

Religion and rights

By [Walter Brueggemann](#) in the [January 9, 2007](#) issue

In Review



God's Joust, God's Justice: Law and Religion in the Western Tradition

John Witte Jr.
Eerdmans

John Witte has written a book that is profoundly in touch with the intractable issues in U.S. public life and in that of the West generally. Professor of law and ethics at the Emory University School of Law and director of its Center for the Study of Law and Religion, Witte takes what he calls a binocular view of religion and law, respecting them as distinct enterprises that are nevertheless very much in need of each other and inescapably intertwined in the history of Western public culture. He writes out of a strong belief in God's providential governance of history and understands that religious conviction and articulation are indispensable and "ineradicable" elements in the public process of history. (The *joust* in the title is a word from Martin Luther, who takes history as "God's joust.")

Witte presents his thesis about the interplay of religion and law in three parts. He begins with a brief but telling history of human rights in the West and of religion's defining contribution to the emergence of those rights, which resulted in the 1984 passage of the Universal Declaration of Human Rights and the 1966 creation of two international covenants promulgated by the United Nations: the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Although these declarations breathe the air of Enlightenment emancipation, Witte insists that the Jewish and Christian communities were midwives in the modern rights movement, without which it would have lacked the authority and staying power to arrive at such compelling claims.

In his review of the history of human rights in the West and the role of religion in the formation of those rights, Witte regards Luther's contribution as a focal point. Luther's great insight into the twofold nature of humanity—*simul iustus et peccator* (both justified and sinful)—is a crisp formulation of a "universal insight about human nature" that is the ground from which he posited "freedom and duty" as the way of faith and law. It is more than a little ironic that biblical scholars have long been tied up in knots over the theological meaning of *law* in Paul and Luther, all the while largely missing Luther's decisive role as a social theorist concerning Western constitutional law.

Witte gives consideration to Orthodox as well as Catholic and Protestant contributions, studying in detail the battle for legal protection of religion in Russia and noting with chagrin the oppressive legal actions in Russia in 1997.

While Witte has a profound historical interest, his aim is to examine the current interface of religion and human rights in order to affirm the important interaction between the two. He proposes a pair of theses: first, that religion should play a greater role in the cultivation of human rights, and second, that human rights should have a larger place in the calculations of religious bodies. The first thesis carries with it an insistence that secular Enlightenment claims by themselves are too thin to sustain human rights. The second is a summons to religious bodies to actively defend human rights, because those rights are at risk everywhere in the world.

While recognizing that constitutionalism must be independent of religious advantage, Witte argues that it should not be disconnected from religion; indeed, constitutionalism should be informed by religion in crucial ways. In Western culture, and certainly in the U.S., Witte says, we are engaged in a “war for souls” that is not only a major matter for religion but also a major challenge for constitutional law. In a nice summary of his pervasively dialectical thinking, Witte concludes that there “must be a more careful balancing of the Great Commission and the Golden Rule,” in order that “dogmatism might be tempered and . . . conflicts assuaged.”

In his book’s second section Witte focuses on the U.S. struggle for a constitutional balance between law and liberty. Assessing the major contribution of Puritan constitutionalism, he considers the founding generation’s critical reflection on natural law and the social contract, which issued in the separation of church and state and the hard-fought struggle for the First Amendment. He summarizes a series of proposed drafts of the First Amendment, showing that the framers were judicious and pragmatic in their approach. In Witte’s view, for all the accent on separation of church and state, the play and force of religion amid civic institutions has always been assumed, and it continues to be an urgent matter in our present circumstances. He also discusses the harshness of Catholicism under the Syllabus of Errors of 1864 and the remarkable way in which Vatican II reversed that document’s argument and made the Catholic Church a force for human rights.

In the final section, Witte turns his attention to the family, a venue in which religion and constitutional law meet. His discussion of marriage is particularly persuasive, enabling us to see clearly his passionate agenda. Acknowledging that in the civic sense marriage takes the form of a social contract, he contends that the practice of religious covenant adds thickness and gravitas to the marriage transaction that an Enlightenment-style contract can never do. Covenant situates a marriage within a community and within a liturgy, Witte says, making the resources and support of the

community available to the wedded couple and summoning the couple to responsible married life.

Witte maintains that without religion public practices of rights are sure to be distorted. He offers a critique of the positivistic theory of law that was given major expression by Supreme Court justice Oliver Wendell Holmes, who denied that law is integrally connected to truthful valuing of right and wrong, good and evil, and insisted that law is simply a pragmatic matter of social convenience and convention. Against such a view, Witte asserts: "Law is much more than the rules of the state and how we apply and analyze them. Law is also the social activity by which certain norms are formulated by legitimate authorities and actualized by persons subject to those authorities."

Witte concludes with these powerful claims:

Religion and law are two universal solvents of human living, two interlocking sources and systems of values and beliefs that have existed in all axial civilizations. . . . Law gives religion its structure. . . . Religion gives law its spirit. . . . Law and religion, therefore, are two great interlocking systems of ideas and institutions, values and beliefs. . . . They share many elements, many concepts, and many methods. They also balance each other by counterpoising justice and mercy, rule and equity, orthodoxy and liberty, discipline and law. Without law, religion decays into shallow spiritualism. Without religion, law decays into empty formalism.

Though this study of rights is a historical analysis, it breathes with contemporary passion. Among other things, it is a summons to the churches and other religious communities to care about the great public dimensions of order and value. He urges them to dispense with myopic and sectarian preoccupations and to address the big issues.

Witte's voice is among many that recognize that the "secular hypothesis" of the West is a failed notion. The recovery of responsible religion is one facet of the restoration of human dignity and eventually of a just peace. Witte challenges religious communities to take up the task of midwifery, to impinge upon the public domain in a way that will attest to and protect the thickness of humanity. "The real challenge of the new Christian Right," he says, "is not to the integrity of American politics but to the apathy of American religions. It is a challenge for peoples of all

faiths and of no faith to take their place in the marketplace.”

The passionate faith of this informed believer impinges upon his carefulness as a historian. My favorite evidence of Witte’s passion is this passage:

Just turn off Pat Robertson or Jerry Falwell. Turn away the missionary at your door. Close your eyes to the city crucifix that offends. Cover your ears to the public prayer that you can’t abide. Forego the military chaplain’s pastoral counseling. Skip the legislative chaplain’s prayers. Walk by the town hall’s menorah and star. Don’t read the Decalogue on the classroom wall. Don’t join the religious student group. Don’t vote for the collared candidate. Don’t browse the evangelicals’ newspaper. Avoid the services of the Catholic counselor. Shun the readings of the Scientologists. Turn down the trinkets of the colporteurs. Turn back the ministries of the hatemongers. All these escapes to the virtual frontier, the law does and will protect—with force if necessary. Such voluntary self-protections from religion will ultimately provide far greater religious freedom for all than pressing yet another tired constitutional case.

I take Witte’s advice to be that we shouldn’t “sweat the small stuff.” But for the big stuff we must get back into the process. The future of our society depends on religious communities that can supply the narrative that will ground the work of human rights. Witte’s welcome book is an important wake-up call.