Journal of Law and Religion (2023), 38: 1, 118–125

BOOK REVIEW SYMPOSIUM

Religious Liberty and Human Rights: Their Origin, Their Development in the Anglo-American Legal Tradition, and Why They Are Still Needed

Ian Leigh

Emeritus Professor of Law, Durham University
Email: ian.leigh@durham.ac.uk

doi:10.1017/jlr.2022.59

Abstract

Discussed: *The Blessings of Liberty: Human Rights and Religious Freedom in the Western Legal Tradition*. By John Witte Jr . Cambridge: Cambridge University Press, 2021. Pp. 316. $110.00 (cloth); $29.99 (paper); $24.00 (digital). ISBN: 9781108429207.

John Witte, Jr.'s book *The Blessings of Liberty* contains an important message about the origins and continuing relevance of religious liberty. Based on careful historical analysis of the development of religious liberty in England and the US, Witte demonstrates the importance of Protestant thinking both to the right and to human rights more generally. In the process he refutes both Christian and post-Enlightenment sceptics. His discussion of contemporary US and European law shows how much the right is still needed today, despite the claims of contemporary scholars that freedom of religion and belief is a redundant right.

Keywords: religious liberty; human rights; Protestant thought; US constitutional law; fundamental rights; European Convention on Human Rights; Court of Justice of the European Union; freedom of conscience; Roman law; Enlightenment thought

By any measure, John Witte, Jr. is a towering figure in the scholarship of law and religion. For more than thirty-five years, he has served as director of the Center for the Study of Law and Religion at Emory University while producing a formidable canon of books and articles in academic journals. His careful scholarship, selfless leadership, and tireless enthusiasm has inspired dozens of scholars, especially Christian scholars working in the field (not least through his general editorship of the Cambridge Studies in Law and Christianity and Great Christian Jurists in World History book series). Witte's work uniquely spans three fields in which he is equally well versed and at home: the history of Protestant thought in relation to political, legal, and constitutional questions; legal history (especially relevant to this volume, US Constitutional history); and the modern juridical exposition of religious liberty in US and international courts. All three are on display in the nine interlocking essays that comprise *The Blessings of Liberty.*

The book's title, taken from the Preamble to the US Constitution of 1787, is a reflection of Witte's belief that "freedom is a unique gift of God to all human creatures" (11). However, he modestly foreswears any competence to ground the claim theologically or philosophically,

thus sidestepping theoretical debates about the nature of human rights. Instead, he points to evidence grounded in the lived experience of enunciating legal categories and concepts, fleshing them out, fine-tuning them, and reconciling them into the complex and detailed legal, constitutional, and international human rights law that protects religious freedom today. Witte makes the larger claim that religious freedom not only is the first liberty historically, but that it also remains the cornerstone for protection of many other rights. It does so, he argues, because religion provides the ethical grounding necessary to a human rights regime; because it underpins notions of human dignity, community, and human nature and need; and because of the place of religious institutions alongside the state in realizing rights, especially in transitional societies. This view is a striking corrective to the frequently voiced claims in contemporary scholarship that religious freedom is a largely unnecessary human right and that religions themselves are major human-rights violators and oppressors.

Assessing the Christian contributions to the development of rights and liberties in the Western legal tradition, Witte notes that "[w]hile many human rights lawyers today dismiss premodern Christian rights talk as a betrayal of Enlightenment liberalism, many Christians today dismiss modern Enlightenment rights talk as a betrayal of traditional Christianity" (16). Accordingly, in the book's first chapter Witte seeks to counter the prevailing human rights orthodoxy that sees rights as merely the product of the Enlightenment by pointing to the biblical foundations of human rights, tracing the contribution of Roman law, medievalism, Catholicism, and early modern Protestant thought to the development of the concept.

Discussing the Anglo-American legal tradition, Witte studies the development of rights and liberties covering the period from Magna Carta (1215) to the seventeenth century in England and its colonies prior to the American Revolution. Despite the adulation Magna Carta evokes in certain quarters and at certain times—not least around its millennium—the mystery is how this ragbag list of feudal demands has attained its elevated constitutional reputation. In England, until recently, so little attention was paid to the provisions of the Great Charter that in 1969 Parliament came close to repealing it altogether in a tidying-up exercise because the statutory draftsman realized that the operative provisions had all been superseded by later legislation. In any event, the Preamble was spared because of its symbolic significance. The *idea* of Magna Carta is, however, considerably more potent as a source of inspiration—contemporary Conservative proponents of a "British Bill of Rights"[1] are only the latest in a long line of political and legal theorists to draw inspiration from it.

The *background ideas* that the Charter gives rise to remain the cornerstone of limited government: that the king (now government) is subject to the law, that justice should be impartial, and that individuals have rights against the state. It is easy, however, to read these ideas anachronistically and therefore to misunderstand them. In the thirteenth century, the royal courts created under John's father, Henry II, were only beginning to dispense justice, there was not yet a parliament, laws were made by the King-in-Council, and the common law was only at the very beginning stage of the long process of evolution that continues to the present day. Nonetheless, in the intervening centuries—and especially in England from the seventeenth century onward, thanks to the Chief Justice Sir Edward Coke and others—the *idea* of a constitutional tradition founded on Magna Carta has cast a long shadow. It is that idea, rather than the specific clauses of Magna Carta, that exerts such a powerful sway. That influence was particularly potent in early America, where, in the seventeenth century, it inspired a series of charters in the colonies (61–72).

[1] See in the United Kingdom the Conservative government's Bill of Rights Bill 2022–23, HC Bill [117], https://publications.parliament.uk/pa/bills/cbill/58-03/0117/220117.pdf.

https://doi.org/10.1017/jlr.2022.59 Published online by Cambridge University Press

Even the provision in the Charter that is central to Witte's story, that "the English Church shall be free," was rooted in some very specific thirteenth-century grievances about church appointments and property. It is quite a stretch from these rather archaic concerns to modern notions of religious liberty. Many bishops in this period were primarily royal counselors and ambassadors, and a bishopric—together with its accompanying land and wealth—was a reward for services rendered to the king. In the period before the emergence of Parliament or a distinct executive branch, England was governed from the king's court. Nearly all those educated enough to be useful as advisers would have been in holy orders, and ecclesiastical patronage was routinely used to reward them. These dynamics of power and allegiance are important to understand when we read Article 1 of Magna Carta: "the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired."

The "English Church" referred to the contemporary Roman Church in England, the current Established (Protestant) Church of England was a sixteenth-century creation. This was a period when all monarchs swore allegiance to the pope and lived in real fear of eternal damnation if they were excommunicated. King John himself had only just settled a long-running dispute with the pope over the appointment of the archbishop of Canterbury, Stephen Langton, who was the first other party to Magna Carta. What were the freedoms of the English Church that Magna Carta refers to? This was *not* religious liberty in a modern sense: freedom to believe or exercise one's beliefs without persecution. In England that came later, from the seventeenth century onward, under the name of toleration—first of Protestant minorities, then Roman Catholics and Jews, and finally atheists. It was *not* freedom from religious discrimination either. The one visible, if very small, religious minority in England in 1215 were Jews, and they were expelled in 1290 by John's successor, Edward I. In the years before 1215, King John, in need of funds, had been harassing the Jewish community in order to extract money from them. He had also taken over those debts owed to Jewish moneylenders where the debtor died, thus collecting them for himself. Magna Carta did nothing to stop this practice—it was taken to be part of the royal prerogative—but clauses 10 and 11 alleviated the burden on the debtor's heirs by foregoing interest—to the king, of course, not the Jewish lender—until they came of age and by exempting certain property from the debt.

If we are not talking about religious liberty or nondiscrimination, what we are talking about is religious autonomy in the form of a glimmering recognition in Article 1 of Magna Carta that the church should be allowed to govern its own affairs. How was this observed? Not well or much. One of Langton's predecessors, Thomas Becket, had been murdered in Canterbury Cathedral forty-five years before, on the apparent orders of John's father, Henry II. For centuries, much of English history revolved around the perpetual struggle between the pope and English kings. Ongoing disputes over church appointments, property, the emerging jurisdiction of the royal courts, and, of course, royal divorces, would culminate in the confiscation of much of the church's property when the monasteries were dissolved three centuries later under Henry VIII, who proclaimed himself supreme governor of the Church of England, now reformed and Protestant. The Church *of* England got its freedom eventually—seven hundred years *after* Magna Carta—with the introduction of self-government under the synod system in 1919, although even now Parliament can veto its legislation and the monarch must assent to it. I mention all this to introduce a skeptical caveat to Witte's account, which in places tends toward eulogy, echoing Coke and some of his forebears.

In the third chapter of *The Blessings of Liberty*, Witte successfully refutes the idea that the Protestant reformers of the sixteenth century were somehow uninterested in natural law

https://doi.org/10.1017/jlr.2022.59 Published online by Cambridge University Press

and natural rights.[2] The widely held mistrust among contemporary Protestants, based on the view that the concepts derive solely from the Enlightenment or from earlier scholastic writings, is ahistorical. Rather, as Witte convincingly demonstrates, early Protestants not only regularly referred to these terms in their writings, but they also used them to develop distinctive approaches that contributed to the development of human rights, religious freedom, and democratic revolution based on their teachings on scripture, human nature, divine sovereignty, and the Decalogue.

Martin Luther, for example, argued that earthly authorities operate because of divinely ordained norms in the law of nature (81–83). The Decalogue gave expression to the duties owed under natural law to God and one's neighbor. Knowledge of the natural law came through both scripture and natural reason. In a formulation that Thomas Aquinas before him and John Finnis long after would both agree with, Luther saw positive law and natural authorities as practical necessities because of human frailty in keeping the natural law and the need to adapt the natural law to local conditions. Melanchthon developed this approach to the Decalogue into a sophisticated scheme under which the first table supported positive laws governing relations between God and persons and the second table more detailed positive laws regulating relations between persons. Another notable early Lutheran contribution was the Magdeburg Confession of 1550, which posited a right of resistance in defense of rights under natural and divine law, particularly violations of the people's "essential right" of religion, against the Holy Roman Emperor. Anabaptists drew on their two-kingdom theology to develop arguments that became an essential and familiar part of the lexicon of religious liberty: the importance of individual conscience, opposition to established religion, the principle of religious voluntarism, and church autonomy (89–91). Calvin drew on concepts of natural rights and natural order, as well as natural duties owed to God and to neighbors in his scheme of subjective rights, an approach further developed by Christopher Goodman and Johannes Althusius.

A study of the 1780 Massachusetts Constitution's "mild and equitable establishment of religion" (to quote its drafter, John Adams[3]) comprises the book's fourth chapter. As Witte elaborates, the story of the constitution and its amendments belies conventional wisdom about the abandonment of European establishment of Christian denominationalism in the early American states. In Massachusetts there was no high wall of separation between church and state—Congregationalism was the preferred religion, reflected in ceremonial, moral, and institutional references in the constitution. It embodied "strong established forms of virtue, morality, religious education, and public ceremony" (9), which were considered foundational in protecting constitutional rights generally, alongside a form of limited protection of religious freedom for minorities. Nineteenth-century amendments to the 1780 constitution eliminated religious tithes and oaths. In some ways, constitutional development in Massachusetts tracked and at times anticipated the mild or weak form of establishment that also evolved in Anglican England. This is the kind of legal history in which Witte excels—drawing lessons from the technical historical discussions over drafting the constitution for contemporary debates about secularism. Indeed, one could perhaps go further than the Massachusetts case study and argue that religious neutrality is a chimera, that all constitutions must embody a worldview of some kind, and that the mild Christian

[2] Readers familiar with Witte's work will recognize a reprise of the some of the arguments from an earlier book that focuses on Calvin and his successors: John Witte, Jr., *The Reformation of Rights* (Cambridge: Cambridge University Press, 2007).

[3] John Adams, "Diary, with Passages from an Autobiography," in *The Works of John Adams, the Second President of the United States: With a Life of the Author, Notes, and Illustrations*, ed. Charles Francis Adams, 10 vols. (Boston: Charles C. Little and James Brown, 1850), 2:399, quoted in Witte, *Blessings of Liberty*, 10n5.

https://doi.org/10.1017/jlr.2022.59 Published online by Cambridge University Press

version has proved better at protecting rights generally than have the alternatives.[4] As Witte points out at the conclusion of the chapter, "the disestablishment of traditional religion has led to the establishment of new secular beliefs and values that are sometimes enforced with as much dogmatism, hardness, and cruelty as any established religious regime of the past" (137).

Witte broadens the story in the fifth chapter, "Historical Foundations and Enduring Fundamentals of American Religious Freedom," to analyze the "six major principles of religious freedom" (139) in the American founding era of 1760 to 1820: liberty of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state, and no established religion. Witte traces these first in original state constitutions, those of Virginia, Pennsylvania, New Jersey, Maryland, and New York, and then in a discussion of the background and interpretation of the First Amendment to the US Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This is well-ploughed ground, and Witte himself has gone over it in fine detail elsewhere.[5] Here it serves to ground a brief rejoinder to various constitutional revisionists who decry the "specialness" of religious liberty and who treat the First Amendment as an exercise in Protestant hegemony, substituting their own values with "faith-like qualities" or offering unrecognizable caricatures of religion with which to disparage religious liberty (160–65).[6] Witte's corrective is to remind readers of the "immensely valuable goods that religion offers to a community" and of the indispensability of religious freedom for the protection of other fundamental human rights (166). Citing the Court's *Hobby Lobby* and *Masterpiece Cakeshop* decisions as evidence, he is optimistic that in the US Supreme Court, after a period from 1980 to 2010, during which the court moved away from protecting religious liberty, the pendulum is now beginning to swing in the other direction.[7]

Chapter 6, "Balancing the Guarantees of No Establishment and Free Exercise of Religion in American Education," illustrates this process in relation to schools and universities. This field is highly significant: it accounts for fully a third of the First Amendment jurisprudence, and, as it is in Europe, is a highly contested cultural battleground in view of its importance in shaping the values of the future generations. The "balancing" in the title refers to the moves of the Supreme Court in its recent case law to reaffirm free exercise, free speech rights, and relax limits on governmental funding for religious schools and parents and students in the face of more rigid approaches at the state level.[8]

Witte's chapter on tax exemptions is a different kind of case study. It considers the tensions between the Establishment and Free Exercise Clauses, examining the constitutional

[4] See Rex Ahdar and Ian Leigh, "Is Establishment Consistent with Religious Freedom?," *McGill Law Journal* 49, no. 3 (2004): 635–81.

[5] John Witte, Jr., Joel A. Nichols, and Richard W. Garnett, *Religion and the American Constitutional Experiment*, 5th ed. (Oxford: Oxford University Press, 2022). See Nathan Chapman's discussion of *Religion and the American Constitutional Experiment* elsewhere in this review symposium. Nathan S. Chapman, "American Religious Liberty without (Much) Theory," *Journal of Law and Religion* 38, no. 1 (2022) (this issue).

[6] Referring to the work of Steven D. Smith, Winnifred Sullivan, Phillip Hamburger, and Brian Leiter among others.

[7] Burwell v. Hobby Lobby Stores, Inc, 573 U.S. 682 (2014) (allowing a closely held corporation protection under the Religious Freedom Restoration Act); Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018).

[8] Hosanna-Tabor Evangelical Lutheran Church School v. EEOC, 565 U.S. 172 (2012); Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020); Arizona Christian School Tuition Organization v. Winn, 563 U.S. 125 (2011); Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017); Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

https://doi.org/10.1017/jlr.2022.59 Published online by Cambridge University Press

rationale for tax exemptions for religious property.[9] His discussion moves from the common law and equitable protections for church property and charitable purposes, through early challenges under the states' constitutions to the modern theory and law of religious property exemptions. While religious tax exemptions reflect constitutional respect for religious autonomy and recognize the need for an institutional underpinning to Free Exercise rights, Witte nonetheless urges some moderation in such claims in recognition of the fact that "[n]ot every corner and building on a sweeping church campus is vital to its ministry" (225). In modern times, religious groups are often seen as part of the so-called third sector, partnering with the state or acting as its surrogate in delivering welfare or social services. This partnering in turn gives rise to tensions about the price of such cooperative ventures if the state requires conformity with its agenda. However, as Witte wisely points out, if a religious organization finds the preconditions for exemption inimical to its freedom, it has the option of forgoing exemption and rendering its taxes to Caesar.

Witte acknowledges that he writes with the "accents" of a North American Protestant from the Anglo-American common law tradition (12). He undoubtedly displays much greater self-knowledge than many other authors to whom one or both of those labels could be applied. He is to be commended for including chapters dealing the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), his focus in chapter 8 and 9. The former has jurisdiction over human rights petitions from more than 800 million people in virtually the entire continent, and the latter jurisdiction over 27 countries. Despite their importance, many North Americans tend to be unfamiliar with the contributions of the Strasbourg and Luxembourg courts, and for such readers these chapters may serve as a useful introduction.

The jurisprudence of the ECtHR has grown since its seminal *Kokkinakis* decision in 1993.[10] A substantial body of case law now interprets not only the right of freedom of thought, conscience, and belief (Art 9 ECHR) but also the right of nondiscrimination in the enjoyment of European convention rights (Art 14 ECHR) and the right of a parent for their child to be educated in accordance with their religious and philosophical convictions (Protocol 1, Article 2). These range from decisions on matters of individual religious liberty (such as dress, diet, holidays, symbols in schools, school curriculum, the status of rights and duties under religious law, conscientious objection, among many others) to questions of religious association and autonomy (such as registration requirements, state interference in religious appointments, disputes over religious leadership). Importantly, the ECtHR has found that Article 9 imposes an obligation of religious neutrality on states (although mildly established religions do not fall foul of this) and a positive obligation to allow religious liberty to be exercised in fact, for example, by combatting societal persecution of minorities like Jehovah's Witnesses.[11]

More recently still, the CJEU has become active in the field—so far in quite limited fields, reflecting limited EU competence, notably employment discrimination.[12] Whether, as Witte suggests, this makes it "the New Boss of religious freedom" is still an open question (259). For the most part, the CJEU tracks the approach under the Convention. This is hardly surprising, as membership of the Convention is a prerequisite before a state can accede to the European

[9] The chapter constitutes a modified version, in response to the arguments of critics, of John Witte, Jr., "Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?," *Southern California Law* Review 64, no. 2 (1991): 363–415.

[10] Kokkinakis v. Greece, 17 Eur. H.R. Rep. 397 (1993) (holding that the applicant's conviction under a law prohibiting religious proselytism violated Article 9).

[11] 97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia, 46 Eur. H.R. Rep. 30 (2008).

[12] Also animal welfare and ritual slaughter, state aid, and free movement of persons.

https://doi.org/10.1017/jlr.2022.59 Published online by Cambridge University Press

Union. The European Union itself has acceded to the Convention, and the main human rights obligations under EU law were drafted with these Convention obligations firmly in view. Moreover, the CJEU is quite explicit in frequently citing Convention jurisprudence. There are some emerging differences between the two overlapping systems that have excited commentators, but it is important not to exaggerate the impact of these. The CJEU religious liberty jurisprudence does, however, include naïve references to neutrality that Witte rightly criticizes (280–82).[13]

In other places, however, because of his aforementioned "accents," Witte's account of European developments does need to be read with caution. It is startling, for example, to be told repeatedly that the jurisprudence of the ECtHR is a kind of "soft law" that member states do not need to obey (see, for example, 235, 259, see also 287). That interpretation is directly at odds with the obligation under Article 46 of the European Convention on Human Rights and Fundamental Freedoms 1950: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."[14] Nor is it "soft law" as far as municipal courts are concerned: the constitutional texts of many European countries have the effect of making the Convention and the ECtHR's judgments superior law. Even in dualist Britain, sections 2 and 3 of the Human Rights Act 1998 require domestic courts to take account of—or, pursuant to judicial interpretation, to generally follow—Strasbourg rulings as a whole and not only those involving the United Kingdom itself.[15] More subtly, Witte's account in chapter 8, if anything, underplays the significance of the Margin of Appreciation doctrine, which is in many respects the key to understanding the ECtHR's approach to Article 9 of the Convention[16]—certainly in leading decisions such as *Leyla Şahin* v. *Turkey*,[17] *SAS* v. *France,*[18] and *Lautsi* v. *Italy*.[19] There are some lesser niggles too. For example, laïcité is not a movement that has emerged in recent decades to challenge "traditional Christian establishments" (10). In French law, it goes back at least to the early twentieth century, in the Law on Separation of Church and State of 9 December 1905, if not earlier. It is certainly true, however, that it has taken a new direction in France (as it has in Belgium and Switzerland) as a reaction to the presence of visible Muslim minorities. Likewise, Turkish secularism is hardly a new or recent phenomenon: it is, as Witte might have put it, part of the ur-text of the Turkish Constitution, following the 1928 amendments to the 1924 Constitution. Indeed, Europe as a whole exhibits considerably more constitutional diversity than Witte allows. It is true that establishment is in retreat, especially in Nordic countries, but most European countries had other and divergent patterns for state-religion relations to

[13] Discussing two decisions on animal slaughter: Case C-426/16, Liga van Moskeeën en Islamatische Provincie Antwerpen and Others, ECLI-EU:C:2018:335 (May 29, 2018); and Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering, ECLI-EU:C:2020:1031 (Dec. 17, 2020).

[14] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, as amended by Protocol 11, European Treaty Series, no. 5 [hereafter, ECHR].

[15] See further Ian Leigh and Roger Masterman, *Making Rights Real: The Human Rights Act in Its First Decade* (Oxford: Hart Publishing, 2008); the contributions in Roger Masterman and Ian Leigh, eds., *The UK's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford: Oxford University Press, 2013).

[16] "Everyone has the right to freedom of thought, conscience and religion." ECHR, article 9(1).

[17] 2005-XI Eur. Ct. H.R. 173 (2005) (Grand Chamber) (holding that a prohibition on wearing the Islamic headscarf at a Turkish university did not violate Article 9).

[18] 2014-III Eur. Ct. H.R. 341 (Grand Chamber) (finding that French legislation prohibiting the wearing of face coverings in public places legitimately pursued the objective of *vivre ensemble*).

[19] 2011-III Eur. Ct. H.R. 61 (Grand Chamber) (holding that the display of crucifixes in Italian state schools did not violate the right of a parent to have her children educated in accordance with her religious and philosophical convictions (taken in conjunction with Article 9)). See Rex Ahdar and Ian Leigh, "Post-secularism and the European Court of Human Rights; or How God Never Really Went Away," *Modern Law Review* 75, no. 6 (2012): 1064–98.

https://doi.org/10.1017/jlr.2022.59 Published online by Cambridge University Press

start with. These misgivings aside, Witte does provide a useful introductory overview as well as some insightful comparisons with the United States.

Overall, *The Blessings of Liberty* is a notable, rich, and sweeping contribution to religion and law scholarship by one of its foremost exponents. In the historical material, in particular, Witte is at the top of his scholarly game. The story he tells about the origin, development, and importance of religious and human rights is a vital one for legal scholars and the Christian community alike to comprehend.

https://doi.org/10.1017/jlr.2022.59 Published online by Cambridge University Press