittelbar* party, unless the dispute concerned a Land-Peace violation or a denial of justice in a lower court. See Lorenz, 187; and Dick, 65 and the literature cited there.

<sup>173</sup> See Stefan Xenakis, *Untertanenprozesse an Reichsgerichten: ein systematisch-bibliographischer Überblick* (Bern, Switzerland: Peter Lang, 2018); Ralf-Peter Fuchs, “The Supreme Court of the Holy Roman Empire: The State of Research and the Outlook,” *Sixteenth Century Journal* 34, no. 1 (Spring 2003): 15 and the

Yet there was very little that was jurisdictionally self-evident or total in the legal landscape of the Holy Roman Empire in this period. Indeed, litigants might choose to pursue other means to resolve disputes besides the Imperial Chamber Court: through mediation by particular Estates, the Regent, or Emperor; in imperial assemblies; through procedures internal to leagues;<sup>174</sup> the Imperial Aulic Council (*Reichshofrat*);<sup>175</sup> the Imperial Regiment (while it existed until 1531), and more.<sup>176</sup>

In addition, specific privileges and exemptions shaped, in practice, the jurisdiction of the Court. In many of the cases discussed in this dissertation, a litigant declined the jurisdiction of the Imperial Chamber Court on the basis of an old imperial privilege that listed the specific courts in which that litigant could exclusively be sued—usually the courts of neighboring cities. Over the course of the sixteenth- and seventeenth-centuries the Court’s appellate jurisdiction was selectively narrowed as territorial rulers obtained imperial privileges that prevented their own subjects from pursuing cases against the decisions of their courts—the privilege of non-appeal (*privilegium de non appellando*).<sup>177</sup> It was even possible to secure total exemption from the Court’s jurisdiction (*Exemtionsprivileg*).<sup>178</sup>

While it is true that in order to understand the Imperial Chamber Court, we must understand the ways in which its context shaped, delimited, or undercut its jurisdiction, it is equally important to grasp what was new about it. In particular, the Court was endowed with certain characteristics that indicate the intentions of its creators to ensure its independence from the personal justice of the Emperor—a significant innovation and departure from previous instantiations of an imperial court.<sup>179</sup> Nonetheless, as we will see, there were challenges to maintaining these characteristics, and to ensuring this independence

First, the Court was to have a stable location. In other words, it was not to travel with the Emperor. Second, the right to declare the *Acht* (outlawry) was extended to the Court. This highest form of punishment was a right formerly belonging to the Emperor alone.<sup>180</sup> Finally, the Judges of the Court were to be appointed not only by the Emperor but also by a specific set of Estates and Electors, and were to be a mix of nobles, as well as doctors of Canon and Roman law.<sup>181</sup> The Court President (*Kammerrichter, praesidens*) was to be an imperial prince, selected by the Emperor. He served a representative function—on behalf of the Emperor, and on behalf of the Court as a whole, vis-a-vis litigants, court personnel, and all in public session (*Audienz*). The Emperor also selected two direct-subject nobles as *generosi* who would stand in for the Court

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literature cited there; Helmut Gabel, “Daß ihr künftig von aller Widersetzlichkeit, Aufruhr und Zusammenrottierung gänzlich abstehet.” *Deutsche Untertanen und das Reichskammergericht* in *Frieden durch Recht: Das Reichskammergericht von 1495 bis 1806*, ed. Ingrid Scheurmann (Mainz: Verlag Philipp von Zabern, 1994), 274; Werner Troßbach, “Untertanenprozesse am Reichshofrat,” *Zeitenblicke* 3 (2004), no. 3, <http://www.zeitenblicke.de/2004/03/trossbach/trossbach.pdf>. Also, for the study of subject litigation in the second half of the eighteenth century, see Rita Sailer, *Untertanenprozesse vor dem Reichskammergericht: Rechtsschutz gegen die Obrigkeit in der zweiten Hälfte des 18. Jahrhunderts* (Cologne: Böhlau, 1999).

<sup>174</sup> More on leagues in Chapter 5.

<sup>175</sup> See Chapter 1, footnote 15.

<sup>176</sup> Smend, 64.

<sup>177</sup> Whaley, *Germany*, 363. See also Lorenz, 189; and Gross 35-6.

<sup>178</sup> Lorenz, 193.

<sup>179</sup> Gross, 33; Wilson, 626.

<sup>180</sup> Smend, 46.

<sup>181</sup> After 1548, all judges had to be university-trained jurists, if not doctors. See Peter Stein, *Roman Law in European History* (Cambridge, UK: Cambridge University Press, 1999), 91.

President if necessary, as well as two doctors of law as judges (*Beisitzer*). The number of Judges to be appointed varied in different Court ordinances, but the number floated around twenty.<sup>182</sup>

These innovations came with challenges. Perhaps the most complicated was that the Estates were both the primary litigants over whom the Court had jurisdiction, and those responsible for appointing its judges, financing it, creating laws about it, and evaluating it through visitations.<sup>183</sup>

In its first twenty years, the Court was unstable, undergoing multiple location changes,<sup>184</sup> and periodic dissolution as attempts to fund the Court through general taxation failed, due to financial, structural, and enforcement limitations of the imperial order as a whole.<sup>185</sup> The Court's instability in the first decades of its existence makes its role in the Reformation all the more interesting. For it was roughly at the same time that Reformation cases begin appearing in the Court that the Court became more stable and prestigious. Thus, when telling the story of the Reformation cases, it is essential to understand not only the legal pluralism backdrop, and the new kinds of claims the Court was making about its jurisdiction and authority, but also the reliance of that Court for its stability on the very people and institutions that would be litigating there, and the coincidence in time of the Court's rise with the influx of Reformation-related cases.

Between 1544 and 1548, the Court was suspended due to pressure from the Schmalkaldic League of Protestant princes.<sup>186</sup> When the Schmalkaldic League was defeated militarily in 1547, the Emperor revived the Court on his own terms. Yet the Princes' Rebellion and estates-led negotiations in the early 1550s generated a transformation that inaugurated a "new order" in legal imperial relations, and signified a departure from the Emperor's heavy-handed "Interim Politics."<sup>187</sup> These reforms were made more concrete in the 1555 Imperial Chamber Court Ordinances, which are regarded as a major watershed in the Court's history, putting it on an even firmer basis until the end of the Empire in 1806.

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<sup>182</sup> Dick, 77-8. Smend argues that this last condition, unlike the first two, was not constitutional in nature—not, that is, designed to ensure the independence of the Court from the personal justice of the Emperor. Rather, it was a purely bureaucratic and technical aspect of the establishment of the Court. He says that in the documentary remainders of the discussions surrounding the establishment of the Court, we do not see discussion about the meaning of dispersing the appointment authority of the Judges among the Estates. He suggests that this constitutional interpretation was offered first by the Protestants in the first half of the sixteenth century. When they found that the imperial court system might be the Empire's biggest challenge to reform, they posited the interpretation that the purpose of delegating appointment was to increase the authority of the Estates, and to separate the Court from the authority of the Emperor. Catholics challenged this interpretation (Smend, 33-34, 41). Moreover, delegation of the presentation of judges was initially regarded as a duty not a right; it was highly practical and was not designed, as later interpretations had it, to redound heavily on the distribution of power (Smend, 35-36, 40, 48).

<sup>183</sup> On visitations, see Dick 80-81; and Anette Baumann, *Visitationen am Reichskammergericht: Speyer als Politischer und Juristischer Aktionsraum des Reiches (1529-1588)* (Berlin: De Gruyter Oldenbourg, 2018).

<sup>184</sup> In the first decades of its existence, however, the location of the Court moved almost a dozen times, until in 1527 it settled in Speyer, where it would remain, with brief interruptions, for the next 150 years. The last century of its existence (roughly 1690 to 1806) were spent in Wetzlar (Scheurmann, *Frieden durch Recht*, 96). Court personnel were guaranteed certain reduced prices on required living expenses such as food and housing, and were exempt from local taxation, which greatly impacted the localities in which the Court was based. While the Court's presence in a town brought great prestige, it also generated stratification and resentment. See Ingrid Scheurmann, "Die Installation des Gerichts in Frankfurt und die Speyerer Zeit," in *Frieden durch Recht*, 89-108.

<sup>185</sup> Whaley, *Germany*, 164.

<sup>186</sup> More on these developments in the 1540s and 1550s at the end of Chapter 5.

<sup>187</sup> Whaley, *Germany*, 330.

## The Reception of Roman Law

The founding of the Court was the “decisive step”<sup>188</sup> in a “centuries-long process of gradual adoption and adaptation of Roman law” in the German lands.<sup>189</sup> The 1495 ordinance that established the Court stated that it was to judge “according to the common law of the Reich [Empire] and also according to the proper, worthy and accepted statutes, ordinances, and customs [...] that are brought before them.”<sup>190</sup> “Common law” (*jus commune*) referred to the collection of Roman law source texts compiled by Justinian in the sixth century C.E. Litigants also had the right to present to the Court local and customary laws for consideration in their case.<sup>191</sup>

Scholars have challenged the metaphor of “reception” on several grounds.<sup>192</sup> Trusen argues that “reception” implies the substantive, wholesale adoption of a foreign law. This obscures both the gradual, piecemeal nature of the process, as well as the varieties of legal transformations that this period witnessed.<sup>193</sup> For Trusen, reception must be looked at in the *longue durée*, beginning with early reception in the thirteenth century, primarily through ecclesiastical courts, and into the sixteenth and seventeenth centuries. Furthermore, what happened in the period was actually the “scientification” or rationalization of the German judiciary and of German legal culture. The transformation that this period underwent was not primarily the substantive change of legal rules. Rather, it was a change in the legal imaginary itself, and in the positionality of legal teaching, jurisprudence, and law-making to a scholarly level.<sup>194</sup>

The adoption of the procedures of the learned Roman law shaped German legal thinking more deeply than the reception of its substantive law.<sup>195</sup> It is important to note that there are many examples of ways in which Roman-canonist procedure had already taken root in the German lands.<sup>196</sup> Though the Imperial Chamber Court was not the first secular court to adopt Roman-canonist procedure (preceded by the courts of some free imperial cities), when it did adopt the procedure, it had a multiplying impact. In part, this happened through a trickle-down

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<sup>188</sup> Karl Kroeschell, “Die Rezeption der Gelehrten Rechte und ihre Bedeutung für die Bildung des Territorialstaates,” in *Deutsche Verwaltungsgeschichte*, ed. Kurt Jeserich, et al., vol. 1 (Stuttgart: Deutsche Verlags-Anstalt, 1983), 279–80.

<sup>189</sup> Strauss, 65.

<sup>190</sup> Dawson, 188.

<sup>191</sup> See Peter Oestmann, *Rechtsvielfalt vor Gericht: Rechtsanwendung und Partikularrecht im Alten Reich* (Frankfurt am Main: Klostermann, 2002); Kroeschell, “Die Rezeption,” 281; Gross, 32, 35.

<sup>192</sup> Kroeschell, “Die Rezeption,” 282. Hermann Conring coined the term the “reception” of Roman law in the German lands in his 1643 manuscript *De origine iuris Germanici*. Conring’s historical argument, that Roman law was taken up in Germany not primarily through legislation but through German students studying in Italian universities (Kroeschell, “Die Rezeption,” 280) was coextensive with a theoretical one; his writings advocated for the *usus modernus pandectarum* (“the modern use of the Digest”)—a school of jurisprudence that advocated applying Roman law in a manner relevant to context, and harmonizing it with customary and statutory law of specific localities.

<sup>193</sup> Trusen, *Anfänge*, 2.

<sup>194</sup> Trusen, *Anfänge*, 3.

<sup>195</sup> Dick, 220-1; Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* (Göttingen: Vandenhoeck & Ruprecht, 1967), 183; Gross, 32. “Procedural law” refers to rulers governing the manner and process by which a case is handled. “Substantive law” refers to rules governing how facts are to be adjudicated.

<sup>196</sup> See Dick, 11-18.

effect. But also, in the first half of the sixteenth century, there was hardly an imperial assembly at which the institutional and procedural law of the Imperial Chamber Court was not discussed.<sup>197</sup> These settings may have functioned as an education for estates and rulers. These discussions, moreover, led to the adjusting and tailoring of Roman-canonical procedure to align with the constitutional specificity of the Holy Roman Empire of the German lands. In between the promulgation of roughly fifteen Imperial Chamber Court Ordinances (*Reichskammergerichtsordnungen*) between 1495 and 1555, imperial assemblies had the capacity to legislate aspects of the Court within regular imperial recesses (*Reichsabschiede*), through the outcomes of visitation commissions (*Visitationsabschiede*), ordinances on notaries (*Notarordnungen*), as well as Land-Peaces. The Court itself could announce temporary procedural adjustments in the form of a *Gemeine Bescheide* (common notification), which they did 45 times between 1495 and 1555.<sup>198</sup>

The Court's procedural and substantive legal requirements had a percolating impact on the Empire's many legalities. This worked in tandem with the priorities of German princes interested in consolidating their territories, for whom Roman law offered a strong potential for systematizing and integrating the legal variability within their domains. Emperors, German princes, and city magistrates employed the learned jurists who were returning from study in Italy and France in city governments and chanceries, and increasingly, to replace the benches of lay judges (*Schöffen*). But these changes were not evenly distributed. They more easily took hold in the fractured political landscape of the south, while in the north, the old centers of legal expertise—Lübeck and Magdeburg—and the most authoritative legal text, the *Sachsenspiegel* (Mirror of Saxony), held their weight against Roman law.<sup>199</sup>

In addition to the systematizing and consolidating functions that Roman law offered, there was a sense in which this legal tradition was already part of the Empire's "Roman" heritage. Thus, for emperors and princes across these centuries, establishing Roman law was in part about *translatio imperii*.<sup>200</sup> This myth was introduced by Frederick I, Barbarossa, (r. 1155-1190), who claimed himself in line with the emperors of antiquity, and established a basic recognition of the validity of Roman law in the Empire as a result of this claimed lineage. Barbarossa introduced the "late-classical assumption that the Emperor was the origin of all political power" and "more consistently than ever before, the attempt was made to base the power of all courts on the power bestowed by the Emperor."<sup>201</sup> This ideology eventually extended beyond Roman law and procedure to likewise elevate imperial legislation such as land-peaces, reformations, and recesses.<sup>202</sup> Moreover, in the early sixteenth century, this ideology extended beyond the Emperor to include all manner of ruler with respect to his domain.<sup>203</sup> Thus, the adoption and adaptation of Roman law in the German lands operated in multiple ways—

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<sup>197</sup> See Dick for period between 1495-1555.

<sup>198</sup> Dick, 2, 9. See Peter Oestmann, *Gemeine Bescheide: Teil 1: Reichskammergericht 1497-1805*, ed. Peter Oestmann (Cologne: Böhlau Verlag, 2013).

<sup>199</sup> Kroeschell, "Die Rezeption," 281.

<sup>200</sup> On the cultivation of imperial aesthetics and ambitions in the period, see Frances Yates, *Astraea: The Imperial Theme in the Sixteenth Century* (New York: Routledge, 1975), 1-28; also John Headley, *The Emperor and His Chancellor: A study of the Imperial Chancellery under Gattinara* (New York: Cambridge University Press, 1983); and Heinz Schilling, "Charles V and Religion" in *Charles V, 1500-1558, and His Time*, ed. Hugo Soly and Willem Pieter Blockmans (Antwerp, Belgium: Mercatorfonds, 1999).

<sup>201</sup> Willoweit, 126.

<sup>202</sup> Kroeschell, "Der Rezeption," 285.

<sup>203</sup> Trusen, *Anfänge*, 9.



rationalizing the legal system, consolidating the dominion of rulers, upholding the myth of Roman continuity, and locating the source of justice variously in the Emperor and princely rulers. In the fifteenth century, “the imperial title [...] took on a distinctly national coloring, forgoing any pretense to universal rule. [...] In 1486, a law used for the first time the title ‘Holy Roman Empire of the German nation.’ The name was the only real vestige of the Roman imperium, although it was still loaded with emotional and political possibilities.”<sup>204</sup>

The establishment of the Imperial Chamber Court has been regarded as a decisive step in this story because it was first in the early modern period that secular courts began to adopt Roman law wholesale; until then, canon law was at the forefront of reception and most jurists were clergy.<sup>205</sup> The rising prominence of Roman law as a secular discipline and source of law was a new and profound change. “The canon law pulled the Roman law behind it” and it was carried by the clergy into civil life and the civil courts.<sup>206</sup>

While territorializing princely rulers sought to integrate it, many others were opposed to the Roman law’s insinuation into the German lands. Lower nobility railed against the ways in which the emerging prestige of the lawyerly, bureaucratic class was causally linked to their displacement in the social hierarchy. Some members of the lower nobility were able to adjust to these social changes by sending their children to universities, but others were left without a clear social position.<sup>207</sup>

The sixteenth century teemed with popular imagery calling attention to the corruption, greed, and sophistry of all manner of legal actors—including judges, lawyers, and local notaries. Indeed, “the movement of opposition to law reached special intensity in the German-speaking regions of the Holy Roman Empire around the time of the Protestant Reformation.”<sup>208</sup> Peasants were especially vocal critics of Roman law’s competition with “good old law” (*guten alten Recht*).

Some scholars have shown that it was precisely during the period of reception that the notion of an ancient Germanic law gained traction. Gerhard Köbler argues that this itself is evidence of Roman law’s influence—ancient Germanic law became a customary law (*consuetudo*), which was a Roman law category.<sup>209</sup> Teuscher’s book on the *Weistum*, for example—an instrument that claimed to be a transcription of group testimony under oath as to the established custom of an area—tells a nuanced story about this. Interestingly, the period around 1600 saw the greatest number of *Weistümer*.<sup>210</sup> Teuscher argues that though these documents claimed to record laws valid for a locality since time immemorial, in fact, “the regulations are scarcely any older than the documents that record them.”<sup>211</sup> The documents were not simply transcriptions of orality (as they claimed to be) but instead “products of a written culture”<sup>212</sup> that, though presented as if they had merely transcribed a ritual performance of legal agreement with the population of a village present, in fact were drafted in chanceries by learned

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<sup>204</sup> Gross, 10. On the Holy Roman Empire as inheritor of the Roman Empire, see Chapter 1, section “The Holy Empire.”

<sup>205</sup> Kroeschell, “Der Rezeption,” 283.

<sup>206</sup> Trusen, *Anfänge*, 21.

<sup>207</sup> Strauss, 52.

<sup>208</sup> Strauss, 30.

<sup>209</sup> Karl Kroeschell, “Germanisches Recht als Forschungsproblem,” in *Festschrift für Hans Thieme zu seinem 80. Geburtstag* (Sigmaringen: Jan Thorbecke Verlag, 1986), 13-14.

<sup>210</sup> Dawson, 154.

<sup>211</sup> Teuscher, 133.

<sup>212</sup> Teuscher, 33.

jurists of Roman law.<sup>213</sup> Teuscher argues that “paradoxically, this vision of the law,” as “established, old oral tradition,” was “more closely connected to forerunners of modern developments, such as [...] the formation of large, proto-state power structures.”<sup>214</sup> “The perception of local laws as old legal customs was in many respects less the point of departure for the reception of learned law than the consequence of it.”<sup>215</sup>

Whitman’s study of the fortuitous timing of the rise of the Imperial Chamber Court and the “reception” of Roman law in the German lands with the Reformation finds echoes in this dissertation.<sup>216</sup> In particular, I argue that certain legal transformations in this period—such as changes in the way co-litigation was conceived, the role of the state in recognizing new forms of combination, and the shifting valence of protestations, among others—might have their origins in proto-Protestant experimental usages of instruments of Romano-canonical procedure.

## Conclusion

This chapter has provided a brief introduction to the legal culture of the German lands of the Holy Roman Empire by exploring its constitutional structure, legislative typology, and two especially important legal forums—imperial assemblies and courts. While we set out to understand why the laws of 1520-22, promulgated by the most powerful offices of the Holy Roman Empire, failed to create a legal front against the Lutheran movement as a heresy, along the way we have gained a more complete picture of the way in which courts could function as important sites of constitution-making in this period.

In the next chapter, we begin a detailed exploration of the substantive law on which litigants and lawyers based their arguments in the Reformation cases.

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<sup>213</sup> Teuscher, 188-9

<sup>214</sup> Teuscher, 164.

<sup>215</sup> Teuscher, 199.

<sup>216</sup> See James Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (Princeton, N.J.: Princeton University Press, 1990).

### CHAPTER THREE

#### PEACE, PROPERTY, AND JURISDICTION: PATCHWORK JURISPRUDENCE IN REFORMATION LITIGATION

In August 1521, the imperial Fiscal (prosecutor), Dr. Reynhart Thyel, sent out a Mandate against the city of Erfurt (“the Mayor, Council, and entire Commune”) on account of allegations made against the city by the clergy there.<sup>1</sup> It was alleged that between May and July 1521, there had occurred various attacks on the two collegiate churches in Erfurt, the Church of Our Lady and St. Severus; the clergy’s living quarters were overrun and violently broken into, leaving windows smashed, and property including clothing, books, bed linens, pots, and kettles either destroyed or stolen.<sup>2</sup> These attacks, alleged the Fiscal, were carried out by “a mob or a society” that gathered at night, and sometimes during the day.<sup>3</sup> Some citizens as well as servants of the city council were part of that group.<sup>4</sup> When the deans of these two collegiate churches went to notify the city council, and to request its protection, the city did nothing against it, and did nothing to prevent it from happening in the future.<sup>5</sup> Not long after, more attacks occurred against not only the two churches, but 44 other clerical residences, including the residence of a Provost. The mob broke into cellars holding wine, letting the wine drain out.<sup>6</sup> In the end, damages amounted to 4000 Gulden. It was the “common rumor and reputation” that these attacks happened with the knowledge and will of the council.<sup>7</sup> Even more, the city ordered its citizens not to rescue the clergy, and indeed while it was happening and while they could have helped, they chose to “take it easy” instead.<sup>8</sup>

According to the Fiscal’s account, the deans of the two collegiate churches, out of necessity, went to the city council seeking protection and defense. The council responded with a set of significant cash demands, and compelled the deans to sign an agreement with very specific property-related terms concerning customs, inventorying, and buying and selling.<sup>9</sup> For instance,

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<sup>1</sup> On the Fiscal, see Chapter 1. Landeshauptarchiv Sachsenanhalt Standort Wernigerode Rep. A53 No. F37 (“Wernigerode F37”), Q1, “Mandatum Penali Fiscalis,” 1522. I am reconstructing the alleged events on the basis of several documents submitted by the Fiscal.

<sup>2</sup> Wernigerode F37, Q6, “Positiones et Articuli,” 1524.

<sup>3</sup> Wernigerode F37, Q6, “Positiones et Articuli,” 1524: “ein Rotthe oder gesellschaft”

<sup>4</sup> Wernigerode F37, Q6, “Positiones et Articuli,” 1524: “das in gemellter ratt und gesellschaft der beschediger vil burger, burgers sone und gesindt auch des Raths diener mitgewest seindt.”

<sup>5</sup> Wernigerode F37, Q6, “Positiones et Articuli,” 1524: “das wiewol der rath zu erffurth diser gewaltsamer handlung gut wissens gehept ist doch die warheit one das er icht dargegen furgenomen oder in zukunfft dergleichen zufurkomen understanden habe”; “das Bürgermeister, Rathmeister, Rathe und gemein zu Erfurth des gut wissen getragen und doch den geistlichen beschedigten, mit keiner hilf oder scheirm beystand thun wöllen.”

<sup>6</sup> Wernigerode F37, Q6, “Positiones et Articuli,” 1524: “das sie in etlichen kellern der geistlichen die Reiff an den fassen abgehawen und den wein in den keller lauffen lassen haben.”

<sup>7</sup> Wernigerode F37, Q6, “Positiones et Articuli,” 1524: “das ein gemein gerucht und leumut darvon sey das sollich mit des Raths wissen und willen geschehen sey.”

<sup>8</sup> Wernigerode F37, Q6, “Positiones et Articuli,” 1524: “das den Burgern in einer gemein durch den Rath oder von eins Raths wegen gebotten worden in angezeigter vergweltigung der geistlichen stillzusitzen und die geistlichen nit zuretten; das Rathmeister Rath und gemein zu Erfurth solhe handlung gewist und wol weren helfenn mogen habens aber nit gethan sonnder die genem gehept.”

<sup>9</sup> Wernigerode F37, Q1, “Mandatum Penali Fiscalis,” 1522: “wie ir on einich ursach aus eigenem gewaltigem furnemen und mut willen die geistlicheit so bey uch in erffurt wonet frevenlich uberlauffen ire heuser und wonungen gewaltiglich auffgestossen, und das ire zerschlagen zerprochen und in andere wege nach ewerm lußt und wolgefallen zu irem verderblichen schaden gefrevelt und gehandelt und darzu derselben geistlicheit ein merglich summa gelts die sie uch geben müssen abgedrungen habt.” For the agreement, see second to last document

it required the churches to report to the city all property they possessed whether inside or outside of the city, including houses, land, vineyards, hops gardens, fields, pastures, and particular kinds of income-yielding financial arrangements, and to pay taxes on its incomes, like any other citizen of Erfurt.<sup>10</sup> One of its terms touched on jurisdiction: “that the clergy shall not burden any citizen or subject of the city council with spiritual demands, rather, will let those persons be summoned before the council, the city magistrate, or territorial court; only then will the matter be remitted elsewhere, on a case by case basis.”<sup>11</sup> Only after they had signed this agreement did the council promise defense against the mob.<sup>12</sup> In other words, the Fiscal alleged, the city took advantage of the vulnerable state of the clergy, and the deans agreed to their demands out of “legitimate fear of great evil on the part of the city.”<sup>13</sup>

In the face of these fears, the Mandate continued, the clergy sought the Emperor’s help, who mobilized his imperial Fiscal to prosecute the city on the clergy’s behalf. Their actions, the Mandate said, violated “honor, law, propriety, the holy Empire’s laws,” as well as the city’s “own duty and oaths.”<sup>14</sup> The Court ordered the city to “cease its violence and mischief from this hour on,”<sup>15</sup> and by one month from then to have repaid the damages, at risk of imperial disfavor and punishment, including a penalty of 30 marks lötigen golds.<sup>16</sup> By the following January, the imperial Fiscal reported back to the Court that the city had failed to obey the Mandate, and had even in the meantime sent creditors to the clergy to repay the city’s considerable debts,<sup>17</sup> warranting the carrying out of the financial penalty. A *Citatio* sent out to the city of Erfurt summoned them to Court.

What was not mentioned anywhere in the Court’s Mandate, or the Fiscal’s petitions, was that the uprisings that took place against the clergy that June began a few weeks after of the Worms Edict was promulgated, and the text of it printed and circulated among the “common man” in Erfurt.<sup>18</sup> And a few weeks before the Worms Edict was promulgated, Luther himself had

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of the case file beginning with “Wir Paulus Shulmeister,” as well as Q7, titled “Artickel die priesterschaft zu Erfurt vom Rath furgeschlagen unnd ubergeben.”

<sup>10</sup> Wernigerode F37, Q7, “Artickel die priesterschaft, etc.,” 1524: “Item, das die geistlichen einem erbern Rath anzeigen wollen, was fur guter sie ine und auß erffurdt auch an frembden orten, die etwan die burger oder des Rathes unnderthonen landessen, als hewser, hof ecker, weingarten, hapfberg [Hopfenberg], wysen, weiden, gerten, widerkauff, erzbins etc. gewesen und an sich gepracht solh guter sollen sie verrechten gleich andre uns burger das hundert gellt und das geschoss gleichmessig den burgern davon geben.”

<sup>11</sup> Wernigerode F37, Q7, “Artickel die priesterschaft, etc.,” 1524: “das sie keinen burger der des raths unnderthan mit geistlicher forderung besweren sollen sonder dieselben vor dem Rath statt voydt oder landtgericht heishen lassen, das soll inen sleunig hilff geschehet Es were dann das die sach von einem Rath nach gelegenheit anderswohin geweyset wurde.”

<sup>12</sup> Wernigerode F37, Q6, “Positiones et Articuli,” 1524: “das alsdan der Rathe inen sagen lassenn sie wollenn ir erpietens den vormunden und handtwercken anzeigen; [...] das nach sollichem erpieten der geistlichen und nit ehe der Rathe in die sachen gesehen und verschaffet hatt, das die bose Ratt gestillet ist werden.”

<sup>13</sup> Wernigerode F37, Q6, “Positiones et Articuli,” 1524: “das die geistlichen auß ehehaffter forcht grossers ubels durch den Rath zu letztz dahin bewegt und pracht seind worden das sie solhe artickel bewilligt und angenommen und furter sich vershriben haben...”

<sup>14</sup> Wernigerode F37, Q1, “Mandatum Penali Fiscalis,” 1522: “wider alle erberkheit recht pillichait und des heiligen reichs ordnung auch wider ewer eigen pflicht und eide.”

<sup>15</sup> Wernigerode F37, Q1, “Mandatum Penali Fiscalis,” 1522: “das ir solchen ewern unpillichen gewalt frevel und mutwillen von stund an abstellet.”

<sup>16</sup> See “Usages” in dissertation front matter for an explanation of this monetary denomination.

<sup>17</sup> Wernigerode F37, Q2, “Citatio,” 1522: “auch darneben demselben unserm key. gepot zuwyder ewer glaubiger an die gemelten geistlicheit zubezalung ewer selbst gemachten schulden zuweysen understehn und sie mit grossen und merglichenn Sumen bezalung zuthung genotigt.”

<sup>18</sup> Ulman Weiss, *Die frommen Bürger von Erfurt: Die Stadt und ihre Kirche im Spätmittelalter und in der*

returned to Erfurt to a triumphant welcome, and had preached in the city where he had become a monk in 1505.<sup>19</sup> The so-called “parson storm” of 1521 in Erfurt was one of the first “Martinist” anticlerical, anti-Worms uprisings in the Empire, a “prelude” to the plunderings of monasteries and church institutions that would take place in the coming years, many of which would be litigated in the Imperial Chamber Court.<sup>20</sup> That the Fiscal in this case failed to mention this context is remarkable; for if the city had given cover to the mob that attacked clergy residences, then it might easily have been shown that this mob had Lutheran leanings. The Worms Edict itself clearly prohibited providing any kind of cover for followers of Luther. Why was the Edict not invoked? Why did the Fiscal fail to make this link for the judges between the violence against clergy residences and the pro-Luther cause?

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To the extent 1521 failed to bring about a legal front against the spread of Lutheranism, local church and monastic institutions sometimes sought the help of courts to resolve disputes arising from local reformations or Luther-inspired anticlerical acts. These litigants were doing nothing new; in the 1520s, Reformation probably seemed an extension of late medieval anticlerical, anti-Rome, and territorializing moves by princes and cities, and courts had, since that time, been one venue in which property, jurisdiction, and peace disputes had been brought. Indeed, Erfurt did not formally introduce Reformation until 1525, and like other places, it had had its fair share of conflict between clergy, city council, and commune before Luther’s ideas were in circulation at all.<sup>21</sup> An analysis of the pre-Reformation context in the German-speaking lands of the Holy Roman Empire indicates that it was not so abnormal or unusual for spiritual authorities to make use of a variety of legal means to address encroachments on their property, authority, and powers, and that they were already in practice at using civil courts for addressing these conflicts.

Nonetheless, the kinds of elisions we see in the case against Erfurt are characteristic of many of the Reformation cases. The reasons for these elisions change. In the earliest cases, the Reformation context of a dispute were elided because of a continuity in the litigative strategy of church and monastic institutions before and after 1521, just discussed. Then, in the mid-1520s, there was a shift. For the first time, some cities and princes became open converts and began to reform their domains explicitly in the Lutheran and Zwinglian manner.<sup>22</sup> In 1526, the Speyer Recess identified the “division of the Religion” (*Zwyspalt der Religion*) as one cause of the “uprising of the common man” of 1525. In this urgent context, the Recess called again on the Emperor to urge the convening of a Christian Council or a National Assembly for the purpose of resolving the division of the religion. It also forbade innovations in “the holy Christian faith and religion, also the ceremonies and well-inherited usages of the holy Christian churches.”<sup>23</sup> Its most consequential article—section 4—stated that until the convening of a Council or Assembly, each of the Estates had authority to “live, govern, and behave with their subjects in matters of the

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*Reformationszeit* (Weimar: Böhlau, 1988), 126.

<sup>19</sup> Weiss, 123-124.

<sup>20</sup> Weiss, 126. For more on the Reformation in Erfurt, see Robert Scribner, “Civic Unity and the Reformation in Erfurt,” *Past and Present* 66 (Feb. 1975): 29-60.

<sup>21</sup> See Weiss, Chapters 1 and 2.

<sup>22</sup> Whaley, *Germany*, 181.

<sup>23</sup> For text of the 1526 Speyer Recess, see Senckenberg, *NSRA II*, 272-80.

Worms Edict, as each hopes and trusts himself to answer to God and the Emperor.” Finally, the Recess added plunder (*Spoliation*) and confiscation (*Entsetzung*) to the list of actions that would count as a violation of the Land-Peace.<sup>24</sup> The Speyer Recess thus, on the one hand, gave plaintiffs an additional legal ground on which to sue cities and princes for reforms explicitly on the basis of innovations in the religion. On the other hand, the evangelical estates saw the 1526 Recess, especially section 4, as license to ignore the Worms Edict and to continue reforms so long as they would be ready to answer to God and the Emperor about them.<sup>25</sup> Thus, although by invoking the Speyer Recess of 1526, the Reformation context was increasingly brought to bear in cases, it appeared as one legal issue among many, and the consequences of invoking it were never predictable as the very same Recess was used equally by the evangelical litigants to suggest that their actions were actually protected and legal.

After 1529, when the protesting estates began to decline the forum of the Imperial Chamber Court on the argument that the dispute was a matter of religion and therefore not within the jurisdictional competence of the Court (as we will see in chapter 4), plaintiffs had yet another reason to omit the Reformation context in the case. In order to avoid the legal black hole of the evangelical estates’ “matter of religion” argument, plaintiffs found themselves in the position of having not only to elevate the civil and public law matters of peace, property, and jurisdiction, but also to positively deny that a dispute had any link to a dispute in religion. In one case, as we will see in the following chapter, one plaintiff even submitted a “Correction” to his suit, explicitly removing all language that touched on old-faith ceremonies and worship, and replacing it with language about property and jurisdiction.

Despite these elisions, litigants and lawyers found ways to thematize or bring to the surface the issue of Reformation in these disputes—through sometimes colorful, sometimes more subtle forms of rebuke and suspicion. And in other cases, references to a Lutheran litigant found its way into a proceeding apparently entirely unrelated to the Reformation context, without there being a clear legal purpose for doing so.

More than anything, this chapter pieces together the sources of law on the basis of which the Reformation suits were litigated—not only the issues plaintiffs and the Fiscal raised, but also the sources of law and legal issues that defendants raised. This chapter presents and delineates the patchwork jurisprudence that developed in the Imperial Chamber Court to handle Reformation-related disputes—before the protesting estates began to conceive of the disputes as a unit and experiment with the extraordinary jurisdictional claim that they constituted, collectively and individually, “a matter of religion” (Chapter 4), and before the Augsburg Peace of 1555 settled the meaning of a “violation of the Religion-Peace” (Chapter 6). Included in this patchwork were not only the learned Roman law, but also the terms of various imperial recesses; treaties and out-of-court settlements; an endless range of specific ancient privileges recorded in original documents (*Urkunden*); usages that extended “beyond human memory”; and the fundamentals of the dualistic imperial constitutional order, such as it was, among others.

Overall, these cases potently raise the question: in whose interest was it to make legible the Reformation context of a dispute, at a time when the consequences of doing so were so multifarious?

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<sup>24</sup> Branz, 74.

<sup>25</sup> See more on this in Chapter 5.

## Peace

As discussed in Chapter 2, since the eleventh century in the German lands, kings had brokered “peaces” between feuding parties as an expression of their particular authority as mediators at the center of an endlessly complex feudal network. These peaces initially had the legal character of a contract. By the thirteenth century, kings were promulgating peaces as a form of legislation, but their enforcement capacity was limited. In the late fifteenth century, in an expression of the dualistic imperial constitution in which Emperor and Estates co-governed, the Imperial Diet promulgated the Eternal Land-Peace, and the Imperial Chamber Court was established to actualize its terms in the form of an institution rather than the person of the Emperor.<sup>26</sup>

Land-Peace violations had as an essential element actual physical violence, the threat of violence, or the facilitation of violence. Section 1 of the Eternal Land-Peace of 1495 prohibited “feuding, warring, hijacking, taking captive, attacking, laying siege, [...] scaling the fortified walls of castles, cities, markets, fortifications, villages, farms, or hamlets, or conquering them violently, or damaging property with fire or other means.”<sup>27</sup> The assisting, advising, encouraging, housing, feeding, or in any way aiding of someone doing such actions would also be considered a violation of the Land-Peace. Section 5 even deemed the subsequent privileging or favoring of someone who had committed such acts to be a violation of the Land-Peace.<sup>28</sup> Imperial Chamber Court case files of the sixteenth century include other related acts that were litigated under the Land-Peace rubric, including: raiding, killing, cruelty, and coercion. Other kinds of actions that on their own might not have counted as a violation of the Land-Peace could become one if they were carried out with a certain “quality,” actions such as encroachment and taking control over property and property rights; confiscating property; embargoing; detaining persons or things; and defamation.<sup>29</sup> Litigants thus had the opportunity to argue that a wide range of cases had the quality of a Land-Peace violation,<sup>30</sup> and judges had a great deal of discretion in determining what counted as a violation of the Land-Peace. Not all violations of the Land-Peace would result in outlawry; financial penalties were another frequent consequence.<sup>31</sup>

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<sup>26</sup> See also Hendrik Baumbach and Horst Carl, eds., *Landfrieden - epochenübergreifend neue Perspektiven der Landfriedensforschung auf Verfassung, Recht, Konflikt* (Berlin: Duncker & Humblot, 2018); and Siegrid Westphal, “Reichskammergericht, Reichshofrat und Landfrieden als Schutzinstitute der Reichsverfassung,” in *Schutz der Verfassung: Normen, Institutionen, Höchst- und Verfassungsgerichte: Tagung der Vereinigung für Verfassungsgeschichte in Hofgeismar vom 12. bis 14. März 2012*, ed. Thomas Simon and Johannes Kalwoda (Berlin: Duncker & Humblot, 2014); also Anette Baumann, *Visitationen am Reichskammergericht: Speyer als Politischer und Juristischer Aktionsraum des Reiches (1529-1588)* (Berlin: De Gruyter Oldenbourg, 2018), 137-49.

<sup>27</sup> On plunder as a legally and morally legitimate form of violence in the context of feuding in the medieval period, see Stefan Xenakis, *Gewalt und Gemeinschaft: Kriegsknechte um 1500* (Paderborn: Ferdinand Schöningh, 2015), 265-6. For other meanings of plunder, see Daniel Lord Smail, *Legal Plunder: Households and Debt Collection in Late Medieval Europe* (Cambridge, MA: Harvard University Press, 2017) and Michael Jucker “Plünderung, Beute, Raubgut: Überlegungen zur Ökonomischen und Symbolischen Ordnung des Spätmittelalterlichen Kriegs, 1300-1500,” in *Kriegswirtschaft und Wirtschaftskriege*, ed. Valentin Groebner, Sebastian Guex, and Jakob Tanner (Zurich: Chronos Verlag, 2008), 51-69.

<sup>28</sup> Branz, 16.

<sup>29</sup> Branz, 19, 23-4.

<sup>30</sup> Malte Hohn, *Die rechtlichen Folgen des Bauernkrieges von 1525: Sanktionen, Ersatzleistungen und Normsetzung nach dem Aufstand* (Berlin: Duncker & Humblot, 2004), 298.

<sup>31</sup> Branz, 24.

In the early 1520s, Land-Peace law was not initially seen as a way to deal with Lutheranism or to prosecute evangelical reforms. The Worms Edict of 1521—a *sui generis* attempt to deal with the Lutheran problem—itsself serves as evidence that it was believed that a special legal basis was required for prosecuting the new heresy at the level of imperial law.<sup>32</sup>

In the Speyer Recess of 1526, new elements were added to the list of actions that constituted a Land-Peace violation.<sup>33</sup> The Recess described “how in many places, the spiritual and worldly [estates] stand in danger in their life and limb, also that their annuities, fees, and tithes”—*Zinß, Renth, Gült und Zehenden*, terms that signified not only forms of wealth and financial arrangements, but the rights implicit in them<sup>34</sup>—“are being detained, and they are hindered from bringing them in or distributing them.” “Because no one should be plundered or confiscated [of anything] against law, therefore every ruler, whether spiritual or worldly, should, according to the content of the Land-Peace, loyally defend and protect against violence and injustice, so that until the future Council, peace, unity, and equality can be held between the spiritual and worldly estates, and so that neither worldly nor spiritual have cause to complain of any improper violation or confiscation.”<sup>35</sup> This was the first time that the Imperial Diet made a direct connection between the Land-Peace and the Reformation, the first time that an imperial law besides the Worms Edict was promulgated to manage the Reformation’s conflicts.<sup>36</sup>

In the Speyer Recess of 1529, any violent act impinging the rights of another estate, if done for reasons of faith and religion, could be considered a violation of the Land-Peace. “No one, of the worldly or spiritual estate may violate, coerce, or conquer another on account of the faith (*des Glaubens halben*), nor deprive them of their annuities, tithes, and goods.” It also prohibited, as a violation of the Land-Peace, protective lordship over subjects who leave their rulers on account of faith matters. But because the acts listed could already be considered Land-Peace violations, the mentioning of the faith conflict and reasons added nothing new; if anything, the Recess made it clear that faith reasons were no escape from the consequences of a Land-Peace violation.<sup>37</sup>

The Augsburg Recess of 1530 was sweeping in its ambition to undo the reforms of the previous decade.<sup>38</sup> Both in terms of the numerous measures promulgated,<sup>39</sup> and the lengthy narrative portions in which they were couched, it was clear that the aim of the Recess was to stymie further efforts at reform in the evangelical manner.<sup>40</sup> After efforts to dialogue on doctrinal issues went nowhere, the Emperor (present at the Diet for the first time since 1521) doubled down on his policy that the Worms Edict was still valid law.<sup>41</sup> As in 1529, the protesting estates

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<sup>32</sup> Branz, 74.

<sup>33</sup> See timeline in appendix to see overview of the Recesses in relation to one another.

<sup>34</sup> Branz, 83.

<sup>35</sup> See convenient appendix in Branz, 285-293 for excerpts of key imperial recesses as they pertain to religious peace.

<sup>36</sup> Branz, 75.

<sup>37</sup> Branz, 82-3.

<sup>38</sup> Kohnle, 381-94

<sup>39</sup> Not all of the measures were Land-Peace related, such as Section 60 which guaranteed imperial protection to old-faith Christians who lived under Protestant rulers (Branz, 86). See Senckenberg, *NSRA II*, 314-5 for Section 60 text.

<sup>40</sup> For instance, Sections 10-37 (Senckenberg, *NSRA II*, 309-311) included a declaration of the Emperor’s commitment to protect the old inherited Christian worship, ceremonies, and usages, and describes the circumstances to date of the reforming changes being made in territories and cities. Sections 38-56 (Senckenberg, *NSRA II*, 312-314) described the particular Catholic teachings, ceremonies, and usages that should continue.

<sup>41</sup> Whaley, *Germany*, 299-300.



departed and the old-faith majority promulgated a lengthy series of specific measures, some of which were addressed directly to the Elector of Saxony and his associates (*Mitverwandten*). These prohibited all innovations in religion (section 57) and the printing or sale of anything that might lead to disunity in matters of faith (section 2); seeking to convert anyone to their sect or disturbing monastic persons in their faith and ceremonies (section 3); seizing any property or rights of any estate (section 62), especially on account of faith (section 65), especially that of the spiritual estate (section 59); required the promotion of Catholic worship and Christian good works everywhere (section 56), the reestablishment of those things where they had been taken away (section 59), and the restitution of all alienated property and rights for bishoprics, monasteries and collegiate churches (sections 6 and 59). To violate these explicitly anti-reform laws would thereafter be considered a violation of the Land-Peace, subject to prosecution by the imperial Fiscal in the Imperial Chamber Court (section 67).<sup>42</sup> In other words, no longer was violence an essential element for a Land-Peace violation; effectively any actions done against the spiritual estate, and the old-faith worship and institutions, could be considered a violation of the Peace.<sup>43</sup>

The legal validity of the 1530 Recess was, however, a matter of debate in the decades following, not only because the protesting estates protested portions of it, bringing out the tension between the inherited principle of unanimity and the decision procedure of majority rule,<sup>44</sup> but also because several of the most important sections of the Recess when it came to the anti-reform measures were promulgated unilaterally by the Emperor, with the willing approval of the majority of estates, again raising the challenges inherent to the Edict form, discussed in Chapter 2.<sup>45</sup>

Still, the 1530 Recess broadened the definition of a Land-Peace violation, and portended an increase in the Land-Peace litigation that would occur in the Imperial Chamber Court. With the Nuremberg Settlement of 1532, which promised an end to the Imperial Chamber Court's jurisdiction over "matters of religion," however, it seemed that the protesting estates had successfully negotiated an end to this threat.<sup>46</sup>

Between 1532 and 1541, no Imperial Diets met, and therefore no new Land-Peace legislation was promulgated, leaving the question of the extent of Land-Peace law deeply ambiguous.<sup>47</sup> On the one hand, 1530 represented a doubling down on the Edict of Worms. On the other hand, 1532 was a clear move away from the Worms regime.<sup>48</sup> Both of the legal regimes produced in these years had questionable legal validity—as majority recesses, unilateral mandates, and private contracts. The circumstances were ripe therefore for a period of tremendous litigative creativity, as parties sought to settle the meaning of these laws, contracts,

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<sup>42</sup> Three of the sections explicitly mentioned the Land-Peace: Sections 59, 62, 65. See *NSRA II*, 314-316, and Branz, 287-288.

<sup>43</sup> Branz, 82. Gero Dolezalek, "Die juristische Argumentation der Assessoren am Reichskammergericht zu den Reformationsprozessen 1532-1538," in *Das Reichskammergericht in der Deutschen Geschichte: Stand der Forschung, Forschungsperspektiven*, ed. Bernhard Diestelkamp (Cologne: Böhlau Verlag, 1990), 29.

<sup>44</sup> See section on majority rule above, and see also section on protestation in Chapter 5.

<sup>45</sup> Branz, 89, and the literature cited there. This also touched on the issue of the relative power of estates vis-a-vis the Emperor; the estates, even when divided on matters of faith, often cooperated to ensure that the Emperor did not behave like a monarch. Whaley discusses this throughout his book, see e.g. Whaley, *Germany*, 312.

<sup>46</sup> For more on the Nuremberg Settlement and other developments in 1532, see Chapter 4.

<sup>47</sup> On the lack of imperial diets in this period, see Whaley, *Germany*, 310, and the literature cited there.

<sup>48</sup> Brady suggests that 1532 was the first step towards the Augsburg Peace of 1555 (Brady, *Protestant Politics*, 82).

and legal regimes. This period also saw the first declaration of the *Acht* by the Imperial Chamber Court, over the city of Minden, in 1538.<sup>49</sup>

Already in the early 1540s we begin to see the emergence of the Religion-Peace as a new kind of legislative form, on the template of the Land-Peace. Though Religion-Peace has typically been seen in the historiography as a shorthand for a kind of reconciliation or rapprochement between religious confessions, the opposite of religious war,<sup>50</sup> in fact, Religion-Peace means something more like the legislation that delineated the terms of the relations between confessions, and which religion-related offenses counted as violations of the Land-Peace. It was the beginning of public law on churches in Germany, more than it was the beginning of religious toleration or religious freedom.

## Property

It would be difficult to overstate the importance of property in the early Reformation. Whether to do with indulgences and other sacramental instruments for motivating the donations of believers, the accusation of clergy greed in receiving multiple and bloated incomes, the concerns about opulent display of Church wealth in the form of relics and various sacred items as part of ritual—property was a central issue for Reformation theologians and their followers. As discussed in Chapter 1, these concerns dovetailed with political-economic concerns around property including popular anti-feudal resistance to tithing, and opposition to the massive land-holding and wealth of churches as a problem for territorializing rulers. Reform-minded princes and cities targeted church property. Old-faith clergy and institutions saw the potential of this proxy issue to discredit the new movement—to argue evangelicals were making a variety of category mistakes, or were revealing their suspect motives in seeking to gain property and wealth.

Körber writes that in the question of church property, all of the divisions and antagonisms of the Reformation converged to a combustion point.<sup>51</sup> According to Ocker, “imperial acceptance of Lutheran churches had nothing to do with tolerance of Luther’s faith” but everything to do with acceptance of its radical property claims.<sup>52</sup> As Brady writes, “the German Reformation was a struggle for faith; it was also a struggle for property.”<sup>53</sup> The Reformation brought with it not only widespread secularizations, and a revision of law governing church property and its usages within territories, but also increasing reliance on secular rulers to codify biblical morality into civil and economic laws.<sup>54</sup> Approximately two-thirds of cases brought to the Imperial Chamber Court by church institutions between 1520 and 1539 were brought by monasteries seeking restitution of property.<sup>55</sup>

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<sup>49</sup> U. Hölscher, “Die Geschichte Der Mindener Reichsacht 1538-1541,” *Zeitschrift Der Gesellschaft Für Niedersächsische Kirchengeschichte* 9 (1914): 192–202.

<sup>50</sup> See e.g. Wayne P. Te Brake, *Religious War and Religious Peace in Early Modern Europe* (Cambridge, UK: Cambridge University Press, 2017). This is why I translate *Religionsfrieden* as Religion-Peace rather than Religious Peace; more on this in Chapter 6.

<sup>51</sup> Kurt Körber, *Kirchengüterfrage und Schmalkaldischer Bund: Ein Beitrag zur Deutschen Reformationsgeschichte* (Leipzig: Verein für Reformationsgeschichte, 1913), iii.

<sup>52</sup> Ocker, xiii.

<sup>53</sup> Brady, *Protestant Politics*, 162ff.

<sup>54</sup> See Berman, 156-175 and 374-375.

<sup>55</sup> Ocker, 110 and the literature cited there.

### *Church property, from the Proprietary Church System to the Patronage System*

“Even before the end of persecutions” in the first three centuries of the Common Era, “some Christian communities had what looks like corporate property in practice—a cemetery, a clergy-house, a building for worship.”<sup>56</sup> Then, “under Christian emperors, church property received special treatment in the law, so that something like civil personality, or property-owning capacity, was attributed to the church of each city.”<sup>57</sup> Bishops administered the property of their city’s church.

Church wealth increased quickly. “Emperors financed magnificent buildings; Christians in general gave not only bread and wine for the Eucharist, wax and oil for lights, and food or money for the clergy and the poor, but treasures of plate and precious stones; and not only things but land,” which “flowed in from gifts and legacies, including the clergy’s private property,” and “it came to be taken for granted that the livelihood of bishop and clergy, help for the poor, and upkeep of church buildings were paid for partly by income from land.”<sup>58</sup>

From the fourth century onwards, we begin to see multiple churches in one city, and churches established in rural areas. Still “any offerings in money, kind, or land were part of the diocesan property administered by the bishop.”<sup>59</sup> In the fifth century, localized distinctions began being made within church property according to function, such as funds for the bishop’s use, the poor, the clergy, and the Church Fabric (*Kirchenfabrik, fabrica ecclesiae*);<sup>60</sup> this practice became more widespread from the tenth and eleventh century onwards.<sup>61</sup>

Around the same time, “diocesan property” (centrally managed by bishops) “was becoming an ever smaller proportion of all existing church property, while the clergy supported by it became only some among the whole clergy.”<sup>62</sup> Instead, “almost every church in town or country” came to have “its own land from which produce and rents were drawn, its own slaves and tenants, and its own income in offerings.”<sup>63</sup> “By the eighth century virtually every old parish church both sides of the Alps and in the remnant of Christian Spain was a self-supporting property-owning church,” with significant independence from Bishops, on whose incomes and administration they no longer relied.<sup>64</sup> This was the beginning of what Ulrich Stutz famously called *Eigenkirchenwesen* or the “proprietary church system,” by which is meant this situation in which an increasingly larger share of overall church wealth was made of property in private possession—a church building along with its contents, its land, stock, tithes, dues, offerings, and the rights to appoint its priest, were the possession of some person or family.<sup>65</sup>

It was in this context that forms of church property ownership came to vary tremendously, linked in equally multifarious ways to forms of lordship. Higher churches, which

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<sup>56</sup> Susan Wood, *The Proprietary Church in the Medieval West* (Oxford; New York: Oxford University Press, 2006), 9.

<sup>57</sup> Wood, 9.

<sup>58</sup> Wood, 9.

<sup>59</sup> Wood, 10.

<sup>60</sup> Wood, 10. The Church Fabric refers to a fund with its own legal personality consisting of all incomes and wealth dedicated to the specific purpose of maintaining church buildings.

<sup>61</sup> See *Handwörterbuch zur deutschen Rechtsgeschichte*, vol. 2, s.v. “Kirchengut,” by H.J. Becker, 753-761. And see Körber, 4.

<sup>62</sup> Wood, 10.

<sup>63</sup> Wood, 10.

<sup>64</sup> Wood, 11.

<sup>65</sup> Wood, 1. See *Handwörterbuch zur deutschen Rechtsgeschichte*, vol. 1, s.v. “Eigenkirche,” by W.M. Plöchl, 879-880. Also see discussion in Ocker, 18-31.

included monasteries and abbey churches that had “massive splendours” and “lordships of several thousand mansi or peasant holdings,” might belong to a king or prince, a founder or his or her heirs, non-founder nobles such as lay abbots and advocates, a larger church or monastery, or a bishopric.<sup>66</sup> Lower churches—those “wooden sheds with barely a pewter or horn chalice” with lordship of “a single peasant holding or less”<sup>67</sup>—constituted the vast majority of churches, and lordship over them sometimes belonged to lay proprietors including rulers, nobles, or knights; families and partnerships with common property; townsmen and merchants; communes; priests; nearby higher churches like monasteries, collegiate churches, or chapters; and bishops and bishoprics, who might be lords over churches both within and outside of their diocese.<sup>68</sup>

These proprietary churches were established by private individuals and families for a variety of reasons. There was some “combination of piety and prestige” in doing so. The church often served as “a memorial and burial-place,” as a “shrine for relics,” a gift to a saint, or as the basis of a charitable foundation.<sup>69</sup> A proprietary church required the consecration of the bishop to count as a church—and this, along with the authority to ordain clergy, were “the two great levers for the diocesan bishop.”<sup>70</sup> But ownership, possession, usage, management and control of the new church was not always clear, and varied greatly from case to case. In practice, churches were established to be self-sufficient, and were treated as the property of their founders. Some of this can be attributed to the decay of public law after the fall of Western Roman imperial government in the fifth and sixth centuries.<sup>71</sup>

But Wood suggests that there is a more positive story to tell here about “the everyday sense in which a church ‘belonged’ to someone who, in spite of having ‘given’ it an endowment, felt it was his own and treated it as his own,” and the ways in which this sense “could easily—in the ambience of customary law—become what rulers and local courts recognized as a property-right.”<sup>72</sup> The Church’s wealth was sustained into the late middle ages by widespread pious belief of everyday people who gave of their wealth to achieve salvation, who believed in the salvific potential of good works.<sup>73</sup> “Gift of property to churches or monasteries were personal acts of devotion. They implied exchanges of service and protection between heaven and earth.”<sup>74</sup>

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<sup>66</sup> Wood, 437. See in general Wood, 247-436.

<sup>67</sup> Wood, 437.

<sup>68</sup> Wood, 584. An exclusive focus on late medieval developments might lead us to assume that lay involvement in church property was always part of a secularizing trajectory. But a look at earlier developments, especially the development of the proprietary church system against the backdrop of increasing decentralization of the Church during the rise of Barbarian kingdoms, can help us see that patterns of lay involvement and property interests in church wealth were long established; the idea of a separation of church property from other kinds of property seemed always to give way to pragmatic and particularistic arrangements. See in general, Wood, 437-728.

<sup>69</sup> Wood, 12.

<sup>70</sup> Wood, 12, 16.

<sup>71</sup> Wood, 100.

<sup>72</sup> Wood, 100. She suggests that understanding Barbarian conceptions of gift-giving helps explain this. To make a gift was not “totally detached from the giver; on the contrary, it established a link or even a hold on its recipient, to be released by a counter-gift. Perhaps in giving land to a church and thereby to God, a saint, or the poor, a Barbarian both staked a claim on God’s mercy, the saint’s intercessions, and the prayers of the poor, and kept a hold on land and church,” in lieu of “the ultimate counter-gift” which was “realized invisibly and out of time” (Wood, 101). In other words, establishing and endowing a church was “a link or bridge” (Wood, 756), an act of binding, not alienation (Wood, 103-108).

<sup>73</sup> Körber, 8-9.

<sup>74</sup> Ocker, 25.

Pious endowments and gifts grew continuously reaching their height in the fifteenth and sixteenth centuries.<sup>75</sup> But these pious donations could be delayed, qualified, or made conditional on a variety of specific factors.<sup>76</sup> Later, donors might renege on a donation by denying that it had happened, saying it was done under coercion or that their consent was invalid.<sup>77</sup> In this way, donations were “an ongoing process, involving many people, and never absolutely completed.”<sup>78</sup> The countergift in some cases was non-material, the hopeful expectation that “parting with the property” would “lay up treasure in heaven”<sup>79</sup>; but in other cases, it was “prayers in their lifetime, a burial-place, perhaps deathbed admission to the community or a funeral as for a monk or canon, anniversary masses, inscription of their name in the Liber memorialis; burial for a dead son, or entry for a living one; perhaps some specified almsgiving or commemorative feast; in more general terms, the monks’ *societas* or confraternity, and a share in the rewards of their way of life” that they got in return.<sup>80</sup> Sometimes the countergift was the right to appoint clergy of that church. Sometimes it took the form of material goods or money, which made it hard to distinguish from a sale transaction.<sup>81</sup> In some cases, they were not averse to using precisely that language of a “sale,” though on its face this would violate the inalienability principle.<sup>82</sup>

The ideology of the strong separation of temporal and spiritual property came about in the context of the Investiture Controversy and Gregorian reforms of the eleventh century. In the tenth and eleventh centuries, there was a rise of the idea of “monastic liberty” which in part involved an attack on the proprietary church system.<sup>83</sup> The root of the problem was seen as “the general ‘mingling of sacred and secular things.’”<sup>84</sup> The consequence was a hardening of the boundary between spiritual and temporal on matters of property, and prohibition on alienation of church property from its divine purposes was made more strict, though how this was defined remained always an object of discussion and deliberation.<sup>85</sup> Plöchl describes the “defensive character” of this conceptual distinction.<sup>86</sup> But the problem was not about challenging views that regarded a church as property—that was never really the core of the dispute.<sup>87</sup> Indeed, the 1122 Concordat of Worms that marked the end of the Investiture Controversy recognized the lordship of lay rulers over churches “in terms that we may call broadly ‘feudal.’”<sup>88</sup> This gave rise to the development of the canon law of patronage (*ius patronatus*) in the twelfth century. The canon law of patronage was more than anything a rationalization and codification of proprietary church practices, in light of Gregorian reforms, according to principles of the newly developing Roman

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<sup>75</sup> Körber, 8, 9.

<sup>76</sup> Wood, 755.

<sup>77</sup> Wood, 756.

<sup>78</sup> Wood, 756.

<sup>79</sup> Wood, 759.

<sup>80</sup> Wood, 759.

<sup>81</sup> Wood, 760-1.

<sup>82</sup> Wood, 763ff.

<sup>83</sup> Wood, 839-40. “The *Eigenkirche* was one in a syndrome of practices addressed by reforming legislations” including: “alienation of church property, largely by the clergy; hereditary claims of laity or clergy alike to altaria, prebends, offices, custody of treasures; the want of ‘common life’, especially in cathedrals; ‘headless clergy’ in the service of lords (not necessarily serving any church); the marriage or concubinage of clergy, and resultant property claims of their children [...]; and simoniac traffic in offices and Orders” (Wood, 854).

<sup>84</sup> Wood, 855.

<sup>85</sup> Wood, 861-2.

<sup>86</sup> Willibald M. Plöchl, *Geschichte des Kirchenrechts: Das Kirchenrecht der abendländischen Christenheit, 1055 bis 1517*, vol. 2 (Vienna: Verlag Herold, 1966), 406.

<sup>87</sup> Wood, 863.

<sup>88</sup> Wood, 864.

legal science.<sup>89</sup> Rather than the world of the gift and counter-gift,<sup>90</sup> this was a world of rights in exchange for patronage in the form of a financial gift and protection—rights similar to those of a property-owner, plus clergy appointment rights, and other kinds of rights, such as “a kind of insurance policy” for provision “if the patron fell into want.”<sup>91</sup>

In summary, after the Investiture Controversy, we see a double move. On the one hand, there was a move towards drawing a sharper conceptual distinction between church property and all other kinds of wealth, especially through the mechanism of the prohibition on alienation of church property,<sup>92</sup> laws against simony,<sup>93</sup> as well as a sharper conceptual distinction between temporal and spiritual church property.<sup>94</sup> On the other hand, the canon law of patronage formalized and regularized the rights that would accrue to lay church donors, marking an apparent jurisdictional win for the Church as against the more unruly and lay-dominant proprietary church system, but ultimately proving to pave the way for greater secular control over church governance.<sup>95</sup>

### *Types of Church Wealth*

What were the kinds of properties under dispute in Reformation cases? Landed property formed a large proportion of Church wealth. These took the form of buildings for worship (cathedrals, churches, chapels), and residential buildings for monks, nuns, priests, the poor and infirm (monasteries, cloisters, parsonages, infirmaries, poor houses, hospitals).<sup>96</sup> Also there were kinds of outposts owned by various institutions for hosting traveling clergy or administrators, for collecting tithes, and certain administrative functions (such as *Zehnthöfe*). As noted above, the Church Fabric was also a form of wealth, a fund with its own legal personality consisting of all incomes and wealth dedicated to the purpose of maintaining church buildings.<sup>97</sup>

Church wealth also included income-yielding real properties, such as facilities for the production of goods that would be sold by the church institution (like wine).<sup>98</sup> Land owned by the church—in the form of farms, homes, fields, grasslands, gardens, forests, pasturelands, also saltworks and mines—could also be held and managed by nobles, citizens and farmers who then paid various types of annuities, in the form of *Zinsen* (*Lehenszinsen* or *Pachtzinsen*)<sup>99</sup> or *Gefälle* for the use of that land.<sup>100</sup> *Rente* was another form of annuity that itself became the object of

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<sup>89</sup> Wood, 886.

<sup>90</sup> See Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies*, trans. W.D. Halls (New York; London: W. W. Norton & Company, 2000).

<sup>91</sup> Ocker, 23; Plöchl, vol. 2, 419.

<sup>92</sup> See Ocker, 17, 25. Also Paul Mikat, “Bemerkungen zum Verhältnis von Kirchengut und Staatsgewalt am Vorabend der Reformation,” *Zeitschrift Der Savigny-Stiftung Für Rechtsgeschichte, Kanonistische Abteilung* 67 (1981): 267.

<sup>93</sup> Plöchl, vol. 2, 407-8.

<sup>94</sup> Plöchl, vol. 2, 405-6.

<sup>95</sup> Dietrich Kratsch, *Justiz, Religion, Politik: Das Reichskammergericht und die Klosterprozesse im ausgehenden sechzehnten Jahrhundert* (Tübingen: Mohr Siebeck, 1990), 13.

<sup>96</sup> Ocker, 31.

<sup>97</sup> Plöchl, vol. 2, 423; Körber, 4. See footnote 60 above.

<sup>98</sup> Ocker, 32.

<sup>99</sup> Not to be confused with modern usage of “*Zinsen*” meaning “interest”; interest was forbidden in 1139, though there were methods for going around this prohibition. See Plöchl, vol. 2, 449-451. Also see *Handwörterbuch deutschen Rechtsgeschichte*, vol. 5, s.v. “Zins,” by P. Landau, 1707-1713.

<sup>100</sup> Körber, 2.

speculation, and by the sixteenth century was “one of the most widely used legal devices for transfer of property rights.”<sup>101</sup> It originated in the twelfth or thirteenth century, when landholders granted churches the right to annual deliveries of yields from their lands, in perpetuity. This “created in the grantee a property right in the land, and not just a personal obligation of the grantor.”<sup>102</sup> If the grantor or future tenants of the land failed to deliver, the church had the right to take possession of the land. In the fifteenth century, increasingly these annual deliveries took the form of money rather than goods, and it became a widespread practice to buy and sell these rights to annual deliveries, often connected with the purchase or lease of land; a buyer would pay a certain price as a down payment for the land, with the remainder of the price to be paid in the form of annual deliveries of produce or money (*Renten*), on the understanding that failure to deliver would result in the possession of the land.<sup>103</sup> Sometimes, a smaller church would be pledged as security for a loan, in most cases to a monastery or higher church.<sup>104</sup> Usually there would be a fixed term for repayment, at which point the church would fall to the monastery.<sup>105</sup>

The Church also gathered tithes (*Zehnten*) and other kinds of compulsory fees.<sup>106</sup> By the ninth century, the paying of tithes had moved away from the previous model of being “a personal observance of the well-to-do,” with “its destination [...] largely a matter of choice” to becoming compulsory on all Christians, and a matter of “rights of particular churches over defined populations or territories.”<sup>107</sup> “Tithes, firstfruits, baptism, and burial rights became pertinences of churches, part of their value as property.”<sup>108</sup> Disputes about which church institution should receive the tithes of certain villages and communes were commonplace and persisted into our period. Tithes could be redirected, traded, exchanged, pawned, or sold.<sup>109</sup> Tithe-districts more often aligned with their founders’ or owners’ lordship than with parish boundaries.<sup>110</sup> Private church founders sometimes reserved the right to testate the tithe to another church, if they wished.<sup>111</sup> The acquiring of new tithes “could give a new church and its lord a stake in the development of wider territory.”<sup>112</sup> Over time, there was an increasing linking of tithe and territory, a shifting from being conceived as an obligation on a person “to pay tithe to a particular church depending [...] on where he lived” to being conceived as “a charge on specific lands regardless of who held them and where he received the sacraments.”<sup>113</sup> This “made it easy to treat the tithe [...] as separate, negotiable bits of revenue like any rent.”<sup>114</sup>

“Offerings,” fees and dues constituted another key source of revenue and therefore of church wealth. These depended to some extent on custom of a locality or region; “offerings could be elaborately distinguished according to who paid them and what was their occasion and

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<sup>101</sup> Berman, 173.

<sup>102</sup> Berman, 173.

<sup>103</sup> Körber, 2, 7; William J. Wright, “The Nature of Early Capitalism,” in *Germany: A New Social and Economic History. Volume 1: 1450-1630*, ed. Sheilagh Ogilvie and Bob Scribner (London: Arnold Press, 1996), 186.

<sup>104</sup> Wood, 771.

<sup>105</sup> Wood, 772.

<sup>106</sup> Körber, 2; Plöchl, vol. 2, 425-438.

<sup>107</sup> Wood, 462.

<sup>108</sup> Wood, 462-3.

<sup>109</sup> Ocker, 32.

<sup>110</sup> Wood, 474.

<sup>111</sup> Wood, 465.

<sup>112</sup> Wood, 471.

<sup>113</sup> Wood, 479.

<sup>114</sup> Wood, 479.

intention.”<sup>115</sup> “Some were given by individuals for individual reasons, to fulfil a vow or as part of a penance; for a blessing on a pilgrim’s pack before leaving home, or on newly planted fruit trees or a new well; for an annual commemorative mass; or for more or less unavoidable occasions—marriage, baptism, burials.” Also, offerings were given at regular mass and at regular feasts. In some sense these offerings can be thought of as payment to a professional for his services to a client, though demanding payment of this kind was forbidden.<sup>116</sup> Churches varied with the kinds of offerings, fees, and dues they were entitled to collect, based on what they were empowered and consecrated to carry out—if they had a burial ground, for example, or a baptismal font, or an altar for the church’s patron saint.<sup>117</sup> Unlike tithes, these were less easily transferable and tradable, in part because they often were paid in church, in a liturgical context.<sup>118</sup> So competition for offerings was often allocated at the time of consecration, or in the form of agreements between competing church-owners.<sup>119</sup> And peasants for their part could exercise some choice on where their offerings went, more so than tithes.<sup>120</sup> “By the eleventh century, with regional and local variations, [offerings] are regularly named in the charters as pertinences, along with tithes and lands.”<sup>121</sup>

Church institutions owned a variety of precious objects (*Kleinodien*) for use in religious rites and devotions, such as reliquaries, liturgical gear, books, paintings, and statues.<sup>122</sup>

Benefices (prebends, *Pfründe*) were ecclesiastical incomes. They were attached to certain offices (*Amt*) like rector of a parish, cathedral dignitaries, or canonries.<sup>123</sup> These were also a form of wealth that could be traded, accumulated, redirected, confiscated, and claimed. It took the form of land, capital, or profit-bearing rights. In the late middle ages, the benefice varied in form and extent—some benefices did not include use of a parish house, while others had a residence, the right to collect tithes of a certain place, and incomes from various enterprises. Each parish received one parish benefice, but as the numbers of a congregation grew, the status of the church institution might change and draw increasingly more benefices. It was not uncommon for a priest to have multiple benefices; a priest with only one would probably have to supplement his income elsewhere.<sup>124</sup> The right to a benefice was granted by a bishop.<sup>125</sup> But a donor who endowed a benefice could make stipulations, such as that the benefice be restricted to the donor’s kin.<sup>126</sup> Also a donor might stipulate the “right of presentation—the right to present candidates to a post,” though in theory only the papal court could trump the power of the bishop to formally appoint.<sup>127</sup> Hence, when Protestants confiscated, they hoped to achieve total control of management of church personnel; by staking a claim on church incomes, they were also assuming control of the bishop’s and papacy’s functions.<sup>128</sup>

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<sup>115</sup> Wood, 478.

<sup>116</sup> Wood, 478.

<sup>117</sup> Wood, 479.

<sup>118</sup> Wood, 480.

<sup>119</sup> Wood, 480.

<sup>120</sup> Wood, 482.

<sup>121</sup> Wood, 486.

<sup>122</sup> Ocker, 31-2.

<sup>123</sup> See Plöchl, vol. 2, 409-416; Ocker, 33.

<sup>124</sup> Körber, 3-4.

<sup>125</sup> Ocker, 23n23.

<sup>126</sup> Ocker, 24n26 and the literature cited there.

<sup>127</sup> Ocker, 33.

<sup>128</sup> Ocker, 33.



Church foundations and endowments (*Stiftungen*) were a major source of wealth for the Church, and the main source of the capital used for loans. These were endowments established by lay donors for particular purposes, such as for charitable institutions, for maintaining monasteries, or for the holding of a mass.<sup>129</sup> The medieval church was in those times the only safe economic institution, so a donation was also a kind of retirement plan; donations to monasteries and houses of worship in exchange for room and board in a monastery until death, plus a burial, were not uncommon especially for the patriciate class.<sup>130</sup> Donated endowments were also a way for noble classes to ensure financial wellbeing of their descendants: unmarried daughters of the noble and landed elite would have a secure place in a woman's monastery.<sup>131</sup>

### ***Pre-Reformation Secularization Methods***

Secularization and conversion of church property did not begin with the Reformation. For centuries, a variety of means—legal fictions, technical loopholes, as well as force and impunity—were used to displace church wealth from the hands of the church alone, or from the intended purposes of a certain fund of wealth, despite the prohibition on the alienation of church property. Kratsch calls this the “normalized violation of inalienability of church property” in the late medieval period: “the church property-grabbing Protestants could therefore call upon the ‘models’ of Catholic territorial rulers in defending themselves against Emperor and Empire.”<sup>132</sup> The late middle ages produced the legal pathways, structures, instruments, and argumentation that made a reformation of the relation between church property and state authority possible.<sup>133</sup> Mikat argues that the practical and political development of these relations was prior to the theoretical or theological grounding or justification of them.<sup>134</sup> Much of this secularization happened through secular rulers with territorial ambitions through indirect taxation, patronage rights, protector rights, among other methods. But some of this happened in collusion with church authorities.<sup>135</sup>

One key point to make here is that although we use “secularization” to refer to the varieties of ways in which church wealth was re-formed or re-purposed, secularization was just one form of doing so, or often the final step in a sequence of mechanisms. Lehnert identifies a processual sequence of first sequestration (including inventorying, a ban on selling), possession (confiscation of property without changing the dedicated purpose of that wealth), reformation (reformulating purpose of wealth for another pious objective), innovation (use of wealth for use in a broader definition of pious objective), cumulation (centralization and fusion of wealth with the common treasury), and secularization (worldly use of church property).<sup>136</sup>

The patronage system, for one, opened up pathways for a wide range of secularization techniques, especially starting in the fifteenth century, and ultimately to the development of *Staatskirchenrecht* (territorial governance of church institutions).<sup>137</sup> Lay donors including princes increasingly became patrons specifically to be able to influence church governance of the

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<sup>129</sup> Körber, 5.

<sup>130</sup> Körber, 7.

<sup>131</sup> Körber, 8.

<sup>132</sup> Kratsch, 13.

<sup>133</sup> Mikat, 309.

<sup>134</sup> Mikat, 309.

<sup>135</sup> Kratsch, 12-13. Mikat calls it “camouflaged (*getarnten*) secularization” (Mikat, 302).

<sup>136</sup> Kratsch, 24.

<sup>137</sup> Plöchl, vol. 2, 418.

institutions in their domains.<sup>138</sup> Princes would deliberately unite as many continuous patronages as they could in order to make a claim to the right to presentation of as many clerical posts in their region as they could.<sup>139</sup>

Also beginning in the fourteenth and fifteenth centuries, some princes and territorial rulers began simply to claim prerogatives to be informed about or to have some kind of say in internal church matters especially concerning property, as part of a generalized lord-subject relationship,<sup>140</sup> or in exchange for a generalized duty to protect (*Schirmvogteirecht*).<sup>141</sup> Key was the work of inventorying church property and managing that information. Secular rulers would appoint an official whose task it was to manage this information.<sup>142</sup> In many cases, these oversight privileges led incrementally to direct management of certain parts of church wealth, so that we have evidence already in the fifteenth century of territorial rulers taking in all incomes directed to a church, and apportioning out benefices, upkeep expenses, and keeping some for themselves, on their terms.<sup>143</sup> Cities likewise sought to increase their oversight over church wealth by gaining control over a patronage.<sup>144</sup> A lay representative would be selected by the commune or city council to administer the wealth that was specifically dedicated to upkeep and maintenance of the physical church.<sup>145</sup>

In some cases, agreements would be made between church institutions and secular rulers of localities that required ever more access to church wealth and to use of the monastery or building itself (as a fortress) in cases where churches were under direct threat and required military defense. Rulers in some cases regularized the steady flow of church monies into territorial coffers by charging fees, under the auspices of preparing defensive funds, despite canon law rules exempting spiritual goods from taxation.<sup>146</sup> Cities were likewise successful at getting around the prohibition on taxation.<sup>147</sup> Some rulers and cities would negotiate privileges to access monies of endowments for “other pious purposes” that had nothing to do with military defense and protection.<sup>148</sup>

In addition to using patronage rights, protective rights, and sovereign prerogative to inventory, control, and tax ever greater portions of church wealth, rulers and cities attempted “to restrict (or regulate) the flow of real property into Church hands.”<sup>149</sup> Mortmain laws (*Amortisationsgesetze*), for instance, came into widespread use in the twelfth to fourteenth centuries. These were laws that forbade or required a ruler’s approval before property could be

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<sup>138</sup> Ocker, 23.

<sup>139</sup> Körber, 16.

<sup>140</sup> Mikat, 307. Indeed, Mikat says here that in some places, the dependency relationship between lower church institutions upon local princes and municipalities was so great that it was the Bishops who were regarded by lower church institutions as a threat to their wealth (Mikat, 308).

<sup>141</sup> Körber, 22; Mikat, 299-300; Plöchl, vol. 2, 442; Ocker, 66-67.

<sup>142</sup> Ocker, 10; Körber, 19. Mikat writes that late medieval techniques of inventarization, visitation, auditing, and ultimately sequestration—carried out both by secular authorities as well as church authorities with respect to lower churches—were similar to the techniques that would be used in the Reformation period (Mikat, 297-299).

<sup>143</sup> Körber, 21.

<sup>144</sup> Thomas Brady, “Economic and Social Institutions,” in *Germany: A New Social and Economic History. Volume 1: 1450-1630*, ed. Sheilagh Ogilvie and Bob Scribner (London: Arnold Press, 1996), 281.

<sup>145</sup> Körber, 18. These were variously called *Kirchenmeistern*, *Baumeistern*, *Heiligenpflegern*, *Kirchengeschwornen*, *Kirchpröpsten*, *Zechmeistern* or *Zechpröpsten* (Körber, 19).

<sup>146</sup> Mikat, 305-7.

<sup>147</sup> Körber, 15.

<sup>148</sup> Körber, 22.

<sup>149</sup> Euan Cameron, *The European Reformation* (New York, NY: Oxford University Press, 2012), 31.

sold with the condition of perpetual, inalienable ownership, something that at the time could only be done by a perpetual institution like the church.<sup>150</sup> In addition to such territorial and municipal laws, we see increasingly from the fourteenth and fifteenth centuries that contracts of sale to a church provided evidence as a condition of sale that the seller had the right to buy back the property; in some cases, rulers would claim this so-called right of repurchase (*Rückkaufsrecht*) regarding real estate that had never belonged to them.<sup>151</sup>

Finally, there were practices among late medieval clergy and certain financial instruments and practices of church institutions themselves that provided pathways to secularization and conversion of church property. To the extent there was a redirecting of benefices and endowments from founding purposes, this contributed to a general slackening of standards around alienation of property.<sup>152</sup> The practice by clergy of taking in multiple benefices, and appointing vicars to carry out daily activities of a parish, was a kind of conversion.<sup>153</sup> Even more explicit was the institution of the commendam (*Kommende*), a canon law method for redirecting a benefice to a third party without transferring the duties of office originally attached to the benefice.<sup>154</sup> Another form of conversion of church property purposes was incorporation (*Inkorporation*), the legal process of subsuming wealth and funds of smaller churches into higher churches and monasteries, usually due to financial need of the higher church, a university, or a monastery.<sup>155</sup>

On the eve of the Reformation, the contradictions of the overall church property system contributed to the Church's "vulnerability."<sup>156</sup> "This monetary tangle harmed the Church's image with laypeople: an impoverished local priesthood seemed to offer a poor service for the money that it demanded; much of what was levied effectively 'disappeared' into enclosed monasteries or the arcane areas of higher education or administration. In spite of gifts prodigally given to some sectors of the Church, the institution as a whole managed to appear simultaneously impoverished, grasping, and extravagant."<sup>157</sup> At the same time, the rise of lay charitable institutions in the late middle ages set up a contrast with the economic basis and "moral sensibility" of church institutions; "this new world valued service over mediation, instruction over ritual, and thrift over display."<sup>158</sup>

Ocker argues that the Peasants' War indirectly "accelerated lay designs on church dominion, under the cover of traditional religious obligations" by provoking evangelically-inclined church patrons and territorial rulers to take defensive action against the plundering and iconoclasm of rebel armies.<sup>159</sup> Protestant princes and cities opportunistically confiscated church property in the name of protection. Ironically, "it was the *protectors* who posed the enduring threat to the material basis of the church."<sup>160</sup> This is important: to the extent princes and cities were confiscating church property in the Reformation period, their actions were often continuous

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<sup>150</sup> Plöchl, vol. 2, 402-404; Körber, 14; Mikat, 303-304.

<sup>151</sup> Mikat, 304.

<sup>152</sup> Cameron, 31-32 on "'diverting' money from one cause to another."

<sup>153</sup> Körber, 10-11.

<sup>154</sup> Körber, 11-12. Michael Ott, "In Commendam," in *The Catholic Encyclopedia*, vol. 7 (New York: Robert Appleton Company, 1910), accessed September 2, 2018, <http://www.newadvent.org/cathen/07719a.htm>.

<sup>155</sup> Körber, 12-13. See also Plöchl, vol. 2, 419ff.

<sup>156</sup> Cameron, 30. Also see Körber, 25-27 on conditions that generated broad support for secularization efforts of princes, cities, and nobles.

<sup>157</sup> Cameron, 32.

<sup>158</sup> Brady, "Economic," 281-2.

<sup>159</sup> Ocker, 55.

<sup>160</sup> Ocker, 75, emphasis in original.

with the methods and techniques of the late medieval period; these intrusions were “variants on a recognized theme, and the mere fact of encroachment did not really distinguish the new church.”<sup>161</sup> What had changed was not the forms—legal and otherwise—but the substance of their designs on the uses of church wealth: especially the aim to install and support evangelical preachers, to empty monasteries of their clergy, and to use wealth for a variety of pious and sometimes not-so-pious purposes.<sup>162</sup>

Thus, in terms of law, it is no surprise that churches would have responded to these claims and confiscations as they had throughout the previous century or two, bringing disputes concerning church property to a wide variety of forums and tribunals. “In most of the West, from the eighth century onwards, we find rulers’ or public courts—or increasingly, ad hoc assemblies of laymen and ecclesiastics—dealing with claims to churches as they would with claims to land, by the same processes and on the same grounds.”<sup>163</sup>

## Jurisdiction

In many Reformation cases, plaintiffs sued for violations of their jurisdictional rights. Jurisdiction refers broadly not just to the right to adjudicate disputes or pass legislation concerning certain places, people, or subjects. Rather, it includes the whole range of rights and privileges that accrue to people, offices, institutions, or polities. The sources of these rights and privileges were multifarious and varied.

In some of the Reformation cases, one party or another would argue that the dispute belonged before an ecclesiastical court or a temporal court. But this is only one kind of jurisdictional dispute to be found in the Reformation cases.

More frequently, jurisdictional disputes in the Reformation cases concerned issues of control over property, the authority to tax, to wage wars, to appoint preachers, to discipline personnel in spiritual or worldly institutions, to punish citizens, to provide protection (*Schutz und Schirm*), to change laws, or broadly to do things differently than they had been done before.<sup>164</sup> More than the binary of spiritual and temporal, the important categories in these disputes had to do with lordship rights (both “high” and “low”), patronage rights, and the relative supremacy of different kinds of rulers including prince, prince-bishop, bishop, abbot or abbess, provost, dean, capital, mayor and city council, among others.

While in many ways the spiritual/temporal binary was insufficient for describing the German lands’ “settings of extreme physical, social, economic, and cultural diversity,”<sup>165</sup> nonetheless, the binary mattered as a discursive framework.<sup>166</sup> Even though the binary on its own

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<sup>161</sup> Ocker, 75.

<sup>162</sup> Ocker, 76-77.

<sup>163</sup> Wood, 776. Wood, 776-788, contains examples of litigation. Ocker cites as just one example that the diocese of Constance, between 1522 and 1531, brought “complaints on behalf of various male and female monasteries and clergy of the diocese before the bishop, the papacy, the Swiss Confederacy, the territorial tribunal (*Landgericht*) of Thurgau, the territorial tribunal of Swabia, the Austrian high bailiff at Altdorf, the city of Constance, the imperial tribunal (*Hofgericht*) at Rottweil, and the Imperial Chamber Court at Speyer” (Ocker, 110).

<sup>164</sup> On protection see *Handwörterbuch zur deutschen Rechtsgeschichte*, s.v. “Schutz und Schirm,” by D. Willoweit, vol. 4.2, 1528-29.

<sup>165</sup> Brady, *German Histories*, 27.

<sup>166</sup> See Oestmann’s study in which he looks at post-1555 court disputes about jurisdiction to understand the boundary of worldly and spiritual competence in the latter part of the sixteenth century based not on abstract rules or agreement, but on concrete, case-by-case disputes. Peter Oestmann, *Geistlichen und Weltlichen Gerichte im alten Reich: Zuständigkeitsstreitigkeiten und Instanzenzüge* (Cologne: Böhlau, 2012).

settled very little when it came to resolving hard jurisdictional disputes, to the extent “spiritual” and “temporal” were terms in which disputes about jurisdiction were conceptualized, it is important to understand something about them, which will be summarized in the first part of this section.

Understanding the spiritual/temporal framework is also necessary in order to understand the significance of the protesting estates’ claims that the Imperial Chamber Court had no jurisdiction over disputes involving them because those disputes were “matters of religion.” As we will see in Chapter 4, this jurisdictional argument called for a deliberative, conciliar forum outside of the papal ecclesiastical court hierarchy.

Beginning in the eleventh century, and continuing into the late medieval period on the eve of the Reformation, the Church had both civil and criminal jurisdiction. Its civil jurisdiction was defined in terms of personal status and the substantive issue. The Church had competence in all legal matters concerning clergy, over all disputes concerning crusaders, the poor, orphans, and widows, as well as travelers, merchants, and mariners, as well as Jews.<sup>167</sup> The *privilegium fori* for clergy would only be stripped if there was first a degradation of the clergy (a formal removal of his rights by the Church, or if the cleric himself laid off his clerical garments); in other words, even a heavy crime itself did not justify the prosecution of a cleric by a worldly court.<sup>168</sup> Lay persons could sue other lay persons in ecclesiastical court, provided both parties agreed to submit to its decision; this latter condition was often a legal fiction in places where no worldly forum could provide real recourse.<sup>169</sup>

In terms of substance, the Church had jurisdiction over all *causae spirituales* which included disputes concerning marriage, church offices and church incomes, as well as *causae spiritualibus annexae*, which included such issues as patronage, disputes about marital property, legitimacy disputes, tithe and inheritance matters, accusations of usury, as well as any contracts or claims that were empowered or based on oaths or vows.<sup>170</sup> Any dispute in which one party accused another of a sinful deed could be brought before an ecclesiastical court “*ratione peccati*” (because of sins),<sup>171</sup> in other words, “if the salvation of souls were at stake.”<sup>172</sup> Also, in cases of a worldly court denying justice (*Rechtsverweigerung, iustitia denegata*) church courts had competence.<sup>173</sup> These broad, open-ended pathways to church jurisdiction meant that in the medieval period practically any worldly dispute could find its way into a church court.<sup>174</sup>

When it came to criminal jurisdiction, church courts had competence over such matters as apostasy, heresy, simony, sacrilege, false oath, perjury, divorce, incest, bigamy, and rape. There were also “mixed delicts” that could be handled by both worldly and church courts, which included blasphemy, counterfeiting, and violation of godly peace (*treuga Dei*).<sup>175</sup> The categorical

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<sup>167</sup> Winfried Trusen, *Anfänge des gelehrten Rechts in Deutschland: ein Beitrag zur Geschichte der Frührezeption* (Wiesbaden: Franz Steiner, 1962), 41.

<sup>168</sup> Plöchl, vol. 2, 348.

<sup>169</sup> Trusen, 42.

<sup>170</sup> Plöchl, vol. 2, 348; Trusen, 35-37.

<sup>171</sup> Willibald M. Plöchl, *Geschichte des Kirchenrechts: Das Katholische Kirchenrecht der Neuzeit, zweiter Teil*, vol. 4 (Vienna: Verlag Herold, 1966), 356-7

<sup>172</sup> Karl Rahner, *Encyclopedia of Theology: The Concise Sacramentum Mundi* (New York: Seabury Press, 1975), 230.

<sup>173</sup> Plöchl, vol. 2, 348.

<sup>174</sup> Trusen, 38.

<sup>175</sup> Plöchl, vol. 2, 348.

separation of criminal and civil procedure in church courts happened first in the thirteenth century.<sup>176</sup>

Beginning in the eleventh century certain instruments and institutions emerged that would extend church jurisdiction. The *treuga Dei* or *pax Dei* was an obligation established by the Church in the era of heightened feuding that required a ceasefire from Wednesday evening to Monday morning, as well as during certain holy periods, and the protection of clerics, monks, nuns, women, crusaders, farmers, and merchants.<sup>177</sup> The sanction for violation was excommunication and interdict (banning from participating in certain rites). Another instrument was that of sanctuary, according to which all churches and certain privileged places would be places of perpetual peace, and therefore completely off limits to violent invasion, even by worldly authorities who would seek a person who had committed worldly crimes.<sup>178</sup> Beginning in the thirteenth century, and increasingly in centuries following, decretals were promulgated providing for exceptions to the application of sanctuary law, as worldly rulers' claims to pursue criminals in their jurisdiction led to more and more exceptions, and the weakening of the overall institution of sanctuary.<sup>179</sup>

Beginning in the fourteenth century, secular rulers created competing legal instruments designed to undermine or limit ecclesiastical jurisdiction. For instance, the institution of *recursus ab abusu* empowered a territorial authority to force a church judge to reverse a judgment considered unjust, to pay satisfaction (*Genugtuung*) to the party wrongly judged, and in some cases, the territorial authority could detain that judge.<sup>180</sup> Also, some localities promulgated laws forbidding the delivery of letters and court documents from spiritual judges to their subjects.<sup>181</sup> The goal of some of these measures was to prevent the possibility of spiritual courts claiming "custom" in the future.<sup>182</sup> Part of the territorializing work of secular rulers was to try to put into writing their rights against the backdrop of this fluid political landscape, especially through claims of custom, and to enforce their position as a ruler concerned with the wellbeing of the church, the logic being that the reason for limiting spiritual jurisdiction was because if the clergy were too involved in material matters, it would sink their spiritual status.<sup>183</sup> This kind of competition of spiritual and worldly did not happen to the same extent in spiritual territories, where bishops were also the territorial rulers and therefore civil matters were often in spiritual courts.<sup>184</sup>

Even at the time when the principle of *privilegium fori* was most clearly defined and legislated in the thirteenth century, we see that clergy themselves would flout the rule, by suing both other clergy and lay people in royal courts, or not challenging the jurisdiction of a worldly court if they were sued. In the late medieval period, *privilegium fori* also began to be undermined in a variety of ways. These were incremental changes. For example, according to the important legal compilation *The Mirror of Saxony*, in certain financial and debt cases involving clergy, a

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<sup>176</sup> Plöchl, vol. 2, 353.

<sup>177</sup> Plöchl, vol. 2, 350.

<sup>178</sup> See Karl Shoemaker, *Sanctuary and Crime in the Middle Ages, 400-1500* (New York: Fordham University Press, 2011).

<sup>179</sup> Plöchl, vol. 2, 351.

<sup>180</sup> Plöchl, vol. 2, 349.

<sup>181</sup> Mikat, 283.

<sup>182</sup> Mikat, 283.

<sup>183</sup> Mikat, 284-5.

<sup>184</sup> Mikat, 283.

worldly judge could adjudicate.<sup>185</sup> This was in contrast to the thirteenth and fourteenth centuries, when financial and debt cases would be adjudicated in church court; even if a city or territory started a proceeding against a cleric, the spiritual court could claim jurisdiction and declare all of the proceedings null.<sup>186</sup> Cities sometimes tried to pass statutes against the *privilegium fori*, but would then be placed in excommunication and interdict.<sup>187</sup> In some cases, the *privilegium fori* was negotiated away as a concession to territorial princes made for certain kinds of other privileges and protections.<sup>188</sup>

Location also played a role in the competence of a church court. In general, the place of residence of the plaintiff determined which church court had original jurisdiction. But other markers could play a role, such as the location of a dispute, the location in which a contract was made, or the location in which a crime occurred.<sup>189</sup> Territorial rulers sometimes claimed jurisdiction over a matter that would substantively otherwise belong in a church court based on the principle *forum rei sitae* (the forum where the thing is situated).<sup>190</sup>

Though there was a hierarchical court system—from lower church courts subject to a Bishop, to Bishop courts, to Metropolitan courts, to Super-Metropolitan courts, all the way up to the Papal Court—the latter had universal jurisdiction, which meant that at any time in a proceeding, a party could bring a dispute there in the first instance, or the Papal Court could pull a case to it at any stage of a proceeding.<sup>191</sup> Reform efforts in the fifteenth century sought to limit the instances in which ordinary hierarchy could be bypassed in this way.<sup>192</sup> Importantly, interspersed within and around this hierarchy were jurisdictional privileges given by the Pope for other kinds of courts specific to certain localities and institutions, such as universities, cathedral capitals, and monastic orders.<sup>193</sup> The Pope also appointed delegated judges called Conservators whose jurisdiction sometimes cut into and limited the legal competences of existing church courts.<sup>194</sup> Some scholars argue that this increasing use of particularizing forms of jurisdiction contributed to the undermining of the overall unity and coherence of the church court system.<sup>195</sup>

### **Patterned Particularism in Jurisdiction and Property Arrangements**

Statutes on jurisdiction frequently did not align with actual legal relations; law in the books is more helpful for determining how church and worldly authorities wanted things to be, or what they each regarded as encroachments, rather than describing how things were actually done.<sup>196</sup> The statutes themselves were also in flux across period and locality as the relative might and legitimacy of spiritual and secular authority waxed and waned.<sup>197</sup>

But there is more to this story than the gap between law in the books and law in action. Rather, the particularism of jurisdictional and property arrangements was built into the legal

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<sup>185</sup> Mikat, 271.

<sup>186</sup> Trusen, 38.

<sup>187</sup> Trusen, 39.

<sup>188</sup> Mikat, 271.

<sup>189</sup> Plöchl, vol. 2, 352-3.

<sup>190</sup> Mikat, 272.

<sup>191</sup> Plöchl, vol. 2, 351-2.

<sup>192</sup> Plöchl, vol. 2, 352.

<sup>193</sup> Plöchl, vol. 2, 351-2; Trusen, 40.

<sup>194</sup> Plöchl, vol. 4, 356.

<sup>195</sup> Plöchl, vol. 2, 352; vol. 4, 355-6.

<sup>196</sup> Mikat 278.

<sup>197</sup> Mikat, 280-2.

norms and legal culture ordering it. Matters of jurisdiction were variously settled through war and feud, imperial mandate or privilege, arbitration and treaties,<sup>198</sup> custom and historical usage,<sup>199</sup> or contracts. In this way, questions of jurisdiction straddled the anachronistic categories of public and private law.<sup>200</sup>

Questions of property and jurisdiction were often tightly linked. The basis of the property and jurisdictional configurations at play in the Reformation cases is best understood through the entanglements of ecclesiastical geography, political geography, and personal histories. There were patterned but idiosyncratic ways in which individuals pieced together livelihoods, how institutions pieced together incomes, and how customary, local, political configurations conditioned what was and what was not possible. The configurations of property and jurisdiction were intricate and irregular, homologous to the political configurations of the Empire as a whole in this moment.

This also meant that the impact on church property in the Reformation was not total and sweeping but piecemeal.<sup>201</sup> As Ocker writes: “Without a true monarchy, the links between aristocracies, princes, cities, and other regional authorities varied all the more. These links were the very substance of German political life. The connections of aristocratic networks to monasteries, cathedral chapters, and collegiate churches conditioned both resistance to confiscation and success. [...] Ultimately, one must try to determine not just how the church lost property but how the redistribution of property affected these lateral relationships.”<sup>202</sup>

## Patchwork Jurisprudence

With rare exception, the Reformation cases in the Imperial Chamber Court made hardly any reference to the three sources of law of the early 1520s—the Bulls, the Worms Edict, and the Regiment Mandate. Litigants in the Reformation cases also rarely cited the *Corpus Iuris Civilis*, the authoritative Roman law compilation, as a source of substantive law, though the Court was operating according to the norms of Romano-canonical procedure.<sup>203</sup>

Rather, the sources of law cited in the Reformation cases ranged from references as broad as “the Holy Empire’s laws,” to the details of specific ancient privileges; from the customary standards on the duties and rights of lordship, to the details of a certain endowment; from norms around the inviolability of imperial protection, to the terms of a treaty. After 1526, litigants on both sides of an issue increasingly cited the legislation promulgated at imperial assemblies, Recesses. We can broadly categorize these sources of law under the headings of peace, property, and jurisdiction.

Litigants always invoked multiple sources of law, and as the case progressed, layers of law were often added. Sometimes, this came in the form of allegations that a defendant party had failed to adhere to the terms of a Court mandate, or had continued its illegal behavior despite the pending proceeding, resulting in fresh accusations or to proceeding in contumacy. In other cases, improper technical form or invalid uses of legal instruments would become central to a case,

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<sup>198</sup> Mikat, 287, 290-3.

<sup>199</sup> Mikat, 276, 294.

<sup>200</sup> Mikat, 273ff. See brief discussion of private and public law in Chapter 2.

<sup>201</sup> Ocker, 9.

<sup>202</sup> Ocker, 11-12.

<sup>203</sup> See discussion of Roman law in Chapter 2.



sometimes relegating the substantive issues with which the case was launched to secondary importance.

What will become clear as we proceed through the Reformation cases discussed here is that the validity of all of these sources of law, and the relative priority of them, was not settled in advance; as in litigation in other times and places, precisely the argumentative labor in most of these cases was to stake a meta-legal claim about which facts of a story were pertinent, which interpretations of a given law were valid, and which laws mattered more than others. Some of the character of these claims was shaped by the particular context of litigation, in which parties were geared to achieve a certain outcome—to win a case, to claim certain rights, to settle certain facts, to secure one’s interpretation of events. Some of the character of these claims was shaped by the legal pluralism and legal culture of the Empire, in which particular, ostensibly private law cases had the capacity to take on broader importance, whether as a matter of public or constitutional law (such as it was) or as a site for staking claims that would matter in other cases.

In this context, the *narratio*—the description of the events in question—was of the utmost importance. The *narratio* itself played a large role in the judicature of the Court, because whether or not a particular concrete situation was an instance of a violation of the various laws in question was the core of the litigants’ argumentative labor.<sup>204</sup> As a result of this central role of the *narratio*, there was plenty of opportunity for litigants to insert language into a proceeding that had no explicit legal relevance to their case, perhaps in the expectation that doing so would have an impact on the outcome nonetheless, for example as a form of aggravating factor. While the narration was thus a normalized mode of affective speech in litigation, in the Reformation cases, this form of speech took on a particular character. The Reformation cases are thus dotted with the language of pious rebuke, as, for instance, a plaintiff highlighting the violent irreverence and invented teachings of the defendant, while the defendant underlines the financial mismanagement and absenteeism of the plaintiff. In the process, the Court became a site in which pious forms of mutual rebuke and accusation were declared and registered.

In the remainder of the chapter, I offer a detailed account of the sources of law cited in Reformation-related litigation. This analysis reveals an enormous range and heterogeneity of claims. Given how much ground is covered in the litigation, the absence of reference to the recent legislation responding to the Lutheran challenges is all the more striking.

Writing about case files poses certain challenges of presentation. On the one hand, the ordered, articulated structure of the case files on its face demands a methodical presentation that stays close to the procedural back-and-forth of this type of litigation. Otherwise, details of argumentation, response, and counter-response get lost, simply too difficult to keep track of. On the other hand, the analytical interest in identifying patterns across cases seems to require a willingness to depart from the order of the case file itself, and to move from one case file to another under different thematic headings. I have chosen a middle path to reconcile these two competing demands. For each point of analysis, I present one core exemplary case. This allows me to keep the coherence of the case file’s procedural and narrative flow, while highlighting points of analysis. Each case is evidence of many things, and so as we proceed through a given case, threads will appear that were discussed in more length in another case, but that apply equally to the case at hand.

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<sup>204</sup> Branz, 25.

## Suing on the Basis of the Worms Edict

Although the Worms Edict, and the other high-profile legislation of the early 1520s discussed in Chapter 2, found little usage in the Reformation cases, there is at least one exception.

In 1529, Johann Fabri, the parish priest at Lindau's St. Stephan church, sued the mayor and city council of the imperial city of Lindau.<sup>205</sup> Fabri held a number of other important titles. He was vicar for the Bishop of Constance since 1517, chaplain to the brother of the Emperor, Ferdinand, beginning in 1522, and himself the Bishop of Vienna in 1530.

Luther's teachings had begun to be taught and preached about in Lindau around 1522. In 1524, the city demanded that Fabri give the full parish priestship to Siegmund Rötlin, who Fabri had appointed as his vicar, but who turned out to be a follower of the "new teachings." Not only was the commune inclined to these teachings, but they felt it was wrong that Fabri continued to receive income as the parish priest, while he was never in the city, busy with the work of serving both the Bishop and the Archduke Ferdinand.<sup>206</sup>

Beginning in 1525, Fabri launched a series of actions against the city of Lindau. First, Fabri tried to bring heretical preachers in front of the spiritual court of the Bishop of Constance in 1525. Despite multiple summons sent to Lindau, and even a warning from the Archduke Ferdinand, Lindau did not send their preachers to appear in the court.<sup>207</sup> Second, Fabri appealed to the *Reichsregiment* to order that Lindau provide him a letter guaranteeing safe passage (*Geleitsbrief*) so that he could enter Lindau without fear.<sup>208</sup>

Third, Fabri launched two suits against Lindau for the evasion of tithes. In the first one, pending in the Imperial Chamber Court from 1525-1526, Johann Fabri sued not only the mayor and council of Lindau, but also four communes that were branch locations of the parish of Lindau (Aeschach, Schachen, Schönau, and Rickenbach).<sup>209</sup> In the second one, which will be discussed here, Fabri sued Lindau, and the case ended up litigating the question of whether the dispute was a matter of religion.

According to Fabri's *Petitio Summaria*, submitted in the Summer of 1529, Fabri had had legal title in the parish at Lindau for many years, and had, during that time, rightfully used all priestly rights, incomes, and usages due to him as legal priest there.<sup>210</sup> These were "belonging to him, and not belonging to anyone else" and "had always been used without any hindrance." Despite this, Lindau had, since 1524, begun to disturb, confiscate, and plunder the parish church, St. Stephan, doing so on its own authority, without legal recognition.<sup>211</sup> The city appointed misguided preachers, one Thomas from Bludenz, Austria, and Joachim Gagell, who had been chased away and cast out of localities elsewhere, on account of their unchristian actions which they committed in the 1525 Peasant Uprising. The city, by appointing them, gave them permission to all of the incomes, usages, and rights that were in fact Fabri's. Furthermore, when Fabri sent several Christian priests and lawyers to Lindau, assigning to them the administration

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<sup>205</sup> Bayerisches Hauptstaatsarchiv (RKG) 5083 ("Munich 5083").

<sup>206</sup> Wolfart, 257-62.

<sup>207</sup> Wolfart 254, 259.

<sup>208</sup> Wolfart, 259-61. On safe passage, see *Handwörterbuch zur deutschen Rechtsgeschichte*, s.v. "Geleit," by B. Koehler, vol. 1, 1481-89.

<sup>209</sup> See Bayerisches Hauptstaatsarchiv (RKG) 5082. Wolfart, 262.

<sup>210</sup> Munich 5083, Q3, "Petitio Summaria," 1529. Also see Q1, "Mandatum," 1529.

<sup>211</sup> Munich 5083, Q1, "Mandatum," 1529: "turbieren, entsetzen, spollirn"; "aigen gewalts"; "on rechtliche erkantnus."

of his parish, and warned the Lindauers “in a princely and fatherly way” to cease their actions—Lindau disobeyed, refused to allow into the city those people that Fabri had sent. The city effectively stripped Fabri of all of his rights as a parish priest, blocking even his attempts to send in new administrators, and illegally gave themselves the authority to appoint not only an administrator, but also preachers, according to their preferences; and to take in the parish’s incomes and distribute them according to their own wishes. All of these actions, Fabri’s lawyer alleged, violated (1) the common law, (2) the imperial order and constitution, (3) the Land-Peace, (4) the Imperial Edict of Worms, and (5) the 1526 imperial Recess of Speyer.<sup>212</sup> The city was ordered to cease those actions, or else face a penalty of 40 marks lötigen golds.

This is the only case I have seen in which the Worms Edict was explicitly cited by the plaintiff as one of the laws of which the defendant was allegedly in violation. But to which action did it specifically apply? Most likely, it was meant to apply specifically to the appointment of the “misguided preachers.” But even that claim was connected with the larger frame of the suit as a dispute about the administration rights of a parish church, including the right to appoint priests and direct its incomes and usages. Fabri gave no other language to his reference to the Worms Edict. It is noteworthy that the Edict, on its own, was not regarded even by this plaintiff and his lawyers as sufficient basis for bringing a suit to the Imperial Chamber Court. In addition, as we will see, after the protesting estates entered the suit and declared it a matter of religion, Fabri was put in the position of having to downplay precisely those elements that would have made the Worms Edict relevant to the case.

### ***Lindau’s Response Declining the Forum***

In November 1529, Lindau submitted its *Exceptiones Fori Deklinatori*, objections declining the jurisdiction of the Court.<sup>213</sup> Their submission cited an imperial privilege which said that the city could only be sued in front of certain judges.<sup>214</sup> The case, they said, should therefore be nullified and remanded to their “privileged judge” (*gefrente Richter*), in this case, the city council of the imperial city of Constance,<sup>215</sup> to whom they said Fabri had already consented as the proper forum for this case. They included four documents as evidence of this.<sup>216</sup> Fabri failed

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<sup>212</sup> Munich 5083, Q3, “Petitio Summaria,” 1529: “alles gemeinem rechten und der Reichs reformation ordnung Landfrieden und dem key. Edict zu Wormbs ußgangen darzu auch dem key. und des heiligen Reichs speierischen Abscheidt so im 26 Jar uffgericht zuwider und vielangezognem d. johan fabri zu merglichem schaden und Nachtheill.”

<sup>213</sup> Munich 5083, Q5, “Exceptiones Fori Declinatori,” 1529.

<sup>214</sup> Munich 5083, Q13 and Q15 were submitted as evidence of Lindau’s privileges from 1452, renewed in 1521.

<sup>215</sup> Constance was Zwinglian.

<sup>216</sup> Munich 5083, documents marked c, d, e, and f (Q8, Q9, Q10, and Q11). Q8 is the document that Lindau submitted as evidence to show that Fabri had agreed to discuss whether to bring their dispute before the privileged judge (*gefrente Richter*). In this letter, Fabri let Lindau know that he was escalating the dispute by proceeding against them legally since they had not responded to his good-faith efforts. However, “so that you do not claim later as if I wanted to cheat you out of your freedoms, therefore it is my desire to come to an understanding with you” to litigate the matter either before one of the *gefrente Richter*, or in front of the Imperial Chamber Court, and to ensure that if the messenger from the Imperial Chamber Court came with a summons, that he would have safe passage or not. In Q9 (dated Monday after Bartholomew 1525) we see Lindau’s response to Fabri accepting the proposition to pursue the dispute in front of the mayor and city council of Constance, according to their privilege. In Q10 we see a letter from Lindau to Constance requesting them to accept the dispute in their court, saying that Fabri had invited them to resolve the dispute in court, and they had suggested Constance as judges. Q11 (dated August 30, 1525) is Constance’s acceptance of this. Constance wrote: “We received your letter concerning the future legal proceedings

to disclose his having earlier agreed to have the case pursued in one of the courts named in Lindau's imperial privilege.

After declining the forum, the city went on to address the “ungrounded” and “false narration” which was the basis of Fabri's petition and the Court's mandate. In pursuing this mandate, Dr. Fabri committed *subreption* (stated untruths) and *obreption* (covered over or was silent on certain truths). First, the city denied that they acted with self-authority, or that they confiscated the benefices and incomes of the parish, or that they drove Fabri away. Rather, the mayor and council of Lindau had been loyal to Dr. Fabri, in the hope that he, as a loyal pastor, would stay and support the commune in emergencies and at times of death (referring most likely to the plague). This, however, did not happen. Over their many well-intentioned requests and demands that Fabri come to Lindau and to not abandon them in their death emergencies, “as he was obligated to do by God and righteousness,” nonetheless, Fabri did not come to them.<sup>217</sup> Fabri violated “both godly and spiritual laws” according to which a cleric is given shelter and compensation in exchange for doing his duty and carrying out the services linked to his office. Fabri thus covered over the fact of his own absenteeism, especially at times of desperate need. The city also denied that they had not given safe passage to the administrators that Fabri had sent, and they included two documents indicating not only that they had given them safe passage, but that Fabri knew about it.<sup>218</sup>

One of those documents is a copy of the letter of safe passage that Lindau had sent to Fabri in 1526.<sup>219</sup> At the beginning of the letter, Lindau said that it was giving this letter in response to the order of the *Reichsregiment* and on the request of Fabri, to allow Dr. Fabri—who was in Lindau “to preach the holy Gospels”—safe passage.<sup>220</sup> But in the document, Lindau went on to express their serious concerns about doing so. “We have no lack of disputes and conflicts around the true word of God and the Gospels,” they said, and having Fabri or his appointees in the city, no matter how worthy of persons they were, would ultimately be more dangerous than useful to the city.<sup>221</sup> Still, Lindau said, the city gave safe passage letters to Fabri and his servants out of obedience to Roman imperial majesty.

In his response to the *Exceptiones*, which is extensively damaged, we see indications that Fabri challenged all of the points raised by the city. For instance, Fabri denied the claim that he was an absentee priest, noting that he had personally delivered sermons in Lindau on the Gospels thousands of times.<sup>222</sup>

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agreed upon between you and Dr. Fabri. Although we have avoided many of such cases until now (*wie wol wir solcher handlens uns bis daher vil entschlagenn habend*), still we want to please you and Fabri, so we will not deny your request, especially as Fabri has also requested this from us.”

<sup>217</sup> Munich 5083, Q5, “*Exceptiones Fori Declinatori*,” 1529: “do er (nachdem sie burgermeister und Ratt, ime doctor fabern trewlich zu solcher pfar in hoffnung das er als ein trewer selsorger in noten und sterbenden zeitten(?) bei ynem bleiben und nit von inen weichen sollt das aber nit geschehen geholffen) über ir vilfeltig guttlich bitt, beger, und ervordern, zu inen zekomen und sie in sterbenden noten nit zuverlassen wie er dan von gott und der billichhait zuthun schuldig war, zu inen nit komen.”

<sup>218</sup> Namely, Munich 5083, Q6, “*Copey des glaidts so Statt Lindau doctor Fabian Zugeschickt*,” 1529; and Q7, “*Copia Missive*,” 1529.

<sup>219</sup> Munich 5083, Q6, “*Copey des glaidts so Statt Lindau doctor Fabian Zugeschickt*,” 1529.

<sup>220</sup> Munich 5083, Q6, “*Copey des glaidts so Statt Lindau doctor Fabian Zugeschickt*,” 1529: “in unser Statt das heilig evangelium zu predigen”

<sup>221</sup> Munich 5083, Q6, “*Copey des glaidts so Statt Lindau doctor Fabian Zugeschickt*,” 1529: “darzu das wir diser zeitt an verhandlungen des waren wortt gottes und evangelions keinen mangel haben”; “meher unrats und gefar dan nutz besorgen mußten.”

<sup>222</sup> Munich 5083, Q12, Replik, 1530: “ist doctor johann fabri pfarrer zu Lindau gewesenn hatt inn aigner

In 1531, Lindau submitted the *Mandatum Constitutionis Generalis* of the Protesting Estates, appointing Dr. Hirter and Licentiate Helfmann as their attorneys, in which it was indicated that they now considered the dispute a “matter of religion.”<sup>223</sup> We will return to Fabri’s response to this claim in Chapter 4.

In 1540, the Court renewed the Mandate against Lindau.<sup>224</sup> While the case file is murky as to the circumstances of this renewal, in early 1541, Lindau responded to the Mandate with a letter explaining to the Court why they were not obligated to proceed.<sup>225</sup> “This obviously and undeniably is a religion matter” they wrote. The Court, by issuing this Mandate, was going against and not conforming to the various imperial and kingly treaties, decrees, and compromises, and the various notifications of the same, both in and out of law that required a pause to all such cases. Furthermore, Lindau said that the Court knew that they, along with “other estates of the Christian understanding,” had recused the judges in all and every religion matter, for good reasons.<sup>226</sup> The suit never reached the *litis contestatio* stage.

### **The Holy Empire’s Laws, the City’s Duty and Oaths**

When, as we saw in the introduction to this chapter, the Fiscal sued the city of Erfurt for allegedly failing to stop and in some cases facilitating the attacks on the clergy, for failing to prosecute or punish culprits, and for forcing the two collegiate churches to agree to sacrifice financial autonomy and large sums of wealth in exchange for nominal protection, he did so on the basis of several legal standards.<sup>227</sup> In doing these things, he argued, the city violated “honor, law, propriety, the holy Empire’s laws,” as well as the city’s “own duty and oaths.”<sup>228</sup>

When the Fiscal cited “the Holy Empire’s laws” as one of the sources of law of which the city of Erfurt was in violation, he was gesturing to a set of customary standards and legal documents that made up the constitution of the Empire. One component of this constitutional order was the Golden Bull of 1356, cited in several Reformation cases, which outlined the procedure for the election of the Emperor, and fixed the exact number and identity of the seven Electors. It also regulated the succession to the Electorates based on primogeniture, and “forbade the territory of the Electorate to be reduced or subdivided in any way,” thus laying “down the principle that the Electoral dignity went together with possession of the Electoral territory, thereby reversing the earlier view that the Imperial arch-offices of state were the main determinants of Electoral dignity.”<sup>229</sup> Though the terms of the Golden Bull did not directly play a role in the Erfurt case, it was “the first of the fundamental laws of the Empire,” a precondition for the ones that followed.<sup>230</sup> To say that Erfurt was in violation of it in this case was to gesture to the very foundation of the constitutional order. Another component of the constitutional order, also cited in several cases, were the reforms of 1495, in particular the Eternal Land-Peace which,

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personn woll tausent malen inen das Evangeliums verkhuht.”

<sup>223</sup> See case file protocol for information on events in the intervening years. Protocol is not in my possession. I am not sure why there were such long gaps in this case, or what was happening in the intervening time.

<sup>224</sup> Munich 5083, Q23, “Copey der Ladung [...] cum executione,” 1541.

<sup>225</sup> Munich 5083, no quadrangel, last document in case file.

<sup>226</sup> Munich 5083, no quadrangel, last document in case file: “stenden der Cristennlichen verstantnus”

<sup>227</sup> See discussion of Wernigerode F37 above.

<sup>228</sup> Wernigerode F37, Q1, *Mandatum Penali Fiscalis*, 1522: “wider alle erberkheit recht pillichait und des heiligen reichs ordnung auch wider ewer eigen pflicht und eide.”

<sup>229</sup> Gross, 16-17.

<sup>230</sup> Gross, 16.

among other things, forbade all feuding between Estates and set up the Imperial Chamber Court to judge in disputes that violated the terms of that Peace. But the Fiscal did not lean heavily on a Land-Peace argument in this case; he did not insist that these actions were a violation of the Land-Peace specifically.

Rather, the city of Erfurt behaved in a way that violated its “own duty and oaths,” as well as “honor, law, propriety,” and “the holy Empire’s laws.” Duty and Oath (*Pflicht und Eid*) always referred to the lordship relationship. Arguably, the Fiscal’s claim was that the city of Erfurt, in violating its “duty and promise” to protect the clergy of the city, violated something at once more fundamental and more particularistic than the Land-Peace legislation. Its “duty and promise” was more fundamental because it gestured to an implicit set of norms around the seriousness and gravity of oaths, the responsibilities of lordship vis-a-vis vulnerable subjects, as well as the special protection warranted to those of the spiritual estate—an aggravating factor in the city’s negligence. It was more particularistic because it implicated a long-running jurisdictional competition with the Archbishop of Mainz about who had lordship over the clergy there.<sup>231</sup>

### ***Rebukes Against Clergy***

The Fiscal’s case against Erfurt rested primarily on stabilizing the facts which, if true, would speak for themselves as the sorts of behaviors warranting censure in the generalized laws and lordship customs of the imperial order. The responses by the city contained not only formal challenges on matters of legal procedure, but also attempts to deny the factual claims made by the Fiscal, attempts, that is, to tell an alternative story of the events.

The city stressed that it had had a friendly relationship with the clergy, while at the same time referencing the clergy’s own role in the animosity and attacks. Specifically, the city’s account contained rebukes of the clergy’s privileges against taxation, gestured obliquely to liberties they had taken with regards to Erfurt subjects in their spiritual jurisdiction, and highlighted discord amongst the clergy themselves (likely referring to the reforming elements of the city’s clergy), such that some of the mob in question in fact were clerical students.<sup>232</sup>

In February 1522, the city submitted a *Protestatio und Exceptiones* document. In it, they asked the Court to nullify the *Citatio* and summons sent out to them, on the grounds that the imperial Fiscal’s accusations against them were unfounded. Interestingly, they said it was unlikely that the clergy intended by requesting the Emperor’s help to thereby accuse Erfurt of the attacks; instead, they suggested that the Fiscal was aggressively exercising his prerogative to prosecute even where no request had been made to sue anyone in particular. Responding to the first of the substantive allegations, the city denied that it had had any involvement in the attacks on the clergy.<sup>233</sup> Indeed, the city itself had received reports of “rebellious defiant acts by several

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<sup>231</sup> For more on this background, see Weiss and Scribner, “Civic Unity.” Though not a litigant in this case, the Archbishop was mentioned throughout as having played a direct role in the provenance of this proceeding, and was party to the Treaty of Hammelburg (see below).

<sup>232</sup> For a discussion of the complicated alliances in the city of Erfurt at this moment, see Bob Scribner, “Anticlericalism and the Cities,” in Peter A. Dykema and Heiko A. Oberman, eds., *Anticlericalism in Late Medieval and Early Modern Europe* (Leiden, New York, Cologne: Brill, 1993), 151. See also Branz, 126ff; and Scribner, “Civic Unity,” 40.

<sup>233</sup> Wernigerode F37, Q4, “Protestatio unnd Exceptiones,” 1522: “es sey gantz on, und mag sich in der warheit nymer erfinden, das Burgermeister rats und gemeinde der stat erffurt die geistlicheyt ye uberfallen, ihr

priests, knights, students and other frivolous, unknown persons” who had “amassed together at night in Erfurt, captured and damaged clergy houses, and carried out their wantonness and outrages in them.”<sup>234</sup> By the time the city council had become aware of these attacks, the group had already left, and the city appointed guards to protect against further damage. But by the time the guards had reached that place, it said, attacks had begun in other places. Eventually, the group fled so the city was unable to punish them immediately. “Indeed, that is how the uproar dissolved away and was thereby stilled, and nothing further came of it.”<sup>235</sup> The city swore that it had had no prior knowledge of the attacks, that as soon as they had been made aware of it, they “did not neglect to mobilize our citizens to defense,” and “to this day, we strive to punish those suspected of participating in it who are under our jurisdiction.”<sup>236</sup>

Responding to the second of the substantive allegations, concerning the taking of clergy money and pressing them to sign the agreement, the city alleged subreption and obreption on the part of the imperial Fiscal, and offered an alternative account that showed that the clergy institutions there in Erfurt, far from being forced, willingly agreed to pay off a portion of the city’s debts. According to the city, some time before, they had approached the churches seeking “advice and aid” (*Rat und Hilff*), as the city found itself with a burden of extreme cash debt,<sup>237</sup> in part due to a new taxation scheme promulgated at the 1521 Imperial Diet.<sup>238</sup> According to the city, not long after the attacks described above, the deans said that they had come to the realization that “if the city of Erfurt deteriorates, that likely the same would happen to the two collegiate churches.”<sup>239</sup> And so these foremost representatives of the clergy in Erfurt authorized the rescue of the city of Erfurt, as well as their own and church property—not only to ensure the city’s ability to defend and protect them, but “also in consideration of the fact that for years, they had kept to themselves the property of many citizens, and had neglected paying taxes toward the

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hewser aufgestossen sie an im guetern oder personen beschedigt verwaltigt oder in einichen andern weg gem inen gefrevelt, ...sonderlich auch ganz on, das sie inen einich gelt verschreibung oder anders abgetrungen uberfallen vergeweltigen beschedigen oder betrungen lassen haben.”

<sup>234</sup> Wernigerode F37, Q4, “Protestatio unnd Exceptiones,” 1522: “ein widerlichs geposell von etlichen pffaffen knechten studenten und andern leichtfertigen unbekanntten menschen, bey nechtlicher weyl in erffurt zusammen geheufft haben, in etliche der geistlichen heuser gefangen sein darinnen mutwillen und frevell geübt und beschedigt haben.”

<sup>235</sup> Wernigerode F37, Q4, “Protestatio unnd Exceptiones,” 1522: “doch so zerging die auffrur und wurd damit gestillt und weyters nichts darauß.”

<sup>236</sup> Wernigerode F37, Q5, “Littere Excusatorie,” 1523: “Wir mugen aber ewer key. mayt ...mit warheit berichtenn das wir vor der that und geschicht vonn solcher furgenommenen conspiracy und auffrur kein wissens gehabt als wir aber hernach derselbigen inne wordenn, und vorstendig, habenn wir nicht unterlassenn, unsere burgere inn harnisch zuerfordern und denn thethern mit allem vleyß nach zutrachten also das wir unns hierinen nit anders dan geburlich und unvorwislich wie auch unsers verhoffens die geistligkeit selbst nit anders sagen, wurde oder konte, wo die jenigen so unverdechtig darumb gefragt wurden ertzaigt und gehalten trachtenn auch nach heuth zu tage so viel zu nen(?) mugelich denn jenigen so bey diesser auffrur sollen gewest und unserm gerichts zwang unterworffenn sein, nach uns jegenn dieselbigen wo wir sie erfahren konthenn mit ernster und geburlicher straff zuerzeigenn.”

<sup>237</sup> Wernigerode F37, Q4, “Protestatio unnd Exceptiones,” 1522: “Vor etlichen zeiten mag ein ersamer rat bey denn stiefften zuerkennen gegeben haben im und gemeiner stat grossen last der ubermessigen gelt schulden, damit sie jedoch an ir verschulden beschwert weren und sie umb rat und hilff in solch angelangt haben.”

<sup>238</sup> Wernigerode F37, Q5, “Littere Excusatorie,” 1523: “wie e. key mayt auß dem mannigfeltigem ansuchen ßo jungst zu wormbs widder unns geschiehenn sunder zweyfel vormargkt habenn, und unns Burgerlichenn und weltlichenn guther halbenn ßo sie ein zzeit her in grosser zcal zu sich bracht und der stat zenßbar gewest do durch der stat einkommenn merglich geringert.”

<sup>239</sup> Wernigerode F37, Q4, “Protestatio unnd Exceptiones,” 1522: “so hetten sie inen bedacht, wo gemeine stat erffurt zuverderben mocht komen, das es als dan mit den beyden stiefften versehenlich auch bescheen macht.”

common treasury and other civil duties”—by paying up to 10,000 gulden worth of the city’s debts.<sup>240</sup> This the city accepted with great gratitude, and guaranteed again to those representatives their safety and security.<sup>241</sup> The clergy agreed to this “willingly, not with any distress or powerful fear.”<sup>242</sup> It was on the basis of this friendly agreement that the city denied that this suit launched by the imperial Fiscal could have been brought at the request of the clergy of Erfurt.

Notwithstanding these pre-trial attempts by the city to have the Court nullify the case, the Court ordered the *litis contestatio* in August 1522, and the Fiscal’s accusations made in the *Positiones et Articuli* were just as damning as the original Mandate had been, now with the added claim that the city of Erfurt had disobeyed the Court’s order in the Mandate to cease its actions and was required to pay back damages and all that had been taken.<sup>243</sup>

In their *Exceptiones*, the city once again painted a picture of having been struck by the ravages of a plundering mob, which they sought to defend against; but they added in this account that the 1521 attacks were the result of a conflict among the clergy themselves. They began their account several years prior. “Your honors have no doubt received reports of the merciless and ruinous damages that the city underwent, and how several years ago the city council was faced with significant rebellion, uproar, and disobedience, all of which occurred against the will of the city council and which the city was unable to stop.”<sup>244</sup> These uprisings, the city explained, were part of a pattern of attacks happening against many clerical institutions in a number of cities, and “in which many people were killed, though, praise God, none of the clergy.”<sup>245</sup> These attacks somehow led to discord between the two collegiate churches, such that in the summer of 1521, “the clergy’s own servants and companions, including students, with their followers, assembled and made an unexpected uprising and uproar, without the will or knowledge of the council.”<sup>246</sup> The clergy refrained from bringing lawsuits against each other, and the city suggested that in the

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<sup>240</sup> Wernigerode F37, Q4, “Protestatio unnd Exceptiones,” 1522: “Und haben darauf zuerrettung gemde stat auch irer und der kirchen gueter bewilligt auch in mit betrachtung das sie etlich jar, vil burger gueter bey sich gehabt, davon dem gemeinen beutell geschaß und ander burgerliche pflicht nachplieben wern, das sie zuergetzung desselben etlich der stat glaubiger auf sich nemen und dieselben mit der zeit bis auf ein summa zehen tausent guldin ablegen wollten.” See also Wernigerode F37, Q5, “Littere Excusatorie,” 1523.

<sup>241</sup> Wernigerode F37, Q4, “Protestatio unnd Exceptiones,” 1522: “welchs dann ein erber rat zu grossen danck angenommen und inen widerumb in der stat erffurt auch des rats gepieten gleyd und sicherheit und sovil verschrieben, das sie irer oder irs gesyndts zu recht und pillichkeyt mechtig sie zu schutzen und handthaben und nicht zuverlassen.”

<sup>242</sup> Wernigerode F37, Q5, “Littere Excusatorie,” 1523: “williglich und ausserhalb drangsals oder beweglicher forchte.”

<sup>243</sup> Wernigerode F37, Q6, “Positiones et Articuli,” 1524: “das war ist one das sie solhem mandat in einichem stuck oder artickel parirt oder gehorsamt haben.”

<sup>244</sup> Wernigerode F37, Q8, “Exceptiones contra pretensos articulos,” 1524: “und anfangklich zweifelt einem Rat nicht es sey khund und offenbar und e.g. haben bericht empfangen wie es mit der stat erffurt gelegen in was ungedey und verderblichen schaden, dieselb steet, und wie sich merckliche emporung aufrur und ungehorsam etlich jar here, durch zuschub, erhaben und gehalten alles wider willen eins rats und auch on das das ein rat stillen hett können.” Perhaps this is referring to uprisings in the city in 1509? See Scribner, “Civic Unity,” 33.

<sup>245</sup> Wernigerode F37, Q8, “Exceptiones contra pretensos articulos,” 1524: “darinnen auch also zuvilmaln leuth erschlagen werden, der darnoch got lob in solcher handlung gegen der clerisey, keins beschehen.”

<sup>246</sup> Wernigerode F37, Q8, “Exceptiones contra pretensos articulos,” 1524: “und nach dem meniglich khundt, dies schwinde leiff und zeit, die zwitracht, auch zwischen der geistlicheit erhaben, darunter zanck und irrung ichtzinter erwachsen, und dweil also im zwey und zwenzigsten jar im sommer verschieuen, gnanter zweyer stiftt personen unter einander irrig und zweyspeltig wie des jezundter allenhalben leyder alzuvil ist das der geistlichen aigene diener und gesynd sambt studenten, mit iren anhangern so sich dorein gemenget, ein aufstehen und aufrur unversehener sach gemacht, on willen wissen eins rats.”



vacuum, the Fiscal prosecuted the city without any factual basis. Indeed, continued the city, the clergy expressed distress that the city, despite all it did to stop the mob—including quickly mobilizing defense and patrols, day and night, during the attacks; and afterwards, promulgating an edict ordering the return of all goods taken, no matter how little, and to turn in all culprits to be punished<sup>247</sup>—now found itself in this legal trouble.<sup>248</sup> On account of these facts, the city said, they wished to have the suit nullified.

### *Spiritual or Temporal Jurisdiction*

In the *Exceptiones* the city also argued that the Fiscal was not entitled to sue the city of Erfurt in this case, because, among other reasons, the case concerned spiritual persons and property. “The imperial fiscal may not sue what concerns spiritual persons and spiritual goods before the imperial worldly chamber court.”<sup>249</sup> In the *Protestatio et in Eventum Responsiones ad Articulos* document, the city restated this argument, saying that this matter belonged before the ordinary spiritual judge.<sup>250</sup> The city suggested that the antagonistic Archbishop of Mainz directed the dean of one of the collegiate churches, who had approached the Archbishop as the ordinary judge in this case, to bring the suit before the Imperial Chamber Court instead, and to claim that it was a profane matter.<sup>251</sup> The suit, they alleged as the proceeding was winding down in 1537, had become a “matter of blame-shifting, in order to disparage, annihilate, and oppress the city of Erfurt.”<sup>252</sup>

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<sup>247</sup> Wernigerode F37, Q8, “Exceptiones contra pretensos articulos,” 1524: “das sie sich mit wachen im harnasch, nacht und tag, auch ein schliessig der ketten in gassen zustillen solchen unfug erberlich und einverwiflich, auch mit irer cost und darlegung erzeigt und gehalten, und das nach begagner that, von dem rat offentlich getruckt, edict on allen offentlich steten angeschlagen, und von den canzely verkundiget, gebotten das ein jedermann die entwandte hab und guter, wie wol die gering gewest sovil der zu ime khomen widergeben, auch die theter und wer die inn hett, ansagen sollt, bey eins rats ernster straff.”

<sup>248</sup> Wernigerode F37, Q8, “Exceptiones contra pretensos articulos,” 1524: “auch die geistlichen welcher diese sach furnemlich ist, sich zuclagenenthalten und offentlich von sich sagen es sey inen leyd, das ein rat, nach dem sie wissen das er aller muglich vleis gethan, solcher gesambleter ratt und bosen buben zu steurn angeclagt und in weythern schaden, und verderb irent halben gefurt sollen werden, welchs auch ir woll bevelch und meynung nit ist.”

<sup>249</sup> Wernigerode F37, Q8, “Exceptiones contra pretensos articulos,” 1524: “geburt dem fiscal kein clag noch clag artickell, aus dem grundt key fiscal mag darumb nicht clagen was geistliche person und geistlicher gueter betrifft vor key. werntlichem camer gericht.” *Wertlich* was one variation of *wellich*, meaning worldly. See *Deutsches Wörterbuch von Jacob Grimm und Wilhelm Grimm*, s.v. “weltlich,” accessed July 3, 2019, <http://www.woerterbuchnetz.de/DWB?lemma=weltlich>.

<sup>250</sup> Wernigerode F37, Q10, *Protestatio et in eventum responsiones ad articulos*, 1524: “Item zum vierdten, do des key. fiscals und auch des Erzbischofs zu Mentz furnemen gegen den von Erffurt geschopfft belangen die geistlicheyt der selben personen und irer gueter, So gehoren die selben sachen fur die geistlichen ordinarien, als die bequemen Richter ainig, der aber der fiscal von ampts wegen weder vor werntlichen noch geistlichen Richtern und dann privati agentes ander ende dann vor den geistlichen gerichtten auch nit zuthun haben.”

<sup>251</sup> Wernigerode F37, Q8, “Exceptiones contra pretensos articulos,” 1524: “furnemlich dweil die selben geistlichen personen gegen welchen Rom Rat zu erffurt mishandellt sein soll, des sindicus nit gesteeet sich gar nichts beschweren noch beclagen, die doch also mundig und geschickt wie gemeinlich die geistlichen das sie inen kein beschwerungen wider pillikeit lassen auflegen, die auch onzweifel ein erbern rat zu erffurt, wol entschuldig# hallten, denen auch leyd ist, das sie der gestallt, vom key. fiscal und hernach von erzbischofe also sollen molestirt werden zu irer der geistlichen selbern und auch der stat ungedey verderb und untertruckung.” Also see Wernigerode F37, Q10, “*Protestatio et in eventum responsiones ad articulos*,” 1524 and Wernigerode F37, Q11, “*Supplicatio*,” no date.

<sup>252</sup> Wernigerode F37, no quadrangle, fourth to last document in case file, “*Exceptiones et protestationes*

At the same time, the city challenged a concurrent suit, regarding the same set of facts, then pending in a Papal Court, because it was not the spiritual court of first instance. In an undated and unquadrangled document, the city of Erfurt notified the Court that Johann Weidemann, Dean of the Church of Our Lady had launched a proceeding at the Papal Court in Rome against the city of Erfurt for the very same actions that had been at issue in this case before the Imperial Chamber Court; that the Papal Court had appointed a commissioner to gather witness testimony, and that he sought for the alleged culprits not only the *Bann* (excommunication) but also a penalty of 20,000 ducats.<sup>253</sup> The city said that this violated not only the 1495 law, reiterated in 1521 at Worms, that no estate may be proceeded against in a foreign court, but also “imperial and Church laws” according to which disputes concerning the clergy and their property, properly belonged before the spiritual court of first instance.<sup>254</sup>

In this, one of the earliest Reformation cases, a number of circumstances were in circulation that we will not see in cases to come. First, the city of Erfurt, in the midst of undertaking reforms, was taking the position that the dispute belonged before an ecclesiastical court because it involved spiritual persons and property; in other words, it did not belong in an ecclesiastical court because of the Reformation context, but because the allegations concerned clergy and spiritual matters. It was the Fiscal, ostensibly representing the city’s clergy, who wanted the case to remain in the Imperial Chamber Court; Erfurt intimated that the Archbishop of Mainz had suggested to the clergy to bring the case as a “profane matter” to the Imperial Chamber Court, perhaps because it provided a more authoritative forum for settling questions of lordship, rather than those only of property. Second, at the same time that the case was proceeding before the Imperial Chamber Court, a case was pending before the Papal Court on the very same set of facts, meaning that the magistrates of the city of Erfurt were at risk of excommunication—a factor rarely seen in other Reformation cases.

### *City as Culpable House-Father*

One of the accusations and rebukes the Fiscal made against Erfurt was that the city was failing to uphold the standard of a “loyal, caring, diligent ruler and house-father.”<sup>255</sup> Even if the city did not actively take the lead in the parson storm of 1521, he said, still, it had let it happen without consequences, and it had capitalized on the danger for the clergy to extort money from them in exchange for protection. In a document of “additional articles,” the Fiscal said that not only was it the common rumor and reputation that the city knew all about the mob and attacks, but that it would have been impossible for them not to know about their meetings, or to have failed to have seen their attacks on the open streets, since the clergy of Erfurt lived in residences next to lay residences. It would not have taken long for the city to guard not only one place, but all clergy places at once, and it would have taken no time for reports of attacks to get to the

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cum anweis articulis preemtorialibus,” 1537: “Also ist es ein zu geschobenn sache, das die stad erfurdrt zu schmelerunge des heiligenn reichs, gethilget, und underruckt werde.”

<sup>253</sup> On Weidemann, see Weiss, 132, 134-5.

<sup>254</sup> Wernigerode F37, no quadrangle, fourth to last document in case file, “Exceptiones et protestationes cum anweis articulis preemtorialibus,” 1537: “Item zum viertenn, do des kay. fiscall, unnd auch des Erzbischoffs fur nemen gegen denn vonn Erfurdrt geschopfft belanngen die geistlichkeit derselbenn personenn unnd irer gutter, so gehorenn die selbenn sachenn fur die geistlichenn ordinarien als die bequeme Richter einig...”

<sup>255</sup> Wernigerode F37, Q14, “Articuli Additionales pro parte Fiscalis contra Erfurdern,” 1526: “trewer, fürstiglich, fleissig Regenten und Hausvater”

council, because everything was relatively close together and would have been immediately witnessed by many. The Fiscal repeatedly used the standard of a “loyal, caring, diligent ruler and house-father” to cast an incredulous light on the claims of the city that they did not know about any of the plans, and that they were too slow to catch or punish any of the culprits. Indeed, during one of the attacks that occurred during the day, citizens watched from the early summer morning hours until late at night as the attacks took place as if it were a spectacle.<sup>256</sup> The city did not seriously enforce the edict they passed, and they did not do what would be minimally expected in order to capture and punish the culprits and restore the lost property. A case in point was that of one leader in this society or mob, a student that was called “the Swiss” (*der Schweizer*),<sup>257</sup> who was taken into Erfurt’s custody, but was released without any punishment and without having restored any of the property taken or damaged. All of this showed that the city of Erfurt did not exercise proper diligence in quelling and dealing with the uprisings and attacks, and therefore was grossly negligent (*lata culpa*).

The Fiscal also cast doubt on the claim of Erfurt that the two collegiate churches volunteered to pay 10,000 gulden towards the city’s debts. He said that the city had long been making exorbitant cash demands on the clergy. Each time it did so, when the clergy would respond that they could not pay, those refusals would be followed by attacks on clergy residences. Regarding the agreement, the Fiscal reiterated that the clergy were forced to sign the document in exchange for the protection of the city, though protection was their right anyway, and when they asked for changes to certain terms, they were denied this. Only after signing did the attacks stop.

The city of Erfurt, for its part, argued that the Court should not recognize these “additional articles” because “no plaintiff may amend a claim or make a change to” their original suit after the *litis contestatio*.<sup>258</sup> These articles, it argued, were therefore inadmissible. They attempted to get the case nullified, this time on the grounds of improper form.

But responding to some of the articles in substance, the city denied or challenged the Fiscal’s account. For instance, they argued that that there was a way to gain access to clergy residences without using public streets.<sup>259</sup> They also argued that it was not so unheard of for the governments of cities to be unable to stop these kinds of attacks, citing examples of other cities in which the attacks on clergy were even more “coarse,” in which clergy were forcefully ejected from their residences and chased out of town.<sup>260</sup> They reiterated that among those who participated in the uproar were choir pupils, students, and priests.<sup>261</sup> They also stressed that they

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<sup>256</sup> Wernigerode F37, Q14, “Articuli Additionales pro parte Fiscalis contra Erfurdern,” 1526: “Allso das solliche beschedigung ganz offenbar und Notorium gewest, auch die Burger und Bergerin zu Ertfurt morgens fruhe, dweill es mitten im summer gescheen, biß zu endt desselben. darzu als einem Spectackell zuzusehen zugelauffenn.”

<sup>257</sup> A reference perhaps to “going Swiss,” a euphemism for Zwinglianism? See Thomas A. Brady, *Turning Swiss: Cities and Empire 1450-1550* (Cambridge University Press, 1985).

<sup>258</sup> Wernigerode F37, Q15, “Exceptiones,” 1527. See also Wernigerode F37, Q22, “Exceptiones unnd ursachen warumb sindicus zu antworten nit schuldig,” 1536.

<sup>259</sup> Wernigerode F37, no quadrangle, fourth to last document in case file, “Exceptiones et protestationes cum anweis articulis peremptorialibus,” 1537: “nemlich, das man zu den geistlichen heusernn woll komen kann, one berurunge offenhlicher strassen.”

<sup>260</sup> Wernigerode F37, no quadrangle, fourth to last document in case file, “Exceptiones et protestationes cum anweis articulis peremptorialibus,” 1537: “So ist es auch nicht setzlam, das solich geringe geschicht, fenster außwerffenn, gegitter zubrechenn, und thör uffstossenn, inn erfurdts geschehenn, dann es ist landkundig, das man vill grober, inn viell stettenn und furstenthumben mit denn geistlichenn gehandelt, do man denn geistlichen ire heuser und guttere genomenn, darzu sy noch verjagt und die heuser ingeprochen und anddern gegebenenn...”

<sup>261</sup> Wernigerode F37, no quadrangle, fourth to last document in case file, “Exceptiones et protestationes

did imprison and punish culprits. As for “the Swiss” student, who was allegedly a ringleader of the mob, he was released into the jurisdiction of the university rector.

### ***Out-of-Court Treaty***

Between 1528 and 1534, no new actions were taken in the proceeding. Then, in 1535, the city of Erfurt challenged an attempt by the Fiscal to relaunch the proceedings, by presenting an agreement—the Treaty of Hammelburg of 1530—that the city said extinguished any pending litigation that existed between the city and the clergy.<sup>262</sup> The Fiscal attempted to reject this claim on a number of grounds, but ultimately, this out of court agreement was accepted by the Court.<sup>263</sup>

This was another major source of law in the Court: treaties and settlements achieved outside of the Court that then were invoked either to show the failure of one party to live up to it, or to put an amicable end to the proceedings as a whole. In this case, the Treaty of Hammelburg was an agreement made in February 1530 between the Archbishop of Mainz and the city of Erfurt, in which, among other things, the parties agreed to restore an indulgent lord and loyal subject relationship, and that would require the city to pay for damages to certain church properties.<sup>264</sup> The agreement also had terms that the mass “according to old usages” would only take place in the two collegiate churches and in St. Peter church, but “concerning all other houses of worship and in matters concerning the faith and ceremonies” neither party would have “anything given, taken, permitted or forbidden”—de facto license for “new faith” worship.<sup>265</sup>

Particular agreements, contracts, and settlements made outside of court had a status in the Court’s considerations. As we will see in the next chapter, the Nuremberg Settlement of 1532 loomed large in the cases in which it was a question whether the dispute was a “matter of religion.” Also, in a dispute between the Archbishop of Riga and the city of Riga from 1529, for instance, the Archbishop sued the city for denying his lordship rights in violation of the Kirchholm Treaty of 1452. That treaty stated that the Archbishop of Riga and the Teutonic Order would share worldly lordship over the city of Riga. By swearing obedience exclusively to the Order, the city violated that Treaty.<sup>266</sup> In the case of the Treaty of Hammelburg, the clergy (led by the Archbishop of Mainz) and the city came to an agreement that explicitly had within its scope the issue covered by the pending litigation, which the Court ultimately accepted.

### **Worldly Enforcement of Spiritual Judgments**

Apparent in the Erfurt case was the dubious position of the city. Specifically, the Fiscal alleged that the city had let the attacks happen, and had capitalized on the danger to the clergy in order to extort property from them, while the city was at pains to show that it had done its best to quell the uprising and to protect the clergy. Indeed, even in the historiography, it is not quite clear where Erfurt stood; there was division within the city council that extended past the city’s

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cum anweis articulis peremptorialibus,” 1537: “...auch communis, vox et fama in erffurdt das Chor schuler, Studenten, pfaffenn selbst soliche Rottierung gemacht.”

<sup>262</sup> Wernigerode F37, Q18, “Anzeug die sactz vertragenn,” 1535.

<sup>263</sup> Wernigerode F37, Q19, “Exceptiones auff den vermaynten Anzeyg des Vertrags,” 1535. See protocol.

<sup>264</sup> Weiss, 241-4.

<sup>265</sup> Weiss, 242.

<sup>266</sup> Bundesarchiv Berlin-Lichterfelde AR1-A Nr. 271 (“Berlin 271”); discussed in more detail in Chapter 4.

official introduction of the Reformation in 1525.<sup>267</sup> In the case of Erfurt, the question was whether the city had done enough to protect the clergy as it was obliged to do.

There were other cases in which the position of a city or ruler were thematized.<sup>268</sup> Take, for instance, a property dispute pending in the Court from 1526-1527 involving a family in the village of Habenhausen, that ended up becoming a proxy dispute between the city of Bremen, which had begun reforms in 1522, and the Dean and Capital of the two collegiate churches in Bremen, St. Wilhadi and St. Stephan. The case began as an apparently straightforward request by the plaintiffs that the Imperial Chamber Court mandate the defendants to carry out the terms of a prior Papal Court judgment. It ended with the plaintiffs explaining that they had turned to the Papal Court and the Imperial Chamber Court in order to avoid relying on the jurisdiction of Bremen, which had been influenced by the “Lutheran sect” and therefore could not be relied on to carry out the terms of an ecclesiastical court judgment.

A Mandate and *Petitio Summaria* describe the plaintiff’s position.<sup>269</sup> A dispute about property in the village of Habenhausen had first been adjudicated before the Cathedral Provost at Bremen (an ecclesiastical court) as the forum of first instance, and then moved to a Papal Court in Rome. The Roman Court had produced an Executorial Letter calling on the worldly power to enforce the judgment “because according to legal order and custom of both spiritual and worldly authorities, in order for law to achieve its purposes, both authorities (spiritual and worldly) must be helpful to each other.”<sup>270</sup> This Mandate was thus produced by the Imperial Chamber Court so that the legal decision of the Papal Court would be carried out. The purpose of the Mandate was to actualize the Executorial Letter, to require the defendants to immediately—within 3 days of receiving the Mandate—carry out the terms of the Papal Court’s prior judgment with regard to the disputed property at Habenhausen, which involved delivering ownership of that property as well as its usages, plus court expenses, to the plaintiffs.

The defendants submitted an *Exceptiones* containing a number of objections.<sup>271</sup> First, they argued that imperial ordinances provided that no one should be brought before a foreign court (in this case, the Papal Court) in the first instance, rather, they should be tried before a judge with original jurisdiction.<sup>272</sup> Second, if a final judgment were to be spoken by a foreign judge, the execution of that judgment should be sought at the place where the losing party resided or where the disputed goods lay—not at the Imperial Chamber Court.<sup>273</sup> The plaintiffs

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<sup>267</sup> Scribner, “Civic Unity,” 207.

<sup>268</sup> Niedersächsisches Landesarchiv Stade 27 RKG Nr. 97 (“Stade 97”).

<sup>269</sup> Stade 97, Q1, “Mandatum cum clausula justificatoria,” 1527; and Stade 97, Q2, “Petitio Summaria,” 1527.

<sup>270</sup> Stade 97, Q1, “Mandatum cum clausula justificatoria,” 1527: “Und daruf ursachn halber das sie diser zeit execution und volnstregkung solhs irs behaptn Rechtn anderst nit dan durch weltliche oberkeyt konden oder mogn erlangn an gedachtem unserm Camergericht in crafft obberurter clausel umb nachvolgend mandat und ander notdurfftig hilff des rechtn gegn euch diemutiglich anrueffn und bitten lassen. Dieweil dan nach rechtlicher ordnung und herkomen bed geystliche und weltliche obrigkeytn darmit das recht seinen furgang erryche eyn andern behilfflich sein sollen, Auch billich und recht, und uns vestiglich gemeynt, das gesprochn urtheyln volnstreckt werdn, und inen daruf solich mandat erkent worden ist...”

<sup>271</sup> Stade 97, Q4, “Exceptiones,” 1527.

<sup>272</sup> Stade 97, Q4, “Exceptiones,” 1527: “Erstlich so ist offenbars rechten auch in des reichs ordnung versehen das keiner an außlendische gericht soll gezogen sunder in erster instantz vor seiner ordenlichen oberkeit und gerichts zwang furgenumen warden.”?

<sup>273</sup> Stade 97, Q4, “Exceptiones,” 1527: “deßgleichen so ist im rechten versehenn wen ein end urtel von einem frembd richter gesprochen das die execution und volziehung derselben urtel allein an ortten do der verlustig teill gesessen oder die strittigen gutter gelegen geschehen und begert soll werden.”

ignored these two jurisdictional rules, so the defendants were not required to respond to this Court's Mandate.

Third, the defendants alleged subreption and obreption in the Mandate. They offered instead a "true" version of events. There was property, they said, in the village of Habenhausen that had been owned by the defendants' forefathers peacefully with authentic title and without objection "for 20, 30, 40 years ago and longer than men can remember." Around 30 years before, the two collegiate churches, St. Wilhadi and St. Stephan had claimed that land was theirs. The parties had agreed to have the dispute handled by the Dean and Capital at St. Eucharien of Bremen, as well as by the city council of Bremen. There it was judged that Sivert (the defendant's father-in-law) and his descendants would keep the goods, and they should pay an annuity of four wheelbarrows of grain to St. Stephan. But when Sivert died, the plaintiffs without any legal reason sued Sivert's daughter (Alecke/Adelheiden) and her husband (Johann von Essen) in front of the Cathedral Provost at Bremen. The case was pending there for a while. "But because the plaintiffs did not like that judge (perhaps because they knew that the judge would not decide in accordance with their wish) therefore they petitioned to the papal curia that the matter be transferred to the Pope."<sup>274</sup> This parenthetic note gestures to a court-shopping motive on the part of the plaintiffs in moving the dispute to the Papal Court, though the dispute was pending in the local ecclesiastical court, ostensibly without issue.

Soon after this case began, before the *litis contestatio*, Johann died. According to the defendants, after he died, the Dean and Capital said several times that they would come to a settlement out of court with the surviving children and that they would not continue the case at Rome. Despite these promises, the Dean and Capital nonetheless continued the case, which ultimately produced multiple rulings against Johann von Essen as applied to his successors. The Papal Court had continued the case in contumaciam, that is, in the absence of the defendant parties who willfully remained out of the case, but in fact, said the defendants, the Papal Court had not summoned any of Johann's descendants after his death. The decision was therefore invalid. And because the Papal Court's judgment itself was invalid, the defendants had no duty to respond to this Court's mandate ordering compliance.<sup>275</sup> The defendants asked the Court to remit the case to the mayor and city council of Bremen as the proper judges, in whose domain lie the disputed property and where the defendants lived. For the defendants, it was not just that the city of Bremen was the proper worldly authority to carry out the judgement of the Papal Court; rather, the Papal Court's judgment itself was invalid, therefore the order from the Papal Court that it should be carried out by a worldly authority should be nullified, and the case should be relitigated in Bremen.

The plaintiff's *Replik* began by insisting that the matter before the Imperial Chamber Court was not to discuss the main substantive issue of the dispute. In response to the defendants' objection that the judgment, on which the Executorial Letter was based, should have been decided by the city of Bremen and should be remitted there, the plaintiff churches argued that "this case, by virtue of the kind and nature of the goods, as they belong to the Church, more

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<sup>274</sup> Stade 97, Q4, "Exceptiones," 1527: "do aber gemelltem capitel solcher richter nit gevallen (der villeicht nach irem willen nit urtailen wollen) haben sy in curia bei pebstlicher heiligkeit angehallten das die sach ex absoluta ptate pendente adhuc lite coram primo iudice sollt advocirt werden."

<sup>275</sup> The defendants' final objection in the Q4 Exceptiones document had to do with who was summoned. The mandate was sent out to several people who were not mentioned at all in the case at Rome, and "according to law," one cannot belatedly apply a decision to a third party not originally included in the scope of the decision.

properly belongs before the spiritual scepter.”<sup>276</sup> Second, the plaintiffs responded that at the time that the spiritual court had summoned them, the defendants had submitted a claim of jurisdictional incompetence, but this was rejected, and the decision was declared “*res judicata*”—that is, the question of jurisdiction was unavailable for re-litigation. By continuing the proceeding after this point, the defendants consented tacitly and expressly to the forum.<sup>277</sup>

### **“*Spiritual Sword will not cut with the Lutheran Sect*”**

In the *Replik*, the plaintiffs also responded to the allegation that they had moved their suit to the Papal Court because they doubted that the Cathedral Provost in Bremen would judge in their favor. The plaintiff said that even though the ordinary judge in this case was properly the Cathedral Provost in Bremen, nevertheless, he “however cannot or may not execute the judgment at this time because his sword will not cut with the opposing party, who follows the Lutheran sect.”<sup>278</sup> And in response to the defendants’ argument that the Executorial Letter was improperly sought at the Imperial Chamber Court, that it should have been sent to the city of Bremen to carry out its decision as the worldly authority with original jurisdiction, the plaintiff said that “no execution is to be provided by Bremen, which the opposing party alleges is their ordinary judge in worldly authority, because of hostile sentiments.”<sup>279</sup> The plaintiffs continued, “and also they [Bremen] have until now stood by the defendants throughout, and are still in part *mitfecher* (co-fighters, co-instigators) of the matter.”<sup>280</sup> Specifically, the city of Bremen was “somewhat related” (*etwas verwant*) in this dispute, because Bremen imprisoned for several days a group of tenant farmers, who had been permitted by the plaintiffs to build their homes upon the disputed property.<sup>281</sup> The plaintiffs then asked rhetorically: “what kind of justice and carrying out of the law should the plaintiff expect from Bremen when they have been participants in the dispute, using their power to stand by the defendants in their willful actions?”<sup>282</sup> In other words,

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<sup>276</sup> Stade 97, Q5, “Replicae,” 1527: “das wird ime nit gestannden dan so hat dise rechtvertigung noch art und natur der gutter dweil die der khirchen zugestanden unnd noch zusten nindert annders gerechtvertiget mogen werden dann vor dem geistlichen stab.” See *Deutsches Wörterbuch von Jacob Grimm und Wilhelm Grimm, s.v.* “Stab,” definition 8, accessed July 3, 2019, <http://www.woerterbuchnetz.de/DWB?lemma=stab>.

<sup>277</sup> Stade 97, Q5, “Replicae,” 1527: “die gegenteil haben als sie vor den geistlichen richter gefordert worden irs vorthails auch nit vergessen und angemast incompetencia furbracht sey inen aber mit urtheil und recht ab erkhannt worden und die urtheil in rem judicatam gangen ob sie ~~gleich~~ aber nit declinirt so hatten sie durch ire erschinen unnd handlung forum tacite et expresse prorogirt darumb mogen sie sich diser vermeinten exception nit weiter behelffen.”

<sup>278</sup> Indeed, Bremen had begun to reform the city’s churches and monasteries in the Lutheran manner in 1522.

<sup>279</sup> Stade 97, Q5, “Replicae,” 1527: “Dann als weitter gegendheil auch vermeint e.g. seien diser Execution halber unnbillich ersucht worden als solt die deren Ordinario geburen, darzu sagt anwald Ordinarius sey wie obengemelt der geistlich richter der khun oder mag aber diser zeit berurte urtheil nit exequiren, dan so will sein schwert bey dem widderteil, welche der Luththerischen Sect anhangen, nit schneiden so ist bey den von Breme welche die gegenteil vermeinen ir ordinarias zusein in der weltlichen obrickeit, sich kheiner execution zuversehen Propter sententia adversaria.”

<sup>280</sup> Stade 97, Q5, “Replicae,” 1527: “und auch das sie den widderteilen bisher fur und fur beygestannden und nach der sachen zum teil mitfecher sein”

<sup>281</sup> Stade 97, Q5, “Replicae,” 1527: “das die widderteil die bawleut der spennigen gutter welche darauf als coloni dieselbigen zu Bawn durch die cleger hievor gesetzt worden gefangen, die gefencklich in die statt Breme gefurt und die von Breme die selbigen auch ettlich tag darin gefenglichenthalten.”

<sup>282</sup> Stade 97, Q5, “Replicae,” 1527: “was recht und auch execution solten sich dan die cleger bey den von Bremen als diser sachen teilhaftig und die den widderteilen in irem geweltigenm furnemen beigestannden unnd inen behilfflich gewest versehen haben.”

according to the plaintiffs, Bremen had exposed itself as partial towards the defendants by imprisoning these tenant farmers.

In a later *Supplicatio*, the plaintiffs stated explicitly that the defendants were resisting carrying out the decision of the Papal Court because the defendants “received help from those in their locale, namely at Bremen, who are also of this abominable trend of the faith.”<sup>283</sup> The plaintiff also alleged that Bremen had overrun the Capital’s members and administrators and, heavily armed, had forced them to make oaths.<sup>284</sup> On the plaintiffs’ account, this resulted in an impossible situation: the spiritual authority had no power of execution of its own judgment, and because of the city’s Lutheranism, there would be no hope of expecting the ordinary worldly authority to ensure enforcement of the decision. That was why they turned to the Imperial Chamber Court.

### ***Rebukes against clergy***

In response to these accusations, the defendant’s *Duplik* reads, in part:

Also, the other party says that it is not proper for Bremen to carry out the execution with respect to this case because they are in part followers of the Lutheran sect, and with them no execution may be acquired. To that this lawyer says that the other party would be excessive in citing this as evidence<sup>285</sup> because until now the city council of Bremen has always conducted itself with respect to the clergy in a way that they cannot with equity make any such claims.<sup>286</sup> Also no clergy has ever been denied his rights or denied any execution [of his judgments], and in Bremen no one has been authorized to hold the goods, incomes, rents or wealth of the clergy, and to this day in the city of Bremen all worship services, ceremonies and the whole clergy hold all masses as they always have, and it is abusive/insulting to hear that the city of Bremen for that reason that this matter involves its citizens and subjects should be considered on those grounds co-instigators, because the other party may never be able to prove with truth that Bremen is biased or has ever acted in a way that is not proper for a worldly ruler.<sup>287</sup>

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<sup>283</sup> Stade 97, no quadrangle, first document in case file after protocol, “Sup[plicatio] mit erzelung der geschichte des zeugen process,” no date: “als sy aber durch hilf deren der ort als zu Bremen und auch in disen widerwertigen leuffen des glaubens khein execution bekhommen”

<sup>284</sup> Stade 97, Q5, “Replicae,” 1527: “das sy auch etwan die capitls herren und verordneten mit gewapner hanndt uberloffen glub [Gelübde] von inen gedrungen.”

<sup>285</sup> Stade 97, Q6, “Duplice et in eventum conclusiones,” 1528: “das dem gegenteil solich sein anziehen wol wer uberblibt.”

<sup>286</sup> Stade 97, Q6, “Duplice et in eventum conclusiones,” 1528: “dan sich ein erbarer rat zu bremen bisher je unnd alwegen gegen den geistlichen dermassen gehalten darab sy sich mit keinem fug oder bilich keit zubeclagen.”

<sup>287</sup> Stade 97, Q6, “Duplice et in eventum conclusiones,” 1528: “Zum andern do gegenteil furgibt als solt der stat Bremen diser sachen halber kain execution gepurn dan sy zum teil mitfechen der lauterischen sect anhangem und bey inen kain execution mocht erlangt werden, darzu sagt anwald das dem gegen teil solich sein anziehen wol wer uberbliben dan sich ein erbarer rat zu bremen bisher je unnd alwegen gegen den geistlichen dermassen gehalten darab sy sich mit keinem fug oder bilich keit zubeclagen es ist auch keinem geistlichen je rechts versagt oder einig execution abgeschlagen und wurd zu bremen niemand gestatet den geistlichen ire guter einkomen renten oder gulten furzuhalten und werden uff heutigen tag in der stat Bremen alle gots dinst ceremonien und die ganz clerisey allermassen, wie vor alter her gehalten und ist schimpfflich zuhoren das die stat bremen darumb das dise handlung ire burger und underthan belangt mit fecher sein sollen, dan die widerteil nit der warheit nymmer darbringen



In the *Duplik* the defendant city also denied that the alleged causes why the plaintiffs felt they could not litigate in Bremen was because Bremen had improperly imprisoned some tenant farmers who had built on the disputed property; rather, the tenant farmers were arrested because they refused to hand property back to the defendants that belonged to them by law. To underline the city's lack of bias against the clergy, the defendants said, referring perhaps to the Peasants' War or another uproar, that "if the clergy of Bremen had not been protected by the city council and Bremen had not stood by the clergy with such a big and valiant seriousness, then the clergy would have been attacked both in and outside of the city."<sup>288</sup>

The defendants also denied the claim that the city council of Bremen had exhibited its bias towards the defendants by using force to get oaths from the plaintiffs.

Here is the actual shape of things: when, several years ago, the dispute between the parties regarding the disputed goods befell, and the parties appeared before the Cathedral Provost, there a member of the Cathedral Chapter, named Liederns Kistemacher, freely, willfully, without any cause hit Frau Alecke, the wife of Johan von Essen, on her chest to the earth, so that she soon after that had a stillbirth. The father of Johann, Herman von Essen, saw this, and asked [Kistemacher] why he hit the woman, and [Kistemacher] lost his mind and ran upon Herman von Essen and hit out two of his teeth, also directed big hits to his face that are still visible. And because of that, many people know about it. That was the only reason why the city of Bremen demanded the oath stating that he would not act further with violence against the defendants.<sup>289</sup>

The picture here is one of clerical plaintiffs who "treated the defendants violently, sought to confiscate their goods and possessions without justification of law, and in other ways damaged them."<sup>290</sup>

It is not clear what the plaintiffs thought they would get by bringing up that the city of Bremen was leaning towards Lutheranism. They raised the issue in the context of explaining why they had brought the dispute to the Papal Court, rather than litigating in the Cathedral in

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mogen das sich die von bremen in diser sachen de/je parteyisch gehalten oder ychzig gehandelt das einem E. Rat als weltlicher oberkait nit zustende."

<sup>288</sup> Stade 97, Q6, "Duplice et in eventum conclusiones," 1528: "das aber die angezogen Bauleut gefangen worden ist darumb geschehen das die bawleut sich mit gwalt widersezt den beclagten ire gulten so inen von rechts wegen zugehorig von iren eigen gutern zuraichen und seind die bawleut der vermeinten widerteil halben gar nit gefangen worden wolichs e.g. sunderlich us dem abzunemen dan wissentlich und offenbar mag auch durch die widerteil nit widersprochen werden wa(?) die clerisey zu Bremen durch ein E. rat nit geschutzt und mit so grossem dapfferm Ernst ob inen gehalten wern sy bisher in vil weg inwendig unnd usserhalb bremen angriffen worden."

<sup>289</sup> Stade 97, Q6, "Duplice et in eventum conclusiones," 1528: "so hats dise gestalt als vor etlichen jaren sich irrung zwischen gemelten partheyen der spenigen guter halber zugetragen und sy die partheyen vor gemelten thumprobst erschinen do hat ein chorherr liederns kistemacher freilich ganz mutwiliglich on einige ursach Frau Alecke johan von essen eliche hausfrau fur ir Brust zu der erden geschlagen, also das sy bald dar nach abortini geborn da herman von essen jez gemelts hansen vatter das gesehen und den corhern gefragt warumb er die frauen geschlagen ist der corher von sunden uff herman essen geloffen ime zwen zene eingeschlagen auch sein angesucht mit grossen schleglen dermassen zugericht das noch sichtgliclich und menigliclich der art des gut wissen hat darum auch der gemelt und keinen andern ursach nachmals durch einen E. rat in glubt genummen der gestalt das er gegen denen beclagten mit gewalt ferers nichts furnemen sole."

<sup>290</sup> Stade 97, Q6, "Duplice et in eventum conclusiones," 1528: "Daruß dan e.g. offentlich vernemen das die vermeinten cleger alwegen geweltigliclich mit der beclagten gehandelt sy irer guter unnd possession on erlangts oder erwunnen(?) rechtens zuentsezt understanden und in ander weg vilveltigliclich beschedigt haben."

Bremen; if the Cathedral of Bremen had made a ruling, they could not expect to rely on the corresponding worldly authority, the city of Bremen, to execute its judgment. They also raised the issue of the city's Lutheranism in the context of dispelling the defendant's argument that the Court should remit the case entirely, even in the main substantive issue, to the city council of Bremen. The city of Bremen, the plaintiffs argued, was not a neutral arbiter, but was allied with the interests of the family against the two collegiate churches on account of its Lutheranism.

The Court promulgated an administrative ruling in July 1528 that asked the defendant family to restate all of their allegations in article form. The family did so, producing a Positions and Articles document soon after.<sup>291</sup> The plaintiff churches responded with an *Exceptiones* document in September 1528, in which they repeated their jurisdictional arguments.<sup>292</sup> The protocol ends in January 1529 with no conclusion.

### **“High Contempt for Divine Worship and of the Spiritual Estate,” A Land-Peace Violation**

In 1529, Christoph the Archbishop of Bremen and Administrator of the Stift Verden sued the mayor and city council of Bremen for violently attacking the church of St. Paul situated outside of the city; plundering the monastery including all of its house goods, belongings, and that of the persons inside of it, taking them away or else breaking or destroying them.<sup>293</sup> They even partially deconstructed the building itself, taking away stone and other building materials. Furthermore, it accused the city of Bremen of holding the persons of the monastery in stables, in order to “hunt them into misery.”<sup>294</sup> “All of this not having satisfied you,” they are accused of having removed the old pious preacher in the city of Bremen itself, chasing out him and other pious clergy, while at the same time accepting back “runaway monks and apostates,” some of whom were of the Lutheran sect, who “had forgotten their own oaths and promises,” and who preached and acted in an “unchristian manner.” Then, after that, through the incitement of these runaway preachers and apostates, it was achieved that all sacraments, rites, and ceremonies of the holy Christian churches—with high contempt for divine worship and service, and of the spiritual estate, and in general the common Christian unity, peace, and love—were destroyed and completely annihilated.<sup>295</sup> Until today, alleged the Archbishop, the Christian sacraments, the mass, and other godly offices and services were not taking place. Rather, churches, altars, and monasteries had fallen apart, having been taken with violence from the spiritual persons and prelates. Thus, no one was safe in his property or person.

In this case, the plaintiff Archbishop was explicit that not only did the city violently attack clergy and plunder church and monastic properties, but it also removed clergy of the old faith, appointed preachers of the “Lutheran sect,” welcomed back apostate monks, and abolished the traditional sacraments and worship.

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<sup>291</sup> Stade 97, Q7, “(A) Vertrag belangend,” 1528.

<sup>292</sup> Stade 97, Q8, “Positiones et Articuli,” 1528.

<sup>293</sup> Bundesarchiv Berlin-Lichterfelde AR1-A Nr. 475 (“Berlin 475”). See Wilhelm von Bippin, *Geschichte der Stadt Bremen, Vol. 2. Bremen im Zeitalter der religiösen Kämpfe* (Bremen: C.E. Müller, 1898), 47, 49.

<sup>294</sup> Berlin 475, Q1, “Copia mandatum Archieps zu Ciuitatem Bremen,” 1529: “mit ferrern furnehmen, desselben closters viehheuser so noch steen, darinn die personen des closters sich bis heer mit irer armuth enthalten, auch zw zerreisen, hinweg zwprechen und die personen genzlich in das elendt zu weisen und zuveriaigen.”

<sup>295</sup> Berlin 475, Q1, “Copia mandatum Archieps zu Ciuitatem Bremen,” 1529: “das alle sacrament, ordenung und ceremonien, der heiligen christlichen kirchen, auch mit vill und hoher versmahung und verachtung gotlicher ehre und dinstes und des geistlichenn stands, und sunst die gemeyn cristenliche einigkeite fried und lieb.”

All of these acts violated “common written law, the Golden Bull, imperial Reformation, and the Land-Peace, all of which forbid, at risk of heavy penalty, for anyone to confiscate, war, rob, feud, or in any other way damage another on their own authority without legal sanction.” Here, the Archbishop invoked the most foundational components of the imperial constitution, and explicitly sued the city for violating the Land-Peace. In addition, he said that their acts went against “the order of the Holy Christian Church,” which perhaps referred obliquely to the Papal Bull, but more likely referred to the generalized and ubiquitous constitutional norm that the Empire, being Holy, holds the spiritual estate, the church and monastic institutions, and their sacraments, rites, and ceremonies, in the high regard that are their due. To show contempt for them was not just a violation of a particular Papal Bull or imperial ordinance, but more broadly, a more fundamental smear upon “common Christian unity, peace, and love.”

At one point in a later *Petitio*, Christoph mentioned that the recesses violated were specifically the Speyer Recesses of 1526 and 1529,<sup>296</sup> but did not elaborate on what precisely the city violated in those Recesses. Most likely, the relevant article in the Speyer Recess of 1526 to which he referred was the one that forbade innovations in “the holy Christian faith and religion, also the ceremonies and well-inherited usages of the holy Christian churches.”<sup>297</sup> The Speyer Recess of 1529, among other things,<sup>298</sup> said that any violent attacks, property confiscations, or jurisdictional or lordship seizures that were done by anyone “whether of the spiritual or worldly estate, on account of the faith” would now count as a violation of the Land-Peace, punishable by the *Acht*.<sup>299</sup> What was new here was that even if a property confiscation or jurisdictional or lordship seizure did not involve violence, if done “on account of the faith” it would be considered a violation of the Land-Peace.<sup>300</sup>

The Mandate ordered that the city rebuild the St. Paul monastery with its own money; that it return all of the spiritual persons to their positions; that it return or replace all of their plundered and confiscated goods; that it restore the mass; also that it make reparation (*Abtrag*) to the Archbishop for this violence and damage, and show him obedience as its lord;<sup>301</sup> that it remove the inciteful preachers and apostates; that it re-erect the broken churches and altars; that it not hinder the spiritual persons and prelates in carrying out the mass and other Christian ceremonies; that it not commit any violence against them, but rather leave them in their persons, body, property, and freedoms of goodly custom; also that it let the churches and monasteries remain in their ways and that in all of this it not be disobedient or recalcitrant. If it failed to do these things, the city faced the punishment of the Land-Peace, namely, the *Acht*.

### ***Counter-Suit against the Archbishop, Breaking Promises of Lordship***

In September 1529, Bremen brought a long and detailed counter-suit (*Reconventiones*) against the Archbishop. It began by stating that the law permits a defendant to bring a counter-suit against a plaintiff before the same judge (*coram eodem iudice*). They presented the counter-

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<sup>296</sup> Berlin 475, Q3, “Petitio,” 1529: “des zum rechten unnd des reichs ordnung und abscheiden sonderlich den auf negst hie zu speyer im 26 und dis lauffenden 29 jars gehaltenen rechtstäge gegeben.”

<sup>297</sup> See Senckenberg, *NSRA II*, 272-80.

<sup>298</sup> See discussion of 1529 Recess in Chapter 5.

<sup>299</sup> See Senckenberg, *NSRA II*, 292-301.

<sup>300</sup> Branz, 83. See discussion of this in “Peace” section above.

<sup>301</sup> Bremen was not a free imperial city; it was subject to the Archbishop of Bremen.

suit in the same form that any suit would be brought; 38 articles outlined their complaints against the Archbishop.<sup>302</sup>

When Christoph became Archbishop, the city said, he promised to the city council, the entire city of Bremen, and the collegiate church of Bremen, that he would work to support the city, avoid its division, and protect it.<sup>303</sup> The Archbishop, the city alleged, violated these promises. He introduced multiple burdens and hardships on the poor subjects of the city, by incurring large debts and creating new tariffs. It provided several cases of these new debts and tariffs. First, the city of Bremen loaned the Archbishop 1000 gulden that still remained unpaid. Second, even though the council and city of Bremen had always been freed from having to pay a tariff on any goods at Langwedel, the Archbishop and his personnel ordered Bremeners not only to pay tariffs on their goods at Langwedel, but at times, they violently took their goods and detained Bremeners in prison when they resisted. Third, even though the citizens and subjects of Bremen had never before had to pay tariffs to drive their oxen through Verden or Stattel, the Archbishop and his officials forced the citizens and inhabitants of Bremen to pay tariffs, and when some of the citizens did not pay, their oxen were taken away. Fourth, even though the citizens and subjects of Bremen had never in past times had to pay anything for gathering carts of wood, the Archbishop forced those from Bremen to pay 1 gulden to the Capital at Verden for each cart of wood they gathered.<sup>304</sup>

In addition, the Archbishop broke his lordship promises by getting involved in wars and feuds that placed Bremen and its inhabitants in danger and hardship. The city recalled the actions of the brother of the Archbishop, Herzog Heinrich von Braunschweig the younger, at a time when he and the other princes of Braunschweig violently took the duchy of Hoya. Apparently aided through a servant of the Archbishop, Herzog Heinrich violently took 110 sturdy pigs from the rural citizens of the city of Bremen, without any cause. Another relative of the Archbishop—this time Herzog Eric of Braunschweig, the cousin of the Archbishop—detained 19 Bremen citizens at Erenburg without any cause or legal permission, and held them there in heavy imprisonment for several weeks, and taxed them several hundred gulden. Yet another relative—this time the Bishop of Minden, the Archbishop’s brother—robbed the parts of Vieland that belong to Bremen and quarried and distributed his booty in the Archbishop’s own castle at Peterschlagen.

On yet another occasion, the Archbishop’s brother, the Bishop of Minden, allegedly gave support to one of the public enemies of Bremen. Specifically, the Bishop of Minden housed and boarded and took as his servant the rejected enemy of the city of Bremen, Roplene/Rolf von Deischold, who had several times damaged Bremen with robbery and fire. When Bremen encountered this public enemy, imprisoned him, and sought to put him on trial, the Bishop of Minden threatened Bremen, so that Bremen had to fear further violence. On another occasion, the Bishop of Minden—during a time when the Archbishop had conveyed several knights to conquer the people of Vieland (thus leaving the city undefended)—robbed, burned and destroyed crops and oppressed the people of Bremen in many ways. In summary, “these violent actions of

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<sup>302</sup> Berlin 475, Q4, “Reconventiones,” 1529. Q6 of the case file is a copy of the Q4 Reconventiones, with some additions and changes throughout the document.

<sup>303</sup> Berlin 475, Q4, “Reconventiones,” 1529: “nutz und aufnemen alzeit furdern irenn schaidenn abwendenn sy darvor schuzenn und schirmen sollenn und wollenn.”

<sup>304</sup> The Q6 version of the Reconventiones notes that the Archbishop had collected 80 marks as a result of these various tariffs placed on the people of the city of Bremen.

the Braunschweigian princes happened through the instigation of the Archbishop himself, was tolerated by him, and he gave no aid or assistance to those from Bremen.”

More than tolerating or encouraging such acts, the Archbishop himself had given shelter at Schloss Rottenburg to a public robber and thief who had done especially large damage to Bremen, named Schullerman, in order to keep him from having to go to prison. When Bremen requested that the Archbishop hand over to them the offender, named Schullerman, to put him on trial, he instead let Schullerman go. This was not the only alleged criminal that the Archbishop sheltered; he “housed, boarded, and hid” several “public rejected enemies of Bremen” at the two collegiate churches of Bremen and Verden, including one man who had on multiple occasions set fire to several parts of Bremen’s town hall and to several private homes; nonetheless, the Archbishop let him live at Verden and took him as a servant.

In addition to all of these ventures involving the Archbishop and his relatives, the counter-suit described the impacts of the Archbishop’s feuding on the inhabitants of Bremen, feuding that took place “even though the Archbishop promised he would not pursue feud in this domain.” For one, he had recently sent several knights against the Duke of Geldern in Holland. On account of that, the Duke of Geldern detained several ships belonging to Bremeners, and took more than 14,000 gulden worth of goods. On a separate occasion, the Archbishop took 400 gulden from a citizen of Gronnigen, named Hernick, who had been traveling through the Stift Bremen. As a result, that same Hernick took from a citizen of Bremen, Heinrichen Bliffernicht, his ship and over 1300 gulden worth of goods, alone on account of the actions of the Archbishop. A third episode provided further evidence of the direct negative impact of the Archbishop’s actions on the citizens of Bremen. The Archbishop, without the knowledge or consent of the common estates of the collegiate church of Bremen, overran the Wursten people in Friesland in 1517, and the people of Hadeln, neighbors of Bremen, burning and completely spoiling them, at a cost of 20,000 gulden to the city of Bremen. This overrunning of its neighbors caused great damage and made it difficult for Bremeners to purchase their daily wares and victuals; what before one bought for one grosschen, now one had to pay three grosschen for it.

On occasion, when the Archbishop had no current war or feud, he would quarter a great crowd of knights in Bremen, who would rob and plunder the city, as well as the surrounding countryside. They would stay for weeks at a time, eating up all that the poor people had, taking it with violence and bringing it to spoil. Overall, since the Archbishop assumed office, the Bremeners were “daily in a state of worry, and must stand guard to ensure that they are not damaged or run out of the city by the knights.”

The narration ended with specific requests for the Court, namely, that the Court should demand that the Archbishop (1) repay his debt of 1000 gulden to the city; (2) abolish the tariffs and other burdens he introduced, including at Langwedel, Verden, and Stattel, and that the residents and subjects of Bremen no longer be arrested or detained on account of these and be left by their old customs; (3) pay back what they were forced to pay for tariffs and wood; (4) pay restitution for damages caused by the actions of his relatives who were given license by the Archbishop, by the actions of the city’s enemies who were maintained by the Archbishop, and by the impacts of the Archbishop’s feuds and wars, and to refrain himself from such future acts and damages;<sup>305</sup> and (5) “the Archbishop should be removed of all authority and jurisdiction concerning Bremen; that the city of Bremen should have charge of its courts and territories; and

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<sup>305</sup> Berlin 475, Q6, “Reconventiones,” 1530: “und dergleichen eingrif und beschedigung sich kunftiger zeit zuenthalten.”

the city should be put in the Emperor's protection (*Schutz und Schirm*) and be considered a city of the empire."<sup>306</sup>

### ***Bremen's Attentata Suit***

This counter-suit is followed in the case file by yet another kind of suit, called a *Libellus Attentatorum* (or *Attentata Clag*), submitted by Bremen against Christoph the Archbishop of Bremen.<sup>307</sup> This was a legal instrument that allowed a party to bring in new information with bearing on the suit. It was a suit within the suit that required resolution before returning to the main issue.<sup>308</sup> This suit introduced some new facts and allegations that described the Archbishop's alleged illegal actions following Bremen's submission of the counter-suit, described above. When litigants in a pending dispute took aggressive action against each other outside of Court, that was grounds for submitting an Attentata suit, and could greatly impact the proceedings.

The Attentata suit begins by summarizing the legal proceedings so far: after the Archbishop brought a penal mandate against the city of Bremen in August 1529, and after Bremen entered the case by submitting a counter-suit (*Reconventiones*) in November 1529, the Archbishop undertook a variety of retributive actions to pressure the city to obey the terms of the Mandate.

Their first accusation was that the Archbishop, "without any legal cause" imprisoned Johan Roden/Rode and Herman Farberger/Vorberger, two citizens of Bremen. The Attentata's Mandate suggested that this was done with the intention of hindering them from delivering a message from the city council of Bremen to other persons that the Archbishop was at the time holding in prison, Dr. Johan Wick and his secretary.<sup>309</sup> And this is the second accusation, that the Archbishop arrested the city of Bremen's delegate in these pending legal matters, Dr. Johan von der Wick, and his secretary; that he took them to Verden, and had them inspect the city's seals and letters, rewrite certain documents, and notarize others. In short, the Archbishop had arrested this doctor of law and his secretary for the purpose of having them manipulate some documentation relevant to the pending legal proceeding. The doctor was then forced to take an oath that he would return when summoned.

In another episode, a Bremen citizen, Dietrich Refschleger, though traveling under guarantee of safe passage near the castle Verden, was attacked by street thieves who violently took 80 Gulden and 2 horses. The Archbishop's riding messenger partook in this attack, and then rode to the castle Verden, taking one of the citizen's satchel as booty. The Mandate added that a gag was put in Refschleger's mouth, and he was pushed into a bush.

In addition, the Archbishop attempted to bring villages and territories belonging to Bremen under his authority, namely Schloß Bederxa and the village of Liehe, by taxing its subjects 200 gulden, going against this pending legal proceeding.

The suit contained other accusations of retributive action on the part of the Archbishop. The Attentata suit ended by requesting the Court to order the Archbishop to cease and undo all

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<sup>306</sup> That is, become *reichsunmittelbar*, directly subject to the Emperor, a free imperial city.

<sup>307</sup> Berlin 475, Q7, "Libellus Attentatorum," 1530.

<sup>308</sup> Samuel Oberländer, ed., *Lexicon Juridicum Romano-Teutonicum* (Nürnberg: Johann Christoph Lochners, 1723), s.v. "Attentata," 67.

<sup>309</sup> On von der Wick/Wieck/Wyck, see Wilhelm von Bippen, "Wyck, Johann von der," in *Allgemeine Deutsche Biographie* 44 (1898), 381-383, accessed July 3, 2019, <https://www.deutsche-biographie.de/gnd143557653.html#adbcontent>; and Bippen, 45ff. For this episode, Bippen, 50-1.

such new actions that were aimed at burdening the city of Bremen in light of the pending legal proceedings, and that he should return the city of Bremen to the state it was in when the litigation began. This would mean: releasing Johan Roden and Herman Farberger from prison; releasing Dr. Johan Wick from his oath, and returning to him the documents in question; repaying Refschleger 90 gulden and 2 horses; undoing taxation burdens on Liehe and Schloß Bederxa; among other things.

As a result, the Court sent out a Mandate against the Archbishop in February 1530, for violating the common law and the Land-Peace, with a penalty of 40 marks lötigen golds for failing to cease the actions described.<sup>310</sup>

### ***The Archbishop's Responses***

Against both the Counter-Suit and the Attentata Suit, the Archbishop responded in June 1530 with a variety of technical challenges. For instance, he argued that a counter-suit required a *simuleum casum*, an analogous cause of action or issue. The suit brought by the Archbishop was a Land-Peace issue, whereas the counter-suit brought by the city of Bremen was a matter of civil law, he argued. The only forum in which a violation of the Land-Peace can be adjudicated is the Imperial Chamber Court, but the counter-suit, being a civil matter, must be tried before the judges of first instance in Bremen, as described in the imperial ordinance titled “How counts, barons and others, electors, princes and prince-like rulers may be proceeded against at law.”<sup>311</sup>

Furthermore, the legal actions Bremen had so far undertaken in the context of the pre-trial stage were improper because Bremen was not directly subject to the Emperor but rather was directly subject to the Archbishop. Therefore, the city was obliged to obey the original Mandate and obey the demands made therein “especially insofar as they concern the Christian faith.”<sup>312</sup>

Despite these objections, the Court required the Archbishop to settle the *litis* in the Attentata suit, hindering the original suit until that matter was resolved.

### ***Attempt to Reframe: Bremen's Attempt to Become a Free Imperial City?***

In a Supplicatio, the Archbishop asked that the Court strike down this administrative decision concerning the *litis contestatio* in the Attentata suit, because all of the acts which were outlined in the original Mandate against Bremen, and its orders “that the city rebuild the St. Paul monastery, that they restitute the driven-out fathers and other clergy persons that they plundered and confiscated from; that they fire the rebellious preachers and apostates; that they reestablish the broken churches and altars; that they not hinder the clergy persons and prelates in holding the mass and other ceremonies; that they not commit any violence but leave them in their freedoms of old, praiseworthy custom in their person, body, possessions and goods, and also that they leave the churches and monasteries in their old, praiseworthy ways”—all of these demands

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<sup>310</sup> Berlin 475, Q5, “Copey mandat,” 1530.

<sup>311</sup> It is not clear to me the grounds on which Christoph argued that the counter-suit was not a Land-Peace issue. See Berlin 475, Q9, “Exceptiones con Reconvencionnes,” 1530, in which the Archbishop’s lawyer cited a precedent from 1528, in which a court recognized a case in which a count sued the city council based on the land-peace, and the city counter-sued for homicide, based on civil law. The Imperial Chamber Court ruled that the count was not required to respond and the case was remitted to the court of first instance.

<sup>312</sup> Berlin 475, Q3, “Petitio,” 1529: “dweyl dieselbigen [Bremen] seiner fürstlichen gnaden on mittel underworffen derselbigen underthon und von rechts wegen zu gehorsamen schuldig sein, sonderlich sovil das ausganngen mandat der cristenlichen glauben belangen ist.”

conformed to what was contained in imperial ordinances, the Land-Peace, edicts, and imperial recesses.<sup>313</sup> In other words, the Archbishop was asking the Court to return to the framing he had proffered: that this was a dispute about a city violently changing the religion without authority to do so, and upsetting long-inherited customs and worship.

By allowing the *Attentata* and counter-suit by Bremen, the Archbishop also alleged, the Court emboldened the city in its long-standing efforts to become a free imperial city and to flout the Archbishop's lordship.<sup>314</sup> Indeed, the final request of the Court that the city made in its Counter-suit was that the city become *reichsunmittelbar*, directly subject to the Emperor rather than the Archbishop. According to the Archbishop the Imperial Chamber Court was not the proper forum in which to seek the privation of lordship prerogatives and freedoms of a prince of the Empire, which was the city's clear intent. Much less was it the correct forum to do so since the plaintiff was an Archbishop, a spiritual prelate.<sup>315</sup>

### *A Matter of Religion?*

In 1532, the Schmalkaldic League listed the case as a matter of religion.<sup>316</sup> Yet the city of Bremen did not undertake the Protestant strategy of co-litigating with other protesting estates and declining the forum on the argument that the dispute was a "matter of religion." This was probably because ongoing negotiations with the Archbishop seemed promising,<sup>317</sup> and since the city was launching the counter-suit against the Archbishop in a bid to gain *reichsunmittelbar* status, they were not interested in a complete rejection of court judicature.<sup>318</sup>

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<sup>313</sup> Berlin 475, Q10, "Sup[plicatio]," 1531: "In dem mandat hoghgedachter meiner g. h. gegen gemeltem sein underthon der von Bremen zu uberfluß uspracht wird uff furbracht narration under andern inen gebotten Sant Paulsen closter so sie abgebrochen widerumb uff zubawen, auch daselbs und der usgetrieben vättern das jhenig sy die von Bremen ine und andern geistlichen personen des stifts bremen genomen spoliirt und entsezt widerumb zugeben, den uffrurischen prediger, apostate wie der dan genant wird zuurlauben, die zerbrochen kirchen und altar widerumb uff zurichten, die geistlichen person und prelaten an meßhalten und andern ceremonien nit zuverhindern noch ime darin einichen gewalt zuzufiegen sonder sie ire person leyb hab und guter bey irn freyheiten alten loblichen herkomen auch die kirch und kloster in iren wird und wesen bleyben zulassen und wird uff solch mandate nichts anders gebetten dan den zugehorsamen wie dan dasselbig und die petition daruff gefolgt und den 13. 7bris 1529 inbracht (doruff sich anwalt zeucht) inhelt Also das in berurten puncten nichts anders begert und geben wird dan was e.g. vermag deß reichs ordnung außgekhunten landfriden kh. reformacion key. Edicta und gegebenen deß reichs abscheide on das zuhandhab# schuldig."

<sup>314</sup> Berlin 475, Q10, "Sup[plicatio]," 1531: "und die von bremen in solchen irem furnemen gehalts starkt werden allein darumb abgeschlagen darumb hohermelter Erzbischof seiner regalien privirt."

<sup>315</sup> Berlin 475, Q10, "Sup[plicatio]," 1531: "als ein Erzbischof und ordenlich prelat zu Bremen hat diß orts meins erachtens unangesehen der privation von wegen der seiner zuclagen mag darumb nit repellirt werden dan je so ist ## allein der Regalien und freyheiten so die vonn Re## hat privirt, aber deß Bistumbs und der administration der geistligkeit und versehung seiner f.g. underthon, sovil die geistligkeit belangen ist gar nit wie da e.g. diß orts auch kein gewalt uber sein g. ime dasselbig auch nit zunemen haben." Indeed, Johann von der Wick did see this case, and the religious division more generally, as an opportunity to advocate for Bremen's becoming *reichsunmittelbar*; see Bippin, 49-50, 54. Berlin 475, Q11, "Supplicatio," 1531 is an interesting document describing an incident in which the city of Bremen punished a convent-brother of the Teutonic order who led an uproar against the city. The city claimed that the Archbishop's prerogatives to appoint a judge to the criminal court (*Halsgericht*) had been deprived, and therefore the city, in order to not let those actions go unpunished, executed the convent-brother on their own. The protocol may provide more context for this document, which, however, is not in my possession.

<sup>316</sup> Schlütter-Schindler, 26, 28-9.

<sup>317</sup> Schlütter-Schindler, 45.

<sup>318</sup> Schlütter-Schindler, 120n435, 121.



In 1533, Bremen came to a compromise out of court with the Archbishop.<sup>319</sup> They agreed to stop all pending legal disputes before the Imperial Chamber Court, excepting those that had to do with questions regarding the old-faith worship and ceremonies, insofar as those would be resolved in a future Christian Council.<sup>320</sup>

### **Injuring the Honor and Status of Clergy**

In 1534, the Archbishop of Bremen brought another suit against the city of Bremen, this time for injury to the “honor, lineage, and status” of the Archbishop.<sup>321</sup> The case file has no protocol and the documents have no quadrangle numbers, indicating that the judges likely never discussed the case, and the proceeding fizzled out after the production of the *Citatio*. Yet the case reveals another cause of action available to old-faith litigants: that of injury and insult to clergy.<sup>322</sup>

The *Citatio* began with a statement of law, that in common written law it is clearly provided for that no one should, through words or deeds, smear or injure the honor or good reputation of another, and that in particular, subjects are obliged to uphold the honor of their rulers.<sup>323</sup> Yet, alleged the Archbishop, the city of Bremen violated these in three ways. First, the city submitted a supplication to the imperial government in which it, among other things, accused the Archbishop of “tyrannical and unchristian violence.”<sup>324</sup> This although the Archbishop had always “acted and governed as nothing other than a Christian, mild Archbishop and prince.”<sup>325</sup> Second, in September 1531, some citizens of Bremen went into the residence of the late counselor and servant of the plaintiff, a commandry of the Teutonic Order, who was under the protection (*Schutz und Schirm*) of the Archbishop, and killed him without any legal grounds. This deed was done either on the city’s behalf, or the city allowed it to happen, or the city silently ratified the murder by leaving it unpunished.<sup>326</sup> Third, the city of Bremen had

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<sup>319</sup> Schlütter-Schindler, 120-1.

<sup>320</sup> Bippin, 95.

<sup>321</sup> Bundesarchiv Berlin-Lichterfelde AR1-A Nr. 477 (“Berlin 477”).

<sup>322</sup> For other examples of Reformation cases in which the legal issue was insulting clergy, see Buck, 251-5; however, these were cases before spiritual courts.

<sup>323</sup> Berlin 477, no quadrangle, second document in case file, “Clagen,” 1534: “Darumb und dweil dem also, und aber im rechten loblich versehen, das niemant den andern hohen oder niddern standts noch mit wortten oder wercken iniuriert noch an sein erhen schmehen soll, furnemblich aber die obrigkeit von iren underthanen von denen sie ebe(?) schützt beschirmt und von allem schaden laut ired ayds behutet werden sollen.”

<sup>324</sup> Berlin 477, no quadrangle, first document in case file, “Copia Citationis cum Executione,” 1534: “So sollet ir doch des unbetrachtet, auch uber das in ime (ime alls ewern landtsfursten und herrn vor allem schaden zu warnen seyner nutz zufurdern wie dan getrewen underthanen wol anstee) gelobt und geschworn, verschiener zeit ine in einer supplication, so ir damals unser keyserlichen damals im reich gehalten regierung ubergeben lassen, under andern alls solt er sich tyrannischen und unkristischen gwalts geprauchts beschuldigt und in also an seiner andacht furstlichen erhen und warden am hochsten angetast geschmecht und iniuriert.”

<sup>325</sup> Berlin 477, no quadrangle, second document in case file, “Clagen,” 1534: “anders nit, dan eine Christlichen milten Erzbischof und fursten gezimet und wolanstat gehandelt und regiert.”

<sup>326</sup> Berlin 477, no quadrangle, second document in case file, “Clagen,” 1534: “einer seiner rethe und diener weyland Conventhur des teutschen ordens im hauß zu Bremen in seiner eigener behausung selb drit ine jar der mindern zal ein und dreissig im monat septembris durch ire burger, on alle redlich und in recht gegruendte ursach, on das sie das auch zuthun macht gehapt unerwundes(?) rechten eigens furnemens und mit gewalttiger thath, unerlichen umbringen, solliche ubelthat, gestattet und ungestrafft haben hingaen lassen.” Also: Berlin 477, no quadrangle, first document in case file, “Copia Citationis cum Executione,” 1534: “weiland N. Conventhur teutsch ordens zu Brem,

recently captured several of its citizens. Some died of torture in the tower, some of them were executed, others were exiled. These poor captured citizens were interrogated by the Bremeners about the Archbishop. “All of which in no way is proper for them to do, and highly forbidden in law,”<sup>327</sup> and “deeply offended the Archbishop.”<sup>328</sup> For these acts, the Archbishop asked for the Court to place a penalty upon the city of Bremen of 50,000 gulden.

## Incitement

Moving from injury to incitement against clergy, this case has to do with events that took place in Hildesheim several weeks after the city council of Hildesheim decided, with popular support, to accept the Augsburg Confession in August 1542.<sup>329</sup> The defendant in the case was Cornelius Völkers, from nearby Sarstedt, who was appointed the first evangelical preacher of the former St. Paulus monastery in Hildesheim. The plaintiff was the Bishop of Hildesheim, Valentin von Tettleben, who was a plaintiff in several Reformation cases; on the same day that he sued Völkers—December 19th, 1542—he launched at least one other sweeping case at the Court, in which he named specific Protestant leaders, and sued for the restitution of all worship services, clerical appointments, and church property that had been lost or changed with the city’s introduction of the Augsburg Confession.<sup>330</sup>

In the *Citatio*, we read the Bishop’s version of events and his grounds for suing. On October 3, 1542, Völkers allegedly wrote in a letter to one Hans Heydtmuller, a citizen of Hildesheim, that a noble told him that the Bishop’s arrival in town meant danger for the Protestant citizens. (The Bishop resided in Mainz, and came to Hildesheim in October to challenge the city council for the reforms, and to remind them of his lordship there.) The clergy, he was alleged to have said, have a treasonous plan “to deliver the citizens there to the butcher’s stalls”—a euphemism for betrayal.<sup>331</sup> And that therefore, Heydtmuller should warn “the citizens who have love for the word of God”<sup>332</sup> that they should take care, diligently watch the gates and protective walls of the city, and keep an eye on what the clergy and monks are up to “because the treason would be great.”<sup>333</sup> And that they must do as the citizens of Minden did, who drove the

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so seiner andacht rath und diener auch in seyner fundern schutz und schirm gewesen, in seyner aigen behausung zu Brem so eins yeden sich erste wonung sein soltt, unersuchts viel weniger einiches rechten erlanngt, durch ewere burger eygens furnhemens und gwalts selbs dritt jemerlich umbringen lassen oder zum wenigsten dem selben also zugesehen sollichs gestattet geduldet ungestrafft hingeen lassen also stilschweigend ratificiert und angenem gehalten.”

<sup>327</sup> Berlin 477, no quadrangle, second document in case file, “Clagen,” 1534: “Zum dritten beclagt sich anwalt von wegen und in namen...erzbischof...gegen Bremen... als sie verschiner zeit ettliche ire Burger gefangen, deren eins theils in der matter und thurn gestorben, eins theils vom lebenn zum tod gerichtet, eins theils aber relegiert worden, das man dieselbigen armen gefangenen leut uff hochgedachten erzbischove anwalts principal fursten in seiner stand wurden und wesen peinlich gefragt, damit auch sein f.g. welchs ine kein weg zuthun gepurt hat und in recht sonderlich hoch verpotten Alles hochgedachten fursten zuverletzung, seiner f. wurden standts wesens namen und stamms.”

<sup>328</sup> Berlin 477, no quadrangle, first document in case file, “Copia Citationis cum Executione,” 1534: “welchs alles sein andacht zu jederzeit sich solliche schmehe und iniurien begeben zu herzen gefast.”

<sup>329</sup> Niedersächsisches Landesarchiv Hannover, Hann. 27 Hildesheim 715 (“Hannover 715”). See Karl Kayser, *Die Einführung der Reformation in der Stadt Hildesheim und die Feier derselben am Lutherfeste, 10. November 1883. Nebst Angehängten Actenstücken Aus Der Reformationszeit* (Hildesheim: Julius Gude, 1883).

<sup>330</sup> See Niedersächsisches Landesarchiv Hannover, Hann. 27 Hildesheim 694.

<sup>331</sup> Hannover 715, Q1, “Citatio uff die Acht,” 1543: “uff die Fleischbanck liefern.”

<sup>332</sup> Hannover 715, Q1, “Citatio uff die Acht,” 1543: “die burger so gottes wort lieb hetten”

<sup>333</sup> Hannover 715, Q1, “Citatio uff die Acht,” 1543: “Unnd das sie auff iren thoren unnd zingeln auch weiß

clergy and monks out of the city, “so that thereupon they might have the same peace, and the Gospels further develop”<sup>334</sup>; that they must destroy certain monastic buildings, “the earlier, the better,”<sup>335</sup> and to tell the evangelical brothers that if they are to have peace, they must also chase the Bishop out of the city.<sup>336</sup>

According to the Bishop, Völkers’ alleged letter had some effect: on October 6, and on several nights thereafter, citizens of Hildesheim gathered in the night with their armor—no one, “neither spiritual nor worldly residents, knowing what to expect from the other.”<sup>337</sup> These unruly gangs openly threatened to carry out the “unchristian, bloodthirsty advice” contained in the letter, “to kill the Bishop or at least to capture him and to do with him what they will, and with the singular aim to spill blood, cause tumult, belligerency, and uproar against the Bishop and clergy, to violate them in their bodies, their possessions, and their well-being.”<sup>338</sup>

These acts of intimidation, the Bishop argued, violated prudence, natural, godly, and written laws, the Golden Bull, the Holy Roman Empire’s ordinances and decrees, and the Land-Peace. The proper punishment for such acts was, he said, outlawry (*Acht*).

The case file contains no record that Völkers responded to the suit. A new summons from June 1543 added that the defendant’s failure to respond put him in further danger of punishment. It does not seem that this repeated threat made any impression on Völkers, or that the suit had any conclusion.

In this case, the theological divide appeared in the language of the incendiary letter (“those who love the word of God”; “to ensure the Gospels’ further spread”). It also appeared in the coded rebuke by the Bishop that Völkers’ deeds expose him as a false cleric, contrasting his actions to those of the clergy at Hildesheim who “strive diligently at all times for honesty, peace, and justice while fulfilling their offices and worship services, and never did anything to bring about uproar, rage, spilling of blood or burden to neighbors.” Implicit in this comparison was a rebuke, demonstrating the quality of cleric the “new sect” produces. The legal cause of action in this case, however, was that of incitement to violence, a violation of the Land-Peace.

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die pfaffen und Munch anrichten vleissig ausssehen hetten dann die verreterei groß were.”

<sup>334</sup> Hannover 715, Q1, “Citatio uff die Acht,” 1543: “da alsdan dieselben frieden gehabt hetten unnd das Evangelium furtgangen.”

<sup>335</sup> Hannover 715, Q1, “Citatio uff die Acht,” 1543: “dar zu die zwey Plockheuser die Carthaus unnd die Clöster zur sulthen zerstöret je ehe je lieber.”

<sup>336</sup> Hannover 715, Q1, “Citatio uff die Acht,” 1543: “Unnd demnach obgedachten heydmuller weiter gebetten solchs den evangelischen Brudern samptlich antzusagen, das sie den Blawen bischof sein andacht meynend mit sampt allen pfaffen unnd monichen zu hildesheim austreiben wöltten so wurden sie frieden haben.”

<sup>337</sup> Hannover 715, Q1, “Citatio uff die Acht,” 1543: “niemandt von baiden gaistlichen und weltlichen inwonern gewust wes er sich zu dem andern zugetrösten oder zuversehen.”

<sup>338</sup> Hannover 715, Q1, “Citatio uff die Acht,” 1543: “Darauff dan ferrer ervolgt das uff den Freitag darnach den sechsten obgemelts monats octobris die ganz stat hildeßheym unnd derselben Burgerschaft bei nechtlicher weyl in harnisch gebracht, das niemandt von baiden gaistlichen und weltlichen inwonern gewust wes er sich zu dem andern zugetrösten oder zuversehen. Dergleichen etliche mher nacht darnach zu etlichen malen sich auch rottirt und zusamen gelauffen in gemut unnd maynung solchem obgemeltem deinem schreiben unnd unchristlichem blutigirigem rathe nachzusezen sein andacht, mit sampt derselben zugewandten todtschlagen oder sonst zum wenigsten zufahen und ihres mutwillens mit inen zu pflegen. Alleyn der ursachen blut vergiessen, Tumult, rumor unnd uffrur gegen seiner andacht unnd derselben gaistlicgkeyt zuzurichten, sie an iren leyben, haben, guetern, unnd aller wolfart zuvergwaltigen.” See Valentin von Teteleben, *Protokoll des Augsburger Reichstages 1530*, ed. Herbert Grundmann (Gütersloh: Carl Bertelsmann, 1958), 36, for a description of these events; see introduction of this edited protocol by Teteleben for a biography of him.

## Public Execution as a Violation of Imperial Protection

In late 1532 and early 1533, two combined suits were launched in the Imperial Chamber Court against the city of Memmingen for violating an imperial safe passage letter when it executed Ludwig Vogelmann in January 1531.<sup>339</sup> One suit was brought by the surviving children of Vogelmann, led by Ludwig Vogelmann's son, Joachim, who appointed Dr. Valentin Gottfried as their lawyer. Another suit was brought by the imperial prosecutor, Dr. Wolfgang Weidner. It was at times a subject of discussion, recorded in the protocol, the extent to which these suits (the family's and the Fiscal's) should be handled separately or together.<sup>340</sup>

"In the matter of the gruesome, unlawful violation committed upon the late honorable and pious Ludwig Vogelmann," began the Positions and Articles document from 1535.<sup>341</sup> Vogelmann had been the former respected city clerk (*Stadtschreiber*) for Memmingen (from 1508-1523). At the time of his death he was serving as Burgrave, councilor and advisor to Christoph, the Bishop of Augsburg, and as lay administrator of the Antoniter monastery in Memmingen. He was regarded during his lifetime as an "honest, pious, and good man." However, "on account of several important reasons," a conflict emerged between Vogelmann and the city council, and the dispute was brought before the city council of Ulm to adjudicate. An agreement was brokered that put the parties back "in the good" with one another. Nonetheless, "good benefactors, friends, and loyal people" warned Vogelmann to beware of the city of Memmingen and to take precautions against its mayor and city council. As a result of these prudent warnings, Vogelmann went to the Imperial Diet at Augsburg and sought and received an imperial letter of protection (*Schutz- und Schirmbrief*) so that "the body, possessions, and goods of Vogelmann were taken into especial imperial advocacy, protection, and safe passage for three years." The Emperor gave notice in particular to the mayor and city council of Memmingen to "hold fast to the terms of that imperial protection," and "not to force, distress, insult, or violate Vogelmann, neither through themselves nor through someone else on their behalf." Another imperial protection letter was granted to the Antoniter Order in Memmingen. "To violate, insult, damage in body or limb, much less to bring someone from life to death, who is under imperial protection is illegal and unauthorized," the document continued; it violated common law, statutes and the order of the Holy Empire.

"Despite all of this, and despite Vogelmann's service and usefulness to the city, ignoring the above-mentioned Ulm agreement; against all law and fairness, and the Holy Empire's Land-Peace and special imperial protection letters; also against the privileges of the Preceptory at Memmingen—the city of Memmingen mercilessly brought Vogelmann from life to death." Armed servants of the city captured Vogelmann while he was on his way to the Antoniter monastery, and broke through several gates and doors with logs, axes, and other instruments in the process. They took Vogelmann as a prisoner "as if he were a public evildoer and their worst enemy" and had him tortured in a "gruesome and horrific" manner. Then, "unsatiated by such

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<sup>339</sup> BayStA (RKG) 5657 ("Munich 5657"). See brief discussion of this case already in Chapter 1.

<sup>340</sup> The case file is incomplete; certain documents are missing, including notably all of those from the period between the months December 1533 to May 1534, when Landgrave Philip of Hessen and the Elector of Saxony wrote saying it was a matter of religion, to the time they were added to the case, to the time they were removed from the case.

<sup>341</sup> Because the case file is incomplete, I am relying on the Positions and Articles document, which was the first submitted document after the *litis contestatio*, i.e. after the pre-trial stage and settling of the issue, which occurred around 3 years after the suits were first launched. For more on *litis contestatio*, see summary of court procedure in Chapter 1.

undeserved torture,” the next morning, “on their own authority, without any orderly court process, they led Ludwig Vogelmann to the public marketplace in order to kill him.” All of this was against “law, the Golden Bull, the Land-Peace, the Holy Empire’s constitutional order and statutes, as well as the imperial protection and safe passage letters,” but it also violated “all honorable fairness, natural human rationality, custom, and good virtues.” For these violations, the city was ordered to pay 50 marks lötigen golds, half to the descendants of Vogelmann, and half to the Court.<sup>342</sup>

### ***Duty and Right to Punish Treasonous Former City Servant: A Direct Appeal to the Emperor***

Memmingen’s first move, as a free imperial city directly subject to the Emperor, was to make an appeal directly to the Emperor, probably in January 1533.<sup>343</sup> The language of the appeal suggests that they believed that by presenting the Emperor with the other side of the story, he would see that, due to Vogelmann’s treasonous activities, through which he violated not only the Ulm contract but also his citizenship oath and several city statutes forbidding sedition, they were correct to violate the imperial protection letter by exercising their capital and criminal jurisdiction in Vogelmann’s case. Not least because Vogelmann had himself, just before his execution, allegedly confessed to these acts and intentions, Memmingen was in fact not only in the right to do so, but had a duty to do so. The Memmingen appeal also indicated that Vogelmann was misusing the imperial safe passage letter as a protection as he emboldened his seditious activities against the city; that he was using the imperial letter as a cover as he proceeded to act with impunity against the city. And that by law, the imperial safe passage letter could not be understood to extend to protect its holder from the legal consequence of his own crimes. For these reasons, Memmingen appealed to the Emperor directly to order the Imperial Chamber Court to stop the proceeding.<sup>344</sup>

The position of City Clerk was quite influential; during his tenure, Vogelmann would have processed all of the city’s correspondences, have known all of the official documents (*Urkunden*) and legal titles of the city, and therefore would have developed a deep and current knowledge of the political, economic and legal matters of the city. One of his duties was to take minutes of the meetings of the city council, and there he would have been exposed to countless personal requests and concerns from individual citizens and constituencies.<sup>345</sup> Though born elsewhere (in Schwäbisch Hall), Vogelmann and his wife were conferred citizenship of Memmingen in 1513, and he was given a series of honors and privileges over the years of his tenure, indicating how highly regarded he was in Memmingen.<sup>346</sup>

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<sup>342</sup> Because a violation of imperial safe passage implicated imperial sovereignty, it was within the Emperor’s prerogative to regard Memmingen’s violation of the Land-Peace as warranting deceleration of the *Acht* (outlawry) (Rautenberg, 57). It is notable that the *Acht* is not mentioned here as a possible consequence.

<sup>343</sup> Peer Frieß, “Die Causa Vogelmann: vom lokalen Konflikt zum reichspolitischen Problemfall in der Reformationszeit,” *Memminger Geschichtsblätter / Historischer Verein Memmingen e.V.* (2016), 104-5.

<sup>344</sup> Frieß, 105.

<sup>345</sup> Frieß, 75-6.

<sup>346</sup> Friedrich Dobel, *Memmingen im Reformationszeitalter nach handschriftlichen und gleichzeitigen Quellen, Fünfter Theil: Das Reformationswerk zu Memmingen von dessen Eintritt in den Schmalkaldischen Bund bis zum Nürnberger Religionsfrieden, 1531-1532* (Augsburg: Lampart, 1878), 7; Frieß, 76.

Though anti-clericalism and calls for reform as to clergy privileges and morals had been brewing in Memmingen since the 1470s,<sup>347</sup> it was not until Christoph Schappeler, the priest at St. Martin parish church, began openly preaching pro-Luther sermons in the early 1520s that city officials began to take notice of a new kind of escalation.<sup>348</sup> Some city council members opposed the new teachings and others supported them, and overall the council's approach was to avoid conflict.<sup>349</sup> In 1522 the city passed a preaching ordinance demanding "exclusive reliance on the scriptures." This was a common move in imperial free cities with a strong Reformation movement; "the city fathers refused to believe that the 'Gospel' might prove controversial"; historians have traced the impact of this notion of a communal consensus based on the Gospel.<sup>350</sup> In 1523, Schappeler's provocative preaching on the abolition of tithes in the New Testament led to a "constitutional crisis" in the city, as more and more people refused to pay tithes. Key charitable institutions were threatened with insolvency; the city's standing with noble endowers was compromised; and the Emperor might choose to send in troops if the current city council could not maintain order.<sup>351</sup>

Ludwig Vogelmann was one of Christoph Schappeler's greatest critics.<sup>352</sup> He was deeply frustrated with the lack of decisive action on the part of the city council to deal with Schappeler and his followers, and was even more disturbed by the apparent support that some members of city council showed Schappeler.<sup>353</sup> Vogelmann's opinionated statements led to his gradual alienation from the city's elite.<sup>354</sup>

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<sup>347</sup> Blickle, *Communal*, 26ff, 37.

<sup>348</sup> Frieß, 76; Friedrich Dobel, *Memmingen im Reformationszeitalter nach handschriftlichen und gleichzeitigen Quellen, Erster Theil: Christoph Schappeler, der erste Reformator von Memmingen, 1513-1525* (Memmingen: Verlag der Besemfelder'schen Buchhandlung, 1877), 11. For more on the 1479 Endowment (*Stiftung*) from the noble Vöhlin family that established this preachership office at St. Martin, as well as the requirements, duties, and rights of its office holder, see Dobel, I, 9f. Blickle notes that these positions were "somewhat outside the conventional clerical hierarchy" and many similar positions were established in the second half of the fifteenth century. They were like lectureships, "founded to provide intellectual guidance in matters of faith" and "largely free from any sacramental or pastoral duties." In this case, the occupant received 100 Gulden; preachers in these positions had a disproportionate impact on the Reformation (Blickle, *Communal Reformation*, 21). Blickle dates the first council remark on Schappeler's incendiary sermons to August 1521 (Blickle, *Communal Reformation*, 19). See also Dobel, I, 28-29. City chronicler Galle Greiter wrote on Nov 15, 1523 that Dr. Schappeler had made his "first Lutheran sermon" (Dobel, I, 36).

<sup>349</sup> Dobel, I, 36; Frieß, 77; Blickle, *Communal Reformation*, 28.

<sup>350</sup> Blickle, *Communal Reformation*, 20n14. A "fiction" because it covered over the fact that what it meant to follow the gospel was precisely what was under dispute; citing a contemporary report: "For a while there has been great confusion between clergy and laity in our town, with all inhabitants interpreting the holy gospel to their liking and despising anybody else's opinion. Thus, they call each other heretics and exchange many other insults, whereby the common people are confused, all to the detriment of souls and the honor of God" (Blickle, *Communal Reformation*, 43).

<sup>351</sup> Blickle, *Communal Reformation*, 38ff; Dobel, I, 43ff.

<sup>352</sup> Dobel, V, 8; Dobel, I, 28-9.

<sup>353</sup> Frieß, 77. Vogelmann wrote in the city council protocol on Nov 27, 1523: "Yet again we face upheavals because of the Lutherans. The preacher has arrived from Switzerland, where he visited Zwingli in Zurich, preached against masses, intercession by the saints, and other matters; the result has been much debate and resentment and much talking in the council; in summa: the preacher enjoys support, Luther threatens to take over, I fear the worst; it is decided to meet the clergy and talk to them, to stop them from calling the preacher a heretic" (Blickle, *Communal Reformation*, 30). Original here: Dobel, I, 37.

<sup>354</sup> Frieß, 78; Dobel, I, 41.

Vogelmann left his position and the city in 1524<sup>355</sup> and became a secretary for Christoph the Bishop of Augsburg.<sup>356</sup> Throughout the 1520s, Vogelmann remained engaged in city politics from afar, and mutual distrust brewed. Around 1530, Vogelmann took two steps that challenged the city. First, he was given administration of the Antoniter monastery, from which position he could launch continuous and concrete opposition against the Reformation policies of the city, including ordering the performance of mass in the chapel despite the council's having forbidden it, and transferring benefices so that they could not be accessed by the city.<sup>357</sup> Second, at the Imperial Assembly at Augsburg, he agitated against Memmingen's city government and requested and ultimately received imperial guarantees of safe passage and protection due to fear for his personal safety from Memmingen's city council, which he said also made it impossible for him to carry out duties of his office as administrator of the Antoniter monastery.<sup>358</sup>

The city council of Memmingen consulted with the city of Nuremberg on how best to proceed against him.

Vogelmann is now a great enemy of the word of God and despite all of the good that Memmingen has done for him when he came as a poor young man, he still does so much secretly against the city [...] and is so totally a follower of the priests that where he has an opportunity to provoke unrest among those who are followers of the word of God, he does not hold back, and lets Memmingen have no peace, as though he has nothing else to do but day and night complain against us and make us unfavored by the Emperor, and hated by [the other estates].<sup>359</sup>

In January 1531, they decided to arrest him, torture him, and execute him.<sup>360</sup> Before his execution, he signed a statement in which he allegedly confessed to acting against his civil oath, violating a contract made between them,<sup>361</sup> disparaging the city before the Emperor, and stirring up conflict in the city to provoke uproar, among other things.<sup>362</sup>

### ***Declining the Forum Based on an Imperial Privilege Concerning Jurisdiction***

The attempts by Memmingen to convince the Emperor that the execution of Vogelmann was justified had no effect. Hirter, the lawyer for Memmingen, sought to decline the forum of the Court based on an imperial privilege given to Memmingen in 1471 by Emperor Friedrich III, and

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<sup>355</sup> Frieß, 79; Dobel, V, 9-10.

<sup>356</sup> Frieß, 80.

<sup>357</sup> Dobel, V, 16-17; Frieß, 87.

<sup>358</sup> For text of the supplications see Dobel V, 19-25. Schlütter-Schindler, 134; Frieß, 91-92.

<sup>359</sup> Text of their letter to Nuremberg in Dobel, V, 27ff: "Dieweil nun diser Vogelmann ain grosser feynd des wort gotes vnnd vngeacht das jm vil guts zu Memmingen beschehen vnnd alls ain armer gesell dahin komen, so waist er aber vil gehaim der Statt und sonst annderer Stett handlung auch, vnnd ist so gar den pfaffen anhengig, das er, wa er denjhenen, so dem wort gotes anhengig, vnruo antragen mag, das nit spart vnd sonnderlichen vns zu M kain ruo last, sonst nichts zu schaffen hat dann das er thag und nacht trachtet, wie er vnns durchaechten, mit der vnwarhait verclagen vnnd in gross vngnad gegen kayser, konig, fürsten, herren, gegen den Bundtsstenden vnnd meniglichem verhaust machen mecht,..." On inter-city communication and advice-seeking, see Christopher W. Close, *The Negotiated Reformation: Imperial Cities and the Politics of Urban Reform, 1525–1550* (Cambridge University Press, 2009).

<sup>360</sup> Frieß, 95-6.

<sup>361</sup> Referring to the contract mediated by Ulm.

<sup>362</sup> Karrer, 195-7; Schlütter-Schindler, 134n561.

confirmed by then current Emperor Charles V in 1521. According to Memmingen, this privilege said that “thenceforth and into the future eternally no one, of whatever estate (*wirden, stats, oder wesens*), may launch a legal suit against Memmingen or its citizens, residents, or subjects, seeking their goods and properties, whether it concerns honor, body/life, or property, at the Hofgericht at Rottweil or any other court. And the only places where one could take legal action against them was before the following cities: Augsburg, Ulm, Ravensburg, Biberach or Kempten.”<sup>363</sup> Thus, “anyone who proceeds against Memmingen and its people in any other court, the whole proceeding is invalid, powerless, and nonbinding with respect to the Memmingers, and is completely undamaging to them.” The children of Vogelmann, argued Memmingen, by suing the city in the Imperial Chamber Court, violated an oath that they took as citizens of Memmingen, which all citizens pledge to every year, to do nothing to undermine the city’s privileges, freedoms, and immunities.<sup>364</sup>

These arguments also came to no effect. Though we do not have documents in the case file from the period immediately following (December 1533 to May 1534), the Protocol gives some indication of the kind of arguments that Memmingen was met with. For the Fiscal and the plaintiffs, the key was to bring Memmingen to a point where they were forced to settle the *litis*. Gottfried argued that because the case involved a violation of an imperial protection and safe passage letter, it could not be heard anywhere but at the Imperial Chamber Court, and that despite the defendants’ objections, the *litis contestatio* should happen.

Hirter made a third attempt to remove the case from the Court’s jurisdiction by claiming that the case was a “matter of religion.” This will be discussed in Chapter 4. These attempts by the defendant city in the pre-trial stage to decline the forum of the Imperial Chamber Court were unsuccessful; in September 1534, the Court ordered the defendant to settle the *litis*. Then in September 1535, about a year after the city’s failed attempt to recuse the judges as part of the protesting estates’ Recusation strategy, the court ruled that the *litis contestatio* take place with the defendants *in contumaciam*.<sup>365</sup>

### ***Negotiated Out-of-Court Settlement***

Beginning with Memmingen’s direct appeal to the Emperor, the city undertook an unusually active extra-judicial agenda to have the case nullified.<sup>366</sup> Part of this effort was focused on gaining the advocacy support of the Schmalkaldic League, in particular by having the case listed as one of the cases “concerning the religion” that would then be included in the co-litigation strategy of the protesting estates. Another part of this agenda was centered on imperial delegates and King Ferdinand, the brother of Charles V, and in part, these negotiations also thematized the question of whether the suit could be considered a “matter of religion.” We will return to these issues in Chapter 4.

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<sup>363</sup> Munich 5657, Q13, “Articuli adicionales fori declinatory,” 1533. For text of that privilege see Philipp Jakob Karrer, *Memminger Chronik, oder Topographie und Geschichte der kurpfalz-bayerschen Stadt Memmingen* (Memmingen: Rehm, 1805), 423-7. This privilege is not contained in the case file; usually a party would submit this kind of evidence, but I do not see any indications that this *Urkunde* was submitted by Memmingen here.

<sup>364</sup> Munich 5657, Q13, “Articuli adicionales fori declinatory,” 1533.

<sup>365</sup> Sprenger, 209.

<sup>366</sup> Another case with a lot of out-of-court advocacy and negotiations were the cases involving the city of Frankfurt. See Jahns, 256-7.



Witness testimony proceedings took place in 1538 and 1539 in Dillingen and Weisenhorn.<sup>367</sup> In the end, the dispute was settled out of court in the Tettngau treaty in May 1542, according to which it was forbidden for anyone to launch a suit against Memmingen regarding this matter, and Memmingen would pay the family of Vogelmann 3000 gulden.<sup>368</sup> Final payment amounting to 10,000 gulden occurred in 1548, with the help of other Protestant cities.<sup>369</sup>

### Patronage Rights (*Jus Patronatus*)

In 1537, Philipp von Rechberg, who was both the Cathedral Provost at Worms, and the Cathedral Dean at Augsburg, sued a noble citizen of Ulm named Ludwig von Freyberg for willfully taking over the administration of the parish of Öpfingen bei Ehingen, on the Danube, in the Bishopric of Constance, and confiscating property and incomes.<sup>370</sup> In his *Petitio Summaria*, he wrote that in April 1536, Ludwig had ordered Hans Moßberg, the vicar, to clear out of the parish, and in the process confiscated large quantities of chaff, barley, wheat, rye, hay, wood, straw, and grain.<sup>371</sup> He did this although Hans, like Ludwig, was an “honest and pious prelate.”<sup>372</sup> Since then, he had taken all tithes, annuities, rental fees, and incomes of the parish to himself or redirected them. These actions, claimed Philipp, violated several layers of rights and laws. First, it violated the rights of the liege lords (*Lehensherren*) and legal patrons of the parish, the noble family von Berg. It also violated the rights of Philip von Rechberg himself, in his capacities as the Cathedral Provost at Worms, and the Cathedral Dean at Augsburg, to whom the parish had been invested by both the von Berg family and the Bishop of Constance in 1518, and who therefore had administration and presentation rights there. Finally, it violated the rights of the vicar Hans Moßberg who had been, until then, receiving incomes through the parish.

Collectively, these violations defied (1) a specific protection relationship (*Schutz und Schirm*) between the Emperor and the plaintiff; (2) common written laws; (3) the Golden Bull; (4) the Land-Peace in which it is provided for that no one, whatever estate they may be, may in any way damage another estate; (5) the Speyer Recess of 1526; and (6) the Augsburg Recess of 1530, which especially forbade that any one, on their own authority, bring to themselves the incomes, tithes, or rents of a spiritual estate; and warned that each should remain peacefully with what he has in goods and administration of them, as inherited from earlier times.<sup>373</sup>

In light of all of these violations, the plaintiff requested that the Court order Ludwig von Freyberg to return the confiscated wealth, to pay in addition the total worth of his takings, to

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<sup>367</sup> More on the witness testimony proceedings in Chapter 4.

<sup>368</sup> After the Schmalkaldic War, the city would pay out 10,000 gulden. Frieß, 116-119; Karrer, 197-204; Dobel, V, 35.

<sup>369</sup> Frieß, 119; Dobel, V, 35.

<sup>370</sup> Bayerisches Hauptstaatsarchiv (RKG) 2019 (“Munich 2019”). Including tithes (*Zehnten*), annuities on the loaning of capital (*Renten*), and rental fees on the lending of land (*Zinsen*).

<sup>371</sup> Munich 2019, Q21, “Positiones et Articuli,” 1541 for list of all items taken and their values. For example: “Item er lutz von Freyberg hatt ime Mosperger all sein hew, im stadel geweltiglich genomen, dasselb verkaufft, und das gelt zu seinen handen genomen.”

<sup>372</sup> Munich 2019, Q21, “Positiones et Articuli,” 1541: “Item das der von Rechperg als ain eerlicher und fromer prelat, sich der massen gehalten, das er pillich, weder von lutzen von freyberg, noch yemandts andern vil angezaigter pfarr geweltiglich solte entsetzt oder spoliertt warden. Item das herr Hans Mosperger, des von Rechpergs arendierter, sich gleicher massen und gestalt gehalten habe.”

<sup>373</sup> Munich 2019, no quadrangle, third document in case file after protocol, “Ladung cum Executione,” no date. Also: Munich 2019, Q4, “Petitio Summaria,” 1537.

redirect the incomes to Hans Moßberg, to release administrative control of the parish, and to “let the plaintiff and his administrator remain with the parish and the old Christian usages and ceremonies, safely and uninjured.”<sup>374</sup>

This last sentence of the plaintiff’s suit was the only indication in the plaintiff’s allegations that what was at stake in the dispute was “the old Christian usages and ceremonies” as such. It is on one level self-explanatory that by taking over administration of the parish and redirecting the incomes away from then-vicar Hans, Ludwig obstructed the exercise and carrying out of “old Christian usages and ceremonies.” Yet the plaintiff party was making a choice here to sue in a manner that turned on the property violations in question; and, specifically, to do so under the terms of patronage rights and under imperial law, especially the Land-Peace and a variety of recesses and statutes.

### *Since Longer than Humans Can Remember*

The defendant, Ludwig von Freyberg, entered the case through a power of attorney appointing Ludwig Hirter.<sup>375</sup> He also submitted the combined power of attorney for the protesting estates, including himself who, though not an estate, was “a citizen of Ulm,” one of the protesting cities.<sup>376</sup>

First, they responded to the suit with a number of normal procedural arguments. They capitalized on an apparent notarial error, for instance, arguing that it had improperly taken four years for the summons to be sent out after production of it.<sup>377</sup> The plaintiff responded that these were merely notarial errors in the writing of the date as 1533 rather than 1537, and questions of form, which should not nullify the case.<sup>378</sup>

Substantively, Ludwig von Freyberg claimed that he was the Lord of Öpfingen, including its castle and village, and as such possessed high and low dominion (*Oberkeit*) there; that his forefathers had been, as its liege lords, in peaceful administration and quasi possession<sup>379</sup> of the parish “since longer than humans can remember.”<sup>380</sup> As such, Ludwig von Freyberg, like his

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<sup>374</sup> Munich 2019, no quadrangle, third document in case file after protocol, “Ladung cum Executione,” no date; and Munich 2019, Q21, “Positiones et Articuli,” 1541: “Item das auch lutzen von Freyberg bey hoher straff und pennen und bey vermaidung ro.key und kon. mt. schwerer ungnad von rom.kay.mt. gepotten, dem hern kleger und sein verweßern bei vilgemelter pfarr und altem christenlichen gebrauch und cerimonien sicher und unbelaidigt beleiben zuelassen.”

<sup>375</sup> On Ludwig von Freyberg, see Caroline Gritschke, *Via Media: Spiritualistische Lebenswelten und Konfessionalisierung: Das süddeutsche Schwemckfeldertum im 16. und 17. Jahrhundert* (Berlin: Akademie Verlag, 2011), 49-50; and Rainer Sailer, “Öpfingen im Mittelalter: Eine Spurensuche nach Geschichte und Geschichten” (2016), accessed May 30, 2019, [https://www.oepfingen.de/fileadmin/Dateien/Bilder/Geschichte\\_OEpfingen/OEpfingen\\_im\\_Mittelalter\\_Teil\\_2.pdf](https://www.oepfingen.de/fileadmin/Dateien/Bilder/Geschichte_OEpfingen/OEpfingen_im_Mittelalter_Teil_2.pdf)

<sup>376</sup> Munich 2019, Q5, “Mandatum Constitutionis,” 1537; and Q6, “Copia Mandati Constitutionis Generalis der protestierenden Chur und Fursten Graven frey und Reichstette darinn benennt unnd Lutz von Freiburg als Burgern der Stadt Ulm,” 1538.

<sup>377</sup> Munich 2019, Q7, “Ursachenn cum Annexa petitione et protestatione,” 1538.

<sup>378</sup> Munich 2019, Q8, “Petitio,” 1538; Q9, “Supplicatio pro Rescripto,” 1538. The plaintiff then submitted corrected versions of the Citatio and Petitio Summaria in Q10, “Copia Citationis,” 1538; and Q11, “Petitio,” 1538.

<sup>379</sup> *Possessio vel quasi* refers to incorporeal property. See Marta Madero, “The Servitude of the Flesh from the Twelfth to the Fourteenth Century,” *Critical Analysis of Law* 3, no. 1 (2016), 151; and Karl Stehlin, “Die Exemptionsformel zu Gunsten der Schweiz im Westfälischen Frieden,” *Anzeiger für schweizerische Geschichte* 15, no. 1 (1917).

<sup>380</sup> Munich 2019, Q16, “Exceptiones protestationes unnd erpieterrn Cum annexa petitione,” 1540: “das der gemelt Ludwig von Freyberg und seine voreltern vonn zehen, 20, 30, 40, 50, 60 und mer jar dann kain mensch

forefathers, had the right to appoint and remove the priest of the parish and its vicar. This appointment, however, was conditional on the approval of Philip von Rechberg (the plaintiff) as the representative of the Bishop of Constance. In the past, these appointments had been approved without incident—until the most recently appointed vicar.<sup>381</sup>

### *A Matter of Religion*

The conflict began, said the defendant, when Hans Moßberg was appointed vicar, and neither preached nor in other ways behaved as a vicar.<sup>382</sup> Eventually he departed from the parish.<sup>383</sup> So Ludwig von Freyberg appointed another vicar “who would deliver the pure, clear, plain Gospels and word of Christ”<sup>384</sup> without “any human ornament or addition.”<sup>385</sup> Indeed, Ludwig “considered the teaching and preaching of this vicar as Christian and in line with the holy Gospels.”<sup>386</sup> It was after this appointment that Philip von Rechberg brought this suit against Ludwig von Freyberg, saying that he illegally took to himself the administration of the parish and improperly redirected its incomes away from Hans Moßberg. In doing so, Philip von Rechberg ignored the fact of the former vicar’s own departure, and that it had been the custom since time immemorial that the present vicar be paid through parish incomes. Ludwig denied that his actions constituted a Land-Peace violation, or a confiscation of the incomes of clergy.<sup>387</sup>

The entire dispute, said the defendant, came down to Philip von Rechberg’s objecting to the new vicar they appointed. He “has no other objection to this vicar, except that he does not

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gedenckenn mag in ruwigen inhabenn gewer, und quasi possession gewesen und noch seyn der lehenschafft der pfarr zu Opffingen unnd das sie derselbenn alwegenn und ye recht patroni gewesen unnd noch seien also das jus patronatus dem gemelten vom freyberg und seinem voreltern alwegenn und je zugehort unnd noch zugehoren.”

<sup>381</sup> Munich 2019, Q16, “Exceptiones protestationes unnd erpieterrn Cum annexa petitione,” 1540: “das alle und yede so seine vicarien gewesen, durch den gedachtenn Ludwigen vonn Freyberg angenomen und alwegen besetzt und entsetzt wordenn seienn, welche er auch die pfarr also verwaltenn lassen one alle irrung und widersprechen biß uff jungsten ernembten und gesetzten vicarien.”

<sup>382</sup> Munich 2019, Q16, “Exceptiones protestationes unnd erpieterrn Cum annexa petitione,” 1540: “das der gemelt Hanns Moßberg nit predigen und sich sonst dermassen gehalten auch sunst anders geubt.”

<sup>383</sup> Munich 2019, Q16, “Exceptiones protestationes unnd erpieterrn Cum annexa petitione,” 1540: “das gedachter hanns moßberg also vonn der pfar abgewichenn.”

<sup>384</sup> Munich 2019, Q16, “Exceptiones protestationes unnd erpieterrn Cum annexa petitione,” 1540: “das vil gemelter vonn Freyberg seinem lang hergeprachten und erssennem gebrauch nach ainem andern Vicarien gesetzt der ime und seinen underthanen das Rain, clar, lautter, evangelium und wortt Christi verkunthen soll.” (This clause is underlined in the case file, most likely by a judge.)

<sup>385</sup> Munich 2019, Q7, “Ursachenn cum Annexa petitione et protestatione,” 1538: “gedachts Lutzenn vonn Freybergs beger und gemuth allein sey zu seiner hohen und nider oberkhaitt ein Cristenlichen verkholder des hailigen wortt gotts, dasselbig auch on allen menschlichenn than [Tand] oder zusatz, rheim, lautter zu predigenn und zuverkhunden, zu habenn.” Though not named in the case file, this is most likely referring to Georg Keller. See Sailer, “Öpfingen im Mittelalter.”

<sup>386</sup> Munich 2019, Q16, “Exceptiones protestationes unnd erpieterrn Cum annexa petitione,” 1540: “das vielgemelts vonn Freyberg seines gesetzten vicarien leer predigenn fur christenlich und dem heilligen evangelio gemes halt.”

<sup>387</sup> Munich 2019, Q16, “Exceptiones protestationes unnd erpieterrn Cum annexa petitione,” 1540: “damit dann e.g. aigentlich und gruntlich vernemen, das gegenwurtiger spann kain landtfridbruch noch entsetzung noch das Ludwig von Freyberg willenns gewesen oder noch nit seie, ime her Philipsen... als ainem gaistlichen die rent und gult zunemen, oder ine derselbenn zuentsetzenn, so erpuett er sich frei willig und will sich des hiermit vor e.g. offentlich bewilligt und protestirt habenn, das er ime von Rechberg alle usstende nutzung auch was kunfftiglich verfallenn wurd und uber die gewonlich und lang herpracht underhaltung aines vicarienn unnd vogt recht bevor stet verfolgenn zulassen wie vonn alter her einzubringen.”

like his faith and teachings, which, however, Ludwig von Freyberg considers truly Christian and the word of God.”<sup>388</sup> Thus, “all of the conflict has to do with the faith and religion.”<sup>389</sup>

The defendant party thus argued that he in fact inherited the right and authority to administer the parish, and to appoint and de-seat a vicar, conditional on the approval of the Bishop of Constance or his representative; and that customarily, certain parish incomes went directly to the vicar. He thus challenged the claims the plaintiff made in terms of patronage rights, and then, by presenting the chronology—beginning with the departure of Hans Moßberg, and leading up to the launching of the suit—suggested that Phillip sued Ludwig only because Philip objected to the new vicar because he did not agree with his faith and teachings.

As we will see in Chapter 4, Philip von Rechberg found himself in the position of having to insist that the dispute was not primarily about letting the parish remain with “the old Christian usages and ceremonies,” as he had initially said, but rather, was primarily a matter of *jus patronatus*, property, the right of appointment, and spoliation, and a violation of several layers of imperial law including recent Recesses. He had to elide the Reformation context in order to strengthen his case.

### Highest Advocate of the Christian Church

In April 1532, the Imperial Chamber Court summoned the mayor, council and commune of Bremen, plus “the 104 men of that city,” regarding a suit brought by the entire clergy in and around Bremen.<sup>390</sup> The case file—though containing no special protocol (indicating that the judges never called for its compilation), and no documentation that indicates a response by the defendant parties—provides a snapshot of the ways in which issues of property and faith were translated into familiar legal idiom.

The “104-Man Revolt” of 1530 began as a “citizen protest over access to the city’s pasturelands.”<sup>391</sup> It was led by a committee of 104 elected representatives—four for each of the area’s twenty-six parishes. “By 1532 growing violence prompted the council to exile several antireform magistrates and to permanently remove the cathedral chapter from the city,” and to introduce evangelical preaching into the Bremen Cathedral that year.

In the Mandate, the Court wrote:

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<sup>388</sup> Munich 2019, Q16, “Exceptiones protestationes unnd erpieterrn Cum annexa petitione,” 1540: “das der gedacht herr philips von rechberg kain ander einred noch widersprechen hatt, dann allein das ime der vielgemelt jungstgesetzt vicarii seins glaubens und leer halb nit gefellig welche doch Ludwig von Freyberg fur ain gerechte waren Cristenliche wer und wortt gottes helt.”

<sup>389</sup> Munich 2019, Q16, “Exceptiones protestationes unnd erpieterrn Cum annexa petitione,” 1540: “das also allain aller spann glaubenns und der religion halb ist.”

<sup>390</sup> Staatsarchiv Bremen 6,1 (RKG) Nr. B24 (“Bremen B24”), no quadrangle, second document in case file, “Mandatum penale cum executione,” 1532: “Wir [...] embieten den ersamen unnsern und des reichs liebe getrewen Burgermaister Rat gemainde und sonnderlich den hundert vier mannen der stat Bremen so von ainer gemain daselbst zu oberkait vermaint erwelt sein sollen unnsern gnad und alles guts Ersamen lieben getrewen unns haben die Ersamen unnsrer lieb andechtig Brobst dechant und Capitl des Erzstifts Bremen desgleichen prelaten Brobst dechant Capitl annderer stiftkirchen Closter und Gotzheuser, auch pharrer vicari und gemain phaffhait und clerisey in der stat auch ausser halb so in dem erzstift Bremen wonen mit clag furbringen unnd zuerkennen geben.”

<sup>391</sup> Jason L. Strandquist, “Bremen,” in *Dictionary of Luther and the Lutheran Traditions*, ed. Timothy Wengert (Grand Rapids, MI: Baker Academic, 2017), no page numbers online, accessed August 7, 2018, <https://books.google.com/books?id=i9HIDQAAQBAJ&lpg=PT194&ots=GitXHATall&dq=revolt%20of%20104%20men%20Bremen&pg=PT194#v=onepage&q&f=false>.

According to written law, the Golden Bull, the kingly Reformation, the established Land-Peace and our and the Empire's ordinances—no one may plunder or deprive someone of what he holds in peaceful possession.<sup>392</sup> Yet, in recent days, the clergy of Bremen have been degraded and plundered in their freedom, jurisdiction, grounds, gardens, and pastures of the village Utbremen, including their agricultural land and rights.<sup>393</sup>

The Mandate was general about the facts, and there was no mention of the ways in which this property dispute was tied up with evangelical teachings. By the time this suit was brought, the clergy of Bremen could have invoked the Recess of 1530, for instance, against the introduction of evangelical preaching in the Cathedral. But they did not; they only invoked long-established norms and laws regarding property, and only by inference did they make reference to any more recently established recesses.

The Mandate continues:

And they humbly call upon us, that we, as the highest advocate (*Vogt*) of the Christian Church, make right against your violent, self-authorized actions with imperial relief.<sup>394</sup> Whereas no one should be dispossessed outside of law with violence of what he holds in peaceful possession, and since we are disposed to law and equity, therefore, we command you to pay the heavy penalty stated in the above-mentioned imperial recesses and ordinances of 50 marks lötigen golds—half to us in the Court and half to the plaintiffs. And that within fourteen days of receiving this mandate, you return to the clergy all of their freedoms, jurisdictions, and lands unconditionally, that you completely restitute them and that you leave them undisturbed. However, if you would like to submit an alternative *narrata*, or to offer objections and legal causes for the above actions, then we summon you to the Court.

This invocation of the Court, that “we”—recall that all Court mandates and summons were written in the name of the Emperor, so it is to him the clause refers—as the “highest advocate (*Vogt*) of the Christian Church,” is not customarily used in such a document, and seems to be a subtle effort to index the faithful context of the dispute. In the 1530 Augsburg Recess, the Emperor used the very same expression, referring specifically to the Emperor in his capacity as the worldly representative of the Church, who held a duty of protection towards it.<sup>395</sup> But this

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<sup>392</sup> Bremen B24, no quadrangle, second document in case file, “Mandatum penale cum executione,” 1532: “Wiewol nach vermog geschribner Recht gulden Bullen kuniglicher Reformation aufgerichteen Lanndtfriden und unnsrer und des Reichs ordnung niemant den anndern seiner hab gueter und ruebiger possession spoliern und ensezen.”

<sup>393</sup> Bremen B24, no quadrangle, second document in case file, “Mandatum penale cum executione,” 1532: “so sollet jedoch in kurzverruckhten tagen dieselben clerisey irer freyhait jurisdiction grundt Sarten(?) heve und waidlanndt, des dorffs utbremen sambt seiner veldmarckh und gerechtigkeit entwert und spoliert haben, des sy sich merckhlich und zum hochseten beschweren.”

<sup>394</sup> Bremen B24, no quadrangle, second document in case file, “Mandatum penale cum executione,” 1532: “und unns darauf diemutiglichen anruffen und bitten lassen, das wir als oberister vogt der cirsteliche kirchen, gegen solchen eurn gewaltigen thatliche hanndlungen unnsrer kayserlich notdurfft umsehen zuthuen gnedigklichen geruchten.”

<sup>395</sup> See section 10 of 1530 Augsburg Recess, for example, in Senckenberg, *NSRA II*, 309. See also *Handwörterbuch zur deutschen Rechtsgeschichte*, vol. 5, s.v. “Vogt, Vogtei,” by D. Willoweit, 932-46.

was the only subtle, though out of the ordinary, indication we have that this property dispute concerned church property and church litigants, against a backdrop of reform in the city.

### The Priest's Lutheran Lawyer

Some cases during this period in the Imperial Chamber Court, though not Reformation cases, make legible the Lutheran leanings of a litigant in order to achieve a particular end in the litigation—though sometimes that end is not so clear.

Take for instance the case of Christoph Hoss, doctor of laws and procurator at the Imperial Chamber Court since 1522, who in 1530 sued a priest, Johann Purpner, then vicar at the Speyer Cathedral, for unpaid wages. Hoss had served “in a most loyal way”<sup>396</sup> as Purpner’s lawyer in a case against the commune at Kappelrodeck (Cappel unter Rodeck) where Purpner was formerly curate/rector. Between 1526 and 1531, Hoss had carried out a variety of judicial and extra-judicial tasks, including the production of some extensive documents at his own expense, without remuneration for his labor, other than four gulden given at the time the contract was made.<sup>397</sup>

In his *Replik*, Purpner claimed first of all that he paid more than the four gulden Hoss claimed.<sup>398</sup> More importantly, it was Hoss who at a certain point in the proceedings abandoned his appointment, leaving Purpner alone in the case,<sup>399</sup> doing so both against imperial law, as well as his promise that he would serve as advocate, procurator, solicitor and councilor in his matter. He did so suddenly after a September 1 administrative decision in the case, in which the Court ordered Hoss to settle the *litis*. Hoss even kept with him many of the documents that Purpner needed in order to continue to pursue the matter.<sup>400</sup>

Then Purpner said that he did not know what the cause was for Doctor Hoss’s leaving him in the middle of the proceeding, but that he speculated that it was because Hoss had overheard him saying to his father that Doctor Hoss was Lutheran and therefore wondered whether he could trust him to carry out his affairs. He could think of no other reason, he said, why Hoss would no longer want to serve as his advocate and procurator, for he had otherwise treated Hoss with nothing but friendship.<sup>401</sup> He described the complications that Hoss’s unexplained abandonment of the case posed for the legal proceedings, and sought restitution for the costs and disadvantages that this caused him.

Hoss for his part responded that this *Replik* was unfounded; he denied that he received any of the additional payments that Purpner outlined.<sup>402</sup> But he did not address the statement that he abandoned the case, or about his being Lutheran. And in a final document submitted by Purpner the issue of his being Lutheran was not brought up at all; instead, he used language that

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<sup>396</sup> Landesarchiv Speyer E6 (RKG) 812 (“Speyer 812”), Q2, “Copia supplicationis pro citation ad videndum taxari labores,” 1535: “zum getrewlichsten gedeint.”

<sup>397</sup> Speyer 812, Q2, “Copia supplicationis pro citation ad videndum taxari labores,” 1535.

<sup>398</sup> Speyer 812, Q6, “Replie et Conclusiones in eventum,” 1535.

<sup>399</sup> Speyer 812, Q6, “Replie et Conclusiones in eventum,” 1535: “mich an meinem rechten verlassen.”

<sup>400</sup> Speyer 812, Q6, “Replie et Conclusiones in eventum,” 1535.

<sup>401</sup> Speyer 812, Q6, “Replie et Conclusiones in eventum,” 1535: “Gnediger her, waß doctor Hossen darzu verursacht mitten in meinem rechten zu verlassen hab ich nit wissen. Es were dan die ursach, umb das ich zu meinem Vatter hab gesagt, ich habe vernommen, daß doctor Hoss Luterrisch sey, ob ich imme durffe vertrauen, mein handel zu fueren, daß mir doctor Hoss hatt uff gehalten, ob er mir deß halben nit mer wollen Advociern Statt in seinem wissen, dan ich ime sonst nichts gethon sonnder alle fraindtschafft, wie ich hab kondth bewisen.”

<sup>402</sup> Speyer 812, Q7, “Conclusiones,” 1535.

had to do with the duty of office of an Imperial Chamber Court procurator, that his actions were not motivated by noble purposes, but rather “*sub rusticulum animum.*”<sup>403</sup> In the end, the plaintiff, Hoss, won the case, with Purpner obligated to pay a certain amount.<sup>404</sup>

In 1531, Christoph Hoss was “reminded” after a 1531 visitation of the Court to abide by the terms of the 1530 Augsburg Recess in points of the religion; by this point, it was known that Hoss was Lutheran.<sup>405</sup> It was first in 1548, however—after the four-year hiatus of the Court, and the Schmalkaldic War—that Hoss and several other Lutheran procurators were fired from the Court.<sup>406</sup> He was reinstated either in 1553 after the Passau Treaty, or in 1555. He died in 1558 or 1559.

## Recently Ordered Peace in the Religion

In April 1540, Count Martin of Wallerstein, represented by Dr. Lukas Landstraß, sued Count Ludwig the Elder of Öttingen due to events concerning the St. Jacobs parish church at Öttingen.<sup>407</sup> Sometime between 7 and 8 o’clock in the morning the day after Laetare Sunday (March 18th), Count Ludwig allegedly sent a servant, Wolffen Riethmuller, to the sexton of the parish church at Öttingen to take the key of the church away from him, and locked up the church. Around this time, a citizen of Öttingen gave birth, and desired a baptism for her baby “according to old praiseworthy custom”; but she was prevented from the baptism, and forbidden to even seek out the sexton for that purpose. Instead, she was forced to have the baptism done in another place outside of the city. Then, “unsated with this,” on the following day, around 9 o’clock in the morning, Riethmuller, along with a secretary named Bietsch Serretan, went to the chaplain of St. Sebastian church, who was serving also at St. Jacob “because no orderly pastor or priest who was according to the old praiseworthy usages had been presented or invested or ordained there in the parish,” and ordered him to “completely stop all of his religion, ceremonies, as well as all access and usage of the parish church, because Count Ludwig would no longer tolerate it as the religion in that parish church.”<sup>408</sup>

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<sup>403</sup> Speyer 812, Q8, “Conclusiones in eventum contra pretensas conclusiones,” 1536: “und wo purpner gepuret so mochte er mitt gutter wissen sprechen das doctor hos nit generosum, sonder sub rusticulum animum et ab on(?) officii pietate humanaeque alienum gehapt hete, das er purpner kein trüw und wolthonen von doctor hosen beremen kan, wie wol ers genaigt were.”

<sup>404</sup> Ironically, Johann Purpner seems to have pursued his own case for withholding of income, in completely different circumstances. In 1530 he was asked to leave his position because he had lost his voice, but proved to be a bit of a troublemaker in putting up a fight against this; see Gustav Bossert, “Beiträge zur badisch-pfälzischen Reformationgeschichte, III. 1529-1546,” *Zeitschrift für die Geschichte Oberrheins* 18 (Heidelberg: Carl Winter’s Universitätsbuchhandlung, 1903), 227ff, accessed July 4, 2019, <https://archive.org/stream/zeitschriftfrdi20langoog>.

<sup>405</sup> Baumann, *Visitationen*, 125.

<sup>406</sup> Malte Hohn, *Die rechtlichen Folgen des Bauernkrieges von 1525. Sanktionen, Ersatzleistungen und Normsetzung nach dem Aufstand.* (Berlin: Duncker & Humblot, 2004), 281-2 and the literature cited there. *Zeitschrift für Bücherzeichen, Bibliothekskunde und Gelehrtengeschichte* 6 (1896) 107, accessed July 4, 2019, <https://books.google.com/books?id=mF1xQAAMAAJ&pg=PP11#v=onepage&q&f=false>.

<sup>407</sup> Bayerisches Hauptstaatsarchiv (RKG) 1476 (“Munich 1476”). Count Ludwig the Elder began introducing Reformation in 1539. See Reinhold Herold, *Geschichte der Reformation in der Grafschaft Oettingen, 1522-1569* (Halle: Verein für Reformationgeschichte, 1902).

<sup>408</sup> Munich 1476, Q2, “Copia mandate penalis,” 1540: “... (dieweyll kein ordenlicher pfarer oder priester, der nach altemloblichen gebrauch presentiert und investyert auch nit ordiniert unnd geweyset alda uff der pfar gewesen) bevolhen, in der pfar zuversehen verordnet haben, ime dem Caplan zu sagen unnd zugebieten, das ehr sich gemelter pfar kirchen mit seinen Religion Ceremonien Zugang unnd gebrauch genzlich enthalten solte, dan dir

These acts, the Mandate continued, went against the “praiseworthy, Christian usages” such as “holding mass and other holy and Christian sacraments, offices, and ceremonies” which have remained undisturbed and without any kind of hindrance at St. Jacobs church for “longer than human memory stretches.”<sup>409</sup> Not only did Count Ludwig lack any authority to hinder access or usage of the church,<sup>410</sup> but in so doing he also violated imperial law: “our imperial edict and mandate and our and the Empire’s Land-Peace, as well as numerous promulgated recesses and in particular, the recently ordered peace in religion, in which it is ordered and demanded, that no one, on account of faith, religion, or any matter may burden, insult, afflict, disturb or hinder another.”<sup>411</sup>

In order to avoid the penalty provided for “in the Empire’s Land-Peace and Peace in the religion”—namely the *Acht*—Count Ludwig was ordered to “leave undisturbed all and every holy Godly office, ceremony and usage of the holy Christian Church, as from ages inherited and praiseworthily maintained, without any hindrance, burden or antagonism” and to leave all images, and church items unchanged, unshaken, and undisturbed and to show himself to be obedient and acting in accordance with imperial ordinances and recesses.

In June, the Court sent a *Citatio Executionis* to the Count for having failed to obey the terms of the Mandate; specifically, although the court messenger reported having successfully delivered the Mandate to his usual residence, and recorded his receipt of it, nonetheless, when someone was sent to collect the key from his servant Riethmuller, he responded that he knew of no mandate, and had no order to do anything.<sup>412</sup> And when that person was sent to the Count himself, the Count “hotly” responded that he had nothing to carry out with respect to the Mandate. In so doing, the *Citatio* said, the Count was in danger of bringing upon himself the *Acht*, and so should respond to this summons.

In October, the defendant Count Ludwig appointed Dr. Christoph Hoss and responded with an *Exceptiones cum annexa petitione* in which he declined the jurisdiction of the Court, first on the basis that as a direct imperial subject there were certain rules contained in the Court’s ordinances regarding when one may be sued in the first instance there, and that this case did not count among them; nor may the party sue on account of *Rechtsverweigerung* (the denial of justice at a lower instance).<sup>413</sup>

And second, he declined the forum on the basis “that you, judges, in matters concerning Christian faith and religion, and all that flows from it, according to written law, have no jurisdiction. Now it is however the undeniable truth that the present matter is nothing other than one concerning the religion, as the plaintiff’s own narration indicates. Therefore, the present matter, according to its place and nature, is to be adjudicated before an ecclesiastical forum

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die alt Religion in gemelter pfarkirchen lennger zgedulden nit gelegen sein wolte.”

<sup>409</sup> Munich 1476, Q2, “Copia mandate penalis,” 1540: “vil lenger here dan sich menschen gedechtnuß erstreckt nach loblichen Cristlichen gebrauch mit meshalten unnd allen andern heyligen unnd Cristenlichen Sacramenten Ampten unnd Ceremonien [...] auch bey der heyligen Cristenlichen kirchen, satzungen, ordnungen wolher gebracht gebreuchen unnd gewonheyten unbetruebt und on menigklichs verhinderung plieben.”

<sup>410</sup> Munich 1476, Q2, “Copia mandate penalis,” 1540: “weder fueg noch recht gehabt oder noch habest.”

<sup>411</sup> Munich 1476, Q2, “Copia mandate penalis,” 1540: “auch zuo solchen in unnsern kayserlichen Edict unnd mandat unnd unnsern unnd des reichs lanndfrieden unnd vielen auffgerichten abschieden unnd sonnderlich jungsten unnsern kay. in den Religion bevolhnen frieden geordnet unnd gebetten seye, das niemandts den andern des glaubens Religion oder annderer Sachenhalb beschwerem, belaidigen, betrueben, irren oder verhindern sole.” Referring to the Peace Mandate of 1532, promulgated as part of the Regensburg Recess.

<sup>412</sup> Munich 1476, Q3, “Copia Execute Citationis,” 1540.

<sup>413</sup> Munich 1476, Q7, “Mandatum constituciones,” 1540.



(*coram iudice ecclesiastico*).<sup>414</sup> Unlike other cases we have seen in which ecclesiastical jurisdiction referred to the spiritual courts, here, in the context of the Nuremberg Settlement, he is referring to a Christian Council. He defended this on the basis of the 1532 Nuremberg Settlement, which required a pause to all processes in matters concerning Christian faith and religion, until a free common Christian council or national assembly; followed by multiple imperial and kingly missives and directives to the Court saying as much.<sup>415</sup>

These arguments did not convince the Court, which required the litigants to settle the *litis* in October of 1540. The plaintiff's Positions and Articles restated his account in article form, with some added detail including the claim that by Count Ludwig's locking of the Church, the subjects at Öttingen were "plundered and confiscated of their old praiseworthy, inherited church usages, sacraments, baptism and ceremonies."<sup>416</sup> This striking use of "plunder" and "confiscation" normally reserved for property disputes, was used here to describe the forbidding and removing of access to use of the church, with all that entails in terms of sacraments and ceremonies. More than simply ignoring the Court's Mandate, when representatives of Count Martin went to Count Ludwig's servants to retrieve the key, open the church, and reestablish the holy Christian ceremonies, they responded derisively that Count Ludwig had the Church locked up, and would unlock it in his own time. When Count Martin, "as a lover of the true religion" sent servants to open the Church themselves "without violence," the servants of Count Ludwig locked it up again and threatened them with words of violence, including that they would "clobber them over the head." And so, to avoid violence, the servants of Count Martin left with it still locked up.<sup>417</sup> All of these behaviors were evidence of Count Ludwig's and his consorts' "arrogance," "animosity, and hatred."<sup>418</sup>

### ***Or a Matter of Religion?***

In May 1541, Count Ludwig responded to the Positions and Articles with a document, titled "A reminder of the imperial majesty's suspension and pausing in the matter of the religion, with annexed petition" in which he argued that he had no obligation to take part in this proceeding because the judges of the Imperial Chamber Court cannot be the "*competens iudex*" in this case because "all processes concerning the religion, and under the appearance of the

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<sup>414</sup> Munich 1476, Q6, "Exceptiones cum annexa petitione," 1540: "aus dissem grundt, das e.g. in sachen Christlichen glauben und religion betreffend und allen daraus fliessende noch besagt geschribner recht kein jurisdiction gepueren. Nhun ist aber die unwidersprechlich warheitd das presens causa nichts anders dan tueram(?) religione belangen thut, uf die narrate ausgangner proceß dasselbig augensheinlich mit bringen sich gezogen. Also das gegenwerts sach irer ort unnd natur nach coram iudice ecclesiastico zu rechtvertigen ist."

<sup>415</sup> More on this in Chapter 4.

<sup>416</sup> Munich 1476, Q8, "Positiones et Articuli," 1540: "das also seiner gnaden underthannen zu Otting ir altenn loblichen herbrachten kirchen preuche Sacrament Tauffs und Ceremonien durch versperrung der kirchen biß uff den heutigen tag gewaltiglich spoliert unnd noch entsetzt seyenn."

<sup>417</sup> Munich 1476, Q11, "Testamenten davon das penal mandat meldung thut," 1540: "Dardurch unser gnediger her als ain lieb haber der warhafften religion geursacht das seiner gnaden geordenten solchen der pfarkirchen zugang on alle gewaltsame durch ain ainige person haben geoffnet zu dem ampt benten(?) und das selbig halten wollen aber Grave Ludwigs diener die selben Kirchen widerumb worspert und Grave Martins Capelan und gesanten auch den schlosser der hievor auffgethon mit beschwerlichen tronworten(?) und emporung ime schlosser werd so er ferner auffthue der Kopff erschlagen und so sich d geordenten ains solchen anmassen werden man mit inen zum haitzen(?) treten und sollen also on schanz und gefar besten neben andern unzeitigenn hitzigen tronworten violenter hinwegk und abgetaben(?).

<sup>418</sup> Munich 1476, Q11, "Testamenten davon das penal mandat meldung thut," 1540: "hochmut, neid, haß."

religion, as flowing from or out of it”<sup>419</sup> were to be suspended. This was according not only to earlier recesses and settlements, but was most recently repeated in an order from the Emperor that came out of the Regensburg Diet of 1541.

It is evident, he argued, from the language of the plaintiff’s own narration that this is “purely and entirely a matter of religion.”<sup>420</sup> And as Count Ludwig was one of the protesting estates, that suspension applied to him as well.<sup>421</sup>

In August 1541 the defendant submitted another document titled “Causes and reminder of the imperial recess and the Emperor’s declaration that followed at Regensburg in religion matters, along with attached request,” which reproduced a letter sent to the lawyer Christoph Hoss by his principal, defendant Count Ludwig, basically restating his understanding that the Regensburg Recess, and an imperial declaration that followed it, made it clear that the Imperial Chamber Court must pause religion matter cases; and asked that the case be suspended, and the plaintiff no longer heard, and that no further decisions come down in the case.<sup>422</sup>

In 1542, both Counts came to a compromise, that reformed worship would happen in St. Jacob and old-faith worship in St. Sebastian, and that parish incomes would be evenly divided for priests of both churches.<sup>423</sup>

In this case, we see that beginning in the early 1540s, there began to develop a language of a “religion-peace” as a new kind of legislative form, on the template of the Land-Peace. In this case, the plaintiff described the relevant portions of the Regensburg Recess of 1541 that forbade violent confiscations and the like as “the recently ordered peace in religion.”<sup>424</sup>

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<sup>419</sup> Munich 1476, Q14, Erinnerung Ro. Key. Mt. Suspension und anstellung in sachen der Religion cum annexa petitione,” 1541: “das alle proceß die religion sachen belangen und under dem shein der religion als darvon herr oder daraus flissendt.”

<sup>420</sup> Munich 1476, Q14, Erinnerung Ro. Key. Mt. Suspension und anstellung in sachen der Religion cum annexa petitione,” 1541: “Item ist die unwidersprechlich warheidt das gegenwurtig sach aus der religion herrurdt unnd ein tanter pur religion sach ist sich dessen uf die narrata f.G. vender(?) außgangen penal Mandaten referiert und gezogen.”

<sup>421</sup> Munich 1476, Q14, Erinnerung Ro. Key. Mt. Suspension und anstellung in sachen der Religion cum annexa petitione,” 1541: “darzu wolgedachten graf einer aus gemeines(?) protestierenden stenden und der religion zu gewandten derhalben vormag key. Suspension deren der beclagt grafen alieege(?) anhangen will Bit demnach anwalt den beclagten seinen g. hern bey Ro. Key. Mt. suspension und anstellung in massen hieoben deduciert ist in religion sachen wie andere protestierende stende und zugewandten pleiben zulassen.” More on this identification with the protesting estates in Chapter 5.

<sup>422</sup> Munich 1476, Q15, “Ursachenn und erinnerung des Reychs abschiedt und kay. mt. daruff gevolgter declaration zu Regenspurg in Religionn sachen sampt angehanckten bitt,” 1541: “Diewyl in der Raychs abscheidt und key. Mt. declaration daruff gevolgt lauter und mit claren Worten begriffen und verabscheydet ist, das das key. Camergericht in Religion Sachen gegen meniglich still steen und nit weyther procidiren, sollt ich uff des widertheyls anhalten umb handlung sollichen des Reychs abscheidt und stillstandt ains key. Mt. declaration exception weyß, warumb E.G. gegenwurtiger sachen nit Richten werenn zurwenden und mich keins wegs vor E.G. einlassen in ansehung das alle Religion sachen wie die genannt vermög angezogen Regenspurgischen abschidts suspendiret und in eynen stillstandt khom weren. Will also auß sonderm schriftlichen bevelch E.G. des Reychs abschiedt und key. mt. declaration daruff gevilgt also erinnert haben. underthenniglich bitten die wolgedachtigen Grave Ludwigen bey dem thanige so durch der stend des Raychs und key. mt. zu Regenspurg verabschiedet worden pleyben und gemessen zulassen und den widerthayl mit seiner vermeinten rechtvertigung und anruffen nit zuhorenn als sich anwaltds g. herr endtlich zu E.G. auß oberzelten furprachten ursachen versehen und verfernern urtheylen und erkhamussen nit unschweren(?) oder dem widerthayl waythero Proceß erkennen.”

<sup>423</sup> Herold, 20.

<sup>424</sup> Also in Landeshauptarchiv Sachsenanhalt Standort Wernigerode Rep. A53 No. H156 (“Wernigerode H156”), Q5, “Peticio summaria articulirta uff die pen den land friden,” 1550: “das uff dem gehaltenen reichstag zu Regenspurg anno 41 von der Kay Mt und den stenden des heilligen reichs sonderlich gesetzt und geordnet das in der religion und glaubens sachen auch sunst khainer ander ursach willen, wie die namen haben möchte, niemants hoch

Yet, the defendant insisted for his part that the key element of the Regensburg Recess was its confirming the Nuremberg Settlement of 1532 which ordered a suspension of all “matter of religion” disputes before the Imperial Chamber Court.

What is so striking about this case is that we see that the “matter of religion” and the “peaces in religion” were operating as parallel imperial sources of law. The next chapter examines the “matter of religion.” In chapter 6, we will see that the “peace in religion” swallowed up the “matter of religion.”

## Conclusion

Collectively, these cases illustrate the variety and range of the sources of law cited by parties in the cases, and the ways in which the cases were litigated under issues of property, peace, and jurisdiction laws. We have also seen a range of ways in which parties elevated or downplayed the Reformation context of a dispute.

In the dispute between Johann Fabri and the city of Lindau, Fabri sued the city for illegally seizing his rights, authorities, and incomes as parish priest there, and redirecting them to two “misguided” preachers; and for denying appointed administrators access to the city. In that case, Fabri cited a variety of legal authorities, including the common law, the imperial constitution, the Land-Peace, the 1521 Edict of Worms, and the 1526 Imperial Recess of Speyer. In response, the city cited an imperial privilege limiting the forums in which they could be sued, “both godly and spiritual laws,” and the nexus of authorities that made the dispute a “matter of religion” (to be discussed in Chapter 4). This is the only case I have seen in which the Worms Edict was cited by the plaintiff as one of the laws of which the defendant was in violation.

We have also discussed a case in which the imperial Fiscal sued the city of Erfurt for facilitating attacks on the clergy by a mob, for failing to punish the culprits of those attacks, and for forcing the two collegiate churches in Erfurt to agree to sacrifice financial autonomy and large sums of wealth in exchange for nominal protection. He said that the city had violated “honor, law, propriety, the holy Empire’s laws,” and the city’s own “duty and oaths,” which referred to the proper lordship relationship. Interestingly, despite the Reformation context of the so-called “parson storms,” the Fiscal did not sue on the basis of the Worms Edict. Both parties used the *narratio* portion of their legal filings to provide the “true” version of events. The defendants, for instance, argued that the Fiscal was suing the city on its own prerogative, rather than on behalf of the clergy, with whom the city had a good relationship. The defendants also cited “imperial and Church laws” according to which the Fiscal may not sue in disputes concerning spiritual persons and goods before the worldly court; as well as the imperial law that provided that no estate may be proceeded against in a foreign court (referring to a concurrent dispute in the Papal Court concerning the same facts). The case ended up being settled outside of Court in the Treaty of Hammelburg.

The third case we discussed had to do with property in the village of Habenhausen. The plaintiffs sought the Court’s help in executing the terms of a Papal judgment because the worldly authority that would normally be expected to do so—the city of Bremen—was inclined towards

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oder nider standts bis zu endung gemainer oder nacional concili den andern vertriben, bevedhen, bekriegen, berauben, fachen, etc. noch darzuhelffen oder furstub thuon, sonder ein jeder den andern mit rechter freuntschafft und cristlichen lieb mayen und die khirchen unzerbrechen und umbgethan und einen ieden bey dem so er noch in possess bleiben lassen etc. alles bey vermeidung der kay. mt. schwerer ungnadt und straff darzue der pen in ußgebhunten khayserlichen landfriden begriffen.”

the Lutheran teachings, and so, they claimed, could not be trusted to carry out the ruling of the Papal court.

In the dispute between the Archbishop of Bremen and the city of Bremen, the Archbishop's original allegations concerning the plunder of a monastery and appointment of Lutheran preachers were set aside in light of counter-allegations brought by the city that the Archbishop had seriously burdened the city and its citizens through costly and dangerous ventures. The Archbishop argued that in bringing these counter-accusations, the city was attempting to gain direct imperial status, thus litigating the question of lordship which was properly reserved to other forums.

A few years later, the Archbishop again sued the city of Bremen, this time for injuring the "honor, lineage, and status" of the Archbishop by supplicating to the Emperor for protection from the Archbishop's alleged "tyrannical and unchristian violence." In another case in Hildesheim, the Bishop of Hildesheim sued a Lutheran preacher there for inciting his followers to threaten and violently attack clergy and church property. In yet another case, a former city official's complaints to the Emperor regarding the reforms of the city of Memmingen led to his execution, despite an imperial letter of protection.

Several of the cases discussed in this chapter also made arguments that the dispute was a "matter of religion" and therefore did not belong before the Imperial Chamber Court. It is to those arguments we now turn.

## CHAPTER FOUR

### SHIFTS IN DISPUTATIONS TOWARDS “MATTERS OF RELIGION”

This chapter is about the protesting estates’ experimental and extraordinary, multi-layered claim, beginning around 1529, that a number of disputes that were then pending in the Imperial Chamber Court, though formally about matters of property, peace, or jurisdiction, in fact flowed from disputes concerning “matters of religion.” Therefore, they argued, the Court had no jurisdiction to adjudicate in these cases, and the background disagreements that gave rise to these disputes should be treated collectively by a free Christian Council.<sup>1</sup>

On its face, this may seem like a straightforward objection to the forum, a claim about temporal versus spiritual jurisdiction. But in fact, as we will see, this claim was extraordinary, for several reasons. First, in this period, “religion” had no specifically legal meaning.<sup>2</sup> It was unconventional to use that term to denote a certain legal forum or object of dispute. Second, to say that something was a matter of religion was to put it in a jurisdictional no-man’s-land. A dispute concerning a “matter of religion,” they said, did not belong in the Imperial Chamber Court as a temporal court. Nor did it belong in an ecclesiastical or spiritual court; it did not, in other words, assimilate or overlap with “spiritual matters” as they were understood legally at the time. Rather, according to the protesting estates, the nature of the disputes had no proper existing forum, other than the extraordinary forum of a Christian Council. Third, the protesting estates were trying to make legible a certain factor that brought a wide range of pending cases in the Court together. In the last chapter, we saw how the Reformation backdrop of a dispute was sometimes elevated and sometimes downplayed in a dispute, for a variety of reasons; now, we see an attempt to make the Reformation backdrop legally meaningful in the context of litigation,

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<sup>1</sup> On the conciliar option, see Stollberg-Rilinger, *Old Clothes*, 97; Brady, *German Histories*, 81-2. This position of the protesting estates was summarized in an instruction they sent in the summer of 1533 to their delegates, concerning how they should apply themselves to the Court’s judges: “Each and every matter that concerns the religion, that has been bound to both God and law, cannot be fairly judged or proceeded by any judge, whether he is spiritual or worldly, high or low; rather those same matters should be heard and discussed nowhere other than through a free, Christian council” (“Dadurch alle und yde sachen, die religion belangend, von gots und rechts wegen dermassen anhengig worden, das von keinem richter, er sei geistlich oder weltlich, hoch oder nidder, pillich in den fellen dawider gehandelt oder procedirt warden soll, sonder sollen dieselben sachen nirgent anders, dan durch ein frei, christlich, concilium und das wort unsers herrn geortert und entscheiden werden, wie wolichs dasselb wort, alle recht und vernunft wollen und vermugen”) (Fabian, *UARP I*, Nr. 57, 164).

<sup>2</sup> See Ernst Feil, *Religio. Vol. 1: Die Geschichte eines Neuzeitlichen Grundbegriffs vom Frühchristentum bis zur Reformation*, 4 vols. (Göttingen: Vandenhoeck & Ruprecht, 1986). Feil shows that in the late medieval period, the term “religio” meant variously worship, as well as the situation in which one devoted oneself to worship. The “religious” were those who took oaths to devote themselves to worship. To be “religious” could also be used more broadly to refer to the virtue of being devoted to worship. The term was “self-explanatory”; it had neither a philosophical nor theological importance. Indeed, “there were no problems for which the solution required a more specific definition” of “religion” (Feil, 231). For more on the use of “religio” and related terms by the early reformers, see Feil, 235-81. See earlier chapters in Feil on the uses of “religio” in antiquity, early Christianity, and the high Middle Ages. See also Wilfred Cantwell Smith, *The Meaning and End of Religion: A New Approach to the Religious Traditions of Mankind* (New York: Macmillan, 1963), 19-44. See also Clifford Ando, “Religion, Law, and Knowledge in Classical Rome,” in *Roman Religion*, ed. Clifford Ando (Edinburgh: Edinburgh University Press, 2003), 1-15. Ando shows that for the Romans, “religio” is best translated as “the sum total of current cult practice”; central to this was the idea of an “asymmetrical reciprocity between humans and gods,” such that “relations between gods and men [were] characterized by ‘justice,’ and hence to be governed by *ius*, a system of justice or body of law” (Ando, 5). See also Matthew C. Mirow and Kathleen A. Kelley, “Laws on Religion from the Theodosian and Justinianic Codes,” in *Religions of Late Antiquity in Practice*, ed. Richard Valantasis (Princeton, NJ: Princeton University Press, 2000), 263-274.

and to argue that rather than continue to adjudicate the details of a specific case in terms of a dispute between two parties, that the cases should be handled collectively at a deliberative Council.

In this chapter, I explore the reception and impact of this proto-Protestant argument about “matters of religion.” Through a close look at case files, correspondences, and judges’ notes, I consider the details of the protesting estates’ “legal descriptive strategy,”<sup>3</sup> and track the unsettled quality of this term as it was invoked in dozens of Reformation-related cases. I show that, in the course of litigation, these arguments were met variously with rejection, confusion, or a wait-and-see attitude.

This chapter reveals that, out of the tussle of these inconclusive disputes, “religion” rose to the surface as a significant legal term. It became a bricolage legal category, that indexed a set of constitutional conundra born out of the Reformation, without resolving them.

The bricolage character of the legal category will be discussed in the conclusion. For now, I want to underscore three central tensions that constitute that bricolage. First, there was a tension in the category “matter of religion” between being foundationally a matter of “conscience,” on the one hand, and being inextricably entangled with material matters, on the other. As we will see, for protesting estates, pious motivation, beliefs about correct teaching and correct worship were always the “origins” of a matter of religion dispute. Yet this position exposed them to the retort that even if these “origins” of a dispute were removed, the justiciable issues of peace, property, and jurisdiction remained, which belonged before the Court. The protesting estates then responded that matters of religion were precisely those matters that were entangled with material issues but that had their origins in or flowed from differences in the religion, and that the material dispute could not be resolved without attending to the religious divide that had given rise to it. Thus, in contrast to scholars who argue that the Reformation produced a definition of “religion” tied to interior conviction and conscience, my research shows that the protesting estates were insisting precisely that all “matters of religion” were entailed with worldly consequences.

Second, there was a tension between “matter of religion” being spoken of as a commonsense moral category, on the one hand, or as a narrow legal category, on the other. Particularly in cases involving violence, or long-standing dynastic disputes, plaintiffs expressed incredulity and rebuke when the protesting estates claimed that the matter concerned the religion. But in other cases, “matter of religion” gestured narrowly to those agreements and recesses that explicitly governed such matters. Thus, plaintiffs who otherwise freely elaborated the Reformation context of a dispute—in the hopes of mobilizing prosecution under the terms of the explicitly anti-reform Augsburg Recess of 1530, for instance—could claim, without contradiction, that the dispute was not a “matter of religion.”

Third, there was a tension in the category between its classificatory and homogenizing effect, on the one hand, and its reliance on the details of particular disputes for its definition, on the other. The “matter of religion” category was defined not through abstract principles but in the form of lists and examples that were always embedded in particular cases and disputes. Yet the matter of religion category had the effect in this litigation of lifting a dispute out of its particularity, and declaring that nothing else in a case mattered but its being a matter of religion, and it was on these grounds alone that the proceeding should be nullified.

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<sup>3</sup> Simon Teuscher, *Lords’ Rights and Peasant Stories: Writing and the Formation of Tradition in the Later Middle Ages*, (Philadelphia: University of Pennsylvania Press, 2012), 77.

As we proceed through the cases below, these three central tensions will appear again and again.

### **The New Argumentation that 1532 Unleashed: The Nuremberg Settlement of 1532**

On November 6, 1532, Emperor Charles V sent an instruction, while on a visit in the Duchy of Mantua, to the Judges of the Imperial Chamber Court:

“[I]t is our desire and order that you exercise loyal zeal and goodly attention in the handling of the common Land-Peace, and of the [Regensburg] Peace Mandate that we established between all estates in matters concerning the disputatious religion, [...] so that peace and unity may persist in the German nation and so that law and justice may be achieved. Where, however, legal disputation, conflict, and matters that concern the religion come before the Court, it is our serious order, based on relevant, important causes and motivations, that you suspend such matters that concern the religion, until further order from us.”<sup>4</sup>

The Emperor’s order that the Court suspend all “matters that concern the religion” (*sachen, die religion belangendt*) was one outcome of months-long negotiations between the Emperor, the Elector of Saxony on behalf of the protesting estates, and the Electors from Mainz and the Palatinate on behalf of old-faith estates.<sup>5</sup> By the time the Emperor agreed to suspend these cases, in July 1532, it was on the condition that the directive remain a secret, known only to the negotiating estates and the Court. In particular, the old-faith estates, gathered at that very time for a Diet in Regensburg, were not to be told of this promise. In his final instructions to the Electors of Mainz and the Palatinate before the sealing of this agreement, which would be kept in writing exclusively with them, he ordered “that this assurance by all means be well-guarded and kept by your hands and not publicized, nor that anyone else be given a copy of it, for many critical reasons and especially to prevent that the other estates of the Empire be made all the less unhappy.”<sup>6</sup>

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<sup>4</sup> Fabian, *UARP I*, Nr. 31, 105-6: “[S]o ist an euch unser gnedigs begeren und bevelh, das ir ewer getrewe vleiß und gut aufmerken haben zu handthabung des gemeinen lands- und auch des fridens, so wir zwischen allen stenden in sachen, die stritige religion belangende, aufgericht [...], damit in teutscher nation wie oblaute guter frid und ainigkeit besteen und das recht und gerechtigkeit iren furgang wie pillich dester mehr erraichen mugen. Wo aber rechtliche spenn, irrung und sachen, die religion belangendt, vor euch im rechten schweben weren oder kunftiglich furkomen wurden, ist auß treffenlichen grossen ursachen und bewegnissen unser ernstlicher bevelh, das ir soliche sachen, die religion belangendt, biß uff unsern witem bevelh abstellet und suspendiret.”

<sup>5</sup> Schlütter-Schindler, 31; Kohnle, 401-6. For more on the negotiations, see Rosemarie Aulinger, “Die Verhandlungen der Kurfürsten Albrecht von Mainz und Ludwig von der Pfalz mit Karl V. 1532 in Mainz: ‘Missing-Link’ Zwischen dem Reichstag 1530 und dem Nürnberger Anstand 1532,” in *Im Schatten der Confessio Augustana: Die Religionsverhandlungen des Augsburger 1530 im historischen Kontext*, ed. Herbert Immenkötter and Gunther Wenz (Münster: Aschendorff, 1997), 185-199.

<sup>6</sup> On the instruction of secrecy, see Otto Winkelmann, *Politische Correspondenz der Stadt Strassburg im Zeitalter der Reformation. Vol. 2: 1531-1539, [PC II]* (Strassburg: Verlag von Karl Trübner, 1887), 169n1: “das diese versicherunge in alwege bei euern [der Kurfürsten] handen wolverwart und behalten und nit publiciert noch jemens copei davon gegeben werde, aus viel beweglichen ursachen und sonderlich zu verhuiten, das die andern stende des reichs desto weniger unlustig gemacht warden.”

In the Peace Mandate made public from these negotiations (promulgated on August 3, 1532) as an addendum to the Recess of the Regensburg Diet, the promise to cease cases concerning matters of religion was absent.<sup>7</sup> Instead, it reiterated the language of earlier Land-Peace legislation found in recesses of the previous decade, in which it was agreed that until the convening of a Christian Council, the participating estates would not feud, war, rob, capture, conquer, or siege another estate on account of the faith, nor for any other reason, [...] rather each should treat the other with proper friendship and Christian love.”<sup>8</sup>

Thus, the Emperor’s directive to the Court had an apparently contradictory character. On the one hand, he was ordering the Court to carry out the terms of the public agreement (the Peace Mandate) that had been appended to the Regensburg Recess, and in general to uphold the Land-Peace laws. On the other hand, he was ordering the Court to implement the terms of a secret agreement made among a small subset of estates and himself, to suspend cases concerning the religion. Which kinds of cases should be governed by the terms of the Land-Peace laws and the Regensburg Peace-Mandate, and which should be governed by the secret Nuremberg Settlement? Which should be adjudicated according to normal law, and which should be suspended? The Emperor seemed to produce here a distinction between cases “concerning the disputatious religion” in which adjudication would produce “peace and unity” and others “concerning the religion” which adjudication would lead to “disputation and conflict.” If adjudicating a case according to normal laws and procedures would lead to peace and unity, he seemed to be saying, then let the legal and judicial norms prevail. If, however, adjudicating a case according to those norms would lead to discord, then suspend those cases. What were the judges to make of this? As we will see, the directive generated a variety of perspectives among the Judges.

The Emperor’s ambiguous directive left some of the protesting estates’ unsatisfied. Landgrave Philip of Hessen, for instance, called it “an insulting, laughable peace, and an uncertain assurance.”<sup>9</sup> Most of the protesting estates disagreed with the condition of secrecy, and that it would not be shared in writing. They also had intended for the negotiations to lead to an imperial order to pause collectively a specific list of cases that they identified as “matters of religion.” In the end, the Nuremberg Settlement only allowed that each of the respective litigants would be given the opportunity to seek a pause in their own case.<sup>10</sup> In the end, though the Nuremberg Settlement would prove to be “worthless”<sup>11</sup> in achieving the suspension of any cases, it marked the first time in which anyone other than the protesting estates gave credence, in the context of these disputes, to this invented category “the matter of religion.” As I will show, this bare acknowledgment turned out to be consequential in ways that none of the parties could have anticipated.

The Emperor took his time to send his directive to the Court regarding this secret term of the Nuremberg Settlement. The delay did not go unnoticed by the protesting estates; on October 21, 1532, over three months after their initial agreement, the Elector of Saxony sent a letter to the

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<sup>7</sup> Schlütter-Schindler, 36 and the literature cited there; Otto Winckelmann, *Der Schmalkaldische Bund 1530-1532 und der Nürnberger Religionsfriede* (Strassburg: J.H.E. Heitz, 1892), 252-3; Brady, *Protestant Politics*, 80-2; Bernd Christian Schneider, *Ius reformandi: die Entwicklung eines Staatskirchenrechts von seinen Anfängen bis zum Ende des Alten Reiches* (Tübingen: Mohr Siebeck, 2001), 108-14.

<sup>8</sup> Fabian, *UARP I*, Nr. 15, 61: “keiner den andern des glaubens noch sonst keiner andern ursach halben beveheden, bekrigen, berauben, fahen, uberzihen, belegern [...] sonder ein jeder den andern mit rechter freuntschaft und christlicher liebe meynen.” See Peace section in chapter 3.

<sup>9</sup> Winckelmann, *Der Schmalkaldische Bund*, 257.

<sup>10</sup> Winckelmann, *Der Schmalkaldische Bund*, 250-2; Schlütter-Schindler, 33-5.

<sup>11</sup> Winckelmann, *Der Schmalkaldische Bund*, 264.



Emperor letting him know that new cases concerning the religion had been launched, and requesting that the Emperor notify the Court about their agreement.<sup>12</sup> On the same day, he also sent a letter to the judges of the Court:<sup>13</sup>

We do not doubt that it is to you unconcealed, in what manner [the Electors of Mainz and the Palatinate], by the permission of the Emperor, this past summer at Schweinfurt and then Nuremberg, undertook to establish through negotiations a common peace concerning the religion and other matters in the Holy Empire, and that, from God's bestowal, such a peace was established and settled at Nuremberg with the Emperor's permission, and which has since been promulgated in the Empire and publicly announced.<sup>14</sup> And that the Emperor also obliged you to observe the terms of that peace, where we or our associates (*mitgewanten*), collectively or individually, were to be put upon with law (*mit recht angelegt wurden*) by someone, whoever they may be (*were der were*), on account of matters of religion (*der religion sachen halben*), [...] that you terminate it [...].

The letter then pointed out several newly launched cases that they, the protesting estates, considered matters of religion; they said that though these matters concerned the religion, they were being sued “under the appearance of law.”<sup>15</sup> Should the Court continue with these cases and arrive at legal judgments in them, such behavior would be deemed a “void, willful, unjust act to destroy the imperial majesty's written peace and standstill” as well as “natural and written laws.”<sup>16</sup>

These two letters to the Court—the one from the Elector of Saxony on behalf of the protesting estates, and the one from the Emperor—set off a flurry of discussions and debates among the judges in their plenum session on November 29, 1532. Judges' notes reveal that there was disagreement among the judges about how to proceed.<sup>17</sup>

The first question the judges discussed was: what can possibly be meant under the term “matter of religion”? Several distinct views were represented. Two judges, Matthias Alber and Johannes König made an argument to absurdity.<sup>18</sup> The Court had no jurisdiction over “pure religious disputes.” Unless the directive had no object, or was redundant, it must be ordering them to suspend cases over which they currently had jurisdiction. Thus, they argued, the Court had to go beyond the apparently narrow meaning of “concerning the religion” to include the secularization and dispossession cases that those known as the protesting estates had been

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<sup>12</sup> Fabian, *UARP I*, Nr. 29, 100-2.

<sup>13</sup> Fabian, *UARP I*, Nr. 30, 103-5. Not sure of the chronology here; though dated two weeks earlier than the Emperor's directive to the Court, the Judges say that the Protestants' letter came to them “soon after” (*baldt nach*) they received the Emperor's letter (Fabian, *UARP I*, Nr. 35, 111).

<sup>14</sup> I.e. the Regensburg Peace Mandate (Winckelmann, *Der Schmalkaldische Bund*, 263).

<sup>15</sup> Fabian, *UARP I*, Nr. 30, 104: “solicher sachen halben, die religion antreffen, in schein vermeints rechtens zu clagen.” I think the cases referred to here are Hauptstaatsarchiv Stuttgart C3 (RKG) 4523 and Hauptstaatsarchiv Stuttgart C3 (RKG) 4524 (Ambrosius Kaut v. Ulm), and the case concerning St. Arbogast (Bishop Wilhelm of Strassburg v. City of Strassburg case).

<sup>16</sup> Fabian, *UARP I*, Nr. 30, 104.

<sup>17</sup> See: Gero R. Dolezalek, “Die Assessoren des Reichskammergerichts und der Nuremberger Religionsfriede vom 23. Juli 1532,” in *Recht, Gericht, Genossenschaft und Policy*, ed. Gerhard Dilcher and Bernhard Diestelkamp (Berlin: Schmidt, 1986), 84–96. Dolezalek uses the journal of judge Mathias Alber for the period October 1532 to April 1533.

<sup>18</sup> For details on all of the judges, see Dolezalek, “Die Assessoren,” 86-89.

arguing were “matters of religion.” Alber and König also made a purposive argument, linking the decisive aim of the directive with the Court’s overall purpose: to preserve the peace, even if it was at the cost of postponing justice. And there will only be peace, they said, if these dispossession cases were put to rest for now.<sup>19</sup>

Assessors Hartmann Mor and Justinianus Moser argued that even if the words of the directive were to be understood in that way, the agreement was not binding on the Court. The Imperial Chamber Court was not beholden to the instructions of the Emperor, only to the common law and the imperial Diet decrees. A contract that the emperor made with the protesting estates behind the backs of the old-faith estates only binded the contracting parties, not the Court.<sup>20</sup>

The Court’s President, Adam von Beichlingen, argued that the Emperor was entitled to give such a directive if such an agreement was the only way to protect the peace. In support of this view, Alber cited Corpus iuris C.1.19.4 which showed that an Emperor permitted deferment of payment for debtors even at the expense of the rights of creditors, indicating that the rights of some can be delayed for the good of the whole.<sup>21</sup> In other words, there were circumstances in which the rule of law was not the only pathway to achieving the ultimate purpose of the Court: maintenance of the Land-Peace.

Assessor Arnold Glauburger doubted whether the imperial order was binding, but said that it was important, in the interest of the Empire, to pause the cases. He suggested therefore looking at each of the cases for existing procedural means to bring about a suspension, without having to rely on the legally questionable imperial directive. Here, the Judge was calling for the use of procedural techniques to achieve the valuable purpose of pausing cases, without using the questionable means of the imperial order.

In the end, thirteen of the seventeen judges present agreed that they wanted in some way or another to uphold the emperor’s directive, but that they would ask the Emperor what he meant by “matters of religion,” and in the meantime would not proceed in any of the questionable cases. Philip Drachstedt agreed that writing to the Emperor was a good idea, but with the condition that the cases continue. The four who disagreed with the idea of writing to the Emperor (Haller, Burchard, Alber, and Glauburger) each had different reasons. Konrad Haller said that they should simply tell the protesting estates that they had not had sufficient time to discuss the matter and they would respond later.<sup>22</sup> Philipp Burchard said that they should tell the protesting estates that they should present their objections in a procedurally correct form internal to the proceedings, rather than pursue extra-judicial negotiations with the Emperor to stop those proceedings.<sup>23</sup> Alber advised against writing to the Emperor, preferring to deal with the question with regard to individual cases. Glauburger agreed with Alber, that the Judges needed no interpretative help from the Emperor; that they should read the imperial missive openly in Court, and debate with the procurators over it. This they agreed to do. In the context of two cases,

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<sup>19</sup> Dolezalek, “Die Assessoren,” 91.

<sup>20</sup> Dolezalek, “Die Assessoren,” 91.

<sup>21</sup> See Fred Blume, trans., *The Codex of Justinian*, Vol. 1, ed. Bruce W. Frier (Cambridge, UK: Cambridge University Press, 2016), 299: “Emperors Gratian, Valentinian, and Theodosius Augusti to Florus, Praetorian Prefect. All rescripts issued to grant delays in the cases of debtors shall not be valid unless adequate surety for the payment of the debt is provided.”

<sup>22</sup> Dolezalek, “Die Assessoren,” 91.

<sup>23</sup> Dolezalek, “Die Assessoren,” 92.

against Ulm and against Strassburg, on December 4, 1532, the Court read out the Emperor's letter.<sup>24</sup>

In addition to reading the Emperor's directive in public audience on December 4, the judges wrote to the Emperor to seek his clarification.<sup>25</sup> In it, they indicated having received the directive to uphold both the general Land-Peace as well as "the other peace," referring to the Regensburg Peace Mandate.<sup>26</sup> As the Emperor sent only the bare directive, however, without mentioning the negotiations from which they emerged, or the precise contents of the deal, the Court did not know which matters and parties were envisaged in its terms.<sup>27</sup>

For these reasons, we are not a little concerned, especially since in many of the cases that come before us, one party says it concerns the religion, that the issues cannot be disaggregated (*unzerteillich*), while the other sues for plunder, or violent dispossession in violation of the Land-Peace and of the 1526 Speyer Imperial Recess, and therefore that the matter originally or certainly did not touch the religion. When the parties regard the very nature of the dispute differently—whether religion is directly involved in the dispute or not, whether the word 'religion' extends to goods, or to the robbery of the goods, or to the specific cases described in the peaceful resolution [the Nuremberg Peace]—such questions we are not confident to handle on our own without your clarification. We have not given a clear answer to the protesting estates, because we wanted to write you first to ask for the document itself [the Nuremberg Peace], and also to ask what you meant, which parties and which issues are conceived to be included in the peace, and to what extent. Without your answer, we cannot act confidently, however it is of the highest importance that we act with care and certainty in these matters.<sup>28</sup>

On the very same day that the judges responded to the Emperor's directive, the Emperor himself wrote a letter to them, again from Mantua, spurred by a flurry of frustrated letters from the protesting estates. In this letter, received by the Court on December 23, 1532, the Emperor finally explained that the directive he sent before was borne of an agreement made at Nuremberg in July with the protesting estates.<sup>29</sup>

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<sup>24</sup> Dolezalek, "Die Assessoren," 92; Robert Schelp, *Die Reformationsprozesse der Stadt Strassburg am Reichskammergericht zur Zeit des Schmalkaldischen Bundes (1524) 1531-1541 (1555)* (Kaiserslautern: Buchhandlung Schmidt in Kommission, 1965), 82.

<sup>25</sup> Fabian, *UARP I*, Nr. 35, 110-13.

<sup>26</sup> Fabian, *UARP I*, Nr. 30, 103-5: "des gemeinen landfridden und sonst des andern friddens."

<sup>27</sup> Fabian, *UARP I*, Nr. 35, 112. They say they requested the treaty from the Archbishop of Mainz, but that he said to request it directly from the Emperor.

<sup>28</sup> Fabian, *UARP I*, Nr. 35, 112: "So werden wir aus erzelten ursachen in nit geringe sorgfeligkeit gefurt, sonderlich auch, dieweil sich allerhand fell deshalben vor uns zugetragen, die ein partei als die religion belangend und derselbigen als unzerteillich anhengig achten, aber der gegenteil halten und clagen wolte, das es ein spolium oder gewaltig entsetzung widder den landfridden, auch ufgerichten des reichs abschieds, sonder den hie zu Speyer anno etc. xxvi ufgericht, und also ursprunglich ader gewißlich dieselbige religion nit beruren solt, alsdan die sachen eine der andern ungleich und was art und wesens die seien, die religion one mittel oder nit antreffen und ob das wort religion sich uff die gutter und entwerung derselben erstrecken ader verstanden werden sollen ader die berurte frydlych bewilligung, solchs vermoge wir also one erkundung und erclerung nit wol merken und sicher handeln mogen."

<sup>29</sup> Dolezalek, "Die Assessoren," 92.

In recent days, we wrote to you and ordered, among other things, that you pause and suspend all pending or future cases concerning the religion until our further order, as we have recently at Nuremberg, through [the Electors of Mainz und the Palatinate] in the matter of the disputatious religion<sup>30</sup> established a common peace with the Elector of Saxony and his associates, in which we let it be said, among other things, that we will pause all proceedings against them in matters concerning the faith and the religion,<sup>31</sup> whether through our Fiscal or others, those that have already begun or have yet to begin, until the next Council, or, if a Council not be held, through the Estates of the Empire in another way addressing it.<sup>32</sup> Because it is our will and intention that this recess [the Nuremberg Settlement] will maintain peace, therefore we order that you, in all matters and proceedings concerning the faith and the religion, as against the above-mentioned Elector of Saxony and his allies, that are pending before you in law now or in the future,<sup>33</sup> not proceed or act further, rather that you fully pause those proceedings until a Council or until the estates of the Empire address the matter in another way. But in other disputation and proceedings that do not concern the faith and the religion, you should and may, as is proper, act and enact what is law.

This letter, having been written before the Emperor received the Judges' letter, left much unanswered. The Judges waited for another letter from the Emperor, one that would respond directly to their request for greater clarification, until, having received no response, they discussed the situation again on January 30, 1533.<sup>34</sup> Finally, on February 14, 1533, the Court received the long-awaited response from the Emperor, dated at Bologna January 26, 1533.<sup>35</sup> The impatient tone of the letter was pronounced. He wrote that he would not send the specific contents of the Nuremberg Settlement to the Court because they had everything they needed in front of them:

We hear from the parties' pleadings, arguments, and counter-arguments, what religion and faith matters may or may not be, therefore we consider your request for a declaration from us unnecessary, on the view that no better explanation may be given in the text of the Settlement, than that which the cases bring themselves.<sup>36</sup> Also, the agreement does not extend further than alone upon the matters of religion and faith<sup>37</sup> and nothing further is contemplated in that agreement that affect judicial proceedings or that would be of service [in

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<sup>30</sup> Fabian, *UARP I*, Nr. 36, 114: "...in der strittigen religion sachen..."

<sup>31</sup> Fabian, *UARP I*, Nr. 36, 114: "...das wir alle rechtfertigung in sachen, den glauben und die religion belangende..."

<sup>32</sup> Such as through a National Assembly. Fabian, *UARP I*, Nr. 36, 114: "...durch die stende des reichs in ander weg darinnen fursehung getan wurde..."

<sup>33</sup> Fabian, *UARP I*, Nr. 36, 114: "...das ir in allen sachen und rechtvertigungen, den glauben und die religion belangende, so wider jetztgenanten churfursten von Sachssen und seiner lieb zugewandten vor euch in recht schwebend weren oder kunftiglich furkomen wurden..."

<sup>34</sup> Dolezalek, "Die Assessoren," 92-3.

<sup>35</sup> Fabian, *UARP I*, Nr. 46, 133-4.

<sup>36</sup> Fabian, *UARP I*, Nr. 46, 134: "...so achten wir ewer begerte declaration fur unnoturftig, auch in ansehunge, das kein besser erleuterung darinne gegeben weren mag, dan wie es die sachen selbs mitpringen..."

<sup>37</sup> Fabian, *UARP I*, Nr. 46, 134: "...es erstrecken sich auch die wort solcher abredde weiter nit, dan allein uff der religion und des glaubens sachen..."

clarifying]; therefore sending you the requested copy of the agreement is unnecessary.<sup>38</sup>

The Emperor thus denied their request to view the contents of the Settlement, because it contained no further definition of what the parties meant by “matters of religion.” Furthermore, he noted that the cases themselves yielded argumentation, and it was within competence of the Judges to decide whether those were convincing or not based on their expertise. His statement that “the agreement does not extend further than alone upon the matters of religion and faith” must have struck the Judges as profoundly unhelpful. The Judges found themselves in the difficult situation of being told both that they had the expertise, authority, and resources they needed to determine which cases should be suspended, and that the Emperor had a very specific expectation that some cases should be suspended based on the terms of the agreement.<sup>39</sup>

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This remarkable set of correspondences in 1532 captures a new way in which Reformation issues were finding a foothold in life of the Court. While in the previous chapter, I showed that the issue of Reformation was litigated through a patchwork of laws and norms, and the advantages and disadvantages of when and how to make the Reformation context legible in a given dispute were not always clear, this chapter captures the moment when, beginning in the early 1530s, Reformation issues came to be debated in terms of whether this or that imperial law, treaty, or agreement applied. And whether this or that law applied increasingly hinged on whether the issue could correctly be called a “matter of religion.”

As the judges said, the parties vehemently disagreed about the issue at the core of a given dispute; one sued for plunder, a violation of the Land-Peace, and the other said the dispute concerned the religion. Defendants said the issues could not be disaggregated; property confiscation could not be disambiguated from the question of proper stewardship of church property, and the pious motivation to reform clergy abuses of church wealth. Plaintiffs responded with a general objection against the claim of religion, stating simply that it was strange and alarming that the defendants would claim that violent plunder and spoliation could be attached to the term “religion.” The parties, the Judges said, “regard the very nature of the dispute differently.” Far from hair-splitting, the spectrum of interpretations that litigants brought indicated a core instability of the category itself.

Even as the term became increasingly salient as a subject of imperial political negotiations, its instability remained, even for those who had the authority to define its meaning once and for all. As far as the Judges were concerned, the matter of religion had no settled legal meaning. They handled its use variously with silence, rejection, or a wait-and-see attitude. Here, in the context of the Nuremberg Settlement, for the first time, the Emperor himself was using the term; for the first time, the term had gained salience in the political context of a Settlement, and the Court hoped that that agreement had contained some kind of satisfactory juridical definition. But what source of authority was ruling? Neither in the context of litigation, nor in Judge’s plenary sessions, nor in their correspondence with the Emperor was there any reference to the

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<sup>38</sup> Fabian, *UARP I*, Nr. 46, 134: “...und ist sonst ferner in derselben abredde nichts verleibt, das gerichtliche handlung berurend oder zu dießem articule dinstlich seien; deshalb der begerten abschrift von unnoten...”

<sup>39</sup> For a study on the role of judges in determining the meaning of “matters of religion” as recorded in Visitation protocols, see Baumann, *Visitationen*, 137-45.

possibility that Roman law, common law, or imperial law would hold the answer—no authoritative texts were cited. Even as some judges argued that any secret treaty the Emperor brokered with a small group of estates carried no authority over the Court, they still hoped at least that a better definition would be found in the text of the Nuremberg Settlement itself. When this hope was disappointed, they turned to the Emperor—not as a source of definitional authority, but simply as a party to that agreement, the terms of which required clarification in order for the Court to be able to act on it.

Many treaties and recesses throughout the 1530s and 1540s confirmed the Nuremberg Settlement suspension of “matter of religion” cases before the Imperial Chamber Court. These included: the Treaty of Kaaden (1534),<sup>40</sup> the Treaty of Vienna (1535),<sup>41</sup> the Frankfurt Settlement (1539),<sup>42</sup> the 1541 imperial suspension mandate,<sup>43</sup> the 1541 Regensburg Recess,<sup>44</sup> and the 1542 Speyer Recess.<sup>45</sup> Yet none of them discouraged plaintiffs from bringing lawsuits, nor the Court from changing its judicature.

### **Contextualizing the Political; Focus on Process Rather than Outcome**

This episode involving the Judges, the Emperor, and the protesting estates indicates the political context in which the Reformation cases were embedded. In a number of ways, the Reformation cases were politically charged, and had political significance. First, the litigation, conceived as a block, was the object of imperial-level negotiations, like those that took place in Schweinfurt and Nuremberg in 1532. Second, the political backdrop influenced the way in which these negotiations unfolded. It mattered, for instance, that it was the Elector of Saxony who was negotiating for the protesting estates; his leverage in the context of the Emperor’s fragile attempts to ensure his brother’s election as King has been well documented.<sup>46</sup> Similarly, the protesting estates’ threat to refuse to pay into war coffers against the Turks unless the cases were suspended has been seen as a powerful explanation for the Emperor’s motivations in making (however toothlessly) such a drastic concession.<sup>47</sup> Third, Reformation litigation was the subject of political advice that cities sought from each other,<sup>48</sup> and the suits were one of the main reasons for the establishment of the Schmalkaldic League.<sup>49</sup> Fourth, it is a constant of litigation in almost all historical periods that its purpose was not only to pursue a legal answer to a question or a resolution to a dispute, but to pressure another party to come to extra-judicial negotiations—what some would call a politicization of litigation. In these and other ways, to neglect the political would be to miss an important part of the story.

Yet when it comes to understanding the “matter of religion” category and its significance, this exclusively political perspective disables us. In particular, by viewing the litigation as an undifferentiated block, the collective existence of which mattered as the subject of political negotiations, and as political leverage, scholars have tended to reduce all discussions about the

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<sup>40</sup> Schlütter-Schindler, 147-8; Whaley, 308-9.

<sup>41</sup> Schlütter-Schindler, 148-54.

<sup>42</sup> Schlütter-Schindler, 165; Friedrich, *Territorialfürst*, 201-9; Whaley, *Germany*, 314.

<sup>43</sup> Schlütter-Schindler, 205.

<sup>44</sup> Schlütter-Schindler, 210-1.

<sup>45</sup> Schlütter-Schindler, 217.

<sup>46</sup> Aulinger, 187.

<sup>47</sup> Schlütter-Schindler, 31.

<sup>48</sup> See Close, *Negotiated Reformation*.

<sup>49</sup> See Dommasch, *Die Religionsprozesse*.

meaning of the matter of religion as politically inflected, motivated, and interested. This has disabled them from seeing the techniques and legal culture that the production of the term reveals, and the unintended consequences that exceed and belie the interests and motivations of those involved. A review of what historians of the Reformation cases have said about the category can help us see the dimensions that have so far been unexplored.

Throughout this chapter, as in other sections of the dissertation that discuss the cases in detail, outcomes are of secondary importance. As we have seen, rulings are postponed, settlements are reached out of court, litigants slow down the proceedings, and many cases are left unresolved. Thus, outcomes have little analytical value for understanding the meaning of the “matter of religion” at any particular moment.

## Religion Literature

In recent decades, a critical historiography of the category “religion” has emerged. Wilfred Cantwell Smith’s 1962 book *The Meaning and End of Religion* inaugurated an anti-essentialist critique of the category, challenging its use as an analytic in comparative and historical work. These early critiques were primarily philosophical and methodological: the term “religion,” Smith argued, had been reified, so that it seemed to refer to a real “theoretical entity of speculative interest.”<sup>50</sup> This was an error in naming that drove scholars to distort the proper object of study—persons, things, and ideas—studying instead an imagined impersonal, transcendent phenomenon.<sup>51</sup> Beginning in the 1980s, Talal Asad added a genealogical and ethical critique, identifying the Christian (especially Protestant and liberal) premises and predicates that underlie “religion” as a modern academic and governmental category, and its extension as a universal as part of the colonial project. Moreover, Asad challenged the self-evidence of the idea that “religion” and “secular” are opposites of each other, showing instead that these concepts are mutually constitutive, and historically coemergent.<sup>52</sup> Since then, authors have extended and deepened these insights, showing the ways in which construction of “religion” is not just a definitional act, but a normative, discursive one; the work of identifying what does and does not count as religion is always normatively loaded, tied to certain hierarchies, privileges, freedoms, and stakes.<sup>53</sup>

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<sup>50</sup> Smith, *The Meaning*, 22.

<sup>51</sup> For an anthropological approach to the study of religion, see Clifford Geertz, “Religion as a Cultural System,” in *The Interpretation of Cultures: Selected Essays*, ed. Clifford Geertz (London: Fontana Press, 1993).

<sup>52</sup> See e.g. Talal Asad, “Reading a Modern Classic: W.C. Smith’s ‘The Meaning and End of Religion,’” *History of Religions* 40, no. 3 (2001): 205-222; and Talal Asad on Geertz, “The Construction of Religion as an Anthropological Category,” in *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore, MD: Johns Hopkins University Press, 1993), 27-54.

<sup>53</sup> See e.g. Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton, NJ: Princeton University Press, 2005); Winnifred Fallers Sullivan et al., *Politics of Religious Freedom* (Chicago, IL: University of Chicago Press, 2015); Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton, NJ: Princeton University Press, 2015); Tomoko Masuzawa, *The Invention of World Religions, or, How European Universalism Was Preserved in the Language of Pluralism* (Chicago, IL: University of Chicago Press, 2005); Elizabeth Shakman Hurd, *Beyond Religious Freedom: The New Global Politics of Religion* (Princeton, NJ: Princeton University Press, 2017); Benjamin L. Berger, *Law’s Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2016).

Together, these critiques have inaugurated an interdisciplinary literature that studies the specificity of the religion category's usage in particular times and places, and its production as a domain of human life distinct from other domains such as science or superstition. Scholars have also generated a rich array of conceptual histories of the term religion, that have traced the twists and turns of the term's usage.<sup>54</sup>

In many of these accounts, the sixteenth and seventeenth centuries figure as a decisive moment in the formulation of religion as a modern category. In particular, the rediscovery of antiquity in the Renaissance, the Encounter with the so-called "new world," and the Reformation produced the intellectual and social context in which for the first time it was possible to speak of religion as an exteriorized system of ideas and beliefs to which an individual may internally adhere;<sup>55</sup> as a genus of which there were various species,<sup>56</sup> and to speak of religion in the plural.

According to this literature, the Reformation contributed to this development in a number of ways. First, it generated difference, which created conditions in which it became desirable to find a language to describe "the clash of conflicting religious parties," not only in terms of comparability but in terms of hierarchy.<sup>57</sup> Second, the Reformation encouraged the rise of creeds and confessional statements in the sixteenth century.<sup>58</sup> This created the conditions in which groups were defined and compared to one another based on what they believed to be true.

While these accounts are especially useful to account for the rise of the "world religions" analytic in academia and theology, it cannot tell us much about the use of religion as a specifically legal category. To the extent scholars of this period address religion as a legal category, it is through reference to the period's touchstone settlement, the Augsburg Peace of 1555, in which "for the first time, 'religion' could be understood as a political and legal construct."<sup>59</sup> The formulation commonly attributed to the 1555 Peace—*cuius regio, eius religio*, whose land, his religion—indicated, on this view, a move towards "objective formulation" of confessional difference.<sup>60</sup> In historiographies of secularism, this signified a departure from the old ways of describing confessional difference in terms of truth and falsity, orthodoxy and heresy, instead clearing a space for nascent state neutrality and religious freedom.<sup>61</sup> In

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<sup>54</sup> See Daniel Boyarin, *Border Lines: The Partition of Judaeo-Christianity*, (Philadelphia, PA: University of Pennsylvania Press, 2004); Brent Nongbri, *Before Religion: A History of a Modern Concept* (New Haven, CT: Yale University Press, 2013); Peter Harrison, *The Territories of Science and Religion* (Chicago, IL: University of Chicago Press, 2015); Jonathan Z. Smith, "Religion, Religions, Religious," in *Critical Terms for Religious Studies*, Mark C. Taylor, ed., (Chicago; London: University of Chicago Press, 1998); Rebecca Nedostup, *Superstitious Regimes* (Cambridge, MA: Harvard University Press, 2010).

<sup>55</sup> Smith, *Meaning*, 43, 44.

<sup>56</sup> Nongbri, 20.

<sup>57</sup> Smith, *Meaning*, 44.

<sup>58</sup> See Jaroslav Pelikan, *Credo: Historical and Theological Guide to Creeds and Confessions of Faith in the Christian Tradition* (New Haven, CT: Yale, 2003), 460-66. Blum argues that Lutherans invented "Bekenntnis" (confession) as an exhaustive form of delineating the content of shared convictions (Blum, 28).

<sup>59</sup> Peter Harrison, *The Territories of Science and Religion* (Chicago, IL: University of Chicago Press, 2015), 97.

<sup>60</sup> The formulation "*cuius regio, eius religio*" to summarize a key principle of the Augsburg Peace of 1555 was first used in 1599 by Johann Joachim Stephani (1544-1623). See Axel Gotthard, *Der Augsburger Religionsfrieden* (Münster: Aschendorff, 2004), 10. Johann and his brother Matthias (1570-1646) were proponents of Episcopatism, according to which territorial rulers in Lutheran lands would carry out duties of the office of bishop in their domain. See Martin Heckel, *Staat und Kirche nach den Lehren der evangelischen Juristen Deutschlands in der ersten Hälfte des 17. Jahrhunderts* (Munich: Claudius, 1968), 237.

<sup>61</sup> Some authors make a link between this new legibility of confessional pluralism in Western Christendom and religious liberty. See e.g. Pelikan, *Credo*, 243: "As has frequently been observed, therefore, religious liberty was



historiographies of sovereignty, the 1555 formulation of “religion” marked its beginning as a principle of territorial division and a sphere of governance.<sup>62</sup> But in these accounts, the period before 1555 is entirely dismissed.

The historiography of the Reformation cases, though it has remained untouched by this newer scholarship on the religion category, circulates a certain refrain about the protesting estates’ argument concerning “matters of religion.” Specifically, authors decry the term’s lack of definition as an indication of an underdeveloped legal science, or of the politicization of law. In an 1890 essay, for instance, Winckelmann argued that the Nuremberg Settlement was a weak foundation for a resolution between the Catholics and Protestants in part because “its content was much too ambiguous, vague, and indefinite.”<sup>63</sup> Specifically, the clause in which the Emperor promised that in matters concerning the faith, he would tolerate no legal proceeding against the protesting estates at the Imperial Chamber Court, the vague language permitted each party to interpret the clause to their own advantage. When the Emperor, in response to the Court’s request for greater clarity on the meaning of “matters concerning the faith,” stated that it was the Court’s job to decide, any promise the treaty held for protecting the Protestants from litigation fell away. Naturally, he said, the Court, being populated primarily by those of the “old faith,” would adopt an interpretation advantageous to the status quo.<sup>64</sup> With that, he wrote, “the floodgates of arbitrariness of the overwhelmingly Roman-leaning [i.e. Church of Rome] Court was opened,” in part because the judges did not know, or did not want to know, the pre-history to the agreement, from which the expression “*Religionssache*” derived its meaning. They interpreted the term as narrowly as possible, let cases involving secularizations or other church innovations simply continue, saying that the term *Religionssache* did not apply to it.<sup>65</sup> The failure here was what Winckelmann called “typical sixteenth-century-style statecraft,” according to which finding a way out of and around difficult questions through provisional language was favored.<sup>66</sup>

In his 1892 book on the Nuremberg Settlement and the Schmalkaldic League, Winckelmann devoted a few pages to the term “religion.” He noted that as negotiations were winding down, the Protestant delegates raised objections about an apparently innocuous change in the language of the final peace treaty: where the Protestants had written that there should be a suspension of all cases “concerning the religion” (*der Religion halber*) the Emperor’s revised formulation was “regarding the faith” (*den Glauben belangend*). The revision, Winckelmann

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the product of the Reformation, but not of the Reformers. It was not the teaching of any one confession, but the result of the presence of so many competing confessions.” Others suggest religious liberty had more to do with concepts specific to the Protestant confessions; see e.g. John Witte and Frank S. Alexander, eds., *Christianity and Human Rights: An Introduction* (Cambridge, UK; New York: Cambridge University Press, 2010), 27-8.

<sup>62</sup> See Talal Asad, “Trying to Understand French Secularism,” in *Political Theologies: Public Religions in a Post-Secular World*, ed. Hent de Vries and Lawrence E. Sullivan (New York: Fordham University Press, 2006), 497-8. More frequently, these are identified with the Treaty of Westphalia of 1648; see e.g. Saba Mahmood, “Religious Freedom, the Minority Question, and the Geopolitics in the Middle East,” *Comparative Studies in Society and History* 54, no. 2 (2012): 418–446. See also a reference to the *cuius* principle in Hannah Arendt, *The Origins of Totalitarianism* (San Diego; New York; London: Harcourt, Inc., 1951), 274n16: “The first minorities arose when the Protestant principle of freedom of conscience accomplished the suppression of the principle *cuius regio eius religio*.”

<sup>63</sup> Otto Winckelmann, “Über die Bedeutung der Verträge von Kadan und Wien (1534-1535) für die deutschen Protestanten,” *Zeitschrift für Kirchengeschichte* 11 (1890): 213.

<sup>64</sup> Winckelmann, “Kadan und Wien,” 214.

<sup>65</sup> Winckelmann, *Der Schmalkaldische Bund*, 261-2.

<sup>66</sup> Winckelmann, “Kadan und Wien,” 213. More on vagueness as a juridical technique in Chapter 6.

speculated, was calculated to undermine the intended meaning of the clause. In a letter to the imperial delegates, the Protestants requested that the language be put back because “presumably no one would be proceeded against on account of his faith, while they probably would be on account of matters that had their origin in matters of faith.”<sup>67</sup> Having received the Protestants’ request, the Emperor expressed some frustration about their presumptuous quibbling given his tremendous leniency in negotiating with them in the first place, and did not make the requested change in the final August 2nd official text of the Settlement, though he did change his language in correspondences with his delegates, the Court, and the imperial estates.<sup>68</sup> Winckelmann expressed doubt about whether such a switch—from faith to religion, or from matters of faith to matters that had their origin in faith—would have made the clause clearer. He concluded with a whiff of frustration: “it would have been more correct and more secure in any case to define precisely the concept of *Glaubens-* or *Religionssachen*.”<sup>69</sup>

Like Winckelmann, Smend discussed the “religion” category in the context of these negotiations surrounding the Nuremberg Settlement of 1532. He indicated that the Emperor’s intention in changing the language of the Settlement—from “matters of religion” to “matters of faith”—had been to isolate the set of cases covered by the suspension to only those in which a Protestant was sued for believing what he believed—where faith (*Glauben*) has an interior quality, having no impact on matters of material or tangible concern. Smend noted that this approach was strategic and dishonest because the Protestants were not being proceeded against for what they believed—in an internal, propositional way—but rather because of worldly disputes following from the changes in faith.<sup>70</sup> The Protestants were seeking to make legible that this change in faith had an impact on worldly matters—such as property, jurisdiction, and authority—and that the involvement of worldly matters should not exclude recognition that the origin of the dispute was a disagreement in faith. For Smend, the fact that the Settlement brought no change to the Court’s performance, and that the “legal war” against them continued, confirmed that the suspicions of some Protestants were correct: that the Emperor had managed through these negotiations to secure the Protestants’ financial support for looming war against the Turks while giving them empty promises in return.<sup>71</sup> The experience taught the Protestants, Smend said, that they would not achieve their goals through negotiations with the Emperor.<sup>72</sup>

While Winckelmann and Smend focused on the ways in which the analytic obscurity of the religion category was linked to bad faith negotiations laced with mutual distrust, that often played a useful political role, Dommasch’s treatment of the subject focused on the way in which even the Protestants—whose request to suspend only those cases “concerning the religion” generated the question of its definition in the first place—themselves did not agree on how to define it.<sup>73</sup> Dommasch pointed out disagreement within the Schmalkaldic League, and that some members’ cases were denied this title.<sup>74</sup> At one point, the Landgrave of Hessen argued that some

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<sup>67</sup> Winckelmann, *Der Schmalkaldische Bund*, 251, citing a July 25 correspondence: “daß versehnlich niemand seines Glaubens halben mit Recht vorgenommen (werden würde), aber wohl um Sachen, die aus des Glaubens Sachen ihren Ursprung hatten.”

<sup>68</sup> Winckelmann, *Der Schmalkaldische Bund*, 252.

<sup>69</sup> Winckelmann, *Der Schmalkaldische Bund*, 251.

<sup>70</sup> Smend, 147-8: “da ja nur des Glaubens wegen niemand einem Prozeß ausgesetzt sein würde, sondern nur wegen weltlicher, aus der Religionsveränderung folgender Streitsachen.”

<sup>71</sup> Smend, 148-9.

<sup>72</sup> Smend, 149.

<sup>73</sup> Dommasch, 16.

<sup>74</sup> Dommasch, 17n33 cites references to published source materials in which the League debates the merits

of the cases the League had dubbed “matters of religion” rhymed with “Religion” like “Hase” (rabbit) rhymes with “Pauker” (timpanist)—in other words, not at all.<sup>75</sup>

The core failure of the protesting estates, according to Dommasch, was their inability to define the difference between religion matters and worldly matters—in other words, to articulate why a matter of property confiscation was in fact not a matter of property confiscation. Dommasch’s discussion about the category “religion” then evolved into an attempt to give more clarity to the term than he believed it had at the time of its use. His primary concern was methodological, to settle an analytic that the subjects of his study failed (on his view) to adequately define, and to explain what made a religion case different from a regular worldly dispute. At one point, for instance, he studied a document—a list written by the Landgrave of Hessen in December 1535 in an instruction to his delegates at the Schmalkaldic League, of the kinds of cases the Landgrave considered matters of religion—in the spirit of evaluation, correcting it for errors, rather than analyzing what it revealed.<sup>76</sup> In the book’s final paragraphs, Dommasch wrote that the inconclusiveness of the efforts of the Protestant princes and cities to stop the proceedings against them could be traced back to the fact that the difficult problem of an exact differentiation of matters of religion from cases with a purely worldly object had not been satisfactorily resolved. Ultimately, he said, the ambiguity at the heart of these cases “eroded the idea of the Empire and damaged the function of the Empire’s organs.”<sup>77</sup>

Jahns’ rendering of the Reformation cases in which Frankfurt was embroiled made a similar move. She brought her own analytical binary of “religious” and “worldly” to the debates about the meaning of “matters concerning religion” and seems to evaluate the coherence or usefulness of the argumentation of the parties based on this external standard.<sup>78</sup> For example, she said that the focus of the Protestants’ argumentation was to highlight the pious motivations for their actions, and to “minimize the worldly aspect of the dispute,” but, as we will see, this characterization simplifies the nuanced argument that Protestants were making that piety and worldly matters were inextricably linked.

Schlütter-Schindler’s book was the first to move the scholarship away from the earlier historiography’s mode, which had always focused on the ambiguity of the term “religion” and criticized its vagueness. Instead, one main purpose of her book was to track how the Schmalkaldic League made decisions about what counted as a matter of religion, and how the selection of those cases changed over time.<sup>79</sup> It is moot, she says, to try to distinguish analytically worldly from churchly, or financial and political from theological perspectives, since it was characteristic of this period that “both domains” were tightly interwoven. Thus, her question was simply: which cases did the Schmalkaldeners define as matters of religion in the period after the Nuremberg Peace of 1532? And did the character of the cases that were counted as matters of religion change over time?<sup>80</sup> While previous scholars had focused on disagreement between the Emperor and the Protestants, or the Protestants and the Court, Schlütter-Schindler

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of members’ requests to consider its case a matter of religion. For full study of this subject see Schlütter-Schindler.

<sup>75</sup> Dommasch, 17. “Der Hase” means rabbit, and “der Pauker” means either timpanist or a pejorative term for a teacher – I am not sure why the Landgrave chose these as his two non-rhyming words, but the point that there is a mismatch between the title “*Religionssachen*” and the cases that have been given the name, is noteworthy.

<sup>76</sup> Dommasch, 17-23, 61.

<sup>77</sup> Dommasch, 96.

<sup>78</sup> Sigrid Jahns, *Frankfurt, Reformation und Schmalkaldischer Bund: d. Reformations-, Reichs- u. Bündnispolitik d. Reichsstadt Frankfurt am Main 1525-1536* (Frankfurt am Main: Kramer, 1976), 250.

<sup>79</sup> Schlütter-Schindler, 15.

<sup>80</sup> Schlütter-Schindler, 30.

showed that determinations about how to label a case were linked to a number of considerations internal to the Protestant league such as the aspirations and costs of the League's promise of mutual military support; political predictions about how certain cases and disputes would unfold; and suspicions and dysfunctions internal to the League.<sup>81</sup> She showed that overall there was a lack of intensive discussion about the nature and character of the cases; the focus was more on how to deal individually with cases involving any reform-minded ally, and on trying to avoid legal proceedings. Hence, instead of abstract definition, members produced lists.<sup>82</sup> Schlütter-Schindler's rendering of these debates showed that the term's ambiguity allowed it to become an index for tensions internal to the League. In their debates about what counted as a matter of religion and what did not, members indicated to each other what kinds of acts and changes they were willing to endorse—to give “*Luft und Platz*” (air and space) to—in the ongoing effort to define the boundaries of this union (simultaneously confessional and political in nature) they had collectively undertaken.<sup>83</sup> The designation of a dispute as a matter of religion signaled what the League was willing to fight with the Emperor and old-faith Estates over, rather than a designation with a carefully worked out referent.<sup>84</sup>

This chapter contends that these varied motives, interests, and considerations contributed to, but did not fully comprehend, the bricolage character of the matter of religion term. To understand better the matter of religion, we have to move away from the familiar register in which Reformation historians have discussed it as a limitation on the legal science of the day, or a failure of the parties involved to posit a clearer definition. Instead, I suggest we bring the insights of the critical study of religion as a category to bear on this early sixteenth century usage.

### **The 1532 Nuremberg Settlement in Litigation Context**

As discussed in Chapter 3, the events of the late 1520s and early 1530s had produced a number of laws, the legal status of each of which was deeply controversial, and therefore produced circumstances in which litigants in the Reformation cases were required, in a new way, to weigh the advantages and disadvantages of making the Reformation context of a given dispute legible in their case. In particular, two legal agreements produced in this time contributed to the legal polysemy. First, the 1530 Augsburg Recess—promulgated by a majority of estates, but protested by the evangelicals—was clear that it was a continuation of the Worms Edict regime. It explicitly forbade many of the actions and changes that reforming rulers were making in their domains, violations of which were to be prosecuted at the Imperial Chamber Court under penalty of the Land-Peace. But its legal status was controversial, not only because of the protestation by the evangelical estates, but also because key parts of it were framed as imperial mandates, with the “willing approval” of the estates. The suspect quality of unilateral mandates and edicts has already been discussed in Chapter 2. Second, the 1532 Nuremberg Settlement promised a pause to cases “concerning the religion” in front of the Imperial Chamber Court. The Settlement seemed to contradict and undermine precisely what was promulgated in 1530. Yet this

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<sup>81</sup> See especially Schlütter-Schindler, 133-45.

<sup>82</sup> Schlütter-Schindler, 26, 30n70.

<sup>83</sup> Schlütter-Schindler, 213.

<sup>84</sup> For another important in-depth analysis of the Schmalkaldic League's definitions of “die Causae religionis,” see Gabriele Haug-Moritz, *Der Schmalkaldische Bund 1530-1541/42: eine Studie zu den genossenschaftlichen Strukturelementen der politischen Ordnung des Heiligen Römischen Reiches Deutscher Nation* (Leinfelden-Echterdingen: DRW-Verlag, 2002), 77-92.

Settlement also had a questionable legal status, as it constituted essentially a private—initially secret—treaty between the Emperor and the protesting estates to limit the judicature of the Imperial Chamber Court, an authority the Emperor did not really have.<sup>85</sup> Moreover, as noted at the beginning of the last section, the Nuremberg Settlement itself underwrote a public Peace Mandate ordering that until the convening of a Christian Council, all Land-Peace laws should be upheld.<sup>86</sup>

For the plaintiffs of many Reformation cases, the 1530 Augsburg Recess, and to a lesser extent the Peace Mandate of 1532, promised a legal basis for suing princes and cities not just for violent actions, for property confiscations, or for jurisdictional seizures, but also for doing those things “on account of the faith and religion.” Yet, to bring a suit under these terms risked inviting a retort by the defendants that the dispute was a “matter of religion” and therefore, under the terms of the 1532 Settlement, did not belong before the Court. For the defendants, to invoke the 1532 Settlement risked a doubling-down on prosecution under the 1530 Recess or the 1532 Peace Mandate, as doing so essentially constituted an admission that their actions were in violation of the prohibition of unauthorized actions on account of faith or religion.

One case provides a particularly vivid example of this. In this case, both parties read the terms of the Nuremberg Settlement in favor of their own argument. This was a case brought by the Imperial Fiscal, Wolfgang Weidner, against the mayor and council of the imperial city of Lindau in 1536.<sup>87</sup> On the order of King Ferdinand, the Fiscal prosecuted Lindau for having in 1534 “forbade and abolished all well-inherited Christian ceremonies, usages, and customs” in “all of their churches, parishes, and places of worship, including in the cloister there,” and, furthermore, for establishing “new, uncustomary, and forbidden usages and ceremonies” instead.<sup>88</sup> These actions violated several layers of law. First, it violated the common written law, the Golden Bull, the Land-Peace, as well as “multiple Recesses” in which it was ordered and provided for that “no one, of whatever estate, may feud, war, or rob nor in any way against law, violently violate, damage, or injure another; nor, if the clergy are involved, to hinder or disturb them in the carrying out and practice of their spiritual offices and worship, let alone to forbid, punish or through violent aggression to scare them away from their worship, or to coerce or force them to suspend or refrain from doing the same.”<sup>89</sup> Second, the recently promulgated peaceful settlement made at Nuremberg in 1532 (to which Lindau was a party) “in the matter of the disputatious religion” provided that “no one should trouble, injure, or violate another, whether of the spiritual or the worldly estate.”<sup>90</sup> Third, the city was being prosecuted for violating the

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<sup>85</sup> Schlütter-Schindler, 36.

<sup>86</sup> Branz, 180.

<sup>87</sup> Bayerisches Hauptstaatsarchiv (RKG) 5654 (“Munich 5654”); see Dommasch, 90.

<sup>88</sup> Munich 5654, Q7, “Positiones et Articuli,” 1538. The letter from the King to the Fiscal ordering him to prosecute is Munich 5654, Q3, “Copia eyns konigklichen schreyben an fiscalen ausgangen,” 1536.

<sup>89</sup> Munich 5654, Q1, “Copia Citationis,” 1536: “wiewol in beyden beschriben Rechten, der gulden bullen unsern und des Reichs ausgekündt Landtfriden, und vilfaltigen desselben abschides geordnet und versehen, das kheyner was stands wurdens oder wesens der sey den andern bevheden, bekriegen, berauben, noch in eynich ander gestalt oder weyse verlangts Rechtens und mit der that, vergeweltigen, beschedigen oder ver- unrechten bevor ab priesterschaft und geistlichen personen, an volnpringen und ubungen Irer Geistlichen Empter und Gotsdienst Irren Turbiern verhindern vil wennygen durch verpot, bestravungen und andere thatliche vergewaltungen von Iren Gotsdiensten abschrecken und dieselbigen zuw suspendiern oder zuw unterlassen, notigen, tringen oder zwingen.”

<sup>90</sup> Munich 5654, Q1, “Copia Citationis,” 1536: “wiewol auch durch unß des Nechstverschinen zweyunddreyssigsten Jars in der streyttigen Religion sach eyn fridlicher anstandt so zuw nurenberg gemacht auffgericht verpact und allenthalben im Reich verkunden lassen, das daruber kheyner den Andern Er sey Geistlichs oder weltlichs stands betruben, beleyden noch vergeweltigen soll.”

special protective (*Schutz und Schirm*) rights of the House of Austria vis-a-vis the female cloister in Lindau.<sup>91</sup> Fourth, the city ignored a Mandate promulgated by King Ferdinand at Vienna that “ordered the city to abolish the aforementioned unseemly innovations, and to place everything in its previous state.”<sup>92</sup> Thus, continued the *Citatio*, “on account of these actions, you should fall into the penalty of the Land-Peace, especially the recently established Nuremberg peaceful Settlement.”<sup>93</sup> Over and over again, the Fiscal as well as King Ferdinand cited the Nuremberg Settlement as one of the central legal bases for their case against Lindau.

The city responded to the Court’s *Citatio* with a letter, written by Hirter and Helfmann, in which they requested that the Court recognize the case as a “matter of religion,” and therefore that any adjudication of it should cease, under the terms of the Nuremberg Settlement of 1532. “Our especially good friends of the same Christian understanding—the mayor and council of the city of Lindau—,” the letter began, “in the matter of the women’s cloister there, regarding the suppressed papist mass and ceremonies, were summoned to the Imperial Chamber Court.”<sup>94</sup> This matter was, they said, “directly a religion matter.”<sup>95</sup> Therefore, “in the name of and on behalf of the estates we are representing of this Christian union,” they asked, without argument, that the Court recognize it as such.

King Ferdinand likewise wrote to the Court, describing his order that Lindau cease its actions and return everything to its previous state, and mentioned also a correspondence between the Elector of Saxony and Landgrave of Hessen with him on this matter.<sup>96</sup> The first document in that exchange was a *Supplicatio* from the Elector of Saxony and the Landgrave of Hessen to the King, dated December 1535 in which they said that Lindau had asked them “as our union relations” to “set them in your gracious and friendly counsel.”<sup>97</sup> The letter described the actions of “those from Lindau” as having been done “alone to praise and honor God the Almighty, and so that his salvific words be clearly taught”; that they were motivated by a desire “out of the affliction of their conscience alone”<sup>98</sup> to create a “Christian ordinance true to the holy Gospels and Godly word,” not at all to act against the King or the Emperor in doing so.<sup>99</sup> Since the city’s

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<sup>91</sup> Munich 5654, Q1, “Copia Citationis,” 1536: “das ir doch sollichs alles unangesehen indem frauen Closter bey Euch So unseren hauses osterreich mit sonderlichem Schutz und Schirm verwannt ist, die wolherbrachten Christlichen Ceremonien preuch und gewonhayten der kirchen verpotten und abgethan.” See “Highest Advocate of the Christian Church” section in Chapter 3.

<sup>92</sup> Munich 5654, Q1, “Copia Citationis,” 1536: “auch zuverachtung eins Koenigklichen Mandats an Euch zu wien ausgegangen und verkundt obberurte furgenannten unzimliche Neuerungen abzuthun und in vorigen standt zuw stellen usw.” This order from the King is described in Q3, discussed below.

<sup>93</sup> Munich 5654, Q1, “Copia Citationis,” 1536: “Das ir auch dannach sollich euer geübte handlungen in die poen obannzognenrecht Landtfridens und sonderlich jungst zuw Nurenberg auffgerichten und aussgekundten fridlichen anstands gefallen sein sollet.”

<sup>94</sup> Munich 5654, Q4, “Presentate 10. May Anno 36 belangend die Stat Lindaw g. den key. Fiscal, Den Achtparen und hochgelerten Ludwig Herter Doctor und Johan Helfffman Licentiat der rechten beide des keyserlichen Cammergerichts jzo zu Speier auch dergemainen Christlichen eynungs verwante advocaten und procuratoren daselbst unsern guten Protestierende Stend und Lindaw g. den key. Fiscal,” 1536.

<sup>95</sup> Munich 5654, Q4, “Presentate, etc.,” 1536: “one mittell ein Religion sachen ist.”

<sup>96</sup> Munich 5654, Q3, “Copia eyns konigklichen schreyben an fiscalen ausgegangen,” 1536.

<sup>97</sup> Munich 5654, Q5, “Copia ainer Supplication von Churfürsten von Sachsen Landtgraf Philipsen von Hessen und der selben mitverwanten an Ko. Mt. ausgangen Belangen Lyndau,” 1536: “So haben sy uns underthenigklich dienstlich und vleyssig gebeten Innen als unsern Eynungs verwants in deine gnediglichen und freundtlichen beraten zusetzen usw.”

<sup>98</sup> Munich 5654, Q5, “Copia ainer Supplication, etc.,” 1536: “auss bedrengnuß irer gewissen allein.”

<sup>99</sup> Munich 5654, Q5, “Copia ainer Supplication, etc.,” 1536: “So ist dennoch unser underthenigs und hochvllaissigs bitten E. konigklich mt. wolle gestalt und gelegenheit der sachen bedanckhen und erwegen und

actions were motivated in this way, the Nuremberg Settlement, insofar as it forbade any form of disturbing another in his religion, should apply both ways.<sup>100</sup>

In his response dated February 1536, King Ferdinand reiterated his claims and demands, urging the Elector and Landgrave to encourage Lindau to cease.<sup>101</sup> However, unlike the *Citatio* which launched the case, this letter stressed that Lindau's actions violated King Ferdinand's *Vogteirechte*, his special protective lordship relationship to the cloister, which, in turn, he said, violated the peaceful settlement made at Nuremberg.<sup>102</sup> For the King in this letter, the violation of the Nuremberg Settlement was precisely in the city's "minimization and narrowing" of his "princely authority and supremacy."<sup>103</sup> Put another way, it was not the innovations in the religion alone that violated the peaceful settlement at Nuremberg, but that the innovations in the religion violated his lordship rights; and it was the violation of his lordship rights that stepped upon the Nuremberg Peace. This framing decentered the language of conscience and pious motivation that, for the Elector and Landgrave, made the case a matter of religion.

### **Material Context Determines Matter of Religion**

This move by the protesting estates to defend their argument that the Lindau case was a matter of religion because Lindau's motivations in promulgating the ordinance were based on the force of their conscience and their desire to see God's word spread was actually quite rare in the cases. More commonly, the protesting estates argued that it was precisely in cases where matters of conscience and piety were entangled with apparently straightforward disputes about peace, property, and jurisdiction, that the name "matter of religion" should be assigned. Indeed, they argued, no one would defend the view that the Imperial Chamber Court could adjudicate disputes that had no material element. We saw this represented in the judges' considerations above; Alber argued that since the Court did not have jurisdiction of "pure matters of religion," the Emperor must have meant something by his directive, so the judges had to determine to what he was referring. The protesting estates made this argument, too.

In a case in which the Bishop of Strassburg sued the city of Strassburg for damaging and taking the incomes of the St. Arbogast monastery, the evangelical estates made this argument very clearly. When they entered the case as co-litigants, the correspondence between the Emperor and the Court regarding the Nuremberg Settlement was ongoing. In response to the Emperor's December 3 letter, the Bishop's lawyer argued that it applied only to matters concerning religion and faith;<sup>104</sup> this issue, by contrast "touches secular goods alone."<sup>105</sup>

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obgемelte von Lyndaw bey Irer Christenlichen verordnung wölhe dem heiligen Evangelio und gotlichen wort gnediglich pleyben und sy daruber nit beschweren."

<sup>100</sup> Munich 5654, Q5, "Copia ainer Supplication, etc.," 1536: "sondern e. konigklich mt. deshalben gegen innen gefaste ungnad gnediglich fallen auch hochgemelter key. Mt. fridens dar innen sy wol alls wir begriffen neben und gleich uns entphangklichen sein und geniessen lassen als wir zuw e. konigklichen mt. der underthenigisten hoffnung stehen."

<sup>101</sup> Munich 5654, Q6, "Copia der Ko. Antwort an Churfursten von Sachsen, Landtgrav Philpsen usw. und dero mitverwanten ausgangen," 1536.

<sup>102</sup> Dommasch, 18-9. Smend, 153.

<sup>103</sup> Munich 5654, Q6, "Copia der Ko. Antwort etc.," 1536: "an unser Landtfurstlichen Obrighkayt und hochayt zuw abbruch verkleynerung und schmelerung."

<sup>104</sup> Dated January 4, 1531, in Winckelmann, *PC II*, 671: "das hochemelt schreiben allein die religion und den glauben belangt."

<sup>105</sup> Dated January 4, 1531, in Winckelmann, *PC II*, 671: "und dann seins gn. herrn sachen allain zeitliche

In response, the protesting estates wrote that:<sup>106</sup>

any unbiased observer would recognize that the Nuremberg Settlement, and the Emperor's directive that came out of it, contemplates all matters, whether to do with persons, goods, annuities, or tithes that touch on faith and religion, or belong to it.<sup>107</sup> This was the very reason for the negotiations in the first place. For this Court would under no circumstance have jurisdiction over matters of faith and religion alone;<sup>108</sup> and unless the suspension refers to the persons, goods and associated pending and mutually relevant matters that flow from matters concerning the faith and religion, it would have been unnecessary to negotiate a peace to suspend to such cases at all, or for the Emperor to trouble himself at all.<sup>109</sup>

The protesting estates argued that disputes about property, peace, and jurisdiction could have their origin and beginning in disagreements about articles of faith, the correct forms of worship and ritual, or in pious struggles against old-faith Church abuses.

Another example of this form of argumentation comes in a case at the end of our period, one that is particularly instructive because it illustrates that the "matter of religion" argumentation had outlived the Schmalkaldic League and the co-litigation strategy of the protesting estates.

In 1554, the Abbess of the female collegiate Church Of Our Dear Lady (*Stift Zu Unserer Lieben Frau*) in Lindau, Katharine von Bodman, sued the mayor and city council of the imperial city of Lindau, saying Lindau had seized the *Gefälle* (payments for real estate), *Zehnten* (tithes), and *Zinsen* (annuities) of the parish church St. Stephan, over which the abbess possessed patronage rights.<sup>110</sup> In doing so, the Mandate said, the city not only disadvantaged and damaged her rights and those of the parish church, but it also violated common written laws, the Emperor and Empire's established ordinances, statutes, and recesses.<sup>111</sup> She sued for a restoration of rights and property taken, and for the city to cease all of their illegal actions immediately<sup>112</sup>, under penalty of 20 marks lötingen golds. A *Petitio* submitted soon after asked that the Court declare the city contumacious for failing to cease its actions and for failing to respond to the Mandate.<sup>113</sup>

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güter berüerete."

<sup>106</sup> Fabian, *UARP I*, Nr. 50, 140-2.

<sup>107</sup> Fabian, *UARP I*, Nr. 50, 141: "...alle sachen, als personen, güter, rendten und zins, so des glaubens und religion articul beruere, auch darzu gehören, mit in dieselben sachen gezogen und begriffen sind..."

<sup>108</sup> Fabian, *UARP I*, Nr. 50, 141: "...dann sonst, so der glaub und [die] religion allain, daruber ir on das nit richter sein köndet..."

<sup>109</sup> Fabian, *UARP I*, Nr. 50, 141: "...und die personen, güter und zugehörige anhängige sachen und condependtien, so des glaubens und religion sachen halben harfliessen, nicht auch in berurtem stillstand, ruw und friden gebracht und damit gemeynt sein sollen, were von unnöten geweßt, von demselben friden und stillstand zu handeln und ire kay. Mat. vergeblich darumb zu bemühen..."

<sup>110</sup> Bayerisches Hauptstaatsarchiv (RKG) 8281 ("Munich 8281"). The protocol is empty, and the documents have no quadrangles, indicating that the judges never called for the case file to be collated.

<sup>111</sup> Munich 8281, no quadrangle, second document in case file, "Copia Mandati," 1554: "wider gemeine geschribne recht unnsere unnd des Reichs auffgerichte ordnungen satzungen und Abschied Auch ir Clegerin unnd irem Gotshauß zu Abbruch nachteil unnd schaden irer habenden gerichtigkeit."

<sup>112</sup> Munich 8281, no quadrangle, second document in case file, "Copia Mandati," 1554.

<sup>113</sup> Munich 8281, no quadrangle, third document in case file, "Petitio Summaria," 1554.



In August 1555, the city of Lindau entered the case and submitted *Exceptiones fori declinatorie*, objections declining the forum. Presented in articulated form, the city began by arguing that as a free imperial city, Lindau had been given the privilege from late emperors and kings to only be tried before certain cities, namely: Constance, Überlingen, Ravensburg, and St. Gallen (in modern-day Switzerland). Next, the city of Lindau denied having confiscated any rights, goods, or incomes from the Abbess.<sup>114</sup> On the contrary, it argued that the city had always acknowledged the Abbess and her ancestors as alone the patrons and liege lords of the St. Stephan parish. What they challenged was the claim that the tithes of Lindau belonged to the Abbess; the tithes, they said, belonged directly to the parish priest there, and had always been given to him without any complaint or hindrance by the Abbess.

Indeed, continued the Lindauers, before the “maliciously brought out Mandate,” the Abbess had always publicly acknowledged this configuration. The desire and plans of the city of Lindau was, they said, nothing other than that the appropriate incomes of the parish go to “the Christian servants of the Church, and that they deliver the Godly word and pastoral care, as has always been the duty of a parish priest.”<sup>115</sup> For the Abbess’ part, they argued, the only reason that the Abbess did not want to give those incomes to “the church servants and deliverers of God’s word” was that “in certain points and articles of our holy Christian religion, ceremonies and usages” she and Lindau “are not the same.”<sup>116</sup> By not stating as much in the Mandate, the Abbess’ narration committed subreption and obreption (obscuring truth and covering over it). This dispute, they said, was a matter of religion, and had to do with the “present tension in faith and religion.”<sup>117</sup> As such, and in accordance with various promulgated recesses and agreements, as well as the Passau Treaty of 1552, such disputatious matters of religion belonged before a common Christian council or national assembly and should be postponed until such a meeting.

Thus, Lindau in this case declined the forum of the Imperial Chamber Court on two distinct grounds: first, on the basis that this was a matter of religion; second, on the basis that the city received from late emperors a jurisdictional privilege to only be tried in the first instance in the courts of Constance, Überlingen, Ravensburg, or St. Gallen. So that “insofar as the matter is a religion matter, then it belongs directly before a Christian council; and if it is a worldly matter, then it belongs before the privileged judges (*gefreyte Richter*).”<sup>118</sup>

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<sup>114</sup> Munich 8281, no quadrangle, fifth document in case file, “*Exceptiones fori declinatoriae*,” 1554.

<sup>115</sup> Munich 8281, no quadrangle, fifth document in case file, “*Exceptiones fori declinatoriae*,” 1554: “Item dass Burgermeister und Rhat der statt Lindaw beger und vorhaben nie anderst gestanden begeren auch noch nit anderst, denn dass solliche der pfarr lindaw gefelh iren christenlichen dinern der kirchen und verkundern des gottlichen worts und sehsorgern zugestellt werden Wie die vor jhenen alwegen und jeden pfarhern zugehort.”

<sup>116</sup> Munich 8281, no quadrangle, fifth document in case file, “*Exceptiones fori declinatoriae*,” 1554: “Item, dass die hochgedachte fraw Eptissin zu Lindaw den kirchen dienern der pfarr zu Lindaw und verkundern gottlichs worts allain die zehenden und gefell der pfarr darumben nit verfolgen lassen wolle, dieweil die in einichen puncten und artickeln unser heiligen christlichen religion mit irer f.g. ceremonien und geprauch halb nit ainhellig.” See similar kind of argumentation in case involving Ludwig von Freyberg, Chapter 3, Munich 2019.

<sup>117</sup> Munich 8281, no quadrangle, fifth document in case file, “*Exceptiones fori declinatoriae*,” 1554: “Item, dass also unwidersprechlich volge, dass dise sach ein Religion sach und handlung seye und gegenwertigen span ein glaubens und Religion span seie.”

<sup>118</sup> Munich 8281, no quadrangle, fifth document in case file, “*Exceptiones fori declinatoriae*,” 1554: “item gesetzt, doch nit gestanden, dass diese ein weltlich sache und die Religion nit belangte noch glaubens sach were, so solte demnechst die hoch gemelte fraw epitissin gerurte Burgermeister und Rhat zu Lindaw nit vor E.G. sonder vor iren gefreyten richtern beclagen. Item, dass also ein unfelig argument und dileumma volge, So verr dise sach ein religion sach, so gehore die ohne mittell fur ein christenlich consili, ist ess dann oder were ess ein weltliche sache, So gehort die vor der statt lindaw gefreyte Richter unnd dass ist offenpar wahr.”

They then went further to explain what the nature of the dispute was and why it belonged to a free Christian council to resolve. “Most of the electors, princes, counts, free lords, and cities that have accepted the Augsburg [Lutheran] Confession hold it to be the case that the incomes of a parish, and the tithes that belong to a parish, be given to servants of the Church and the deliverers of the word of God. But, according to existing Godly and Spiritual Law, all tithes should be given to the servants of the Church, by virtue of those same servants giving the holy Sacraments.”<sup>119</sup> The parish priest office at Lindau, continued the city, was vacant.<sup>120</sup> During this vacancy of several years, the Abbess had illegally taken the tithes to herself. When the city attempted to correct this, by redirecting the incomes to its proper destination—for the use of paying the incomes of church servants and preachers of the word of God in Lindau, regardless of whether they carried out old-faith sacraments—they were acting on a core matter of disputation in the religion; and the Abbess was likewise responding to it on those grounds. But she chose, instead of seeking the proper forum to resolve it—a Christian council—rather to sue for confiscation of rights and property, which was simply not what this case was about, said Lindau. The core question that was the source of disagreement, Lindau said, was: how should tithes be directed when a parish seat is occupied by servants of the Church and deliverers of God’s word who will not carry out the old-faith holy sacraments? This, they said, could not be resolved through reference to existing law, and it definitely should not be handled in a temporal court that would obfuscate this religion and faith aspect.

The dispute was settled out of court in February 1556, according to which Abbess Katharina would give up her patronage rights, as well as the tithes, rents, interests and incomes of the collegiate church, and in return the city would give to them the patronage rights of the parish Lindenberg, which had belonged to the Hospital of Lindau.<sup>121</sup>

### **The Range of Actions that Could Make a Dispute a “Matter of Religion”**

In Chapter 3, we learned about the arrest, torture, and public execution of a former city official of Memmingen, Ludwig Vogelmann.<sup>122</sup> The suits brought by the imperial Fiscal and Vogelmann’s family against the mayor and city council of Memmingen said that the city had violated the laws of the Empire, the Land-Peace, as well as special imperial protection letters which had been given in 1530 to Vogelmann as well as the Antoniter monastery, of which Vogelmann was the lay administrator. After a failed attempt to decline the forum on the basis of a fifteenth century imperial privilege regarding where the city of Memmingen could be sued, and ongoing efforts to appeal directly to the Emperor to order the Court to bring a stop to the case based on their argument that they had the right to punish Vogelmann for violating his oaths to

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<sup>119</sup> Munich 8281, no quadrangle, fifth document in case file, “Exceptiones fori declinatoriae,” 1554: “item, setzt und sagt wahr sein, dass mehrerteil bey allen churfursten fursten graven freynnhern und stett so die augspurgisch confession angenohmen, es also gehalten werde, dass die einkommen der pfarhen und zehenden, so den pfarren zuhoren, nichts desto weniger den dienern der kirchen und verkundern des gotlichs worts geraicht werdenn. Item, dass alle zehenden vermog d. gottlichen und geistlichen recht den dienern der kirchen gegeben werden sollen, und darumben dass inen die heiligen sacrament durch dieselben diener der kirchen mitgetheilt zugeben gepotten angenomen und bewilligt.”

<sup>120</sup> What is not mentioned here is that Lindau had formally introduced the Reformation already in 1528, so no parish priest appointed by the old-faith Church would have been accepted by the local population.

<sup>121</sup> Wolfart, 392.

<sup>122</sup> Munich 5657.

the city, stirring up conflict, and other seditious activities, Memmingen's magistrates then sought to decline the forum because the dispute was a "matter of religion."

In November 1533, Hirter submitted a document to the Court in which he provided eight reasons why the Vogelmann case should be considered a matter of religion.<sup>123</sup> The "matter of religion" cases were never defined through abstract principles. Rather, a given case was always described as a matter of religion on the particular grounds of the dispute. A litigant would describe a particular fact, and then say "and therefore it is undoubtedly clear that the matter directly flows from the religion." Likewise, the Schmalkaldic League in its internal deliberations, the Judges in theirs, and the correspondences between the Emperor, the Judges, and the League—none of these yielded an abstract definition. The Schmalkaldic League produced various lists to submit to the Emperor and the Judges to "describe" what counted as a matter of religion.<sup>124</sup> As we will see below, plaintiffs likewise argued that a dispute was not a matter of religion simply by presenting a particular fact, and then saying "and therefore it is undoubtedly clear that this dispute does not concern the religion."

According to Hirter, the first indication that "this matter took its beginning, middle, and end from and on account of the religion" was that Ludwig Vogelmann had been an honest, well-regarded City Clerk of sixteen years in the service of the city, up until "the holy Gospel and pure, clear word of God was delivered" in Memmingen "as in other places in the holy Empire." After that, "he completely gave himself over to the papacy, and all of the priests who were offensive to the city, and was so attached to their fabricated worship," to such an extent that he gave up his office as City Clerk.<sup>125</sup> The "first cause for this separation was the religion," because "had the Gospel of Christ not come into Memmingen, and had the city not given up the papacy, Ludwig Vogelmann would have remained our City Clerk."

Second, when he began to work as secretary for the Bishop of Augsburg, and then became Burggrave of Augsburg, he thereby took oaths with two other lords antagonistic to the city. When the city of Memmingen warned him that they could not abide this, he sued with the city council of Ulm, which resulted in a compromise, according to which Vogelmann would never again advise or serve the city in any way, neither in spiritual nor in worldly matters,<sup>126</sup> and the city agreed to pay him 400 gulden for the strain during his service.<sup>127</sup> "This dispute, legal proceeding, and compromise had absolutely no other cause than the religion." Vogelmann had taken an oath with the Bishop, in violation of his oath with the city. And Memmingen had "many significant issues" with the Bishop and his clergy, so Vogelmann could neither advise nor serve

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<sup>123</sup> Stadtarchiv Memmingen A330/1.

<sup>124</sup> The evangelical estates created lists on at least four separate occasions in the 1530s and 40s. See Gabriele Haug-Moritz, "Religionsprozesse am Reichskammergericht: Zum Wandel des reichspolitischen Konfliktpotentials der Kammergerichtsjudikatur im Reich der Reformationszeit (1530-1541), in Anette Baumann and Joachim Kemper, *Speyer als Hauptstadt des Reiches: Politik und Justiz zwischen Reich und Territorium im 16. und 17. Jahrhundert* (Berlin; Boston: Walter de Gruyter GmbH, 2016), accessed May 20, 2019, <https://books.google.com/books?id=Vw6yDQAAQBAJ&lpg=PT6&dq=haug-moritz%20religionsprozesse&pg=PT29#v=onepage&q&f=false> [no page numbers in online version]

<sup>125</sup> Stadtarchiv Memmingen A330/1: "Als bey inen das haylig Evangelium gar erbeben und rhain lauter wort gottes wie an andern orten im heiligen Reych verkundet worden, ist er doch dem Babstumb gar ergeben und allen der Statt widerwertigen pffaffen und irem erdichten gotzdienst so anhengig gewest das er auch damit er demselben gnug thun mug das statschreyber ampt aufgeben."

<sup>126</sup> Stadtarchiv Memmingen A330/1: "Auch des weyter begeben und zugsagt das er wider ain ersamen rath zu Memmingen sein lebenslang weder in geistlichen oder weltlichen gemeiner statt sachen nit raten sein steen oder dienen soll in keinerley weys noch weg."

<sup>127</sup> On the Ulm agreement, see Frieß, 83-4.

the city council who, in conflict with the Bishop, would simultaneously go against his religion.<sup>128</sup> If the religion dispute were not there, such a dispute between both parties would have been avoided.

Third, despite the Ulm compromise, Vogelmann accepted a position as administrator of the Antoniter monastery. He then went to the Diet at Augsburg and supplicated to the Emperor and fictitiously claimed that he was in fear and insecurity as a result of the inflammatory, misguided preachers in Memmingen, and that he was not bold enough (*nit keck sey*) to administer without protection. He asked for a letter of imperial protection and safe passage. In his supplication to the Emperor, not only did he disparage without cause the city of Memmingen and its preachers, against his civil oath, but he himself also indicated and testified that he sought the protection only on account of the religion.<sup>129</sup> If there were no division of the religion, and were he not one of the old faith and a follower of the preachers, he would not have had a need for any imperial protection, said the city of Memmingen.

Fourth, Vogelmann went beyond simply seeking protection, thus placing Memmingen in highest disgrace with the Emperor. Rather, against the Ulm compromise, “with all possible diligence, speed, cunning, and evil methods, he sought to convince the Emperor to overrun the lovers of the Christian name and of the holy word of God, to kill them, to chase them out and to subvert them, and thereby to completely obliterate the holy Gospel which was being loyally and peacefully preached in their city; and to plant and establish the papacy there again.” The way he did this was by telling the Emperor that “the new teachings (meaning the holy word of God)” would cause uproar and rebellion, and would “bring the Christian people from Christian devotion to frivolity (*Leüchtfertigkeit*), disobedience, envy, hate, and antagonism,” so that the Emperor was made to worry greatly. And furthermore, he told the Emperor that the aim of this evil, uproarious, self-serving faith was to bring the property of the churches and their servants into lay hands. He also told the Emperor that the majority of the patrician families had remained firm on the “old Christian faith” and that most of the others had left the old faith based on misunderstanding.<sup>130</sup> All of these statements by Vogelmann “indicate that it happened only because of the religion.”

Fifth, Vogelmann also in his supplication to the Emperor requested that he step in to change the city’s constitution to ensure an old-faith majority on the city council “in order to protect the city from further descent, and to bring it to the right way.”<sup>131</sup> This was another indication, said Memmingen, that the dispute was a matter of religion.

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<sup>128</sup> Stadtarchiv Memmingen A330/1: “Er inen auch wider sein Religion mit warhait nit rathen noch dienen künden.”

<sup>129</sup> Frieß, 88; Schlütter-Schindler, 134; Frieß, 91-2; Winckelmann, *PC III*, Nr. 25, 30 footnote 2; Dobel, V, 19-22 is a report from the Memmingen delegate to the 1530 Augsburg Reichstag on the supplication the preceptor of the Antonier monastery had made to the Emperor. It describes the preachers abolishing all old ceremonies, and that violation of this would lead to imprisonment and torture until death, as had happened tyrannically in other places against the pious Christians (“wie an andern orten gegen fromen Christen jrer sect Thirannisch geschehen” (Dobel, V, 20). Dobel, V, 22ff contains the document in which preceptor asks for safe passage “so that we can carry out our offices, as God and Christian order demands us to do, unhindered by the Zwinglian preachers and their followers.” (“damit wir vnserer Ampt, wie vns von got vnd christenlicher ordnung aufgelegt vnnnd bevolchen ist und würt, vnverhindert vor den zwinglischen predigern vnd jren anhengern volbringen” (Dobel, V, 25). See in general Dobel, V, 5-33, esp. 15f.

<sup>130</sup> Dobel, V, 20: “vnnnder dem valschen schein seins glaubens der gaistlichen vnnnd jren anhennger gueter in der weltlichen brauch zu bringen.”

<sup>131</sup> Dobel, V, 21; Frieß, 89.

Sixth, Vogelmann wrote letters to two respectable citizens of Memmingen, in which he provoked in them “great fear and terror” that the city’s actions were putting them in direct peril of the Emperor’s military action. In particular, he indicated that Memmingen’s adopting the Zwinglian Tetropolitan confession put it at particular risk, while at least with the Lutherans, the Emperor was willing to negotiate—all of which happened, again, on account of the religion.

Seventh, Vogelmann seized two benefices that had already been sold to two farmers.<sup>132</sup> When the farmers complained, Vogelmann asked the parish priests of their towns to excommunicate them.<sup>133</sup> A letter that found its way to the hands of the city council indicated that Vogelmann did this in order to “bring the city into an onerous and unbearable game”<sup>134</sup> — by which was meant that Vogelmann intended through these actions to provoke the city to arrest him and thus to violate the letter of imperial protection.

Eighth, Vogelmann wrote many threatening letters regarding the faith and religion to Memmingen and many citizens, such that many fled from the city, setting up residence elsewhere and giving up their citizenship, indicating the extent of the fear and terror that Vogelmann made there. Many thought that they were daily under threat of being besieged and overrun on account of the faith and religion; the city was disunified. Vogelmann did all of this in order to abolish the holy Gospel and to reestablish the papacy. It was only on account of the faith and religion that Vogelmann stirred up this unrest and discord.<sup>135</sup> These acts constituted sedition. Vogelmann confessed to undertaking all of these actions when the city arrested him, “without especially severe questioning,” as recorded in the confession statement (*Urgicht*),<sup>136</sup> and right up until the moment of his death, he said he did all of it “only on account of the faith.”

From this document, we come to understand that the protesting estates were arguing that all kinds of actions—quitting a job, seeking imperial protection, sedition—though these may have a civil or public law cause of action, can additionally have their origins in matters of religion. It was precisely this entanglement that they were trying to make legible.

### **Homogenizing Cases, Lifting them Out of Particularity**

At the same time, it was constitutive of the protesting estates’ strategy to lift a dispute out of its particularity and to claim that the only important feature of a dispute was what made it like dozens of other suits—that it was a matter of religion.

Just two weeks after the execution of Vogelmann, Memmingen requested to join the Schmalkaldic League.<sup>137</sup> By March 1531, it was accepted.<sup>138</sup> When the suit was launched at the Imperial Chamber Court in late 1532 and early 1533, the city appointed Dr. Ludwig Hirter as their procurator, who was already representing them in another case,<sup>139</sup> and was one of the two lawyers representing the protesting estates collectively. But it was not until about one year later in late 1533 that the protesting estates’ power of attorney document was submitted, declaring

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<sup>132</sup> Schlütter-Schindler, 134.

<sup>133</sup> Dobel, V, 32.

<sup>134</sup> Stadtarchiv Memmingen A330/1: “ain beschwerlicher und untreglicher spil fieren und pringen.”

<sup>135</sup> The language here is very strong. Stadtarchiv Memmingen A330/1: “hocherschrockenliche Sedition, aufrur und empörung [...] lesterlichen vorhabens [...] frefenlich [...]”

<sup>136</sup> Karrer, 195-7.

<sup>137</sup> Frieß, 102.

<sup>138</sup> Dobel, V, 35.

<sup>139</sup> See Bayerisches Hauptstaatsarchiv (RKG) 1176, case involving Matthias Mairbeck, 1532-1534.

them co-litigants in the dispute as it was a “matter of religion.”<sup>140</sup> And, it was not until 1535 that the League finally agreed to include the Vogelmann case in its list of religion cases.<sup>141</sup> Nonetheless, from late 1533, throughout 1534 and 1535, Memmingen, Hirter, and the protesting estates were making arguments as though it were a “matter of religion” case.<sup>142</sup> In Chapter 5, we will discuss the responses by Weidner and Gottfried to the attempt by the protesting estates to enter the case as co-litigants.

Because it involved the execution of a well-connected official, the Memmingen case turned out to be one of the most divisive and controversial among the protesting estates, and it came to be regarded as a sort of liability for the Schmalkaldic League.<sup>143</sup> In her analysis of debates internal to the Schmalkaldic League concerning “matters of religion,” Schlütter-Schindler argues that unlike other deliberations in which considerations of a more political and pragmatic nature were at the center, the Vogelmann case deliberations came down to a disagreement about the substance of the dispute, rather than the politics of it.<sup>144</sup> Over time, Memmingen’s protection and the priorities of the League became increasingly at odds, and in the end, the city was pressured to resolve the dispute out of court.<sup>145</sup> Why was a case that was so controversial and divisive among the League members, such that it was not included on the list of religion cases until late 1535, still being litigated as though it were a matter of religion case well before that?

On July 2, 1533, delegates from Memmingen were among several cities that presented their troubles and concerns over pending or rumored legal action in the Imperial Chamber Court.<sup>146</sup> The Schmalkaldic League recess noted that,

this matter is quite important but there is some doubt about whether it may actually be pulled into the *Religionssachen* or not. So, the messengers and delegates see it would be good that this matter be taken into consideration, and that the delegates to Speyer speak about it to both Dr. Ludwig Hirter and Lic. Helffman, whether one may find some way through which those from Memmingen can be unburdened of these difficulties; and that in the mean time they protect those from Memmingen to the best of their ability.

This last phrase provides a clue as to why the protesting estates aided Memmingen in the case before it was counted as a matter of religion. It was a protective stance by the other protesting estates to join Memmingen in this case, rather than a principled one. Note that they did not say

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<sup>140</sup> Munich 5657, see Protokoll, reference to Q14, which is not present in the case file. Dommasch, 90. Frieß, 103. For more on the power of attorney and specifically its use in this case, see Chapter 5.

<sup>141</sup> Schlütter-Schindler, 90n142, 135.

<sup>142</sup> This is similar to other disputes, such as the Frankfurt cases; in November 1532, the city of Frankfurt invoked the 1532 Nuremberg Settlement in their case which they argued was a “matter of religion” although they had not been part of those negotiations, had not yet adopted the Augsburg Confession, nor had they joined the Schmalkaldic League, which they did in 1533 (Jahns, 127).

<sup>143</sup> Schlütter-Schindler, 47: “in particular, the Memmingen Vogelmann case would continue to preoccupy the League and would be of considerable interest for its judgment criteria.” Also, Schlütter-Schindler, 75n2: “The Memmingen Vogelmann case seems especially to have busied the minds.” Frieß, 110-1.

<sup>144</sup> See Schlütter-Schindler 135-45 for a discussion of how the Schmalkaldic League made decisions when the case was not so clear.

<sup>145</sup> Frieß, 110-1, 114-6. Schlütter-Schindler, 201.

<sup>146</sup> Ekkehart Fabian, *Die schmalkaldischen Bundesabschiede: 1530-32*, vol. 2 (Tübingen: Osiander, 1958) [SBA 1530-32 II], 26. See Schlütter-Schindler, 133-4. Dommasch 90n10.

“whether it is or is not a matter of religion” but rather “whether it may actually be pulled into the matters of religion or not.”<sup>147</sup> This suggests an awareness of categorization as a positivist act, a choice about how to draw the boundaries around what it meant to be a “matter of religion,” not a philosophical question about what is or is not a matter of religion based on a preexisting analytic.<sup>148</sup> The definition of “matter of religion” was in the process of formation, defined, in part, through choices the League was making. In this case, they decided that before they would settle on the question of whether they would fully advocate on Memmingen’s behalf like they were for other religion cases—a calculation that was multi-pronged—that “in the meantime” they would act *as if it were* in order to protect Memmingen as a co-believer.<sup>149</sup>

The Vogelmann case was controversial because of its subject matter. In one telling exchange, for instance, Philip of Hessen wrote to the Elector of Saxony in November 1533 saying that the Recusation of the judges accusing them of being biased in their adjudication in matters of religion, then being drafted, should include also the Memmingen/Vogelmann case because “Vogelmann had caused mutiny and upheaval in the city on account of faith matters.”<sup>150</sup> The Elector of Saxony wrote back to Philip of Hessen that December, disagreeing with him about including Memmingen’s Vogelmann case (or as he called it the case of the “beheaded city clerk of Memmingen”) as a matter of religion, because he felt that it weakened their overall argument, or perhaps even the legitimacy of their cause: “All that we enjoin should, if God wills, be found to have no deficiency.”<sup>151</sup>

The circumstances surrounding its being included in the list of religion cases was somewhat murky. By the time the Recusation was produced in 1534, the Vogelmann case was still not considered a “matter of religion.”<sup>152</sup> Yet Memmingen submitted the Recusation in their case.<sup>153</sup> Already in November 1533, in the document summarized above in which Hirter described eight reasons why the Vogelmann case should be considered a matter of religion, Hirter wrote that it was proper for a judge to remove himself from a case if he was aligned with one or the other party, and that “all of the judges are given over to and are followers of the

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<sup>147</sup> Fabian, *SBA 1530-32 II*, 26: “ober der eigentlich in di religionssachen gezogen werden moge oder nicht.”

<sup>148</sup> There are many examples of this reflexive awareness around naming and categorization in Reformation cases, not only for the “matter of religion,” but also for the proto-confessions and various epithets regarding them. For example, in describing one of the reasons why a case involving Strassburg was a matter of religion, the evangelical estates said that the plaintiff in that case, the Bishop, had said of the city: “der irrigen verfürischen secten zwinglischer leer, damit eyn statt straßburg befleckt sein solte (also hat er der predig des euangelii den tittel geben).” The Bishop had referred to the city as “stained with the false, blasphemous sect and Zwinglian teachings,” and parenthetically the author noted “this is the title that he gave to the preaching of the Gospel” (Fabian, *UARP I*, Nr. 51, 148). In the same document, the evangelical estates referred to the proto-Catholic majority as “the obedient princes (as they say);” “den gehorsamen fursten (wie sy sagen)” (Fabian, *UARP I*, Nr. 51, 148). See also the language in Munich 264 discussed at length in Chapter 6, about the way in which “hundreds of faiths [...] all want to have a name”; “die doch alle ein Namen haben wollen” (Bayerisches Hauptstaatsarchiv (RKG) 264, Q6, “Replück und Exception schriftt,” 1556).

<sup>149</sup> See Schlütter-Schindler for in-depth study of internal decision procedures of the Schmalkaldic League.

<sup>150</sup> Fabian, *UARP I*, Nr. 71, 202: “Und weil der von Memmingen sach pillich in die religion sachen gezogen wirdet, dan der Vogelmann, durch deß glaubens sachen meuterey und aufrur zu erregen und zu erwecken, understanden, so sehen wir fur gut an, das dieselb sach in die recusacion außtruglich gesetzt und so eher so besser gerichtlich damit procedirt werde.”

<sup>151</sup> Fabian, *UARP I*, Nr. 72, 206: “Dan an uns sol ob got wil in allem dem, das wir vorschreiben, auch kain mangel befunden werden” Elector of Saxony also was concerned about including Zwinglians into the League.

<sup>152</sup> Schlütter-Schindler, 80.

<sup>153</sup> Schlütter-Schindler, 63n17.

papacy,” so in any matter of faith or religion or that has its origins in it, are bound to be suspicious if ruled by these judges. “For if a judge who follows the papacy is competent to judge such a dispute, he would judge that everything that Vogelmann did was to root out the misguiding, new, heretical and uproarious teachings, because that it how they consider them, and so everything Vogelmann did was done well and honestly as a pious old Christian.” And on this view the punishment carried out by the city made Vogelmann a saint and a martyr.<sup>154</sup>

Like all of the other cases being litigated with the protesting estates involvement, the Recusation failed to achieve its aim; the Court continued the proceeding without interruption. At the next League assembly, the Memmingen case was not discussed.<sup>155</sup> Then, after the next League assembly in December 1535 in Schmalkalden, Memmingen was included in the list of religion cases, without any mention of the reasons for this addition in the Recess itself.<sup>156</sup> It was made on the basis of the Landgrave of Hessen’s opinion that the case was a matter of religion because of Vogelmann’s specific antipathy to the Reformation, that that was the motivation for his actions.<sup>157</sup> But the violent act at the center of the suit made it an uneasy addition that pushed the limits of the coherence of the “matter of religion” category.

### **Violence, and “Religion” as Honorific, Commonsense Moral Category**

In some cases, especially those involving acts of violence or aggression, or in long-standing dynastic disputes that suddenly took on the “religion” mantel,<sup>158</sup> the claim that a dispute was a “matter of religion” was met with incredulity. Cases involving alleged acts of violence on the part of the proto-Protestant litigants gave plaintiffs an opportunity to challenge their claim that the dispute was a matter of religion. In these cases, we see “matter of religion” operating as a commonsense moral category, where “religion” is an honorific, a designation for something good and pious.

This was apparent in the witness testimony of the Vogelmann case. There was inaction in the case after the *litis contestatio* took place and the plaintiffs and Fiscal submitted the Positions and Articles, in September 1535.<sup>159</sup> On August 16, 1536, the Court announced that it would continue the proceedings by selecting within the next three months the commissioner to carry out the witness testimony proceeding.<sup>160</sup> In 1538 and 1539, the witness testimony proceedings took place at Dillingen and Weisenhorn. Because the defendants were contumacious in this case (or, from their perspective, were not obligated to proceed), they suggested no witnesses, and their articles were not presented for testimony.

The “Rotulus” was the document produced by the commissioner at the end of the testimony proceedings.<sup>161</sup> In this case, the last 200 pages or so are the actual witness testimony,

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<sup>154</sup> Stadtarchiv Memmingen A330/1: “Und man inen deßhalb wider gott und unnbillich beschehner massen gestrafft wol aber ainen hailigenn und marterer aus ime gemacht hab.”

<sup>155</sup> Schlütter-Schindler, 75. Ekkehart Fabian, *Die Schmalkaldischen Bundesabschiede: 1533-36*, vol. 2 (Tübingen: Osiander, 1958) [*SBA 1533-36 II*], 37-8.

<sup>156</sup> *SBA 1533-36 II*, 66ff. See Dommasch, 73n246; and Schlütter-Schindler, 90n142.

<sup>157</sup> Schlütter-Schindler, 144.

<sup>158</sup> Though I do not discuss them in this dissertation, the cases involving Herzog Ulrich of the Duchy of Württemberg evoked precisely this kind of skepticism. See e.g. Hauptstaatsarchiv Stuttgart C3 (RKG) 2808, 2809, 5560, 1175, 4182, and 5162.

<sup>159</sup> On July 5, 1536, the judges had a deliberating session (Sprenger, 209).

<sup>160</sup> Sprenger, 209.

<sup>161</sup> See more in Chapter 1 on court procedure.



which follows a very strict formula for each witness: first the oath, then asking basic personal details, then asking whether each article was true or not true, and how they knew it to be so (heard directly, saw directly, heard secondhand, or generally known/rumored), then any documentation witnesses may have had to support it. For example:

The first article states that Vogelmann was Burggrave, councilor and servant for the prince-bishop of Augsburg, etc. The Bishop of Augsburg confirms this, as the first witness. The second, third, fourth, fifth, sixth, seventh, eighth, and ninth witnesses from Dillingen, and also the eighteenth, nineteenth, twentieth, and twenty-first witnesses from Weysenhorn, and the third witness from Memmingen confirm it also. And an even greater report in support of the first articles is to be found in the *Examine Testium* at Weysenhorn, where the prince-bishop of Augsburg testified that he first of all appointed Vogelmann as a secretary, and then took him on as a Burggrave; contents of the appointment letter are inserted in the Rotulus, and these clearly show [that he had these roles].<sup>162</sup>

Thus, though most of the language of the Rotulus was formulaic and predictable, some documents thematized the question of whether the dispute was a matter of religion. In one document, for instance, two citizens of Memmingen, Walter Isenberg and Veitt Buschler through their appointed lawyer, Gerung, refuse to take part in the witness testimony commission.<sup>163</sup> They said that Vogelmann had committed multifarious guilty, highly shocking, uproarious, heavy and treasonous actions against the city of Memmingen, forgetting the oath that he was obligated to uphold as a sworn citizen of the city, also against his own safe passage letter, and three city statutes and laws,<sup>164</sup> that had as their punishment death. And also he, freely, without especially heavy questioning, in his own handwriting, and also right before his death before more than a thousand people, publicly read out and testified to having done those things. So, they said, it is very clear and obvious that one should not have acted any differently than Memmingen did; that Memmingen was ready to answer to God, all nobility, and also all unbiased judges and courts, as an obedient city of the Emperor and Holy Empire, and that the city was obligated to carry out its punishment against his evil and wrongdoing. These two citizens refused to take part in the proceedings, they wrote, because the matter and proceeding had “its origin and beginning out of the religion, and truthfully followed and originated from it,” and therefore has been accepted as a matter of religion by the protesting estates, who collectively participate in this case, and who have recused the Court President and Judges of the Imperial Chamber Court regarding all such matters as suspicious.<sup>165</sup>

To this, Wolfgang Vogelmann (the son of Ludwig Vogelmann, principal plaintiff) responded with incredulity and rebuke.<sup>166</sup> Ever since Memmingen’s tyrannical, illegal

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<sup>162</sup> Munich 5657, Q30, “Kommissionsrotulus,” 1538; and Q36, “Kommissionsrotulus,” 1538/39.

<sup>163</sup> Munich 5657, Q30, “Kommissionsrotulus,” 1538, in section beginning with “Dern von Memmingen Recusation und Protestation.”

<sup>164</sup> Namely: violating the Ulm contract, disgracing the city before the Emperor, and provoking unrest in the city.

<sup>165</sup> Munich 5657, Q30, “Kommissionsrotulus,” 1538, in section beginning with “Dern von Memmingen Recusation und Protestation”: “arckwonig und verdechtig.”

<sup>166</sup> Munich 5657, Q30, “Kommissionsrotulus,” 1538. It seems that this was a transcription of an oral statement by Wolfgang. The Rotulus prefaces the statement thus: “Auff solche, in dess Memmingischen Anwalds verleiβne schrufften hat bemelter wolfgangg voglmann fur sich selb und in namen wie obgemelt bedachts begert

decapitation committed against the pious and innocent Ludwig Vogelmann, he said, and ever since the Fiscal and the Vogelmann family sued the city at the Imperial Chamber Court for these acts, Memmingen had been outrageously and illegally trying to find ways of escaping being brought into the case.<sup>167</sup> They attempted to “pull their unchristian, tyrannical, punishable actions into an alleged religion in order to evilly cover with the holy Gospels their shame and murder, as they do even today.<sup>168</sup> They think that if they say with their mouths that they are evangelical, that no one will proceed against them for their punishable actions.”<sup>169</sup> The Court, he said, had rejected this improper escape and excuse, and on multiple occasions had ordered them to settle the *litis*, and then to take part in the witness testimony, but they remained contumacious. The Memmingers had persisted through their disobedience, in their insult and minimization of the Court’s authority.

Wolfgang Vogelmann’s response suggested that for him, the protesting estates’ invocation of the case as a matter of religion was simply a means to escape the Court’s jurisdiction; to continue to persist in this line of argumentation even after the Court has rejected it as improper, made them contumacious. Moreover, for Wolfgang, it was doubly egregious to do this because of the mismatch between their “unchristian, tyrannical,” murderous actions and their cover of the holy Gospels.

In his summary of the witness testimony, the lawyer for the family, Gottfried, argued that the testimony overwhelmingly supported his case for the plaintiff family.<sup>170</sup> He described the protestation and recusation submitted by Memmingen and the other protesting estates as “insulting, fictitious, and unfounded” and “invalid and wicked.” Gottfried contrasted this with the piety, ability, and good reputation of Vogelmann. He stressed that the safe passage letter was valid, and it was fully within the Emperor’s powers as the highest natural and orderly ruler over those from Memmingen, to expect their adherence to it; their violation of it clearly left them in the penalty of that letter. Again, Gottfried was recentering the legal issue under which the case was brought—the violation of the imperial protection letter—and decentering the context of that violation as a Reformation-related dispute, while stressing the disproportion of Memmingen’s claim that the case was a matter of religion by highlighting the “wicked” quality of their actions.

### **Imprisonment of a Priest as a “Matter of Religion”**

Another case involving this sort of use of “matter of religion” as a commonsense moral category was the case of Benedict Bautz. In the Autumn of 1532, Benedict Bautz, a priest who was at the time appointed Chaplain of the Cathedral at Speyer, and parish administrator in

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dieselben nottrufftiger weise wissen zu verantworten, hat auch zu anfang des ersten actu ferner mundtlich furgepracht [...].”

<sup>167</sup> Munich 5657, Q30, “Kommissionsrotulus,” 1538: “frevenlicher, unfuegsamer, und unrechtmessiger auszug.”

<sup>168</sup> Munich 5657, Q30, “Kommissionsrotulus,” 1538: “sonder ir unchristenliche tyrannische und straffliche verhandlung in ein vermainte Religion ziehen, ir schand und mord mit dem hailigen evangelio bößlich bedecken wollen, wie si dann jetz und noch heuttigs tags thuen.”

<sup>169</sup> Munich 5657, Q30, “Kommissionsrotulus,” 1538: “und vermainen dieweil sy sich mit dem Mund evangelisch nennen, so sollen oder dorffen si umb ir straffliche verhandlungen niemand mer weder recht noch antwort geben.”

<sup>170</sup> Munich 5657, Q44, “Probation unnd in eventum conclusion schriftt,” 1540.

Hedelfingen, brought suit against the mayor and city of Esslingen for events that allegedly happened one year prior.<sup>171</sup> He was represented by Dr. Ludwig Ziegler.

One morning in October 1531, Bautz was sitting at breakfast at the Speyer Cathedral's *Zehnthof* (the building storing church wares especially wine) in Esslingen, along with various "lay and clergy persons from the Cathedral at Speyer," when suddenly, four officials of the city of Esslingen erupted into the room, pushed Bautz backwards from the table, ripped his hunting knife from him, said they were putting him under arrest, and led him away. They brought him to the tower, left him to lie on the floor, and gave him only water and bread. After ten days, in order to be released, he was forced to swear an oath "to God and the saints" to stop collecting tithes in Esslingen, to stop coming there, and to not take any action against the city's imprisonment of him in any way, "with or without law." When Bautz asked after the causes of his arrest, they answered that they were following orders from the mayor and council of Esslingen.<sup>172</sup>

But, Bautz argued, the city had no right or reason to injure, abuse, imprison and detain him, and in doing so they violated spiritual and worldly law, as well as the Land-Peace.<sup>173</sup> Bautz asked that the city be required to pay 400 gulden in damages.<sup>174</sup>

A few weeks later, the protesting estates submitted their power of attorney document, proposing to enter as co-litigants with Esslingen on the grounds that the dispute concerned the religion.<sup>175</sup> In January 1533, they submitted a document titled "why this matter, in light of the imperial majesty's contract, and both of their majesties' letters delivered to the Court President and Judges, should not, cannot, and may not proceed further; with appended protestation." In it, they argued that this case involving the alleged injuries of Benedict Bautz was governed by the terms of the Nuremberg Peace (the "contract" (*Vertrag*) mentioned in the title of the document), and therefore should be suspended from further litigation, "because the causes why Benedict Bautz was imprisoned and punished with the tower for several days had everything to do with the honor of God, the holy Gospels, and one of the highest and biggest points of the Christian faith."<sup>176</sup> The document then went on to quote from a report produced by the mayor and city council of Esslingen explaining their reasons for punishing Bautz. It read:

When, in the previous year, we undertook the holy Godly truth—pure, clear, unmingled with human extras—in our city and domain, through God-fearing, pious, appropriate preachers, who we brought to our city to let preach; we, as a Christian authority (obligated to work energetically to protect against all manner of division and disunity) let it be seriously ordered, among us and especially among the priests at the parish properties and among monastic persons, that no one may

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<sup>171</sup> Hauptstaatsarchiv Stuttgart C3 (RKG) 193 ("Stuttgart 193"). See Sprenger, 134; and Dommasch, 89.

<sup>172</sup> Stuttgart 193, Q1, "Ladung," 1532: "Als er auch die gemelten ewer Statt diener ein antzeigung der ursachen, das sie dermaßen mit jene handelten, gefragt, die selben jene, das sy von euch deß befehl hetten geantwurt."

<sup>173</sup> Stuttgart 193, Q1, "Ladung," 1532: "kein fug, recht, noch ursach, gehabt haben [...] Alles unpillicher weyß, wider geistliche und weltliche recht, auch unsere und des reichs ausgekundte Landfridt, und abschidt

<sup>174</sup> Stuttgart 193, Q2, "Petitio Summaria," 1532; also Q7, "Positiones et Articuli," 1536.

<sup>175</sup> Stuttgart 193, Q4, "Copia mandati constitutiones generales der protestierenden chur und fursten graven, frey und reichs stetten darinn benennt, unnd Esslingen," 1532.

<sup>176</sup> Stuttgart 193, Q5, "Bericht warumb inn diser sachen vermoge kay. Mt vertrags und baiden irer mt schreiben an cammerrichter und beysitzer ausgangen nit ferrers mehr soll kan noch mag procediert werden cumm annexa protestatione," 1533: "Dieweil die ursachen darumb Benedict Butz gefenniglich angenommen und ettlich tage mit dem thurm gestrafft, allain die eher gottes das heilig evangelium und fast ainen den hochsten und grösten puncten des cristenlichen glaubens belangt und antrifft."

resist/oppose the Godly truth, nor smear, insult or in any other way injure another [on its account].

Despite all of this, however, it happened after a certain amount of time, when our preacher Master Ambrosius Blarer<sup>177</sup> came to deliver the Godly truth, that many Christ-believing people came [to hear him preach] from the [neighboring] principality of Württemberg in secret, out of great fear of their rulers. They indicated to us that one of the priests who was a follower of papist statutes and oppositional to the Godly truth, named Benedict Bautz, who had been appointed a parish administrator in the principality of Württemberg in a small village called Hedelfingen, had been heard publicly by several persons saying evil things,<sup>178</sup> and he would zealously point out each and every farmer from this village Hedelfingen who would go to hear the preachers, and afterwards, those same would be punished by the government of Württemberg as heretical knaves.<sup>179</sup>

The second point they raised was that Bautz forced “weak and ill people who had called for him in their hour of death,” to let him perform the holy sacraments in the papist manner, which was “unchristian and against the clear order of Christ, our eternal redeemer,” and therefore made them go against their own consciences, and “against the correct Christian usage as was established by Jesus Christ himself and as it had been carried out at the time of the holy apostles, instead using human fictitious statutes.”<sup>180</sup> Through these actions, Bautz not only burdened the consciences of many in their most vulnerable hour of need by carrying out unchristian death rites, but also, he brought significant “damage and disadvantage” to many who were targeted by the rulers of the old-faith principality of Württemberg “only on account of their hearing the Godly truth.”

So these two points went towards explaining (1) why the case at hand was a matter of religion, governed under the terms of the Nuremberg Settlement, and perhaps also (2) why Bautz deserved to be punished by the city—why the city had cause to punish. But the lawyers for Esslingen and the protesting estates then move on to arguing (3) why they had the right to punish

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<sup>177</sup> Ambrosius Blarer was a prominent Zwinglian preacher who served in many cities. See Brady, *Protestant Politics*, 84; also Theodor Keim, *Ambrosius Blarer, der schwäbische Reformator: aus den Quellen übersichtlich dargestellt* (Stuttgart: Besler, 1860). See correspondences between Constance, Ulm, and Memmingen regarding Blarer in Ekkehart Fabian, *Die Beschlüsse der Oberdeutschen Schmalkaldischen Städtetage, Part 2: 1531-2* (Tübingen: Osiander, 1959) [BOSS II], 30, 40.

<sup>178</sup> Stuttgart 193, Q5, “Bericht etc.,” 1533: “das ainer aus den pfaffen, so zurselben zeit auf dem pfarhofe bei dem alten pfarherrn so den pabstlichen sazungen anhengig und gotlicher warhait widerwertig gewesen Benedict Bautz genannt unnd ettwa im Bapsthumb ain Pfarr verweser im furstenthumb wirtemberg inn ainem flecklin Hedelfingen offenlichm borsen etlicher personen horn und vernomen lassen.”

<sup>179</sup> Stuttgart 193, Q5, “Bericht etc.,” 1533: “Wie das er alle unnd jede Baurn so aus bestimptem flecklich hedelfingen in unser stadt und oberigkait an die predig geen, wol mit vleis ufzaichnen und volgents dieselbigenn als kezerische buben der regierung in wurtemberg zuverdienter straff anzaigen.”

<sup>180</sup> Stuttgart 193, Q5, “Bericht etc.,” 1533: “Desgleichen hat sich bemelter pfaf bei schwachen krancken leuten zu denen er in iren sterbenden notten berufft mit reichung der hailigen sacramenten ganz ongepurlicher oncristenlicher gestalt und wider denn hellen bevelch Christi unsers Ewigen erlosers uff die erdichte Bebstliche weiss erzaigt gehalten und die armen ainfaltigen schwache bekomerte herzen dahien nötten wollen dieselbige hailige sacramenten wie es bishieher im Babstumb mit anruffung der hailigen und anderer wais gehalten zuentpfahen und sie also von dem rechten christenlichen geprauch wie der durch christum jesum selbst eingesetzt und zur zeit der hailigen appostel gehalten abwendig zumachen uf menschliche erdichte sazungen wider ir selbs aigen gwysse zuweisenn.”

him. “It is right and proper,” they said, “for any Christian ruler to take this kind of action,” especially as they had already passed the law mentioned above—namely, that no one may resist/oppose the Godly truth, nor smear, insult or in any other way injure another [on its account]—which Bautz violated through his unchristian burdening of the consciences of ill and dying people, [a law] which he had no right to circumvent.”<sup>181</sup>

Bautz and his lawyers responded to this “report” and protestation in May 1533.<sup>182</sup> The narration, they said, not only failed to conform to the Imperial Chamber Court ordinances (a technical argument regarding orderly legal form), but was also false and libelous. He requested that their report be rejected and thrown out, and that the defendants be required to settle the legal issue as to the substance the plaintiff brought up in his suit, namely his arrest (aggravated through violence), his imprisonment (aggravated through near starvation), the forced oath, his banishment from Esslingen, and their forbidding him taking in tithes, all of which “do not at all concern the religion.”<sup>183</sup>

He expressed incredulity regarding the claim that this was a matter of religion, suggesting that “they themselves must testify and say [i.e. admit, or on some level know] that this does not concern the religion.”<sup>184</sup> Whatever it was that concerned Esslingen in matters of religion, and whatever the Emperor agreed to, and whether they had the right to punish on those grounds—none of that had to do with him, Bautz argued; and if the city wanted to say that their outrageous and libelous actions against Bautz had some justification, then they should pursue those claims through the ordinary channel, namely, to follow through with the *litis contestation* in this Court. The plaintiff and his lawyers also argued that since Bautz had only sued Esslingen, the Court should not allow the protesting estates to get involved, nor should they be allowed to hinder the proceeding and *litis contestatio* or insert their “incongruous and smearing” claims.<sup>185</sup>

In a later document, Bautz and his lawyers responded to the substantive accusations by the city. First, no lay ruler, they said, may capture and imprison a priest; or if he does so for good

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<sup>181</sup> Stuttgart 193, Q5, “Bericht etc.,” 1533: “verhoffenn und wissenn auch aus erzelter ursachen nichts anders dan das einer jeden christlichen oberigkait wol angestanden und gepurt hat, wir auch pfaff bauzen berumbte vorhabende prodicon(?) und onchristlicher der krancken und sterbenden gewissen beschwerung halber uber darvor obbemelt unser geschehen verbot zuthun schuldig und pflichtig gewesen und des keins wegs habenn kondem oder sollen umbgehen.” Esslingen also indicated here that there was precedent for punishing priests by secular authorities, including by the Imperial Government (*Reichsregiment*), that had been in existence from 1500-1531 as a form of imperial enforcement representing not only the Emperor but also Estates of the Holy Roman Empire, which once punished a priest “on account of his shocking, malicious, murderous actions, by placing an iron collar on him and letting him be hit with reeds by the informants”; see Stuttgart 193, Q5, “Bericht etc.,” 1533: “So ist es bey uns das wir ein pfaffenn straffenn kein neues dann meniglichen im hailigen reich onverborgen das wir hievor da das key. regiment als die damals an stat ro. key. mt unsers aller gnedigsten herrn im hailigen raich die hochst oberigkait gewesen und das camergericht sich wesentlich bey uns enthalten auch ein pfaffen seiner erschrockenlichenn begangenen boßwichtischen unnd morderischen stuck halber an das halseisenn habenn stellen unnd mit riden durch denn nachrichter außschlagenn lassenn und haben das ort weder vonn gaistlicher oder weltlicher oberigkaitt nie kein verweisung intrag oder vehinderung gedulden noch leidenn durffen, wollen auch geistlich darfur halten, wir wern alles verclagens vonn Benedick bautzen wo andere neidsiche und rachselige verhezer und anstiffter nit wern Auch wol vertragen gewesen das sey aber alles Got bevolhen.”

<sup>182</sup> Stuttgart 193, Q6, “Replie et esslingenschen protestationem et excogitationem facti narrationem,” 1533.

<sup>183</sup> Stuttgart 193, Q6, “Replie etc.,” 1533: “die dan die religion gar nicht belangen thutt.”

<sup>184</sup> Stuttgart 193, Q6, “Replie etc.,” 1533: “in sachen die sie selb bekennen und sagen muessen das es die religion nit betreffen.”

<sup>185</sup> Stuttgart 193, Q6, “Replie etc.,” 1533: “mit ongereiemptn schmlichem bericht.”

reason, then he must turn him over to his spiritual authority in a specific amount of time.<sup>186</sup> Furthermore, it was not proper for any worldly ruler to punish a priest and to expel him from a city because he had no jurisdiction over the priest; so the defendants committed the highest injuries against the plaintiff when they brought him to the tower.<sup>187</sup> Second, they denied and called “fictitious” the claims that Bautz had reported farmers from Württemberg to the authorities there for going to Esslingen to hear Blarer preach.<sup>188</sup> They likewise denied the claim that he “forced” people to receive the holy sacrament according to the form of the Christian church, because “he did not force anyone rather it was requested of him, and he gave it to them as he is obligated to do, according to the ordinance of the holy Christian church, under one kind.”<sup>189</sup> These two reasons that the city gave justifying their imprisonment of Bautz were nothing more than smears.<sup>190</sup> Bautz also noted that the only reason he did not administer the parish of Hedelfingen was because he did not “adhere to the changed religion, did not preach the new errors, nor wanted to follow those teachings”—obliquely referring perhaps to the popular demand for “new faith” preachers there.<sup>191</sup>

When the judges discussed the case in April 1536, one judge noted that Esslingen was not one of the protesting estates at the time of the incidents in question, and that they had even signed onto the antireform imperial recess at Augsburg in 1530. Another judge noted that Bautz suggested in his supplication quite other reasons for his imprisonment, that had nothing to do with his being of the old faith; it was for those reasons that the city was obligated to settle the *litis* so that those claims could be litigated. One of the judges opined that the city of Esslingen was justified in imprisoning Bautz, who violated the city’s edict by celebrating the mass there. Another judge noted that no authority, not even the Emperor, let alone a city, could proscribe faith with an edict.<sup>192</sup>

Even after the Court ordered the legal issue to be settled in contumacy (*litis contestatio in contumaciam*) on April 3, 1536, Esslingen sent an instruction to its lawyers, stating that

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<sup>186</sup> Stuttgart 193, Q11, “Probationes et in eventum conclusiones,” 1540: “so gepurt keinem laien ain priester zu fahen unnd in gefencknus zu halten [...] wann aber ain weltlicher arriert priestern in zugelaßnen vallen, als in begangnen lassenn fahet, ist er schuldig den priester seinen gaistlichen oberkeit in bestimpten zeit zu antworten, sonst thut er wider recht.” These laws are given citations.

<sup>187</sup> Stuttgart 193, Q11, “Probationes et in eventum conclusiones,” 1540: “gepurt kainer weltlichen oberkeit einen priester zustraffen, unnd den stat zuverweisen, dann sie ber die priester kein gerichtszwang haben.”

<sup>188</sup> Stuttgart 193, Q11, “Probationes et in eventum conclusiones,” 1540: “die erst ist erdicht, und der cleger hat nie gedacht die wirtenbergerischen pawern so gar esslingen in des plarers predig gangen, iren oberkait anzugeben, wirt es auch kain bidenman mit warheit von im reden, oder schreiben, und so er gleich das gesagt und gethon, wen er mer darum zu loben dann zu schelten, dann es auch den beclagten und den iren wol vil nutzer sein solt, wann sie den plarer nie gehort hetten.”

<sup>189</sup> Stuttgart 193, Q11, “Probationes et in eventum conclusiones,” 1540: “Die ander ursach, das er die leuth hab zwingen wollen nach form der cristlichen kirchen das heilig sacrament zuempfhahen, ist auch nit war, dann er niemantz gezwungen, sonder wen das von im begert, dem hat ers, wie er schuldig gewest nach ordnung der heiligen cristlichen kirchen geraicht under ainerlai gestalt, daran er dann nit unrecht gethon.”

<sup>190</sup> Stuttgart 193, Q11, “Probationes et in eventum conclusiones,” 1540: “und hat also dan beclagten den baiden angezogen ursachen halb nit gepurt den cleger zu fahen und fencklich im thorm zuenthalten, und haben ine damit unpillich wider recht geschmecht.”

<sup>191</sup> Stuttgart 193, Q11, “Probationes et in eventum conclusiones,” 1540: “das dem cleger das landt wirtemperg je verpotten worden sei, das er aber diser zeit sein pfar hedelfingen bei esslingen nit bersicht, unnd darauf wonet, das geschicht darumb das der cleger inn den geenderten Relligion kain pfarr versehen, die newein irrungen, nit predeigen, leeren noch denen anhangen will.” Referring here probably to Hauptstaatsarchiv Stuttgart C3 (RKG) 3942 (1531-1532).

<sup>192</sup> Sprenger, 64.

Esslingen wanted them to proceed with the same strategy they had had until this point, because “the matter is so clearly a religion matter that violates the imperial peaceful truce [the Nuremberg Settlement], and the many directives that were given to the judges after that agreement.”<sup>193</sup>

Over the next few years, the case crawled along.<sup>194</sup> The Court established a witness testimony commission for the case, and gathered testimony in 1538, with Esslingen still in contumacy.<sup>195</sup> The proceedings paused temporarily after the 1539 murder of Hirter.<sup>196</sup>

In 1540, Bautz and his lawyers submitted the *Probationes et in eventum conclusiones*.<sup>197</sup> This was a document in which a party summarized the evidence for their claims after the conclusion of the witness testimony commission, and sought to make their account credible to the judges, or even to discount the credibility of the other party’s account, not only through the summary of facts but also the citation of laws.<sup>198</sup> Among other things, the document used the protesting estates’ “religion” claim as a way to challenge the trustworthiness of the defendant party to engage in a good-faith manner with the proceeding. Specifically, in describing the evidence for the point that the city of Esslingen had held Bautz in the tower for ten days and sustained him only with bread and water, “the plaintiff knows of no other way to prove this, other than with the city’s vassals [who were holding him in the tower], but the defendants, no doubt, would not provide for such testimony.”<sup>199</sup> Why? “Because the defendants allegedly make this matter as ‘religious,’ and according to their unlawful interpretation and practice, pull it into the agreement in the Nuremberg Peace-Settlement (which they themselves never held) which excepted the Court’s jurisdiction.”<sup>200</sup> In other words, though Esslingen itself had not adhered to the terms of the Nuremberg Peace Settlement (those portions that were publicly promulgated as the Peace Mandate that forbade any violence until a Christian council) they sought to include this case as those excepted from the Court’s jurisdiction under the terms of that treaty, on the justification that the dispute concerned the religion. Through this argument, Bautz and his

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<sup>193</sup> Stuttgart 193, Q8, letter from city of Esslingen to Dr. Ludwig Hirter, 1536.

<sup>194</sup> The judges discussed the case again in September, 1536 but little is to be gleaned from the judges’ notes, other than a repetition of some of the facts of the case, and that Hirter submitted a protestation that they do not let themselves into the case because it is a “causa relligionis.” See Berlin, AR 1 Misc. Nr. 530. f. 28v.

<sup>195</sup> In Stuttgart 193, Q11, “Probationes et in eventum conclusiones,” 1540, Ziegler asked the Court to add the witness testimony to the case file; and if the witness testimony was not to be found in the chancery for whatever reason, then the gathering of witness testimony should be carried out again. Indeed, the case file lacks a Rotulus, the document produced by the commissioner of witness testimony. But Bautz submitted the testimony of two witnesses in Stuttgart 193, Q12, “Zeugen sag,” 1540.

<sup>196</sup> See Baumann, *Visitationen*, 143, and the literature cited there, on the suspicion that the Court President was behind the murder.

<sup>197</sup> Stuttgart 193, Q11, “Probationes et in eventum conclusiones,” 1540.

<sup>198</sup> See Oberländer, *Lexicon Juridicum Romano-Teutonicum*, s.v. “Probatio,” 561. Though I have only come across a small handful of these documents in the case files I gathered, it seems that they contain the most detailed references to Roman law.

<sup>199</sup> Stuttgart 193, Q11, “Probationes et in eventum conclusiones,” 1540: “Dann das die beclagten den cleger im thorn zehen tag allain mit wasser und prot gespaiset, waist er cleger anderst nit dann mit den beclagten stat knechten zubeweisen, dienen wurden aber die beclagten on zweifel nit gestatten khunt schaft zugeben.”

<sup>200</sup> Stuttgart 193, Q11, “Probationes et in eventum conclusiones,” 1540: “dieweil die beclagten dise sach vermeintlich als religioß machen und nach iren onrechtmessigne ußlegung und uben in selb gerichtlich geschehen zusag bewilligung und e.g. gerichtlich vorbehaltung in den nurnbergischen fridstand (den sie selb nie gehalten haben) zu ziehen und enstanden.” Interestingly, in no other cases have I seen the use of the adjective “religiös” to describe the case; “religion” is always in the nominal form. Twice in Q11, including: “dieweil Esslingen dise sach fur Religioß vermaintlich halten wollen” (because Esslingen allegedly wants to hold this matter as religious).

lawyers argued, Esslingen had given themselves license to carry out all manner of contumacious and illegal behavior in the context of the proceeding. Bautz and his lawyers noted, for example, that in another case involving Esslingen, in which they were sued by the Cathedral at Speyer, the mayor and city council forbade their citizens from giving testimony under threat of punishment of limb and property.<sup>201</sup> The city of Heilbronn, in reliance on the same lawyers and also with involvement of the protesting estates (including Esslingen), did the same in a case involving the Beginen monastery there.<sup>202</sup> Thus, though in order to prove their statement that Bautz had indeed been mistreated in the tower, they required the testimony of Esslingen city servants, they would certainly not receive such testimony, because the city of Esslingen would prevent their testimony through threats. That the justification for all of this—not only the imprisoning of Bautz, but also the coercion of potential witnesses—was that the dispute was a matter of religion, this, Bautz said, was an “unlawful interpretation” of the issue, that inspired the rebuke of him and his lawyers.

In November 1540, the Court ordered the city of Esslingen to pay 300 gulden to Bautz for his court costs and damages, and 20 gulden for chancery costs.<sup>203</sup>

### **Taking it Back**

In some cases, the plaintiffs literally retracted all language from their original petition that would indicate the Reformation context, when doing so threatened to derail the suit.

In a dispute that began in the Court in 1529, for example, the plaintiff was Thomas, the Archbishop of Riga (in modern-day Latvia), and the defendant was the mayor and city council of the city of Riga.<sup>204</sup> The Archbishop sued the city for denying the lordship rights of the Archbishop over the city, in violation of the Kirchholm Treaty. That treaty, agreed to in 1452, stated that the Archbishop of Riga and the Teutonic Order would share worldly lordship over the city of Riga.<sup>205</sup> Against this, said the Mandate of July 1529, the city recently swore obedience only to the Order and declared that henceforth, the city would have no Archbishop as its lord.

Then, “on the basis of the currently circulating innovations,”<sup>206</sup> in addition, the city took over the Cathedral of Riga and its properties; abolished the “praiseworthy inherited worship”; confiscated the churches’ spiritual treasures and jewels<sup>207</sup>; forced the clergy out of the city; displaced the canons of the two parish churches, St. Peters and St. Jacobs, of their prebends; and took from the Archbishop and his clergy the lands, fields, properties, mills, tithes, and incomes

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<sup>201</sup> Stuttgart 193, Q11, “Probationes et in eventum conclusiones,” 1540: “dann sie hievor inn sachen des dhom capitls zu speier iren burgern khuntschaft zugeben, de facto auch bei straf leibs und guts verpotten wie e.g. dessen sonder zweifel von der parthei und commissario wol werden bericht sein, dergleichen haben auch heilpronnen wider ire begebenen practiciret.” Referring to Hauptstaatsarchiv Stuttgart C3 (RKG) 3943, see there especially Q31, “Supplicatio und weither bevelh dem commissarien der zeugen halb zuthun ains erwir. dhombcapls. zu speir in deren sachen g. stat Esslingen,” 1536, and related documents.

<sup>202</sup> Referring to Hauptstaatsarchiv Stuttgart C3 (RKG) 1732, see there especially Q7, Citatio Commissarii,” 1535, and documents following.

<sup>203</sup> Stuttgart 193, Q14, “Executoriales,” 1541.

<sup>204</sup> Bundesarchiv Berlin-Lichterfelde AR1-A Nr. 271 (“Berlin 271”).

<sup>205</sup> Carl Eduard Napierksy, *Riga’s ältere Geschichte in Übersicht, Urkunden und alten Aufzeichnungen zusammengestellt* (Riga; Leipzig: Eduard Frantzen’s Verlags-Comptoir, 1844), lvii-lviii.

<sup>206</sup> Berlin 271, Q1, “Copia mandati penalis cum annexa cita[tionis] und zu end geschribner execution,” 1529: “uff ytzschwebenden neuerung.”

<sup>207</sup> Berlin 271, Q1, “Copia mandati penalis etc.,” 1529: “den loblichen herprachtenn gotsdinst abgethan, der kirchenn unnd geytslichen kleinot unnd geschmeyde, uss den kirchen zu euch genommen.”



that they had in and around the city. They even took lights and bells, and defaced the gravestone of a deceased Archbishop. The city also forbade the mass and holy sacraments at the nunnery in Riga, which was under the protection of the Archbishop, and confiscated their gardens and their incomes.

The Archbishop pleaded with the city, continued the Mandate, to recognize him as their “natural lord,” to restore the clergy to their positions, to repair the damages and to return the confiscated property, incomes, and goods. None of this, however, happened. Instead, “against common law and our imperial edicts, ordinances, reformation and land-peace,” they did not. The Mandate ordered that the city pay 400 marks lötingen golds, and that within three weeks of receiving this Mandate, the city recognize the half lordship of the Archbishop and also, at risk of outlawry (the *Acht*), restore all of the damages and positions, allow them to carry out the customary worship, and return everything to its prior state.

Then, in August 1530, the Archbishop let the Court know in a *Petitio* that he and the city of Riga had come to an out-of-court agreement that for two years, both parties would cease all of the conflicts described in the Mandate, with the hopes of laying the matter to rest, but that if either side stirred anything up in this period, they would return to the Court to continue the litigation.<sup>208</sup>

In 1532, the Archbishop submitted a *Petitio Summaria* in which he said that the two-year period saw neither friendship nor goodwill between the parties; indeed, the Archbishop suspected that the city made the agreement in 1530 simply in order to delay the necessity of carrying out the terms of the Mandate.<sup>209</sup> “Although the defendants seemed, after receiving the Mandate, that they wanted to actualize all of its demands, and through words they restituted everything, yet it is undeniably true that they did not do what they said they would do.”<sup>210</sup> Therefore, the Archbishop asked that the Court require the other party to come to *litis contestatio*. The *Petitio* repeated the allegations contained in the Mandate, and added the violation of having failed to obey the terms of the Mandate. All of this was in violation of the common law, the Golden Bull, the imperial and kingly reformations, also the Empire’s constitutions, ordinances, statutes, edicts, decrees, and especially the imperial Land-Peace; in addition, this went against the “long peacefully held” Kirchholm Treaty, as well as the *possessio vel quasi* and usages of the Archbishop and his clergy, and also thereby implicitly minimized the jurisdictional authority of the Imperial Chamber Court.<sup>211</sup>

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<sup>208</sup> Berlin 271, no quadrangle, second document in case file, “Petitio A,” 1530.

<sup>209</sup> Berlin 271, Q2, “Petitio Summaria Articulate,” 1532: “Sonnder jezernnante Burgermeister Rath unnd gemein, uber vielfeltig ir f.g. vermanen, die z[eyt?] verbeygehn, unnd on alle fruchtbarliche vereinigung verfliesen habenn lassen, Also das darab meniglich woll abzu- nemen hatt, durch sie nichts anderß dann verlengerung der zeit, dem kay. mandat volg zuthonn gesucht wordenn.”

<sup>210</sup> Berlin 271, Q2, “Petitio Summaria Articulate,” 1532: “Item ist auch war, wiewoll dickgenante Burgermeister, Rath und gemeinde zu Riga, als baldt nach verkunthen kay. mandat, anwaltdts g. principaln seiner f.g. Capittell und verwanten, under einem angenomne schein, als wollten sie dem mandat gertzlich geleben, inhalt und nach außweysung instruments und brieffen gertzlich mit worten restituiert haben. So ist doch die onwidersprechlich warhaitt, daß sie in der thatt auß allen entsetzten stucken inn dem kay. mandat gesetzt und clag wiß erzellt seiner f.g. und deren capittell allein ettliche stuck, nemlich irn f.g. hoff den stiefft huolm etlich ecker und dannoch nit all auch gar nit mit der freyhaitt wie die ir f.g. und deren capittell furmals und von altem her ingehabt, zwgestelt haben.”

<sup>211</sup> Berlin 271, Q2, “Petitio Summaria Articulate,” 1532: “zu schmelerung ir maiestat und ewere gnadenn jurisdictionn unnd gerichtszwangng.”

In October 1533, the city of Riga responded with an *Exceptiones* document to decline the forum of the Court.<sup>212</sup> They did so on the grounds that the city was not *reichsunmittelbar* (was not directly subject to the Emperor). Only if the dispute were a violation of the Land-Peace, they said, could the Court pull the city before it in the first instance. But the Archbishop's suit was primarily aimed at restoring the abolished ceremonies and the lost church property. Therefore, the first-instance ordinary judge in this case should be their direct lord, namely the Master of the Teutonic Order, whose jurisdiction and lordship over the city were "indivisible and impartible."<sup>213</sup> The city did not address the Kirchholm Treaty, though this last claim obliquely rejected the shared lordship with the Archbishop. Nor did Riga address any of the specific allegations in the Mandate and *Petitio*, other than to say that the allegations were "unfounded."

Then, the city said that if these arguments to decline the forum of the Imperial Chamber Court do not convince the judges, then they "protest the entire proceeding as null," in reliance on "the imperial peace and standstill on account of the religion,"<sup>214</sup> referring to the Nuremberg Settlement. Though the city of Riga was not a co-signer of the Settlement, they were covered under the terms of the agreement, they said, because it stated that it applied to "all who confess and accept the word of God, and all who will do so."<sup>215</sup> To corroborate this reading, the city submitted a letter from Philip the Landgrave of Hessen, dated August 1, 1533, written to the lawyers for the evangelical estates, Dr. Hirter and Licentiate Helffman, in which Philip stated that the city of Riga should be included in the terms of that settlement.<sup>216</sup>

### *The Archbishop's "Corrections"*

In 1534, the Archbishop again and again asked the Court to declare the city in the *Acht* for its recalcitrance and contumacy. Finally, he submitted a document as a "correction" to several articles in his 1532 petition "insofar as it concerns the ceremonies and the faith."<sup>217</sup> First, he wrote, he wished to correct the eleventh article of that petition; he wanted to "expunge the words

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<sup>212</sup> Berlin 271, Q5, "Exceptiones articulate declinatoriy fori cum annexa protestatione," 1533.

<sup>213</sup> Berlin 271, Q5, "Exceptiones articulate declinatoriy fori cum annexa protestatione," 1533: "indivisibilis unnd ontailbar."

<sup>214</sup> Berlin 271, Q5, "Exceptiones articulate declinatoriy fori cum annexa protestatione," 1533: "Sindicus protestirt auch hiemit offentlich wo e.g. uber und wider vorgeschriebenn exceptiones die sach fur derselbigen behalten wurd, des er sich doch vermog des reichs recht unnd ordnung keins wegs vorsicht das er ime und seinen herrn alsdan furbehalten woll, denn kay. frieden und stilstandt der Relligion halben ufgericht furzuwenden dweill die von Riga auch darin begriffen."

<sup>215</sup> Berlin 271, Q5, "Exceptiones articulate declinatoriy fori cum annexa protestatione," 1533: "in ansehung das der obengemelt kaiserlich vertrag unnd stilstant vermag das alle die das wort gots bekent und angenommen haben, auch annemen werden sich des selbigen gepruchen und frewen sollen und mogen."

<sup>216</sup> Berlin 271, Q5, "Exceptiones articulate declinatoriy fori cum annexa protestatione," 1533: "inhalt des durchleuchtigen hochgeborenen fursten herrn philipsenn lanndtgraven zu hessen an den hochgelerten doctor ludwigen hirter und ire sindicum als der evangelischen stend Anweld mit A verzeichnet ausgangen." For the letter, see Berlin 271, Q6, "Dem hochgelerten unsern lieben getrewen Ludwig hertter doctor johann helffman licentiat baide kay. Cammergerichts advocaten procuratorn," 1533. See also Berlin 271, Q13, "Bericht und Protestation," 1535, in which Helffman explains to the Court that at the recent Schmalkaldic Diet, the Elector of Saxony, the Landgrave of Hessen, and the other evangelical and protesting estates "accepted and recognized" that "the matter of the city of Riga is a matter of religion" ("vermög des schmalkaldischen abschaids der statt Riga sach fur ein religionn sach anngenummenn unnd erkhannt habenn").

<sup>217</sup> Berlin 271, Q10, "Correction etlicher ingeprachter clag cum adicionali unnd protestationem," 1534: "in willenn und mainung etlich punctenn in seiner furprachten articullierten petition den 2. decembris anno 32 sovil die Ceremonien und den glauben belangen möchte zu corrigirenn abzuthon und yetz zur zeit fallenn zulassen."

‘abolished the praiseworthy inherited worship’ and have the article instead read like so: ‘that the defendants in this and other churches at Riga violently took away the church silver treasures, jewelry, silk, gemstones, liturgical vestments, chasubles, lights, bells, altars, etc. In summary, everything that was inside of them.’<sup>218</sup> Second, he corrected the fourteenth article of the original petition, which had included the words “the office of the holy mass and the holy sacrament” to be substituted with the words “that the defendant prevented the priests from carrying out necessary service in the nunnery in Riga, over which the Archbishop had protection [*Schutz und Schirm*].”<sup>219</sup> Third, he corrected the twenty-first article of the original petition, which had included the words “customary worship.” Those words should be expunged and replaced, he said, with “necessary worship.”<sup>220</sup> “And,” he continued, “throughout the complaint and petition, everything that concerns the religion, ceremonies or the faith and their restitution, now, at this time, and in this proceeding, should not be stated or demanded.”<sup>221</sup> In other words, the Archbishop asked to remove any component of his complaint that touched on things that could be construed as matters of religion.

Then, continuing this point, in his 1534 *Replik*, the Archbishop denied that the case was principally about restoring the abolished ceremonies. Primarily, he argued, it was about lordship and jurisdiction, and the way in which the city had rejected doing proper homage to the new Archbishop, and it was also about the illegal confiscation of goods. All of this “touches upon neither the Christian faith nor the religion, and have nothing in common with it, because the spiritual religion or our faith does not stand upon temporal goods or their confiscation, rather, goods do not concern the faith at all.”<sup>222</sup>

“It is true, however,” he continued, in a moment of rebuke, “that it is unfitting of the faith and the Gospel, and also outside of law, to confiscate temporal goods with violence, and it is not proper for any evangelical to do so, as anyone can contemplate by themselves.”<sup>223</sup>

He also argued, drawing on language from the 1529 Speyer Recess, that it was undeniable that in matters of plunder and confiscation of lordship, jurisdiction, and property

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<sup>218</sup> Berlin 271, Q10, “Correction etc.,” 1534: “Item in den ailfften artickel seiner ubergebnen petition will anwalt corrigirt unnd uß dem selbenn artickel gethon habenn unnd dispungirt die wort den loblichen langherprachten gotzdiennst, abgethonn und den artickel also wie nachvolgt gestellt habenndt: Item war das ehegenante beclagte in yetzgemelten und annderen kirchen zu Riga alle der kirchenn silver klinodien Cleynoten geschmeid von Seyden edegestein Meßgwandt Caselen leichter glockenn altar etc. und in summa was darin gewesenn, darauß zu irenn handen und gewalt genomen und noch habenn.”

<sup>219</sup> Berlin 271, Q10, “Correction etc.,” 1534: “Und dan in dem 14. artickel will er corrigirt und herauß gethon haben diese wort die ampt der hailigen meß unnd die hailigenn Sacrament geraicht und anstatt derselbenn andere substituirt, und den artickel wie nachvolgt gestellt haben: Item zum 14. war und offenbar das die vilberurte beclagt den Closter jungfrawen in den statt Riga die unnder hochgedachts ertzbischofs unnd Clegers schutz und schirm seyen ire priester so inen die notturftige diennst thun sollten abgestellt unnd entzogen habenn.”

<sup>220</sup> Berlin 271, Q10, “Correction etc.,” 1534: “Der gleichenn will auch anwalt in dem 21. artickel seiner articulirte clag und in der petition derselbenn das wortlin gwonlichs gotzdiennst expungirt und corrigirt darfur notturftige gotzdiennst substituirt und gesetzt.”

<sup>221</sup> Berlin 271, Q10, “Correction etc.,” 1534: “und durchauß in der clag und angehengter petition alles die so die Religion Cerimonien oder den glauben unnd derenn Restitution belanngt yetz zur zeit und in diser Rechtvertigung nit gesetzt oder begert haben.”

<sup>222</sup> Berlin 271, Q11, “Replie et conclusiones,” 1534: “die wedder den cristenlichenn glauben noch Religion beruren, auch damit kain gemein haben dieweil die gaistlich Religion, oder unnsere glaub nit uff zeitlichenn gutern oder deren endtsetzung stat# sonnder die guter den glauben gar nichts belangen.”

<sup>223</sup> Berlin 271, Q11, “Replie et conclusiones,” 1534: “Aber wol die warhait das es dem glauben und Evangelium ungemeiß ain andern usserhalb rechtens mit gwallt dess seinen und zeitlich guter zuenttsetzen auch kainem evangelischen zusteet noch gepurt wie menigklich bey im selbs erwegenn khan.”

concerning churches, clergy, princes, prelates and others, by those of whatever estate they may be, that the Imperial Chamber Court would be the proper forum for such a case. He also argued that the basis of the city of Riga's argument about the proper forum being the Master of the Teutonic Order alone was "entirely false," and "injures [the city's] own honor and oaths," as the Archbishop had been their lord there in Riga since the city was established. The Order in Latvia could not be the judge in this case because it would be doing so on the basis of a "confiscated lordship and jurisdiction,"<sup>224</sup> which it properly shared with the Archbishop since 1452. In cases of contested shared lordship, he said, the Imperial Chamber Court was the proper forum. If the Order had jurisdiction in this case, it would result in the situation that the Order would decide on the status of the lordship of the Archbishop over Riga, which cannot be the case because "*pars in parem imperium non habeat*" (equals have no sovereignty over one another).<sup>225</sup>

The Archbishop also responded in this *Replik* to the city of Riga claiming that the Nuremberg Settlement applied to them, and that this case should be paused as a matter of religion. He said this claim went "against the truth and public laws" and moreover was not pertinent and therefore should not be permitted. "The other party themselves cannot be so unclever, also anyone can well understand, that there is a big difference between [on the one hand] confiscation of temporal lordship and jurisdiction or robbery of temporal goods, which this petition is about, and [on the other] religion and faith."<sup>226</sup> He then referred to what he said in his "Corrections" document, protesting that he hereby intended to remove any mention of the abolishing of ceremonies or about the faith in his petition, that he no longer sought anything with regard to those matters in this case.<sup>227</sup>

Also in the *Replik*, responding to the letter sent by the Landgrave of Hessen indicating that Riga should be covered by the terms of the Nuremberg Settlement, the Archbishop's lawyer wrote that his principal "regrets that the Settlement applies alone to religion and faith and not at all to temporal lordship, jurisdiction and goods or their violent confiscation."<sup>228</sup> This could be a sarcastic statement—for if the case were actually about religion and faith (which it was not), then the Settlement would actually apply to it (which it did not). Alternatively, he could be saying that if the Settlement applied to temporal lordship, jurisdiction, and goods, then perhaps the city of Riga would have ceased their behaviors; in other words, if the city of Riga respected a suspension to courtroom disputes concerning the religion, then maybe it would respect a Settlement that demanded a suspension to violent confiscations. The Archbishop also suggested that if the city of Riga heeded "human nature, which does not desire the goods of another," as well as "God, justice, and all laws and equity," then "all of this strife and many other quarrels

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<sup>224</sup> Berlin 271, Q11, "Replie et conclusiones," 1534: "enntsetzter oberkait und jurisdiction."

<sup>225</sup> Detlef Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter* (Munich: C.H. Beck, 2007), 168.

<sup>226</sup> Berlin 271, Q11, "Replie et conclusiones," 1534: "dan gegenthail selbst nicht so unbehendndt auch menigklich wol verston kann das es ain grosser unschied seye zwischenn endtsetzung zeitlicher oberkait unnd jurißdiction oder beraubung zeitlicher guter darauff anwalt petition gestellt und zwischenn Religion und glauben."

<sup>227</sup> Berlin 271, Q11, "Replie et conclusiones," 1534: "will auch anwalt hiemit wo etwas im mandat oder seiner articulierter petition gesezt die cerimonien oder glauben berurenn dasselbig yez zur zeit corrigirt abgethon unnd enndtsetzt habenn dasselbig auch gantzlich fallen laseenn darauff etwas zuerkennen noch zur zeit und in diser seiner petition nit gebeten noch begert haben des er sich offentilch protestirt."

<sup>228</sup> Berlin 271, Q11, "Replie et conclusiones," 1534: "Mag anwalts g. principal woll leyden das sie sich desselben anstands so allain uff die Religion und denn glauben unnd gar nit uff zeitlich oberkait jurißdiction und guter oder derenn gewalthattliche enntsetzung gestellt wol hielten unnd auß dem nit giengenn."

would not be necessary.”<sup>229</sup> The case, he said, should be able to proceed on the basis of the property and jurisdiction dispute, quite separately from the matter of religion.<sup>230</sup>

In 1534, Riga submitted the Recusation document of the protesting estates, which the Court deemed null in an administrative ruling, but the city nonetheless declined to participate in the witness testimony commission on the grounds that that it was commissioned by a “biased judge.”<sup>231</sup> The witness testimonies confirmed the Archbishop’s claims, adding more detail to the events in question. Interestingly, several of the witnesses made it clear that the Rigans did not accept the Archbishop as their lord “because of Lutheranism.”<sup>232</sup> Another witness noted that the Rigans took control of the churches and placed Lutheran preachers in them.<sup>233</sup> All of this, despite the Archbishop’s efforts to remove the context of the divided religion from the case.

### “Religion” with a Narrow Legal Referent

While “matter of religion” was often used in this general, commonsense, moralistic way by plaintiffs, the term came to have the character of a narrow legal category, bootstrapped into the terms of the protesting estates’ power of attorney and other related documents such as the 1534 Recusation,<sup>234</sup> and codified in the Nuremberg Settlement of 1532, as well as numerous agreements made thereafter that promised a suspension of proceedings before the Imperial Chamber Court in “matters of religion”—including the Kaaden Treaty of 1534 and the Frankfurt Treaty of 1539.<sup>235</sup>

An instructive example of this comes in the case of Johann Fabri discussed in Chapter 3. Fabri—the parish priest of Lindau, but concurrently in the service of the Bishop of Constance, then in the service of Archduke (later King) Ferdinand, and then, by the time the Imperial Chamber Court case was drawing to a close, himself becoming the Bishop of Vienna—sued the city of Lindau for having in effect stripped Fabri of all of his rights as a parish priest, blocking even his attempts to send in new administrators, illegally appointing Zwinglian preachers who

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<sup>229</sup> Berlin 271, Q11, “Replie et conclusiones,” 1534: “Möcht auch leiden das sie die menschenn natur hieltenn kaines fremdbenn gutz begerthenn noch ainen andern seines zeitlichen gutz widder gott Rechte unnd alle gesatz und billigkait enntsetzenn wurde diß zanncks unnd vil anders haders nit von noten sein.”

<sup>230</sup> Berlin 271, Q11, “Replie et conclusiones,” 1534: “Sie wurden auch obbemmelt anstandt so strictissimi juris diweyl er juri communi entgegen nicht so weyt allem iren geilz(?) dadurch zuersettigenn außtheinen(ausdehnen?) oder streckenn das er auch dass jhenig so von der Religion ganntz abgesundert der gar nit anhengig begreyffenn sollt das sie on das das evangelium stricts(?) verstann(?) wollenn unnd nicht leidenn konnen das man denselbenn etwas an warten zuthue. Aber was an guter dem angestossenn werden möcht, sollt bey inen angenomen werdenn unnd erstreckung leidenn, das dan anwalts ewer gnad billichenn und rechtmessigen zu bedenckhen under wegen wis recht es sie gesezt habenn will.”

<sup>231</sup> More on this in Chapter 5, section on recusations.

<sup>232</sup> Berlin 271, Q16, “Attestationes,” 1537, Peter Wampe’s testimony (ninth witness): “die Rigesschenn habenn dem jzregerennndenn unnsrem gned. herrnn erzbysschofe vonn wegenn der Luthery vor irenn herrnn nycht annehemen wollen.”

<sup>233</sup> Berlin 271, Q16, “Attestationes,” 1537, Jaspas Korb Pfarher zw Ronneburgk’s testimony (seventh witness): “und habenn die rigeschenn die kyrchenn ingenommen unnd Lutherisschenn predicantenn darinn gesatz.” Also Henrich Wedekynth pfarher zwr pernigell’s testimony (twelfth witness): “die pfar herrnn darvonn verjagt unnd ire lutherisschenn predicantenn darinn gesatz. Also Bartholdt Kuebus pfarher zw zuntzell’s testimony (thirteenth witness): “unnd habenn alle kyrchenn gespliirt unnde verwusth die altaria zwrbrochenn unnd habenn solliche kyrchenn noch inn weherenn unnd brawchenn sie nach der Luthery.”

<sup>234</sup> On these see Chapter 5.

<sup>235</sup> See footnotes 40 and 42 above.

had participated in the Peasant Uprising elsewhere, and giving to them the parish's incomes.<sup>236</sup> Lindau first attempted to decline the forum on the basis of an imperial privilege, and also alleged subreption and obreption on the part of Fabri, who had withheld, they said, that he was an absentee priest. Then, in 1531, Lindau submitted the *Mandatum Constitutionis Generalis* of the protesting estates, appointing Dr. Hirter and Licentiate Helfmann as their attorneys, in which it was indicated that they now considered the dispute a "matter of religion."<sup>237</sup>

In 1536, Fabri submitted a document titled "*Duplik* and Information that this matter is not one of religion, rather one of plunder and public violence."<sup>238</sup> The document provided several arguments or indications that the dispute was not a matter of religion, as Lindau and the protesting estates were claiming.

First, he noted that this case had been pending in the court for many years before the protesting estates entered, and before they submitted their protestation and recusation of the Court in matters of religion. According to Fabri, if it were truly a matter of religion, why did the city not decline the forum on that basis in the first place? Second, "it is evident," he said, that the case rested on Lindau's having taken from Fabri, without the right to do so, certain items of great value, including beautiful mass robes, mass books, silver oblations and other things, and then sold everything and made money out of it.<sup>239</sup> "And since they do not want it, they should equitably have given those things which had been with [Fabri] back again."<sup>240</sup> That the city simply sold the items for money was offered by Fabri as proof that their alleged actions were within the category of spoliation—the illegal taking of property through secretive or destructive means—and had nothing to do with religion.<sup>241</sup> Third, "even before they accepted Zwinglianism," the city council and citizens of Lindau, though obligated to pay tithes, reneged on this duty.<sup>242</sup>

Fourth, said Fabri, Lindau confiscated various church income streams and properties, and even the tithe registry.<sup>243</sup> This was not a matter of religion but one of spoliation, said Fabri, "because at every Imperial Diet, the protesting estates had agreed to not take the property of others." This rather opaque sentence turns out to be revealing. What difference would it make as to whether it was or was not a matter of religion whether the city had signed on to the various imperial recesses forbidding the taking of others' property? This sentence makes sense if we realize that Fabri and his lawyer Landstrass knew that to say that something was a "matter of

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<sup>236</sup> Bayerisches Hauptstaatsarchiv (RKG) 5083 ("Munich 5083").

<sup>237</sup> See protocol of the case file for information on events in the intervening years. The protocol is not in my possession. I am not sure why there were such long gaps in this case, or what was happening in the intervening time.

<sup>238</sup> Munich 5083, Q20, "Dupplicatio und Information das diese sach nit ain religion sach sunder spoliren und ein offentlicher gewalt sey," 1536.

<sup>239</sup> Munich 5083, Q20, "Dupplicatio etc.," 1536: "Zum andern ist beweylich außs der handlung das die clag und sach an dem stehe, das die von Lindau anwalts hern und principalen das sein on recht genomen schone meßgewant meßbucher silberne opferkande und anders das anwalts hern und principalis zu der kirchen geben [...] alles verkaufft und gelt darauß gemacht."

<sup>240</sup> Munich 5083, Q20, "Dupplicatio etc.," 1536: "und do sie es ye nit wolten solten sie pillich das thenige so den hern principalen gewesen widerumb geben haben."

<sup>241</sup> Oberländer, *Lexicon Juridicum Romano-Teutonicum*, s.v. "spoliare, spoliiren," 657: "ausziehen / berauben / plündern / einen mit Gewalt oder heimlich aus dem Besitz einer körperlichen oder uncörperlichen Sache setzen."

<sup>242</sup> Munich 5083, Q20, "Dupplicatio etc.," 1536: "Zum dritten so ist auch war das gedachte vonn Lindau unnd ir burger meinem gnedigenn hern von wyen schuldig und austendig und von der Zeit do sy den Zwinglismum noch nit angenommen das wollen sie nit betzalen und sein Gnad hat doch ire burger betzalen müssen."

<sup>243</sup> See Bayerisches Hauptstaatsarchiv (RKG) 5082 concerning the tithe registry.

religion” was distinct from saying that something was covered under the various recesses “concerning the religious divide” (the *Zwiespalt in der Religion*) that had been arrived at in imperial assemblies. In other words, Fabri was saying in effect here: this case is not a matter of religion because it is a matter of the religious divide. Without understanding the narrow legal referent that “religion” had in each of these usages—the cases covered by the Nuremberg Settlement, on the one hand, and the imperial recesses forbidding innovations, on the other—the sentence makes little sense. According to the 1530 Augsburg Recess, for instance, the kinds of actions Lindau had undertaken, though explicitly about “the division in the religion,” were categorized as violations of the Land-Peace, and therefore were definitely justiciable in the Imperial Chamber Court. The plaintiffs also knew that if they said this was a “matter of religion,” then it meant precisely that this case could risk not being litigated in the Imperial Chamber Court—according to the protesting estates’ argument. To concede that the dispute was a “matter of religion” would risk taking the dispute outside of justiciability. This indicates the way in which “matter of religion” was being used categorically as a matter of legal classification to refer only to those disputes that would be governed by the terms of the Nuremberg Settlement.

Fabri went on to say that if Lindau did not want Fabri as their priest, and instead wanted someone else to serve them as preacher who had the false religion, then they should support him with their own income sources, not the annuities and incomes of Fabri.<sup>244</sup> This he took to be further confirmation that it was primarily a matter of confiscation and spoliation. If Lindau had supported their preachers, even preachers of the false religion, with their own sources of income, Fabri said, he would have had no cause to bring the case.

Fifth, the Lindauers, while taking part in the pending litigation in front of the Court, sold some of the property in question—though completely unauthorized to do so. This action, Fabri’s lawyer argued, violated the Nurnberg Settlement, which the Estates had agreed upon, and showed contempt to the Court.

The petition concluded by repeating that this was not a matter of religion, but one of plunder and a violation of the common Land-Peace, and also against all that had been proffered by the protesting estates, namely, that they would not take anything from anyone, and that they did not wish to dispute with anyone at the Court about true or false religion at this time.<sup>245</sup> Put another way, if the protesting estates were serious about not wanting to dispute about true and false religion at the Imperial Chamber Court, then they would litigate this dispute as a matter of property; by insisting that it was a matter of religion, they were saying that the only way for the Court to litigate was to adjudicate on true or false religion—which of course it may not do. In other words, they were making it a “matter of religion” not on the substance but precisely in order to escape the jurisdiction of the Court.

### **Leaving in Place the Predicate That There Was Such a Thing as a “Matter of Religion”**

In Chapter 3, we learned about the 1537 suit brought by Philip von Rechberg, who was both the Cathedral Provost at Worms and the Cathedral Dean at Augsburg, against a noble citizen

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<sup>244</sup> Munich 5083, Q20, “Dupplicatio etc.,” 1536: “wollen si ye meinen Gnedigen hern zu einem pfarher nit haben und einem anden der falsam religionem habtt, solten sie den selben erhalten mit Irem und nit mit meins Gnedigen hern von wyen gulte und renthe.”

<sup>245</sup> Munich 5083, Q20, “Dupplicatio etc.,” 1536: “das diese sach nit ein religion sach sein sunder spoliirn ein offenlicher gewalt wider den gemeinen landfriden auch wider aller protestirende stendt erbietten das sye khainem das sein nennen[nemen] wollen und niemantem an diesem kay. Camergericht veram oder falsam religionen diser Zeit nit disputiert.”

of Ulm named Ludwig von Freyberg.<sup>246</sup> Philip alleged that Ludwig, without authority, had ordered then-vicar, Hans Moßberg, to leave the parish church, had confiscated large quantities of parish goods, and had redirected the tithes, annuities, and incomes of the parish. These actions were in violation of imperial protection, common written laws, the Golden Bull, the Land-Peace, the Speyer Recess of 1526 and the Augsburg Recess of 1530. The only indication in the language of the Summons about the Reformation context came at the very end, as the plaintiff asked the Court to order Ludwig von Freyberg to return the confiscated wealth, redirect the incomes to Hans Moßberg, release administrative control of the parish, and to “let the plaintiff and his administrator remain with the parish and the old Christian usages and ceremonies, safely and uninjured.”<sup>247</sup>

In response, Ludwig argued that in fact he had the right to appoint the vicar of the parish, and though that appointment was conditional on the approval of the Bishop of Constance, historically, that condition was nominal only; every recommended appointment had been subsequently approved without incident. He argued to the Court that the only reason Phillip brought this suit challenging his *jus patronatus* claims was because he objected to the vicar which he had appointed, namely someone “who would deliver the pure, clear, plain Gospels and word of Christ” without “any human ornament or addition.”<sup>248</sup> On these grounds, Ludwig declined the forum of the Court on two grounds. First, because “the matter is purely and clearly dependent on the religion and incontrovertibly has its origins and beginning in it.”<sup>249</sup> As such, it fell under the terms of the Nuremberg (1532), Kaaden (1534), and Frankfurt (1539) treaties that declared all such cases should be paused until a future Christian council.<sup>250</sup> Being a matter of religion, it “involves electors, princes and other estates of the holy religion, our holy Christian faith, who had previously protested the imperial recesses.”<sup>251</sup> Second, there was no spoliation or improper confiscation, as the plaintiff claimed; rather, the defendant was acting within his rights to appoint and to direct the incomes of the parish to the appointed vicar, as was customary. If the plaintiff wished to challenge his patronage rights, then he must sue the defendant in front of their ordinary judge in the first instance, and not for a Land-Peace violation in the Imperial Chamber Court.<sup>252</sup> In other words, Ludwig von Freyberg was not obligated to respond to this matter before the Imperial Chamber Court, not just because “the present matter truly and foundationally concerns the division of the holy religion,” but rather also that even if it did not concern the religion, it did not rise to the level of a Land-Peace violation, and therefore the Imperial Chamber

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<sup>246</sup> Munich 2019.

<sup>247</sup> Munich 2019, no quadrangle, third document in case file after protocol, “Ladung cum Executione,” no date; and Munich 2019, Q21, “Positiones et Articuli,” 1541.

<sup>248</sup> Munich 2019, Q7, “Ursachenn cum Annexa petitione et protestatione,” 1538: “gedachts Lutzenn vonn Freybergs beger und gemuth allein sey zu seiner hohen und nider oberkhait ein Cristenlichen verkholder des hailigen wortt gotts, dasselbig auch on allen menschlichenn thant [Tand] oder zusatz, rheim, lautter zu predigenn und zuverkhunden, zu habenn.”

<sup>249</sup> Munich 2019, Q7, “Ursachenn cum Annexa petitione et protestatione,” 1538: “dise sach auch pur lautter der Religion anhengig ist, und unwidersprechenlich daher irenn anfang und ursprung hatt.”

<sup>250</sup> See this argument in Munich 2019, Q7, “Ursachenn cum Annexa petitione et protestatione,” 1538; and Q16, Exceptiones protestationes unnd erpietern cum annexa petitione,” 1540. Like the Nuremberg Peace, the Treaty of Kaaden (June 1534, i.e. six months after the protesting estates’ Recusation of the Court), and the Treaty of Frankfurt (1539) promised a standstill to cases, and likewise had no teeth. See footnotes 40 and 42 above.

<sup>251</sup> Munich 2019, Q16, Exceptiones etc.,” 1540: “Churfursten und fursten und andern steenden so sich in der heiligen religion unsers hailligen christenlichen glaubens.”

<sup>252</sup> Munich 2019, Q16, Exceptiones etc.,” 1540.



Court was not the appropriate forum.<sup>253</sup> They thus testified and protested that in this matter of religion, they were not obligated to enter the case, to settle the legal issue (*litis contestatio*), or to proceed.

The lawyer for the plaintiff responded that the allegation that this was a matter of religion should not be countenanced. First, Ludwig von Freyberg did not become a citizen of Ulm until two years after the events in question.<sup>254</sup> So the lawyer for the protesting estates improperly accepted this dispute as a matter of religion. Second, this was a violent Land-Peace violation,<sup>255</sup> so the claim that it was a matter of religion should not give it cover.<sup>256</sup> He asked that the judges not hear them, declare them *in contumaciam*, and require them to pay contumacy expenses.<sup>257</sup> He gestured to the willfulness of the claim that this was a matter of religion, its constructed quality, when he said that the other party's mere allegation should not be accepted on its face; the defendant lawyers have "made a protesting and religion matter out of it" although this matter did not relate to the religion, but rather was materially, substantively governed by law, a spoliation matter that violated common written laws, and the two recesses.<sup>258</sup> Nonetheless, Philip left untouched the premise that there was such a thing as a "matter of religion."

Ultimately, the Court required the settling of the *litis*, and proceeded with the defendant in contumaciam. But it does not go far past the Positions and Articles stage, as the defendants refused to take part, and the case file fizzled out in 1541.

## Bricolage Jurisprudence

This dissertation contributes to the "religion" literature by excavating the messy, litigation context in which "religion" was first used as a legal category in the Reformation period. It shows that we cannot understand the meaning of "religion" in the Augsburg Religion-Peace of 1555—and arguably, "religion" as a secular legal category thereafter—without

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<sup>253</sup> Munich 2019, Q16, *Exceptiones etc.*, 1540: "das der gemelt Ludwig vonn Freyberg diser sachen halb vor dem hochloblichenn kaiserlichen CG antwort zugeben nit schuldig, nit allain darumb das gegenwurttig handlung auch die zweispaltung der heilligenn Religion warhafftiglich unnd grundtlich belangt, sonnder das sie sonst dermassen gestalt das ob sie schonn die Religion nit betreff, das dannoch e.g. derselbigenn nit richter, nach er Ludwig vonn Freyberg vor e. g. antwort zugeben schuldig."

<sup>254</sup> Munich 2019, Q8, "Petitio," 1538: "so sey wissentlich das zu der selben zeyt Lutzen von Freyberg auch sein sun noch nit Burger zu Ulm sein gewesen auch anwaltdts herrn und principalenn oder seinem vicarius noch nit endtsetzt oder veriaigt und austriben sonder ist anwaltdts principal und sein vicarius erst bey zwaien jaren enttsetzt und ausgetribenn und Lutz von Freyberg erst lang darnach Burger zu Ulm worden ist, darauß dann mit der warheitt volgt das mer gemelte der protestirend stendt anweldt sich unpillich diser sach annemen." The question of citizenship in cities of nobles from surrounding regions was important in the medieval and early modern periods. It was a way for nobles to benefit from the comforts of city life, as well as be protected in times of unrest. It was a matter of negotiation for example how long they could reside in the city, how expensive of a property they could purchase, and what the city would get in return. Since 1534, von Freybergs had sought citizenship in Ulm; they were finally given citizenship rights in 1537. See Sailer, "Öpfingen im Mittelalter."

<sup>255</sup> Munich 2019, Q8, "Petitio," 1538: "darauß dann mit der warheitt volgt das mer gemelte der protestirend stendt anweldt sich unpillich diser sach annemen dan sy ir vermeint angeben als solt diese sach ein Religion sach sein welche ein gewaltsame und Landt zu Schwaben fur ein landt fridpruchigen sach gehalten gar nit schirmen oder furtagen mag."

<sup>256</sup> Munich 2019, Q8, "Petitio," 1538: "dan sy ir vermeint angeben als solt diese sach ein Religion sach sein welche ein gewaltsame und Landt zu Schwaben fur ein landt fridpruchigen sach gehalten gar nit schirmen oder furtagen mag."

<sup>257</sup> Munich 2019, Q8, "Petitio," 1538; and Q15, "Anzaig cum annexa petitione," 1540.

<sup>258</sup> Munich 2019, Q15, "Anzaig cum annexa petitione," 1540: "ein protestierende und Religion sach darauß gemacht."

understanding the meaning of “matters of religion” in the context of the Reformation-related litigation of the decades prior to it.

This dissertation also brings more nuance and detail to familiar tropes about the “religion” category that have circulated in the historiography of the Reformation cases since at least the late nineteenth century.

In the early Reformation period, the “religion” category in legal discourse gained its particular definition and contours in response to certain demands endogenous to law—specifically, the techniques of litigation, and the constraints of Roman-canonical legal procedure. In this chapter, we have seen moments of articulation, in which actors—in particular, old-faith and evangelical litigants and their lawyers, as well as judges—not only used the phrase, but moments in which disagreement about its contours elicited more language about it. Importantly, these moments did not yield reflective, second-order deliberation; the discussions were always tied to tangible disputes. In other words, the meaning of the phrase “matter of religion” was being worked, reworked, and reworked again by interested parties in high-stakes disputes. Litigation at its core is interested; thus, to speak of the “interests” of the parties is not to reduce the legal to the political, but to get at a structural characteristic of litigation.

Each attempt to use the term, and each move to challenge it, or to brush it aside, added another piece to this bricolage legal category. The concept of “bricolage” helps us understand the way in which the category emerged, in particular, the heterogeneous, contingent, and retrospective quality of its production. Claude Lévi-Strauss described bricolage as a particular mode of production in which the bricoleur confronts particular material constraints: “his universe of instruments is closed and the rules of his game are always to make do with ‘whatever is at hand.’”<sup>259</sup> The tools and materials he has to work with are “closed” because they were not selected for the purpose of carrying out the particular project before him; instead, they are “the contingent result of all the occasions there have been to renew or enrich the stock or to maintain it with the remains of previous constructions or destructions.”<sup>260</sup> The principle of selection, collection, and retention of these tools and materials is simply that “they may always come in handy.”<sup>261</sup>

Each time the litigants, judges, and lawyers invoked the term “matters of religion,” they were not setting out to define a new category of legal issue. They were, rather, setting out to win a case, or to settle a dispute, to regain lost property and lost rights, or to avoid punishment or outlawry—using the techniques that were “at hand.” In the litigation, we see the repeated and insistent use of this term, and its repeated and insistent rejection; these were “driven by the efforts of litigants representing conflicting interests to restate the law to favor their side, under the supervision of courts with a role commitment to deciding according to rational and universalizable criteria.”<sup>262</sup> As the stakes shifted from case to case, the meaning of “matter of religion,” its centrality, and its contours shifted in turn. Its use in a particular case was not predictable as all parties experimented with how to mobilize their arguments, and how to respond, based on a hunch that their approach would work in a certain way for the case before them.

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<sup>259</sup> Claude Lévi-Strauss, *A Savage Mind* (Chicago, IL: University of Chicago Press, 1966), 17.

<sup>260</sup> Lévi-Strauss, 17.

<sup>261</sup> Lévi-Strauss, 18.

<sup>262</sup> Duncan Kennedy, *The Rise and Fall of Classical Legal Thought*, 2nd ed. (Washington D.C.: Beard Books, 2006), xv.

Thus, the sources of this category were multiple, and therefore often contradictory. Its content was not the product of self-reflexive or self-conscious deliberation, but of “practice”—gambits in the context of litigation, that sometimes hit or missed and yet remained part of the stuff of the category as a matter of naming.<sup>263</sup> Its authors were not singular, nor can we point to a single bricoleur. Our focus, therefore, is not on any particular actor or group of actors, but on the “modes of operation,” and “schemata of action” available at law to the people involved.<sup>264</sup> Embedded as these practices were in existing civil procedure and the legal culture of the Holy Roman Empire of the early sixteenth century, the term accrued certain tropes that cleaved to the “religion” category as a matter of habit, strategy, or memory. More than a term referring to something existing “out there” in society, “matter of religion” was a modality of legal language that operationalized certain strategies, that indexed certain constitutional conundra, and that expressed certain suspicions or concerns.

In particular, the matter of religion category bore three tensions. The first tension concerned the term’s referent. For the protesting estates, if the dispute in question had at its root “the affliction of their conscience alone” that the word of God be clearly taught,<sup>265</sup> or a different theological interpretation,<sup>266</sup> or if the other party was motivated by old-faith zeal to obliterate the “new teachings,”<sup>267</sup> for instance, then it was a matter of religion. But for plaintiffs, these arguments that placed at the center the context of correct worship, correct teachings, and pious motivation—these were subject to the criticism that the Imperial Chamber Court did not have jurisdiction over such matters anyway. As a worldly court, it could not adjudicate “pure spiritual matters.” In other words, even if one took the pious context of the dispute away, the cause of action that brought them to the Imperial Chamber Court—concerning peace, property, or jurisdiction—remained.<sup>268</sup> For the protesting estates, however, the material context was what distinguished the nonjusticiable “matter of religion,” that required the involvement of a Council to resolve, from ecclesiastical matters belonging before a church court. The matter of religion was always bound up with the material conditions, and therefore would always touch on matters of property, peace, and jurisdiction<sup>269</sup>; analogous to the necessity to determine the legitimacy of a child before determining the distribution of family inheritance.<sup>270</sup>

The second tension concerned the term’s valence. Plaintiffs often assumed a generic meaning of “matter of religion,” to mean something good and pious. They often expressed incredulity and rebuke when defendants claimed the dispute was a matter of religion, especially in cases involving violence, or in which long-standing dynastic interests were at play. As the protesting estates’ usage of the matter of religion term became increasingly tied to the subject of imperial negotiations and recesses, in which “matters of religion” would be suspended at the

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<sup>263</sup> Michel de Certeau, *The Practice of Everyday Life*, trans. Steven Randall (Berkeley: University of California Press, 1984), xi.

<sup>264</sup> de Certeau, xi.

<sup>265</sup> See e.g. Munich 5654, Q5, “Copia ainer Supplication, etc.,” 1536: “auss bedrengnuß irer gewissen allein.”

<sup>266</sup> See e.g. Munich 8281, in which the defendants argued that according to canon law, tithes should be directed to the person who gives the sacraments, whereas for those adhering to the Augsburg Confession, tithes should be given to those who deliver the pure word of God; and that it was this difference of opinion in the proper recipient of church incomes that explains the dispute between the city of Lindau and the Abbess.

<sup>267</sup> See e.g. Munich 5657.

<sup>268</sup> See e.g. Berlin 271, in which the plaintiff “corrected” his petition to remove all language about ceremonies and worship, and made his suit all about property and jurisdiction.

<sup>269</sup> See discussion of the Strassburg case regarding St. Arbogast monastery above.

<sup>270</sup> The evangelical estates make this argument in the Recusation of 1534, see Chapter 5.

Court, plaintiffs found themselves in the position of arguing that a dispute that they otherwise had shown had a Reformation context was not a “matter of religion.” In these cases, we see the term’s valence narrowing to that of a specific legal category.

The third tension concerned its scope. On the one hand, to invoke the term had the effect of lifting a dispute out of its particularity, and isolating the only important legal claim about that case as being that it was a matter of religion. On the other hand, the claim that a dispute was a matter of religion was only ever defined through examples and lists, embedded in the particular circumstances of a dispute.

In chapter 6, we will see that the religion category, as it was naturalized, domesticated, enclosed, and contained within imperial law in the 1550s, never lost this heterogeneous, contingent, quality; rather all of the varied referents, techniques, and affective associations cleaved to the category. Its content was “pre-constrained,” “limited by the particular history” of each of those contexts and articulations.<sup>271</sup> Arguably, the legal category “religion” never lost this “constitutive indeterminac[y]”<sup>272</sup> as vagueness and ambiguity became the ultimate virtue of the post-Augsburg imperial order.

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<sup>271</sup> Lévi-Strauss, 19.

<sup>272</sup> Hussein Ali Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (Chicago, IL: University of Chicago Press, 2012), 31.

## CHAPTER FIVE

### PROCEDURAL PROXIES FOR THE RELIGION QUESTION

Moving away from the previous two chapters' focus on substantive law, this is a chapter about the details of legal procedure and its surprising role in the Reformation cases and the construction of the "religion" category. I argue that some of the most consequential legal transformations of the early Reformation happened through experimental uses of mundane, formulaic instruments of Roman law civil procedure in the context of Reformation-related litigation. A close examination of three legal instruments in particular—the power of attorney, the protestation, and the recusation—shows the ways in which litigants and lawyers inserted claims, advanced possibilities, and manufactured precedents that were met variously with opposition, confusion, or a wait-and-see attitude, shaping not only the course of litigation in an individual case, but also, the Empire's constitutional development.

Indeed, some of the most significant elements of the post-1555 legal order—its recognition of multiple "religious parties," its increased investment in the consolidation of imperial institutions to manage agonistic difference, and the formation of two distinct legal interpretive universes along confessional lines which eventually destabilized the Augsburg system in the seventeenth century—all have traces in experimental gambits and "juristic techniques" by proto-Protestant litigants.<sup>1</sup> First, the protesting estates' usage of the "power of attorney" document was drawing on a legal culture of combination and corporatism, and in the process proposing a new form of legally legible group identification and belonging in terms of confession—the beginning of the idea of a "religious party" as a legal category. Second, their usage of the protestation instrument was drawing on centuries worth of customary legal practice, while at the same time mobilizing it in order to articulate a new way of relating law and conscience. The protestation instrument became a mode of "veridiction," a bearing truth about the event and about oneself in a high-stakes context. In the process, it stabilized imperial institutions as the meaningful contexts in which pious utterances would take place. Finally, the recusation instrument, though tapping into familiar principles and doctrines against judge bias, became a means of making accusations of confessional partisanship, and making legible a whole set of suspicions linked to questions of authority and legal validity, paving the way for inherently unstable confessionally-distinct jurisprudences within the imperial legal system.

Each of the mundane instruments of legal procedure discussed here operated as vehicles for legal speech acts. To understand the significance of the usages of these legal instruments, we must look at more than the propositions made in them, whether those propositions were true or false, valid or invalid, sincere or insincere, or the motivations and strategies that underlie them. A speech act analysis of these legal instruments helps us to see, instead, the "verblike" quality of an utterance. Actors make claims about law, about who "we" are, and what kind of shared world we should build—all of which are "constitutional" questions—not just through what is being said, but in the saying itself.<sup>2</sup> The speech act aspect of an utterance indicates the horizon of that shared world even as the language does not fully state it explicitly.<sup>3</sup>

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<sup>1</sup> Geertz, "Local Knowledge," 174; "juristic techniques" gets at the way in which "legal representation of fact is normative from the start." This coincides with a turn in the way Martin Luther and Philip Melanchthon began around 1530 to speak of Roman law as a law of peace and impartiality; see Whitman, 17-28.

<sup>2</sup> Constable, 13, 21, 23, 29.

<sup>3</sup> Constable, 10.

In the three sections that follow, I analyze how three instruments of Roman law civil procedure—the power of attorney, the protestation, and the recusation—were used by or on behalf of evangelical litigants in the period before 1555. This chapter attends to the “performative” and “passionate” dimensions of the usages of these instruments. The “performative” aspect gets at the circumstances of an utterance, the conventions and formal rules that make it so that something is effected precisely in being said.<sup>4</sup> Through drafting and uttering the words of these instruments, the proto-Protestants sought to *empower* their lawyers in common, to *protest* the 1529 Recess and others following, and to *recuse* the Judges of the Imperial Chamber Court. Insofar as these speech acts were bound by conventions of law, however, they could be declared illegitimate or invalid.<sup>5</sup> Indeed, as we will see, the 1530 Power of Attorney was implicitly denied by the Court, the 1529 Protestation was not appended to the Recess and therefore had no legal existence as far as the Court was concerned, and the 1534 Recusation was rejected by the judges outright.

The “passionate” dimension is an extension of the performative.<sup>6</sup> It gets at the unruly and imaginative dimensions of a legal speech act, the aspect that appeals not to formal authority and rules but to others whom one singles out as standing with one in meaningful relation.<sup>7</sup> The passionate dimension gets at the way in which speakers make “claims on their hearers to acknowledge their truth or their right,” and the measure of their effectiveness is not whether they are invalid or valid, but rather whether they are persuasive, or, more minimally, whether they stick and get repeated.<sup>8</sup> In a passionate utterance, “I declare my standing with you and single you out, demanding a response in kind from you, and a response now, so making myself vulnerable to your rebuke, thus staking our future.”<sup>9</sup> The proto-Protestants, in the process of undertaking these legal speech acts, were (1) mobilizing and stabilizing the practical knowledge that brought speaker and listener together in a constitutive “we,” (2) participating in, while at the same time interrupting and transforming, the shared legal backdrop that gave these speech acts their meaning, and (3) proposing through enactment very particular proposals for a possible new constitutional order. These were not targeted self-consciously in a propositional or policy-oriented manner. Rather, these were the consequences of law’s “own speech escap[ing] its control in unpredictable ways.”<sup>10</sup>

## Instrument #1: Protestation

Conventional wisdom links the term “protest” in the name “Protestantism” to the general stance of the early reformers against the “old faith,” its Church, and its institutions. Martin Luther’s statement at Worms in 1521—“Here I stand, I can do no other”<sup>11</sup>—is identified as the

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<sup>4</sup> Constable, 21; Austin, 4-6.

<sup>5</sup> Constable, 34.

<sup>6</sup> Cavell, 176ff.

<sup>7</sup> Constable, 34-5.

<sup>8</sup> Constable, 36.

<sup>9</sup> Cavell, 185.

<sup>10</sup> Constable, 11.

<sup>11</sup> Hans-Jürgen Becker, “Protestatio, Protest: Funktion und Funktionswandel eines rechtlichen Instruments,” *Zeitschrift für Historische Forschung* 5 (1978): 388. For a source critique of Luther’s concluding words at Worms, see: Karl Müller, “Luthers Schlußworte in Worms 1521” in *Philotesia: Festschrift für Paul Kleinert*, ed. Adolf Harnack et al. (Berlin: Trowitzsch & Sohn, 1907): 269-289.

quintessential moment of protest—a “saying no.”<sup>12</sup> Aware that the teachings of Luther and other reformers eventually affected all levels of German society, many expand this single posture of protest into a popular movement resisting the status quo. But the sense of “protest” as primarily a “saying no” is anachronistic and incomplete.

Most Reformation historians, on the other hand, trace the provenance of the name “Protestantism” to the formal legal act of “protestation” that reforming rulers made in response to the 1529 Speyer Recess. Wandel notes that the name therefore became “an artifact both of the contest over jurisdiction at the heart of Reformation and of the centrality of law in the pursuit of Reformation.”<sup>13</sup> We know that this is not the only place where legal terms imbricate the Reformation lexicon. Indeed, the term “reformation” itself, was “in contemporary usage [both] the technical term for revisions made in a legal code or a set of ordinances” as well as “the most general name for the hoped-for renewal of everything from local customs to the whole complexion of public and private life.” Therefore, Strauss notes, “all talk about ‘reform’ and ‘reformation’ [...] carried associations of law and jurisdiction.”<sup>14</sup> These kinds of tantalizing statements about the imbrication of legal terminology and concepts of central importance to the history of the Reformation, are where theorization typically ends. The overlap of these terms, it is suggested, are self-explanatory in a context in which law and religion were tightly coupled, and in which religious change always already meant legal change.

In the following, I argue that there is much more to be said about these moments of overlap. Specifically, the significance of the fact that the name “Protestantism” is linked to a little understood legal instrument—the “protestation”—that had its origins in classical Roman law and had become ubiquitous in the constitutional life of the sixteenth century Holy Roman Empire, has been left under-theorized.

The term used in the early sixteenth century was “the protesting estates” (*die protestierenden Stände*). The term “protesting” carried with it the very specific referent of the protestation legal instrument, and the “estates” referred to those rulers who had submitted the 1529 Protestation. The words “Protestant” and “Protestantism” first came into widespread use during the Enlightenment, two-hundred years after Luther’s stand.<sup>15</sup>

This section tells an earlier story about the provenance of “Protestant.” It offers a synthesis of a specialized and somewhat neglected historiography on the protestation as a legal instrument and its usage in the context of the early Reformation in the German lands. In doing so, it amends a stream of historiography that tends to collapse the two hundred-year period between the Reformation and the Enlightenment, encouraging us instead to slow down and linger in the messy years of the early Reformation, and to consider the ways in which its impacts have survived into the late modern period. This section is also an invitation to pay more attention to the most technical, formalistic, and legalistic aspects of the early Reformation in order to offer more careful theories about the relationship of law and religion in this period. By highlighting the ad hoc and tangible quality of legal experimentation, we can clear a path for understanding the particular constitutional, social, cultural, religious, and political “riddles” that the term “protesting” had originally indexed.<sup>16</sup>

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<sup>12</sup> See e.g. Harry Pross, *Protest: Versuch über das Verhältnis von Form und Prinzip* (Neuwied: Luchterhand, 1971).

<sup>13</sup> Wandel, 100, 156.

<sup>14</sup> Strauss, 51-2.

<sup>15</sup> Becker, 401; Julius Boehmer, “Protestari und Protestatio, protestierende Obrigkeiten und protestantische Christen,” *Archiv für Reformationsgeschichte* 31, no. 1 (1934): 21.

<sup>16</sup> Boehmer, 2.

In particular, I argue that protestation became the quintessential proto-Protestant form of “veridiction.”<sup>17</sup> In the early Reformation, in addition to substantially transformed forms of penance and confession, acts of “truth-telling,” avowal, and witnessing increasingly took the form of legal speech acts, including the protestation. That is, the meaningful contexts of proto-Protestant avowal increasingly became imperial legal contexts.

### ***Protestatio in Roman Law***

The Latin word “*protestatio*” in general usage was an intensification of its base verb “*testor, testari, testatus*” which means to bear witness, testify, swear, or give as evidence.<sup>18</sup> In the everyday language of the antique period, *protestatio* was also used to refer to an open declaration or announcement.<sup>19</sup> In classical Roman law, the *protestatio* was a formal legal act, carried out in writing, reserved for private law contexts. Its function was that, through making a clear statement, persons could hinder an incorrect interpretation of their actions, which might otherwise arise if they were to remain silent, when they predict that remaining silent would be prejudicial, i.e. create a presumption against them at some future date.<sup>20</sup> The Roman law source texts that provided the basis for this type of legal instrument are not to be found within a single rubric, but rather, are spread throughout the *Corpus Juris Civilis*—in sections having to do with subjects as varied as statutes of limitation, contract law, and the conduct of funerals.<sup>21</sup>

One section, for instance, describes a situation in which persons bury someone to whom they could become heir, from whom, however, they do not desire to inherit. It states that in order for such persons to positively prevent the presumption that by burying this person they intend to inherit, they should protest before witnesses “that they are performing the burial out of a sense of duty.”<sup>22</sup> Thus, the protestation was the legal form used to declare what one was doing when one did something. It was a way of anticipating and foreclosing interpretations of one’s actions that would lead, directly or indirectly, to unfavorable or undesirable outcomes.

Protestation was also a way of interrupting a prescriptive period. In a context in which, for instance, possession over property for thirty years could create a claim of ownership, owners had the right to publicly protest each year, effectively interrupting the clock by declaring that by permitting the lessees to hold possession over their property for this time, they did not intend thereby to create a right of ownership.<sup>23</sup>

With the revival of Roman law beginning in the eleventh century, *protestatio* gained more discussion, attention, and definition.<sup>24</sup> Lifted from its contextualized descriptions in the *Corpus Juris Civilis*, canonists recommended using the protestation instrument in general anytime where silence could be misinterpreted as implicit agreement.<sup>25</sup> Even more expansively,

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<sup>17</sup> Michel Foucault, *Wrong-Doing, Truth-Telling: The Function of Avowal in Justice*, ed. Fabienne Brion and Bernard E. Harcourt, trans. Stephen W. Sawyer (Chicago, IL: University of Chicago Press, 2014), 14-17, 28, 92.

<sup>18</sup> Becker, 388; Boehmer, 2.

<sup>19</sup> Becker, 389.

<sup>20</sup> Becker, 388. On “prejudice” see Dawson, xv.

<sup>21</sup> Becker, 388-9.

<sup>22</sup> Justinian’s Digest 11.7.14.8 in Alan Watson, ed., *Digest of Justinian*, vol. 1 (Philadelphia, PA: University of Pennsylvania Press, 2009), 352.

<sup>23</sup> See Justinian’s Codex 7.39.2.1 in Bruce Frier, ed., *The Codex*, vol. 2, 1895-97; and Justinian’s Codex 7.40.2 in Bruce Frier, ed., *The Codex*, vol. 2, 1911.

<sup>24</sup> Becker, 390.

<sup>25</sup> Becker, 390.



canonists explained that the protestation could be used anywhere where one does not want the legal conditions to be finally settled, rather one wants to keep multiple possibilities open, in order to secure greater freedom of action later.<sup>26</sup>

With the increased usage of this instrument in the medieval period, there was also increased experimentation and, arguably, abuse. Formulas popped up in books of legal forms to make protesting easier and more regular.<sup>27</sup> Already in the thirteenth century, we see efforts by jurists to work out the various kinds of *protestatio*, its permissibility in different contexts, and its legal consequences.<sup>28</sup>

In addition, the sites of usage proliferated well beyond the private law sphere. Indeed, there was barely any area of legal life in which *protestatio* did not find some application in the late medieval period, including heresy law, treaty-making, coronation law, and more.<sup>29</sup> An interesting case of this can be seen in election and coronation law, which also highlights the layered and multivalent quality of protestation.<sup>30</sup> In 1308, after long negotiations, Henrich VII was voted king of the Holy Roman Empire by the imperial electors. But the Duke of Lauenburg occupying the Saxon electoral office had a disputed claim to that position. So, another elector, the Archbishop of Trier, insisted that the decree announcing the election contain a protestation, stating that the presence of those who are improperly occupying an electoral office should have no influence on the validity of the election.<sup>31</sup> The formal purpose of the protestation was to protect the validity of the election, and to hinder any legal challenge that may arise later, on the basis that one of the electors was improperly occupying the office. But the protestation had another purpose, which was to preclude any presumption that by participating in a valid election, the Duke who had a contested claim to the Saxon electoral office had thereby resolved the validity of his own office. At yet another level, the purpose of the protestation was to register the Archbishop's position on the matter, a way of protecting himself from any consequences—political, legal, or otherwise—that may have resulted from his actions being presumed to have been a declaration of support of the Duke's claim to the disputed Saxon electoral office.

In high politics, protestations were used not only to hinder potentially prejudicial presumptions, but also to indirectly communicate to relevant audiences. A protestation could be made into propaganda, or kept secret and publicized at the right political moment.<sup>32</sup> It was a kind of non-confrontational way of registering one's position in a long-running dispute. In the process, it signaled an expectation of future engagement on the issue. The protestation could also become a means of declaring one's neutrality in a dispute.<sup>33</sup> Formally, the purpose of such a protestation would be to foreclose any punishments or censures that may, after all the chips had fallen, have resulted from taking sides.

Protestations also became public or secret amendments to oaths, contracts, treaties, and agreements, and often had the effect of undermining the very terms of such agreements. This form of nullifying protestation, in which the behavior of the protesting party does not permit of the interpretation they posit ("*protestatio facto contraria non valet*") was controversial, and its

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<sup>26</sup> Becker, 391.

<sup>27</sup> Becker, 391.

<sup>28</sup> Becker, 391.

<sup>29</sup> Becker, 392.

<sup>30</sup> Becker, 393-4.

<sup>31</sup> Becker, 393.

<sup>32</sup> Becker, 394-5.

<sup>33</sup> Becker, 395-6.

legal permissibility was contested.<sup>34</sup> In one instructive case in 1530s England, the person hand-selected by King Henry VIII to be the Archbishop of Canterbury insisted on amending his oath of canonical obedience to the Pope with a protestation, in which he stated that “it is not nor will it be my will or intention by such oath or oaths, no matter how the words placed in these oaths seem to sound, to bind myself on account of the same to say, do, or attempt anything afterwards which will be or seems to be contrary to the law of God or against our ... king<sup>35</sup> [...]” In his heresy trial years later, this protestation was likened “to a man who killed another but thought himself safe because he had protested before the deed that it was not his will to kill.”<sup>36</sup>

By the beginning of the sixteenth century, protestations had become a ubiquitous legal instrument. It was the bread and butter of the lawyerly craft. In the sections that follow, we will see the use of protestations both in Reformation litigation, as well as in deliberative contexts surrounding them especially imperial assemblies. The protestation produced by the evangelical party in response to the 1529 imperial assembly at Speyer became a touchstone not only in future diets, but also in the Imperial Chamber Court, and was the legal speech act that gave the evangelical party the epithet by which they most became known: “the protesting estates.”

### *The 1529 Assembly*

As noted in Chapter 2, the Recesses produced at the end of imperial diets throughout the 1520s were ambiguously worded, and always looked forward to a future Christian council which would resolve the stewing theological and liturgical conflicts.<sup>37</sup> These Recesses were interpreted by some proto-Protestant rulers to give them license to reform church and polity in their domains, until such a Council took place.

The 1526 Recess from the Diet at Speyer was similar in its effects. Unanimously agreed upon by the Emperor and Estates, it stated that they would wait to reconcile the core issues of faith and practice at a future Christian Council; that innovations regarding religion would not be tolerated, but (Article 4) that when it came to enforcing the Worms Edict, until a further decision came down, each of the Estates was given authority to “live, govern, and behave with their subjects in matters of the Worms Edict, as each hopes and trusts himself to answer to God and the Emperor.”<sup>38</sup> Having been made unanimously, it could—in theory—only be changed or undone unanimously, and it stated that this Recess would remain valid until the Christian Council took place.<sup>39</sup>

Old-faith estates interpreted the Recess to mean that though changes already made may temporarily be allowed to stand, no further innovations should be allowed, and for them, the notion that rulers were responsible before God and the Emperor was a clear statement in favor of the status quo.<sup>40</sup> Yet, the 1526 Recess—in part because of its being passed unanimously, in part because of its claim to be valid until a Christian Council would settle the core issues of theology

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<sup>34</sup> Becker, 396-7.

<sup>35</sup> Jonathan Gray, *Oaths and the English Reformation* (Cambridge, UK: Cambridge University Press, 2012), 100-1.

<sup>36</sup> Gray, 104.

<sup>37</sup> See Chapter 6 for a discussion of the role of dissimulation in the legal culture of the Holy Roman Empire.

<sup>38</sup> Julius Ney, *Die Appellation und Protestation der evangelischen Stände auf dem Reichstage zu Speier 1529* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1967), 4-5.

<sup>39</sup> Becker, 398; Ney, 5; Whaley, *Germany*, 181.

<sup>40</sup> Whaley, *Germany*, 295.

and practice—was interpreted by the evangelical estates as embedding into fundamental law a justification for local reformations, their *ius reformandi*.<sup>41</sup> Insofar as the evangelical estates felt bound in conscience to create pathways for the word of God in their lands, they were ready to answer to God and the Emperor about their actions.<sup>42</sup>

The Emperor called the 1529 assembly with, among other things, the express purpose of clarifying Article 4 of the 1526 Recess.<sup>43</sup> Far from bringing about peace, the article “concerning our holy faith and Christian religion” had resulted in some cases in uproar, opposition, violence, violation of the Land-Peace, and disobedience. These actions, he announced, required that the assembly reconsider how to achieve peace in the Empire until a future Christian Council is scheduled.<sup>44</sup>

The Recess produced at the end of the 1529 Diet at Speyer called for the Emperor to fulfill his promise within the year of convening a free Christian Council, so “that the German nation can be united in holy Christian faith”; further delay could not be endured (Article 1). It suggested that if a Council could not be called within that one-year timeframe, that instead the Emperor call a special assembly of all estates of the German nation specifically for the purpose of resolving these issues (Article 2). The document went on to describe an article of the Speyer 1526 Recess that “has been interpreted by many in such a way as to pull them into a great misunderstanding, and to excuse all kinds of terrible new teachings and sects” (Articles 3 and 4). Therefore, in order to prevent this, they agreed upon new standards. First, that until the future Council, all estates who until then had enforced the Worms Edict should continue to do so. Second, that all those estates in whose domains the new teachings had emerged because suppressing them would have led to uproar, should prevent all future innovations as much as humanly possible (Article 4).<sup>45</sup> Teachings and sects that went against the sacrament of the true body and blood of Jesus Christ should not be accepted by any estates of the Empire; and the mass should not be abolished or hindered, even in those places where the new teachings had emerged (Article 5). Anabaptists should be executed without a preceding trial; only if they go through penance might they be pardoned (Article 6). No ruler should tolerate the subjects of another ruler who had fled due to prosecution of Anabaptism (Article 7). Preachers should avoid anything that could cause uproar among the common man against rulers; preachers should preach the Gospels only according to the interpretation approved by the holy Christian church, and should avoid teaching disputatious matters until a decision of the Christian council (Article 8). Finally, no estate should in any way violate the rights of another estate, and no estate should give special protection to the subjects of another estate on the basis of the faith (Article 10).<sup>46</sup>

### ***The 1529 Protestation***

The jurists and chancellors of reforming princes and cities began mutual consultation about a protestation as soon as the Emperor’s purpose for calling the assembly became clear<sup>47</sup>—

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<sup>41</sup> Whaley, *Germany*, 181-2.

<sup>42</sup> Ney, 5.

<sup>43</sup> Whaley, *Germany*, 296.

<sup>44</sup> Ney, 6.

<sup>45</sup> Boehmer, 9.

<sup>46</sup> Ney, 16-19. See Ney and Boehmer for a careful analysis of the timeline, the decision procedures, the committees, and drafts that constitute the storyline of the assembly. For the text of the Speyer Recess of 1529, see Senckenberg, *NSRA II*, 292-301. Also see discussion of 1526 and 1529 Recesses in Chapter 3.

<sup>47</sup> Boehmer, 7-8.

evidence that the protestation was not a spontaneous, improvised act, but the product of many drafts and of negotiations among proto-Protestant rulers and their delegates.<sup>48</sup>

The Protestation, written on behalf of one elector,<sup>49</sup> four princes,<sup>50</sup> and fourteen cities,<sup>51</sup> was read aloud on April 19 in the assembly. It identified a series of procedural problems and internal contradictions as the basis of their argument that the Recess was invalid overall, and invalid as to them in particular, such that they were not obligated to enforce it.<sup>52</sup>

First, they argued that the 1529 Recess effectively annulled certain articles of the 1526 Recess, even though the 1526 Recess, having been made unanimously, had achieved the status of a “perpetual, fixed, and inviolable” law; “we cannot and may not consent to the annulment of the aforesaid articles, to which we unanimously agreed and which we are pledged to uphold.” This argument clustered together three challenges to the 1529 Recess. First, there was an argument that a category mistake had been committed—the 1529 Recess is not like the 1526 Recess, and cannot therefore abolish or replace it. Second, there was a procedural argument that “a unanimous vote cannot and may not be altered with honor, reason, and justice except by unanimous consent.” Third, there was an argument about acceding to majority rule in matters of religion: when it came to the command of God, the salvation of souls, and the conscience, one cannot point to any majority to justify one’s actions.

This latter point, about ultimate obedience to God, again, was bound with procedural concerns. Since the 1522 imperial assembly, the Emperor had been promising a Christian council to resolve the division in the religion. The grievances that had given rise to that promise had not gone away, and all assemblies since then had determined that resolution could not come about any other way. Yet, the protesting estates argued, the 1529 Recess was a thinly veiled attempt to settle disagreements about doctrine and practice (properly reserved for a Council) through the workings of an imperial assembly. The remainder of the document attempted to prove that this was the case.

The first way the 1529 Recess improperly attempted to settle matters of doctrine and practice, they said, was buried in the statement that those who had been enforcing the Worms Edict hitherto should continue to do so until the future Christian council (first clause of Article 4). Being among the estates that had opted not to enforce the Worms Edict, this statement seemed not to apply to the evangelical estates. But if they agreed to it, then “it would be enjoined on us that, against our own consciences, we ourselves should now condemn as unjust the doctrines that we have thus far held to be unquestionably Christian and still think to be such.” That is, they would be agreeing not only to the validity of the enforcement of the Worms Edict in some domains, which involved a variety of strong-handed methods against Luther himself, anyone who gave him protection, and his followers, but also, they would be indicating support for prosecuting the underlying doctrines, which they believed in. Moreover, the protestation continued, the Worms Edict was suspended and annulled at the 1526 Recess, when they unanimously agreed that “every estate in the Empire, in such matters as concern the Edict, may live and rule for itself and its people as it hopes to answer for itself, first of all before God and

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<sup>48</sup> Boehmer, 11.

<sup>49</sup> The Elector of Saxony

<sup>50</sup> Landgrave Philip of Hessen, Margrave Georg of Brandenburg-Ansbach, Duke Ernst of Brunswick-Lüneburg, Prince Wolfgang of Anhalt.

<sup>51</sup> Strassburg, Augsburg, Ulm, Constance, Lindau, Memmingen, Kempten, Nördlingen, Heilbronn, Reutlingen, Isny, St. Gallen, Weissenburg, Windsheim.

<sup>52</sup> For summaries of the 1529 Protestation, see: Ney 20-1; Whaley, *Germany*, 296; Becker, 400. Whaley stresses the procedural critiques, and Becker stresses the protective quality of the protestation.

his imperial majesty.” In summary, not only did the 1529 Recess violate their consciences by forcing them to give an indication that the Worms Edict was, in some places, substantively correct, but also, since 1526, the Worms Edict had not been valid law; the 1529 Recess was touching upon matters that they had all agreed at 1526 were properly left to a Council to resolve.

The second way the Recess slipped in matters of doctrine and practice properly reserved for a future Christian Council (the Protestation continued) was through the clause which stated that in those domains in which the new teachings had arisen, and where such teachings could not be suppressed without complaint and peril, all further innovations should be prevented as far as humanly possible until the Council (second clause of Article 4). The implication here, said the Protestation, was that the only reason the new teachings had not been suppressed was because doing so would lead to conflict and uproar, but that ideally these teachings would be suppressed because erroneous. Agreeing to this article would require them, argued the protesting estates, to implicitly admit that they had articles in their faith that “were not well-grounded.”

Third, regarding the article concerning the mass (Article 5)—“there is the same and much more trouble.” First, the protesting estates explained that their ministers had rejected the papal mass on the basis of the scripture, and had justified a new evangelical mass based on the example of Christ and the usage of the holy Apostles. If they agreed to this resolution, then they would be saying thereby that their ministers were erroneous, and doing so would go against their conscience. Second, if it were allowed in their domains to hold different, opposing masses, even if the papal mass were not erroneous (which it was), still, that itself would bring about contention, tumult, and revolt, and would fail to promote peace and unity. Third, the article on the mass was clearly intended only for those places where the new doctrines had arisen. Thus, it proposed that those “adhering to the clear, pure word of God” should set up a standard and establish order and regulation only in their cities, towns, and provinces. This, the protestation asserted, the majority of estates would not be willing to suffer if the conditions were reversed (suggesting that it was uncustomary to set up a regulation only with respect to certain domains). Fourth, the article on the mass clearly, based on its substance, was the kind of thing that it was necessary to treat in a Christian council.

On the article about the ministers preaching and teaching the holy Gospel according to interpretations of scripture approved and received by the holy Christian Church (Article 8) – “that would pass very well if all parties were agreed as to what is the true, holy Christian Church. But, so long as there is great contention about this [...] then we propose to abide by the word of God alone.” They proposed that “only the word of God and the holy Gospel of the Old and New Testaments, as contained in the biblical books, shall be preached clearly and purely, and nothing that is against it. For with that, as the one truth and the correct rule of all Christian doctrine and life, no one can err or fail.”

They then argued that the Recess was not conducive to the maintenance of peace and unity pending the coming Council, but rather, directly opposed to it. This they said was to be clearly perceived from the fact that no distinction was made in the first clause as to what and how far such obligation to the penalties of the Edict should extend. This had given license to some rulers, under color of the Edict, to bring some of their ministers under the jurisdiction of their courts, forcibly taking or withholding their tithes, rents, interests, tributes, debts, and inheritances. Under the pretext of the Edict, other kinds of acts could be licensed, including declaration of the *Acht*, violent action, and attempting to compel them to do that which was against God, his holy Word, our souls and good conscience. “And you can consider what a Christian ruler would be bound to do to protect the souls, bodies, lives, and property of himself

and his subjects.” This last sentence seemed a promise of escalation if they started enforcing the Edict. Given that the Edict had been annulled beginning in 1526, the protestation suggested, but still these forcible takings of their subject ministers’ property had proceeded under its pretext—imagine how much worse it would be if the door of the Edict should be opened again?

If this announcement of our evident grievances shall not be allowed by you, the princes, and others, then we herewith protest and testify openly before God, all men and creatures, that we, for ourselves, our subjects, and on behalf of all, each and every one, consider null and void the entire transaction and intended decree—which was undertaken, agreed and passed against God, his holy Word, all our souls’ salvation and good conscience, likewise against the 1526 Recess. And we protest not secretly, not willingly, but for reasons above stated and others good and well-founded.

The protestation ended by stating that they committed to acting in conformity with the 1526 Recess; and to be incorruptible as concerns the clergy; and to carry out the articles relating to Anabaptism.

Throughout, the document intermingled arguments from piety, procedure, pragmatism, and the conscience and autonomy of rulers. The protestation was more than a series of arguments and objections, or a statement of dissent, however. Its purpose was not to convince; the protestation was precisely the instrument used when efforts to convince had failed, when facts were moving in a different direction. The purpose of the document was to hinder any interpretation of their behavior that would validate the 1529 Recess or the Worms Edict, or that would signal that a Council was no longer necessary, or that would suggest that they were simply being willfully disobedient. Its purpose was to destabilize the 1529 Recess, and remove any argument—including those made in the context of litigation—that they were obliged to abide by its terms.<sup>53</sup>

### ***Protestation in Litigation***

In the most comprehensive book to date on Imperial Chamber Court procedure, there is no reference to “protestation” as a legal instrument. The author only mentions it in quoting a sixteenth century formula book that used “protestation” synonymously with *Einrede* (objection).<sup>54</sup> Given the high rate of use of protestations in the cases I examine, and given that Dick’s source base was primarily the various Court ordinances (rather than case files), this absence suggests that it was a ubiquitous but not a heavily regulated legal instrument.

It also indicates, born out by a close look at the use of protestations in the case files themselves, that the term protestation was at times used broadly and generically as a vehicle to make objections and raise points of disagreement with the other party’s account. For instance, one party referred to the Recusation of the Court in 1542 as the “Recusation und Protestation.”<sup>55</sup>

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<sup>53</sup> On the significance of the form the protestation took as a notarial instrument, see Hermann Conrad, "Ein Notariatsinstrument als rechtliche Form des Protestes und der Appellation in Glaubensfragen auf dem zweiten Reichstag von Speyer (1529)," in *Festschrift für Alexander Knur*, ed. Werner Flume and Richard Hamm (Munich: C.H. Beck, 1972), 55-64.

<sup>54</sup> Dick, 151.

<sup>55</sup> Hauptstaatsarchiv Stuttgart C3 (RKG) 4375 (“Stuttgart 4375”), no quadrangle, last document in case file,

Likewise, a document that made reference to the protesting estates' 1530 Protestation of the 1530 Augsburg Recess referred to it as the "Appellation und Protestation."<sup>56</sup> Protestation was a polysemous term. It was thus a vehicle well-suited to the production of legal speech ungoverned by the rhythm of normal procedure of litigation, the back-and-forth of articulated responses. There was no one form of a protestation. A protestation declared a posture; it was not a narrowly defined legal speech act with predictable legal effects.

Protestations in civil litigation were used to clarify and qualify the nature of the involvement of the defendants in a sort of total declaration of their position. A protestation was often made at the beginning of an *Exceptiones Fori Declinatorie* document, for instance, to make it clear that the defendant did not intend, by submitting the document, in any way to acknowledge the jurisdiction of the Imperial Chamber Court in that case. This was in line with the canonist doctrine that if one engaged in a proceeding through protestation, one could respond to the suit of the opponent without thereby committing to settle the *litis*, provided one did so "*animo informandi iudicem*" and not "*animo contestandi*."<sup>57</sup> In other words, this form of protestation hedged against the risk that even by submitting a document that aimed precisely in the pre-trial stage to decline the forum of the Imperial Chamber Court, the party might implicitly accept the Court's jurisdiction.<sup>58</sup>

Another oft-used clause stressed that a protestation was intended to be repeated at every court appointment until the desired act (nullification of case or remission to another court) occurred. In Goslar's protestation to Duke Heinrich's suit, for instance, there was a clause in which Goslar's lawyer wrote that by submitting this instrument, the city of Goslar was not formally entering the case, and whatever further action they had to take in response to the mandate, they wished to have this protestation repeated with respect to it.<sup>59</sup>

A protestation could be a vehicle for declaring that even though the defendant declined the forum or requested the nullification of the suit, that he would obey the terms of the Mandate that launched the suit insofar as it forbade further violence.<sup>60</sup> In other words, it was a way of declaring the defendant's obedience in relation to one aspect of the Mandate, while preserving their oppositional posture in relation to the Mandate and its accusations overall.

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1543.

<sup>56</sup> Hauptstaatsarchiv Stuttgart C3 (RKG) 4524 ("Stuttgart 4524"), Q6, "Instrumentum Protestationis," 1532.

<sup>57</sup> Becker, 391.

<sup>58</sup> Examples of this usage: Stuttgart 4524, Q10, "Exceptiones articulate," 1532; Niedersächsisches Landesarchiv Hannover, Hann. 27 Hildesheim 467 ("Hannover 467"), Q1, "Protestationes cum annexis exceptionibus petitione unnd erbietung," 1529; Munich 1476, Q6, "Exceptiones cum annexa petitione," 1540; Munich 2019, Q16, "Exceptiones protestationes unnd erpietern cum annexa petitione," 1540; Munich 8281, no quadrangle, last document in case file, "Exceptiones fori declinatorie," 1555.

<sup>59</sup> Hannover 467, Q1, "Protestationes etc.," 1529: "zu dem daß sich ein erbar rhat und gemeind als universitas dieser sachen nit weiter dann sy als universater belanngen mocht (das sy doch keins wegs verhofen) durch nachfolgende hanndlung sich deren angenommen underzogn noch zu partheyen gemacht und waß sy derhalben auf so ausganngen mandat dits malls und hienach hanndlen und furnemen werden daß sy sollhs allein metu canin verterpen gethann haben wollenn, unnd mit vorbehaltung sollcher protestation welche sy hiernach auf ein jeden termin und in allen hanndlung ob die gleich nit wird außtrucklich gemeldt hiemit repetiert habenn."

<sup>60</sup> Hannover 467, Q1, "Protestationes etc.," 1529: "und darumb ein erbar Rhat und gemeind obgemellt sollichen mandata auch sovil hochemelts herzog person belanngen fur nichtig Achten und halten wollen daß hiemit protestierend jedoch vorbeheltlich dieser protestation wollenn sy key. mt. zu underthenigster gehorsam sollichen mandaten sovil ferner gewallt darin verbotten wird sich gehorsamlich erzeigen und denen geleben, wie sy dann auch bisher je unnd je key. m. zugehorsamen geneigt gewest."

But protestations were unstable legal ground on which to stand; though intending to preserve a legal way to extricate from the case, the result was often that a protesting litigant would be treated as contumacious. This was the outcome in many Reformation cases.

I do not see any usage of the protestation in the Reformation cases that is specific to the protesting estates. If anything, exceptions declining the forum (*Exceptiones Fori Declinatorie*) became their signature move. Rather, my argument is simply that the logics and particular character of this instrument, which had its origins in Roman private law and was used ubiquitously in litigation in the Imperial Chamber Court, are evident in the protestations made by the evangelical estates in the imperial assemblies of 1529 and following. To understand why the name “protesting estates” and eventually “Protestant” stuck, we need to understand that the name references a specifically legal instrument and what it made possible in terms of performative and passionate legal speech acts, not simply as a political declaration, a “saying-no.”

### *Protestation as Veridiction in Constitutional Context*

The 1529 Protestation and the protestations used in Reformation litigation had polyvalent functions and meanings. Like the classic *protestatio*, they were intended to hinder any prejudicial interpretation of future action. Protestation was a way of narrating their motives for not implementing the 1529 Recess, or for not following the directed course of a legal proceeding, in terms of a divergent legal interpretation, rather than as mere disobedience, contumacy, rebellion, crime against the Emperor, or a violation of the Land-Peace.

Their protestations also indexed disputed ground. In the case of the protestations made by the evangelical movement, these protestations almost always worked at the nexus of law, legal procedure, and conscience. Over and over again, they were using the protestation to make it clear that the status quo implied the falseness of the new teachings, or that a standard procedure would imply that they tacitly recognized the validity of the majority’s decision or the judges’ acts.<sup>61</sup> The protestation of 1529, for instance, described specific articles of the Speyer Recess as traps, that if they were to agree to them, they could be presumed to adhere to a set of views on the falseness of the new teachings and be held to a set of direct and indirect legal consequences that would go against both their consciences and their rights as estates and rulers.

The protestation was not an instrument with stable, predictable legal consequences; it was subject to certain “infelicities.”<sup>62</sup> It was a gambit, made with the hope that it would leave them better off than no action; it was a way of throwing into question the Recess’ and the proceedings’ validity. While the formal legitimacy of the protestation was unstable and perennially an object of dispute, it produced the desired effect, which was to cast into doubt the legal status of the Recess or the case itself, and to keep its terms—and the whole question of how to live together constitutionally without a common confession—open for future debate.<sup>63</sup>

In order to understand the evangelical usage of protestation, we must first understand the conditions in which they felt that this kind of flank protection was necessary. In this period, the implications of one’s actions in one place might produce significant legal consequences in

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<sup>61</sup> That presumption would not have been automatic, however. See Chapter 2; the standard for the contractual quality of a Recess was that of unanimity, codified in the *quod omnes tangit* (what touches or concerns all) principle. It is not a complete picture to imagine the protestation as a kind of minority vote in a system of majority rule, with the presumption that those in the minority would nonetheless fall in line.

<sup>62</sup> Branz, 79.

<sup>63</sup> Branz, 75; Becker, 400. On “infelicities” in speech acts, see Constable, 23ff.



another domain. At imperial assemblies—such as the one held at Speyer in 1529—protestations played a particularly important role. Imperial assemblies were densely inflected with legal purpose; its literal staging had constitutional significance. Like a tableau, the arrangement of bodies in space actually embodied, in a legally meaningful way, the constitution of the Empire.<sup>64</sup> If, in everyday life, law was always just beneath the surface, at imperial assemblies, participants were attuned to seeing law right at the surface; every motion, object, or word had the ability to create legally meaningful presumptions. The imperial assembly was thick with legal and constitutional implications; almost nothing could be left without some registering of stances, some mapping of pathways for future action. In this context, protestations were an essential, ubiquitous, and powerful instrument. While ceremonies, rituals, and seating arrangements constituted the primary text of the imperial constitution, protestations were the subtext—indexing disputed claims and intending to undermine the creation of a precedent. Protestations were “ways of preserving a contrafactual legal claim, thereby keeping a conflict that could not be resolved amicably, open and present in ritualized form.”<sup>65</sup>

Protestations thus had multiple temporalities. On the one hand, protestations were situated in a particular present; they had to be invoked at just the right moment in order to preserve a claim. On the other hand, protestations were oriented to the future, enclosing a dispute within the terms of a protestation, with the intention of reaching some compromise, or decision in one’s favor, at a later date, when conditions were more conducive to negotiation. In this way, protestations dotted the constitutional tableau, and the court proceeding, at high context moments, with alternatives and possibilities.

Protestations signaled fealty to the constitutional order by utilizing this customary instrument that was recognizable even to those who disagreed with its particular usage in this case.<sup>66</sup> Protestations registered the commitment of the protesting party to the overall constitutional order. In this way, protestations were also part of the glue of the imperial order; a means of registering a dispute without cutting the bonds of obedience, and bonds of what brought them into constitutional conversation in the first place.

Protestations had a double character: both protective and oppositional.<sup>67</sup> The protestation, in indexing the desire to foreclose certain misinterpretations, or to hinder certain presumptions, also implied a rejection of those misinterpretations or presumptions. Thus, there was an inherent negative stance in a protestation—the protestation was created so that a certain state of affairs would not come to pass, where inaction might have otherwise done so.

But this inherently negative stance, the oppositional character of the protestation, as primarily a “saying no,” became more central over the course of the sixteenth century than it ever had been before.<sup>68</sup> Several things contributed to this development. First, in some protestations, the legal stakes became much less tangible; the specific prejudicial presumption that was avoided, or the interests that were protected through it, became much more loosely defined. In the process, the state of affairs to which the protester was in opposition rose to the surface as the key idea of the document.<sup>69</sup> Over time, it became less and less important to describe the legal right or interest that was being protected through the protestation, until protest

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<sup>64</sup> Stollberg-Rilinger, *Old Clothes*, 2.

<sup>65</sup> Stollberg-Rilinger, *Old Clothes*, 83.

<sup>66</sup> Schlütter-Schindler, 83-5.

<sup>67</sup> Becker, 402.

<sup>68</sup> On modern *Wechselprotest*, see Becker, 387.

<sup>69</sup> Becker, 402.

became something much more like a means of indexing “dissent.”<sup>70</sup> Second, as a corollary, inasmuch as the protestation came to have the effect of foreclosing future deliberation, it lost one of its key functions. The original protestation was designed to poke a hole in an otherwise undifferentiated legal scenario, to interrupt a legal process that otherwise would proceed predictably, increasing the zone of possible actions for the protester, while hindering a certain course of action for the other party. The newer forms of protestation, insofar as they prioritized expressing opposition to the course of action of the other party, rather than carving out a zone of potential future action for the protester, contributed to the locking down of oppositional views. While the older form of protestation was a declaration concerned primarily with the map of potential legal action itself, the newer form of protestation was a declaration concerned primarily with positions, and therefore more agonistic.<sup>71</sup> Finally, these transformations were happening as the legal world of the Holy Roman Empire was transforming. The fragile patchwork of privileges, freedoms, contracts and treaties, gave way to a process by which “dynastically secure” princes established stable institutions and jurisdictional authority by fusing together the motley set of “rights, immunities and prerogatives” that he had gained in his conquests, recasting what was simply a “preponderance of power” into a cohesive sovereign authority originating from a single legal and legitimate “source.”<sup>72</sup> The need to stabilize the complex multilateral relations that had hitherto constituted the Empire gave way to the work of “defin[ing] coherent legal orders for particular places” in a process conventionally called “territorialization.”<sup>73</sup> The value of protestations waned in this context of decreasing legal particularism.

I argue that a missing part of this story of the development of protestation from its primarily protective and legalistic to its primarily oppositional and conscientious valence is the role of the protesting estates. It is not simply a coincidence, a shorthand, or a reflection of the structural linkage of religion and law in this period that the term “protesting estates” (which eventually became the basis of the name “Protestants”) became the dominant signifier for this proto-confession. The significance of their name has to do with the way in which, over and over again, proto-Protestants were both speaking truth and speaking law—the ways in which their utterances worked at the nexus of veridiction and jurisdiction. For the Protestants, civil legal instruments, especially the protestation, became mechanisms of avowal and veridiction.

In his 1981 lectures *Wrong-Doing, Truth-Telling: The Function of Avowal in Justice*, Michel Foucault writes that “one of the most fundamental traits of Christianity is that it ties the individual to the obligation to search within himself for the truth of what he is... as a condition of salvation, and to make it manifest to someone else.”<sup>74</sup> Foucault calls the “verbal act” or “speech act” that this obligation elicits “avowal” and it has certain elements.<sup>75</sup> For one, it involves “passing from the untold to the told,” “within a power relation” where there is “a certain cost of enunciation.”<sup>76</sup> Second, through avowal, the subject “ties [himself] to what he affirms”; he

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<sup>70</sup> Boehmer, 13.

<sup>71</sup> Becker, 406. Here he is talking about the transformation of Rome’s protestations in the context of the Religion-Peaces between 1555 and 1648.

<sup>72</sup> Strauss, 139.

<sup>73</sup> Teuscher, 140.

<sup>74</sup> Foucault, 92.

<sup>75</sup> Foucault, 17, 14.

<sup>76</sup> Foucault, 15, 17, 15.

“promises to be what he affirms himself to be...because it is true.”<sup>77</sup> And third, at the same time, the avowal “modifies ... his relationship to himself”; his avowal foretells a transformation.<sup>78</sup>

Foucault makes a few suggestive references to the ways in which the Reformation both inherited and overturned some of these logics of avowal. He writes that Protestantism was “the great enterprise through which [...] Western Christianity tried [...] to pose anew the link between the obligation to believe in the truth and the obligation to discover within oneself something that is truth, which would be at once the truth of the text and the truth of oneself.”<sup>79</sup> In other words, it posited that “a textual hermeneutics and a hermeneutics of one’s conscience [could] be mutually articulated”<sup>80</sup>—“such that the truth of the text, I would find it within me; and what I would find within myself would be the truth of the text.”<sup>81</sup> Thus, the name they often chose for themselves—“Evangelical”—reflects this link to the text of the Gospels.

For these proto-Protestant rulers, while exposing the truth of oneself, through speech or writing, to the institutional authority of the Church no longer held the purifying power of absolution, the legal speech act of protestation in the context of imperial institutions—assemblies or the Imperial Chamber Court—was a kind of avowal that carried a certain salvific quality. This is not to say that protestation replaced confessional and penitential practices.<sup>82</sup> Rather, the point is that the logics of veridiction extended to this new domain.

Whether in the context of the 1529 imperial assembly and the high-stakes assemblies following that, or in the back and forth of Reformation litigation, the proto-Protestants were using legal instruments, especially the protestation, in order not just to contest disputed facts or offer divergent legal interpretations, but also to offer a hermeneutics of the event, to narrate the truth of what was happening. They wanted to say “what meaning [they] gave to [their] gestures.”<sup>83</sup> They were insisting on “the need for another type of knowledge than the one that allowed them to establish the facts.”<sup>84</sup> If acts and events were seen by Catholics as heresy (in the context of assemblies), or as wholly civil/temporal in nature (in the context of litigation), the Protestants were arguing that there was something pious but not churchly, religious but not ecclesiastical in these disputes. They were rebuking what they saw as the full absorption of events into the relationship between man and Church as rights-bearing institution, as property-owner, as juridical instance, calling instead for legibility of events in public law in terms of the relationship between man and God.

The protestation instrument became a home for these forms of speech acts, existing exactly at the boundary of spiritual veridiction and juridical veridiction.<sup>85</sup> But unlike the inherited Christian forms of avowal that had qualities of mortification, penance, and a suspicion of the self, or the articulation of creeds and confessions, as we saw at the 1530 Augsburg Diet, the proto-Protestant avowal had more the quality of a declaration, designed to align “the

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<sup>77</sup> Foucault, 16.

<sup>78</sup> Foucault, 17.

<sup>79</sup> Foucault, 93.

<sup>80</sup> Foucault, 92.

<sup>81</sup> Foucault, 169. For a suggestive reference to the way in which Luther equated natural law with conscience, see Skinner, 5, citing John T. McNeill, “Natural Law in the Thought of Luther,” *Church History* 10, no. 3 (September 1941): 211-227.

<sup>82</sup> See Ronald K. Rittgers, “Embracing the ‘True Relic’ of Christ: Suffering, Penance, and Private Confession in the Thought of Martin Luther,” *A New History of Penance*, ed. Abigail Firey (Leiden: Brill, 2008).

<sup>83</sup> Foucault, 215.

<sup>84</sup> Foucault, 215.

<sup>85</sup> Foucault, 152.

discursivity of the [legal] inquiry that sought to establish the truth of the fact,” on the one hand, with the proto-Protestant hermeneutics of the event, on the other; to offer their own “imperfect and incomplete accounts of law” which at the same time would establish the truth of who they were.<sup>86</sup>

In the end, the proto-Protestant protestations dramaturgically stabilized these contexts of avowal—imperial assemblies and the Imperial Chamber Court—as the meaningful institutional structures and the meaningful power relations<sup>87</sup> within which these pious utterances would take place.<sup>88</sup>

## **Instrument #2: The Power of Attorney**

In this section, I consider a mundane, formulaic legal instrument—the “power of attorney”—and how it became the unlikely vehicle for asserting exploratory claims about potentially new legally legible forms of identification in early Reformation Germany.<sup>89</sup> It is surprising but true that the protesting estates made themselves legally visible not first of all in the political settlement of 1555 but in the tussle of courtroom documents. Here, again, we see that 1555 is not the beginning of something, but rather, the end of a decades-long process of rendering this group formation legible at law.

The “power of attorney” (*mandatum constitutionis generalis*) was a long-winded document in which a litigant designated his lawyer, and identified all of the legal acts the empowered procurator may carry out on the principal’s behalf. A clause at the end of the list emphasized its intended exhaustiveness: “And if our lawyer or his substitute in a given matter requires more license to employ a certain instrument conventionally used in this Court than is herein specified, we intend through this instrument to also have given them such authority.”<sup>90</sup> In general usage, the legal reason for the power of attorney was contained in a formulaic clause in which the principal explained that other business kept him from appearing at the Court himself, hence the delegation of his agency. This clause revealed an inherited principle that the gold standard of litigation was the personal presence of parties; by this period, that expectation had turned into a legal fiction, as the rise of learned law and an expert lawyerly class made legal representation necessary for reasons other than mere delegation of agency.<sup>91</sup> The “power of attorney” was an essential element in all case files of the Imperial Chamber Court; without it, no one except the party her or himself could act.<sup>92</sup> Indeed, a common delaying tactic in litigation was to challenge the validity of the power of attorney. By the end of the sixteenth century, the document had been standardized as a pre-printed form, drawing the eye to those handwritten

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<sup>86</sup> Foucault, 215. Constable, 14, 75; on “imperfect” see Constable’s discussion on grammar as metaphysics (Constable, Chapter 2), and on law’s temporalities (Constable, Chapter 3). Also see discussion in Blum, in which she argues that Protestants invented *Bekennntnis* (statement of creedal confession) as a kind of testimonial or attestation (Blum, 28).

<sup>87</sup> Foucault, 28.

<sup>88</sup> Foucault, 207-10.

<sup>89</sup> On “identification” see Rogers Brubaker and Frederick Cooper, “Beyond ‘Identity,’” *Theory and Society* 29, no. 1 (February 2000): 1-47.

<sup>90</sup> Hauptstaatsarchiv Stuttgart C3 (RKG) 1732, Q3, “Copia Mandatum Constitutione generalis,” 1534.

<sup>91</sup> Eduard Leszynsky, *Die abstrakte Natur der Bevollmächtigung: eine Studie zum Bürgerlichen Gesetzbuch unter Berücksichtigung des gemeinen Rechts* (Jena: A. Kämpfe, 1901), 1-3.

<sup>92</sup> Dick, 79.

elements that linked names and dates for ease of collation in the case file.<sup>93</sup> In the archives, one quickly learns to thumb past the power of attorney on the way to more narrative and argumentative documents.

But the power of attorney document drafted on June 9, 1531 by the protesting estates, which re-appeared in dozens of Reformation litigation case files, broke the mold in three consequential respects. First, the narrative portion of the document contained apparently excessive detail about the reason for the appointment of the lawyers, and was written in a hypothetical, pre-emptive mood. Second, the protesting estates declared themselves co-litigants, or “associates of the same legal dispute” (*eiusdem litis consortes*) for all cases involving a fellow protesting estate. Third, they went on to elaborate that they would enter as co-litigants not just in any case involving a fellow protesting estate, but in those cases concerning “our holy faith, religion, ceremonies, and what attaches to them.”

This power of attorney played a subtle but essential role in the direction that Reformation-related litigation unfolded. Long before the Protestants, as a group, and Lutheranism, as a confession, were given legal status in the Holy Roman Empire in 1555, the protesting estates had achieved ad hoc legal legibility in the shuffle of courtroom disputes through the power of attorney document.

### ***Proto-Confessionalization? “Identification” in law***

The protesting estates’ power of attorney document had important symbolic and legal consequences in the early German Reformation. It became the unlikely vehicle for asserting exploratory claims about potentially radically new forms of belonging and combination in the German lands of the Holy Roman Empire. In the context of messy, high-stakes civil litigation, the power of attorney became an unexpected site and means of rendering the Protestants legible as a group at law, long before they or their confession gained formal legal recognition or legal status in 1555—long before, that is, they became recognized bearers of “religion” rather than “heresy.”

A close examination of this power of attorney document shows that even in the most apparently formalistic or legalistic documents of a case file, we can identify a new vantage point from which to explore the process by which the “protesting estates” became legible as a group. Other historians have accounted for this process in a number of ways. Some assume that substantive differences in creed and confession led naturally to the differentiation and consolidation of groups around those beliefs.<sup>94</sup> Others focus on the range of discursive or disciplinary processes that produced new conceptions of orthodoxy and heresy.<sup>95</sup> Others still decenter creed and theology entirely, explaining confessional pluralism through the

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<sup>93</sup> Smend, 344.

<sup>94</sup> On essentialism see Daniel Boyarin, *Border Lines: The Partition of Judaeo-Christianity* (Philadelphia, PA: University of Pennsylvania Press, 2004), 1-33. Others reject essentialism, but work to re-integrate the role of creedal normativity and what is “irreducibly religious” in confession formation. See e.g. Blum, 11; and Hunter, 41.

<sup>95</sup> See e.g. Markus Friedrich, “Orthodoxy and Variation: The Role of Adiaphorism in Early Modern Protestantism,” in *Orthodoxies and Heterodoxies in Early Modern German Culture* (Leiden; Boston: Brill, 2007); John B. Henderson, *The Construction of Orthodoxy and Heresy: Neo-Confucian, Islamic, Jewish, and Early Christian Patterns* (Albany: State University of New York Press, 1998); R. Po-chia Hsia, *Social Discipline in the Reformation* (London; New York: Routledge, 1992); Brad Gregory, *Salvation at Stake: Christian Martyrdom in Early Modern Europe* (Cambridge, MA: Harvard University Press, 2001).

consolidating mechanisms and processes that characterized the early modern state.<sup>96</sup> Newer work, in turn, decenters the role of the state, identifying instead processes of confession formation that occurred in everyday life, as well as social practices that worked against or around territorial rulers' attempts to consolidate uniform confessions and churches.<sup>97</sup> Almost none of this work, however, takes a close look at the early Reformation, focusing instead on the 1550s and later as the beginning of church and confessional consolidation.<sup>98</sup> Almost all of these accounts, moreover, regard law and legal idiom as epiphenomenal to or derivative of the stories of theological, social, moral, and political formation.<sup>99</sup>

This study illustrates the benefits of looking more closely at the work of classification itself. By attending to the most legalistic aspects of litigation, we can begin to think through the question of group legibility or “identification”<sup>100</sup> in terms of juridical technique, understanding the piecemeal processes of first of all “setting apart,” that operated as unexpected proxies or even pre-requisites for larger constitutional questions of status and recognition.<sup>101</sup>

### *Drafting the Power of Attorney*

At the end of December 1530, just a few months after the Augsburg Diet, in the southwestern town of Schmalkalden, the protesting estates formed an alliance that would require mutual advice and aid in matters legal, political, and military.<sup>102</sup> Even as internal debates were continuing about what brought them together in terms of creed, and how to organize themselves for effective and fair military defense, these princes and cities came up with a plan for collective action regarding the potential flood of suits.<sup>103</sup> Their first step, outlined in the first Schmalkaldic League Recess, was to seek from the Emperor a *Stillstand* (suspension) of the cases.<sup>104</sup> In the likely event that this would not work, the estates asked Johannes Feige, the learned secretary for

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<sup>96</sup> Harrington, “Confessionalization”; Reinhard, “Reformation.”; and Schilling, “Confessionalization.”

<sup>97</sup> Such as naming practices, and professions. See Benjamin Kaplan, *Divided by Faith: Religious Conflict and the Practice of Toleration in Early Modern Europe* (Cambridge, MA; London: Belknap, 2007); David Luebke, *Hometown Religion: Regimes of Coexistence in Early Modern Westphalia* (Charlottesville, VA: University of Virginia Press, 2016); Thomas Max Safley, ed., *A Companion to Multiconfessionalism in the Early Modern World* (Leiden; Boston: Brill, 2011); Paul Warmbrunn, *Zwei Konfessionen in einer Stadt: das Zusammenleben von Katholiken und Protestanten in den paritätischen Reichsstädten Augsburg, Ravensburg und Dinkelsbühl von 1548 bis 1648* (Wiesbaden: F. Steiner Verlag, 1983); Anna Maria Balbach, *Sprache und Konfession: Frühneuzeitliche Inschriften des Totengedächtnisses in Bayerisch-Schwaben* (Würzburg: Ergon-Verlag 2014).

<sup>98</sup> William Bradford Smith, *Reformation and the German Territorial State: Upper Franconia, 1300-1630* (Rochester, NY: University of Rochester Press, 2008), 4: “scholars have been reluctant to extend their examination of confessionalization back into the early sixteenth century, much less into the fifteenth and fourteenth centuries.”

<sup>99</sup> For more on the question of law’s autonomy see: Roger Cotterrell, “Law in Social Theory and Social Theory in the Study of Law” in *Blackwell Companion to Law & Society*, ed. Austin Sarat (London: Blackwell, 2004): 15-29; Christopher Tomlins, “How Autonomous is Law?” *Annu. Rev. Law Soc. Sci.* 3 (2007): 45-68.

<sup>100</sup> Brubaker, 14-17.

<sup>101</sup> Paul Dresch and Hannah Skoda, eds. *Legalism: Anthropology and History* (Oxford, UK: Oxford University Press, 2012), 20.

<sup>102</sup> On the establishing of the Schmalkaldic League, see Schlütter-Schindler, 17-18.

<sup>103</sup> Certain theological and liturgical questions remained unsettled in the League, in particular between the Zwinglian-inclined Swiss and southwestern cities and the Lutheran-inclined domains to the north. See Thomas Brady, *Protestant Politics: Jacob Sturm (1489-1553) and the German Reformation* (Atlantic Highlands, N.J.: Humanities Press, 1995).

<sup>104</sup> For a modern German translation of the first Schmalkaldic League Recess, dated December 31, 1531, see Winckelmann, *PC II*, 2. See Chapter 4 of this dissertation on the 1532 Nuremberg Settlement, which promised a suspension of the cases but was ineffective.

one of the leaders of the protesting estates, Landgrave Philip of Hesse, to draft a memorandum on a litigation strategy to respond.<sup>105</sup>

Feige's memorandum stated that the motivation for their collective action was concern that the imperial prosecutor would proceed against anyone who protested those parts of the Augsburg Recess that had to do with protecting, as Feige derisively described them, the "abrogated ceremonies, the unchristian abuses and misunderstandings of the word of God, and the alleged spiritual jurisdiction."<sup>106</sup> The intention of such a prosecution, the memorandum stated, would be "to force evangelical estates to accept those articles, or else to bring them into censure," and to embolden old-faith litigants to seek restitution through the Court.

Feige proposed that all electors, princes, and estates who "adhere to the Gospel and to the word of God" respond to the threat of prosecution together, acting as "associates of the same legal dispute" (*eiusdem litis consortes*), and that they appoint two procurators at the Imperial Chamber Court, as well as one or two advocates (another form of legal counsel, who lacked authority to present in public audience at the Court), with sufficient power to act in all of their names, and that they collectively compensate them for doing so.<sup>107</sup>

In addition to proposing their formation into *Litisconsorten* and appointing lawyers in common, Feige offered a set of objections for the lawyers to make in the event of litigation. The first objection was a protestation of non-consent, rejecting the jurisdiction of the Court. Feige argued that no matter what the specific facts of a dispute might be, this protestation would be appropriate because "at this time, significant misunderstanding" would be bound to plague any case involving one of them. Instead, a free, Christian council should be the only appropriate way to resolve the disputes "in an unbiased and Christian manner," as "neither God nor worldly law" accords such "matters concerning salvation of the soul, conscience, and the word of God," to a worldly forum such as the Imperial Chamber Court.<sup>108</sup>

Feige asserted another ground for the protestation of non-consent, namely, that the Imperial Chamber Court was "suspect and suspicious" (*suspect und verdacht*) because its judges have sworn to uphold the Augsburg Recess, which protected "the old papist ceremonies, abuses, and judgments of the Pope and his churches, all of which go against the Gospels."<sup>109</sup> If the Court declared a case, whether brought by old-faith litigants or by the imperial prosecutor, within its jurisdiction, the procurators, Feige said, should allege judicial partisanship, as ignorance regarding the plaintiffs' "unchristian ceremonies and lifestyles" willfully neglected precisely that fact of a dispute that would make it a "matter of religion" and therefore beyond the Court's competence to adjudicate. Though this final "suspicion" objection first took form in the protesting estates' recusal of the Court several years later in 1534, by June of 1531 the protesting

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<sup>105</sup> See Winkelmann, *PC II*, 568 showing that the committee dedicated to dealing with the "fiscalisch sach" appointed Feige on December 27, 1530, to draft an instruction on how to deal with these matters. Also see: Ekkehart Fabian, *Die Beschlüsse der Oberdeutschen Schmalkaldischen Städtetage, Part 1: 1530-31* (Tübingen: Osiandersche Buchhandlung, 1959) [BOSS I], 75, in which the committee appointed Feige with the instruction to describe the sorts of objections to use if a member were proceeded against, "and other ways to resist (about which the scholars must discuss)." See also Friedrich, *Territorialfürst*, 133ff. For more on chancellor Feige, see Schlütter-Schindler, 18-20, and the literature cited there.

<sup>106</sup> Fabian, *UARP I*, 19.

<sup>107</sup> Fabian, *UARP I*, 18-24. Winkelmann, *PC II*, 289, is a modern translation and summary of the opinion.

<sup>108</sup> Fabian, *UARP I*, 19-20.

<sup>109</sup> In order to address the question of suspicion, Feige proposed the appointment of arbitrators (*Schiedsrichter*), whereas for recognition of the Imperial Chamber Court's lack of jurisdiction ("noncompetence") he proposed the assembling of a free, Christian council. See Schlütter-Schindler, 19n16.

estates had signed onto all other elements of Feige's proposal.<sup>110</sup> With their approval, he then drafted a power of attorney document, which was invoked in dozens of cases between 1531 and 1544.<sup>111</sup>

Opening with the impressive list of all estates in whose name it was written, the protesting estates' power of attorney document was formulated to make a splash, proposing to reconfigure a regular civil dispute between two discrete parties in a certain locality into a matter of Empire-wide concern involving estates from all parts of the German lands, in some cases after months or years of litigation had already ensued. This remarkable *intitular*, consisting of paragraphs worth of names of some of the most powerful electors, princes, dukes, and cities in the German lands, was followed by an equally remarkable narrative preamble that contains arguably disproportionate detail about the reasons for the appointment of the lawyers. Most powers of attorney of the period named the parties in the suit and briefly described the facts of the case and its legal issue, such as "in the matter of X versus Y, concerning issue Z in city A"—a practice designed to ensure correct sorting of the masses of documents that gave form to this writing-based court procedure.<sup>112</sup> Other powers of attorney were even more generally worded, leaving out the particular legal proceedings for which the power of attorney was being submitted, and simply empowering a procurator to represent them in all litigation that may occur. Yet here, the document began by recalling the recent events at Augsburg:

Because at the recent Augsburg Diet, a set of articles concerning the Christian faith were discussed, decided and decreed by the imperial majesty and many estates, which we, the above-mentioned, neither authorized nor accepted, but rather protested; and because perhaps the imperial prosecutor or any other estate would sue or proceed against the above-mentioned electors, princes, counts, or cities, collectively or individually, on the authority of that Recess; and since we, due to other business, cannot come to the Imperial Chamber Court in person; therefore we appoint Dr. Ludwig Hirter and Licentiate Johann Helfmann to represent us individually and collectively in future matters concerning the faith, religion and what attaches to them.

Though this back-story served no strict legal purpose (the legal purpose of the document already having been achieved in the clause "and since we, due to other business, cannot come to the Imperial Chamber Court in person"), it supplied the basis for the experimental declaration that followed: that the participating estates be considered *eiusdem litis consortes* or "associates of the same legal dispute." The document continued:

[...] where one or more of us is proceeded against or sued on account of our holy faith, religion, ceremonies and what attaches to them, because the matter concerns us collectively and individually, we now hereby make ourselves *Kriegsverwandten* and *consorten eiusdem causae et litis*.<sup>113</sup>

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<sup>110</sup> For the 1534 Recusation, see Fabian, *UARP I*, 253-276; and below in this chapter.

<sup>111</sup> On the lawyers, see Anette Baumann, "Die Prokuratoren am Reichskammergericht in den ersten Jahrzehnten seines Bestehens," in *Das Reichskammergericht: Der Weg zu seiner Gründung und die ersten Jahrzehnte seines Wirkens (1451-1527)*, ed. Bernhard Diestelkamp (Cologne: Böhlau, 2003), 190-4; Schlütter-Schindler, 68; and Smend, 140.

<sup>112</sup> On the writing-based court procedure, see Dick, 119-22; and Chapter 1 of this dissertation.

<sup>113</sup> *Kriegsverwandten* can be translated as "co-litigants," though its literal meaning is "war kin." The term



In other words, a suit against one signee would trigger the involvement of all others. This is the second way in which the document exceeded its strict legal purpose—the *Litisconsorten* clause was inserted in a preemptive, hypothetical mood. The signees claimed that their assemblage as *Litisconsorten* was justified because they regarded themselves as the potential targets of the Augsburg Recess, affected collectively by its threat.

Finally, while it might have been enough to justify their assemblage as *Litisconsorten* by stating their unified defense against the Recess' likely effects, the protesting estates also named the nature of the suits in which they would act as co-litigants: those concerning “our holy faith, religion, ceremonies and what attaches to them.” Thus, in the process of insisting that their relations to one another were meaningful at law, the protesting estates set in motion a new category of legal issue; their hand-picked selection of suits to enter into as *Litisconsorten* were dubbed “matters of religion” (*Religionssachen*).<sup>114</sup>

Their assemblage into *Litisconsorten* was unusual, perhaps even experimental. In the middle of the nineteenth century, German legal scholars uncovered that the *Litisconsorten* concept as they had inherited it had no precedent in classical Roman law, its elements having emerged through a series of linguistic and interpretive mistakes.<sup>115</sup> The textual reference that supplied the germ for this concept was a single rubric in Justinian's Codex (Book III, Title 40), restating two rules originally promulgated by two fourth-century Emperors. One stated:

Disapproving and rejecting the exceptions that litigants have been accustomed to contrive, under the pretense that there are co-parties and in a bid to protract the suit, we permit litigants, whether they are living in the same jurisdiction or in different provinces, to sue or defend (only) so far as their own interests are concerned, despite the absence of a co-party or co-parties.<sup>116</sup>

In other words, the Emperor ordered litigation to proceed despite the absence of a co-party, with the intention of undermining what had become a practice by some to protract a lawsuit by contriving the absence of the co-party and then claiming that they could not proceed without the co-party's presence. The second rule stated:

[I]f some of the interested parties are absent, a common matter can be litigated for all parties without special authorization, providing those present are ready to give security that the absent parties will consider the outcome legally valid, [or] if some claim is made against [the absent parties], the parties who are present will give bond with sureties that they will satisfy the judgment.<sup>117</sup>

Both of these rules aimed to address some of the potential abuses or unfair consequences of co-litigation that had cropped up. To the extent the early modern *Litisconsorten* doctrine was based on these two citations, it was modeled on what were framed as abuses of the practice of

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*Krieg* corresponds to the Latin *causa/causae*, or *lis/litis*.

<sup>114</sup> See Chapter 4.

<sup>115</sup> See Johann Julius Wilhelm von Planck, *Die Mehrheit der Rechtsstreitigkeiten im Prozeßrecht: Entwicklung der prozessualischen Erscheinungen, die durch den Einfluß mehrerer Rechtsstreitigkeiten auf einander hervorgerufen werden* (Göttingen: Dieterich, 1844), 260-3, 105-61, 385-430.

<sup>116</sup> Blume, *The Codex of Justinian*, 775.

<sup>117</sup> Blume, *The Codex of Justinian*, 775.

combination. These abuses, and the rules designed to limit them, marked a change from the practice of combination that had been established a few centuries before.

In the classical period (spanning roughly the first 250 years C.E.), judges had had the option of combining cases under certain circumstances. If multiple disputes came forth at roughly the same time, with congruent legal questions, and if, in the judge's opinion, combining the cases would facilitate a speedy trial by removing repeated enactments of an identical procedural course, then he had the option of doing so. In general, these were disputes in which complex familial or contractual relations translated into a domino effect of claims-making, such as contested inheritances. However, the integrity of each individual suit was not lost in the process; always intact was the cause of action that linked a singular plaintiff with a singular defendant. Furthermore, combination was a matter for the judge's discretion; though a party might petition for combination of his suit with another, its justification had to conform to the judge's purposive logic of saving time and effort, and avoiding contradictory rulings. A petition for combination was never understood to articulate a right; it was a bureaucratic determination.<sup>118</sup>

Furthermore, in the classical period, the combining of cases did not create a new, legally salient relationship between litigants with shared interests. For the Romans, combination happened to cases, not to parties. Where the term "*consortes*" was used, it referred to pre-existing legal relationships, such as co-ownership, or family bonds.<sup>119</sup> For early modern German civil lawyers, by contrast, the legal instrument could be used to produce a combination of parties where none existed before. By the time Oberländer wrote his 1723 Latin-German legal dictionary the term "*consors litis*" was defined simply as "one who, with another at the same time, has a dispute or cause against a third."<sup>120</sup> The term had come to mean any combining of several persons as parties in a case, loosely equivalent to our "class action" or "joinder." Thus, a merely descriptive phrase in a rubric in Justinian's Codex ("persons with interests in the same case") transformed into a generic reified noun of identity.<sup>121</sup>

Though more study would be required to determine this for certain, it is possible that this capacious, party-centered definition in use in early modern Germany has its origins in this early sixteenth-century, proto-Protestant usage. This is not outside of the realm of possibility, since, as discussed in chapter 2, the early Reformation period coincided with the formative years of the

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<sup>118</sup> Julius Weiske, ed., *Rechtslexikon für Juristen aller Teutschen Staaten: enthaltend die gesammte Rechtswissenschaft. Vol. 8: Pfandschaft - Quittung* (Leipzig: O. Wigand, 1854), 700-27. The forms of combination discussed above are not to be confused with the *Eventualmaxime* contained in the Imperial Chamber Court Ordinances of the sixteenth century; these rules allowed documents to be submitted and legal acts to be undertaken simultaneously. Some documents and legal acts had to conform to a successive ordering of claim and response. But other documents and legal acts did not, and if collapsing their ordinary successive ordering would speed up the proceedings, that was permitted. On *Eventualmaxime*, see Dick, 112-7.

<sup>119</sup> Planck, 66. Indeed, other case files from the early sixteenth century Imperial Chamber Court suggest this original usage of "consors" was the norm. For example, the protocol of Stade 97 notes "Herman von Essen ... et consortes" to refer to those linked to Herman von Essen through common inheritance; and in document Q5 of that case file, the plaintiffs call the defendants "Kriegsverwandten," "in procuratore eiusdem litis," "adheren," and "complices." In the case file Landesarchiv Nordrhein-Westphalen (RKG) Duisburg 1597, the first page of the protocol refers to Konrad Trappe's co-litigants in an inheritance-turned-jurisdiction dispute as "consorten" and in Q2 of the same case file they are called "mitkriegs verwanten."

<sup>120</sup> Oberländer, *Lexicon Juridicum Romano-Teutonicum*, s.v. "Consors litis," 179.

<sup>121</sup> According to Daube, the practice of generating action and agent nouns that appear nowhere in Roman law sources from verbs contained therein was common in the medieval and early modern periods. See David Daube, *Roman Law: Linguistic, Social and Philosophical Aspects, The Gray Lectures, 1966-1967* (Edinburgh: Edinburgh University Press; Aldine Publishing Company, 1969).

civil law tradition in Germany, and the Imperial Chamber Court played a central role in the increased institutionalization of Roman law in the German lands.<sup>122</sup>

The Imperial Chamber Court was clearly hesitant to use the term *Litisconsorten*. In case files, when they acknowledge the protesting estates at all, they used two other terms to describe the protesting estates: *Interessenten* (those who have a common interest with one party) or *Intervenienten* (those who enter a dispute between parties because it involves their interests).<sup>123</sup> In the first half of the sixteenth century, these terms seem to have been used interchangeably to refer to two types of circumstances: cases in which a person in a position of lordship over a litigant stepped in, under the mantle of fulfilling his lordly duty to protect (*schützen und schirmen*), in order to demand transfer of the matter to his jurisdiction, or perhaps to provide legal support to the litigant.<sup>124</sup> Or cases in which a person who would be indirectly affected by a decision registered this fact with the Court—for example, a creditor who was suing for debt payment may be an *Intervenient* or *Interessent* in the suit of another creditor to the same person. When the Court used *Intervenient* or *Interessent* at the entrance of the protesting estates in a given dispute, it suggested that the Court was either unsure how to understand what kind of pre-existing, legally legible relationship the protesting estates were proposing they had to one another, or were unwilling to go further to recognize what was specifically new about it.<sup>125</sup>

### *Making Use of the Power of Attorney*

Despite the judges' sometimes inscrutable responses to the protesting estates' power of attorney, we see in many cases that opposing parties vehemently challenged their claim to be *Litisconsorten*. Take, for example, the dispute in the Imperial Chamber Court following the city of Memmingen's public execution of Ludwig Vogelmann, discussed in Chapters 3 and 4.<sup>126</sup>

The case was already underway for about a year before the protesting estates submitted their power of attorney document. In that first year of litigation, spanning the greater part of 1533, the lawyer for Memmingen, Dr. Ludwig Hirter, appealed in vain directly to the Emperor for an end to the case; he protested the jurisdiction of the Court on the basis of a privilege that the city had been given in 1471 and on the basis that the case was a "matter of religion."<sup>127</sup> Then, in early December 1533, with none of these early challenges taking root, Hirter submitted the

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<sup>122</sup> Karl Kroeschell, "Die Rezeption," 279-288; Trusen, *Anfänge*, 2-3, 21. Also see Chapter 2.

<sup>123</sup> Oberländer, *Lexicon Juridicum Romano-Teutonicum*, s.v. "Interessenten," 383 and "Intervenienten," 387.

<sup>124</sup> For example, Bayerisches Hauptstaatsarchiv (RKG) 9654 was a Land-Peace violation case regarding stolen timber. An Elector stepped in as *Interessent* saying that since the defendant was his servant and vassal, the case should be in his jurisdiction, not that of the Imperial Chamber Court. Another example: Bayerisches Hauptstaatsarchiv (RKG) 9876, in which the imperial city of Nuremberg entered as *Intervenient* in a dispute about tithes, on the side of the plaintiffs who were their citizens.

<sup>125</sup> Note that it was not the Schmalkaldic League's "league-ness" that functioned as the basis of the combination claim. Neither in the power of attorney, nor in the case files, did the Schmalkaldic League enter as the co-litigant. Furthermore, in many cases in which the Protestant power of attorney was used, the defendant city in question was not a member of the Schmalkaldic League. For example, in Munich 5657, Memmingen made use of the protesting estates' power of attorney two years before joining the Schmalkaldic League. Frankfurt am Main did the same; see Jahns, 127 on the case Frankfurt Stadtarchiv (RKG) 1035 (M1b/213). The cities of Brandenburg and Nuremberg signed onto the litigation strategy while declining membership in the League (Winckelmann, *Der Schmalkaldische Bund*, 109).

<sup>126</sup> Munich 5657.

<sup>127</sup> Munich 5657, Protocol, and Q13, "Articuli adicionales fori declinatory," 1533. See Frieß, 105-7.

power of attorney document of the protesting estates, asking that all the listed estates be regarded as co-litigants with Memmingen.

The lawyers for the opposing parties—the imperial prosecutor Weidner on the one hand, and Licentiate Valentin Gottfried for the Vogelmann family on the other—responded to this power of attorney with a general objection that the protesting estates should “in no way be let in.”<sup>128</sup> Over the course of months, for each time that Hirter presented a technical or formal challenge to the proceedings, Gottfried and Weidner responded with this refrain as they pushed the Court to act quickly to settle the legal issue.

At several points, Weidner and Gottfried elaborated on this general objection with three clusters of argumentation. It is important to note that they were making these arguments during the pre-trial stage of the proceedings.<sup>129</sup> This was Hirter’s strategy here; he was challenging the legal basis of the suits in order to show that his party had no obligation to settle the legal issue. Often, even more than the argumentation we see during the substantive trial itself, debates in this highly technical pre-trial stage unfolded in terms of legal categories and instruments that operated as unexpected proxies for larger constitutional questions.

The first argument Weidner and Gottfried offered in support of their general objection was that “besides the city of Memmingen, no one was summoned with regard to this matter.”<sup>130</sup> The basis of this argument was that the core of a civil case was a dispute between two named parties; their dispute was with Memmingen, and not with any of the other protesting estates who claimed to enter as co-litigants.<sup>131</sup> This meant not only that Weidner and Gottfried were not obligated to respond to petitions submitted by the protesting estates, but also that they had no duty to send copies of documents, which would normally be provided by opposing parties to each other, to anyone “besides those from Memmingen who are themselves the perpetrators,” for he, Gottfried, “knows nothing about the protesting estates and has no obligation to send them anything.”

Second, the opposing lawyers alleged bad faith. The city of Memmingen, they argued, was “seeking escape” from the case by involving the protesting estates.<sup>132</sup> The power of attorney, and the various protestations and petitions submitted on its authority, represented a strategy of “silent avoidance” of the consequences of the city’s illegal actions.<sup>133</sup> It is not entirely clear what the imperial prosecutor means here by “escape”; was he referring to the spreading out of culpability that co-litigation may result in—the sort of abuses that fourth-century Emperors were legislating against? Or was he speaking from specific knowledge having to do with the Nuremberg Settlement, that the defendant’s intention was to add the Memmingen suit to their list of “matter of religion” cases, with the hope of “escaping” the proceeding in that way?<sup>134</sup>

Third, Weidner and Gottfried argued that the dispute “in no way touches upon the religion,” and that it was “strange and shameful to hear that this case—regarding a violation of imperial protection and kingly privileges, as well as the torturing of a poor person speedily done

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<sup>128</sup> Munich 5657, Protocol: “sich mit den protestierenden stend diser sachen halb mit nichten inzulassen.” On the “general objection” as a legal form, see Dick, 154.

<sup>129</sup> Also called *extrajudizial* and *ante iudicium*. See Dick, 148-50.

<sup>130</sup> Munich 5657, Protocol: “ausserhalb der stat Memmingen auch von im diser sachen halb nymant geladen.”

<sup>131</sup> Munich 5657, Protocol: “das di sach mit ime wider Memmingen und nit wider di protestierenden.”

<sup>132</sup> Munich 5657, Protocol: “dweil der widerteil ir dis ausflucht suchen.”

<sup>133</sup> Munich 5657, Protocol: “meydung tacite”

<sup>134</sup> On the Nuremberg Truce of 1532, see Chapter 4.

without a legal proceeding, and his beheading—should be named a matter of religion.”<sup>135</sup> On the one hand, the two plaintiff lawyers here were responding to one of the substantive jurisdictional arguments that Hirter had made in his 1533 protestations, declining the forum of the Imperial Chamber Court on the grounds that the dispute was “a matter of religion.” On the other hand, Weidner and Gottfried consistently made this argument in the context of rejecting the involvement of the protesting estates, for it was a premise of the protesting estates’ own power of attorney document that they entered into a dispute where “one or more of us is sued on account of our holy faith, religion, ceremonies, and what attaches to them.” Weidner and Gottfried may have reasoned that, to the extent they could show that the case is not a “matter of religion,” they would simultaneously have rebuffed the claim of the protesting estates to have a right to co-litigate. By choosing this strategy, however, the lawyers were leaving intact several powerful premises that the protesting estates had experimentally inserted into their power of attorney document: that there was such a category of legal issue called “matters of religion,” that some of the parallel civil and public law disputes unfolding at the Court ought to be understood as belonging to this category of legal issue, and that in those cases, the protesting estates might have a right to enter as co-litigants.

In addition to introducing a stream of technical and formal challenges, Hirter responded to Weidner and Gottfried’s arguments by stressing that his actions were both correct and legal, and that it was his duty to carry out his oath to his party and to serve the victory of their rights and interests, and “in the name of God, he will continue to act for them so long as he has an order to do so.” Apparently summarizing the crux of a petition he had submitted on December 17, 1533, Hirter stated that indeed Memmingen refused to enter the case without the protesting estates.<sup>136</sup> Even after the Court ordered Hirter, on September 23, 1534, to settle the legal issue, rejecting all of his pre-trial challenges, Hirter continued to claim that “these matters concern the religion.”

The Court seems to have remained passive, or deliberately silent, about the issue of co-litigation. Never explicitly forbidding the protesting estates’ involvement, the Court simply continued to speak of the defendant party singularly as the city of Memmingen: “the dispute between the imperial prosecutor and the children and heirs of the late Ludwig Vogelmann, plaintiffs, against the city of Memmingen, defendant.” Despite these persistent challenges by the opposing lawyers, and despite the *litis contestatio* taking place in contumacy, the protesting estates remained involved alongside Memmingen in the case to the very end in 1545.<sup>137</sup>

### ***Combination, Corporatism and Fellowship***

The proto-Protestant usage of the power of attorney is best understood in the context of the overall legal culture, in which a variety of forms of sub-imperial combination was the norm.<sup>138</sup> The evangelical party was creatively using this nondescript procedural instrument in a

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<sup>135</sup> Munich 5657, Protocol: “frembd und schimpflich.” See Chapter 4 discussion on “religion” as commonsense moral category.

<sup>136</sup> Munich 5657, Protocol: “sich von wegen der stat Memmingen allein ausserhalb der protestierenden stend mit den gegentheiln vermeinte cleger nit inzulassen.”

<sup>137</sup> Another example of this kind of back and forth in judges’ notes dated April 1532 to November 1533 (Herzog August Bibliothek in Wolfenbüttel, Helmstedt 343; see reference in Anette Baumann, ed. *Richterprotokolle—Ungedruckte Quellen zum Entscheidungsprozess am Reichskammergericht 1524-1627*) Nr. 1448, accessed July 9, 2019, [https://grkg.files.wordpress.com/2016/04/2014-06-22\\_richterprotokolle\\_gesamt.pdf](https://grkg.files.wordpress.com/2016/04/2014-06-22_richterprotokolle_gesamt.pdf)).

<sup>138</sup> See Wilson, 547-602.

litigation context to achieve something that was familiar within the “rules of the game” of this period.<sup>139</sup> The form was novel (co-litigants), the grounds of their combination was new (shared belief), but the idea of combination was not new.

In this section, I argue that the power of attorney is a perfect metonym for understanding the ways in which the Reformation transformed the legal culture of combination in the German lands. By understanding the relationship between the League form and the co-litigation strategy, we can see how the proto-Protestants were operating at the cusp of a constitutional transformation on the issue of sub-imperial combination. In particular, the power of attorney registers a move towards combination as a gift of state.

It is important to note that the co-litigation strategy was not simply a translation of the Schmalkaldic League into a form conducive to civil litigation procedure.<sup>140</sup> First, no litigation mentioned the League qua league. The League was never regarded as a litigant, not even as a shorthand for the estates who were members of the League. The litigation, including the protesting estates’ power of attorney document, rather, listed all the names of those involved, and if they used shorthand unifying terms, they were “protesting” or other contextual referents. Indeed, it was not the norm for a league to litigate; leagues more typically adjudicated disputes among members than participated in litigation themselves. Second, as we saw in chapter 4, not all of those who were part of the legal strategy were members of the League, and not all members of the League were approved to partake in the legal strategy.

Indeed, the League represented a specific kind of German corporatism or “fellowship” that was on the wane in the early sixteenth century.<sup>141</sup> I argue here that the proto-Protestant experiment with the power of attorney contributed to the shift in the legal culture of combination and corporatism in this moment.

The term “league” (*Bund*), much like “society” (*Gesellschaft*), is a term with as many meanings and valences as there are historical contexts.<sup>142</sup> In the late medieval period, with the decline of the great imperial dynasties, and as the capacity of the Empire to manage affairs of common life depleted, associations emerged to fill the vacuum, taking a variety of forms: craft and professional guilds, allied city unions “that aimed to stabilize regions of the [Empire],”<sup>143</sup>

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<sup>139</sup> Gerd Althoff, *Spielregeln der Politik im Mittelalter: Kommunikation in Frieden und Fehde* (Darmstadt: Primus, 1997).

<sup>140</sup> For an exhaustive and erudite discussion of the particular form of combination of the Schmalkaldic League, see in general Haug-Moritz, *Der Schmalkaldische Bund*, including 171-3.

<sup>141</sup> The study of corporatism or “fellowship” in German history has a long pedigree. Otto von Gierke’s four-volume *The German Law of Fellowship (Das deutsche Genossenschaftsrecht, 1868)* was one of the most ambitious treatments of the subject, offering a philosophical and historical interpretation of German history from ancient times to his present-day in terms of a struggle between two competing principles: lordship (*Herrschaft*) and fellowship (*Genossenschaft*). Some reject von Gierke’s scholarship due to his specific normative, methodological, and philosophical commitments, among them: the dialectical structure of history separated into epochs; essentialism of lordship and fellowship principles; romantic view of ancient Germanic past as more egalitarian and democratic (von Gierke, xxviii); fellowship as a specifically Germanic form of freedom and intrinsically good (von Gierke, 4); and promotion of the historical school of jurisprudence, according to which justice is to be found not in the cosmos (as in natural law theory) but in humanity, that is, as humanity develops in historical contexts, their moral insights about justice build up, so that the test of the validity of positive law is its alignment with this inherent knowledge of justice held inside “the people” (von Gierke, xvi). I draw on his scholarship with these caveats in mind. See also *Handwörterbuch zur deutschen Rechtsgeschichte, s.v. “Genossenschaft,”* by H. Stradal, vol. 1, 1522-27.

<sup>142</sup> Reinhart Koselleck, “Bund, Bündnis, Föderalismus, Bundesstaat,” in *Geschichtliche Grundbegriffe: Historisches Lexikon Zur Politisch-Sozialen Sprache in Deutschland*, ed. Otto Brunner, Werner Conze, and Reinhart Koselleck (Stuttgart: E. Klett, 1972), 582-671.

<sup>143</sup> Whaley, *Germany*, 214.

commercial and trade leagues (like the Hansa), confederations to maintain the peace,<sup>144</sup> and the estates, which organized the varied imperial landscape according to office and nobility. According to von Gierke, these societies, leagues and confederacies “established and defined the public law of the age.”<sup>145</sup>

Beginning in the late fourteenth century, various emperors attempted to “coordinate the activities of such leagues, or even create an ‘imperial league’ extending over the whole [Empire] as an instrument for the maintenance of peace, stability, and imperial authority.”<sup>146</sup> The Swabian League, formed in 1488, was by far the most successful of these.<sup>147</sup> Leagues had jurisdictional, commercial, and administrative functions vis-a-vis their members, including internal decision and adjudication procedures, membership rights and obligations, and taxation and military components. They were brought together through shared interests (usually regional) having to do with land, authority, and commerce.<sup>148</sup>

The purpose of these fellowships was varied, having internal and external functions. But so were their constitutive acts, the acts that brought these forms into existence. Some were “simple contractual agreements.”<sup>149</sup> Some involved regular “swearing of an oath or solemn vow.”<sup>150</sup> If someone breached the agreement, the group might use fines or penalties or other “positive means to compel an individual to obey.”<sup>151</sup> The groups often had determined in advance their own courts of arbitration, “from which there was no recourse, or only limited recourse, to the regular courts.”<sup>152</sup> Some involved “regular assemblies..., permanent leadership and committees.”<sup>153</sup> Often these groups were not formed to continue indefinitely or permanently; rather they had a specific time limit; “they could be terminated on notice, tacitly or expressly prolonged, or merged into other unions.” Furthermore, “a firm conclusion as to the legal and moral nature of the individual associations is made especially difficult by the fact that it frequently cannot be established whether the unifying agreements and contracts of the societies were constitutive acts or only a manifestation of the joint will of an already existing fellowship.”<sup>154</sup>

The Reformation brought about the first leagues “defined by confessional allegiance.”<sup>155</sup> Peasants were the first to draw on this language of a Christian union, based on the idea of a kind of Christian social contract.<sup>156</sup> And in the context of the period’s widespread apocalyptic

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<sup>144</sup> Whaley, *Germany*, 76. The Golden Bull forbade conspiratorial leagues that aimed to upset the peace rather than preserve it. The stated purpose of all leagues, in one way or another, was to preserve the peace. See Hohn, 21; and Branz, 117.

<sup>145</sup> von Gierke, 63.

<sup>146</sup> Whaley, *Germany*, 76. On the difference between *Bund* and *Bündnis*, see Haug-Moritz, *Der Schmalkaldische Bund*, 23-4.

<sup>147</sup> See Horst Carl, *Der Schwäbische Bund, 1488-1534: Landfrieden und Genossenschaft im Übergang vom Spätmittelalter zur Reformation* (Leinfelden-Echterdingen: DRW-Verlag, 2000); Whaley, *Germany*, 77-80; Hohn, 153-164.

<sup>148</sup> Leagues structurally excluded non-estates. See also Koselleck, 598-600.

<sup>149</sup> von Gierke, 64.

<sup>150</sup> von Gierke, 65.

<sup>151</sup> von Gierke, 65.

<sup>152</sup> von Gierke, 65.

<sup>153</sup> von Gierke, 65.

<sup>154</sup> von Gierke, 65.

<sup>155</sup> Whaley, *Germany*, 179. Koselleck suggests that the first usage of the phrase a “Christian union” was in 1442 by the Bingen Kurverein that united against the heresy of the Hussites (Koselleck, 603)

<sup>156</sup> Koselleck, 604. The “motives” of the peasant unions around the time of the Peasants’ War are the subject of intense debate—mostly linked to whether the religious, theological, eschatological dimensions of the

thought, the possibility of a divine league—a “*Pundtnus mit Gott*”—became more imaginable.<sup>157</sup> These leagues had no end-dates, and lacked some of the institutional attributes that otherwise characterized leagues, because they aimed to be unworldly, to actualize a Christian brotherhood in preparation for the apocalypse.<sup>158</sup> Koselleck speculates that this combination of a *Bund* form with these theological, pious motivations became a “vehicle of radicalization.”<sup>159</sup> Guilds are another form of combination that played a key role in the Reformation.<sup>160</sup>

Among the rulers and estates of the Empire, the first confessional leagues were of the old-faith. In June 1524, an “old-faith” league formed under the leadership of Ferdinand (regent) and Campeggio (papal legate) that included the dukes of Bavaria and representatives of twelve south German bishops.<sup>161</sup> The attendees came to an “agreement on mutual assistance in the execution of the Edict of Worms.”<sup>162</sup> Dynastic divisions within the league made it very short-lived, ending in 1525. Other leagues of old-faith and of Lutheran estates emerged, but were equally short-lived.<sup>163</sup>

Koselleck argues that it was in part thanks to Luther’s translation of the Bible that the concept of a *Bund* took on a theological dimension.<sup>164</sup> There are many references in the Bible to compacts made between humans, as well as compacts made between God and the people of Israel. Latin and Greek translations translated the original terms in ways that produced a variety of valences.<sup>165</sup> For Luther, his translation of the Old Testament used almost exclusively the term *Bund*, stressing its legalistic, worldly connotations, while his translation of the New Testament almost exclusively used the term *Testament*, highlighting the notion of a divine covenant. Even when identical phrases appear in the Old and New Testament, he stays with this differentiated word choice.<sup>166</sup> What was theologically ground-breaking with Luther was that there could be no human participation in the contract with God; it was divinely rendered, it was a covenant of grace that had nothing to do with human works.

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movements were the “super-structure” over material factors.

<sup>157</sup> Koselleck, 603-4.

<sup>158</sup> Koselleck, 604.

<sup>159</sup> Koselleck, 605.

<sup>160</sup> von Gierke, 103. See Anthony Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present* (Ithaca, NY: Cornell University Press, 1984) for some suggestive indications of the ways in which the ethos of guilds was at play in the Reformation. For example, he discusses the way in which the ethos of guilds found expression in proto-Protestant theology and ecclesiology (Black, 112), including the modeling of church structures on the ideal civic association (Church as commune (*Gemeinde*)) (Black, 113). “The earlier guild values of brotherhood and friendship played a prominent part in the ethical language of the early Reformation [...]. Love was the central principle of [Bucer’s] community ethic [...]. The Reformers took such values primarily from the Bible; but, as we shall see, they could also retain something of their guild and communal meaning” (Black, 113). He speculates that there may have been “at least some relationship between the Protestant covenanted community and the traditional oath of mutual aid. In the early days, the Reformation was adopted in some cities by means of a renewal of the communal oath, by which each burgher pledged himself and his goods to the city. One such oath reproduced exactly the spirit of the old guild formulae: ‘We in common citizenship will sacrifice our body and blood for the word of God’” (Black, 113).

<sup>161</sup> Whaley, *Germany*, 179.

<sup>162</sup> Whaley, *Germany*, 179.

<sup>163</sup> Whaley, *Germany*, 181. For other examples of leagues in the Reformation period see Koselleck, 610n140.

<sup>164</sup> Koselleck, 601.

<sup>165</sup> Koselleck, 601.

<sup>166</sup> Koselleck, 601.



Luther warned the Elector of Saxony against the “league-making” of the princes.<sup>167</sup> When the Schmalkaldic League of proto-Protestant princes and cities nonetheless formed in 1530/31—as concerning or threatening as it may have been for the Emperor and old-faith Estates—they were in participating in a form familiar in the German lands. Yet, the experience of the peasant leagues in the wars of 1525 meant that for some rulers, the term “*Bund*” became synonymous with “*Aufbruch*” (rebellion). They therefore often avoided the term *Bund*, preferring terms like “*Einung*” (union) and “*Verständnis*” (agreement). Indeed, even before the Schmalkaldic League had been formalized, even before confession had been settled, there was a “de facto relatedness/solidarity” (*faktische Verbundenheit*) that brought them into conversation in the first place.<sup>168</sup>

Its articles of association made clear their purpose: they had formed themselves in response to the threat posed by various articles of the 1530 Augsburg imperial assembly “concerning our holy matters of faith,” prosecutions and lawsuits in the Imperial Chamber Court, and they were a defensive alliance.<sup>169</sup> Their institutional organization was minimal, focused not on maintaining the peace in a certain territory, but facilitating information and cooperation for its members with regard to this specific issue, and coordinating military defense when necessary.

Thus, the Schmalkaldic League was not a sui generis confessional formation. It was an alliance of evangelical rulers who felt targeted by imperial law.<sup>170</sup> “It was a union of Protestants, yet it never moved to develop a common Protestant Church ordinance.”<sup>171</sup> It did not claim to unite all evangelicals, only those who had some position of rulership.<sup>172</sup> Their formation blended traditional concerns about freedom of the estates vis-a-vis the Emperor, freedom of the German nation vis-a-vis Rome, defense against perceived rights violations, old regional alliances and constellations, and emerging territorial ambitions expressed through the “right to reform” (*ius reformandi*). But this does not mean confession was a cover for or derivative of true political motivations, as it is often glossed; the formation of a league was less political than simply a part of the constitutional landscape of the late medieval and early modern Empire. It was how things were done. That they did not model their group on the Church but on a league gestures to the constellation of issues that defined “religion” as a problem-space; not confession alone, but also jurisdiction, freedom, and authority (or sovereignty) were central. This was a union of estates for whom preservation of their freedoms was tightly linked to their duty to be an “instrument of God,” and to create a Christian order in their domains.<sup>173</sup>

According to Gierke, in the period following 1525, as religious reform became ever more tightly tied to emerging forms of territorial sovereignty, the varieties of fellowship of the late medieval period narrowed into “chartered corporations,” increasingly specific associations established “for single purposes.”<sup>174</sup> Whereas in the past, fellowships were pre-existing groups that might in the course of their existence seek privileges, now the corporate group came into

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<sup>167</sup> Koselleck, 605-6.

<sup>168</sup> Schlütter-Schindler, 19n11.

<sup>169</sup> Fabian, *SBA 1530-32 I*, 12. Whaley highlights the anti-Habsburg common interest (Whaley, *Germany*, 305-7). See also Schlütter-Schindler, 18.

<sup>170</sup> For more on the relationship between confession and combination in the Schmalkaldic League, see Haug-Moritz, *Der Schmalkaldische Bund*, 95-121.

<sup>171</sup> Whaley, *Germany*, 306.

<sup>172</sup> Brady, *Protestant Politics*, 171-2.

<sup>173</sup> Koselleck, 606-7.

<sup>174</sup> von Gierke, 104, 97.

existence in order to safeguard a particular privilege.<sup>175</sup> In other words, it was the privilege—and therefore the entity that gave privileges, i.e. the emerging territorial state—itsself that had the cohering function. Gierke singles out the sixteenth century as a hinge in this change. Any association with a public role or purpose became “components of the state”; all other associations were governed by private law, granted group status for a particular purpose by the state.<sup>176</sup> In other words, the association slowly became a legal fiction, understood as a construction of law, with no prior meaningful existence. Gierke attributes this to the rise of Roman law in the sixteenth century.<sup>177</sup> For Gierke, “the jurisprudence of late Rome and the medieval papacy” supplied the origins of the view that “groups have a merely fictional personality and legal status.”<sup>178</sup> Medieval forms of fellowship were “betrayed by jurists and philosophers, who opted rather for the ‘Roman’ notion of merely fictional collective personality (according to which corporate status was the gift of the state).”<sup>179</sup> One of the great problems of the post-1525 era, according to Gierke, was that groups become “mere creatures of the state” and the state decided “when and to which groups associational freedom and corporate status should be permitted.”<sup>180</sup>

Whatever one makes of Gierke’s evaluative or even nostalgic language here, it does seem that the proto-Protestants were exactly on the border of this older vision of fellowship and this newer version of modern association. The form of the Schmalkaldic League was like that of a medieval league that touched many aspects of public life; but its orienting vision was the single issue of the “matter of religion.”

The suggestion here is that in the context of Reformation litigation, the power of attorney document participated in this shift from combination as a capacious medieval formation to combination as state-gifted. Their rendering of their group through the Roman law categories of *consortes eiusdem causae et litis* moved them towards the containment of the religion issue as a matter of state. They prepared themselves in medieval group formation to walk into a new legal regime in which they would be a particular type of association under a new public law regime called “religion,” codified in the Augsburg Peace.

### **Instrument #3: Recusation**

In 1534, the protesting estates formally accused the Court President Adam von Beichlingen and a “majority of the judges,” of being biased (*parteyisch*) and hostile (*widerwertig*) against them in their rulings, through a recusation. This recusation instrument (not to be confused with self-recusal) would be cited again and again, in case after case involving the protesting estates.

In this section, I argue that the recusation operated not only as a formal accusation of judge bias, but also structurally linked the “matter of religion” with an affect of suspicion, and paved the way for distinct confessionally-based jurisprudences of imperial law.

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<sup>175</sup> von Gierke, 105.

<sup>176</sup> von Gierke, 106, 112.

<sup>177</sup> von Gierke, 5, 114.

<sup>178</sup> von Gierke, xvii.

<sup>179</sup> von Gierke, xxvii.

<sup>180</sup> von Gierke, xvii.

One of the causes of the wars of religion in the seventeenth century was a breakdown of the legal order created through the Augsburg Peace of 1555. Historians have long sought to account for the roots of this breakdown. Heckel argues that already by the 1560s, Catholic and Lutheran jurists and rulers were developing distinct interpretive universes of the Peace, so that one party's claim to make a correct constitutional interpretation would be declared by the other party as an attempt to surreptitiously change the law in line with their violation of it.<sup>181</sup> He shows that the basis of these variant interpretations were practical-political, theological, and also an outgrowth of the Peace itself, which established parity between the two confessions as they related within the institutions of the Empire.<sup>182</sup>

My research suggests that we need to look to events before 1555 to understand this "double jurisprudence" of the Augsburg Peace and the imperial legal order that followed.<sup>183</sup> In particular, we need to look at the protesting estates' relentless use of the recusation instrument in the Reformation cases as a key moment in the development of the jurisprudence of suspicion that characterized post-1555.

### ***Recusation as Legal Instrument***

The 1534 Recusation began by citing Tancred's thirteenth century *Ordo Iudiciarius* section 2.6 titled "*De recusationibus iudicum*." "You without a doubt know well" the document began, "what a terrible thing it is, and what sort of exceeding disadvantage it brings to stand at law in front of a biased, antagonistic judge and to await a judgment that will be based on his hostility."<sup>184</sup> Therefore, the recusation continued, legislators have sought to ensure that judges undertake their duties with an eye to equality, lack of bias, and without any distrust and suspicion.<sup>185</sup> Hence the law provides a way through which to resist the jurisdiction of a judge whom one suspects of bias by recusing him, so long as the causes of that suspicion are fair. The parties (listed) therefore make use of this legal means "not with the notion to injure or vilify anyone," but rather to address the adversity they have been dealt at law through the suits. At the end of the petition, the lawyers proposed that they present the allegations in front of a bench of arbitration judges.

Though the Imperial Chamber Court ordinances lacked any regulation specifically on an instrument for recusing judges, in practice, the Court inherited as part of medieval Roman-canonical legal procedure a general recognition of "judge rejection" (*Richterablehnung*) petitions in its competence, evidenced in the use of recusations in case files.<sup>186</sup> Recusation was just one form of judicial discipline in the sixteenth century. Court visitations by appointed authorities

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<sup>181</sup> Martin Heckel, "Autonomia und Pacis Compositio: der Augsburger Religionsfriede in der Deutung der Gegenreformation," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung* 45 (1959): 159-60.

<sup>182</sup> Heckel, "Autonomia," 161-167.

<sup>183</sup> Heckel, "Autonomia," 190ff. See also Heckel, *Luther und Recht*, 761-72.

<sup>184</sup> Fabian, *UARP I*, Nr. 99, 262. The Tancred citation reads: "Quia valde meticulosa res est sub iudice litigare suspecto."

<sup>185</sup> Fabian, *UARP I*, Nr. 99, 262: "gleich, unparteilich, und sonder allen arkwon oder verdacht furgenommen"

<sup>186</sup> Dick, 77. Siegfried Bross, *Untersuchungen zu den Appellationsbestimmungen der Reichskammergerichtsordnung von 1495* (Berlin: Duncker & Humblot, 1973), 71 citing Johann Heinrich von Harpprecht, *Geschichte des kaiserlichen und Reichs-Cammergerichts von den Jahren 1545 bis 1558: als eine Fortsetzung des Cammergerichtlichen Staats-Archivs.*, vol 1 (Ulm: Stettin, 1785), 62.

provided another means.<sup>187</sup> German legal texts provided for judges to publicly critique the improper decision of another judge in the form of an *Urteilsschelte*.<sup>188</sup> But scholars have argued that the judge's oath provided the main protection for litigants against biased decisions, in particular, in the form of the criminal consequences for a judge who violated his oath.<sup>189</sup> The oath required judges to refrain from delaying a proceeding, to honor the court, to keep records and discussions secret, and to be unbiased in judging, neither warning nor advising one party or another.<sup>190</sup>

Recusation was a form of dilatory objection (*dilatorische Einrede*) that had to happen in the pre-trial stage, that is, before *litis contestatio*.<sup>191</sup> It was within the subset of objections that aimed to decline the forum (*forideklinatorische Einrede*).<sup>192</sup> Its aim was to bring a stop to the case. Unlike an appeal, the recusation did not require as part of its petition a claim that the judges had already made an incorrect legal decision; it could be preemptive.<sup>193</sup>

In Romano-canonist legal procedure, "suspicion alone was a sufficient basis for recusal, and simply raising the exception automatically suspended the judge's power to proceed with the case. The action could proceed no further until the issue had been resolved."<sup>194</sup> Once a petition of recusal had been presented, the judge had to step aside while the parties chose arbiters to determine whether the suspicion was justified. The judge, however, could set a deadline.<sup>195</sup> If an objection of bias was improperly ignored by the judge in question, that was grounds for an appeals procedure.<sup>196</sup>

There were several grounds on which one could seek to recuse a judge in Romano-canonist legal procedure. First, "that the judge's personal status or reputation disqualified him." This was referring to such categories as "excommunicants, schismatics, heretics, Jews, slaves, women, minors, adulterers, or those whom the law deemed *infames*."<sup>197</sup> Second, "if his appointment violated the hierarchical principle that persons could be judged only by their peers or their superiors." These first two categories of complaint were rare, of course, because it was unlikely that such a person would be appointed a judge in the first place.<sup>198</sup>

The third basis of recusation was the most common, having to do with "suspicion that a judge was biased, corrupt, or had interests that conflict with those of one of the parties to an action." Medieval writers on canon law procedure debated the forms this might take.<sup>199</sup> "The range of situations that could raise suspicions about possible judicial bias included personal association or mutuality of interest between a judge and a litigant or a litigant's advocate, such as close blood kinship, relationship through marriage, and other kinds of family connection, as well

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<sup>187</sup> On visitations, see Dick 80-1; and Baumann, *Visitationen*, 108-23. On judicial ethics generally see Brundage, *Medieval Canon Law*, 382ff. On Roman law sources on judicial ethics that became the subject of medieval elaboration, see James Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago, IL: Chicago University Press, 2008), 385n44.

<sup>188</sup> Bross, 88.

<sup>189</sup> Dick, 77-8; Bross, 76, 87.

<sup>190</sup> Dick, 78.

<sup>191</sup> Bross, 71; Dick, 154. On *litis contestatio* see Chapter 1.

<sup>192</sup> Dick, 155.

<sup>193</sup> Bross, 83.

<sup>194</sup> Brundage, *Medieval Canon Law*, 386.

<sup>195</sup> Brundage, *Medieval Canon Law*, 386.

<sup>196</sup> Bross, 72.

<sup>197</sup> Brundage, *Medieval Canon Law*, 386-7.

<sup>198</sup> Brundage, *Medieval Canon Law*, 387.

<sup>199</sup> Brundage, *Medieval Canon Law*, 388n54.

as personal friendship, or alternatively, enmity and hatred. If the judge was the lord of one of the parties or had other close ties with a litigant or his legal advisers, his impartiality might justifiably be questioned. Likewise, if a judge or judicial assessor had formerly served as advocate for one of the parties, his appointment could be challenged.”<sup>200</sup>

The Imperial Chamber Court ordinances did not explicitly envision family relations as an automatic conflict of interest, though ordinances for earlier iterations of the imperial court did so.<sup>201</sup> The oath was seen as sufficient, because the duty to abide by their oaths applied to judges equally when personal relations were involved.<sup>202</sup> Still, there is evidence in case files that parties recused judges on grounds of family relations alone as a form of conflict of interest.<sup>203</sup>

At least in medieval canon law courts, petitions for recusal were “constant and commonplace.” When Martin Luther asked the Elector of Saxony in 1518 to advocate that his trial be in a German forum, rather than in Rome, he did so on the basis that the Roman judges were biased;<sup>204</sup> an example of how logics of recusation were familiar even to non-lawyers. This meant the recusation instrument was also subject to abuse, given its capacity to delay a case.<sup>205</sup> Brundage speculates that the “threat to recuse was a successful litigation device” on its own, pushing parties to seek arbitration.<sup>206</sup>

### *The 1534 Recusation*

A recusal of the judges had already been proposed by Johannes Feige in 1530 as a possible method for members of the Schmalkaldic League to respond to suits in the Imperial Chamber Court.<sup>207</sup> In late 1533, the protesting estates finally agreed to draft a shared recusation instrument to attempt to bring about the pause of the cases that they had so far sought in vain.<sup>208</sup>

The document listed dozens of causes for their suspicion of the judges, “so that no one would have cause to think that perhaps such recusation was done unnecessarily or to delay proceedings.”<sup>209</sup> The first evidence of judge bias they provided referred to the Emperor’s mandate to the Court in 1532, following the Nuremberg Settlement, in which it was agreed to suspend adjudication “in cases concerning matters of faith and thus flowing from religion.” Despite this mandate, the lawyers wrote, the Court had made no change in its judicature. Unless the Court believed that the mandate, and the negotiations that produced them, were “mere words, without any effect,” this failure to shift their administration of justice was evidence of their partisanship.<sup>210</sup>

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<sup>200</sup> Brundage, *Medieval Canon Law*, 388. Also Bross, 72.

<sup>201</sup> Bross, 72.

<sup>202</sup> Bross, 78.

<sup>203</sup> Bross, 73, citing Harpprecht, vol. 1, 93.

<sup>204</sup> Kohnle, 27.

<sup>205</sup> Brundage, *Medieval Canon Law*, 390, 386.

<sup>206</sup> Brundage, *Medieval Canon Law*, 391. On recusation overall, see also Helmholz: “Canonists and Standards of Impartiality for Papal Judges Delegate,” *Traditio* 25 (1969): 386-404; and Linda Fowler: “Recusatio iudicis in Civilian and Canonist Thought,” in *Post Scripta: Essays on Medieval Law and the Emergence of the European State in Honor of Gaines Post*, ed. Joseph R. Strayer and Donald E. Queller (Rome: Libreria Ateneo Salesiano, 1972), 719-85.

<sup>207</sup> See discussion of Feige’s proposal in section on power of attorney above.

<sup>208</sup> Schlütter-Schindler, 42, 50, 61.

<sup>209</sup> Fabian, *UARP I*, Nr. 99, 266: “damit nyemands verursacht wird, zu gedenken, das villeicht solliche recusation unnotturftig freyenlicher weis, allein die sachen damit uffzuhalten oder zu verziehen, beschehe.”

<sup>210</sup> Fabian, *UARP I*, Nr. 99, 264: “plossen worten, on alle wirkung.” See opening section of Chapter 4 for

Then, the lawyers made the remarkable argument that, given how obvious it is that these cases grew out of disagreements in articles of faith and worship which the protesting estates have with the papist priests and clergy, the very fact that the judges did not make this legible in the cases exposed their bias.<sup>211</sup> The judges deemed to be cases of dispossession or confiscation, for example, disputes involving cloistral persons continuing to take a modest income for carrying out pastoral duties, having decided “in front of God and out of the force of their conscience” to establish the correct, Christian worship.<sup>212</sup> In fact, continued the Recusation, their taking an income was in line with the canon law and imperial law principle that the reward should follow he alone who carries out the work—a principle all too often ignored by monks and priests.<sup>213</sup> In order to get to the status of that income, the Recusation continued, the prior questions (*prejudicialarticul*)—concerning the correct articles of faith, form of worship, and use of church property—must be handled. The lawyers offered the following case by way of analogy: a person who expects to inherit from a deceased parent is accused of being born out of wedlock, which would disqualify him from inheriting. In order to determine the civil matter of inheritance, it becomes necessary to address the marriage status of his parents at the time of his birth—a question that may not be dealt with in front of a worldly judge.<sup>214</sup> In the same way, in order to address the civil matter of property, it was essential first to address matters of religion that undergirded the conflict. The only appropriate venue for dealing with such conflicts, they argued, was a common, free Christian council—not any forum that would rely on existing laws “which are to the advantage of the papacy alone,” but rather, one that would adjudicate without biased laws and without partisan judges.<sup>215</sup>

For the lawyers writing this recusation, it was more than biased laws that were the problem; rather, the judges ruled “according to their own partial thoughts.”<sup>216</sup> “It is well known and public” that there have come about a large set of cases emerging from a similar set of circumstances, in which papists sued reforming rulers in the Court. And it was undeniable that when they did so, the Court always ruled in favor of the “old- and so-called right-believing against the new, so-called mistaken sectarians.”<sup>217</sup> The Court had recognized very uncommon and outrageous mandates against the protesting estates—mandates that were not only unheard of in the common written law, but also contrary to customary practice.<sup>218</sup> Several of the judges had even said publicly regarding these uncommon mandates that “one must recognize *exorbitantia mandata* against [the protesting estates] because they also carry out *exorbitantia facta* (outrageous deeds).”<sup>219</sup> The judges also chronically failed to recognize imperial privileges that

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more details on the Nuremberg Settlement and the impacts of its ambiguity.

<sup>211</sup> Fabian, *UARP I*, Nr. 99, 267.

<sup>212</sup> Fabian, *UARP I*, Nr. 99, 264-5: “vor got und uß getrancknus ires gewissens”

<sup>213</sup> Fabian, *UARP I*, Nr. 99, 265.

<sup>214</sup> Fabian, *UARP I*, Nr. 99, 266.

<sup>215</sup> Fabian, *UARP I*, Nr. 99, 263: “nach den rechten, die dem bapstumb allein zu vorteil gesetzt sein”; “parteyschen rechten, auch vor parteylichen richtern und beysitzern”

<sup>216</sup> Fabian, *UARP I*, Nr. 99, 264: “nach iren eignen affectionirten gedanken”

<sup>217</sup> Fabian, *UARP I*, Nr. 99, 267. The Recusation also briefly describes some cases that provide evidence of this pattern. See Fabian, *UARP I*, Nr. 99, 269-70.

<sup>218</sup> Many of the “Reformation cases” were mandate trials, which resulted in temporary directives for quick and effective legal help against threatened injury (Scheurmann, *Frieden durch Recht*, 131). See Chapter 1 on mandates.

<sup>219</sup> Fabian, *UARP I*, Nr. 99, 269.

exempted certain parties from any litigation in the Imperial Chamber Court, which would have required remitting the cases to their proper first-instance judges.<sup>220</sup>

Moreover, the recusation alleged, although the Court had at various times defended its authority and duty to adjudicate such cases by citing the clause of the 1529 Speyer Recess and the 1530 Augsburg Recess that no one, on account of faith, should be deprived of his wealth, the reasoning seemed to “cut just one way,” for although the protesting estates themselves had complained here for those same causes, their cases sit while the papist’s cases proceed.<sup>221</sup>

Some of the grounds of suspicion had to do with the facts of the lives of the judges—familial relationships that might predispose them to bias in favor of clergy, and professional relationships that might indicate conflicts of interest. For instance, the presiding judge raised two of his sons to enter into the clergy, “from which is easy to detect what feelings you may have vis-à-vis the clergy.”<sup>222</sup> Many of the judges had relatives and close friends in the clergy, which the lawyers alleged predisposed them to favor their position.<sup>223</sup> Some of the judges had provostships and received other spiritual dignities and benefices which linked the judges to the papal seat through oaths and duties.<sup>224</sup> This naturally inclined the judges to “those like [them]” in part because they were aware that how the case came out today for the suing spiritual clergy, so it would go for themselves, once they were no longer at the Chamber Court, should they find themselves in a similar situation.<sup>225</sup> Furthermore, despite the oath they took forbidding it, nonetheless several of the judges had heard cases involving prince-bishops on whose council they had at some point served.<sup>226</sup> Some had even carried out legal tasks for these prince-bishops on the understanding that they would receive their fees once they left the Chamber Court.<sup>227</sup>

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<sup>220</sup> Fabian, *UARP I*, Nr. 99, 271-2.

<sup>221</sup> Fabian, *UARP I*, Nr. 99, 269: “Item, wiewol e.g. und ir zu ewer defension die reichsabschid furwenden, das des glaubens halben niemant seiner zins und gulten etc. entsetzt warden soll, so schneidet doch solcher abschid allein uff einer und nit uff beiden siten, nemlich allein für die papisten wider unsere principalen, aber nit für dieselben unsere principalen gegen den papisten widerumb.”

<sup>222</sup> Fabian, *UARP I*, Nr. 99, 267: “auch das ir ewer zwen elteste son in dem genannten geistlichen stand verordnet und dem bapstumb ergeben habt, derenhalben leichtlich zu erachten ist, was gemuts ewer gnad zu den genannten geystlichen oder aber den anhangern der cristlichen bekannten leer sein mögen.”

<sup>223</sup> Fabian, *UARP I*, Nr. 99, 268: “Item so haben etlich ewer der beysitzer, so gleichwol nit im giestlichen stand betretten, doch ire nechste freunt und bruder darinne, derhalben ir versehenlich gleicher weis (wie jhene) des orts gesynnet und affectionirt seyent.”

<sup>224</sup> Fabian, *UARP I*, Nr. 99, 268: “Item so habt ir eins teils propstien und andere geistliche digniteten und pfrunden, derwegen ir dem bepstlichen stul und anderen geistlichen oberkeiten mit eiden und pflichten zugeton und verwandt seyent.”

<sup>225</sup> Fabian, *UARP I*, Nr. 99, 268: “Item, wo gleich solche pflicht nit, so weren ir dannoch darumb dem genannten geistlichen standt mer affectionirt und derwegen parteysch, das ir ewers gleichen, den bapistischen geystlichen, mer geneigt und gunstig weren, dann unsern principal, deren widersachern. Item und auch darumb, dann ir tragen dannoch billichen die fursorg, wie es heut den clagenden papistischen geistlichen ergee, also möcht es euch hernach, so ir nit mer am chamergericht weren, in gleichem fall auch ergeen.”

<sup>226</sup> Fabian, *UARP I*, Nr. 99, 268-9: “Item so seyen etliche andere under euch, den beysitzern, den geistlichen fursten, dero rete ir zuvor gewesen, noch uff disen tag dermassen verwant, das euch von denselben fursten für und für als reten geschriben, wiewol vermög der ordnung ein yeder beysitzer gar nyemants dann dem chamergericht verwandt sein soll.” This is referring to the oath contained in title IX of the Imperial Chamber Court Ordinances, made at Worms in May 1521, see Adolf Wrede, ed., *Deutsche Reichstagsakten Jüngere Reihe*, vol. 2 (Gotha: Friedrich Andreas Perthes, 1896), 275-6.

<sup>227</sup> Fabian, *UARP I*, Nr. 99, 269: “Item so haben etliche andere under euch in zeit ired beysitzerampts bey geistlichen fursten umb bestallung practiciert und auch zusagen von denen erlangt, jerlich dienstgelt von haus in eventum, wann sy vom chamergericht abkomen, das alsdann sollich dienstgelt angeen soll.”

Another set of reasons outlined in the Recusation for the protesting estates' suspicion of the judges related to the ways in which the judges exposed their feelings vis-à-vis court personnel and litigants. They referred to an incident, for instance, in which the presiding judge terminated the positions of two procurators whom he only suspected of following the new teachings.<sup>228</sup> Then, later, when another procurator, who was known to be of the old papist belief, was suspended from his position by the commissioners of the imperial visitation, the judges interceded and argued on his behalf, even against the will of the imperial estates.<sup>229</sup> In addition, the presiding judge initiated a new custom, a procession through the city of Speyer several times a year, in which court personnel were required to appear. If someone did not take part in the procession, "which practice is to be found in no laws, nor in any imperial decree, nor in any previous practice of the Court," the presiding judge would suspect them of belonging to the "errant teaching," and on that account dismiss them from their position.<sup>230</sup> In addition, the Court, the recusation continued, commanded persons who followed the new teachings to swear "to God and all saints"—even though the estates of the Empire agreed at the Diet of Regensburg (1532) that, in order not to burden the consciences of any of them, an oath "to God and the holy Gospels" would suffice—"whereby you planned to entrap and injure the consciences of those of whom you have some suspicion."<sup>231</sup>

The lawyers also highlighted in the recusation the ways in which the judges exposed their proclivities and leanings in public ways.<sup>232</sup> "You have unashamedly let yourself be heard saying that you are against these teachings and the lifestyle of the Lutheran sect (as you call it) [...] that you think nothing at all of it, and much other similar talk that is to the good of the papacy and that minimizes the evangelical teaching and their reformation, or their church order."<sup>233</sup> Furthermore, the majority of the judges followed the presiding judge on this, even expressing their feelings on the matter in public, in taverns, and all manner of society and get-together.<sup>234</sup> The protesting estates pointed to the familiar saying that "the essence of reason is that which works in favor of religion" (*summa ratio est que pro religione facit*), which, they say, the Court interprets as "the essence of reason is that which works in favor of the papacy and the papists." Thus, for the judges, whatever was in favor of the papists, that was in favor of the religion and, in turn, legal and just; everything else was heretical and damned.<sup>235</sup> Some of the protesting estates had even come to believe that several of the judges incited the papist plaintiffs to use imperial law to deal with the conflict.<sup>236</sup> All in all, "you are more our adversaries and counterparts than judges."<sup>237</sup>

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<sup>228</sup> Fabian, *UARP I*, Nr. 99, 267-8: "Item so hat e.g. auch verschiner zeit ir gemuet gegen zweyen procuratoren des chamergerichts wol entdeckt, die sy allein umb verdachts willen obangeregter neuen leer (als man sagt) unverhörter sachen irer steend privirt und entsetzt hat."

<sup>229</sup> Fabian, *UARP I*, Nr. 99, 270.

<sup>230</sup> Fabian, *UARP I*, Nr. 99, 270-1. The 1530 Imperial Chamber Court Ordinances said in section 91 that all Court personnel must adhere to the faith articles as outlined at Imperial Diet of Augsburg of 1530, at risk of losing their position (Dick, 43 and the literature cited there).

<sup>231</sup> Fabian, *UARP I*, Nr. 99, 271.

<sup>232</sup> Fabian, *UARP I*, Nr. 99, 270.

<sup>233</sup> Fabian, *UARP I*, Nr. 99, 268.

<sup>234</sup> Fabian, *UARP I*, Nr. 99, 268.

<sup>235</sup> Fabian, *UARP I*, Nr. 99, 270.

<sup>236</sup> Fabian, *UARP I*, Nr. 99, 269.

<sup>237</sup> Fabian, *UARP I*, Nr. 99, 272.



### *The Recusation in Litigation*

Formally, the 1534 Recusation did not argue against the jurisdiction of the Court as a whole, but argued that some of the judges that populated its bench had exposed themselves, through a pattern of behavior, to be biased in “matters of religion.” However, as with the power of attorney, its legal validity hinged on the soundness of their claim that there had been disputes concerning the religion litigated in the Court, and that the Court had been overstepping its jurisdictional authority by adjudicating in them.

Landgrave Philip of Hessen was one of a few estates who thought that they should formulate a general recusation of the Court in all matters—including worldly disputes. He argued that since there was no consensus between the evangelical estates and the Court about what counted as a matter of religion, a recusation that hinged on this category was bound to be unsuccessful.<sup>238</sup> He also believed that if the recusation did not recuse all of the judges, then they would risk being responsible to respond to those judges that they did not recuse.<sup>239</sup> The majority of the protesting estates, however, held that a general recusation would be an improper violation of imperial jurisdiction, amounting to public disobedience of an institution that had been established by the Emperor as well as the imperial estates.<sup>240</sup> A general recusation would make it impossible to appeal to the Court about unfair lower court decisions in worldly matters, which would lead to a generalized legal insecurity for themselves.<sup>241</sup> Furthermore, as the highest court in the Holy Roman Empire for worldly matters, with no forum from which to appeal its decisions, to recuse the Court generally would be formally impossible.<sup>242</sup> The legal validity of the recusation hinged on the protesting estates’ argument that the Imperial Chamber Court had no jurisdiction in matters of religion, and that the highest forum for adjudicating disputes concerning the religion was a free Christian council.<sup>243</sup> In the end the League agreed, for the time being, to restrict their recusation only to “all present and future disputes concerning the religion, faith and what flows from those,” and to recuse not all of the judges, but only the Court President and an unnamed “majority of the judges.”

When the protesting estates submitted the Recusation for the first time in the context of a set of pending cases on January 30, 1534, the Court quickly withdrew for deliberations, and refused the lawyers’ repeated requests to read the document in public audience.<sup>244</sup> Finally, on March 2, 1534, the Court issued a judgment on the Recusation, declaring it null, void, and invalid, a violation of “common written law and the Holy Empire’s ordinances.”<sup>245</sup> The administrative ruling named two reasons for its nullification. The first was formal, challenging the technical validity of the Substitution which ostensibly gave Hirter and Helfman the authority to act on behalf of all of the parties in the wide array of suits, instead of their originally appointed lawyers. The second reason was substantive: the Court could not accept any recusation of the

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<sup>238</sup> Schlütter-Schindler, 51.

<sup>239</sup> For more on internal League negotiations about the scope of the Recusation, and how territorial rulers and cities tended to view the matter differently, see Schlütter-Schindler, 50-9.

<sup>240</sup> Schlütter-Schindler, 134.

<sup>241</sup> Dommasch, 78; Schlütter-Schindler, 59.

<sup>242</sup> At the 1530 Augsburg Diet, the Emperor abolished appellation from the Imperial Chamber Court to the Imperial Diet.

<sup>243</sup> Dommasch, 79.

<sup>244</sup> See Fabian, *UARP I*, Nr. 99, 255-60; Winkelmann, *PC II*, 205-6; Schlütter-Schindler, 63.

<sup>245</sup> Schlütter-Schindler, 63.

Court in matters of religion, since, only having jurisdiction in worldly matters, they had never adjudicated in matters of religion.<sup>246</sup> The Landgrave of Hessen's prediction came true.

The 1534 Recusation broke the mold in several ways.<sup>247</sup> First, by using the formulation “all present and future matters,” they were straying from the specificity of a recusation—to apply to a certain judge, regarding a specific dispute, involving certain parties. Indeed, some in the League doubted whether this formulation would be legally valid.<sup>248</sup> Also, to the extent that the recusation accused the judges of bias due to their being “papists,” it was doing something radically new. Again, several jurists serving Schmalkaldic League members doubted whether their proclivity to the old faith, itself, would be legally sufficient as a justification for recusation.<sup>249</sup>

After the Court declared the Recusation null and invalid, protesting estates nonetheless persisted in submitting the Recusation in the context of their cases going forward. They thus guaranteed being declared contumacious. Where the protesting estates invoked the recusation, again and again, as a mode of declining the forum and denying their obligation to settle the *litis*, they were met, again and again, with the response that the recusation was null and void and that the party should therefore be declared in contumaciam.<sup>250</sup>

Take for instance, an exchange recorded in the 1536 witness testimony commission established in the case between the Archbishop of Riga and the city of Riga, discussed in chapter 4.<sup>251</sup> They convened at the Turaida Castle in October of 1536, and produced a document summarizing the proceedings in 1537. Before the witnesses who gathered there testified, there is a dialogue between the commissioner and representatives of the two parties—the Archbishop and the City—recorded with the back-and-forth narrative form of “they said,” and “to which we responded.” After the usual greetings, the Riga delegates said that they were under instruction “from their eldest ones” to present their objections to the Commission before doing anything else.<sup>252</sup> The commissioner responded over and over again by stressing the necessity of carrying out the specific charge that was his commission, namely to gather witness testimony. And the Archbishop (who seems to have been there in person), following the commissioner's general line, argued that he was there to hear and give witness testimony in a manner that would not elicit the suspicion of either side,<sup>253</sup> and he was not obligated to hear anything other than that.<sup>254</sup> The Riga delegates said that the commissioner should let the objections be read aloud, or else they would not take part in the commission's proceedings.<sup>255</sup> After the commissioner swore in the witnesses, the Riga delegates and witnesses recused the Commission as “suspicious” and

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<sup>246</sup> Schlütter-Schindler, 64.

<sup>247</sup> Many of these issues were discussed by Schmalkaldeners in various debates regarding not only the 1534 Recusation but also at later points when they were considering drafting additional recusations, in 1538 and 1542.

<sup>248</sup> Dommasch, 79.

<sup>249</sup> Dommasch, 79.

<sup>250</sup> Schlütter-Schindler, 64.

<sup>251</sup> Berlin 271.

<sup>252</sup> Berlin 271, Q16, “Attestationes,” 1537: “nach unns gethanem grusse angezeigt, das sie vonn ehrgedachtem Radte irenn eltistenn, abgefertigt, ein schryftliche instructionn hedtenn, die sie bedtenn vor erst zw lesen unnd sich weyter darauff zuvernehenn usw.”

<sup>253</sup> Berlin 271, Q16, “Attestationes,” 1537: “da myth alle dyngk frey unnd unvordechtiger zwgehenn muchtenn.”

<sup>254</sup> Berlin 271, Q16, “Attestationes,” 1537: “keine instructionn zwhore schuldig”

<sup>255</sup> Berlin 271, Q16, “Attestationes,” 1537: “Also habenn die rigesschn geantwort: Inen weherenn schryffte von eltysthenn mythgethann, die sie soltenn furlesen lassen sunsth wolte inenn nicht gepurenn sich weyter in handdell inzwassenn”

commissioned by “a biased judge,” that they did not want to take part in any of these proceedings. In further dialogue, they made it known that they were not suspicious of the Imperial Majesty as such, just the Court President and by extension the commission itself, being ordered by a biased judge. The reason they knew he was biased was because the Emperor ordered him to cease all proceedings “in such matters.”<sup>256</sup> They expressed hope that the dispute, as it concerned matters of religion, would be paused until a Council. The Archbishop responded that this was a spoliation matter concerning property and did not have to do with the religion. The document that the Rigans successfully asked to have entered into the Commission’s report restated that they recuse the Court President, and that therefore the commission itself was invalid.<sup>257</sup> The commissioner deemed the Rigans disobedient, and continued with the proceedings without them.

### ***Jurisprudence of Suspicion: The Law/Politics Boundary***

In the opening chapter of the dissertation, I described the methodological importance of considering the case files on their own, treating them in their details rather than simply as a block subject of political negotiations. The reductivist historiographical approach that describes the Reformation cases as an instance simply of the instrumentalization of law for political-cum-pious ends, on all sides, has prevented us from seeing the legal historical effects of those cases beyond the intentions or even the awareness of the actors.

But the Recusation instrument thematizes the suspicion that law, when it came to the adjudication of matters of religion, was being overwhelmed by preferences, private interest, politics, and pious zeal. Equally, those of the old faith were suspicious that the protesting estates’ use of the Recusation—like their extraordinary uses of the protestation and the power of attorney, and the argument at the center of each of these that certain worldly disputes of all kinds constituted a “matter of religion”—were likewise overwhelming the law with preferences, private interest, politics, and pious zeal.

One of the *stakes* of these mutual suspicions had to do with the authority and legitimacy of the Court, and the constitutional premise that the Imperial Chamber Court would sustain the Land-Peace. Another stake concerned the future of the relationship between temporal and worldly authority, objects, and forums.

But the *salience* of these mutual suspicions was not necessarily understood until much later. These mutual suspicions concerning the deployment of the religion category would redound upon the future of legal interpretation in the post-Augsburg order. Throughout the early Reformation, the aporia internal to the imperial legal system regarding how to deal with these cases created the conditions in which one suspected the other side not for failing to accede to the one correct answer (because the ostensibly single authoritative source that could settle once and for all the one correct answer, the Christian Council, never took place), but for taking a particular interpretation of the law that apparently served one’s own ends, or the ends of one’s group. In other words, it is one thing to suspect corruption, bias, or partisanship on the part of someone

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<sup>256</sup> Berlin 271, Q16, “Attestationes,” 1537: “kay. may. hettenn irem key. camerrichter bevalenn inn solichenn sachen nicht furt zwfarenn”

<sup>257</sup> Berlin 271, Q16, “Attestationes,” 1537: “Diewiele dann der Camerrichter, als ein recusirt, verschlagenn und arch- weniger richter uber das alle furzufharenn attentirt und ew. f.g. und ehw. inn diessenn sachenn zw commissarien gesatz, des er doch als ein recusirter ired verhoffenns keinn gefug, noch recht hadt, oder habenn kann.”

when “there was a right answer, but the jurist disregarded it in order to produce a wrong answer that fit his ideological predispositions. The defining aspect of this form is that the advocate claims not just that his opponent chose the wrong answer for the bad reason of covert ideological preference, but that there was a right answer, which countered the preference, which the opponent was bound by fidelity to law to adopt.”<sup>258</sup> It is another thing, however, when the “opponent has made the mistaken claim that there is a single right answer, and that it favors his side of the controversy. The motivation for the error [...] is the conscious or unconscious desire to turn ideological preference into legal necessity, with all the political advantages that transformation produces.”<sup>259</sup> It was this latter form of suspicion that is evident in the Reformation cases. Each side saw its interpretation as legally necessary, and saw the other side’s interpretation as motivated.

Take for instance a letter written to the Court President and judges in the context of a case brought by the imperial Fiscal against Lindau for changes it had made to worship and ceremonies in the churches there.<sup>260</sup> In it, Lindau argued that the cases concerning the religion should not proceed, that the Court should pause them, and if they do proceed, then “we cannot understand for what reasons and motivations [you would not pause them] other than to burden the city of Lindau.”<sup>261</sup> By failing to suspend the cases, they said, they were going against the Treaty of Vienna that promised a suspension of cases concerning the religion.<sup>262</sup> The summons sent out against Lindau, they said, contradicted the intentions of the Emperor and the King in negotiating that Treaty, to bring peace and unity to the Empire.<sup>263</sup> For the protesting estates, the judges continuing to adjudicate in the cases that the protesting estates considered matters of religion, after yet another treaty that promised a suspension of the cases, that in itself was evidence of their bad faith, their bias, and their desire to burden the parties for no other reason than that they were of the evangelical understanding. This reasoning is also evident in the Recusation of 1534 itself when the protesting estates make the remarkable argument that, given how obvious it is that these cases grew out of disagreements in articles of faith and worship which the protesting estates have with the papist priests and clergy, the very fact that the judges did not make this legible in the cases exposed their bias.<sup>264</sup>

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<sup>258</sup> Duncan Kennedy, “The Hermeneutic of Suspicion in Contemporary American Legal Thought,” *Law and Critique* 25, no. 2 (2014): 102.

<sup>259</sup> Kennedy, “Hermeneutic of Suspicion,” 102.

<sup>260</sup> Munich 5654, no quadrangle, last document in case file, 1536. See Chapter 4 for more on this case. This document is also contained in Harpprecht, vol. V, 372ff., having been submitted in the context of other cases, such as Stuttgart 2808.

<sup>261</sup> Munich 5654, no quadrangle, last document in case file, 1536: “Nicht können wier ermessen aus was ursachen oder bewegnussen anders dan darmit hochgedachte unsere gnedigst gnedig chur und fursten hern obern und freunde und derselben liebe mit verwanten Burgermeyster und Rath der Stadt Lindaw fur und fur zubelestigen und zubeshweren dieweyl mus diese jegen den von lindaw angezogne sachen one alle mittel ein Religion sachen und also die stende dieser löblichen verstentnus samptlich antreffend und ir gemein ist und iren chur und furstlichen gnaden gnaden und gunsten als gemein zuvortierten und zuverteydigen gebuhren will.”

<sup>262</sup> Schlütter-Schindler, 148-54. See footnote 41 in Chapter 4 on the Treaty of Vienna of 1535.

<sup>263</sup> Munich 5654, no quadrangle, last document in case file, 1536: “und sich genzlich und unzweyfflich versehen und vertrosten das solchs wie in ewer furstlich gnaden gnaden und ewre mytgeteilten gegen den von lindaw ladung widerwertiglich verleybt und befunden wirdet hochgedachter kayserlicher und koniglicher maiestaten gemueth und meynung so ferne ir beyder maiestaten des grunds genugsam bericht und erinnert werden nicht sein und dan hiedurch zu einiger beunruigung im heyligen Romischen Reich besonderlich diesen gezeiten und laufften kein ursach geben werden, als wier wissen unsere herschafften und öbern ungerue iren thyls thun sondern lieber friedt und einickeit sehen auch furdern und erhalten helffen wolten.”

<sup>264</sup> Fabian, *UARP I*, Nr. 99, 267.

For many historians, this form of suspicion is the predictable corollary of a politicized legal system, a system in which the boundary between law and politics did not really exist—a familiar attribution about the Holy Roman Empire.

However, I have striven in this dissertation to show that this is too reductivist, for two reasons. First, it fails to take seriously the legal and constitutional culture of the Holy Roman Empire, and the nuanced and specific ways in which the legal and the political were co-constituted. Second, it relies on the mistaken premise that there is a strict analytic distinction between law and politics, or that politics somehow delegitimizes law, or swallows it up.<sup>265</sup>

I have endeavored to show, by contrast, the usefulness of looking phenomenologically at these legal events. In particular, I show that, whatever the cause of the suspicion, whether justified or not, whether rooted in an incomplete legal system or not, the suspicion itself came to be associated with deployments of the religion category. Put concretely, anytime anybody uttered “matter of religion” or “the religion-peace,” inevitably questions would arise about the referent, valence, and scope of those terms. In answering these questions differently, and as the difference between the answers became more predictable, and more associated with certain alignments and group formations, suspicion that the different answers to the questions were the result of these pre-dispositions became more salient. Here we see the traces of a pattern that would persist into the post-Augsburg order, namely, the idea that certain legal interpretations, when it came to religion-peace law and matters of religion, belonged to certain confessional parties as a matter of course. It was this pattern of mutual suspicion that contributed to the division of legal interpretations of the Augsburg Peace, and led to a breakdown of the constitutional order in the seventeenth century wars.

### **Bootstrapping as a Legal Strategy with Profound Consequences**

Collectively, these instruments constituted the legal strategy that the protesting estates used to contest the Court’s jurisdiction. Together, they formed a robust if dubious challenge to the Court. In a way, each component leaned on the next, and all of them held tightly to the one concession they needed to make it all possible: the concession granted in 1532 that the Court would suspend cases concerning the religion. This bare recognition—we might even say, just the utterance of that name, since the referent was unclear and unknown to the Emperor and Judges with authority to define it—made it possible for the protesting estates themselves to give ad hoc legal personality to their technically heretical group formation through the power of attorney, and to bootstrap “religion” into legal existence as a category of legal issue. Even as the other parties and the Court ignored powers of attorney, denied the validity of the Recusation, and responded in a variety of ways to the argument that a dispute had its origins in a dispute about the religion, these instruments facilitated a de facto naming—both of the category “matter of religion” and of the evangelicals as a group.

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In the next chapter, we jump ahead to the 1555 Augsburg Religion-Peace. But much happened in the 1540s and early 1550s that are not discussed in depth here.

In 1541, the first Imperial Diet took place since the 1532 Regensburg Diet. For the first time, a suspension of the Reformation cases was promised in the form of a Recess. Once again,

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<sup>265</sup> See Christopher Tomlins, “How Autonomous is Law?” *Annu. Rev. Law Soc. Sci.* 3 (2007): 45-68.

the promise led to no drastic change in the Court's judicature. In 1542, the protesting estates declared a general recusation of the Court in all of its jurisdiction, not only in matters of religion. Between 1544 and 1548, the Court was effectively shut down for lack of financing. In the early 1540s, Emperor Charles V adopted a more assertive approach in the Empire, and in 1546 at the Regensburg Diet he declared the Landgrave of Hessen and the Elector of Saxony in the *Acht* for their participation in a 1542 war.<sup>266</sup> In 1547, a war broke out between the Schmalkaldic League and forces loyal to the Emperor. The League lost; the Landgrave of Hessen capitulated and was taken into captivity; the Elector of Saxony was defeated and captured, his electoral title and territory transferred to Duke Moritz who, though he fought on the side of the Emperor in this war, would end up becoming the new proto-Protestant center of gravity after the fall of the League; and all other nobles who had followed League princes were required to pay large sums in exchange for the Emperors forgiveness.<sup>267</sup> When its financing was renewed at the 1548 Augsburg Diet, the Imperial Chamber Court reopened. While the Emperor was at the height of his power, despite checks in the form of papal hostility and estate solidarity, he pursued a politics of imperial religious reform that would be led by him. His so-called "interim politics" proposed "nothing less than a new hybrid imperial religion" while waiting for a Council to restore lasting unity in religion.<sup>268</sup> These proposals, and the constitutional changes they required at the territorial and city level, among other issues such as electoral jockeying, unlocked resentment among the estates, who in 1551 carried out the Prince's Rebellion. Significantly weakened, the Emperor was sidelined as estates, led by Duke Moritz, negotiated the Passau Treaty of 1552 with King Ferdinand. When the Augsburg Peace was negotiated a few years later, it was an attempt to bring the terms of the Passau Treaty from the status of a treaty following a specific rebellion to the status of imperial law.<sup>269</sup>

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<sup>266</sup> Whaley, *Germany*, 318-319.

<sup>267</sup> Whaley, *Germany*, 320.

<sup>268</sup> Whaley, *Germany*, 323.

<sup>269</sup> Drecoll, 85-7, 94.

## CHAPTER SIX

### THE CONTAINMENT OF “RELIGION” AS AN IMPERIAL LEGAL CATEGORY

The Augsburg Religion-Peace of 1555 is widely regarded as an “epoch caesura.”<sup>1</sup> It is a fixture of German historical periodization. It was, writes Heckel “the most important constitutional law of the first German Empire.”<sup>2</sup> 1555, it is said, marks the end of the “tumultuous age of the Protestant Reformation in the German lands” and the beginning of the “era of confessional formation and negotiation.”<sup>3</sup> Often, 1555 even operates as a metonym for the shift from the late medieval to the early modern periods.<sup>4</sup>

In public and academic discourses alike, the Peace has been subject to a variety of polemical interpretations. Authors from a range of confessional and political orientations wrangled over questions of whether the Peace was good or bad for the development of the German nation-state; whether it contributed to the thriving or the confinement of the true faith (whatever that may be for a particular author); whether its primary effect was to maintain a short-term peace in the decades following 1555, or to create the conditions in which the wars of the seventeenth century broke out; whether it contributed to unity or to polarization and division; among others. Some argued that the Peace hampered the spread of their true faith, and the ultimate unification of the religion; that the Peace represented the victory of politics over theology, and that had the negotiations not been dominated by jurists and diplomats—had, indeed, the division been let to go to war earlier on—then God’s hand could have settled the final resolution of the religious division in the German lands.<sup>5</sup>

Since the mid-twentieth century, the evaluative benchmarks for the Peace have shifted, from the nation-state, confessional thriving, and religious unity, towards secularization, toleration, and individual freedom of conscience. To what extent did the 1555 Peace bolster imperial institutions designed to channel potentially violent religious conflict? To what extent did it facilitate multiconfessionalism and everyday toleration? To what extent did it pave the way for modern secular configurations of public law? These questions continue to motivate some studies of the Augsburg Peace as a proleptic event.

These debates about the big picture value of the Peace stand in interesting contrast to the text of the Augsburg Peace itself, which deals with highly tangible aspects of law—especially peace, property, and jurisdiction. The purpose of this chapter is to tie the Augsburg Peace of 1555 to its litigative pre-history. Jurists and diplomats, representing the Empire’s estates and rulers, crafted the Augsburg Peace against the backdrop of litigation in the Imperial Chamber Court on matters of peace, property, and jurisdiction. And they crafted it with the understanding that its terms would be authoritative for all related future litigation in that Court.

Yet the specific relationship between the pre-1555 litigative history that we have been exploring in this dissertation, and the 1555 Augsburg Religion-Peace has been largely neglected, in favor of political histories that foreground the watershed treaty’s negotiations, or forward-looking studies about the German nation-state, secularism, and the rule of law. Though there is a

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<sup>1</sup> Gotthard, 1.

<sup>2</sup> Gotthard, 651 quoting Martin Heckel.

<sup>3</sup> “The Religious Peace of Augsburg (September 25, 1555),” accessed July 10, 2019, [http://germanhistorydocs.ghi-dc.org/sub\\_document.cfm?document\\_id=4386](http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=4386)

<sup>4</sup> Heckel, “Autonomia,” 142. See discussion in Gotthard, 500-78.

<sup>5</sup> For more on the reception history of the Augsburg Peace from the sixteenth century to the present day, see Gotthard, 587-651.

general understanding in the literature that the agonism of the Reformation cases contributed to the conditions in which crafting a Peace like that of 1555 was necessary, they do so again by treating the Reformation cases not as litigation events, but as political events—not in terms of the jurisprudential and procedural details we find in case files, but in terms of negotiations about the cases found in assembly protocols.

In addition, although the Augsburg Peace is regarded as a significant event in the history of religion, few scholars have closely analyzed what the Peace has to say about “religion.” Building on the research presented in Chapter 4, I will highlight one particular aspect of the Peace, namely: its containment of the hitherto unruly term “religion” as an imperial legal category. In Chapter 4, I showed that in the 1530s and 1540s the term “matter of religion” was developing a bricolage legal character; that this development happened not by way of orderly deliberation, but piecemeal in the context of high-stakes litigation formally about matters of property, peace, and jurisdiction; and that the facets of this emergent legal category developed in terms not just of what the generic referent of “matters of religion” was (including ceremony, worship, and clerical offices) but in terms of strategies, forms of argumentation, affective associations, and nodes of agonistic disagreement that came to cleave and inhere to the category as it was applied and invoked at law.

In this chapter, I argue that what the Peace did was to contain within its terms, under a new category of legal issue—“religion”—the range of complicated and fraught peace, property, and jurisdiction issues that had been the stuff of Reformation litigation since the 1520s. There was a continuity in the substance of the legal issues being litigated in the Court; now they were being litigated under the heading of the “Religion-Peace.” I argue that we cannot make sense of the significance of this new heading without understanding the contested nature of the “religion” category prior to 1555.

I link this containment move with the legal culture and juridical technique of dissimulation. I argue that the character of the Peace as essentially dissimulative and ambiguous shaped the way that this new category of legal issue, this newly justiciable object, was conceptualized at its conception. In other words, “religion” as an imperial civil law category did not have a simple noun-like referent, rather, it gestured to a “problem-space.”<sup>6</sup>

The heart of this chapter is an analysis of the first Imperial Chamber Court case in which the Augsburg Religion-Peace was the ruling law. Even in the pre-trial stage of this case, the first that tested the meaning of a violation of the Augsburg Religion-Peace, parties were debating the most fundamental doctrinal question of the relationship between the “two powers”—spiritual and temporal—citing authoritative texts from the Church fathers to Justinian.<sup>7</sup> One does not see this level of debate and citation in the pre-1555 cases. A close reading of this case suggests that, far from settling the “religion” question, the Augsburg Peace simply shunted the question into a new holding pattern, one in which the Court was no more capable of actually resolving the case than it had been before.

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<sup>6</sup> Scott, 4.

<sup>7</sup> Bayerisches Hauptstaatsarchiv (RKG) 264.



## The Augsburg Religion-Peace of 1555: Its References to Litigative Pre-History

The Augsburg Religion-Peace of 1555<sup>8</sup> was one part of the Recess produced at the end of that year's Diet.<sup>9</sup> Far from a manifesto for toleration or freedom of conscience, or a declaration of the principle of territorial sovereignty in religious matters, as it is often portrayed in the historiography, the Peace was concrete and narrow in its language. It is clear that the Peace addressed precisely the kinds of concrete disputes that had arisen among rulers during the Reformation—the kinds of issues that the Imperial Chamber Court had failed to adequately resolve—particularly in the areas of property, jurisdiction, and peace, and that it borrowed language from the Recesses that had been cited in that litigation.<sup>10</sup> Several articles, for instance, referred to maintaining the peace, and the inviolability of possessions and rights in general. No one, it stated, may for any cause engage in feuds, make war upon, rob or besiege another, nor aid others who do so, nor cut off any other Estate from access to provisions, or interfere with its trade, rents or incomes (Section 14). Nor may any one make war upon any Estate of the empire on account of the Augsburg Confession, nor do violence to them, nor force them to abandon their Confession in the dominions where it had been established, and any violation of this would be considered a breach of the Peace (Section 15). Neither may those of the Augsburg Confession commit any of the above-mentioned acts to the detriment of those who adhere to the old faith, or disturb them in their possessions and rights (Section 16).

One frequent issue in the Reformation litigation had to do with clerical incomes, and the appointment of clergy. It is dealt with in the passage that would come to be referred to as the “*reservatum ecclesiasticum*” (clerical exception): when a spiritual estate (i.e. prince-bishop) abandons the old religion and becomes an adherent of the Augsburg Confession, he would immediately lose his office and stop receiving its incomes, and officials of the old religion should appoint his successor (Section 18).<sup>11</sup>

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<sup>8</sup> Note that I translate *Religionsfrieden* as Religion-Peace, rather than the more conventional “Religious Peace.” I do so because *Religionsfrieden* is a compound word, not an adjective (religious, which would be *religiös*) modifying a noun (peace). This is a Peace whose subject is religion. See Gross, 29, on the way in which the Augsburg Religion-Peace was the final chapter of the Public Peace movement.

<sup>9</sup> The Recess itself is lengthy, containing 144 sections, only 20 or so of which are relevant to the “Religion-Peace.” The other sections are about matters of governance, finance, coinage, military, criminal law, and the running of the Imperial Chamber Court.

<sup>10</sup> On the way the Passau Treaty of 1552 shaped the Augsburg Religion-Peace of 1555, see in general Drecoll, *Der Passauer Vertrag*.

<sup>11</sup> This was a pro-old-faith exception to the *ius reformandi* principle, ensuring that hitherto spiritual territories would remain so. But the legal status of this passage was distinctive; the clause begins by stating that it was written without the agreement of all estates, and therefore was included in the Peace on the authority of the imperial majesty. Protestants would later argue that, having not agreed to the passage, it was not binding on them. Also, the passage speaks explicitly about prince-bishops who converted while in office, but says nothing about the status of a prince-bishop who was evangelical at the time he was elected—a prospect that seemed unimaginable to proto-Catholics at the time. Nonetheless, at the very end of negotiations, proto-Protestants managed to secure an exception to the exception from King Ferdinand, who appended a statement to the Peace—the so-called *Declaratio Ferdinanda*—stating that *landsässig* nobles, cities and communes (i.e. subject to a territorial ruler, not to the Emperor himself) that had already been adherents of the Augsburg Confession “from a long time and years prior,” and who were in the territory of a Catholic prince-bishop, might remain evangelical. This was an exception to the exception, and both exceptions undermined the *ius reformandi* principle in distinct ways—by requiring a territorial ruler to be of the old faith in order to keep his office, and then by stating that not all subjects would be required to follow the prince-bishop in faith. Like the clause to which it was an exception, the legal status of the *Declaratio Ferdinanda* was different from that of the Peace overall, being the product not of estate-level negotiations but promulgated unilaterally by the King; its validity was therefore always the subject of intense negotiations. See

Another frequent property issue had to do with the status of *landsässig* church property; that is, property that was privately held by the Church within a territory politically ruled by a city or a secular prince who had chosen the Augsburg Confession. Throughout the first half of the sixteenth century, evangelical rulers had been confiscating these properties and the Church began suing them in the Imperial Chamber Court for these acts. Now, the Peace said simply that *landsässig* church properties and church goods would remain in the hands of those who possessed them at the time of the 1552 Passau Treaty, and that the Imperial Chamber Court might not accept any suit concerning such goods (Section 19).

Several sections were likewise a direct response to the kinds of jurisdictional disputes that were litigated in the Reformation cases. No estate, the Peace continued, should induce or force another's subjects to accept his religion or abandon the other's, or take such subject into his *Schutz und Schirm* (lordly protection) as against his orderly ruler (Section 23). Note that the language of this section was much more about protecting the rights of the ruler to define the religion of his territory, than it was about the rights or consciences of a subject. Another clause limited the Church's jurisdiction within Protestant territory: the spiritual jurisdiction shall not be exercised vis-a-vis adherents of the Augsburg Confession with respect to the religion, beliefs, clerical appointments, usages, rules, and ceremonies they have established, but its jurisdiction still stands on other issues (Section 20). Here, too, one element of the *cuius-regio-eius-religio* principle, for which the Peace is best known, was articulated in concrete language reflective of litigation disputes, rather than as an abstract principle.<sup>12</sup>

Even the way in which the Peace defined the permissible confessions (limiting it only to the Augsburg Confession and the "old faith," and excluding all others, section 17) reminds us that it was addressing not all people, including subjects, but only princes, free imperial knights (Section 27), and the magistrates and councils of cities;<sup>13</sup> in other words, it was a Peace among rulers, addressing the kinds of people who took part in Reformation cases in the Imperial Chamber Court. The section on the right of subjects to emigrate, what would come to be called *ius emigrandi*, also ultimately addressed the rights of rulers: the section stated that subjects who changed religion to one different from their ruler might leave that land and settle elsewhere, but lords had customary right to demand recompense for granting them freedom from subjecthood (Section 24). Far from seeking freedom of conscience when they sought the right to emigrate for subjects, the drafters' purpose was rather to prevent inner-territorial uprising by subjects who wanted to pursue their own religion in the territories, and the Catholics and Protestants were largely in agreement about including it in the Peace on those grounds.<sup>14</sup> Indeed, the *ius*

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Gotthard 17-8.

<sup>12</sup> The *ius reformandi* principle is composed of a variety of elements that are contained in a variety of clauses of the Peace. For instance, in the sections calling for an end to violence, quoted above, there is reference to the inviolability of the domains in which one or the other religion had been established—linking territory, sovereignty, and religion, and stating that no neighboring ruler might undermine this, nor might a subject oppose it violently. See Gotthard 100-110. Also Schneider, *Ius reformandi*.

<sup>13</sup> An apparent exception to the *ius reformandi* principle, though, had to do with free and imperial cities. The Peace says that in many free and imperial cities both religions had been practiced, and they should continue doing so; neither party should try to abolish or force the other to abandon its religion (Section 27). This clause is often cited as a guarantee of confessional parity and mutual toleration in imperial cities, or that mutual toleration was required in certain cities. In fact, this clause raised questions around the nature of sovereignty of imperial cities; were these imperial cities to remain biconfessional because this law created an exception to the *ius reformandi* of a city? Or were they required to be biconfessional because an imperial city magistrate in fact had no *ius reformandi*, being ultimately subject to the Emperor? See Gotthard, 14-6.

<sup>14</sup> Gotthard, 118-9.

*emigrandi* was as much a ruler's right to expel as a subject's right to leave.<sup>15</sup> Though it would reduce the pressure of demanding conformity of religion upon individual subjects (a religio-politics of heresy prosecution), it would prove to preserve and increase the uniformity and confessionalization of a territory. Therefore, the *ius emigrandi* clause was not envisioned as an exception to *ius reformandi*; on the contrary, it made *ius reformandi* practicable.<sup>16</sup>

This link between the Reformation cases and the terms of the Augsburg Religion-Peace are made even more explicit in the section that addressed the Imperial Chamber Court, where we are reminded that the Court remained the preferred forum for litigating disputes about the matters of the kind outlined in the Peace.<sup>17</sup> In particular, we are reminded here that not only was the Augsburg Peace backward-looking, crafted in response to the litigation of the previous decades, but it was also forward-looking, positioned to be the governing legal regime that would rule in religion-related disputes that would be litigated in the Court thereafter. The Imperial Chamber Court must, it said, conform to the terms of this resolution, and must inform parties of its relevant terms (Section 32)—a clause which effectively “deprived the Emperor of the power of interpreting what was or was not a breach of the law.”<sup>18</sup> The correspondence between the Emperor and the Judges of the Imperial Chamber Court surrounding the Nuremberg Settlement of 1532, and the meaning of “matters of religion” (described in detail at the beginning of chapter 4) provides the context for this limitation on the Emperor.

The Peace also stated that the Imperial Chamber Court's personnel, including Court President and judges, may be appointed by those of both the old religion and of the Augsburg Confession (Section 104-106)—overturning a 1532 rule that no Court personnel may be evangelical.<sup>19</sup> In addition, whereas the Treaty of Passau permitted two forms of oath (both “upon God and the saints” which excluded those of the Augsburg Confession, and “upon God and the holy Gospels” which was preferred by those of the Augsburg Confession) the Peace here changed the form of oath to the singular form “upon God and the holy Gospels” at the Imperial Chamber Court, which was regarded as more neutral (Section 107).<sup>20</sup> The Imperial Chamber Court Ordinances of 1555, which were also negotiated at the Augsburg Diet of 1555, made changes to the operation of the Court that likewise reflected issues that had arisen in the course of Reformation litigation, such as limiting the authority of the imperial fiscal to prosecute, changing the number of judges that the Emperor appointed, and regulating visitations of the Court.<sup>21</sup>

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<sup>15</sup> Gotthard, 11.

<sup>16</sup> Gotthard, 119. See Bernhard Ruthmann, *Die Religionsprozesse am Reichskammergericht (1555-1648): eine Analyse anhand ausgewählter Prozesse* (Cologne: Böhlau, 1996), 296-310 for more on the debate about this.

<sup>17</sup> Gotthard notes that neither the language nor the intention of the Peace actually limits jurisdiction of Peace-related cases to the Imperial Chamber Court; though it was the preferred forum for litigating under the terms of the Peace, suits could also be brought to the Reichshofrat (Gotthard, 405). For more on Reichshofrat, see Chapter 1, footnote 15 of this dissertation.

<sup>18</sup> Smend, 179-80.

<sup>19</sup> However, unlike in 1648, when parity became the preeminent ordering principle of imperial public law in matters of religion, the parity of judicial panels was not strictly enforced under the terms of the 1555 Peace (Heckel, “Autonomia,” 240).

<sup>20</sup> See also Adolf Laufs, Christa Belouschek, and Bettina Dick, eds., *Die Reichskammergerichtsordnung von 1555* (Cologne: Böhlau, 1976), 151 (Part 1, LVII. Von deß keiserlichen cammerrichters und der beisitzer eydt).

<sup>21</sup> Whaley, *Germany*, 334-5. See Dick on changes to Imperial Chamber Court Ordinances in 1555. Unlike the Augsburg Religion-Peace, its terms lasted until the end of the Holy Roman Empire, with some minor changes. On visitations, see Chapter 5.

## The Augsburg Peace's Ambiguity

Thus, the language of the Peace was concrete and narrow, reflecting not only the peace, property, and jurisdiction disputes that had been litigated in the Imperial Chamber Court since the 1520s, but also formulated in such a way as to be the legal framework for future disputes that would find their way into the Imperial Chamber Court.

Yet, the language of the Peace, as concrete and narrow as its terms were, was laced with ambiguities. In part, these ambiguities were at the level of interpretation of specific clauses. Section 19, on possession of *landsässig* church properties, for instance, raised all kinds of questions.<sup>22</sup> Some Protestant rulers had allowed clergy to stay in monasteries in their territories throughout the 1520s, 30s, 40s, and 50s, and to continue receiving incomes, with the intention of letting them “die out,” rather than pushing them out. Would those rulers now be forced to accept Catholic “islands” within their Protestant territories, whereas those who had been more aggressive in confiscating and/or converting church property would not have to worry about that?<sup>23</sup> The ambiguity of this clause unleashed a lot of litigation post-1555 about every “slanted shanty left over from a monastery settlement, and every muddy field that monks used to own.”<sup>24</sup>

But even on a more foundational level, the nature of the Peace itself was deeply ambiguous. Some of its ambiguity was related to the nature of imperial law as a whole. The Peace was negotiated among the estates, with King Ferdinand representing the Emperor's interests. Therefore, the extent to which this Peace, like other imperial recesses, had more the character of law or a contract, was bound to be disputed.<sup>25</sup>

More to the point, the Peace was deeply ambiguous as to its purposes and timescale. The *narratio* explicitly described the Peace as an attempt to bring security and safety to the Empire, and to prevent the outbreak of war, mutual aggression, or rebellion, despite the persistence of the division in religion. Referencing earlier settlements and recesses, the *narratio* began by saying that previous agreements concerning “the disputed religion” had apparently been insufficient to maintain common safety and security, and the Estates, along with the Emperor's deputy, the King, had agreed at this assembly that it was of the highest importance to address this issue (Section 7, 8). They collectively realized that compromise and agreement about the “main articles and matters of our holy Christian faith, ceremonies and church usages” were not to be found in a short amount of time, as had initially been hoped or expected, and that the more time passed, the more the division was causing war and rebellions that were disrupting common safety—and that without such safety, any further agreement among the Estates about the main articles and matters would be hindered (Section 9). Thus, the Estates agreed that they needed to set aside these core issues for the time being, for a later date (Section 10), and instead focus on a resolution to establish common peace and security in the German nation (Section 11), especially as the Land-Peace seemed, on its own, to have been insufficient to prevent such disquiet (Section 12). The Peace also recognized that some of the imperial recesses and resolutions of the last thirty years had proven not only insufficient, but had even contributed to antipathy and mistrust

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<sup>22</sup> See description of section 19 above.

<sup>23</sup> Gotthard, 13.

<sup>24</sup> Gotthard, 13. For more on post-1555 religion litigation, see Ruthmann, *Die Religionsprozesse*.

<sup>25</sup> Gotthard 5n15; Heckel, “Autonomia,” 228-33. See in general this dissertation's Chapter 2 about the status of a recess.

among the Estates, and had shown that an immediate resolution, in matters both religious and profane, was not possible (Section 13).

Thus, the Augsburg Religion-Peace was a “worldly peace”—it decoupled peace from the question of a substantive compromise in matters of correct confession, worship, and ceremonies.<sup>26</sup> But, this worldly peace was not intended to sustain a confessional division permanently. Rather, the settlement of issues of faith, ceremonies, and church usages would be postponed, and the present Peace aimed to restore common safety and security “provisionally but enduringly,” in order to facilitate mutual trust and to create conditions conducive to an eventual settlement on those issues. Yet, the persistence of the Peace was in no way to be coupled with the resolution in faith matters; the Peace was to endure in spite of a lack of resolution in such matters. Section 25 summarized this rather nicely: the peace was provisional, designed to ensure security and trust among estates, so that an ultimate resolution on religious unity could be achieved. However, even if a coming Council or Diet did not obtain such a religious restoration, this Peace would still remain in force (Section 25). In the decades following, the question of whether the Peace was to be regarded as a temporary emergency measure (Catholic interpretation), or a constitutional basic law (Protestant interpretation) became more and more difficult to settle.<sup>27</sup>

Heckel writes that the “durability and the temporariness conditioned each other paradoxically”; on one hand, to recognize the enduringness of the Peace was to violate the absoluteness of one’s confessional claim and of the godly law. It therefore had to be described as an interim instrument. At the same time, for as long as the Peace was valid, it “legally ensured and spiritually perpetuated division in the religion.”<sup>28</sup>

Each of these characteristics of the Peace—that it was worldly but aimed to create conditions for eventual religious reunification, that it was provisional but enduring, and that it was both constitutional and contract-like—reflect the deep ambiguity of the Peace.

### **Dissimulation, Vagueness, Casuistry, and Indecision**

Linguists and philosophers of language have long debated the status of vagueness, ambiguity, and generality in legal expression.<sup>29</sup> In the background of these considerations is the

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<sup>26</sup> Volker Henning Drecoll, *Der Passauer Vertrag (1552): Einleitung und Edition* (Berlin; New York: de Gruyter, 2000), 26.

<sup>27</sup> Ruthmann, 11; Heckel, “Autonomia,” 237ff. The final words in the Recess about the Peace stated that having agreed to postpone settling the core issues for a future imperial assembly, everyone also agreed to be present in person (i.e. not through delegates) at that assembly except if ill health prevented them; and in the meantime, each should constitute his scholars and theologians so that negotiations might proceed without delay and conclude in a fruitful way (Section 139-140). The document concluded, before the listing of signatories, with the exhortation that since such future negotiations concerned not just temporal well-being but also “our salvation and deliverance,” no unnecessary delay should come up. They settled on a date of March 1, 1556 to meet at Regensburg for the next assembly (Section 141). A resolution in matters of faith, ceremonies, and church usages never came. Charles V abdicated soon after, leaving the Emperorship to his brother King Ferdinand.

<sup>28</sup> Gotthard, 89 and the literature cited there. For more on this principle of political peace, see Gotthard 91ff. Luebke likewise calls this aspect of the Religion-Peace a “paradoxical fact that the Empire developed a durable multiconfessional regime in the absence of norms that endorsed plurality. Indeed, all but a few regarded plurality as a sign of disorder and decay” Luebke, “Multiconfessional Empire,” 131.

<sup>29</sup> See Ralf Poscher, “Ambiguity and Vagueness in Legal Interpretation,” in *The Oxford Handbook of Language and Law*, ed. Lawrence M. Solan and Peter M. Tiersma (Oxford UK: Oxford University Press, 2012), 129-134.

primacy of the rule of law doctrine. The ideal of the rule of law requires a certain standard of clarity in legal expression to protect values like predictability for the community, the narrowing of the domain that invites judicial discretion, and the prevention of arbitrariness in that discretion.<sup>30</sup>

But it is not enough to see the ambiguity of the Peace as simply an indication of an underdeveloped legal science, or the incompleteness of the rule of law. Instead, the ambiguity of the Peace indicated certain background values that were characteristic of the legal culture of early modern Germany.

Gotthard uses evidence from Augsburg Diet protocols to suggest a number of reasons why ambiguity and vagueness were such a central characteristic of the Peace; he suggests that it was not unintentional, but rather very intentionally and self-consciously done. First, Gotthard notes that some negotiators, such as those from Dresden, when they saw that an issue threatened to derail negotiations or to steal time, would caution to not gamble away the whole agreement, and to move towards generality.<sup>31</sup> So in addition to the basic interest in finalizing an agreement that would secure stability and peace, we may also identify here the immanent interests of participants in a process whose success or failure reflect on their abilities and capacities.<sup>32</sup>

In contexts of limited time and incommensurable opinions, vague language permits legislators “to postpone decisions” and to allow “each party to the compromise [to] read [...] its own position into the text.” Such choices can “hide disagreement,” and permit movement forward. Vagueness reduces decision costs.<sup>33</sup> Carl Schmitt called this approach “dilatatory formal compromise,” which he contrasted with “genuine substantive compromise.”<sup>34</sup> “Its essence [...] is simply the drawing out and postponing of [the substantive] decision. [It] consists in finding a formula that satisfies all contradictory demands and leaves, in an ambiguous turn of phrase, the actual points of controversy undecided.” These are “effective compromises, for they would not be possible if there were no consensus between parties. But the understanding does not affect the issue in question; one only agreed on postponing the decision and to keeping open the most varied possibilities and interpretations.”<sup>35</sup>

Others at the Augsburg Diet advocate for dissimulation in specific moments because in the gaps, common law and canon law would have to be relied upon.<sup>36</sup> So especially those of the old faith thought that any ambiguities would ultimately work in their favor. Also, in this context, “a decision [was] often divisive in social terms. Where there may perhaps have been vague consensus before, a decision [made] dissent visible.”<sup>37</sup>

Perhaps most importantly, the Augsburg Recess “with its obscurities and ambiguities, fully reflected the fact that this was essentially an agreement between lawyers.”<sup>38</sup> The word “dissimulieren” had a legal meaning to describe the specific process of squaring various text drafts—thus it was a principle of textual editing.<sup>39</sup> Against the backdrop of the principle “*quod*

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<sup>30</sup> Poscher, 128.

<sup>31</sup> Gotthard, 52.

<sup>32</sup> Gotthard, 53.

<sup>33</sup> Poscher, 144.

<sup>34</sup> Carl Schmitt, *Constitutional Theory*, ed. and trans. Jeffrey Seitzer (Durham; London: Duke University Press, 2008 (1928)), 84-5.

<sup>35</sup> Schmitt, 84-5.

<sup>36</sup> Gotthard, 52-3.

<sup>37</sup> Stollberg-Rilinger, *Cultures of Decision-Making*, 8.

<sup>38</sup> Whaley, *Germany*, 333.

<sup>39</sup> Gotthard, 52. Contrast this meaning of dissimulation with the kind discussed in Miriam Eliav-Feldon and

*omnes tangit*” (whatever affects all, must also be approved by all), which was the basis for most workaday imperial assembly work, it was a habit of imperial assemblies to work and think in a dissimulative way in order to achieve this unanimity.<sup>40</sup> Thus, dissimulation was one part of a “complex of intellectual instruments and institutional arrangements” that constituted the habitus of imperial public law jurists, who led the efforts.<sup>41</sup>

Thus, the Peace was not a rational systemic unity, but a hard-chewed diplomatic compromise. It contained formal compromises, gaps, and intentional unclarity. As will be familiar from our study of protestations, parties tried to create constellations that would work to their advantage in future disputes over interpretation.<sup>42</sup>

Heckel argues that dissimulation was both a cause of and a response to the divergent legal interpretations of the Peace that were coming from the two sides. On the one hand, every clause of the Peace that on its face was evidence of agreement contained at its foundation the seeds of latent dissent. Dissimulation was the response to these kinds of basic disagreements, an attempt to rescue legal and imperial unity by hiding and covering over contradictions and contradictory interpretations with general, ambiguous, or vague language. But in the process, dissimulation gave parties room to interpret the clauses in the way suited to them. So, there was a cyclical quality here.<sup>43</sup> In the short term, it had a pacifying effect; but in the long term, it came at the cost of the truth-value of law, until the facially unified legal system could not sustain the breadth of interpretations held. Thus, in a way, “a crisis of legitimacy was ‘preprogrammed.’”<sup>44</sup>

### Uses of “Religion” in the 1555 Peace

In Chapter 4, I showed how the literature treats the vagueness and ambiguity of the “religion” category in discussion of the Reformation cases. We saw that most historians have tended to assume either that this vagueness was an indication of an underdeveloped legal science, or that the term was used exclusively as a placeholder for pre-conceived political determinations. I argued against this view, by showing that the vagueness of the term was at once a cause and a result of the bricolage manner in which the category was produced.

In this section, I return to the “religion” category. I argue that, just as the rest of the Peace was born out of the litigative pre-history of the 1520s, 30s, and 40s, so the religion category, as it was invoked in the Religion-Peace was born out of the tussle of these Reformation cases. And, just as the Peace was an attempt to stabilize a legal framework to replace the patchwork jurisprudence that characterized the previous decades when it came to matters of property, peace, and jurisdiction, so the Peace attempted to stabilize the “matter of religion” under its terms. More specifically, participants in the Augsburg Recess of 1555 decided that “religion” would be the term used to denote the kinds of issues covered under the Peace. Indeed, the Augsburg Peace refers to itself as a “Religion-Peace” (section 14) and a “Peace in Religion and other Matters”

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Tamar Herzig, *Dissimulation and Deceit in Early Modern Europe* (Basingstoke: Palgrave Macmillan, 2015).

<sup>40</sup> Gotthard, 53.

<sup>41</sup> Hunter’s main thesis in this article is that imperial jurists as a class held in the post-1555 order as “a duty of office” and as a matter of professional deportment (Hunter, 46) a particular understanding of confessions or religions as “juridical civil associations rather than mystical embodiments of Christ” (Hunter, 48); and of religious freedom as “the juridical recognition of a plurality of religions as legal entities under imperial law” (Hunter, 45).

<sup>42</sup> Martin Heckel, “Die Reformationsprozesse im Spannungsfeld des Reichskirchensystems,” in *Die politische Funktion des Reichskammergerichts*, ed. Bernhard Diestelkamp (Cologne: Böhlau, 1993), 24.

<sup>43</sup> Heckel, “Autonomia,” 167-190.

<sup>44</sup> Luebke, “Multiconfessional Empire,” 136.

(section 197).<sup>45</sup> Henceforth, a “matter of religion” meant a matter governed by the terms of the Augsburg Peace.

Knowing what we know about the fraught legal wrangling of the previous decades around this category, however, its usage here is not self-explanatory. Just as the sections dealing with property, peace, and jurisdiction, and with the nature of the Peace as a whole, harbored ambiguities, so did the conception of “matters of religion” that lay at the heart of the Peace. Far from defining the meaning of “matters of religion”—a term that, as we saw in chapter 4, had been the stuff of decades of legal wrangling and confusion—the Peace contained and enclosed the category without clarifying it. The production of the “religion” category in the previous decades represented natality in legal language; its use in the Augsburg Peace represented its containment.<sup>46</sup> The imperial estates collectively settled the meaning of “religion” to mean “those issues handled under the terms of the Augsburg Peace.” But this containment did not entail greater clarity or definition. Rather, it was simply a decisional process of naming, the creation of classificatory boundaries.

Its characteristic as a bricolage category remained, with all of its fraught ambiguities intact. Indeed, a close reading of the Peace itself shows how the term “religion” was made to do so much work in the text, and carried multiple valences. In short, in the Augsburg Peace, “religion” had an “excess of referents.”<sup>47</sup>

There seem to be at least three usages of “religion” in the text. First, religion referred to the two parties in disagreement. More often, “religion” was applied to “those of the old religion” (i.e. Catholics); the Protestants were referred to as “those of the Augsburg Confession” rather than as followers of a new “religion.”<sup>48</sup> Once, “religion” was used in a double formulation to refer to both groups.<sup>49</sup>

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<sup>45</sup> Section 14: “of this present Religion- as well as general constitution of the established Land-Peace” (diesen nachfolgenden Religions-, auch gemeiner Constitution des aufgerichteten Land-Friedens). Note that here Religion-Peace and Land-Peace are parallel constructions.

Section 197: “the Court President and judges should adjudicate based on the above settled peace and resolution in religion and other matters” (Frieden und Fried-Stand in Religion- und andern Sachen).

Excerpts of the Augsburg Religion-Peace are from “Augsburger Reichsabschied [Augsburger Religionsfrieden],” *Internet Portal Westfälische Geschichte*, accessed June 26, 2018, <http://www.westfaelische-geschichte.de/que739>, digitized from Arno Buschmann, *Kaiser und Reich: klassische Texte zur Verfassungsgeschichte des Heiligen Römischen Reiches Deutscher Nation vom Beginn des 12. Jahrhunderts bis zum Jahre 1806* (Munich: Deutscher Taschenbuch Verlag, 1984), 215-283. For a critical edition of the text of the Augsburg Religion-Peace including draft variations, see Karl Brandt, *Der Augsburger Religionsfriede vom 25. September 1555 kritische Ausgabe des Textes mit den Entwürfen und der königlichen Deklaration* (Göttingen: Vandenhoeck & Ruprecht, 1927).

<sup>46</sup> On natality, see Constable’s discussion of Hannah Arendt (Constable, 91).

<sup>47</sup> David Lieberman, phone conversation with author, September 5, 2018.

<sup>48</sup> Section 16: those Estates “who adhere to the old religion, spiritual and worldly” (der alten Religion anhängig, geistlich und weltlich); compare, in the same section “those Estates related to the Augsburg Confession” (die Stände, so der Augspurgischen Confession verwandt)

Section 18: spiritual estates who “abandon the old religion” (von der alten Religion abtreten würden)

Section 24: those “following either the old religion or the Confession of Augsburg” (der alten Religion oder Augspurgischen Confession anhängig)

Section 106: by those “of both the old religion and of the Augsburg Confession” (von beyden, der alten Religion und der Augspurgischen Confession)

<sup>49</sup> Section 27: “both religions, namely, our old religion and the religion of the followers of the Augsburg Confession” (die beede Religionen, nemlich Unsere alte Religion und der Augsburg Confession-Verwandten Religion)

Section 15: “the faith, church usages, ordinances, and ceremonies of the Augsburg Confession-Religion”



Second, religion was something about which the parties disagreed. They each had their own “religion, faith, church usages, ceremonies,” etc. It was a shorthand for all of the issues that defined what made the two parties distinct from one another, a shorthand for the core conflict and constellation of disputes that provided the impetus for the Peace.<sup>50</sup> Inversely, “Christian religion and faith matters” referred to the ideal of Christian unity, which sat in contrast with the “division and split” that plagued it.<sup>51</sup> In many clauses, the phrase “both religions” was used to refer to that which the two groups, Catholics and Protestants, adhered to, practiced, or were “of.” The groupings themselves were sometimes referred to as “estates” or “adherents”<sup>52</sup> of a religion.

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(von dieser Augspurgischen Confessions-Religion, Glauben, Kirchengebrauchen, Ordnungen und Ceremonien). Note the composition word: “Confessionsreligion.”

<sup>50</sup> Section 15: “and in order that such peace is respected and maintained despite the disputed religion” (damit solcher Fried auch der spaltigen Religion halben)

<sup>51</sup> Section 140: “because of the laying aside of the damaging division and split in matters of our holy Christian religion and faith” (daß von wegen Hinlegung der schädlichen Spaltung und Trennung in Unser Heil. Christlichen Religion und Glaubens-Sachen)

Section 15: “the disputed religion shall only be brought to a complete, Christian agreement and compromise through Christian, friendly, and peaceful means” (soll die streitige Religion nicht anders dann durch Christliche, freundliche, friedliche Mittel und Wege zu einhelligem, Christlichem Verstand und Vergleichung gebracht werden)

<sup>52</sup> Section 17: “who are not adherents of either of the aforementioned religions” (so obgemelten beeden Religionen nicht anhängig)

Section 18: “of both religion-estates” (beeder Religions-Stände)

Section 20: “of both religion-kin” (beederseits Religions-Verwandte)

Section 26: “on account of both of the aforementioned religions” (obbemeldter beeder Religion halben)

Section 27: “for the imperial estates of both religions” (beeder Religion Reichs-Ständ)

Section 32: “regardless which of the above-mentioned religion they may be” (ungeacht welcher der obgemeldten Religion die seyen)

Sometimes “religion” stands alone as a generic term referring to that to which a ruler or subject adheres, such as: Section 23: “No estate shall induce another's subjects to accept his religion and abandon the other's” (es soll auch kein Stand den andern noch desselben Unterthanen zu seiner Religion dringen)

Section 24: “on account of their religion” (ihrer Religion wegen)

More often, when this generic meaning is intended, “religion” appears as one in a list, such as: Section 15: “will not make war upon any estate of the empire on account of the Augsburg Confession and the doctrine, religion, and faith of the same” (von wegen der Augspurgischen Confession und derselbigen Lehr, Religion und Glaubens halb)

Section 15: “let them quietly and peacefully enjoy their religion, faith, church usages, ordinances, and ceremonies, as well as their possessions, real and personal property,” etc. (sondern bey solcher Religion, Glauben, Kirchengebrauchen, Ordnungen und Ceremonien, auch ihren Haab, Gütern, liegend und fahren, Land, Leuthen, Herrschafften, Obrigkeiten, Herrlichkeiten und Gerechtigkeiten ruhiglich und friedlich bleiben lassen)

Section 16: let those who adhere to the old religion “abide in like manner by their religion, faith, church usages, ordinances, and ceremonies” (gleicher Gestalt bey ihrer Religion, Glauben, Kirchengebrauchen, Ordnungen und Ceremonien)

Section 20: “against the Augsburg Confession-kin's religion, beliefs, clerical appointments, usages, rules, and ceremonies” (wider der Augspurgischen Confessions-Verwanten Religion, Glauben, Bestellung der Ministerien, Kirchengebrauchen, Ordnungen und Ceremonien)

Section 20: “In other matters, however, which do not concern the religion, faith, usages, rules, ceremonies, and ministerial activities of the Confession of Augsburg's adherents [...]” (aber in andern Sachen und Fällen der Augspurgischen Confession, Religion, Glauben, Kirchengebrauchen, Ordnungen, Ceremonien und Bestellung der Ministerien nicht anlangend)

Section 27: “Neither party shall venture to abolish or force the other to abandon its religion, usages, or ceremonies” (des andern Religion, Kirchengebrauch oder Ceremonien). “On the contrary, according to the provisions of this peace, each party shall leave the other to maintain in a peaceful and orderly fashion its religion, faith, usages, ordinances, and ceremonies, together with its possessions” (bey solcher seiner Religion, Glauben,

Third, religion was something about which one may or may not make legal resolutions. “Religion” was used to refer to particular kinds of agreements, including the present Peace. It sometimes was used to refer to past, unsuccessful agreements.<sup>53</sup> A “*Vergleichung der Religion*” (compromise, restoration of the religion) always referred to the future deliberations about the “main matter” (“*Haupt-Sach*,” Section 140) that they were postponing for a later assembly or council.<sup>54</sup>

Thus, part of the ambiguity of the “religion” term arose from this excess of referents. But part of its ambiguity also had to do with one of the core issues that had characterized the legal wrangling about the “religion” term in the litigation of decades prior, namely, the relationship between matters of religion and worldly matters. As we saw in Chapter 4, it was always one of the contentions of the Protestants that “matters of religion” included not just issues generically associated with that term at the time—worship, ceremonies, and spiritual offices, for example. Rather, it also included disputes about temporal issues—such as property, peace, and jurisdiction—that “flowed from” or “had their origins in” disputes about worship, ceremonies, and offices. Old-faith litigants, lawyers, and judges often responded to this argument either by ignoring it and moving towards contumacy proceedings, or by expressing astonishment that the acts in question—like plundering and jurisdictional violations—could be given the honorific “religious.” The Augsburg Peace seems to have adopted the holding patterns of the Court when it came to describing the relationship between “matters of religion” and “profane and worldly

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Kirchengebräuchen, Ordnungen und Ceremonien, auch seinen Haab und Gütern)

Only one such list leaves out “religion” altogether: Section 9: final compromise on the “main articles and matters of our holy Christian faith, ceremonies and church usages” (Tractation über die Hauptarticul und Sachen Unsers Heiligen Christlichen Glaubens, Ceremonien und Kirchen-Gebräuchen)

<sup>53</sup> Section 7: “that the articles concerning the disputed religion made at previous imperial diets have been followed by breakdowns and tribulations” (daß der Articul der spaltigen Religion, daraus nunmehr eine gute Zeit allerhand Unrath, Unfall und Widerwertigkeit im Reich Teutshcer Nation erfolgt)

<sup>54</sup> Section 18: “a future Christian, amicable, and final compromise/restoration of the religion” (Vergleichung der Religion)

Section 20: “until a final compromise/restoration of the religion is attained” (biß zu endlicher Vergleichung der Religion)

Section 20: “until the final Christian compromise/restoration of the religion” (biß zu endlicher Christlicher Vergleichung der Religion)

Section 25: “a compromise/restoration of matters of religion and faith” (ein Vergleichung der Religion und Glaubenssachen) “must be pursued, but without an enduring peace” (ohne beständigen Frieden) “a Christian, friendly compromise concerning religion” (Christlicher, freundlicher Vergleichung der Religion) “cannot be achieved”

Section 25: “to assure the quick achievement of a Christian, friendly, and final compromise/restoration concerning the religious division” (desto ehe zu Christlicher, freundlicher und endlicher Vergleichung der spaltigen Religion); “until the Christian, friendly, and final compromise/restoration of matters of religion and faith” (biß zu Christlicher, freundlicher und endlicher Vergleichung der Religion und Glaubens-Sachen); “until the final compromise/restoration in matters of religion and faith” (biß zu endlicher Vergleichung der Religion und Glaubens-Sachen)

Section 139: “the necessary and beneficial compromise and unity in the disputed matters of religion and faith” (die nothwendige und heilsame Vergleichung und Einigkeit in der streitigen Religion und Glaubens-Sachen)

Section 141: “at the next imperial assembly, the Christian compromise/restoration of our holy religion and faith matters will be prioritized” (von Christlicher Vergleichung Unserer H. Religion und Glaubens-Sachen)

Also, “Tractation” refers to the same future assembly: Section 10: “that the discussion of these articles/points of the religion should be postponed to another set time” (daß die Tractation dieses Articuls der Religion auf andere gelegene Zeit einzustellen)

matters.”<sup>55</sup> Slippages in the language of the text between “religion” and “profane and worldly” show that the Augsburg Peace at once saw itself as postponing discussion about matters of religion for a future Christian Council or imperial assembly, and at the same time assimilating its resolutions as to profane and worldly matters under the heading “religion-peace.”

## The Peace in the Court

One of the often-neglected aspects of the Augsburg Religion-Peace is that it was understood at its conception to formulate the legal regime that would be ruling in disputes before the Imperial Chamber Court. That is, rather than suing under the various sources of law—the patchwork jurisprudence—of the previous decades for disputes arising out of the Reformation, from then on, all suits on the grounds of the Augsburg Peace would be “matters of religion.”

This section is about the first religion case—that is, the first legal dispute adjudicated under the terms of the Augsburg Religion-Peace before the Imperial Chamber Court.<sup>56</sup> A detailed reading of this case can tell us something about the impact of the Religion-Peace on litigation. It reveals that it stands out in contrast to the case files of the pre-1555 cases for the kinds of reasons it invokes and source texts it cites. This is especially remarkable as the case never made it to the *litis contestatio* stage. More specifically, unlike the dense particularism of the Reformation cases, the litigants in this case called upon some of the most foundational proof texts and legal sources with regard to the question of the two swords doctrine, and the relationship between temporal

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<sup>55</sup> Section 13: “in the current division of the religion a complete discussion and treatment of peace in both religion, profane and worldly matters will not be undertaken, and these articles have been worked upon and compromised in all ways so that both religions might know what to finally expect from the other” (in wahrender Spaltung der Religion ein erganzte Tractation und Handlung des Friedens in beeden, der Religion, prophan und weltlichen Sachen nicht furgenommen wird, und in alle Wege dieser Articul dahin gearbeitet und verglichen, damit beyderseits Religionen, hernach zu vermelden, wissen mochten, we einer sich zu dem andern endlich zu versehen)

The emphasis is mine. It appears there is a missing “and” – so the terms “religion, profane, and worldly” appear as in a list, rather than as a binary. But having been preceded by “both” we are looking for a pair. Since profane and worldly are synonyms, we have to assume an “and” to separate “religion” from “profane and worldly.” The meaning of this part would then be that since a peace regarding both types of matters—of religion, and of profane/worldly concern—could not be had, therefore they agreed to come to a peace about worldly matters alone.

But later, the very same group of terms—religion, profane, and worldly—was used differently, to refer to the set of issues that the Augsburg Peace itself addressed: Section 104: “according to the above settled, negotiated and ordered peace resolution in religion, profane and worldly matters” (nach dem obgesetzter verglichener und gebottener Fried-Stand in Religion, prophan und weltlichen Sachen)

And in one place, it was said that this Augsburg peace resolution’s ability to address “the disputed religion” issue would help maintain the peace “even in other profane and worldly matters”: Section 33: “and so that in this now settled peace resolution about the article of the disputed religion, having been transacted and decided, along with the imperial Land-Peace, can maintain the common peace even in other profane and worldly matters, bringing it into more actual rightness/regularity” (und damit jetztgesetzter Friedsstand uber den Articul der spaltigen Religion betheydingt und beschlossen, auch der gemeine Fried sonst in andern prophan und weltlichen Sachen neben und mit des H. Reichs Landfrieden desto bestandiger zu erhalten, auch in mehr wurkliche Richtigkeit zu bringen)

<sup>56</sup> I see no evidence of the Munich 264 case discussed in the existing secondary literature. I also see no evidence of an earlier case litigated at the Imperial Chamber Court under the terms of the Peace — but I am open to being corrected. According to Ehrenpreis, the earliest case about specifically monastery property in the Imperial Chamber Court after the promulgation of the Augsburg Peace was in 1556 about the Monastery Christgarten against Count von Ottingen. This case ended up one of the “Four Monasteries” cases. See Stefan Ehrenpreis, *Kaiserliche Gerichtsbarkeit und Konfessionskonflikt: der Reichshofrat unter Rudolf II. 1576-1612* (Gottingen: Vandenhoeck & Ruprecht, 2006).

and spiritual authority. I argue that, while none of these arguments were new, the fact that they constituted the first Augsburg Religion-Peace suit litigated at the Imperial Chamber Court suggests that the Peace, far from settling these fraught issues, simply reset the clock on debates about them. In other words, litigants and lawyers saw the Peace as a new opportunity to settle age-old questions about the two powers that had been at the heart of the Reformation, by shaping the Court's jurisprudence of the Peace.

First a note on the parties. Both Duke Ottheinrich von Pfalz-Neuburg and Prince-Bishop Otto of Augsburg were uncompromising voices in their respective confessional parties. And they were both opinionated and outspoken about the 1555 Peace.<sup>57</sup> Ottheinrich was known for colorfully expressing an expectation of a dramatic religious compromise with the “godless” by simply presenting them with the *Confessio Augustana* and watching as the veils fell from their eyes when confronted with its pure truth. A political compromise of the sort the Peace represented was, at least at certain moments, anathema to him.<sup>58</sup> In 1556, the Duke became one of the Empire's seven Electors.

Prince-Bishop Otto was likewise opposed to compromise. Records of the princely council during the Augsburg imperial assembly show that Otto had said that either a Christian Council would resolve the matters so that all would be required to come under the umbrella of the true Catholic religion, or, if this did not happen, then they should use military force to “fight Satan himself.”<sup>59</sup> Already on March 23, 1555, Prince-Bishop Otto of Augsburg had his chancellor, Konrad Braun, submit a formal Protestation against the first princely council draft of the Augsburg Peace, and then submitted it several times in the months following. Finally on September 25, he submitted a Protestation against the entire Augsburg Peace.<sup>60</sup> He and his successors for generations argued that this Protestation released them completely from the terms of the Peace, that it in no way touched the rights, jurisdiction, and properties of the *Hochstift*, which remained intact as they had been before the division of religion began.<sup>61</sup> This leaves the fact that the Prince-Bishop sued in this case, in part under the terms of the Augsburg Religion-Peace, remarkable if not confusing. We saw in Chapter 5 that a protestation would be invoked in litigation in order to be released from the terms of a law.<sup>62</sup>

I will refer to Duke Ottheinrich von Pfalz-Neuburg as “the Duke,” and Prince-Bishop Otto of Augsburg as “the Bishop.”

## Brief Overview of the Case

The Bishop alleged in this suit that the Duke broke the law when he ordered the parish priests of four villages, Schretzheim, Donaualthem, Wittislingen and Reistingen to appear

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<sup>57</sup> Gotthard, 336. See also Andreas Edel, “Ottheinrich,” in *Neue deutsche Biographie*, vol. 19, Franz Menges, ed. (Berlin: Duncker & Humblot, 1999), 655-6, <http://www.ndb.badw-muenchen.de>

<sup>58</sup> Gotthard, 86-7. See also Axel Gotthard, “Frölich gewest?: Ottheinrich, ein unpolitischer Fürst?” in *Pfalzgraf Ottheinrich: Politik, Kunst und Wissenschaft im 16. Jahrhundert*, ed. Barbara Zeitelhack (Regensburg: Verlag Friedrich Pustet, 2002), 71-93. See also the genesis of his views on *Freistellung* (the right of a subject to believe differently from ruler in Gotthard, 103-4).

<sup>59</sup> Gotthard, 94.

<sup>60</sup> Gotthard, 277-8. See discussion of protestation in Chapter 5.

<sup>61</sup> Gotthard, 278-9; Heckel, “Autonomia,” 252.

<sup>62</sup> Such as the way in which the proto-Protestants invoked the 1529 protestation (see Chapter 5); or in the seventeenth century, the way in which the city of Strassburg invoked their protestation of 1555 in the Four Monasteries dispute (Gotthard, 279-80).

before his superintendent in order to perform a trial sermon and to be “examined” in line with the “new religion,” and threatened a loss of their offices should they fail to forego theirs willingly. These allegations were outlined in two key documents: first, the Bishop of Augsburg’s *Petitio Summaria*,<sup>63</sup> and second, the Mandate sent out by the Court against the Duke on January 8, 1556.<sup>64</sup> The question in the case was: who had the right to regulate religion in those four villages? Given that the four villages were both within the Bishopric of Augsburg and within the principality of the Duke, what kind of authority had the right to regulate religion? Was the Duke in violation of the Peace by seeking to establish the new religion there, or was the Bishop in violation of the Peace by seeking to prevent him from doing so?

The Exception and Defense is the only substantive document we have from the defendant’s side.<sup>65</sup> The production notation reads “Exception and Defense Document against a perniciously promulgated Mandate, Summons, and Inhibition, on the basis of the Religion-Peace.” The Exception and Defense began by naming the cause: a mandate sent out against his principal, the Duke, in which he was “baselessly accused that by establishing the new teaching in those four locations, [...] he went against the old custom of the Holy Empire, as well as the laws, the constitution, and in particular intended the injury and detriment of the Religion-Peace recently established at Augsburg.”<sup>66</sup> The intention of the document was to “provide honest excuse as much as necessary” and also to “reject the parts of the accusations that are unwarranted and unfair.”

The final document of the case file was the Response and Objection document submitted by the plaintiff’s side in May 1556.<sup>67</sup> The longest document in the case file, it is also the final one, suggesting that the case never reached the *litis contestatio* phase. The purpose of this document was to answer the responses and allegations raised by the defendant side, and to provide appropriate objections to them. Its aim was to move the proceeding forward to the *litis contestatio* stage; hence the concluding sentences: “So, it is this lawyer’s request that you recognize that the other party is obligated to settle the *litis*.”

After listing the above-described documents, the Protocol reads that on October 21, 1556, the court announced that Dr. Deschler (the lawyer for the Duke) must submit a response to the plaintiff’s Response and Objection within fourteen days. Deschler sought on January 27, 1557 a fourteen-day extension. But no other documents from the litigants are to be found in the case file.

At the Imperial Diet at Regensburg, held in 1556 and 1557, both parties sought the mediation of King Ferdinand for the dispute. The now-Elector Ottheinrich von Pfalz-Neuburg said the Bishop was in violation of the Augsburg Religion-Peace by preventing him from introducing the Augsburg Confession there, and then for suing him for doing this at the Imperial Chamber Court. He asked that the King order the Bishop to stop hindering his rightful actions, and also to stop the Court case. In response, the Bishop wrote to the King complaining of the interventions of the Elector in his land-princely rights and the hassling of his subjects. He said he

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<sup>63</sup> Munich 264, Q3, “Clagschrifft,” 1556.

<sup>64</sup> Munich 264, Q2, “Copia Mandati & Citationis,” 1556.

<sup>65</sup> Munich 264, Q5, “Exception unnd Defension schrifft wider ain ubel außbracht Mandat Ladung und Inhibition auf den Religion Frieden,” 1556.

<sup>66</sup> Munich 264, Q5, “Exception unnd Defension schrifft etc.” 1556: “mit ungrund angezogen und beschuldigt worden, als sollten sy hochernants cardinals und Bischofes zu Augspurg mit vier flecken mit namen Schrezhaim, Wittisslingen, Thona Althaim und Reüsstingen mit aufrichtung irer neuen leer wider allt herkommen deß hailigen reichs und der recht constitution und sonderlich wider jungst zu Augsburg aufgerichten und publicirten religion friden, eintrag und irrung zuthun sich understannden haben.”

<sup>67</sup> Munich 264, Q6, “Replick und Exception schrifft Respective,” 1556.

wanted to avoid a drawn-out legal proceeding, and therefore asked to arrange a goodly mediation, but in the meantime the Elector should cease the actions in question.<sup>68</sup>

Then, nothing happened until December 19, 1566. On that day, it seems that two documents were submitted to the Court, one an *Informatio juris* (legal opinion) on this matter by Graf Ulrichs zu Helffenstein, and one a Supplication by Dr. Samuel Brothagen.<sup>69</sup> Both of these documents, supposedly Q7 and Q8, are not in the case file. No other entries are in the Protocol.

The plaintiff was represented by Licentiate Amandus Wolf, and the defendant was represented by Dr. Johann Deschler.

## The Mandate

The mandate began, as was customary, not with the alleged facts of the case, but with the laws in question, spiraling in from the most general to the more specific:

Whereas, according to both common spiritual and worldly laws, also inherited Christian order, it is proper for a bishop to follow the old Christian church order in his bishopric; moreover, it has been provided for in many of our and the Empire's ordinances, recesses, and especially the constitution of the publicly promulgated Land-Peace, and in the recently established Augsburg Religion-Peace, that in order to avoid the penalty mentioned within that Land-Peace, each ruler—spiritual and worldly—must let the subjects of the others remain undisturbed in their religion; and especially, that the estates of the Augsburg Confession should carry out no hindrance or violence to the other estates who follow the old religion in their religion, faith, rights, usages, ordinances, and ceremonies, also their subjects, dominions, domains, and properties; nor in any other way to do un-good against the same. Rather, each should let himself be sufficed vis-a-vis the others as is proper according to the law.<sup>70</sup>

Also, the four locations Schretzheim, Donaualthheim, Wittislingen and Reistingen, in which the Cardinal, Bishop, and Collegiate Church at Augsburg have all high and low jurisdictional authority, with rule, taxation, command, and prohibition,<sup>71</sup> are also subject to him in matters of church governance and spiritual jurisdiction, and to him belongs all spiritual and worldly authority, except capital punishment of criminal matters; with the specific condition in criminal matters that the Collegiate Church's personnel will deliver the criminals outside of the city enclosure to the Pfalz authorities. So, in those locations, the plaintiff, as spiritual

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<sup>68</sup> See Josef Leeb, ed., *Deutsche Reichstagsakten: Reichsversammlungen 1556-1662. Der Reichstag zu Regensburg 1556/57* (Göttingen: Vandenhoeck & Ruprecht, 2013), Nr. 562, 1359-60.

<sup>69</sup> Brothagen became an advocate at the Imperial Chamber Court in 1556; perhaps he was by then working for one of the parties? See "Samuel Brothag," accessed July 10, 2019, [https://www.wikiwand.com/de/Samuel\\_Brothag#/Leben](https://www.wikiwand.com/de/Samuel_Brothag#/Leben)

<sup>70</sup> This is referring to Augsburg Religion-Peace sections 15, 16, and 23. At issue in this case was especially Section 23: "No estate should induce or force another's subjects to accept his religion or abandon the other's, or take such subject into his *Schutz und Schirm* (lordly protection) as against his orderly ruler."

<sup>71</sup> The list repeated throughout the document is: rule/sceptre (*Raiß*), taxation (*Steur, Zinß, Gulten*), command (*Gebot*) and prohibition (*Verbot*).

and temporal ruler, alone is suited, and ordered, to make ordinances regarding the religion, and to maintain it.<sup>72</sup>

Three layers of law were cited in this introductory paragraph, providing legal bearing to the accusations that followed. The first and most comprehensive layer was that of “common spiritual and worldly laws” which constituted the “inherited Christian order.” The second was imperial law, made up of its ordinances, recesses, the Eternal Land-Peace, and the Augsburg Religion-Peace. Third were the specific rights (*Gerechtigkeiten*) assigned to the Bishop of Augsburg as regards jurisdiction. According to the first layer, Bishops should be able to carry out their duties fully in their Bishopric. According to the second layer: no ruler should disturb another ruler or his subjects in religion. According to the third layer: the Bishop of Augsburg had full secular and spiritual authority in the four villages in question, except criminal matters that involve capital punishment.

Next, the Mandate narrated the facts, as alleged by the plaintiff.

But, against all of this, you, on the 7<sup>th</sup> of October 1555, wrote to the Bishop of Augsburg, notifying him of your intentions to establish your new religion in those four locations, and demanding him to send the parish priests of those places on a certain day to Neuburg, to be examined and to do a trial sermon in front of your superintendent; and if such did not happen, then you would replace them with other priests, shaped and experienced of your religious order.<sup>73</sup>

The mandate continued that when the Bishop heard about this from his deputy, he told him to use all means to not allow this to happen, and appealed to King Ferdinand, who then wrote to the defendant saying that such actions violated the Religion-Peace, and he should either desist immediately, or suspend those actions until the next imperial assembly, where they could be discussed.

But the defendant did not heed this demand; on December 27, he wrote a letter to King Ferdinand saying he would not desist, but intended to write a report explaining the reasons for his action. Then, on the 4<sup>th</sup> of January 1556, an official for the defendant sent a summons to all of the parish priests of those four villages, ordering that they appear in Neuburg in five days to be examined and perform a trial sermon, or else to abandon their posts; and if they would do neither, then “they should expect further actions against them, which” said the Court mandate “went directly against the common laws, imperial ordinances, recesses, and especially the Land- and Religion-Peace.”<sup>74</sup>

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<sup>72</sup> Munich 264, Q2, “Copia Mandati & Citationis,” 1556.

<sup>73</sup> Munich 264, Q2, “Copia Mandati & Citationis,” 1556: “doch dem allem zu wider dein lieb uff den siebenden tag Octobris nechstverschieden funffundfunfftzigsten jars ein schreiben an gemelten unserm freundt der Cardinal und Bischoffen zu Augspurg haltendt, in seiner freundschaftt abrufen inen statheltern und Rhaten uberschickht darin dein lieb sich vernehmen lasse das sie vorhabens sey in ermelten vier flecken ir new religion uffzurichten unnd derhalben an sein freundschaftt gesonnen(?) Die pfarherr derselben irer flecken uff ein bestimpten tag geen Neuburg fur deiner lieb super intendenten sich examiniren zulassen und probpredig zuthun zuschickhen und wo solchs nit geschehe das dein lieb fur sich selbst andere pfarrer irer religion ordnung geschickht und erfarn dahin ordnen wolte.”

<sup>74</sup> Munich 264, Q2, “Copia Mandati & Citationis,” 1556: “gemeinen rechten Reichs ordnungen abschieden und sunderlich dem ufgerichteten landt und religion friden strack zuwider.”

The mandate ended by saying that these actions should cause the actualization of the highest penalty threatened in those laws, namely, the *Acht* (outlawry).

### Who Violated the Augsburg Religion-Peace?

The Bishop argued in his petition that by summoning the four parish priests to give a trial sermon, the Duke violated the Peace.<sup>75</sup> The language of the Mandate suggests that three sections were in question<sup>76</sup>:

Section 15: Nor may any one make war upon any Estate of the empire on account of the Augsburg Confession, nor do violence to them, nor force them to abandon their Confession in the dominions where it has been established, and any violation of this would be considered a breach of the Peace.

Section 16: Neither may those of the Augsburg Confession do any of the above-mentioned acts to those who adhere to the old faith, and they should leave them undisturbed in their possessions and rights.

Section 23: No estate should induce or force another's subjects to accept his religion or abandon the other's, or take such subject into his *Schutz und Schirm* (lordly protection) as against his orderly ruler.

Deschler, the lawyer for the Duke, began the Exception and Defense with a generic protestation of non-consent, saying that he protested, publicly and formally, the Imperial Chamber Court's jurisdiction, and did not intend through the submission of any document to indicate consent to the Court's jurisdiction in this case, but was only doing what he was obligated minimally to do legally.<sup>77</sup> Deschler then made the provocative statement that, far from violating the Augsburg Religion-Peace, the defendant would like to cite the Augsburg Religion-Peace in his own defense. While the Bishop, he wrote, cited the laws on his own behalf "as if this all [...] might support and abet his unauthorized undertakings, or should protect" him, the lawyer for the Prince, "wants that those same all be repeated and laid bare, word for word and letter by letter, for the protection and defense of his principal—especially the Religion-Peace—[...] as a prince and obedient member of the Holy Roman Empire."<sup>78</sup> The violation, he said, had to do with the King's letter, which entreated and commanded the Duke to cease his summoning of the four parish priests, or at least to suspend them until the next imperial assembly. "This lawyer," began Deschler, writing in the third person, "received the letter not without astonishment." Deschler

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<sup>75</sup> Munich 264, Q3, "Clagschrifft," 1556.

<sup>76</sup> Munich 264, Q2, "Copia Mandati & Citationis," 1556.

<sup>77</sup> Munich 264, Q5, "Exception unnd Defension schrifft etc," 1556.

<sup>78</sup> Munich 264, Q5, "Exception unnd Defension schrifft etc," 1556: "Erstlich g.h., als der herr gegentail (wie das Mandat ausweist deß hailigen Romischen Reichs und gemeinen gaistlichen und weltlichen rechten, Constitution und sonderlich deß hailigen Reichs jungst zu Augspurg aufgerichteten Religion friden fur sich anzeucht als ob dises alles zu furderung und furschub seines unbefuegten vorhabens angezogen konndt oder mochte worden oder ine den herrn gegentail bey seinem unbefügten vorhaben sollte beschützen und vertheidingen mogen, Will fürstlicher anwald gleichfalls dasselbig alles zu schutz und defension seines gnedigen herrn von Wort zu Worten und wie der Buchstab allenthalben sonderlichdes gedachten Religion friden vermag hieher umb geliebter kurz willen repetiert unnderholt [unterhöhlen] haben."



accused the Bishop's side of seeking the King's letter in order to fabricate corroborating evidence of wrongdoing.

First and foremost [we] believe that the King's letter was sent out with precisely the same reason (*grund und fueg ausbracht*) as the imperial mandate, so that the other party may draw on and refer to the King's letter, attained in the absence of and without hearing the other party, [...] as though it was already shown that my principal had acted against the Religion-Peace and therefore is to be declared in the penalty of the Land-Peace and the Holy Empire's *Acht*.<sup>79</sup>

The accusation being made here is that the King's letter, like the Court's mandate itself, had taken the Bishop's allegations at face value, and assumed what actually could not have been concluded without a full hearing of the defendant. There was an implicit accusation of bad faith manipulation of the proceeding; that the Bishop sought the King's letter precisely in order to have it to "draw on and refer to," as evidence that the Duke had acted against the Religion-Peace, when in fact, the King was only writing on the basis of the narration provided by the Bishop's side. "Such a claim," he continued, "would have been more properly made by my principal against the other party [the Bishop], since it was he who acted against the Religion-Peace." He continued:

The Religion-Peace conveys with clear words that you [judges] should not decide any proceeding or mandate [...] that would go against the content of the Religion-Peace.<sup>80</sup> So, we ask that you recognize the mandate and inhibition as acting against the Religion-Peace, and that you abrogate the proceeding, and that you not allow any further hindrance of the princely rights and high jurisdiction that go against the Religion-Peace, the Holy Empire's laws, ordinances, and statutes – neither through your own mandates and inhibitions, nor through the actions of others.<sup>81</sup>

The Bishop, in other words, had violated the Religion-Peace precisely by launching this proceeding at the Imperial Chamber Court. Moreover, though the Imperial Chamber Court was the preferred court of first instance in disputes arising under the terms of the Augsburg Religion-Peace, the Court violated the Religion-Peace through the mandate itself, and therefore had no jurisdiction in the case.<sup>82</sup> Though he did not cite the sections specifically, he seems to be saying that by launching the suit in the Court the Bishop violated Sections 15, 20, and perhaps also 23:

Section 20: Spiritual jurisdiction shall not be exercised vis-a-vis adherents of the Augsburg Confession with respect to the religion, beliefs, clerical appointments, usages, rules, and ceremonies they have established, but its jurisdiction still stands on other issues.

And that the Court, by accepting the suit and sending out the mandate, violated Section 32, and therefore he rejects the Court's jurisdiction, and declines the forum:

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<sup>79</sup> Munich 264, Q5, "Exception unnd Defension schriftt etc," 1556.

<sup>80</sup> Referring to ARP section 32.

<sup>81</sup> Munich 264, Q5, "Exception unnd Defension schriftt etc," 1556.

<sup>82</sup> On the controversial nature of the mandate, see Chapter 2 on court procedure.

Section 32: The Imperial Chamber Court must conform to the terms of this resolution, and must inform parties of its relevant terms.

It is likely that he was able to make this argument about the Bishop and the Court because this was a mandate case; it was the requirement that the Duke stop immediately his actions while the case was pending that he says inhibits his jurisdictional rights.

For the Bishop, this claim by the Duke violated not only the Bishop's jurisdictional rights, but also thousands of years of custom and spiritual and godly laws:

This claim was presented by the other party, without any reason, against all law and propriety/equity, also against the Religion-Peace, how it is shown and deduced from godly and human, spiritual and worldly laws, and in particular would be clearly understood also from the Religion-Peace, in which it is ordered, set under the penalty of the Land-peace, that no authority shall convince away the subjects of another authority and pull to his religion, which, insofar as this concerns the true, old Catholic religion, was set and ordered for itself more than a thousand years ago in the holy Canons and also in imperial laws. Now however it can never be contradicted, for the residents of four locations, because my principal has all *Raiß, Steur, Gebot* and *Verbot* [rule, taxation, command, prohibition] are his true, undoubtable, praiseworthy, sworn, homaged subjects, and because no dominion nor ruler has power or authority to pull the subjects of another to his religion, so it follows undisputedly that such in no way stands to or is proper for the other party.<sup>83</sup>

Wolf dismissed Deschler's protestation as one of "low worth" because according to the language of both the Eternal Land-Peace and the Religion-Peace, it is clear "that this present matter is subject to this Imperial Chamber Court's jurisdiction, and therefore neither the alleged protestation nor any declining of the forum should, nor may, be given credence."<sup>84</sup>

Furthermore, Wolf denied that the laws of the Empire, including the Augsburg Religion-Peace, would defend the other party.<sup>85</sup>

The other party would like to draw on and base his Exception and Defense on the spiritual and worldly laws, the holy Empire's constitution and order, and the established Religion-Peace, which this lawyer had cited properly in the Mandate and Citation, and alleges to defend himself thereby; but that would fail him completely.

He continued:

In the Religion-Peace it is clearly provided for that no estate of the holy Empire should convince away nor pressure or force the subjects of another estate to his religion. Insofar as this article [in the Religion-Peace] concerns the old, true Catholic religion, it is in accordance with the above-mentioned spiritual and

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<sup>83</sup> Munich 264, Q6, "Replück und Exception schriftt Respective," 1556.

<sup>84</sup> Munich 264, Q6, "Replück und Exception schriftt Respective," 1556.

<sup>85</sup> Munich 264, Q6, "Replück und Exception schriftt Respective," 1556.

worldly, indeed even also the godly and natural laws, in which understanding also of that article the principal of this lawyer accepted at the imperial assembly at Augsburg.<sup>86</sup>

In other words: what was there to be converted away from except the status quo? On his view, the article in the Augsburg Religion-Peace that restricted “convincing or forcing subjects of another estate to take on one’s own religion” was designed to limit the new religion, not the old religion.

Therefore, the Religion-Peace in no way suits the wish of the other party to establish the new religion in the four locations, and thereby to pull away the subjects of the Cardinal and Bishop from the true Catholic [religion] onto his new religion.<sup>87</sup>

He continued that if the defendant party would settle the *litis* then the Court could move onto the substantive part of the case in which all of the issues in question could be determined fully.

Whether, however, the other party should act on such letter, or not, and with what reason that letter was sent out by the King, and whether it should be recognized or not that the other party’s violent, threatening, and violent actions were undertaken against all godly, human, spiritual and imperial laws, also the common Land- and especially Religion-Peace, leading to penalty of the Land-Peace – all of which would be found to be the case in the legal pleadings of this matter and the litigation, after the *Litiscontestatio*, through your legal [...] decision. [...] So, it is this lawyer’s request that you recognize that the other party is obligated to settle the *litis*.<sup>88</sup>

### Who Had Jurisdiction? What Kind of Jurisdiction?

The back-and-forth about jurisdiction in this case worked at multiple levels. First, they discussed the question: who had jurisdiction over the four villages? In part this was a question of presenting competing jurisdictional claims, as a matter of evidence. Even so, it turned out that this was not a straightforward question to answer, because each of the parties—the Duke and the Bishop—exercised a certain kind of jurisdictional authority with respect to the villages. But it was not clear, based on the terms of the Augsburg Peace, whose jurisdictional authority

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<sup>86</sup> Munich 264, Q6, “Replick und Exception schrifft Respective,” 1556.

<sup>87</sup> Munich 264, Q6, “Replick und Exception schrifft Respective,” 1556: “Darumb geburt auch dem hern gegenteil vermag angeregets Religion fridens mit nichten, sein Neue religion in vielgemelten vier flecken, anzurichten und also derselben underthanen hohermeltem Cardinal und Bischove von der waren Catholischen auf sein Neue religion abzuziehen.”

<sup>88</sup> Munich 264, Q6, “Replick und Exception schrifft Respective,” 1556: “ob aber der her gegenteil solchem koniglichen schreiben stat thun sollen oder nit und mit was grundt auch dasselbig von irer Mat. außgebracht, und ob von deß hern gegenteils gwalltiger trewlicher und thätlicher handlung wegen, so durch sein f.g. wider alle gütliche Menschliche gaistliche und kayserliche Recht auch dem gmainen Land und sondern Religion friden furgenomen und geubt, in peen deß Landtfridens, erkent wurden soll oder nit, das alles würdt sich in rechtlicher ausfuerung dieser sachen und rechtfertigung, nach die *Litis Contestation* und rechtlichen beschlus, in der sachen auß e.g. erkantnus und urteil wol befunden.”

warranted the regulation of religion there. So, they are pushed from more particularistic discussions into a more wide-ranging discussion about what kind of jurisdictional authority, as such, has the duty and right to regulate religion.

The Bishop argued in his petition that he had “high and low jurisdiction” in the four villages, “except in criminal matters involving capital punishment.”<sup>89</sup> As such, when the defendant Duke sought to regulate religion in the four villages, he violated the Bishop’s jurisdiction.

The defendant argued that the four villages in question were in fact within the Duke’s jurisdiction. The villages, he said, “lie directly within [his] land-princely higher dominion and territory.” To prove this, he notes that he had “*Geleit und Zoll*,” which referred to the general authority and duty to regulate and facilitate trade, including keeping roads safe, managing customs and duties, “as well as other princely sovereign rights”; and in addition the right to tax on several of his enfeoffed properties there.<sup>90</sup> The Bishop’s lawyer, Wolf, dismissed the Duke’s claim that his *Geleit und Zoll* rights corroborated his high jurisdictional authority there.

Most importantly, “to [the Duke] and no one else belongs the capital and criminal jurisdiction.” These rights, he said, have been possessed by his “forefathers of praiseworthy and blessed memory” for “more than a hundred years, without any disturbance or injury.”

So, it is strange and astonishing to hear that the other party presumes to have the high and low jurisdiction (as the mandate claims), as he immediately thereafter, against his own self, conceded that the same high jurisdiction [belongs to] the Prince.<sup>91</sup>

On the defendant’s view, “high jurisdiction” was synonymous with the ability to punish corporeally and capitally, so the person who had capital jurisdiction had high jurisdiction.<sup>92</sup>

In his Response, the Bishop’s lawyer repeated that in the four villages in question, the Cardinal and Bishop of Augsburg and his Collegiate Church there, had “all high and low civil jurisdiction, with rights of taxation, commanding and forbidding, completely; excluding only capital punishment, and that, indeed, with the above-mentioned limits and conditions.”<sup>93</sup> Here, we see the Bishop’s lawyer specifying that the Bishop had “high and low *civil* jurisdiction” and

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<sup>89</sup> Munich 264, Q3, “Clagschrifft,” 1556: “allein die hohenstraffen der malefizischen sachen außgeschlossen.”

<sup>90</sup> Munich 264, Q5, “Exception unnd Defension schrifft etc.,” 1556.

<sup>91</sup> Munich 264, Q5, “Exception unnd Defension schrifft etc.,” 1556: “Wie dan ir f.g. und dero vorfarn loblicher und seliger gedechtnus dessen alles langg zeit her und mer dann ainhundert jar in rwhiger posseß gewer und innhaben one menigclichs irrung und eintrag gewesst sind und noch. Also das frembd und verwunderlich zuhorn ist dz sich der herr gegentail der hohen und nidern gerichtbarkait (wie das mandat mit bringt) sich alldo anmassen soll, so Er doch gleich darauf ime selbs zuwider dergleichen hohe Obrigkait hochernanten main gnedigen fursten und herrn der warhait noch bekantlich ist.”

<sup>92</sup> According to an historical dictionary, synonyms for “*hohe Gerichtsbarkeit*” or “*Hochgerichtsbarkeit*” are “*Blutgerichtsbarkeit*” (blood jurisdiction, *iurisdiction sanguinis*), “*Halsgerichtsbarkeit*” (neck jurisdiction), and “*Blutbann*” (blood sentence, *vindicta sanguinis*). See *Handwörterbuch zur deutschen Rechtsgeschichte*, vol. 2, s.v. “Hochgerichtsbarkeit,” 173-5. “*Hochgerichtsbarkeit*” is defined as “criminal jurisdiction” and “jurisdiction over capital crimes.”

<sup>93</sup> Munich 264, Q6, “Repllick und Exception schrifft Respective,” 1556: “Nun ist aber offenpar, und durch den hern gegentail unvernainlich, das obgemelte und in e.f.g. mandat bestimpte vier flecken, hochstgedachten Cardinal und Bischoven zu Augspurg und seiner f.g. loblichen alten stiftt augspurg mit aller hoher und niderer burgerilcher gerichtbarkeit, als mit raiß, Steur, Rent, Zinß, Gült, Gebott und Verbott durch auß, allein die hohen straf der Malefizischen Oberkait, und doch mit angeregter massen ausgeschlossen zugehörig.”

that his *criminal* jurisdiction was only limited in his inability to carry out the capital punishment (emphasis mine); the Palatinate authorities were responsible for that, but there were limits on how they could go about accessing the criminals within those villages. Specifically, the Mandate stated that “in criminal matters, the Collegiate Church’s personnel would deliver the criminals outside of the city enclosure to the Palatinate authorities.”<sup>94</sup>

The Duke’s lawyer, Deschler, addressed the Bishop’s rather significant caveat on the Duke’s capital jurisdiction.

The other party noxiously claims in the Mandate that my principal, though having the capital jurisdiction in those four villages, only has it to the extent that the other party’s personnel delivers the criminal in front of and outside of the enclosure [i.e. the village boundaries] [...] However, the Collegiate Church personnel are not merely obligated to do so; [rather,] if it does not happen within three days after my principal’s personnel send request, then my principal’s personnel have full power and authority, on account of the high jurisdiction, to take them out [remove the criminals by force] and even to punish the other party’s personnel for their disobedience. [...] From all of which it clearly follows that the principal has high princely jurisdiction without condition, unlike the other party whose privilege is not absolute.<sup>95</sup>

So, the defendant lawyer’s argument here was that the Duke’s capital criminal jurisdiction in the four villages was “absolute” to the extent that if the Collegiate Church personnel would not deliver hypothetical culprits outside of the village to Palatinate authorities within three days of a request, that the Palatinate authorities would have the right not only to take the culprits by force, but also to punish the Collegiate Church personnel who refused to cooperate.

The Bishop’s lawyer rebuffed these claims, arguing that the Palatinate Prince had no authority to punish Collegiate Church personnel for failing to deliver a culprit, that there had

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<sup>94</sup> Munich 264, Q2, “Copia Mandati & Citationis,” 1556: “Wiewol auch die vier flecken schertzheim Oulzheim wittilingen und Reisstingen ermeltem unserm lieben freundt und fursten dem Cardinal Bischoffen unnd Stifft zu Augspurg mit aller hohen und nidern gerichtlichen Obrigkeit als mit raiß, steur, zinß gulten gebot verbot, und sunderlich auch mit dem kirchensatz und der geistlichen jurisdiction unterworffen und seiner freundschaftt alle geistliche und weltliche obrigkeit zugehorn, allein die hohenstraffen der malefizischen sachen außgeschlossen.” welche deiner lieb doch mit dersondernn maß das die ubelichenn durch die pfaltzische in berurten flecken nit angegrifen sonder durch die stiftische amt durch fur die Etter herauß geant- Wort werden sollen, zuestee und also in sollichen flecken sainer frunndtschaftt als geistlicher unnd weltlicher oberkait allein die Religion zuordnen unnd zuerhalten gebuer und bevolhen sey.”

<sup>95</sup> Munich 264, Q5, “Exception unnd Defension schrifft etc.,” 1556: “Zum dritten gnediger herr, als durch den herrn gegentail unfürtreglicher weis laut deß mandats fürbracht ist, als sollte anwalds gnediger furst und herr die hoch malefizisch oberkait mit den bemellten vier dorffern allain mit ainer Maß zugehorn und gebürn, als nemlich das er der herr gegentail und seiner gnaden Ambtleut anwalds gnedigen principaln und ir f.g. ambtleutten etc. die ubelthater für die Etter heraus zuantworten schuldig sein [...] Darneben aber seind deß herrn gegentails ambtleuth die ubelthater anwalds gnedigen principaln nit allain für die Etter heraus zu antworten schuldig sonnder da ir f.g. ambtleut solchs auf ir begern, und ansinnen in drey tagen nit ervollgt als dann haben ir f.g. vollen mach und gewallt dieselbigen für sich selbs in krafft der hohenobrigkait heraus zunemen und deß herrn gegentails ambtleut umb iren ungehorsam darumben wie sich geburt zustraffen [...] Aus welchem nu clarlich ervollgt, das anwalds gnedigen fursten und herrn die hohe Lannsfurstliche obrigkeit der ennden gar nit mit ainer maß sonnder wol in gegenspil ime herrn gegentail und allen andern so dergleichen und noch merere als hofmarchsgerechtigkeit haben, ir freihait nit absolute.”

been no single case in which the Palatinate authorities had had to do a raid to exercise their criminal jurisdiction (i.e. to seize a culprit that the Collegiate Church personnel were unwilling to deliver), nor any evidence that the Palatinate authorities had had reason to punish Collegiate Church personnel.<sup>96</sup>

The Duke's lawyer said that it was not envisioned by the Peace that someone with low jurisdiction would have the right to regulate religion in a given domain.

That however, the other party, on account of his lower jurisdiction (which other surrounding prelates, princes, and lords in the principality have) has the right to hinder my principal in establishing the Christian, true, catholic religion, or claims to give himself that right – this, we hope, neither you nor your other judges, nor anyone else of a correct, healthy reason, and especially who has experience in these matters, would ever consider fair, nor legal.<sup>97</sup>

Deschler made the point here that someone with only lower jurisdiction (such as, on his view, the Bishop) could not exercise the right of establishing and governing religion in an area where someone with higher jurisdiction had that same right, because the lower jurisdiction existed at the will and allowance of the Prince. He said that it would be “against all fairness, as well as human sense, reason, and understanding” that the other party, who had lower jurisdiction, would be entitled to direct and establish his religion, because lower jurisdiction existed conditionally upon the grace of the territorial Prince.<sup>98</sup> “It was neither provided for in the letter of the Religion-Peace, nor much less was it the will, purpose or intention of the Roman Emperor, Kingly Majesty, and the Electors and Estates of the Holy Empire” that he with lower jurisdictional authority have power to establish his religion.<sup>99</sup>

Wolf responded that any claim that the Bishop's jurisdiction over the four villages was derivative of, or existed conditionally by the permission of the Duke's jurisdiction, was both legally wrong, and historically inaccurate. Appealing to origins and ancient provenance, and highlighting the way in which the Bishopric's existence predated the princely status of the Palatinate rulers, Wolf stated that St. Ulrich (d. 973 C.E.)—the beloved consecrated prince-bishop, who exemplified piety and loyalty to emperor—had, first by virtue of his family's status as counts, and then through his appointment as bishop in 923, all jurisdiction in his domains, including the four villages.<sup>100</sup>

For it is known and apparent that hundreds of years ago, at a time when the other

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<sup>96</sup> Munich 264, Q6, “Replück und Exception schrifft Respective,” 1556.

<sup>97</sup> Munich 264, Q5, “Exception unnd Defension schrifft etc.,” 1556: “Das aber ime herrn gegentail von wegen der Nidern gerechbarkait wie hieoben erzelt (welche annder mer umbligennd und ausstossent prelaten fürsten und herrn im fürstenthumb haben) zuostee und gebüre Anwalds gnedigen fürsten und herrn ann aufrichtung irer f.g. christlichen waren Chatholischen Religion zuhindern oder ime selbs dieselbig zuzumessen das werden (wie anwald trostlich verhoff) weder eur gnad noch deren treffenliche beysitzer, noch niemandt annder rechts gesundes verstands.”

<sup>98</sup> Munich 264, Q5, “Exception unnd Defension schrifft etc.,” 1556: “wider alle billichait auch Menschlichen synn vernunfft und verstand.”

<sup>99</sup> Munich 264, Q5, “Exception unnd Defension schrifft etc.,” 1556: “Wie dann der Buchstab des Religion fridens ain solchs mit nichte vermag, noch vilminder der Romischen kayser und Koniglichen Maiestett und gemainer Churfürsten und Stennden, des hailigen Reichs willen mainung noch intention gewesen ist.”

<sup>100</sup> See *Allgemeine Deutsche Biographie*, vol. 39, s.v. “Ulrich, Bischof von Augsburg,” by Karl Uhlirz, 215–21.

party's domain was not yet a principality [was not yet in the princely estate], the four locations belonged to St. Ulrich as one of the holy Empire's counts and the Bishop at Augsburg, with all higher criminal and civil, also lower authority and jurisdiction.<sup>101</sup>

At some point, he said, the capital jurisdiction was given to the Palatinate princes by the Bishop; that is, reversing the Duke's alleged structure of jurisdictional gifting, he claimed that the capital jurisdiction of the Palatinate princes was a right they enjoyed at the pleasure of the Collegiate Church, not the other way around.

The truth is and has been the common reputation among all the old, that beginning during the time of St. Ulrich, not only the high and low authority in civil matters, but rather also the high capital punishment belonged to the Augsburg Collegiate Church, and in those [matters], the Counts of Dillingen and Kyburg turned to the Collegiate Church, and the Palatinate Counts were permitted [to exercise capital jurisdiction]. [This right was given by the Collegiate Church to the Counts] on the basis of good neighborliness at that time and thereafter, when the bishops and worldly authorities were inclined toward each other, each not only not hindering the other in the administration of both spiritual and worldly authorities, but rather also, from Christian zeal, supporting [one another]. From which it follows without contradiction that my principal cannot be entitled to grace from the other party, rather, much more, the other party should gratefully recognize the Collegiate Church of Augsburg's good deed, in permitting and installing the criminal jurisdiction [with them], and should be subordinate to my principal in his higher [status] and rights.<sup>102</sup>

More important for determining lordship were pledges of obeisance. "The residents [of these four villages] have done the pledge of obeisance to the Bishop," so they were "the subjects of the Bishop and the Collegiate Church of Augsburg, and not of the other party nor of the Palatinate."<sup>103</sup> Further proof that the residents of the four villages were not the subjects of the Palatinate was the absence of representatives from those villages at Palatinate assemblies.

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<sup>101</sup> Munich 264, Q6, "Replück und Exception schrifft Respective," 1556: "kund und offenbar, das gemelte vier flecken vor viel hundert jaren und zu der zeit, da diß deß hern gegentails furstenthumb noch in furstlichem standt nit gewesen, S. Ulrich als einen deß heiligen Reichs Graven und Bischoven zu Augspurgk, mit aller hoher fraischlicher und Burgerlicher, auch niderer Oberkeit und gerichtparkeit zugehort."

<sup>102</sup> Munich 264, Q6, "Replück und Exception schrifft Respective," 1556: So der ist die warheit und bei allen alten, das gemain geschrey gewesen und noch von S. Ulrichs zeitten herrurendt, das zu derselben zeit nit allain die hohe und nidere oberkeit in burgerlichen sachen, sonder auch die hohe Malefizische straff dem Stifft aufspurg zugehort, unnd auf denselben von den graven zu Dillingen und Kiburg gewendt worden sey Wie solchs hieoben auch angeregt, und volgendts den pfalzgraven, auß gueter Nachpaurschafft so derselben zeit und darnach die Bischove und weltlichen oberkaiten gegeneinander yedertail den andern in verwaltung beeder gaitlicher und weltlicher oberkaiten nit allein zuverhindern, sonder auch auß Christenlicher eyfer zufferdem genaigt gewesen, zugelassen worden, darauß dan unwidersprechlich volgt, das anwalts gnedigster her principal dem hern gegentail keiner gnaden gestendig sein kan. Sonder das der her gegentail vilmer das Stiffts augspurg guethat, in nachlassung und zustallung der Malefizischen oberkeit, dankbarlich erkennen und anwalts gnedigsten hern principaln an irer ober und gerechtigkeit nicht dermassen zubetruiben understeen solt."

<sup>103</sup> Munich 264, Q6, "Replück und Exception schrifft Respective," 1556: "auch allein seiner f.g. underthans pflicht und huldigung gethan."

That, however, the other party has no land-princely authority over the four locations, and that also the residents of those places are not the subjects of the Palatinate, is however to be clearly deduced therefrom, that [no one from those villages] appeared in the considerably large number of *Landtags* (territorial assemblies) held by the other party and his ancestors, neither before nor within human memory, which otherwise is customary for *Landsässen* (subjects) and *Hofmarkshern* (lord's stewarts) to do; nor sought the least amount of help, nor that the Palatinate carried any burden [with respect to them.]<sup>104</sup>

The Duke also argued that if someone with only lower jurisdiction (such as, on his view, the Bishop) could order religion, then multiplicity of religion in one domain would potentially result.

For if that should be provided for, there would [be] no greater confusion or disorder in Christendom, [...] ; for from that it would follow finally that not only in a principality, duchy, or other domain, but rather also in one single village or small location, many kinds of religion and faith would exist and emerge.<sup>105</sup>

Taking as a shared premise that multiplicity of religion and faith would pose a problem within a single domain – whether principality, duchy, or village – the Duke argued here that the plaintiff Bishop's argument promised a path to achieving this unwanted outcome; if anyone could be entitled to authority to establish religion in a place where they exercised some limited form of jurisdiction, and since it was the case that those with lower jurisdiction possessed it, by definition, at the pleasure of another authority, then there was always the risk that these layered jurisdictional authorities could order religion in different ways within the very same domain.

Responding to this, the Bishop's lawyer said "rather, the contrary is the truth,"

For it is known and obvious, that in the domains where the new religion is accepted, and the worldly authorities subdue/oppress spiritual authorities, and subordinate to themselves the administration of spiritual authority, until now all different and mutually repulsive, and fallen from the Common Catholic Church, sects have emerged – not only in cities and villages, but rather also in houses, yes even in marriage chambers and beds. So that on this day, in a city, hundreds of faiths, who indeed all want to have a name, are invented.

All of which, with the old Catholic church from old times, was not the case, and still is not. Rather, what is believed in a principality, a city, a location, a village, a

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<sup>104</sup> Munich 264, Q6, "Replick und Exception schrifft Respective," 1556: "Das aber der her gegentail, uber vielgemelten vier flecken khein landtsfürstlichen oberkait hab, und das auch derselben inwoner dieser pfalz landtsessen nit sein ist aber uber hinver(?) angezaigte grund, auß dem Lauter abzunemen, das der her gegentail den wenigsten vall oder puncten nit anzaigen khan, noch vilweniger probiren wurdet, das von dieses flecken wegen ye yemandts auf die Landtag so der her gegentail und seiner f.g. voreltern eben vor und bei Manß gedanckhen in zimblich grosser anzahl gehalten, wie sonst mit den Landtsessen und hofmarcks hern gebreuchig, erfordert geschweigen erschinen, oder ye die wenigst hilff oder burdin dieser pfalz getragen, oder gelastet habe."

<sup>105</sup> Munich 264, Q5, "Exception unnd Defension schrifft etc.," 1556: "dann wann das wie erzelt gestattet werden sollte were kain grossere Confusion oder verwirrung der hailigen Christlichen Religion in der Christenheit nie gewesen noch konnfftiglich zu gewarten. Daraus enntlich volgen wurde, das nit allain in ainem furstenthumb Graven oder ander herschafften, sonnder auch in ain ainzichen dorf oder fleckhen mangerlay Religion und glauben entsteen und aufkommen wurden."



house, or a room, that is all, in all kingdoms, principalities, cities, villages, locations, and houses, and among all of those places' residents, of spiritual and worldly estate, high and low persons, men and women, young and old, in the Catholic Church, was always one single unanimous Christian and Catholic faith, and still is. And if some dared to make, against that, any splitting and division, that those same were excluded from all kingdoms, principalities, cities, locations, and villages, indeed from all of the Christian community, and in the entire Roman empire, according to common spiritual and imperial laws, not tolerated, rather driven out, and received their proper punishment.<sup>106</sup>

In other words, the only risk of multiplicity of religion arising comes from domains that have taken on the new religion.

### **Who Had Authority to Order Religion?**

Wolf argued that delegates to the princely council “of both religions”<sup>107</sup> at the Augsburg imperial assembly of 1555 undoubtedly understood the article of the Peace that prohibited inducing or forcing another's subject to accept his religion or abandon the other's (Section 23) as applying equally to subjects who happened to reside in domains where another ruler had capital jurisdiction over them. In other words, capital jurisdiction alone did not determine to whom a resident was subject. The only right that the Palatinate prince had over the four villages was the capital criminal jurisdiction, “and it did not follow that because the other party had high criminal authority over the four locations that therefore the residents of those four locations were his subjects.”<sup>108</sup>

The Duke argued that in fact capital jurisdiction did entail that kind of relationship and authority:

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<sup>106</sup> Munich 264, Q6, “Replück und Exception schrifft Respective,” 1556: “sonder ist das widerspiel die warheit, dan kund und offenbar, das in dem oberkeiten, da die neue Religion angenommen und die weltlichen oberkeiten die gaistlichen verdrucken und sich der verwaltung gaistlicher oberkeit underziehen, bisher alle unterschiedliche und einander widerwertige, und von gmainer Catholischen Kirchen abgefallen secten, nit allein in Stetten und Dorffern, sonder auch in Heusern, ja auch in der ehleuth Camern und betten entstanden, Also das auf diesen tag in einer stat wol hunderterlay glauben, die doch alle ein Namen haben wollen, sein, und erfunden warden Welches alles bei der alten Catholischen Kirchen von alter her nit gewesen, auch noch nit ist, Sonder was in einem furstenthumb, Statt, Flecken, Dorff, Hauß, oder Kamer geglaubt, das ist alles, in allen konigreichen furstenthomben, stet, dorffer, flecken, und heusern und bey allen derselben inwoner, gaistlichs und weltlichs standts hohen und nidern personen, Mannen und weiber, jungen und alten in der Catholischen Kirchen alwegen ein einiger einhelliger Christenlicher und Catholischer glaub gewesen und noch, Also welche dagegen einiche spaltung und trennung zumachen understanden, das dieselben auß allen konigreichen furstenthumben, stetten, fleckhen, und dorffern, ja auß aller Christenlicher gemaind außgeschlossen und in dem ganzen Romischen Reich nach gemainen gaistlichen und key. rechten nit geduldet, sonder außgetrieben worden, und ir geburliche straf empfangen haben.”

<sup>107</sup> Munich 264, Q6, “Replück und Exception schrifft Respective,” 1556: “von den potschafften deß fursten raths baiden religionen”

<sup>108</sup> Munich 264, Q6, “Replück und Exception schrifft Respective,” 1556.

[...] it makes sense that the Prince who has the *merum et mixtum imperium* and has power to judge over life and limb [also] has power to establish and command in the religion and faith matters, in which lie salvation and beatitude.<sup>109</sup>

The term “*imperium merum et mixtum*” began to be used in the German lands in the twelfth century to describe complete jurisdiction (*plena iurisdictio*). Ulpian defined “*imperium*” to be either “*merum*” (simple) or “*mixtum*” (mixed).<sup>110</sup> While “*merum imperium*” referred to high criminal jurisdiction, also known as blood jurisdiction (*Blutgerichtsbarkeit*), including the authority to punish capitally, “*mixtum imperium*” referred to high civil jurisdiction. Beginning in the fourteenth century and into the early modern period, when jurisdiction came to be seen as an essential part of territorial sovereignty, the formula “*merum et mixtum imperium*” became a description of territorial sovereignty per se.<sup>111</sup>

The paragraph that follows made a fascinating argument as to why this was, linking the right to govern religion with the right to decide on matters of life and death. The defendant lawyer continued:

For it is the case, that the primary and greatest motive of the Religion-Peace was so that (just as one has power to damn a thief to the gallows, a murderer to the wheel [torture instrument], and a heretic to fire), in the same way, the ordering of the holy Christian religion, which concerns the soul’s salvation and eternal life, according to godly and natural laws and all reason, would properly belong directly to the higher authority [the ruler with high jurisdiction] and not to the lower jurisdiction.<sup>112</sup>

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<sup>109</sup> Munich 264, Q5, “Exception unnd Defension schrifft etc.,” 1556: “sollte vor dem Lannsfürsten der des merum et mixtum imperium unnd uber Leib und Leben zurichten macht hat inn der Religion und glaubenssachen darinn der Seelen hail und Seligkait gelegen, Sins gefalls zuschaffen und zu gebieten haben.”

<sup>110</sup> See Justinian’s Digest, 2.1.3: “Imperium aut merum aut mixtum est. Merum est imperium habere gladii potestatem ad animadvertendum facinorosos homines, quod etiam potestas appellatur. Mixtum est imperium, cui etiam iurisdictio inest, quod in danda bonorum possessione consistit. Iurisdictio est etiam iudicis dandi licentia.”

Translation in Watson, ed. *The Digest of Justinian*, 40: “*Imperium* [authority] is simple or mixed. To have simple *imperium* is to have the power of the sword to punish the wicked and this is also called *potestas* [power]. *Imperium* is mixed where it also carries jurisdiction to grant *bonorum possessio* [see glossary in Watson]. Such jurisdiction includes also the power to appoint a judge.”

<sup>111</sup> *Handwörterbuch zur deutschen Rechtsgeschichte*, vol. 2, s.v. “*Imperium merum et mixtum*,” by Rudolf Hoke, 333f. Also see William Smith, ed., “*Imperium*,” in *A Dictionary of Greek and Roman Antiquities*, (London: John Murray, 1875), 629: Simple authority is to have “the power of the sword to punish the wicked,” “a power that had no connection with *iurisdictio*” but was instead “conferred by a *lex*.” Mixed authority is *imperium* that “carries jurisdiction within it,” i.e. “an *imperium* which was incident to *iurisdictio*,” or “the power which a magistrate had for the purposes of administering the civil (not criminal) part of the law.” “The *mixtum imperium* was nothing more than the power necessary for giving effect to the *iurisdictio*. There might therefore be *Imperium* without *Jurisdictio*, but there could be no *Jurisdictio* without *Imperium*.”

<sup>112</sup> Munich 264, Q5, “Exception unnd Defension schrifft etc.,” 1556: “dann ainmal war und unwidersprechlich auch das furnembst und groß Motivum deß Religion fridens gewesen ist, das dem (so ainem dieb zum Gallgen ainen Morder zum Rad und ainen Kezer zum feur verdammen macht habe) gleichfals die verordnung der hailigen Christlichen Religion, daran der seelen Seleigkhait und das Ewig Leben gelegen von Gottlichen und Natturlichen rechten auch aller vernufft nach, one mittl als der merern und hochern Oberkait gebüre und nachvollggt und gar nit den nidern gerichtbarkaiten.”

The argument the defendant was making here was that it made sense that the person who had control over matters of life and death – of the highest temporal concern – would also have control over matters of religion, salvation, and eternal life – of the highest spiritual concern. What were the precedents for this view? The defendant cited “godly and natural laws and all reason” in making his argument about the motive of the Religion-Peace.

The plaintiff, for his part, rebuffed this claim with several arguments. First, he stressed the limited nature of the Duke’s capital jurisdiction in those four villages.

It is a [poor] equivalence, when the other party brings together regulation of religion with the punishing of the life of a thief, that he is to direct also his religion in that place where the thief lives, for since the thief is delivered before the enclosures of those locations [i.e. outside of the village boundaries], [the Palatinate authorities] do not approach those locations anymore, because the civil community forfeited [the thief] [...]. The other party in no way orders over the inhabitants of those locations, except when they on account of their evil deed are delivered out of the location to the criminal judge. So, he has nothing to order, also concerning the religion, as provided in the Religion-Peace, over those same, nor to give them any ordinance. It therefore appears strange, that the other party may provide such an equivalence, as though it is the primary fundament of the Religion-Peace, since it is the contrary that is expressly set out and provided for in the Religion-Peace, and it was also held by the imperial estates as an undoubtable case, and therefore not stated specifically in the Religion-Peace, as has been sufficiently explained here.<sup>113</sup>

The Bishop’s lawyer’s argument was that the right to capitally punish did not entail the right to regulate religion in the locations in which a criminal was a subject; for when a criminal committed a crime, the civil community symbolically and literally delivered him outside of the village, forfeiting him to the ruler with capital jurisdiction. In other words, the Duke had a narrow form of jurisdiction over criminals, not a generalized high jurisdiction and lordship status over residents of the villages.

The Bishop’s lawyer then responded to the “thief to the gallows” argument with a sweeping explanation, backed up with citations from civil and canon law, about the relationship between temporal and spiritual authority.

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<sup>113</sup> Munich 264, Q6, “Replück und Exception schrift Respective,” 1556: “So ist es auch ein ungerumbte vergleichung, da der her gegentail die ordnung der religion, also zusammen zupringen understeet, welcher ein dieb ain leben zustraffen hab, das er auch sein Religion an dem ort da der dieb gesessen ist, antzurichten hab, dan da der dieb fur die Etter berurter flecken geantwurt, geet er die flecken nicht mer an, dieweil die burgerlichen gemeinschaftt daselbst verwurckt und dem Malefitz richter bevolhen wurd, und in solchem vall last der flecken oberkeit weiter nit bekhumern, was der malefitz richter mit solchen ubelhäter, der weitter gemelter oberkeit, underthan nit ist mit leibstraff gehandelt werde, und dieweil dan den her gegentail uber vielgemelter fleckhen inwoner nicht ehe noch anderß zugebieten dan so sy von irer ubelthat wegen auß dem fleckhen dem Malefiz richter uberantwurd, So hat er auch der religion halben vermoge berurts religion fridens uber dieselben nicht zugebieten, noch inen einiche ordnung zugeben, Und ist derhalben wol zubefrembden, das der her gegentail furgeben darff, das angeregte vermeinte vergleichung das furnembst fundament deß religion fridens gewesen seye, So doch deß widerspiel im religion friden außtruckentlich gesetzt und versehen, auch durch die reichstende, fur ein untzweivelichen vall gehalten, und derhalben in specie, in den religion friden nit gesetzt worden wie hieoben gnugsam außgefurt ist.”

The mentioned equivalence was directly contrary to the criminal law ordinance and the religion-, godly, natural, also human, spiritual and imperial laws. For, first of all, there are two different authorities ordered by God: the spiritual and the worldly, as Emperor Justinian attests: “The leader says, sacerdotal authority and sovereignty are gifts from God’s supreme kindness, of which the former is devoted to things divine, and of which the latter governs human things. Both proceed from the same beginning, etc.”<sup>114</sup>

This was citing the first sentences of the preface to Justinian’s Novellae number VI:<sup>115</sup>

The greatest gifts among men, made by supernal kindness, are the priesthood and sovereignty, of which the former is devoted to things divine, and of which the latter governs human things and has the care thereof. Both proceed from the same beginning and are ornaments of human life.<sup>116</sup>

The Bishop’s lawyer, after citing Justinian, wrote:

And because the administration of these two authorities are differently divided, so that spiritual matters should be directed by spiritual authority, and worldly matters should be directed by worldly authority, insofar as the religion and the establishing of its things belong to salvation and beatitude, they are subject to the spiritual authority.<sup>117</sup>

The Bishop’s lawyer then cited Gregorius Nazianzenus at length, in a letter allegedly written “to the Constantinopolitan emperor” around 322.<sup>118</sup>

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<sup>114</sup> Munich 264, Q6, “Replück und Exception schrift Respective,” 1556: “Zum andern ist auch gemelte vergleichung und zusammen verfassung der Malefiz ordnung und der religion gotlichen und natürlich, auch menschlichen gaistlichen und key. rechten stracks zuwider, dan erstlich sein zwo unterschiedliche oberkeiten von got geordnet die gaistlich unnd die weltlich, wie solchs Justinianus Imperatur bezeugt, *Dux sunt inquit, potestates sacerdotium et imperium dona videlicet dei a suprema collata clementia, illud quidem divinis ministrans, hoc autem humanis presidens ac diligentiam exhibens ab uno eademque principio procedentia, in aut: quo. oportet epos. in princip. etc.*”

<sup>115</sup> “Maxima quidem in hominibus sunt dona dei a superna collata clementia sacerdotium et imperium, illud quidem divinis ministrans, hoc autem humanis praesidens ac diligentiam exhibens; ex uno eodemque principio utraque procedentia humanam exornant vitam.” See “Nov. VI,” accessed September 25, 2017, <https://droitromain.univ-grenoble-alpes.fr/Corpus/Nov06.htm>, digitization of Rudolf Schöll and Wilhelm Kroll, eds., *Corpus iuris civilis* (Berlin: Weidmann, 1954).

<sup>116</sup> Fred H. Blume, trans. *Annotated Justinian Code: Justinian’s Novels*, accessed September 25 2017, <http://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/novels/index.html>

<sup>117</sup> Munich 264, Q6, “Replück und Exception schrift Respective,” 1556: “Und wiewol die verwaltungen dieser zweyer oberkeiten unterschiedlich abgetailt, also das durch die gaistlich oberkeit, die gaistlichen und durch die weltliche die weltliche sachen verricht werden sollen, so sein sy doch also undereinander geordnet, das die weltlich oberkeit, sovil die religion unnd verrichtung deren ding, so zu der seelheil und seligkeit gehoren, der gaistlichen unterworffen, wie solchs Gregorius Naziazenus zu den Constantinopolitanischen key. schreipt: *Suscipitis ne inquit libertatem verbi libenter accipitis, Quod lex Chri. sacerdotale. vos subijcit potestati atq. istis triunalibus subdit. dedit em. et nobis potestatem, dedit et principatum multo prefectiore principatibus vestris, aut numq. d. justum vobis videtur sie cedat spiritus carni si et terrenis celestia superent. et si divinis preferant humana.*”

<sup>118</sup> See Ernst Dümmler et al., eds. *Monumenta Germaniae Historica. Epistolae Carolini Aevi*, vol. 3 (Berlin: Weidmann, 1896), 229, accessed September 28 2017, [http://www.dmgh.de/de/fs1/object/display/bsb00000539\\_meta:titlePage.html?sortIndex=040:010:0005:010:00:00](http://www.dmgh.de/de/fs1/object/display/bsb00000539_meta:titlePage.html?sortIndex=040:010:0005:010:00:00)): “Suscipitisne libertatem verbi, libenter accipitis, quod lex Christi Sacerdotali vos nostrae subijcit potestati, atque istis

The acceptance of the Christian faith subjects everyone including emperors to the sacerdotal power—“*lex Christi sacerdotali vos (scil. imperatores) nostrae subicit potestati*”—and to sacerdotal tribunals: “*atque istis tribunalibus subdit.*” For Christ had given the priests “*potestas,*” that is, a “*principatus*” so manifestly more perfect than the imperial power. It would run counter to the idea of justice if the flesh were to dominate the spirit, if the terrestrial were to oppress the celestial, if human matters were to be preferred to divine matters.<sup>119</sup>

He then went on to cite a letter from Pope Gelasius to Emperor Anastasius. Dated 494, the “*Famuli vestrae pietatis*” or “*Duo Sunt*” letter was extremely influential in establishing the two powers doctrine<sup>120</sup>:

There are two powers, august Emperor, by which this world is chiefly ruled, namely, the sacred authority of the priests and the royal power. Of these that of the priests is the more weighty, since they have to render an account for even the kings of men in the divine judgment. You are also aware, dear son, that while you are permitted honorably to rule over human kind, yet in things divine you bow your head humbly before the leaders of the clergy and await from their hands the means of your salvation. In the reception and proper disposition of the heavenly mysteries you recognize that you should be subordinate rather than superior to the religious order, and that in these matters you depend on their judgment rather than wish to force them to follow your will.<sup>121</sup>

Summarizing the conclusions of these three key source texts, the Bishop’s lawyer wrote:

And from this appears, how it belongs to the worldly authority’s office to maintain the common usage in temporal peace, to reward the good and to punish the bad; while it belongs to the spiritual authority’s office to order the religion and

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tribunalibus subdit? Dedit enim et nobis potestatem, dedit principatum multo perfectiorem principatibus vestris. Aut numquid justum vobis videtur, si cedat spiritus carni, si a terrenis coelestia superentur, si fivinis praeferantur humana.”

<sup>119</sup> Walter Ullman, *The Growth of Papal Government in the Middle Ages: A Study in the Ideological Relation of Clerical and Lay Power* (London: Methuen, 1955), 170. In citing this, Ullman writes that Pope “Gregory IV [...] puts into the mouth of Gregory Naziazenus statements which the latter never made” (Ullman, 170), citing Dümmler who simply says of the letter, “sed verba minime congruunt” (but the words coincide minimally). At least in the sixteenth century, this text was regarded as authoritative.

<sup>120</sup> Munich 264, Q6, “Replück und Exception schrift Respective,” 1556: “*Idem testatur Gelasius papa qui ad anastasium imperatore ita scribit, duo sunt imperator Augustae [...]*”

See Heinrich Denzinger, ed. *Enchiridion symbolorum definitionum et declarationum de rebus fidei et morum: Kompendium der Glaubensbekenntnisse und kirchlichen Lehrentscheidungen. Lateinisch – Deutsch*, 44<sup>th</sup> ed., ed. Peter Hünermann (Freiburg; Basel; Vienna: Herder, 2015), 146: “Duo sunt quippe, imperator auguste, quibus principaliter mundus hic regitur, auctoritas sacra pontificum et regalis potestas, in quibus tanto gravius pondus est sacerdotum, quanto etiam pro ipsis regibus hominum in divino redditori sunt examine rationem. Nosti etenim, fili clementissime, quoniam licet praesedeas humano generi dignitate, rerum tamen praesulibus divinarum devotus colla submittis atque ab eis causas tuae salutis expetis, hincque sumendis caelestibus sacramentis eisque, ut competit, disponendis subdi te debere cognoscis religionis ordine potius quam praesesse, itaque inter haec illorum te pendere iudicio, non illos ad tuam velle redigi voluntatem.”

<sup>121</sup> James Harvey Robinson, *Readings in European History*, vol. 1 (Boston: Ginn & Co., 1905), pp. 72-3.

worship, and what attaches to those, and what belongs to the human soul and salvation. And just as the spiritual authority does not judge for himself over the blood, in the same way also the worldly authorities and magistrate in no way subjects the religion and what attaches to the same to himself. Rather, much more, he loyally carries out what the spiritual authority orders in the religion. Thus, an authority does not intervene into another, rather each should let the other remain undisturbed in their orderly office.

And it has been the case since the old holy Councils of the Apostles time, that the religion ordinances are established not through the worldly authority but rather through the prelates and the spiritual authorities. And whatever is ordered in each time, the emperor and king loyally upheld, subjected themselves and their subjects to such order, and the bishops and the spiritual [estate] administered the practice and carrying out of the same – as the holy Councils’ acts and decrees, the emperors in their laws, the church histories from Constantine the Great, Valentinianus, Theodosius, Marciano, Justinian, the Constantinopolitan emperors, also several kings in Spain and France, and then also Charlemagne, Louis the Pious and nearly all Roman emperors of the Germans, attest.<sup>122</sup>

After summarizing these authoritative texts, the lawyer wrote that criminal jurisdiction and spiritual jurisdiction were distinct; the former did not entail the latter:

And because now it has been sufficiently explained and proven, with godly and human, spiritual and worldly laws, also the true histories, that the criminal court, and the ordering of the religion and of all matters attaching to the religion, are distinct from one another, that the ordering of the religion belongs alone to the spiritual and not to the worldly, and the high capital punishment alone to the worldly and not to the spiritual authority; how can then the other party so incorrectly present, that the high criminal and worldly authority, from godly and natural laws and according to all reason, is to make, establish and allow the religion ordering? And it is all the more strange and remarkable to hear, that based on [the fact] that the worldly authority punishes the life of the thief, murderer and heretic, that it should therefrom be determined, that they also should

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<sup>122</sup> Munich 264, Q6, “Replück und Exception schriftt Respective,” 1556: “Unnd auß dem erscheidt, wie der weltlichen oberkeit ampt zugehört, den gemainen nutz in zeitlichen friden zuerhalten, die guetten zubelonen, und der bösen zustraffen, also gehort der gaistlichen oberkeit ampt zu, die Religion und gotsdinst, und was denen anhengig ist und zu der Menschen seel seligkeit gehort zuverordnen und wie die gaistlich oberkait für sich selbs über das pluet nit richten, Also sollen auch die weltlichen oberkaiten unnd magistrat, sich der Religion und was derselben anhängig ist, mit nichten underziehen, sonder vielmer was die gaistlich oberkeit, in der religion ordnet, getrewlich volnziehen, und also ein oberkeit der andern, nit für noch eingreifen Sonder ye eine die ander bei irem ordenlichen ampt unbetrüpt pleiben lassen soll. Und auf solche maß, sein in den alten hailigen Concilien von der Apostel zeit heer, der religion ordnungen, nit durch die weltlich oberkeit, sonder durch die prelaten und gaistliche oberkaiten aufgericht, und weß also yeder zeit geordnet, das haben auch die kayser und konig getrewlich gehalten, sich und die underthanen solcher ordnung underworfen, und die Bischove und gaistlichen in yebung und volnzuehung derselben gehandthabt, wie solches der hailigen Concilien Acta und decreta, die kayser in iren rechten selbs und die kirchen historien von Constantino magno Valentinianus Theodosiis Marciano Justiniano den Constantinopolitanischen Kaisern, auch etlichen konigen in Hispania und Franckreich, und dan auch von Carolo Magno, Ludevico pio, und nahendt allen Rom. Kaysern der teutschen bezeugen.”

have the power to order the religion and to carry out its things that are necessary for salvation and eternal life.<sup>123</sup>

Harkening back to the three layers of law described in the Mandate, and plaintiff's initial complaint, the Bishop's lawyer began with a discussion of what the "common spiritual and worldly laws" provide. Interestingly, he used some language here that was absent in the initial complaint. Instead of simply "common spiritual and worldly laws," he now said "all godly as well as human common written spiritual and worldly laws, established thousands of years ago." The addition of "godly" seems perhaps to have been picked up from the defendant's Exception document. He wrote:

All godly as well as human common written spiritual and worldly laws, established thousands of years ago, provide that the holy Religion be arranged not by worldly princes and authorities, but rather through the orderly spiritual authorities appointed in the holy Church, brought into a certain Christian church order, and, improving in each time according to the circumstances of the time; [it is the work of] common Councils to establish the outward ceremonies for the glory of God and the maintenance of the true worship, [then] carried out and agreed upon by the mentioned spiritual authorities. And whatever is ordered by such authority should be carried out by the worldly authority. So was it at the time of the holy Apostles, and has been maintained following that, through an unceasing succession through their following Bishops, up to this time, in all Christian nations, through the whole world. All of this would also be proven through the holy Councils' Acts and Decrees, also the imperial law, and all Church histories, loudly and clearly.<sup>124</sup>

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<sup>123</sup> Munich 264, Q6, "Replick und Exception schrift Respective," 1556: "Und dieweil dan nun gnugsam mit gotlichen und menschlichen gaistlichen und weltlichen rechten, auch den waren historien außgefurt und bewiesen, das die Malefizische gericht und verordnung der Religion und aller sachen so der religion anhängig, also von einander angesondert, das die verordnung der religion allein der gaistlichen und nicht der weltlichen unnd die hohe Malefizische straff allein der weltlichen und nit der gaistlichen oberkeit zugehort. Wie kan dan der gegenteil so vermessenlich furgeben, das der hohen Malefizischen und weltlichen oberkeit, von götlichen und Natürlichen rechten auch aller vernunft nach, in der religion ordnung zumachen, und aufzurichten, zugelassen sey, und sovil desto seltzamer und verwunderlicher ist es zu horen, das auß dem das die weltlichen oberkeit die dieb, morder, und Ketzler am leben hat zustraffen beschlossen warden will, das sy auch die verordnung der religion und deren ding, so zu der seel hailen und ewig leben nott sein furzunemen macht haben sollen."

<sup>124</sup> Munich 264, Q6, "Replick und Exception schrift Respective," 1556: "Dan erstlich vermogen alle gotliche, auch menschliche gamine geschrieben gaistlich und weltliche recht vor tausent jarn ufgericht, das die hailig Religion nicht durch weltliche fursten und Oberkeiten, sonderlich die ordenlichen gaistlichen Oberkaiten, nach Christenlicher ordnung in der hailigen kirchen angericht, in gewisse Christenliche Kircheordnung gebracht, und was yeder zeit nach gelegenheit der zeit, in den eusserlichen Ceremonien zuordnen, zu der ehr gottes und erhaltung deß waren gotsdienst zubessert ist, in gemainen Concilien, durch gemelte gaistliche oberkeit furgenommen und beschlossen, und weiß also durch solche Oberkeit geordnet, durch die weltliche oberkeit volnzogen werden soll, also ist es zu zeitten der hailigen Aposteln und volgendts durch ein unaufhörliche succession bei iren nachkhomen Bischoven, biß auf diese zeit, bei allen Christenlichen Nationen, durch die gantz welt auß gehalten worden, Solches alles wurdt auch durch der hailigen Concilien Acta und Decreta, auch gemelte Key. Recht und alle kirchen historien lauter und unwidersprechlich bewisen."

The paragraph went on to say that these same laws, beginning in the time of the Apostles, portioned out the authority amongst archbishops, bishops, and priests, and it was always the case that such portioning out happened also in worldly kingdoms and principalities,

thereby not to deprive worldly authorities of governance of their land and people, but rather, with respect to the same, the archbishops and bishops, each in his appointed sector, have themselves been ordered [with] the pastoral care and maintenance of the religion and worship, not only with respect to the spiritual [persons] but rather also the emperor, king, princes, dukes, lords, and rulers. All apostolic and conciliar decrees, also imperial law and church histories, attest to this.<sup>125</sup>

For the Bishop here, the portioning out (*außteilung*) of sectors in which spiritual authorities variously had responsibility to carry out pastoral care and maintenance of the religion did not interfere with the responsibilities of worldly authorities. Moreover, the pastoral care responsibilities extended to and included the salvation of worldly rulers themselves.

This argument was concluded by pointing out that, like other bishops, the Bishop of Augsburg had, in his appointed sector, the pastoral care and spiritual jurisdiction, and, like other Bishops, had been in “peaceful ownership and possession” of it since “many hundreds of years ago.”<sup>126</sup>

And from all of this it appears now clearly, that neither spiritual nor worldly law may give the other party support or any aid in his unfair actions, rather [those laws] reject and condemn his actions in every way.<sup>127</sup>

## Conclusion

The Bishop argued that when the Duke summoned the priests of four particular villages to his superintendent in order to give trial sermons and to be examined in line with the new religion, at risk of losing their positions, he violated the Augsburg Religion-Peace. In particular, he violated the articles that proscribe the attempt by anyone to disturb any other estate in their

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<sup>125</sup> Munich 264, Q6, “Replück und Exception schrift Respective,” 1556: “So ist auch in denselben rechten versehen, das zu erhaltung solcher gemainer und Christenlicher ordnung gleich im anfang zu der Apostel zeitten, die Ertzbistumb und Bistumb, und die Pfarren, darin unterschiedlich außgetailt, und solche außteilung auch in die konigreich und weltliche furstenthumb geschehen, und damit den weltlichen oberkaiten an regierung irer landt und leuth nicht benommen, sonder in denselben, die seelsorg und erhaltung der Religion und gotsdienst, den Ertzbischoven und Bischoven, jeden in seinem zugeordneten gezirckh, nit allein uber der gaistlichen, sonder auch der kayser kunig, fursten, graven, hern, und obern personen, selbs bevolhen worden, das bezeugen abermals alle apostolische, und der hey. concilia decreta, auch die key. recht und der kirchen historien.”

<sup>126</sup> Munich 264, Q6, “Replück und Exception schrift Respective,” 1556: “Und auf die maß hat auch das Bistumb Augspurg sein geordneten gezirckh in dem einem yeden Bischove die seelsorg und gaistlich jurisdiction so weit solcher gezirckh geet, vor viel hundert jaren, angereger massen bevolhen, und derselben wie auch andere Bischove in der gantzen Christenheit jeder in seinem diocesi und gezirckh, in ruwigem inhaben und possession gewesen.”

<sup>127</sup> Munich 264, Q6, “Replück und Exception schrift Respective,” 1556: “Und auß dem allem erscheint nun lauter das dem herngegentail wede gaistlich noch weltlich recht, in seinem vermeinten unpillichen furnemen, Steurn noch einichen behilff geben mogen, sonder solch sein furnemen in allweg verwerfffen und verdammen.”



possessions and rights on account of adhering to the old faith (section 16), or to force another estate's subjects to accept the other religion (section 23).

The Duke argued that he did not violate the Peace because in fact he had the kind of jurisdictional authority over those villages that permitted management of religion and faith matters. In addition to certain types of taxation authorities, the Duke had capital jurisdiction in the villages; he had the authority to carry out corporeal and capital punishment of culprits there. Capital jurisdiction, he said, constituted high jurisdiction. And high jurisdiction entailed management of religion. If lower jurisdiction, which is derivative of and exists at the pleasure of higher jurisdiction, could also entail management of religion, then a multiplicity of religions would inevitably result in one territory, and this was not an outcome the Peace aimed for. More importantly, he who had authority over matters of the highest worldly concern should also have authority over matters of the highest spiritual concern in a given domain; authority over matters of life and death should entail authority over matters of salvation.

The Bishop responded, first, by qualifying the Duke's capital jurisdiction over the four villages. He said that the Duke's capital jurisdiction there was extremely limited. The Bishop had total jurisdiction over the four villages, except the type of authority that would require spilling of blood, which was delegated to the worldly authority. The Duke only had narrow jurisdiction over culprits who were handed over to him by the criminal judge. Second, he responded by arguing that capital jurisdiction itself did not entail authority over matters of spiritual concern. He cited authoritative texts from the fourth, fifth, and sixth centuries from Emperors and Popes to state what he regarded as a foundational doctrine of the Holy Roman Empire: that spiritual authority governed matters of spiritual concern, and worldly authority governed matters of worldly concern.

The point of this chapter has been to ground the Peace in its litigative purpose. The Peace was drafted in large part in response to specific disputes that came out of the Reformation cases; and it was drafted with future litigation in mind.

This first case litigated under the terms of the Peace reveals a number of things. First, it shows us that the question of what counted as a "matter of religion" was no longer prescient. No longer did proto-Protestant litigants argue that the Imperial Chamber Court had no jurisdiction because the dispute had its origins in a matter of religion. Instead, the Peace assigned precisely such disputes to the Court as the preferred forum to adjudicate such disputes. Matters of religion became a category of imperial law to describe precisely the disputes that would be governed according to the Augsburg Peace. The radical, exceptional quality of the term was defanged as it became legible as a category of legal issue.

The case echoes pre-1555 litigation insofar as the Duke argued that the proceeding itself was illegal. But he did not make this argument on extraordinary grounds, to throw the case into a jurisdictional no-man's-land; rather he made them on the grounds of the Peace itself, saying that the Bishop was in violation of the Peace precisely by seeking out a mandate against him at the Court, and the Court was in violation of the Peace by granting it. Still, this argument is a product of the jurisprudence of suspicion, described in the previous chapter.

The sources of law cited by the Bishop in his Response are remarkable. He used three foundational source texts for establishing the two powers doctrine. The citation of these sources, which I did not see in any pre-1555 Reformation case, suggests the kind of moment the litigants found themselves in. What were the conditions in which the Bishop and his lawyer, Wolf, would see the pre-trial stage as the place to invoke these well-known citations?

The breadth of interpretations of the Peace present in this case suggests the natality of this legal moment, and the ambiguity of the Peace. The Peace was full of possibilities for litigants and lawyers eager to stabilize an interpretation of the Peace that would work in their favor. The Peace was ambiguous; it did not clarify or settle matters, but contained the terms of these disputes, setting the framework for conflict; it shunted the Court's handling of these issues into a new holding pattern. This is not surprising when we realize that the Peace was precisely geared to a litigative context, and it was not primarily a broad declaration of anything, such as sovereign rights, or the legalization of the Lutheran confession—as it is often portrayed in the historiography.

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The Peace was the final abrogation of the Worms Edict of 1521. While Protestants had long claimed that the Edict had been abolished by various terms of the resolutions and peace treaties of the previous decades, until the Lutheran confession became legal, the terms of the 1521 Edict fundamentally stood. Nonetheless, the aspiration towards a final resolution and restoration of confessional unity maintained the Empire's vision of itself as "Holy"; biconfessionalism was pragmatic but skin-deep. The 1555 Peace did not do away with the idea of "heresy" as such; it simply relocated authority to define and prosecute heresy, and to maintain religious singularity, at the territorial level rather than the imperial level.

In other words, the Peace says more about the dualistic constitutional order of the Holy Roman Empire at this moment, than it does about changing views of the relationship between spiritual and temporal authority. Thought of in this way, the Peace was the culmination of the reform efforts since the late fifteenth century which had worked to secure the power of the Estates vis-a-vis the Emperor. "The reform process begun in the late fifteenth century had ended in a monarchy fettered by German liberty."<sup>128</sup>

Though, as discussed in chapter 2, it would be incorrect to bring modern statist assumptions about the effectiveness of legal events to apply to this period, nonetheless, there is no doubt that the Peace became a touchstone and a framework for conflict for the centuries following. It lasted until it fell apart in 1618, precipitated in part through the inability of the Imperial Chamber Court to resolve the Four Monasteries cases.<sup>129</sup> It was renewed and revised in the Peace of Westphalia in 1648, and it provided the scaffolding of political peace among the Empire's churches until the end of the Holy Roman Empire in 1806.<sup>130</sup>

While the Peace was a touchstone and framework for conflict, it also led to the bifurcation of the imperial legal regime. This is because the vagueness and ambiguity of key clauses of the Peace, combined with a legal culture in which any attempts at legal change had to

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<sup>128</sup> Whaley, *Germany*, 336.

<sup>129</sup> This refers to a set of four cases in the early years of the seventeenth century regarding confiscation of monastic property. In brief, the Court decided against the Protestants in all four cases, and this caused suspicion and anxiety among Protestant Estates that the Court was no longer abiding by the terms of the Augsburg Peace and was instead favoring the Catholics. See Whaley, *Germany*, 414-5; Ruthmann, *Religionsprozesse*, 553-66.

<sup>130</sup> Ruthmann, *Religionsprozesse*, 10. See e.g. Ruthmann, *Religionsprozesse*, in which he closely analyzes the Court's jurisprudence concerning key articles of the Augsburg Peace between 1555 and 1648. Also see Blum, *Multikonfessionalität*, in which she looks at the implementation and impact of the Peace at the local level within one imperial city, Speyer. She asks: what did the Peace contribute to confessional coexistence at the micro level of the city? How did its application work in context? And how did general problems of the Peace become visible or emerge in the city context? Also see Luebke, *Hometown Religion*, which looks at "regimes of religious coexistence" in the archbishopric of Westphalia created in the shade of the Peace.

be described as mere efforts of legal interpretation,<sup>131</sup> and the jurisprudence of suspicion, provided the stuff of the formulation of two distinctive, confessionally-articulated, approaches to legal interpretation. This “bifurcation” of the legal order became more and more pronounced and agonistic over the course of the post-1555 period of confessionalization; unresolved questions of faith and truth smoldered, as the governmental and institutional modes of establishing confessional difference proceeded apace.<sup>132</sup> Some argue that it was the dissimulation and postponement in the 1555 Peace that led, as a direct consequence, to the Thirty Years War of the seventeenth century.<sup>133</sup>

Thus, 1555 was a moment of legal redirection. It aimed to speak law on a variety of tangible questions and disputes. In practice, prior to 1555, the Reformation was being handled at law through a patchwork jurisprudence of civil and public law resolutions through proxy issues of peace, property, and jurisdiction. Now, those matters of peace, property and jurisdiction were enclosed within imperial law under the heading of the “Religion-Peace.” Though the jurisprudence remained unclear and hotly debated, they were now tucked under a heading that had hitherto had no place in imperial law. This reflects law’s tendency to produce its authority, its sovereignty, its jurisdiction, through declaration, and to conceal the messy, “creative, performative aspect” which in fact produced its meaning and significance in the first place.<sup>134</sup> The Peace was responding to the specific kinds of issues that had been popping up in Reformation litigation. As a result, the Peace did not end or finally clarify these disputes; rather, it provided a new legislative basis for interpretation and disagreement about them. Thus, there was a continuity in the kinds of subjects and issues that had been discussed in Reformation-related litigation. In the process, the Peace at once reproduced and contained the particular unresolvable nuances of law that Reformation litigation had stirred up under the heading “matter of religion.”

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<sup>131</sup> Heckel, “Autonomia,” 161-6.

<sup>132</sup> Ruthmann, *Religionsprozesse*, 10.

<sup>133</sup> Heckel, “Autonomia,” 192 and the literature cited there.

<sup>134</sup> Richland, 214 quoting Douzinas.

## CHAPTER SEVEN

### CONCLUSION

In the years following the circulation of Luther's *Ninety-Five Theses* in 1517, several high-profile efforts by the ostensibly most powerful offices of Western Christendom—the Pope and the Emperor—to quell the reform movement were largely ineffective. The Papal Bulls (*Exsurge Domine*, and *Decet Romanum Pontificem*) of 1520 and 1521 excommunicated Luther and his followers as heretics. The Worms Edict of 1521 declared in the *Acht* (outlawry) them or anyone who gave them support or cover. The lesser-known Regiment Mandate of 1522 was promulgated by the Imperial Regiment, a central government created by the Estates and Emperor, and it called on territorial rulers to prevent the “new worship” from being carried out. Together, these legislative acts portended a large-scale inquisition. Yet nothing like that followed. What were the conditions in which this was the case?

In Chapter 2, I showed that in part, the ineffectiveness of these legal acts can be understood by having a greater grasp of the legal and constitutional culture in which they were promulgated. Unilateral acts of law-making were viewed with suspicion by the Estates because of the dualistic constitutional culture in which the power of the Estates and Emperor were co-dependent. Even Estates who were concerned about the Lutheran movement were keen to guard the liberties of the Estates vis-à-vis the Emperor as well as the Pope. Furthermore, the distribution of authority in the German lands was such that individual Estates were more inclined to dissimulate and avoid open conflict, especially with neighboring rulers. More than unilateral legislation, it was the imperial recesses of 1526, 1529 and following that proved to be, if not more effective in terms of enforcement, nonetheless among the key sources of law tested in the Reformation cases.

A discussion in Chapter 2 about why heresy was not more of a central category in disputes among rulers underlines the different status of the various evangelical groups then in formation. While this dissertation focuses primarily on Lutheran and Zwinglian princes and cities who were in a position to litigate about reform, Anabaptists and subjects of all persuasions were being persecuted under heresy and sedition laws. This differential treatment reminds us of the extent to which the Reformation was less about individual freedom and more about sovereignty and the constitutional consequences of the right of rulers to reform their domains.

Chapter 2 concludes with a discussion about the constitutional importance of courts in the Holy Roman Empire, and the reasons courts were an important site of constitution-making in the sixteenth century. First, because there were so many types of courts in the German lands, questions of jurisdiction, and therefore of the distribution of authority that it implied, were almost always on the table at the start of litigation, whatever the subject matter. Second, because of the particular status that courts had had historically in settling conflicts among rulers as regarded authority and dominion, and the complicated relationship between courts and the institution of feuding, courts were one site in which matters on the boundary of public and private law were worked out. Third, the procedures of courtrooms—including public sessions, and the instruments and strategies familiar to judicial proceedings—felt, looked, and acted a lot like the procedures, instruments, and strategies available in imperial diets which were more explicitly about constitution-making. Thus, the constitution-making mindset was often turned on for litigants even as they were hashing out ostensibly private civil law disputes.

The Imperial Chamber Court was particularly important in this context, for a number of reasons: it was the first imperial court that aspired to be independent of the personal justice of the

Emperor; it was the only entity besides the Emperor entitled to declare the *Acht*; its bench was constituted primarily of learned doctors of law; its judges' appointments were distributed among Estates and the Emperor; it adjudicated primarily in matters concerning the Land-Peace; and for the most part at least one of the litigants in a given dispute was directly subject to the Emperor. A discussion of the Court's role in the so-called "reception of Roman law" provides a framework for considering the fortuitous timing of the Reformation cases against that backdrop. At various points in the dissertation, I suggest that certain legal transformations in this period might have their origins in these proto-Protestant experimental usages, such as the changes in the way co-litigation was conceived, the role of the state in recognizing particular forms of combination, and the shifting valence of protestations.

The discussion about the Court's judicature provided a bridge into Chapter 3, which introduced the patchwork jurisprudence of Reformation litigation. Plaintiffs and the imperial Fiscal sued under the broad headings of peace, property, and jurisdiction laws, rather than the high-profile legislation of the 1520s. I begin the chapter by reviewing the historical development of peace, property, and jurisdiction laws. In the peace section, I discuss "peaces" as a legal typology, that had moved from an instrument having the character of a contract in the early Middle Ages, to one having the character of monarchical legislation, to one having the character of an institutionalized, constitutional status in the late medieval period. A Land-Peace violation had always initially involved the element of physical violence, its threat, or facilitation, but this changed during the Reformation. Initially, Land-Peace law was not seen as a way to deal with Lutheranism; the Worms Edict itself is evidence of the belief that a special legal basis was needed for prosecuting the new heresy in imperial law. The first time Land-Peace law was explicitly used to deal with the "division in the religion" came in the 1526 imperial recess, which noted that violence was transpiring in the Empire on its account. In the 1529 imperial recess, any act of violence, its threat or facilitation, done on account of matters of faith or religion was deemed a violation of the Land-Peace, but its terms were redundant because violence was still part of the definition of what constituted a violation. The 1530 Recess was a dramatic shift in that it defined certain acts as violations of the Land-Peace that involved no violence at all, but were explicitly connected to attempts to reform worship and governance according to the "new sect." Each of these attempts—in 1526, 1529, 1530, and beyond—to revise the scope of a Land-Peace violation to deal with the division in the religion was shot through with the ambiguities of the legal typology of an imperial recess (as discussed in Chapter 2)—in particular, the competing status of unanimity versus majority rule; the status of elements that were promulgated unilaterally by the Emperor; and the status of those sections protested by the evangelical estates. Another legal ambiguity was produced when in 1532 the Emperor promised an end to "matter of religion" cases in the Imperial Chamber Court (in the Nuremberg Settlement), while at the same time demanding that violence "in the matter of the disputatious religion" cease, at risk of punishment as a land-peace violation (in the Peace Mandate in the Regensburg Recess). Over the course of the 1540s, the language of a "Religion-Peace" began to circulate as a new kind of legislative form modeled on the template of the Land-Peace, culminating in the 1555 Augsburg Religion-Peace. The legal typology of the "Religion-Peace" did not mean religious rapprochement or reconciliation; rather, it was a kind of legislation that delineated the terms of relations between confessions. It was more akin to the public law on churches than the beginning of religious toleration or freedom of religion.

In the property section, I summarized the evolution of the church property system from the third to the sixteenth centuries in order to highlight the complicated ownership, lordship,

proprietary, and patronage relations that were litigated in many of the Reformation cases. To some extent these practices were in tension with rules that prohibited the alienation of church property and that distinguished temporal and spiritual forms of wealth. I review the types of church wealth that were under dispute in Reformation cases, such as buildings, income-yielding real properties, tithes and offerings, precious and liturgical objects, benefices and offices, as well as fees, rents, and annuities. I concluded the discussion of property by looking at the methods of secularization and conversion of church and monastic property that pre-dated the Reformation, which provides a context for understanding how and why church and monastic institutions seemed so practiced in litigating church property disputes of the Reformation under the terms of existing laws.

In the jurisdiction section, I show that jurisdiction meant not only the right to adjudicate disputes over certain peoples, places, and subjects, but also the whole range of rights and privileges that this implied. Jurisdictional disputes between temporal and spiritual jurisdictions were just one kind of jurisdictional claim made in the Reformation cases. More frequently, jurisdictional disputes had to do with issues of control over property, the authority to tax, to wage wars, to appoint preachers, to discipline personnel in spiritual or worldly institutions, to punish citizens, to provide protection (*Schutz und Schirm*), to change laws, or broadly to do things differently than they had been done before. More than the binary of spiritual and temporal, the important categories in these disputes had to do with lordship rights (both “high” and “low”), patronage rights, and the relative supremacy of different kinds of rulers including prince, prince-bishop, bishop, abbot or abbess, provost, dean, capital, mayor and city council, among others. Jurisdictional arrangements were particularistic, but those particularistic arrangements were not *sui generis* but patterned, built into the legal norms and culture that ordered it. Matters of jurisdiction were variously settled through war and feud, imperial mandate or privilege, arbitration and treaties, custom and historical usage, or contracts. In this context, it was often more important for plaintiffs to settle their particular issue in court than to consider the ways in which the changes portended a large pious reformation, political movement, or major constitutional shift.

In the rest of Chapter 3, I present through direct exposure to the cases the kinds of laws and norms cited in the Court’s judicature and more specifically in the Reformation cases. The sources of law cited were sometimes broad and constitutional or customary in nature, such as the Golden Bull and the “Holy Empire’s laws and ordinances”; sometimes they were very specific to the litigants involved, such as contracts, treaties, and customary usage that extended “beyond human memory.” As a case progressed, layers of law were added as violations of Court procedure added up. Because of the legal pluralism of the German lands it was essential to establish not only the validity of certain legal claims, but also their relative priority. Therefore, the *narratio* portion of a proceeding was of the utmost importance. Notwithstanding the heavily formulated forms of legal procedure in the Court (discussed in Chapter 1), the *narratio* offered extensive opportunity for inserting language to make the Reformation context of a dispute legible. I argue that while the primary purpose of these insertions was to express rebuke towards the other litigants as a normalized form of affective speech in litigation, in the process, the Court became a site in which pious forms of accusation were declared—regarding clergy greed, for instance, or the apostasy of runaway monks and nuns—though the *legal* purpose of such utterances was often unclear.

In discussing the role of the *narratio* and the laws and norms cited, I also considered the calculations involved in eliding the Reformation context in a given dispute—failing to mention,

for instance, that attacks on the clergy of a city were instigated by the promulgation of the Worms Edict. The reasons for eliding the Reformation context of a given dispute changed over our period. In the early 1520s, plaintiffs were continuing familiar legal strategies for peace, property, and jurisdiction disputes as they had been litigated before; at the time, the scope and scale of the events which in retrospect were the beginning of the Reformation in the German lands, were not fully understood, and the actions being undertaken in the name of reform probably felt like the kinds of actions that were being carried out by territorializing princes and self-confident cities throughout the late medieval period. Then, in the mid-1520s, as cities and princes became open converts, and as the 1526 Recess for the first time linked the “division of the religion” with various kinds of Land-Peace violations, plaintiffs became more likely to make the Reformation context of a dispute legible. By the early years of the 1530s, however, the calculations involved in eliding or making legible the Reformation context shifted dramatically, as evangelical litigants began to argue that any dispute concerning matters of religion did not belong within the jurisdiction of the Court. In this context, we see plaintiffs increasingly eliding the Reformation context to avoid the litigative black hole that this form of argumentation had become.

The next two chapters focus especially on a period of litigative creativity on the part of evangelical litigants. In Chapter 4, I explored the reception and impact of the proto-Protestant “legal descriptive strategy”<sup>1</sup> inherent in their argument that a dispute which had been brought by the plaintiff under peace, property, and jurisdiction laws in fact was a “matter of religion”; that therefore the Court had no jurisdiction over the matter; and that until a free Christian Council took place to resolve the underlying theological, liturgical, and ecclesiological disputes, the proceeding should stop. When evangelical litigants made this argument, plaintiffs, judges, and lawyers responded in a variety of ways: sometimes with outright rejection, sometimes with confusion and incredulity, and sometimes with a wait-and-see attitude. Even those with the authority to define the term—the Judges, and (perhaps primarily on the basis of being a party to the Nuremberg Settlement) the Emperor—repeatedly dodged or left the term’s meaning unsettled. Though the category’s meaning remained inconclusive, a set of tensions cleaved to the category as a matter of strategy, memory, and naming, indexing constitutional conundra born out of the Reformation, without resolving them. Leaning on the concept of bricolage described by Claude Levi-Strauss, I argue that “religion” became over the course of this period a bricolage legal category, the quality of its production at once heterogeneous, contingent, and retrospective. Three key tensions existed with respect to the matter of religion argument that constituted its bricolage character. First, concerning the term’s referent; second concerning its valence; and third concerning its scope. In terms of its referent, parties disagreed about the extent to which a “matter of religion” concerned conscience and beliefs alone, or the extent to which it would be entangled with material matters of property and jurisdiction. In terms of its valence, parties sometimes spoke about “matters of religion” as a generic moral category and honorific, and sometimes as a narrow legal category, referring to cases covered under the Nuremberg Settlement (and other agreements that promised a suspension of all cases concerning the religion). In terms of its scope, “matter of religion” had a classificatory and homogenizing effect, bundling a wide range of disputes under its terms, but it also relied on the description of particular details of disputes for its definition, rather than abstract principles. These three tensions inhered to the “religion” category beyond the period of the Reformation cases, constituting its bricolage character that persisted beyond the contingent context of its production.

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<sup>1</sup> Teuscher, 77.

Chapter 5 continues the focus on the proto-Protestant litigative strategy, this time focusing on their experimental uses of three otherwise formulaic, mundane instruments of Roman law civil procedure: the protestation, the power of attorney, and the recusation. In an important way, the evangelical estates' use of each of these instruments simultaneously bolstered and leaned on the religion argument discussed in Chapter 4—bootstrapping the category into legal existence. The protestation of 1529 set the tone and pattern for the kinds of protestations the evangelical litigants would use in cases in which they declined the forum on the basis of the Nuremberg Settlement and other agreements that likewise promised a standstill to “matter of religion” cases in the Court. The power of attorney defined their combination as co-litigants in terms of the kinds of disputes in which they would co-litigate: those “concerning the religion.” And the recusation accused the Court President and an unspecified majority of the judges of bias against the evangelical litigants, and recused its judicature only in cases “concerning the religion.” Each of these instruments presumed the religion category, though it had at the time no formal definition or legal meaning.

In that chapter, I first describe the historical evolution of each of the legal instruments and how they were part of customary legal practice (to combine, to protest, and to recuse), and partook in long-established legal cultural traits of the Holy Roman Empire, while at the same time adopting the form specific to Roman-canonical procedure. I analyze them in this sense as performative legal speech acts with a long pedigree, that were also being used by the evangelical estates in ways that many others regarded and treated as invalid, extraordinary, or illegal. Each instrument leaned on the next in a circular kind of claims-making.

I also analyze them as passionate legal speech acts, which gets at the dimensions of their use that went beyond the appeal to formal authority, the dimensions that could not be simply declared illegitimate or invalid. That is, in the process of combining through the power of attorney, in protesting, and in recusing, and in the particular ways in which they did so, the evangelical estates made “claims on their hearers to acknowledge their truth or their right.”<sup>2</sup> Simply by presenting the power of attorney, the evangelical litigants required the judges and the other parties—even as they were denying the validity of the power of attorney and the insinuation of the protesting estates into their civil dispute with a discrete party—to respond to their proposal to be legible as a group, and to speak about them as a group in order to respond to their claims. Similarly, the protestations—both in the 1529 and 1530 imperial assemblies, and in the form of the *Exceptiones Declinatoria Fori* in litigation—inserted claims even when proceedings were moving in a different direction. The fact that the name “Protestant,” which originated from this 1529 usage, continues to be a signifier of the evangelical movement within Christianity broadly, indicates the effectiveness of those protestations, even when they were rejected as invalid. Likewise, the recusation instrument raised the issue of confessional suspicion, and that suspicion, once articulated, could not be unthought or undone, even as the recusation was repeatedly rejected as invalid by the Court.

Finally, I argue that each of these effects had long term consequences for the imperial legal order. First, the proto-Protestant usage of the power of attorney was the beginning of the idea of the “religious party” in imperial law, that is, of multiple confessions formed as “juridical civil associations rather than mystical embodiments of Christ”<sup>3</sup>; “not as congregations of truth-

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<sup>2</sup> Constable, 36.

<sup>3</sup> Ian Hunter, “Religious Freedom in Early Modern Germany: Theology, Philosophy, and Legal Casuistry,” *South Atlantic Quarterly* 113, no. 1 (2014): 48.



seeking individuals but as mutually hostile civil corporations.”<sup>4</sup> This was part of a process I described in the section on combination, that by the late fifteenth and early sixteenth centuries, as the capacious medieval League form was waning, and the purpose-driven chartered corporation was on the rise, combination was increasingly being achieved not through self-cohering processes of fellowship, but through recognition by state and law. With this argument, I am contributing to ongoing debates about the causes and methods of confession formation. Scholars have studied confession formation in terms of the formulation of creeds and confessional statements and the cohering of groups around them; the discursive and disciplinary processes that produced new conceptions of orthodoxy and heresy; the role of the state in exercising governmental mechanisms required for confessional consolidation; and the everyday social practices that contributed to distinctive confessional identities. I build on this by considering the role of law, litigation, and civil procedure in effecting a thin form of identification and “setting apart” at law, before formal legal recognition came to the Lutherans in 1555.

Second the usage of the protestation facilitated a particular mode of linking law and conscience. Through this legal instrument, the evangelical estates sought to posit a “hermeneutics of the event,” narrating the truth of who they were and why they were doing certain things. Substantively, the point that they repeatedly pressed related to their desire to make legible the pious motives in their acts, and the ways in which all questions of truth, right, and law—especially in their capacity as rulers—returned to their conscientious duty to God, scripture, and the “pure teachings” of Christ. Procedurally, because of the way in which they were making these points within imperial institutions, they stabilized those institutions as meaningful contexts in which such utterances would be made. Consequently, the stakes for recognition in law of one’s claims about and in the name of religion—particularly as a ruler—as a normalized part of the imperial legal order became increasingly important.

Third, the recusation structurally linked the “matter of religion” with an affect of suspicion. In other words, it became a normalized feature of imperial legal life to suspect that in issues concerning religion, the other party was insisting on an interpretation of facts and law that prioritized their confessional preferences over their fidelity to law. Put concretely, anytime anybody uttered “religion,” inevitably questions would arise about the referent, valence, and scope of that term. In answering these questions differently, and as the difference between the answers became more predictable, and increasingly associated with certain alignments and group formations, suspicion that the different answers to the questions were the result of these pre-dispositions became more salient. Here we see the traces of a pattern that would persist into the post-Augsburg order, namely, the idea that certain legal interpretations, when it came to religion-peace law and matters of religion, belonged to certain confessional parties as a matter of course. This paved the way for distinct confessionally-based jurisprudences of imperial law, which became a normalized feature of imperial legal life in the post-1555 period, and which have long been regarded as the roots of the breakdown of the Augsburg system.

Chapter 6 centers around the Augsburg Religion-Peace of 1555. First, I tie the Peace to its litigative pre-history, to show the ways in which its terms were crafted with Reformation litigation in mind, and with an eye to future litigation that would be adjudicated under its terms. This helps us shift the focus from familiar tropes that focus on its epoch-making quality as the hinge from the late medieval to the early modern, or that identify it as the headwaters of secularism, religious freedom, or sovereignty doctrine. Second, I highlight the ways in which the Peace was ambiguous—at the level of particular articles; at the level of its character, whether it

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<sup>4</sup> Hunter, 53.

was more like a constitution or a contract; at the level of its purposes, whether it aimed to create conditions for religious reunification or the peaceful coexistence of multiple confessions; and in terms of timescales, whether it was a temporary emergency measure or an enduring basic law.

Together, these two characteristics of the Peace—its litigative context and its ambiguity—prepare the way for understanding the significance of the term “religion” in the Peace. The term “religion” has multiple valences and an “excess of referents” in the text of the Peace itself, reflecting its bricolage character as it developed over the previous decades of litigation. Sometimes “religion” refers to the two confessional parties in disagreement—“those of the old religion,” for instance. Sometimes it is used as a shorthand for the whole set of issues that made the two parties distinct from one another—ceremonies, faith, and church usages, for instance. Sometimes “religion” is the thing about which legal resolutions are made, so that there are things like “compromises in the religion” or “peaces in the religion.” I argue that the Peace effectively contained the “religion” category without defining it, indexing all of its bricolage character without resolving the tensions inherent to it.

Finally, I present the first legal dispute adjudicated under the terms of the Augsburg Religion-Peace before the Imperial Chamber Court. While parts of the case reflect the dense particularism we saw throughout the Reformation cases, the case also includes a remarkable discussion about the relationship between temporal and spiritual authority that cited foundational proof texts and legal sources—from the Church Fathers to Justinian—which sets it apart from the Reformation cases. I argue that this argumentation is suggestive that parties saw the Peace as interpretively open, and that they saw that the stakes of settling the Court’s interpretation of the Peace was nothing less than this most basic question of Christian governance, that had been asked anew of the Holy Roman Empire in the Reformation.

In summary, this dissertation has made four core arguments. The first argument is that the legal significance of the Reformation is not only to be found in landmark legislation or in the writings of theologians, but in the “unfolding, unstable pragmatics” of civil litigation.<sup>5</sup> My research shows how experimental uses of mundane, formulaic legal instruments of Roman law civil procedure fused with the legal culture and legal pluralism of the German lands, such that the litigation context became an unexpected proxy for the most pressing constitutional questions of the early Reformation.

The second major argument revises a standard reading of the Reformation cases as legally unimportant because politically explosive. I argue that there is a *legal* history to be gleaned from the records of the cases themselves. The use of the court records of Reformation cases has focused on three areas of scholarship: (1) attempts to piece together important legal doctrines such as the meaning of a Land-Peace or Religion-Peace violation; (2) the Schmalkaldic League and its role in the Reformation cases and the political negotiations surrounding them; and (3) the institutional history of the Court, and the ways in which the Reformation cases contributed to or undermined the constitutional status of the Court. Through close readings of case files, I show how legal change came not only through deliberation, abstract formulation, or rational legislation, but rather through a collectivity of small actions that resulted in piecemeal movement in a particular, unforeseen direction.

The third major argument has to do with the impact of Protestantism on modern law. I show that we have so far neglected the ways in which the proto-Protestant litigation strategy of the early Reformation impacted the imperial legal system and gave contour to a proto-Protestant

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<sup>5</sup> Richland, 214.

“legality.”<sup>6</sup> Historians who study the relationship between law and Protestantism tend to investigate it in terms of the writings of theologians like Luther or Melanchthon, or in terms of the legal orders that developed in Protestant territories and cities. My work, by contrast, tracks specific incarnations of imperial law, as effected at the hands of Protestant litigants and lawyers, which, through repetition, formed a nexus of usages we can call characteristically “Protestant.”

The final major argument is that in order to understand the use of “religion” as a *terminus technicus* in the Augsburg Religion-Peace of 1555—and, arguably, the meaning of “religion” as a secular legal category in the late modern period—we must analyze its litigative pre-history. Where scholars tend to adopt “religion” as an analytic for this period, tracking histories of tolerance, violence, or confessionalization, I concentrate on the work of classification itself.

### Speculations about Secularism and Religion

The Reformation has been a fixture in the doctrine of secularism since its earliest philosophical articulations in the eighteenth century. For John Locke, for instance, it was the religious wars of the post-Reformation that generated the need for a separation of religion and government.<sup>7</sup>

Modern expositors of the secularization thesis identify the Reformation as an important point of departure for other reasons. In his book *A Secular Age*, for instance, Charles Taylor describes the ways in which the Reformation inaugurated “the abolition of the enchanted cosmos, and the eventual creation of a humanist alternative to faith.”<sup>8</sup> Brad Gregory argues that the pluralism that the Reformation unleashed resulted in the privatization of religion; in its wake, capitalism and consumerism became the “cultural glue that holds together the heterogeneity of Western hyper-pluralism.”<sup>9</sup>

Historians of religion likewise have long identified the Reformation as one of the key intellectual contexts in which “religion” gained its modern definition.<sup>10</sup> Often, they point to the Augsburg Peace of 1555, in which “for the first time, ‘religion’ could be understood as a political and legal construct.”<sup>11</sup> It was the first modern usage of “religion” as a “*terminus technicus*.”<sup>12</sup> The formulation commonly attributed to the 1555 Peace—*cuius regio, eius religio* (whose land, his religion)—indicates a move towards “objective formulation” of confessional difference.<sup>13</sup> This was a departure from the old ways of describing confessional difference in terms of truth and falsity, orthodoxy and heresy; this new formulation of “religion” cleared a space for nascent state neutrality and was a triumph for the rule of law. “Religion” also denoted a sphere of governance in the context of the emergent territorial sovereignty principle.

But there is more to the significance of the religion category, and its origins in the Reformation, than this.

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<sup>6</sup> Christopher Tomlins and Bruce H. Mann, eds., *The Many Legalities of Early America* (Chapel Hill: University of North Carolina Press, 2001), 2-3.

<sup>7</sup> See John Marshall, *John Locke, Toleration and Early Enlightenment Culture* (Cambridge, UK: Cambridge University Press, 2010).

<sup>8</sup> Charles Taylor, *A Secular Age* (Cambridge, MA: Harvard University Press, 2007), 77.

<sup>9</sup> Brad Gregory, *The Unintended Reformation: How a Religious Revolution Secularized Society* (Cambridge, MA: Belknap Press of Harvard University Press, 2012), 21, 23, 215.

<sup>10</sup> See literature review in Chapter 4.

<sup>11</sup> Harrison, 97.

<sup>12</sup> Feil, 270.

<sup>13</sup> Harrison, 97. On the formulation “*cuius regio, eius religio*” see footnote 60 in Chapter 4.

Talal Asad and others in the critical study of secularism often note that religion emerged coterminously with secularism in the Reformation and post-Reformation period.<sup>14</sup> On its face, this seems to align with what was described in the paragraph above. But in fact, their argument is distinct. For Asad, secularism is a discourse that gives rise to a political and legal doctrine that relies on a set of oppositions under the headings of “the secular” and “religion”—between “belief and knowledge, reason and imagination, history and fiction, symbol and allegory, natural and supernatural, sacred and profane.”<sup>15</sup> The efforts to demarcate a boundary between these sorts of objects—the “behaviors, sensibilities, and ways of knowing” that constitute those efforts and their consequences—constitutes secularism.<sup>16</sup> Thus, central to secularism is not simply the separation of religion from the secular, but the work of constructing those two objects. Secularism “is not simply the organizing structure for what are regularly taken to be a priori elements of social organization—public, private, political, religious—but a discursive operation of power that generates these very spheres, establishes their boundaries, and suffuses them with content, such that they come to acquire a natural quality for those living within its terms.”<sup>17</sup>

Agrama argues that this boundary work produces a particular kind of “secular impulse and anxiety, rooted in an increasingly felt inability to secure a domain of secularity.”<sup>18</sup> The effect of this specifically secular impulse is to ask, again and again, where is the boundary between religion and the secular, and is that boundary being breached?

This question sounds familiar; so much of Christian history has been preoccupied with the question of the proper boundary between the spiritual and the temporal. The question itself is not new, but the objects and stakes are.<sup>19</sup> In the late modern period, the stakes of this question have to do with the distribution of fundamental rights and freedoms historically identified with liberalism, such as legal equality and freedom of belief and expression; as well as the extension of liberal power through colonialism and war.<sup>20</sup> Furthermore, the question provides the late modern secular state with its *raison d’etat*—the intractability of the question, and the perennial suspicion that the boundary is being breached, makes the state’s duty to preserve the distinction through regulation enduring.<sup>21</sup>

As we have seen, the stakes of the question—what is the boundary between the temporal and the spiritual—in the late medieval period had to do with jurisdiction and the distribution of authority, and it had consequences on the lives of those who were governed and adjudicated under its terms in various ways.

This dissertation shows that in the Reformation, not only did the stakes shift, but the definition of the objects did, too. The Reformation cases are key to this story. In them, the spiritual/temporal binary was no longer prescient. Instead, central was what was a matter of religion, and what was not a matter of religion. As I have shown, the term referenced a problem-

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<sup>14</sup> Asad, “Construction,” 116; Mahmood, “Minority Question,” 421; Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, CA: Stanford University Press, 2003), 192.

<sup>15</sup> Asad, *Formations*, 23.

<sup>16</sup> Agrama, 2.

<sup>17</sup> Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton, NJ: Princeton University Press, 2015), 3. See also Russell T. McCutcheon, “They Licked the Platter Clean”: On the Co-Dependency of the Religious and the Secular, *Method and Theory in the Study of Religion* 19 (2007): 173-99.

<sup>18</sup> Agrama, 17.

<sup>19</sup> Agrama, 28. See also Talal Asad, “Trying to Understand French Secularism,” in *Political Theologies: Public Religions in a Post-Secular World*, ed. Hent de Vries and Lawrence E. Sullivan (New York: Fordham University Press, 2006), 497-8.

<sup>20</sup> Agrama, 27-9.

<sup>21</sup> Agrama, 29-30.

space as it had emerged over the course of several decades of litigation, especially the way this redounded on the imperial constitution. This means that it was at once a question of group identification and legal legibility; a category of governance; a term that captured the ways in which temporal and spiritual matters were intertwined in ways that the old jurisdictional binary seemed inadequate to handle; a justiciable object and category of legal issue; a term whose valence evoked a suspicion of playing with the temporal/spiritual boundary in self-serving ways; and a shorthand for the core conflict and constellation of disputes that had provided the impetus for this Peace.

When the Peace used the term “religion” in its name and terms, it contained that category. As I showed in Chapter 6, “containment” did not mean clarity; “religion” was a placeholder, a signifier for a “problem-space.” I would argue that the “origins” story here is not about objective formulation of confessional difference—a prerequisite of modern secularism as facilitator of religious freedom and separation of church and state—but rather about the way in which the indeterminacy and ambiguity itself incessantly raises the question of the category’s boundaries, and obliges the state to provide an answer—underlining the state’s power to both police and question.<sup>22</sup> Here are the origins of secularism not as a form of government characterized by the separation of church and state, but as a “questioning power.”<sup>23</sup> More than anything, the “matter of religion” term denoted a question, the question of whether this or that thing counted as a matter of religion. This is the dominant refrain in its invocation in the cases, as well as in deliberations among the judges, and correspondences and protocols among those who were negotiating treaties and recesses concerning them. In part, this dissertation attempts to describe and analyze the socio-legal and constitutional conditions in which this form of questioning and agonism could be sustained. And it suggests that this questioning and agonism cleaved to the category even past the time and place that were the conditions of its production. To the extent that we see the origins of secularism in the early Reformation, perhaps it looks more like this than the origins stories provided by the standard liberal accounts (a la Locke) or the standard secularization thesis accounts (a la Taylor). Perhaps a legal phenomenology of the “matter of religion” in this period helps us to understand not only the intractability of the “religion” category as it is with us today, but to historicize that intractability.

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<sup>22</sup> Agrama, 27-30.

<sup>23</sup> Agrama, 33.

## APPENDIX: TIMELINE

1495 – First Imperial Diet (Reichstag) at Worms; founding of Imperial Chamber Court

1517 – Martin Luther sends letter to the Archbishop of Mainz, outlining the problematic theological implications of the sale of indulgences; followed by publication of Ninety-Five Theses

1518 – Luther receives summons to Rome; Luther meets with Cajetan in Augsburg instead

1519 – Miltitz meets with Luther; Emperor Maximilian I dies; election of Charles V; first electoral capitulation (*Wahlkapitulation*) for a new emperor

1520 – Papal Bull “*Exsurge Domine*” describes Luther’s heresies; Luther publicly burns it and publishes three consequential texts

1521 – Papal Bull “*Decet Roman Pontificem*” excommunicates Luther; Luther at the Diet of Worms; Worms Edict outlaws Luther and his followers; Luther flees to Wartburg castle

1522 – Imperial Regiment Mandate calls on rulers to outlaw innovations in worship in their domains; Nuremberg Diet does not discuss Luther or Reformation questions

1524 – Nuremberg Diet with famous section confirming Worms Edict but for rulers to implement its terms “as much as possible”; in Edict of Burgos, Emperor contradicts this by ordering that the Worms Edict be enforced unconditionally

1524/5 – Peasants’ War

1526 – Speyer Diet; its Recess forbids innovations in worship and usages, but states in Article 4 that until the convening of a Christian Council or national assembly, each of the Estates has authority to “live, govern, and behave with their subjects in matters of the Worms Edict, as each hopes and trusts himself to answer to God and the Emperor”; definition of Land-Peace violation is explicitly linked to Reformation-related conflicts; the first time that an imperial law besides the Worms Edict is promulgated to manage the Reformation’s conflicts

1529 – Speyer Diet, summoned in part to quash reforms that 1526 had unleashed; its Recess says that any violent act impinging the rights of another estate, if done for reasons of faith and religion, could be considered a violation of the Land-Peace. But because the acts listed could already be considered Land-Peace violations, the mentioning of the faith conflict added nothing new; if anything, the Recess made it clear that faith reasons were no escape from the consequences of a Land-Peace violation. The evangelical estates protested these portions of the 1529 Recess.

1530 – Augsburg Diet, at which the evangelical estates present the Augsburg and Tetropolitan Confessions. Its Recess aims to undo evangelical reforms by defining a wide range of acts done against old-faith worship and institutions as “Land-Peace violations,” even those that did not

have a violent quality, which had hitherto been a prerequisite of a Land-Peace violation. The evangelical estates protested these portions of the 1530 Recess.

1530/1 - Founding of the Schmalkaldic League of evangelical princes and cities; drafting of the combined power of attorney as part of their co-litigation strategy

1532 – Nuremberg Settlement promises an end to “matter of religion” litigation in the Imperial Chamber Court. But it is secret, and the public Peace Mandate promulgated at the Regensburg Diet that same year simply reiterates the sentiments of the 1530 Augsburg Recess, leaving the legal status of both in doubt.

1534 - Recusation of the Court’s President and a majority of its judges by the protesting estates in matters of religion; Treaty of Kaaden promises end to cases concerning the religion in the Imperial Chamber Court

1535 - Estates of all confessional inclinations join forces to quash the Anabaptist Kingdom in Münster; Treaty of Vienna promises end to cases concerning the religion in the Imperial Chamber Court

1539 - Frankfurt Settlement promises end to cases concerning the religion in the Imperial Chamber Court

1541 - Regensburg Diet (first since 1532); first time a suspension of Reformation cases is promised in the form of a Recess, but still no change in Court's judicature.

1542 - Speyer Diet; promise of suspension of Reformation cases; protesting estates declare general recusation of the Court in all of its jurisdiction, not just in matters of religion

1544 - Imperial Chamber Court effectively shuts down for lack of financing

1546 - Regensburg Diet; Emperor declares Landgrave of Hessen and Elector of Saxony in the *Acht*

1547 - Schmalkaldic War; Landgrave of Hessen and Elector of Saxony captured and imprisoned

1548 - Augsburg Diet; Imperial Chamber Court reopened; beginning of Emperor's “interim politics” in which he proposes specific theological and ecclesiological compromises until the convening of a Council; this, in addition to other apparently authoritarian moves, unlocks resentment among the Estates

1551 – Princes’ Rebellion

1552 - Passau Treaty

1555 - Augsburg Religion-Peace

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