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BOOK REVIEW SYMPOSIUM

Religion and the Justification of Rights

David Little

Research Fellow, Berkley Center for Religion, Peace & World Affairs, Georgetown University
Email: wdavidlittle@gmail.com

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Abstract

Discussed: *Faith, Freedom, and Family: New Studies in Law and Religion*. By John Witte, Jr. Edited by Norman Doe and Gary S. Hauk. Tübingen: Mohr Siebeck, 2021. €99.00 (paper); €99.00 (digital). ISBN: 9783161608773.

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.

This review essay registers sincere appreciation for John Witte's singular contribution to defending the importance of the history and interpretation of rights in the Western tradition, especially as related to Christian thought and practice. It also proposes to amend and refine his approach by highlighting the difference between natural and religious justifications of rights, and by suggesting reasons for favoring the former.

Keywords: history of rights in Western Christianity; subjective rights; natural and positive rights; natural and supernatural justifications of rights

With the many other achievements of his distinguished career, John Witte has come to be known as a leading defender of rights, especially rights associated with religion. His writings under review here—the recently published collections of essays, *The Blessings of Liberty: Human Rights and Religious Freedom in the Western Legal Tradition*, and *Faith, Freedom, and Family: New Studies in Law and Religion*,[1] abundantly reinforce that reputation, already well established by earlier works such as *God's Joust, God's Justice: Law and Religion in the Western Tradition*[2] and *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism*.[3] In this essay, I explore the legacy of Witte's work on rights and the potential for continued building of a more powerful and persuasive defense of rights.

As an able defender, Witte conscientiously and dispassionately addresses the growing chorus of contemporary rights critics, inside and outside religious circles. With

[1] These texts are cited parenthetically by page number throughout.

[2] John Witte, Jr., *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Grand Rapids: Eerdmans, 2006).

[3] John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007). Other related works are listed in a complete bibliography of Witte's publications in *Faith, Freedom, and Family*, 733–62.

characteristic thoroughness, he tracks and documents the objections of prominent Catholic, Orthodox, and Protestant thinkers to rights language in general, including a special animus against human rights.

Many Christians, Witte acknowledges, doubt that rights language is all that important in the Bible or the history of the church, and that it is the dangerous invention of Enlightenment liberalism (*Blessings of Liberty*, 15), and that others, like Stanley Hauerwas, find the language at once morally anemic and overly belligerent and urge that it be abandoned by Christians (*Blessings of Liberty*, 292).

Witte devotes an entire chapter in *Faith, Freedom, and Family* (chapter 23) to the critical views of the Anglican moral theologian Nigel Biggar as expressed in his recent book, *What's Wrong with Rights.*[4] For Biggar, only positive or legal rights exist. There simply are no such things as pre-political or pre-legal moral or human rights, and the belief that there are causes endless confusion and strife (*Faith, Freedom, and Family*, 435).[5] On Witte's reading, Biggar is utterly dismayed by abstract and universal rights declarations—like the French Declaration of the Rights of Man and the Citizen (1789), the United States Bill of Rights, or the Universal Declaration of Rights—and believes them to be so much "high-flying rhetoric" (*Faith, Freedom, and Family*, 435–46).

Witte also engages nonreligious rights critics, as in a chapter on Samuel Moyn in *Faith, Freedom, and Family* (chapter 24). At first, Moyn argued that human rights language was originally "utopian" for being incoherent and impractical, and despite the fact that the Universal Declaration of Human Rights was drafted and adopted in the late 1940s had almost nothing to do with the Holocaust or anything else until the 1970s. Even then, it was an invented language without any historical precedent. Later, Moyn claimed that human rights were really the result of conservative European Christian influence in the postwar period.[6]

I believe Witte's work has gone a long way toward refuting these and other criticisms, and for that we are all in his debt. He has amply shown how deeply embedded rights language is in the history of Western Christian thought and practice, and why there is no longer any reason to believe either that modern human rights ideas come exclusively from the Enlightenment or that rights and religion have nothing to do with each other. In addition, he has proved that far from trivializing moral sensibilities, rights language addresses issues of the gravest moral consequence—the protection of basic human security and survival.

After Witte is done, the claim that the concept of subjective natural rights has no meaning cannot prevail, nor can the suggestion that solemn documents like the American Declaration of Independence or the Universal Declaration of Human Rights are nothing but empty rhetoric, or are irrelevant to the Holocaust, or are, at bottom, simply incoherent and impractical. Nor can we possibly credit any longer the suggestion that the original human rights instruments were the simple product of postwar reactionary apprehension on the part of conservative European Christians over the rise of secularism and communism.

At the same time, I am of the view that Witte's defense could still be stronger. In what follows, I offer some refinements of and amendments to his historical account that, I believe, bring it in line with some concessions he makes in recent work regarding the connection of the rights tradition to modern ideas of human rights, along with some general reflections on the implications of these proposals for Witte's overall view of the role of religion in the justification of rights.

[4] Nigel Biggar, *What's Wrong with Rights?* (Oxford: Oxford University Press, 2020).

[5] Biggar, *What's Wrong with Rights?*, 435. For similar arguments from a legal perspective, see Jamal Greene, *How Rights Went Wrong: Why Our Obsession with Rights Is Tearing America Apart* (Boston: Houghton Mifflin Harcourt, 2021).

[6] Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015).

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The History of Rights Reconsidered

In *Blessings of Liberty*, Witte describes his method as a "developmental and eclectic historical approach to modern rights talk" that is "quite different from that offered by many philosophers and theologians." They tend to start with one or another definition of rights, like "natural," "universal," "human," "fundamental," or "inalienable," and then proceed constructively or critically based on that definition. The problem is that "from such lofty theoretical heights," "much of the reality of rights gets blurry, even sometimes lost from view." In contrast, Witte's "bottom-up approach," as he calls it, attends carefully to the arduous process by which, "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; cases get systematized into codes; and all these forms of legality are eventually confirmed in national constitutions, if not regional conventions and international covenants" (*Blessings of Liberty*, 11–12).

Witte identifies as a North American Protestant with special interests in "some of the Protestant and broader Christian foundations of the Western legal tradition of human rights and religious freedom," including the Church Fathers, medieval Catholicism, and some modern Catholic developments, like the Second Vatican Council. He by no means intends to diminish the contributions of Orthodox Christianity and non-Christian religions, but he considers constructing a comprehensive history of rights to be a broadly collaborative project (*Blessings of Liberty*, 12).

Given his bottom-up approach, Witte appears to think definitions are best arrived at toward the end of historical analysis rather than the beginning. To my knowledge, the closest he comes to providing a general definition of rights is the following:

> At its core ... this Western language of rights and liberties enabled jurists to map in ever greater detail the proper interactions between private parties in society and between private parties and the reigning political authorities, whether political, religious, feudal, or economic. Rights defined the claims that one legal subject could legitimately make against another to protect their person, property, business, reputation, and interest, or to compel another to live up to their contracts, promises, and other obligations. Rights and liberties also defined the limits to the actions, duties, or charges that authorities could legitimately impose upon their individual and corporate subjects. (*Faith, Freedom, and Family*, 429–30)

This is a strictly legal definition, and while Witte himself draws a distinction elsewhere between "*natural* rights (based on nature, natural law, or human nature) and *positive* rights (based on the positive law of the state, church, or other legal authority)" (*Faith, Freedom, and Family*, 430) the above definition would cover only positive rights presided over by a civil authority. What Witte leaves out is a fuller description of the similarities and differences between natural and positive rights, which, as I discuss below, Witte himself assumes in his interpretation of the development of the Western tradition, if not always as unequivocally as might be desirable.

Natural and positive rights are both enforceable entitlements, though they are justified and enforceable in different ways. A natural (human) right is a moral "entitlement, a due liberty and power to do or not do certain things," available to and binding upon all human beings, that is "neither of human devising (by law or by agreement), nor conferred by a special ... supernatural warrant[, and are thus knowable] by superanimal sensibilities and

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capacities [typically reason, conscience, or intuition]."[7] Natural rights are self-enforcing in the sense that threats to such things as life, property, reputation, and conscience or to solemn contracts and agreements may, under strict conditions,[8] be defended against by the use of coercion, and, in extreme circumstances, by physical force on the direct initiative of (or on behalf of) any single human being or of any collection of them. Thus, natural rights constitute a moral model or standard by which coercion and physical force are rightly regulated.

Positive rights, as Witte correctly states, are defined and justified by an established legal authority, which at least since premodern times, is understood to govern by means of a monopoly of legitimate force over the inhabitants of a given territory. Accordingly, positive rights specifying protections and obligations authorized under a state based on a natural rights model constitute the essential standards of enforceability by which force and coercion may legitimately be used. The idea behind the conjunction of natural and positive rights is that a widespread practice of self-enforcement is unreliable and unstable, and law and government are needed to secure rights more adequately by institutionalizing their delineation and enforcement.[9] At the same time, positive rights depend upon natural rights for justification and for at least some of their substantive meaning.

It should be noted that when viewed against a natural rights understanding, the part of Witte's definition of positive rights—that they identify "the limits to the actions, duties, or charges that authorities could legitimately impose upon their individual and corporate subjects"—takes on special significance in Western history. It highlights, in certain settings, the fundamental terms of relationship between "the people" and their government.

True to his method, Witte proceeds over the course of hundreds of pages to report on how rights language was used and justified in a wide range of contexts. As background, he calls attention to classical Roman law and some of its terms and opinions that were later appropriated by Christians. *Right* (*ius*) is used in an objective sense, meaning to be in proper order or to perform what is required. But *right* is also used subjectively, as in having a private right to be claimed or defended in owning and managing property or in conducting business and family relations, or to be invoked as procedural guarantees in criminal and civil trials. Public rights governed the exercise of administrative law. The idea of subjective right is sometimes spoken of as a "right of liberty" or expressed as the "rights of the people" to their liberties, though according to Charles Donahue, the notion of a subjective right grounded in nature is not common until after rights language had fallen under the influence of Christianity.[10] That influence would explain Tertullian's famous expanded defense of a

[7] This definition is a reconstructed version of T. E. Jessop, s.v. "Natural Rights," in *The Dictionary of Christian Ethics*, ed. John Macquarrie (Philadelphia: Westminster Press, 1975), 225.

[8] The use of coercion or physical force may, on a natural rights understanding, be initiated by individual persons or groups of them only in response to the *necessity* of averting an *imminent* palpable wrong, and exercised only in a way that is *proportional* and undertaken with *right intention*. For a fuller account, see David Little, "Self-Defense and the Organic Unity of Human Rights," *Journal of Law and Religion* 36, no. 3 (2021): 459–94.

[9] This description of the natural rights model applies both to Protestant and to earlier Conciliar (Roman Catholic) interpretations. Conciliarists, beginning in the twelfth and culminating in the fifteenth century CE, took the "strongly anti-Thomist and anti-Aristotelian" view that secular society was the result of sin: Quentin Skinner, *The Foundations of Modern Political Thought*, 2 vols. (Cambridge: Cambridge University Press, 1978), 2:116. Persons in the state of nature possess the right to exercise force in their own defense, but they decide on the basis of reason (because self-enforcement is unreliable and unstable) to grant the right of enforcement to political authorities (the origin of secular political society). That is, self-enforcement in the protection of rights readily turns into the violation of rights (sin) because of (in John Locke's words, which reflect the Conciliar view) "passionate heats" and the "extravagance of will" that are easily aroused by the exercise of force: John Locke, *Second Treatise of Government* (Indianapolis: Bobbs-Merrill, 1952), ch. 2, sect. 8.

[10] Charles Donahue, Jr., "*Ius* in Roman Law," in *Christianity and Human Rights: An Introduction*, ed. John Witte, Jr. and Frank S. Alexander (Cambridge: Cambridge University Press, 2010), 64–80.

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natural right to religious freedom, which Witte makes much of, about the "privilege inherent in human nature that every person should be able to worship according to his own convictions" (*Blessings of Liberty*, 25). It would also perhaps explain how it is that references to the right of the citizen against the state, so rare in Roman law, according to Donahue, became commonplace in Christian discourse.[11]

In a synoptic chapter on Christian contributions to rights language, Witte excavates "biblical foundations," identifying certain passages and themes in the Hebrew Bible and New Testament of special salience in the development of natural rights language in Western history (*Blessings of Liberty*, chapter 2). Central is the reference in Genesis to the creation of human beings "in the image of God," calling, in Witte's view, for an attitude of universal respect for the dignity of all human beings, and for the recognition that the possession of reason, will, and conscience, born of that image, leads to "the inherent right, duty, and freedom to make choices guided by the law written on the heart and rewritten in scripture, tradition and experience" (*Blessings of Liberty*, 18). In addition, the Decalogue is very "important to later Christian rights theorists." The First Table "defined religious duties to God, the Second Table duties toward neighbors. Later Christian writers used this template to set out the correlative religious rights and freedom that each person can claim to do the religious duties of the First Table, and the corollary civil rights of life, property, marriage, family, and reputation that each neighbor can claim against others" (*Blessings of Liberty*, 19).

Witte says that covenantal images throughout the Hebrew Bible "became critical starting points for later discussions of political covenants, contracts, and constitutions, as well as popular sovereignty, and the right to vote in and for constitutional government" (*Blessings of Liberty*, 20). Frequent references to freedom in the New Testament inspired recurring efforts by Christians to develop new forms of spiritual and political freedom, including the separation of governmental powers and the liberation of conscience and religious organizations from state control (*Blessings of Liberty*, 20–22). And Paul's emphasis on equality with respect to gender, race, and class contributed to ideas of equal protection before the law, and the recurring emphasis in the Hebrew Bible and the New Testament on special care for the widows and orphans, and the poor, sick, aliens, and prisoners generated support for what would become welfare rights (*Blessings of Liberty*, 21).

The Rise of Subjective Natural Rights

Witte shows that two themes were of particular importance for the development of rights in the medieval Catholic period, beginning in the late eleventh century. One was the "renaissance of rights theories and laws," discovered and so well elucidated by Brian Tierney and Kenneth Pennington.[12] Civilian and canon law jurists elaborated codes of rights and liberties protecting both individuals and groups, particularly the church, that were grounded, to be sure, in numerous customs and treaties. But medieval jurists also began to think of subjective rights variously as a "power" "inhering in rational human nature," or the "property" "of a person," as well as the "power" "of an office of authority" (*Blessings of Liberty*, 27).

These new thoughts were undergirded, says Witte, by the "increasingly sophisticated reflections" of theologians and philosophers like Duns Scotus, William of Ockham, Jean Gerson, Francisco de Vitoria, Bartolome de las Casas, and Francisco Suarez. What the

[11] Donahue states that "rarely, if ever, is the term [subjective right] used [in Roman law] to describe the right of a citizen against the state." Donahue, "*Ius* in Roman Law," 78.

[12] Brian Tierney, *The Idea of Natural Rights: Studies in Natural Rights, Natural Law, and Church Law, 1150–1625* (Grand Rapids: Eerdmans, 2001); Kenneth Pennington, *The Prince and the Law: 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993).

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thoughts of people like these were driving at needs to be highlighted more than Witte does. They leave no doubt about the understanding of a subjective right as *natural.* In Tierney's words,

> from the beginning, the subjective idea of natural right was not derived specifically from Christian revelation or from an all-embracing natural-law theory of cosmic harmony but from an understanding of human nature itself as rational, self-aware, and morally responsible. This understanding endured as the basis of many later natural rights theories, both medieval and modern ... The first natural rights theories were not based on an apotheosis of simple greed or self-serving egotism; rather they derived from a view of individual human persons as free, endowed with reason, capable of moral discernment, and from a consideration of the ties of justice and charity that bound individuals to one another.[13]

Though not cited by Witte, one related medieval development very much relevant to natural rights thinking was the attention given to the right of freedom of conscience by Thomas Aquinas and other scholastic theologians. Thomas argued that it is unlawful to attempt to compel unbelievers outside the Catholic faith, like Jews and pagans, to believe. He accepted Augustine's principle, "A person can do other things against [one's] will; but belief is possible only in one who is willing." "Belief in Christ," he said, "is, of itself, something good, and necessary for salvation. But if one's reason presented it as something evil, one's will would be doing wrong in adopting it.'[14] What makes trying to compel faith "unlawful"—unenforceable because "wrong"—is, at bottom, the irreducible conceptual divide between compulsion and belief. Thomas did not elaborate a full-blown theory of natural rights, but he here suggested the beginnings of one with an observation about the inherent character of reasoning and the limits of enforceability. In the nature of things, the human will cannot be prompted to believe by force, only by reason.

The Right of Self-Defense

A second theme is especially notable in the evolution of Western ideas of rights. It is, as Witte says, that "Magna Carta and other medieval charters," along with medieval theories, he should have added, provided "important prototypes [and principles] on which later revolutionaries would call to justify their revolts against arbitrary and tyrannical authorities" (*Blessings of Liberty*, 29; see also chapter 2). Narrowly confined to the interests of the nobles and vastly exaggerated as a warrant for later revolutionary activity, Magna Carta nevertheless did establish certain rights in matters of religion, economic practice, court procedure, and other things that acted as substantial restrictions on royal power, and the same could be said of other charters of the period. Perhaps even more consequential, though, was the substantiation and elaboration of a natural right of self-defense.[15]

[13] Tierney, *The Idea of Natural Rights*, 76–77.

[14] Eric D'Arcy, *Conscience, and Its Right to Freedom* (New York: Sheed and Ward, 1961), 156.

[15] The claim that people might rightfully rebel against a tyrannical pope suggests a right against religious persecution, as did the claim, mentioned earlier, that attempts to coerce belief are unjustified. Also, Bartolome de las Casas (1484–1566) appeared to support the idea that Central American indigenous persons had a right of religious liberty against the Conquistadores. Tierney, *Idea of Natural Rights*, 272. Still, as far as I know, the notion of a discrete, legally enforceable right of freedom of conscience was probably not entertained until the 16th century by Sebastian Castellio (1515–1563). Although the Conciliarists seemed favorable to such a right in theory, they certainly did not practice it. They summarily condemned Jan Hus to death for heresy at the Council of Constance in 1415.

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Regarding relations between rulers and subjects, the right of self-defense was conceived of by Suarez and others as "'the greatest of rights,' a natural inalienable right that inhered in individuals and communities, a right that could be exercised by subjects against a tyrannical ruler." By means of "his arguments that political societies were formed by the volition of free individuals, and that a right to liberty and an inalienable right of self-defense persisted after a government was instituted—[Suarez] helped to establish the substructure on which later theories of rights would be built."[16] Suarez's reference to a covenantal theory of political society, it should be added, draws on both biblical materials and on Catholic conciliar thought. Opposing monarchy in both church and state, Conciliarists proposed a model of plural authority based on the common consent and agreement of the subjects, who, as Tierney shows, were believed to share subjective natural rights.[17]

These two principal themes of the medieval years—the development of sophisticated ideas of subjective natural rights, including substantiating a right of freedom of conscience, and a personal and collective right of self-defense, linked to covenantal theories of political society, and to the special moral priority of that right in any well-ordered system of law and government—lead to a consideration of the premodern period, a period about which Witte makes one of his most important contributions.

The Development of Protestant Natural Rights

During the years, roughly, from 1500 to 1850 CE, Protestant communities were, as Witte describes in detail, especially productive in respect to conceptualizing and applying the language of natural rights. The years began with the Protestant Reformation, marking, as it did, the breakup of the sprawling European medieval establishment and the emergence of a patchwork of territorial nation-states, each with a distinct "people" left to work out its own identity and relationship to government. The initial settlement created by the Peace of Augsburg of 1555, and later expanded and further formalized by the Peace of Westphalia of 1648, established the people's identity of any territory primarily on the basis of the religion of the ruler.

Anglicans adapted wholeheartedly to the settlement, while Lutherans and Calvinists accepted it with somewhat more ambivalence. However, Anabaptists as members of the "Left Wing of the Reformation" like the Mennonites and Swiss Brethren, strongly challenged the interdependence of religion and government central to the settlement, and held out for a notion of the separation of church and state that implied a radical right of freedom of conscience "from the intrusions of both church and state" (*Faith, Freedom, and Family*, 399; see also *Blessings of Liberty*, 89–91). That position had deep roots in the tradition, to be sure, but it had never been formulated and expressed with the intensity and persistence, often at huge cost, as was true of the Anabaptists.

Though Witte does not make the point, there is a noticeable lack of reference to natural rights among Anabaptists. Freedom of conscience for them is typically based on supervening obedience to the will of God enjoined by scripture. The explanation for the oversight may be traced to their renunciation of force, recognizing, as they did, that Lutherans and Calvinists embraced natural rights language to justify taking up arms against unjust rulers. On scriptural grounds, Anabaptists conceded the authority of earthly governments to protect rights forcibly, but denied unconditionally that they as Christians had any such responsibility.

Although "early modern Lutherans did not develop an elaborate theory of natural rights based on the Decalogue or other foundations … they did make some notable

[16] Tierney, *Idea of Natural Rights*, 314–15.
[17] Tierney, 207–35.

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contributions that became important anchors for other Protestants, particularly Calvinists" (*Blessings of Liberty*, 87). On Witte's account, the contributions of many prominent early modern Lutheran leaders were in fact not that notable. Early in his career, Martin Luther proclaimed a strong message of liberty from domination by church and state, appealing to natural law as a relatively independent foundation for earthly law and government, but he left it to his follower, Philip Melanchthon, to adopt and expand on the language of natural rights.

Melanchthon did that by appealing both to natural reason and instinct and to the Decalogue in a way that eventually obscured the differences between them. Because natural reason is seriously corrupted by sin and not finally reliable as a moral guide, Christians need to interpret what is natural by relying mainly on the Bible. They ought to support earthly governments that enforce not only the Second Table of the Decalogue—the protection of life, property, reputation, marriage, and family, but also the First Table—directions regarding religious belief and practice. Earthly authorities ought to punish idolatry, blasphemy, "untrue doctrine, and heresy" that are "contrary to the first table," and they themselves ought to "accept the holy gospel," and "direct others to true divine service" (*Blessings of Liberty*, 86).[18] Melanchthon thereby "helped lay the theoretical basis for the welter of new religious-establishment law promulgated in Lutheran cities and territories in the sixteenth and seventeenth centuries" (*Blessings of Liberty*, 86).[19]

In his early teaching, Luther did support a fairly liberal understanding of the right of conscience on biblical grounds, rather in the spirit of the Anabaptists. Witte notes that he held that earthly governments may enforce only those protections "that extend no further than to life, property, and other external things on earth," and when they presume "to prescribe laws to souls, it encroaches upon God" "and only seduces and corrupts souls" (*Blessings of Liberty*, 85).[20] However, he moved closer to Melanchthon's intolerant doctrine as the result of his strong reaction to what he thought of as the outrageous beliefs and practices that were exhibited in the Peasants' Revolt of 1525.

Witte stresses that one strong point of convergence between Lutherans and Calvinists regarding natural rights thinking concerned the Magdeburg Confession of 1550. In response to the oppressive demands and actions of the Holy Roman Emperor, the leaders of this small Lutheran city in Saxony formally protested. They complained against forcibly "eradicating true doctrine and true worship," and endangering "life and limb," "wife and child," and the "local liberties of the people." They called upon lower magistrates and citizens "to stand up to such superiors" and "protect themselves and their people," exercising "their rights to defend themselves" under the "universal" and "natural" "law of legitimate self-defense" (*Blessings of Liberty*, 87–88).[21]

John Calvin and the Problems of Tyranny and Revolution

On Witte's account, as far as members of the Reformation go, however, it was among the Calvinists, or Reformed Christians, that the theorizing and application of natural rights was

[18] Quoting Philip Melanchthon, *Melanchthon on Christian Doctrine: Loci Communes 1555*, trans. and ed. Clyde L. Manschrek (Oxford: Oxford University Press, 1965), 335–36.

[19] Johann Oldenthorpe (1486–1567), a Lutheran jurist whom Witte discusses, resembles Melanchthon in playing down natural rights thinking and affirming instead that the Bible "is the highest source of law for life in the earthly kingdom" (*Blessings of Liberty*, 136).

[20] Quoting Martin Luther, *D. Martin Luthers Werke: Kritische Gesamtausgabe*, repr. ed., 78 vols. (Weimar: H. Böhlaus Nachfolger, 1883–1987), 11:262 (Witte's translation).

[21] Quoting *Confessio et apologia pastorum & reliquorum ministrorum Ecclesiae Magdeburgensis* [Confession, instruction, and admonition of the pastors and preachers of the Christian congregations of Magdeburg] (Magdeburg, 1550), A1v, J4r–K1r, K2R–L1r, N.

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most extensive and influential. John Calvin's impact was particularly decisive. A distinguished theologian, he was also "a major Christian jurist" by virtue of his extensive legal training and practice. During his years in Geneva, he regularly opined on legal matters and himself served as a judge, communicated actively with contemporary jurists, judges, and lawyers, and drafted critical legislation affecting church-state relations. The dedication of his first edition of the *Institutes of the Christian Religion* (1536) to King Francis I of France was a "cleverly drafted lawyer's brief on behalf of Protestants who were being persecuted by church and state authorities alike," documenting in particular the systematic abuse of criminal procedural rights (*Faith, Freedom, and Family*, 141).

The concern here with rights and their abuse was clearly part of a broader preoccupation with the subject born of his legal background, along with, quite possibly, his exposure to conciliar thinking while studying in Paris.[22] As Witte abundantly demonstrates, Calvin speaks the language of rights—both natural and positive—very fluently. He refers often to the "natural rights" of persons, "the common rights of humankind," the "rights of a common nature," the "equal rights and liberties" of all," as well as the "rights of citizenship," property and marital rights, the "right of asylum," the natural and "just rights" of the poor, the needy, orphans, and widows (*Faith, Freedom, and Family*, 94–95).[23] Witte correctly adds that Calvin always thought of rights in relation to correlative duties and responsibilities.

Calvin never developed a theory of natural rights, but there are here and there hints of one. To say, as Witte does, that the "untidy gaggle" of natural law terms he used "basically described … the set of norms that undergird and legitimize the positive laws of human authorities" is to reiterate the basic point of natural rights theory (*Faith, Freedom, and Family*, 144). But more needs to be a made of this. Calvin sometimes opened the door, at least, to the idea that natural rights provide a standard of moral justification independent of supernatural warrants in his exposition of Romans 2:14–15 and elsewhere.[24] And though later in his life, Calvin certainly shared Melanchthon's view that it was the duty of the state to enforce the First and Second tables of the Decalogue, he took a very different position in his

[22] See David Little, "Calvin and Natural Rights," *Political Theology* 10, no. 3 (2009): 411–30, at 417n27.

[23] Quoting various of Calvin's commentaries, sermons, and lectures collected in *Ioannis Calvini opera quae supersunt omnia* [All the surviving works of John Calvin], ed. G. Baum et al., 59 vols. (Brunswick: Schwetzke, 1863–1900). See *Faith, Freedom, and Family*, 94n47; see also Witte, *Reformation of Rights*, 57–58.

[24] See Little, "Calvin and Natural Rights," 421–27. In an editorial inquiry on a draft of this essay, M. Christian Green wonders whether in the light of his exposition of Romans 2:14–15 Calvin implies that the idea conscience, grounded in natural law, constitutes a "natural" basis on which people agree to be bound or not by human laws. Calvin says as much elsewhere: When "the whole world was shrouded in the densest darkness of ignorance, this tiny little spark of light remained, that men recognized … conscience to be higher than all human judgments." Accordingly, he goes on, "human laws, whether made by magistrate or by church, even though they have to be observed (I speak of good and just laws), still do not of themselves bind the conscience. For all obligation to observe laws looks to the general purpose, but does not consist in the things enjoined." John Calvin, *Institutes of the Christian Religion*, ed. John T. McNeill, trans. Ford Lewis Battle, 2 vols. (Philadelphia: Westminster Press, 1960), book 4, chap. 10, para. 5, 1183–84 (hereafter *Institutes*). Elsewhere, Calvin unequivocally affirms the universal availability of natural morality:

> [W]e observe that there exist in all men's minds universal impressions of a certain civic fair dealing and order. Hence no man is to be found who does not understand that every sort of human organization must be regulated by laws, and who does not comprehend the principles of those laws … [W]hile men dispute among themselves about individual sections of the law, they agree on the general conception of equity. In this respect the frailty of the human mind is surely proved: even when it seems to follow the way, it limps and staggers. Yet the fact remains that some seed of political order has been implanted in all men. And this is ample proof that in the arrangement of this life no man is without the light of reason. Calvin, *Institutes of the Christian Religion*, book 2, chap 2, para. 13, 272–73.

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commentary on Romans. He adhered to Paul's statements in Romans 13:1–10 limiting the jurisdiction of earthly governments to the Second Table only, commenting categorically that earthly magistrates who "bear rule over ... consciences," attempting "to establish their blasphemous tyranny" on the basis of this passage, do so "in vain."[25] When conjoined with statements—later withdrawn—favoring the freedom not just of Reformed Christians but of "all peaceable believers, including Catholics, Jews, and Muslims" entered in the 1536 edition of his *Institutes* (*Faith, Freedom, and Family*, 142),[26] these sentiments established the basis for a truly expansive understanding of freedom of conscience grounded in natural rights, a notion more consistently embraced and elaborated upon in later Reformed thinking.

Witte states (perhaps too unequivocally), that "Calvin was no political revolutionary, even against manifest tyranny." Calvin did allow, Witte admits, for a right of self-defense in private matters, though he urged an abundance of caution lest an act of self-defense turn into the very thing it was supposed to resist, and much of the time he showed, for the same reasons, similar reserve regarding a collective right of self-defense (*Faith, Freedom, and Family*, 149–50). Still, he eventually came to express opinions that turned the right of self-defense in support of armed rebellion against violations by political rulers of "the original natural rights of freedom,"[27] including the protection of conscience and of life and property. He believed such violations aroused in all human beings, an "inborn feeling" "to hate and to curse tyrants."[28] At first, Calvin believed that feeling might express itself in armed rebellion only so long as it was sanctioned by lesser constitutional magistrates, but later he thought even individuals might attempt it.[29]

However expressed, these thoughts undoubtedly bespoke revolution. Moreover, they included ideas of radical political reform. The only enduring remedy to tyranny and the proclivity for violating rights was a constitutional government based on the separation of powers and regular elections. Witte is of course correct that Calvin's vision of government was hardly a modern one. He aimed at a "unitary Christian society" whose laws and policies delineated and protected rights in a way very different from what is expected today (*Faith, Freedom, and Family*, 153). Nevertheless, some important seeds had been planted.

Johannes Althusius, Political Resistance, and Political Reform

Witte gives some attention to the way Calvin's successors developed the theoretical side of natural rights, but he is particularly compelling on the way they applied the idea to resistance and revolution (*Faith, Freedom, and Family*, chapter 15).[30] Johannes Althusius, the German-born-scholar-turned-Dutch-nationalist, is, in Witte's hands, the most outstanding example among the early modern Reformed thinkers of both a sophisticated theorist and inspiring advocate of political resistance and reform (*Faith, Freedom, and Family*, chapter 8).[31]

[25] John Calvin, *Epistles of Paul the Apostle to the Romans and Thessalonians*, trans. Ross Mackenzie, ed. David W. Torrance and Thomas F. Torrance (Grand Rapids: Eerdmans, 1976), 283–86.

[26] Citing John Calvin, *Institutes of the Christian Religion*, trans. Ford Lewis Battles, rev. ed. (Grand Rapids: Eerdmans, 1986), chap. 2, para. 28, at 62 (hereafter *Institutes* [1536]).

[27] This term *urtumlich Natur- und Freiheitsrechte* (the original natural rights of freedom) is used by Josef Bohatec as a fitting summary of Calvin's understanding of natural rights: Josef Bohatec, *Calvins Lehre von Staat und Kirche* [Calvin's teaching on state and church] (Aalen: Scienta, 1961), 94.

[28] Calvin, *Institutes*, book 4, chap. 20, para. 24, at 1512.

[29] David Little, *Religion, Order, and Law* (New York: Harper & Row, 1969), 46n66; see also Little, *Essays on Religion and Human Rights*, 255n96.

[30] See also, Witte, *Reformation of Rights.*

[31] See also Witte, *Reformation of Rights*, 143–208. Althusius's brand of nationalism, like that of other Calvinist resistance theorists, is an incipient form of what is now called, "liberal nationalism," as opposed to "illiberal nationalism," so familiar these days. Liberal nationalism defines citizenship on the basis of equal rights for all,

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On the theoretical side, Althusius built on medieval ideas and on Calvin's interpretation of Romans 2:14–15, arguing that all human beings possess by nature certain prior notions and inclinations of right and wrong known by reason and instinct and to be applied by conscience without coercive interference.[32] "The natural law imparts to all men a freedom of the soul or mind … The exercise of this right cannot be hindered by a command or order, by fear or compulsion."[33] At the same time, he displayed the same ambivalence regarding freedom of conscience found in Calvin. Like his forebear, he dithered over the question of enforcing the First Table of the Decalogue, and wound up favoring, after all, a Christian commonwealth in which the temporal government was ultimately "subject to the spiritual authority of the clergy," a view that entailed a rather narrow view of religious liberty.[34]

But it is in regard to political resistance and reform that Althusius is most significant. An apologist for the Dutch Revolt of 1584, he contended that the idea of natural rights, as supplemented and elaborated in the two tables of the Decalogue, established the standards for the legitimate administration of force based on the right of self-defense. Just as persons had a natural right to defend themselves against attempts to compel conscientious belief (a principle Althusius interpreted narrowly when it came to Reformed belief and practice), so they had a natural right to defend themselves against arbitrary assaults on the body. "Each and everyone in the whole realm should worship without any fear or peril."[35] Similarly, everyone "is given the right to protect [oneself] against force and injury, and … is allowed to use harshness and force against those injuring him or bringing force to bear against him." This includes "one's person and life," and extends "to everything that serves the interests of the human body and life, such as … reputation, goods, and relatives," although Althusius hastens to add that force may rightly be employed only under the conditions of defensive force.[36]

These protections apply directly to relations between rulers and the people. Witte remarks that his "more distinct contribution was to show that tyranny is, in its essence, a constitutional violation—a violation of the covenant by which the polity itself was constituted, a violation of the constitutional duties of the rulers and the fundamental rights of the people as set out in this political covenant … a violation of the natural law and natural rights that undergird and empower all constitutions and covenants" (*Faith, Freedom, and Family*, 173). Althusius's political vision draws heavily on biblical covenantal themes, especially as elaborated in the conciliarist and early Calvinist theories of constitutionalism, as the best means for guaranteeing the natural rights of the people. At bottom, the only legitimate use

whereas illiberal nationalism discriminates on the basis of religious, racial, and ethnic identity. I say *incipient* in Althusius's case because while advocating an equal rights foundation for citizenship, he nevertheless accords special status to Reformed Christians.

[32] Quentin Skinner comments that Althusius and another resistance theorist, the Scottish Calvinist George Buchanan, make clear in their works that "they now see themselves as talking exclusively about politics, not theology, and about the concept of rights, not religious duties." Quentin Skinner, *The Foundations of Modern Political Thought*, vol. 2, T*he Age of Reformation* (Cambridge: Cambridge University Press, 1978), 341.

[33] Witte, *Reformation of Rights*, 171, citing Johannes Althusius, *Politica methodice digesta atque exemplis sacris & profanis illustrate* [Politics methodically arranged and illustrated by sacred and profane examples], 3rd ed. (Herborn, 1614), reprinted as *Politica Methodice Digesta* [Politics methodically arranged], ed. Carl J. Friedrich (Cambridge, MA, 1932), VII.4–7, with translation adapted from *Politica Johannes Althusius* [Politics of Johannes Althusius], trans. and ed. Frederick S. Carney (Indianapolis: Liberty Fund, 1935).

[34] Witte, 199.

[35] Witte, 170. Althusius's comments elsewhere, however, sharply narrow the idea. For example, and as paraphrased by Witte: "Tyrants who offend God and defy true religion [!] should be removed" (*Faith, Freedom, and Family*, 172).

[36] Witte, *Reformation of Rights*, 169. See above note 8.

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of force is to defend against any gross violation of natural rights and, subsequently, to establish a constitutional order premised on protecting those rights.

This same general pattern, brought out so clearly in his treatment of Althusius, reappears in Witte's various discussions of other Reformed figures in premodern Europe. It is prominent in the work of Theodore Beza, Calvin's successor in Geneva, who used the message to rally the Protestant forces in their fight against the French crown in the sixteenth century. Beza was not the theoretician Althusius was. As Witte comments, his leading publication, *The Rights of Rulers*, "was something of a patchwork quilt, sewn together from slender strands of argument [drawn from] all manner of ... sources." Yet he drew "together forty years of Calvinist reflections on the rights of resistance into a powerful new construction of the nature of political authority and personal liberty," providing what would "become a standard argument for later Western revolutionaries" in France, Scotland, the Netherlands, England, and America (*Faith, Freedom, and Family*, 308, 309, 312, 313).

Comparing English and American Calvinism

It is useful, at this point, to single out the English and American examples since they typify impressively the influence of Reformed revolutionary thinking on the final stages of this history. As Witte shows, English and American Calvinists were the specific conduit by which these long-germinating ideas "became a Western commonplace by the time of the American ... [Revolution] of 1776" (*Faith, Freedom, and Family*, 344).

The key figures Witte takes up in this culminating period—Christopher Goodman, John Ponet, John Milton, English Puritan revolutionaries such as the Levellers, New England Puritans, and John Locke—all fit squarely into the general pattern outlined so far. Goodman asserted that the violation of the people's "inalienable rights and liberties," which concern conscientious belief and practice along with protections against threats to life, property, and the like, laid out in the Decalogue and based on "reason and godliness," constitutes tyranny worthy of determined resistance (*Blessings of Liberty*, 96). Ponet went still further, arguing that "kings, princes, and governors [having] their authority of the people" may not "do anything to hurt the people without their consent" or to violate constitutional principles and natural rights. Should that occur, correction ought first to be attempted by "prayer and penance"; second, by means of constitutional remedies; and as a last resort by forceful resistance, even undertaken (following Calvin) by a "private man," if necessary.[37]

Milton had a similar message. Political power "is only derivative, transferred and committed to [rulers] in trust from the people, to the common good of them all ... and cannot be taken away from them, without violation of their natural birthright." It is thus limited by "the authority and power of self-defense and preservation, being originally and naturally in every one of [the people], and unitedly in them all ... lest each [person] should be [one's] own partial judge."[38] Based on his belief in the inherent freedom of rational and conscientious deliberation originally bestowed by God, Milton affirmed an expansive view of freedom of conscience, declaring that a ruler has "neither the right nor can do right by forcing religious things,"[39] though he drew the line at tolerating "papists," since he thought them a political threat.[40] Still, Milton's vision of religious liberty was "more radical" and "more sweeping than most of his fellow English Calvinists could countenance,"[41] and

[37] Witte, *Reformation of Rights*, 118–19.

[38] John Milton, "The Tenure of Kings and Magistrates," in *Complete Prose Works of John Milton*, ed. Ernest Sirluck et al. (New Haven: Yale University Press, 1953–), 3:198–206, quoted in Witte, *Reformation of Rights*, 223.

[39] Witte, *Reformation of Rights*, 242.

[40] Witte, 244.

[41] Witte, 246.

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prompted him to defend quite innovatively the related rights of free speech, press, and assembly.

The Levellers justified their participation in the English Civil War with reference to the right of self-defense. In the words of one of their leaders, it is a "radical principle in nature," undergirding all natural rights and freedoms, and "conveyed to [everyone]," that "by all rational and just ways and means" all human beings may "save, defend, and deliver [themselves] from all oppression, violence, and cruelty whatsoever."[42] At the end of the war, they proposed unsuccessfully the adoption of a series of "agreements of the people," or new constitutions, designed to legalize and protect the "natural rights and freedoms" that were assumed to be the foundation of any well-ordered government.[43] For a time, Leveller leaders disagreed over whether rights and liberties derived from Magna Carta and other traditional English precedents, but the issue was eventually settled by the argument that those rights were outmoded and unavailable to many because of social position, and that there was need for "a new Magna Carta" grounded in nature rather than precedent, and accessible to all (*Blessings of Liberty*, 56–57).

The crucial role of the New England Puritans is summarized well by Witte. "Puritan teachings on liberties of covenant and covenants of liberty were one fertile seedbed out of which later American constitutionalism grew. Many of the basic constitutional ideas and institutions developed by the [New England] Puritans in the seventeenth century remained in place in the late eighteenth century."[44] He spends considerable time on the 1641 *Body of Liberties*, adopted that year by the Massachusetts General Court, a model for the proliferation of written rights guarantees in all the colonies by 1701 and for the elaboration of colonial declarations of rights in the 1770s and 1780s. The document codified the rights to life, liberty, property, family, and reputation conventionally identified with the Second Table of the Decalogue, referring to them as "such liberties, immunities, and privileges" as are founded on both the will of God and nature. It is these rights, of course, that constitutional government is called upon to protect.

The question of freedom of conscience was particularly acute for the New England Puritans as displayed most prominently in the dispute between the leaders of the Massachusetts Bay Colony and Roger Williams. It is regrettable Witte does not attend in some detail to this matter, since Williams, in the course of the controversy, uttered some significant thoughts about the meaning of natural rights. In response to the argument advanced by the leaders—an argument held at once ardently and ambivalently in the tradition—that earthly governments should enforce both the First and Second Tables of the Decalogue, Williams demurred. Citing Calvin's comments on Romans 13, he claimed the jurisdiction of earthly government extended only to the Second Table, resting his case on scripture and experience, but also, quite expansively, on the "natural" conceptual gap between coercion and belief that was affirmed by Thomas Aquinas centuries earlier. He hammered the point home, declaring, in no uncertain terms, that "the power, might, or authority" of earthly governments "is not religious [or] Christian, but natural, humane, and civil."[45]

Witte mentions, though does not develop, the role John Locke played as mediator between the "Christian covenantal theory of society and the state," including the ideas of natural rights, freedom of conscience, and other liberties, as propounded by Reformed

[42] Richard Overton, "An Appeal from the Commons to the Free People" (1647), in *Puritanism and Liberty, Being the Army Debates (1647–9) from the Clarke Manuscripts with Supplementary Documents*, ed. A. S. P. Woodhouse (Chicago: University of Chicago Press, 1974), 323–37, at 325.

[43] Witte, *Reformation of Rights*, 215–18.

[44] Witte, 318.

[45] Roger Williams, *Complete Writings of Roger Williams*, ed. Perry Miller (New York: Russell & Russell, 1963), 3:398.

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thinkers such as Milton, and founders of the American Republic, like Thomas Jefferson and James Madison (*Faith, Freedom, and Family*, 312–13).[46] In fact, scholarly opinion is divided as to whether Locke had a thorough-going natural rights theory—one that does not depend on a supernatural warrant. He sometimes—though not always—claimed that morality requires a divine authority, a fact that may explain why he, unlike Roger Williams, denied freedom of conscience to atheists.

Whatever the ultimate ground of his convictions, he did regard the right of self-defense as a natural right prior to all others. Everyone in a state of nature has a categorical right of defense against arbitrary attacks on life or livelihood, though it must be exercised with due restraint lest it become itself such an act. The crucial problem is that outside the institutions of law and government, it is very difficult to defend oneself with "due restraint" because of the prevailing conditions of fear and passion that accompany such acts. Preventing arbitrary attacks is an urgent reason for the creating and maintaining a government, and that is best achieved by organizing force so as to protect the basic human requirements of security and survival against attack, requirements defined by Locke in terms of the natural rights of "life, liberty, and property."[47] It is in that way, in accord with the tradition, that natural rights became for Locke the foundation of government.

It is this frame of mind that, as Witte implies, influenced the American founders and justified the Revolution of 1776. "Like Jefferson and Franklin, Madison rested his political thought on the moral standards of John Locke's *Second Treatise on Civil Government* … When the resistance to British oppression in north America became a movement for independence and a war to expel occupying armies, the sense of connection between natural rights and nationhood increased immensely[, explaining why] natural-rights theorists insisted on the right of revolution."[48] It also underlay the conviction, expressed in the Declaration of Independence, that when any earthly political order "becomes destructive of the ends of government," namely, securing "certain unalienable Rights," it is "the Right of the People to alter or to abolish it, and to institute new Government."

When it comes to linking the rights tradition, particularly as manifested in the English and American examples, to the Universal Declaration of Human Rights and the two subsequent international covenants on civil and political rights and economic, social, and cultural rights, Witte appears to approve, at least tentatively, of my thesis that the key point of connection is the natural right of self-defense (*Faith, Freedom, and Family*, 341–48). He gives support to my reading of the preamble of the declaration, which states that "if [all human beings] are not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."[49] Beyond that, he seems to concur that my reading provides a plausible rationale for affirming the rights enumerated in the three definitive international human rights documents, particularly when viewed against the "barbarous acts," perpetrated by the "tyranny and oppression" of the mid-twentieth century, "which have outraged the conscience of [human]kind" (*Faith, Freedom, and Family*, 341–43).

Finally, and most gratifyingly, coming from him, Witte concludes that outside of a creditable reading of the text and history of the Universal Declaration, my theory "is also based on a novel rereading of the Calvinist tradition of resistance, revolution, and even regicide against any tyrant who persistently and pervasively violates the people's fundamental rights." What I have tried to do in this essay, by here and there refining and amending Witte's approach, is to strengthen even more the historical support for my

[46] See also Witte, *Reformation of Rights*, 274–75.

[47] For a fuller discussion, see Little, "The Right of Self-Defense," 12–14.

[48] Ralph Ketcham, *James Madison: A Biography* (Charlottesville: University of Virginia Press, 1990), 293.

[49] G.A. Res. 217 (III) A, preamble, Universal Declaration of Human Rights (Dec. 10, 1948).

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interpretation and for appreciating what its implications are. By way of concluding, below I sketch out a few of those implications regarding Witte's work.

Conclusion: The Ambivalent Relationship of Religion and Natural Rights

Thanks to Witte's work, as I said at the beginning, it is no longer seriously debatable whether rights language, including the language of subjective natural rights, occupies an important role in the history of Western Christianity, nor whether that language concerns subjects of grave and universal moral significance in a cogent and commanding way, nor whether that language has compelling resonance in solemn documents like the American Declaration of Independence or the Universal Declaration.

However, as I hope my account reveals, one serious issue remains. It is the deep ambivalence in the tradition over exactly how religious conviction relates to natural rights. One side holds that the justification of natural rights depends necessarily on a supernatural warrant, on a belief, in the case of Christianity, that unless the God of the Bible directly authorizes them, natural rights have no foundation. The other side regards natural rights as justifiable independently of divine authority, though it holds divine authority to be of great supplemental importance. By refining and amending Witte's approach to the history of rights in the way I have, I tried to bring out the character and presence of the second position, thereby highlighting, more than Witte does, the tension between the two positions.

Though I think a choice needs, finally, to be made—and made in favor of the second position!—I concede there are reasons for the ambivalence. On the one hand, the idea of natural rights preserves the noncoercive character of Christian faith by providing moral direction for the organization and conduct of government independent of faith, and by proposing a common standard according to which all peoples, whatever their religious (or nonreligious) beliefs, may be held accountable. On the other hand, assuming a "natural" set of independent moral standards may threaten divine authority, and be seen to place important spheres of life, including law and government, beyond its reach. The tradition is rife with examples of the conflicting tendencies in either direction, often within the same person.

As indicated, I incline toward the "full" natural rights position, independent standards and all, though I make room for divine authority in a supplementary way. That means, to begin with, a right like self-defense, called the "greatest of rights" in the tradition, is morally justifiable against the exercise of arbitrary force independent of any supernatural warrant. The right, correctly executed,[50] is irrefutable on its face and needs no further justification,[51] as confirmed by Witte's observation that "the law calls" various forms of

[50] See above, note 8.

[51] For an elaboration of the claim that arbitrary attacks amount irrefutably to "senseless (i.e., morally indefensible) acts of violence," as they are typically described, see Little, "The Right of Self-Defense," 463–68. It should be added here that pacifist Christians do not refute the absolute wrongness of arbitrary attacks or the belief that it is always right to prevent them. Based on their reading of New Testament prescriptions against using force, they challenge the right of *lethal* defense in two ways: (1) they argue that nonviolent means are always a better way of prevention than the use of force (force begets force), which is an argument about proportionality and is still within the terms of the right of self-defense; and (2) they argue that the right of lethal defense applies to everyone and that the prescriptions against force apply only to Christians, who electively waive the right, supposing that either the first argument is correct or God will act to prevent or punish such acts, thus fulfilling the terms of the right of self-defense supernaturally. On this view, non-Christians, including governments, are fully entitled to exercise the right of lethal defense. Non-pacifist Christians, like Augustine and Calvin, came close to the second argument, except that they, unlike Mennonites, for example, believed that Christians may participate in the (legitimate) use of force as public officials.

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arbitrary force, like "genocide, torture, and deliberate starvation," "*malum in se* offenses, evils in themselves, which no country or culture can countenance" (*Faith, Freedom, and Family*, 702–03). The right is especially potent because it establishes fundamental standards for the exercise of *all manner of force*, as the Reformed revolutionaries and their descendants understood so well. Overthrowing tyrants by defensive force is not enough. Tyrants must be replaced by governments comprehensively designed and conducted in accord with those standards, governments conceived of, characteristically, as some form of constitutional democracy.

An interesting feature about a moral right like this is its categorical character. Categorical moral utterances readily assume a *sacred* value—taken as "given" and not constructed, submitted to and not tampered with, binding and not discretionary. That explains why religious people, such as members of the Christian tradition, would accommodate a right like self-defense as a *supplementary imperative* within their theological framework. The right is not justified supernaturally, but it certainly is *embraced* and *interpreted* as a crucial part of a supernatural system of belief. It is not accidental that in the tradition the right of self-defense is understood as a way of enforcing the prohibition against extrajudicial killing—the Sixth Commandment of the Decalogue. On a natural rights reading, what is already right is given extra weight and significance as one of the Commandments of God.

Differences over justifying the right to freedom of conscience are a good example of the tension we are describing. Natural rights theorists, as we saw, tend to justify that right in respect to the nature of reason: It is simply irrational to think a threat of coercion or force is a reason for believing the truth or rightness of anything. The conceptual gap between force and belief applies to everyone "by nature," Christian or not.

Those on the other side—call them *supernaturalists*—believe that freedom of conscience is a right because the Bible and Christian witness authorizes it. Christian faith cannot by definition be compelled or coerced. Even if initiated by God, it should be received as a gift and thus in a willing spirit of gratitude and love, not abject submission and resignation. The implication is that the right of freedom of conscience rests specifically on a Christian foundation. Strictly understood, everyone enjoys the legal right to hold conscientious beliefs freely only so long as Christian principles undergird the legal system that guarantees the right. Among other problems, one objection to this position is it is up to Christians to decide how broadly or narrowly to apply the right, and history reveals beyond question that when in charge Christians often do the latter.

Considered overall, Witte's work on religion and rights exhibits the ambivalence we have been discussing. One the one hand, he tentatively approves of the natural rights perspective I have suggested. Moreover, in a fascinating article, "Lenn Goodman vs. John Rawls: Law, Religion in a Constitutional Democracy" (*Faith, Freedom, and Family*, chapter 12), he favors a kind of pluralism that, while not a perfect example of natural rights thinking, does not rely on a Christian foundation. The argument is that though Goodman and Rawls start out opposing each other over the degree to which staunchly held religious viewpoints might acceptably be discussed and debated in the public arena and allowed to influence law and policy, they end up sharing a similar position, thanks to some modifications of John Rawls's thought. This shared position implies that, contrary to an absolutist understanding of the separation of church and state, government assistance to religious groups is warranted so long as they are not coerced to accept it, "nonreligious parties also benefit from the same government support," and it is provided "incidentally." These principles all rest on a common set of basic rights, which, in turn, are consistent with Rawls's revised idea of "public reason" (*Faith, Freedom, and Family*, 244–46).

By accepting Rawls's revised idea, Witte disavows the need for a Christian foundation. Even in Rawls's final statement on the subject, he holds that public reason rests on "the distinction between a self-standing political conception of justice and a comprehensive

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doctrine,"[52] meaning two things: (1) that a "political conception of justice" includes "certain basic [equal] rights, liberties, and opportunities (such as those familiar from constitutional regimes)" that are to be given special priority in regard to their protection and advancement;[53] and (2) that these rights are justified *independently* of any "comprehensive doctrine," which is Rawls's label for supernatural or non-supernatural systems of belief.[54]

On the other hand, some statements in Witte's work appear to defend a Christian foundation for rights. In "To Serve Right and to Right Wrong: Pope Benedict XVI on Human Dignity and Human Rights" (*Faith, Freedom, and Family*, chapter 18), Witte approves of Pope Benedict's claim that "religion remains an essential part of the foundation and infrastructure of the modern human rights regime. For religious communities teach and insist on the most fundamental 'idea of the person as image of the Creator' which is 'the absolute essence of freedom.' It was on the foundation of the inherent dignity of 'the human creature' that the world could agree to issue the [Universal Declaration of Human Rights] despite vast differences among modern cultures and faiths" (*Faith, Freedom, and Family*, 353). As Witte puts it, "As a Protestant interested in the religious foundations and dimensions of human rights and the robust protection of religious freedom, I agree wholeheartedly with the Holy Father that religion and human rights need each other" (*Faith, Freedom, and Family*, 354, see also 701; *Blessings of Liberty*, 18 [referencing the "image of God"]).

As I explain above, a full natural rights position would consider references to the image of God as a foundation for human rights as *supplementary support*, not as the justification for them, thereby preserving the self-standing grounds on which basic rights are taken to rest. In my view, a natural rights reading is the best way to resolve the lurking ambivalence deep in the Christian tradition over religion's role in justifying rights. Whether John Witte agrees remains to be seen.

[52] John Rawls, "The Idea of Public Reason Revisited," *University of Chicago Law Review* 64, no. 3 (1997): 765–807, at 803.

[53] Rawls, "The Idea of Public Reason Revisited," 774.

[54] The point here is that Rawls's idea of public reason, which Witte accepts, explicitly rejects reliance on any supernatural authority (or nonreligious equivalent). Rawls's views do not rest on natural rights thinking, and whether they might be improved by embracing it is another matter. For suggested revisions, see David Little, "Religion, Human Rights, and Public Reason," in *Essays in Religion and Human Rights*, 112–42, at 122–24.

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