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Literature Highlights

Excerpt from John Witte, Jr., *The Blessings of Liberty: Human Rights and Religious Freedom in the Western Legal Tradition* (Cambridge: Cambridge University Press, 2021), Preface

For the past thirty plus years, I have been writing on the history, theory, and law of human rights and religious freedom. My main arguments have been (1) that religion has long been a critical foundation and dimension of human rights; (2) that religion and human rights still need each other for each to thrive; and (3) that robust promotion and protection of religious freedom is the best way to protect many other fundamental rights today, even though religious freedom and other fundamental rights sometimes clash and need judicious balancing. I have defended these propositions with various historical, legal, and theological arguments, and have learned much from deep conversations with Christian, Jewish, and Muslim scholars as well as self-professed secular and post religious scholars who variously defend, deride, and demur on the value and validity of human rights and religious freedom.

This volume presses further on all three of these main arguments. It includes nine studies on human rights and religious freedom historically and today – ranging from the earliest ur texts on liberty in the Bible and classical sources to the latest machinations of the American and European high courts. The first chapters explore the foundational role of Christianity in the development of rights and liberties in the Western tradition, particularly in the Anglo-American common-law tradition. Other chapters show how the protection of religion and religious freedom proved critical to the development of domestic and international protection of human rights. Several chapters analyze closely and critically the efforts of the American and European high courts to protect religious freedom and other fundamental rights and liberties. The final chapter titled “Concluding Reflections” responds to criticisms of human rights and religious freedom offered by various scholars and defends these rights and freedoms, particularly against various Christian critics.

Chapter 1 retrieves and reconstructs the gradual emergence of rights and liberties in the teachings of the Bible, classical Roman law, medieval canon law and civil law, the Protestant Reformation, the Anglo-American common-law tradition, and modern national constitutions and international human rights documents. It focuses especially on the contributions of Christian ideas and institutions to rights and liberties throughout much of this historical development, as well as the contributions of Enlightenment liberal and republican thought in more recent times.

Chapter 2 zeroes in more closely to offer a lengthy study of the development of rights and liberties in the Anglo-American legal tradition from Magna Carta, in 1215, to seventeenth-century England and its colonies leading up to the American Revolution. Since the fourteenth century, Parliament and the English courts treated Magna Carta as a source of due-process rights as well as sundry other religious and civil freedoms. In the sixteenth and seventeenth centuries, English Puritans and American colonists gradually developed expansive new Magna Cartas in the forms of written bills and bodies of rights that were eventually echoed in American state and federal constitutions.

Chapter 3 retrieves the long-deprecated teachings of the Protestant Reformation regarding natural law and natural rights, and reconstructs the reformers' role in the development of human rights, religious freedom, and democratic revolution in early modern Protestant lands. Lutherans, Anabaptists, and Calvinists alike made notable contributions to the expansion of public, private, penal, and procedural rights and liberties, which they eventually enumerated in written declarations, charters, and constitutions. The pervasive and persistent breach of these fundamental rights and liberties by a political tyrant, some Protestants further insisted, triggered the fundamental rights of resistance, revolt, and, if necessary, wholesale democratic revolution, as took place in the Netherlands, England, Scotland, France, and America.

Chapter 4 offers a close study of the 1780 Massachusetts Constitution and its amendments to illustrate the tension between inherited European political traditions of establishing one form of Christianity by law, and the emerging American experiment of granting religious freedom for all faiths. The chapter further shows that in early America, the disestablishment of religion did not necessarily mean the secularization of society or the erection of a high and impregnable wall of separation between church and state, religion and politics. Even after outlawing religious tithes and oaths and ending bald discrimination against religious minorities, the Massachusetts constitution retained strong established forms of virtue, morality, religious education, and public ceremony, all of which the state's founders considered essential to the protection of constitutional rights and liberties for all.

Chapter 5 places this Massachusetts story within the fuller context of the American founding era of 1760 to 1820. In this period, the American founders developed six essential principles of religious freedom – liberty of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state, and no establishment of religion. They wove these principles into the new state constitutions as well as into the First Amendment to the United States Constitution. The founders treated religious freedom as the "first freedom," which helped ground correlative constitutional freedoms of speech, press, and assembly as well as other enumerated rights to property and household, civil and criminal procedural rights, due process of law, and more. They also set forth a constitutional and cultural ideal, albeit often breached, that all persons of any faith and of no faith must enjoy religious freedom and other constitutional rights as fully as possible, with courts and legislatures alike tasked to resolve conflicts between rights.

Chapters 6 and 7 offer two studies of this American experiment of religious freedom in action, illustrating some of the trends in the United States Supreme Court's 240 plus cases on religious freedom, most of them since 1940. Chapter 6 studies the complex and shifting run of seventy-five U.S. Supreme Court cases dealing with the role of religion in public schools, the role of government in religious schools, and the rights of parents and children to religion, speech, press, assembly, and tax benefits in education. Questions about religion and education have provided the most active laboratory for Supreme Court religious-freedom jurisprudence and have produced many of the Court's strongest opinions on separation of church and state, religious neutrality, free exercise of religion, and equal access and treatment of religion and nonreligion. This topic will remain a perennial frontier of litigation about religious freedom and human rights.

Chapter 7 takes up the nitty-gritty issue of tax exemption of religious property, an ancient privilege in the Western tradition going to biblical and Roman times, but now under growing attack in America. The current fight over the constitutionality of religious property-tax exemptions illustrates the tension between federal and state laws, free exercise and no establishment of religion, and treatment of traditional and new religions. It also tests concretely the costs and benefits to individual and society of granting religious exemptions from general laws and tests the ancient teaching of the common law and equity law that religious property exemptions relieve the state of burdens it would otherwise have to discharge at taxpayers' expense.

The final two chapters study the parallel religious freedom and broader human rights jurisprudence of the two pan-European courts: the European Court of Human Rights, in Strasbourg, which has poured out more than 170 cases on religious freedom in the past three decades, and the Court of Justice of the European Union, in Luxembourg, which is rapidly emerging as the new boss of religious freedom. The religious landscape of Europe has changed dramatically in the past two generations. Traditional Christian establishments have been challenged by the growth of religious pluralism and strong new movements of *laïcité* and secularism. Massive new migrations have created tense local intermixtures of old and new religions. Old constitutions, concordats, and customs that privileged local forms and forums of Christian identity and morality have come under increasing attack. These changes have radically reshaped the law of religious freedom not only in individual European states but also as determined by these two pan-European Courts. Interpreting the norms of religious freedom laid out in the European Convention of Human Rights (1950) and the Charter on Fundamental Rights of the European Union (2010), these two courts have been notably churlish of late in their treatment of Muslim, Jewish, and conservative Christian claimants, while often privileging self-professed atheists and secularists. The two courts have repeatedly held against Eastern European Orthodox state policies on religion, even while granting wide margins of appreciation to Western European states that blatantly target religious minorities in the name of secularization and *laïcité*. In particular, the Luxembourg Court has begun to second-guess norms of religious autonomy and longstanding constitutional forms of church-state relations, even though EU laws formally protect them. While many other cases in these two courts do offer ample protection, their most recent cases pose troubling signs for religious freedom and

other fundamental human rights.

Throughout these chapters, I have addressed some of the sharp criticisms of religion, human rights, and religious freedom that are now widely in vogue in the Western academy and media. Chapters 1 and 3 take up the rights skepticism of several modern Christian theologians. Chapters 5 through 7 analyze several recent attacks on the historical pedigree and current protections of religious freedom. Chapters 8 and 9 address the escalating attacks on the rights of religious and cultural minorities and the judicial erosion of religious-autonomy claims.

The final chapter titled "Concluding Reflections" collects further criticisms of rights and freedoms, especially those offered by leading Christian scholars today, and then outlines my own defense of human rights and religious freedom. My choice of book title – "the blessings of liberty" – underscores my starting belief, widely shared, that freedom is an inherent human quality and claim. Indeed, in my view freedom is a unique gift of God to all human creatures. But I support the positive law of rights and liberties today more out of utility than ideology. In my view, rights laws over time and across cultures have proved to be useful instruments to promote and protect the good life and the good society; to impose and enforce limits on the power of states, churches, and other authorities; and to enable and equip persons to carry out their vocations and duties to God, neighbor, and self. I do not consider human rights to be a "fundamental belief system." To the contrary, I argue that rights and liberties depend upon fundamental beliefs for grounding, limitation, and direction. I also do not consider rights talk to be a substitute for many other richer forms of moral and communal expression and discourse. I regard rights talk as a useful grammar and vocabulary of human life and interaction, not a language in and of itself. It is a legal means to the fuller ends of justice, peace, order, and happiness, not an end in itself.

I come to this discussion about human rights and religious freedom as a Christian jurist and legal historian, not a Christian theologian or philosopher. Folks in my legal discipline operate closer to the ground than many high-flying human-rights theorists at work today. We lawyers deal with the routine corners and concerns of public and private life – of authority and liberty, of relationships and their rupture, of promises and their breach, of harms and their remedies, of crimes and their punishment. The chapters on religious-freedom cases help illustrate that kind of nitty-gritty, concrete complexity of the law on the books and law in action. We legal historians, in turn, dig out and document how, over many centuries, our legal forebearers gradually developed, by fits and starts, an ever wider set of rights categories, concepts, terms, distinctions, and limitations to map and deal with the complex interactions between and among persons, associations, and authorities. This growing collection of legal rights and liberties instruments was gradually pushed under the legal canopy of what are now regularly called human rights and liberties. Like many legal institutions, legal rights and liberties have emerged out of an evolving spectrum of legal normativity: acts become behaviors; behaviors become habits; habits yield customs; customs produce rules; rules beget statutes; statutes require procedures; procedures guide cases; statutes, procedures, and cases get systematized into codes; and all these forms of legality are eventually

confirmed in national constitutions, if not regional conventions and international covenants.

This bottom-up approach to our topic sometimes produces blurrier lines of reasoning; more slippage between principles, precepts, and practices; provisional and sometimes messier recommendations and prescriptions for church, state, and society. But I hope it also makes for an account and defense of human rights and religious freedom that is more realistic, rigorous, and resilient over time and perhaps even across cultures. This developmental and eclectic historical approach to modern rights talk, however, is quite different from that offered by many philosophers and theologians. Modern critics of human rights often have one or two key definitions or forms of rights in mind – sometimes with labels such "natural," "universal," "human," "fundamental," or "unalienable" rights – and then engage in critical or constructive reflection on rights based on that specific vision or definition. From such lofty theoretical heights, I submit, much of the reality of rights gets blurry even sometimes lost from view.

Finally, I come to this project as a North American Protestant, interested in some of the Protestant and broader Christian foundations of the Western legal tradition of human rights and religious freedom. While noting the contributions of the Latin Church Fathers, medieval Catholics, and the Second Vatican Council, I focus in these chapters more on Protestant contributions to the development of modern human rights and religious freedom in the history of the West. While gesturing to the Greek Fathers and to the rich potential of Eastern Orthodox theology for the development of human rights, I have not given this third branch of Christianity its due – let alone all the other religious and philosophical traditions that have contributed to our understanding of rights. While touching on various Western legal traditions on both sides of the Atlantic, I accent Anglo-American common law and American constitutional law, without corresponding attention to the rich civil-law traditions of Europe and Latin America, or the constitutional developments of individual states in Europe and the global British Commonwealth.

All these accents are functions of my scholarly competence, such as it is, not products of denominational, religious, or geographical chauvinism. Scholars of other Christian denominations and other world religions have happily made many profound contributions to our understanding of rights, liberties, and religious freedom, and these efforts deserve far more recognition than I have given them. Scholars from the many other parts of the Western world – especially in the global south and in southern and eastern Europe – have mined their legal traditions for further insights into human rights and religious freedom. My colleagues at the Center for the Study of Law and Religion and I are taking some account of these developments in an emerging fifty-volume series on "Great Christian Jurists in World History," as well as in our *Journal of Law and Religion*, which offers broader comparative law and religion analysis. But the vast story of the development and protection of human rights and religious freedom in the Western legal tradition, let alone in the global-law tradition, is still being written. And the global struggle for human rights and religious freedom for all must and will long continue.