

PROPHETS, PRIESTS, AND KINGS: JOHN MILTON AND THE REFORMATION OF RIGHTS AND LIBERTIES IN ENGLAND

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God is decreeing to begin some new and great period in his Church, even to the reforming of [the] Reformation itself, [in order] to make a knowing people, a Nation of Prophets, of Sages, and of Worthies.

—John Milton (1644)¹

For by natural birth, all men are equally alike born to like property, liberty, and freedom, and as we are delivered of God by the hand of nature into this world, everyone with a natural, innate freedom and property (as it were writ in the table of every man's heart, never to be obliterated) even so we are to live, everyone equally and alike to enjoy his birthright and privilege; even all where God by nature hath made him free. . . . Every man by nature being a King, Priest, and Prophet in his own natural circuit and compass, whereof no second may partake, but by deputation, commission, and free consent from him whose right and freedom it is.

—Richard Overton (1646)²

We now under Christ [are] a royal priesthood, 1 Pet. 2:9, as we are co-heirs, kings and priests with him.

—John Milton (1659)³

Over the past three decades, a veritable cottage industry of important new scholarship has emerged dedicated to the history of rights talk in the Western

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¹ 2 JOHN MILTON, *COMPLETE PROSE WORKS OF JOHN MILTON* 553–54 (1959) [hereinafter CPW].

² Richard Overton, *An Arrow Against All Tyrants and Tyranny* (1646), reprinted in 1 *TRACTS ON THE PURITAN REVOLUTION 1638–1647*, at 113 (William Haller ed., 1934).

³ 7 CPW, *supra* note 1, at 286.

tradition prior to the Enlightenment.⁴ We now know a great deal more about classical Roman understandings of rights (*iura*), liberties (*libertates*), capacities (*facultates*), powers (*potestates*), and related concepts, as well as their elaboration by medieval and early modern civilians.⁵ We can now pore over an intricate latticework of arguments about individual and group rights and liberties developed by medieval Catholic canonists and moralists and the ample expansion of this medieval handiwork by neo-scholastic writers in early modern Spain and Portugal.⁶ We now know a good deal more about classical republican theories of liberty developed in Greece and Rome and their transformative influence on early modern common lawyers and political revolutionaries on both sides of the Atlantic.⁷ We now know, in brief, that the West knew ample “liberty before liberalism”⁸ and had many fundamental rights in place before there were modern democratic revolutions fought in their name.

In this Article, I focus on the development of rights talk in the pre-Enlightenment Protestant tradition. More particularly, I show how early modern Calvinists—those Protestants inspired by the teachings of Genevan reformer John Calvin (1509–1564)—developed a theory of fundamental rights as part and product of a broader constitutional theory of resistance and military revolt against tyranny. With unlimited space, I would document how various Calvinist groups from 1550 to 1700 helped to define and defend each and every one of the rights that would later appear in the American Bill of Rights and how these Calvinists condoned armed revolution to vindicate these fundamental rights when they were chronically and pervasively breached by a tyrant.

⁴ See JOHN WITTE, JR., *GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION* ch. 1 (2006).

⁵ See Charles A. Donahue, *Ius in the Subjective Sense in Roman Law: Reflections on Villey and Tierney*, in 1 A ENNIO CORTESE 506–35 (D. Maffei et al. eds., 2001); MAX KASER, *IUS GENTIUM* (1993); 1–2 MAX KASER, *AUSGEWÄHLTE SCHRIFTEN* (1976–1977); TONY HONORÉ, *ULPIAN: PIONEER OF HUMAN RIGHTS* (2d ed. 2002).

⁶ See BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES IN NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW, 1150–1625* (1997); ANNABEL S. BRETT, *LIBERTY, RIGHT AND NATURE: INDIVIDUAL RIGHTS IN LATER SCHOLASTIC THOUGHT* (1997); *THE ORIGINS OF MODERN FREEDOM IN THE WEST* (R.W. Davis ed., 1995); RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGINS AND DEVELOPMENT* (1979); MICHEL VILLEY, *LA FORMATION DE LA PENSÉE JURIDIQUE MODERNE* (1968); MICHEL VILLEY, *LE DROIT ET LES DROITS DE L’HOMME* (1983).

⁷ See C. WIRSZUBSKI, *LIBERTAS AS A POLITICAL IDEA AT ROME DURING THE LATE REPUBLIC AND EARLY PRINCIPATE* (1950); ERIC NELSON, *THE GREEK TRADITION IN REPUBLICAN THOUGHT* (2004).

⁸ See QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1998).

As an illustration of this broader story, this Article focuses on the reformation of rights and liberties led by the great English poet and philosopher, John Milton (1604–1674). Writing in the throes of the English Revolution (1640–1660), Milton formulated a revolutionary account of law, religion, and human rights, grounded in a Calvinist theory of human nature and human society. Following Calvinist conventions, Milton believed that each person is created in the image of God with a perennial craving to love God, neighbor, and self. Each person has the law of God written on his and her heart, mind, and conscience, and rewritten in Scripture, most notably in the Decalogue. Each person is a fallen and fallible creature in perpetual need of divine grace and forgiveness, which is given freely to all who ask for it. Each person is a communal animal, naturally inclined to form private, domestic, ecclesiastical, and political associations. Each such association is created by a consensual covenant or contract that defines its form and function and the rights and powers of its members, subject to the limits of natural law. Each association is headed by an authority who rules for the sake of his or her subjects and who must be resisted if he or she becomes abusive or tyrannical. All such resistance must be as moderate, orderly, and peaceable as possible, but it may rise to revolt and regicide if necessary in the political sphere.⁹

More original, and more controversial in its day, was Milton's theory of the "real and substantial" rights and liberties that must prevail in a commonwealth sincerely devoted to a "true and holy reformation." Milton developed his theory of rights and liberties in three overlapping phases—almost in a rolling process of logical discovery and rhetorical calculus. His first major concern was *religious liberty*, which he articulated in five rhetorically violent tracts against the clergy of 1641 and 1642. His initial concern was to protect the individual's liberty of conscience and freedom of worship from what he called the greedy idols of legally-established Anglicanism and the spiritual tyranny of idle ceremonies, corrosive customs, and erroneous beliefs. He returned to these religious liberty themes in several of his later writings, culminating in *A Treatise on Civil Power in Ecclesiastical Causes* (1659). Each time, he called more loudly for freedom of conscience and exercise, open toleration for all peaceable biblical religions, separation of church and state, and disestablishment of religion—principles of religious liberty that would become hallmarks of later American constitutionalism.¹⁰

⁹ See *infra* notes 62–65 and accompanying text.

¹⁰ See *infra* notes 65–217 and accompanying text.

Milton's second concern was *domestic* or *private liberty*, which he defended in his four marriage tracts of 1644 and 1645. His initial focus was to press for the unilateral right of a man to divorce his wife without proof of a traditional fault or impediment and thus gain the right to remarry someone more suitable. He returned to this theme a few more times, too, and eventually widened his argument into a more general call for domestic liberty or privacy—the right of a fit man and fit woman to marry, separate, and divorce in accordance with the simple rules of Scripture and nature alone, the right of parents and teachers to nurture and educate their children in their own beliefs and values, the right of householders to be free from illegal searches and seizures by censors and police, all of which he considered to be essential rights of private domestic association. These principles, too, would become hallmarks of the later Anglo-American constitutional tradition.¹¹

When church and state authorities of the day rebuked him for his radical views and sought to censor him, Milton folded his arguments for religious and domestic liberty into a more general theory of *civil and political liberty*. He sketched some of this argument already in his famous paean to free speech, entitled *Areopagitica* (1644). He expanded and refined the argument in his equally famous *First Defence* and *Second Defence of the People of England* in 1650 and 1654. Now he advocated not just freedom of religious conscience, but freedom of the mind and of opinion altogether; not just freedom of religious worship, but freedom of all speech and public expression; not just freedom to petition God in prayer, but freedom to petition authorities in public; not just freedom to enter and exit marriages without interference, but freedom to participate and rule in all associations, including those of church and state. By the time he was finished, Milton had sketched a good bit of the theory supporting the freedoms of religion, speech, and association that would become central to later English and American constitutionalism, and eventually to the modern international human rights movement as well.¹²

Milton premised his logic of liberty on a fervent belief in truth, with a capital *T*—The Truth of God and Scripture, the Truth of reason and nature, all to be discovered by free and robust education and inquiry, experiment and debate. Only when freed from the tyranny of prelates and monarchs, of tradition and custom, of ignorance and error, of censors and licensors, he believed, could divine, natural, and human Truth finally be discovered and

¹¹ See *infra* notes 218–81 and accompanying text.

¹² See *infra* notes 282–355 and accompanying text.

developed. Milton also premised his logic of freedom on a fervent faith in the inherent goodness and potential of every English man and woman. Once freed from the tyrannies of church and state and of mind and heart, once steeped in the virtues of Scripture and nature and of learning and literature, every English subject would seize the Truth with alacrity and soar to splendid new heights of understanding and accomplishment. What England needed to accomplish all this was a second Reformation that built on, but went beyond, the successes of the sixteenth-century Protestant Reformation. This was to be an outer reformation that purged the core institutions of family, church, and state from all remaining sources and species of tyranny and brought true domestic, spiritual, and civil liberty. It was also to be an inner reformation that purified the heart, mind, and conscience of the tyranny of tried and tired traditions and unleashed a lively spirit of inquiry and learning, a true love of virtue and goodness, and a native talent for self-rule and self-direction.¹³

Part I of this Article provides a brief sketch of the main events and texts of the English Revolution and Milton's emerging role therein. Parts II through IV take up his respective contributions to the reformation of religious, domestic, and civil rights and liberties in early modern England. The Conclusion reflects on the enduring significance of some of Milton's teachings for the evolving Anglo-American constitutional tradition.

This Article is dedicated to the memory of my great mentor, friend, and colleague Professor Harold J. Berman. Twenty-five years ago, when I was a fledgling law student, Hal Berman took me under his wing and patiently began teaching me to fly. For the past twenty-two years, we have worked together as colleagues at Emory University School of Law and in the Center for the Study of Law and Religion at Emory University, sharing a deep common interest in the weightier matters of the law. I was especially grateful for the privilege of working with him on his monumental *Law and Revolution* series, some of whose themes are echoed herein. Whatever I have become as a scholar and a teacher owes much to Hal Berman's noble instruction and example. I dedicate this Article to his memory—with unbounded admiration, appreciation, and affection. The world is much emptier now without my Chief, and I miss him sorely.

¹³ See *infra* notes 65–71, 81–89, 183–89, 194–99, 283–88, 307–12, 325–48 and accompanying text.

I. JOHN MILTON AND THE ENGLISH REVOLUTION

A. *The Causes and Course of Revolution*¹⁴

In 1640, the English “world turned upside down.”¹⁵ For the first time in eleven years, King Charles called Parliament into session, and the members erupted in unprecedented fury against two decades of belligerent royal policies that had left the nation in disarray. Some of Parliament’s fury was directed at Charles’ religious policies. Upon his succession to the throne in 1625, Charles had stepped up his father’s already stern Anglican establishment laws and began persecuting Calvinists (often called Puritans) and other religious dissenters with a vengeance, driving them by the boatload to the Netherlands and to America—some 20,000 in 1632 alone. In 1633, he appointed William Laud as Archbishop of Canterbury, who began purging English pulpits of Calvinist sympathizers and packing them with conservative clerics, loyal to the Crown and to the textbooks of established Anglicanism—the Book of Common Prayer, the Thirty-Nine Articles of the Faith, and the Authorized, or King James, Version of the Bible. Charles and Laud strengthened considerably the power and prerogatives of the Anglican bishops and the ecclesiastical courts. They also tried to impose Anglican bishops and establishment laws on Scotland, triggering an expensive and ultimately futile war with the Scottish Presbyterians. English dissenters who criticized these religious policies were pilloried, whipped, and imprisoned, and a few had their ears cut off and were tortured. When the Parliament was finally called in 1640, it let loose a massive torrent of protests, including the famous *Root and Branch Petition* and *The Grand Remonstrance* that called for the abolition of much that was considered sound and sacred in the Church and Commonwealth of England.¹⁶

Some of Parliament’s fury was directed at the Crown’s repressive political and economic policies. Continuing in his father James I’s footsteps, Charles

¹⁴ This section on the events of the English Revolution is largely derived from volume 2 of Berman’s masterpiece on law and revolution, and the numerous sources cited therein. See HAROLD J. BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* (2006).

¹⁵ CHRISTOPHER HILL, *THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION* (1988). The phrase is from Acts 17:6.

¹⁶ For representative documents on both sides, see 1 CPW, *supra* note 1, at 954–98 and 1 JOYCE LEE MALCOLM, *THE STRUGGLE FOR SOVEREIGNTY: SEVENTEENTH-CENTURY ENGLISH POLITICAL TRACTS* 21–144 (1999).

regarded the Parliament not so much as a representative of the people as a functionary of the Crown, to be called or suspended at the Crown's discretion. After 1629, he suspended the Parliament in retaliation for its uncooperativeness and began imposing fiscal and economic policies that traditionally called for Parliamentary involvement, if not consent. These policies were implemented by a series of new royal officers, notably the widely hated Earl Thomas Strafford. Needing money for his unpopular wars and lavish living, Charles levied crushing taxes on the people without their consent. He feigned a national military emergency that strengthened his royal prerogative and allowed him to institute military tribunals to mete out rough justice against rebels and to fabricate a form of national taxation on all people. He fined the gentry for their failure to become knights and for their purported trespasses on the royal forests. He quadrupled inheritance taxes and receipts from wardships. He sold commercial monopolies to the highest bidders, creating oligarchies that inflicted massive abuses on workers and high prices on consumers. He confiscated private properties and compelled farmers and small businessmen to make loans that were never repaid. He forced tradesmen and craftsmen into guilds that were subject to strict controls, heavy bureaucracies, and sundry fees. And to make all these onerous restrictions work, Charles enhanced the power of the royal prerogative courts and administrators—Star Chamber, Admiralty, High Commission, Requests, Privy Council, and more—that enforced royal policies ruthlessly and stripped away many of the procedural protections and conventions maintained by lawyers in the Inns of Court. Charles' royal officers also interfered deeply in city and rural county governments that had governed local affairs for centuries without much royal involvement. An already weakened economy was made worse by a series of poor harvests, the collapse of the lucrative cloth trade, and spiraling inflation.¹⁷

When Parliament was finally called into session in 1640, an unlikely assemblage of aristocrats, lawyers, artisans, financiers, and religious dissenters united in seizing power with a vengeance. Whipped up by Calvinist preachers who thundered fire-and-brimstone sermons denouncing the tyranny of the English church and state, Parliament worked hard to dismantle Charles'

¹⁷ See LAWRENCE STONE, *THE CAUSES OF THE ENGLISH REVOLUTION, 1629–1642*, at 135–44 (1972); CHRISTOPHER HILL, *THE CENTURY OF REVOLUTION, 1603–1714* (2d ed. 1982). For excerpts and analysis of these royal policies, see *THE STUART CONSTITUTION: DOCUMENTS AND COMMENTARY* (J.P. Kenyon ed., 1986).

policies.¹⁸ In a series of acts from 1640 to 1642, Parliament abolished Star Chamber, the Court of High Commission, and other royal prerogative courts, and shifted much civil and criminal jurisdiction to the common law courts. Parliament limited ship money, forced loans, and other hated taxes and claimed exclusive jurisdiction over all future taxation. It removed many of the new encumbrances on the aristocracy and gentry, restored the traditional uses of the royal forests, and removed some of the monopolies and guilds. It truncated severely the temporal power of the Anglican bishops and removed the clergy from the House of Lords. It tried both Strafford and Laud for their belligerence, sending Strafford to the gallows and Laud to prison. And it passed a law that required the King to call Parliament thereafter at least triennially and ideally every year.¹⁹

When, in response, Charles sought to abolish the Parliament and to arrest some of its leaders for treason, civil war broke out. Royal and Parliamentary forces locked in battle from 1642 to 1646 and again in 1648. Most Calvinist forces lined up in support of Parliament. Many Anglicans remained loyal to Charles. Charles did not help his cause, however, when it was discovered that he sought secretly to enlist the aid of the Scots, promising them special patronage and protection for Presbyterianism in exchange for their military support. Charles also did not help his cause when he proved powerless to put down the Irish Rebellion of 1641, a bloody uprising of Irish Catholics against Protestant settlers in Ireland.²⁰ Charles' own fecklessness in dealing with these Irish Catholics, his marriage to a Catholic, and his attempts to ally with Catholic French and Spanish forces compounded the many rumors already circulating that he was moving to restore a Catholic establishment in England. This enraged the Parliamentary forces even more and provided no end of fodder for Protestant propagandists. They ultimately defeated the royal armies and took Charles prisoner in 1647.

¹⁸ See WILLIAM R. HALLER, *THE RISE OF PURITANISM, OR, THE WAY TO THE NEW JERUSALEM AS SET FORTH IN PULPIT AND PRESS FROM THOMAS CARTWRIGHT TO JOHN LILBURNE AND JOHN MILTON, 1570–1643* (1965); CHRISTOPHER HILL, *PURITANISM AND REVOLUTION: STUDIES IN INTERPRETATION OF THE ENGLISH REVOLUTION OF THE SEVENTEENTH CENTURY* (St. Martin's Press 1997) (1958).

¹⁹ See BERMAN, *supra* note 14, at 201–24; *see also* *THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625–1660*, at 137–261 (Samuel Rawson Gardiner ed., 1906) [hereinafter *CONSTITUTIONAL DOCUMENTS*]; *THE GOOD OLD CAUSE: THE ENGLISH REVOLUTION OF 1640–1660, ITS CAUSES, COURSE, AND CONSEQUENCES: EXTRACTS FROM CONTEMPORARY SOURCES* (Christopher Hill & Edmund Dell eds., 1940).

²⁰ See CRAWFORD GRIBBEN, *THE IRISH PURITANS: JAMES USSHER AND THE REFORMATION OF THE CHURCH* (2003).

While the Long Parliament, as it came to be called, continued to meet regularly throughout the 1640s, it was stymied by the increased radicality of some of its members and the sectarian divisions among Separatist, Independent, and Leveller parties. Only in 1649, with the more radical elements finally and forcibly purged, did the Rump Parliament, as the purged body was now called, return to more concerted leadership of the nation. That year, the Rump Parliament passed an Act declaring and constituting the people of England to be a commonwealth and free state. It abolished the kingship and the aristocratic House of Lords and declared that supreme authority resided in the people and their representatives. It formally and finally disestablished Anglicanism and its episcopal ecclesiastical structures and confiscated large portions of the Anglican Church's property. And most momentous of all, a Parliamentary committee tried the deposed King Charles in a sensational trial, convicted him for treason, and executed him by public beheading. England was now to be a Commonwealth, free from hereditary monarchy, free from an aristocratic House of Lords, free from an established Anglican Church, and subject to the democratic rule of Parliament.²¹

This democratic experiment was short-lived. From 1649 to 1653, much political power shifted to a 41-member aristocratic Council of State, which served alongside the Rump Parliament. This new government did pass several laws that liberalized marriage and divorce laws and that opened large tracts of property held by the Church and the Crown. But it also passed severe laws repressing adultery, blasphemy, Quakers, and unlicensed evangelical preaching, and it imposed a number of unpopular taxes on the people. In 1653, Oliver Cromwell, fresh from military victories over the rebellious Irish Catholics and the Scottish Presbyterians who had recognized Charles II as their King, abolished the Rump Parliament and called for new elections. The new Barebones Parliament, as it came to be called, created a new Protectorate government under Cromwell's leadership. This Protectorate government proved even more repressive than the last, and Cromwell's stern moral, military, and economic policies were singularly ineffective. After Cromwell died in 1658, his son Richard took over, but he proved too weak to sustain the Commonwealth government, and it collapsed.²²

²¹ CONSTITUTIONAL DOCUMENTS, *supra* note 19, at 262–417; 1 MALCOLM, *supra* note 16, at 367–90.

²² SAMUEL RAWSON GARDINER, HISTORY OF THE COMMONWEALTH AND PROTECTORATE, 1649–1656 (Windrush Press 1989) (1903); BLAIR WORDEN, THE RUMP PARLIAMENT 1648–1653 (1974); J.C. DAVIS, OLIVER CROMWELL (2001).

In 1660, King Charles II, son of Charles I, returned to England and restored the traditional monarchical government and the traditional Anglican establishment. This Restoration era, too, was short-lived. When his successor, King James II, the other son of Charles I, began to abuse his royal prerogatives as his father had done and to betray his growing Catholic sympathies, Parliament forced him to abdicate the throne in 1688 in favor of the new dynasty of William and Mary. This was the Glorious Revolution. It established government by the King in Parliament and brought forth the Bill of Rights and the Toleration Act of 1689, two critical constitutional documents that included a number of the rights guarantees initially proposed by the revolutionaries in the 1640s and 1650s.²³

B. The Literature of Revolution

The English Revolution of 1640 to 1660 triggered an avalanche of popular writing by Calvinists. More than 22,000 pamphlets, sermons, and tracts all told were published in these twenty years, denouncing the tyranny of the prior regime, justifying the removal and eventual execution of the monarch, and calling for more robust protections of the people's rights and liberties.²⁴ Following the example of earlier Calvinist revolutionaries on the Continent, English Calvinists pointed first to their historically chartered rights and liberties that had been tyrannically abridged. For them, the Ur text was the Magna Carta of 1215, which had been issued by the Crown at the behest of the church and barons of England. The Magna Carta guaranteed that "the church of England shall be free and shall have all her whole rights and liberties inviolable."²⁵ It also guaranteed that all "free-men" were to enjoy their "liberties"—notably various discrete rights to property, marriage, and inheritance, to freedom from undue military service, to jury trial in criminal

²³ SOURCES OF ENGLISH CONSTITUTIONAL HISTORY: A SELECTION OF DOCUMENTS FROM A.D. 600 TO THE PRESENT 599–605, 607–08 (Carl Stephenson & Frederick George Marcham eds. & trans., 1972).

²⁴ See Catalogue of the Thomason Tracts in the British Museum (1906). For samples of these documents, see TRACTS ON THE PURITAN REVOLUTION, *supra* note 2, LEVELLER MANIFESTOES OF THE PURITAN REVOLUTION (Don M. Wolfe ed., 1944) [hereinafter LEVELLER MANIFESTOES], A.S.P. WOODHOUSE, PURITANISM AND LIBERTY: BEING THE ARMY DEBATES (1647–1649) (1951), and MALCOLM, STRUGGLE FOR SOVEREIGNTY, *supra* note 16. See also WILLIAM R. HALLER, LIBERTY AND THE REFORMATION IN THE PURITAN REVOLUTION (1955); GEORGE YULE, THE INDEPENDENTS IN THE ENGLISH CIVIL WAR (1958); H.N. BRAILSFORD, THE LEVELLERS OF THE ENGLISH REVOLUTION (Christopher Hill ed., 1961); David Wooton, *Leveller Democracy and the Puritan Revolution*, in THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 412 (J.H. Burns ed., 1991) (providing analysis of more recent scholarship).

²⁵ I THE STATUTES AT LARGE OF ENGLAND AND OF GREAT BRITAIN: FROM THE MAGNA CARTA TO THE UNION OF THE KINGDOMS OF GREAT BRITAIN AND IRELAND I (John Raithby, ed., 1811).

cases, and to freedom to pay their debts and taxes from property of their own choosing.²⁶ Some seventeenth-century pamphlets sought simply to broaden these ancient chartered rights and liberties so that they applied to all peaceable churches, not just the Church of England, and to all English citizens and subjects, not just the narrow class of aristocratic free-men.²⁷ This argument was not utopian. Sir Edward Coke, the greatest legal mind of England until his death in 1634, had brilliantly documented four centuries of cases and statutes that had slowly expanded some of the guarantees of the Magna Carta since 1215. His 1628 *Institutes of the Lawes of England*, which put these precedents together, became an anchor text of the pamphleteers in the 1640s and 1650s.²⁸

Also important to these pamphleteers was the Petition of Right of 1628, which Coke, too, had largely drafted. This document set forth “the diverse rights and liberties” of Englishmen in and beyond the Magna Carta. Parliament had pressed this document on a very reluctant King Charles in exchange for their consent to new taxes to support his unpopular wars. The Petition sought to prevent any further royal abuses of power. It called for no taxation without “the good will” and “common consent” of the Parliament; no forced loans from the people; no taking of a man’s life or liberty “but by the lawful judgment of his peers, or by the law of the land”; no taking of a man’s land, no imprisonment, and no disinheritance without “due process of law”; no suspension of the writ of habeas corpus; no forced quartering of soldiers or mariners in private homes; no criminal prosecution or punishment save for actions that were expressly outlawed by Parliamentary legislation; and no further use of martial law save in true emergencies. All these “rights and liberties,” the Petition declared, were to be maintained and enforced “according to the laws and statutes of this realm,” without “prejudice” to the people or to their Parliament.²⁹

But despite this further enumeration, the royal government for the next eleven years trampled on the people’s rights and liberties and suspended Parliament. The challenge that the pamphleteers faced in the 1640s and 1650s became this: how to restore the people’s rights and to reform their government on the strength of more than dusty old charters and precedents that the king

²⁶ *Id.* See also SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 23, at 115–26.

²⁷ See HALLER, *supra* note 2, at 1:102–7, 111–13, 177–78, 182; see also *id.* at 2:170, 3:263–65, 305, 311, 365–66 (providing sample documents).

²⁸ See THE SELECTED WRITINGS OF SIR EDWARD COKE (Steve Sheppard ed., 2003) [hereinafter COKE]; BERMAN, *supra* note 14, at 214–16, 238–45, 257–60, 263–69.

²⁹ SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 23, at 450–53.

could cavalierly disregard. Their answer: England must establish a strong new democratic constitution dedicated to rule of law and respect for rights.

Some of the most articulate proposals came from the pens of a trio of powerful Puritan pamphleteers—John Lilburne, Richard Overton, and William Walwyn.³⁰ Each of these figures wrote a large number of pamphlets on his own and bore the scars of the whips, pillories, and harsh imprisonment he endured for his writings and speeches.³¹ The three of them collaborated, along with Thomas Prince, on *An Agreement of the Free People of England* (1649), a proposed new constitution for England. In the preamble, the authors lamented the “long and tedious prosecution of a most unnatural cruel, homebred war,” occasioned by “the exercise of unlimited or arbitrary power.” They also lamented the “multitudes of grievances and intolerable oppressions” inflicted on the people. Invoking the Gospel teaching, “Blessed are the peacemakers” (Matthew 5:9), they called on their countrymen “to make a right use of that opportunity God hath given us to make this nation free and happy, to reconcile our differences, and beget a perfect amity and friendship once more amongst us, that we may stand clear in our consciences before Almighty God [as] the free people of England.”³²

The 1649 Agreement focused carefully on the forms and functions of government. The heart of the government, they insisted, should be a representative Parliament, with annual election of members, and no member serving consecutive annual terms. All persons were eligible to run for office, save Catholics and foreigners. Interference in elections by anyone was a serious crime. Parliament was to stick to its clearly enumerated powers, including importantly the power over foreign policy and diplomacy and the power to impose taxes at an “equal rate” “upon every real and personal estate.” Parliament could not interfere with the judiciary or executive at the national or local levels, all of which were answerable to the people. Nor could Parliament interfere in military matters, beyond appointment of generals and raising

³⁰ See PAULINE GREGG, *FREE-BORN JOHN: THE BIOGRAPHY OF JOHN LILBURNE* (2000); JOSEPH FRANK, *THE LEVELLERS: A HISTORY OF THE WRITINGS OF THREE SEVENTEENTH-CENTURY SOCIAL DEMOCRATS, JOHN LILBURNE, RICHARD OVERTON, AND WILLIAM WALWYN* (1969); BRAILSFORD, *supra* note 24, at 49–142; D.B. ROBERTSON, *THE RELIGIOUS FOUNDATIONS OF LEVELLER DEMOCRACY* (1951); *THE WRITINGS OF WILLIAM WALWYN* (Jack R. McMichael & Barbara Taft eds., 1989).

³¹ See HALLER, *supra* note 2 (describing examples of the harsh treatment); *LEVELLER MANIFESTOES*, *supra* note 24. See also the major collection in the Union Theological Seminary library in New York City, indexed in *CATALOGUE OF THE MCALPIN COLLECTION OF BRITISH HISTORY AND THEOLOGY* (Charles Ripley Gillett ed., 1930).

³² *LEVELLER MANIFESTOES*, *supra* note 24, at 400–10.

military revenues when needed; other military matters were to be left to local governments in the areas where the troops were raised.³³ Though the 1649 Agreement was silent on the subject, this trio of authors had earlier called for a comprehensive revision and codification of English law, and the crafting of new statutes published in plain English and made easily accessible to the people.³⁴ They had also urged that both the House of Lords and the monarchy be expunged. Other pamphlets offered much more detailed plans for democratic government after the Rump Parliament formally abolished the House of Lords and executed the monarch in 1649.³⁵

The 1649 Agreement further called for “the preservation of those safeguards, and securities of our lives, limbs, liberties, properties, and estates” already set out in the 1628 Petition of Right. To these guarantees, the Agreement added several others. It added a strong religious freedom clause that prohibited “any laws, oaths, or covenants, whereby to compel by penalties or otherwise any person to anything in or about matters of faith, religion or God’s worship or to restrain any person from the profession of his faith, or to exercise of religion according to his conscience.” Also included was a guarantee of freedom from compulsory tithes and appointed clergy and freedom for members of each parish to elect and contract with their own ministers.³⁶ In earlier pamphlets, the authors had also called for freedom from compulsory oath-swearing and military service for the conscientiously opposed, freedom from “a single form of church government” enforced by excommunication, and a guarantee that no one could “be punished or persecuted as heretical” “for preaching or publishing his opinion in religion in a peaceable way.”³⁷ Also in earlier documents, this same trio had called for a more general freedom of “speaking, writing, printing, and publishing” and freedom of the people for “contriving, promoting, or presenting any petitions” to Parliament concerning their “grievances or liberties.”³⁸

In addition to freedom of religion (and speech), the Agreement elaborated several criminal procedural guarantees: no prosecution or punishment for crimes in cases “where no law hath been before provided”; a guarantee of the

³³ See *id.* at 223–34, 291–303.

³⁴ See *id.* at 139, 317.

³⁵ MALCOLM, *supra* note 16, at 1:369.

³⁶ LEVELLER MANIFESTOES, *supra* note 24, at 400–10.

³⁷ *Id.* at 122–23, 139. For this and the next five footnotes, see many examples of each such reform in the subject index of 3 HALLER, *supra* note 2.

³⁸ LEVELLER MANIFESTOES *supra* note 24, at 195, 329.

privilege against self-incrimination; the right to call witnesses in criminal defense; the right to jury trial; no capital punishment “except for murder” or other “like heinous offences,” notably treason; punishments in non-capital cases that were “equal to the offence”; and no imprisonment for delinquency in paying private debts. In earlier pamphlets, the three authors had also called for “just, speedy, plain, and unburdensome” resolution of “controversies and suits in law,” at least two witnesses “of honest conversation” for capital conviction, and no detention or imprisonment without a warrant.³⁹

Finally, the Agreement protected commerce, business, and private property. It included guarantees of tax-free and excise-free domestic and foreign trade as well as freedom from government-sponsored business monopolies, a subject of frequent complaint in earlier pamphlets. It forbade any government actions designed to “level men’s estates, destroy property, or make all things common,” and required officials to make provision for the poor and restore to the families the private estates of criminals, save those who had been executed for treason. This was a truncated version of the authors’ wider calls for a comprehensive system of public schools, hospitals, common recreational places, and well-funded poor relief programs.⁴⁰

This was a quite typical list of the rights and liberties that were being pressed by the Calvinist and other pamphleteers in mid-seventeenth century England. They pressed these claims not merely as positive rights created by the state, but as natural rights created by God and to be confirmed by a state constitution. Every person by his or her very nature, the pamphleteers insisted, has equal and natural rights to life, liberty, and property. Every person is equally called by God to be a “prophet, priest, and king” with a natural right and duty to speak, preach, and rule in the community. Richard Overton put it typically in 1646: “For by natural birth, all men are equally alike born to like property, liberty, and freedom, and as we are delivered of God by the hand of nature into this world, everyone with a natural, innate freedom and property (as it were writ in the table of every man’s heart, never to be obliterated) even so we are to live, everyone equally and alike to enjoy his birthright and privilege; even all where God by nature hath made him free. . . . [E]very man by nature [is also] a King, Priest, and Prophet in his own natural circuit and compass,

³⁹ *Id.* at 139–40.

⁴⁰ *See id.* at 268–70, 288–89.

whereof no second [person] may partake, but by deputation, commission, and free consent from him whose right and freedom it is.”⁴¹

The signature phrase—that every person is a “prophet, priest, and king” with natural rights and duties to speak, preach, and rule in the community—became an organizing idiom of a distinctly Calvinist theory of rights and liberties in mid-seventeenth-century England. It served both to integrate many of the rights and liberties inherited from the common law tradition and to cultivate new rights and liberties that the English Calvinists considered essential to democratic constitutionalism.

The English pamphleteers did not invent this phrase. It was made famous a century before by the German reformer Martin Luther in his 1520 manifesto, *Freedom of a Christian*.⁴² This tract, Luther’s best seller, was a frontal assault on medieval hierarchical views of society, particularly the Catholic Church’s claim that the clergy were by nature and calling superior to the laity. Luther thought this claim unbiblical. Building on 1 Peter 2:9, Revelations 5:10, 20:6 and other biblical texts, Luther argued for the priesthood, prophethood, and kingship of all believers—that everyone in Christendom must be a priest and servant to his peers, that everyone must preach and prophesy God’s truth and justice to his neighbor, that everyone must do his part to help rule and govern the affairs of this earthly kingdom. This was a revolutionary idea in sixteenth-century Europe. It challenged not only the traditional authority of the clergy over laity, but eventually all traditional authority structures—rulers over subjects, husband over wives, parents over children, masters over servants, and more.

While Luther’s idea broke the power of clerical hegemony in the Protestant world, it soon became a recipe for anarchy and antinomianism, as each new Protestant convert now claimed to be a law unto himself, free from the rule of church, state, and family. Chastened especially by the rioting of the 1525 Peasants’ Revolt, Luther and his followers buffered the radical implications of this idea by emphasizing the natural authority of the heads of family, church, and state over their subjects, and the need for all persons to exercise their natural rights and gifts strictly within the limits of their own unique Christian

⁴¹ Overton, *supra* note 2, at 3–4; see also G.P. GOOCH, ENGLISH DEMOCRATIC IDEAS IN THE SEVENTEENTH CENTURY 43 (2d ed. 1959).

⁴² *The Freedom of a Christian* (W.A. Lambert trans., Harold J. Grimm rev.) (1520), in 31 LUTHER’S WORKS 327–77 (Helmut T. Lehmann ed., 1955–68).

vocations and with an eye to the common good.⁴³ The Genevan Calvinist reformers took over this more limited teaching of prophet, priest, and king.⁴⁴ Thus, when in 1562, the Genevan man of letters Jean Morély used the idea of prophet, priest, and king to call for a more democratic form of local church government, free from the heavy hand of the Genevan Consistory, he was excommunicated and banished for his “pernicious,” “slandorous,” “scandalous,” “schismatic,” and “seditious” views. His books were publicly censored and burned, and those who printed or used them were viewed as accessories to heresy.⁴⁵

What had been Calvinist theological heresy in the sixteenth century, however, became Calvinist political orthodoxy in the seventeenth. As English Calvinists chafed under increasingly onerous restrictions on their ability to publish, preach, and participate in Parliament and political life, they began to seize anew on this signature Protestant phrase of “prophet, priest, and king” to ground their opposition. These royal restrictions, they argued, were compromising their rights to discharge faithfully the duties of prophethood, priesthood, and kingship to which God called all Christians. A few radical Calvinist groups, like the Diggers and Ranters, pressed these arguments to anti-establishment extremes.⁴⁶ But most English Calvinists used the teaching that each person is prophet, priest, and king to press for the natural and constitutional rights of free speech, religious exercise, and democratic participation in the churches and commonwealth of England.

C. *John Milton and the Revolution*

John Milton was the most articulate and inventive advocate for this emerging Calvinist political theory. To be sure, Milton was sometimes more individualistic and idiosyncratic in his views than a number of his fellow reformers.⁴⁷ Moreover, he eschewed the fierce denominational loyalty that

⁴³ See JOHN WITTE, JR., LAW AND PROTESTANTISM 87–117 (2002); WITTE, *supra* note 4, at 49–62.

⁴⁴ See 2 JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION (1559) (John T. McNeill ed., Ford Lewis Battles trans., 1960), 4.18.6–17, 19.28.

⁴⁵ See PHILIPPE DENIS & JEAN ROTT, JEAN MORÉLY (CA. 1524–CA. 1594) ET L’UTOPIE D’UNE DÉMOCRATIE DANS L’EGLISE (1993); ROBERT McCUNE KINGDON, GENEVA AND THE CONSOLIDATION OF THE FRENCH PROTESTANT MOVEMENT 1564–1572: A CONTRIBUTION TO THE HISTORY OF CONGREGATIONALISM, PRESBYTERIANISM, AND CALVINIST RESISTANCE THEORY 43–137 (1967).

⁴⁶ HILL, *supra* note 15; NICHOLAS McDOWELL, THE ENGLISH RADICAL IMAGINATION: CULTURE, RELIGION, AND REVOLUTION, 1630–1660 (2003).

⁴⁷ Bernard E. Meland, *John Milton: Puritan or Liberal?*, 33 ENCOUNTER 129–40 (1972); E.M.W. TILLYARD, THE MILTONIC SETTING PAST AND PRESENT (1938).

was expected of a Calvinist in England—flitting easily in and out of warring Independent, Presbyterian, Separatist, Leveller, and other Calvinist camps, and consorting readily with Arminians, Baptists, and other sectarian groups in search of new ideas. But Milton was a fair and forceful summarizer and synthesizer of some of the best inherited Calvinist teachings on rights, revolution, and regicide, and he cast these teachings into enduring English forms, especially in his defense of Parliament's execution of Charles. He repeatedly called England to embrace the Calvinist reformation, and to extend its theological teachings into the political and legal sphere. He grounded his own novel arguments about law, religion, and human rights, as a good Calvinist should, first and foremost in the Bible, whose sundry teachings on point were, in his view, underused by his fellow reformers.⁴⁸ And he anchored his theory of liberty in the teaching that each and every Christian in the commonwealth is at once a prophet, priest, and king with inherent rights that attach to these three offices. This teaching provided him with a sturdy theological anthropology to support the freedoms of speech, religion, and association that he championed especially. It also inclined him toward more radical democratic reforms of church, state, and family—though he later retreated toward more aristocratic views of government and more patronizing views of the individual.⁴⁹

Milton did not, of course, work alone or represent the views of every English Calvinist, let alone every Englishman. The honor roll of prophets of liberty in seventeenth-century England is long—William Ball, John Bastwick, Richard Baxter, John Bunyan, Henry Burton, Oliver Cromwell, Thomas Edwards, John Goodwin, Thomas Goodwin, Robert Greville, Henry Ireton, John Milton, John Owen, Henry Parker, Isaac Pennington, William Prynne, John Pym, Henry Robinson, Samuel Rutherford, John Saltmarsh, Roger Williams, Henry Vane, Henry Vane the Younger, John Wildman, and Gerrard Winstanley, among many others. Milton did not help his reputation among some of these figures by serving as Secretary for Foreign Languages in Oliver Cromwell's increasingly repressive regime, or by escaping persecution even from the Restoration government of 1660. Lacking these badges of courage, many suspected him of duplicity and political trimming. Even Milton's brilliant poems, *Paradise Lost* and *Paradise Regained*, remained for a time

⁴⁸ Elizabeth Tuttle, *Biblical References in the Political Pamphlets of the Levellers and Milton*, in MILTON AND REPUBLICANISM 63–81 (David Armitage et al. eds., 1995) [hereinafter MILTON AND REPUBLICANISM].

⁴⁹ Particularly in 7 CPW, *supra* note 1, at 340–88, 396–463. See analysis and context in 7 CPW, *supra* note 1, at 118–228.

under the shadow of James Harrington's utopian *Oceana* (1656), a more stridently democratic tract that earned Harrington a long stay in prison and eventual exile for treason.⁵⁰ But, longer term, Milton could not be matched in the power of his rhetoric or the prescience of his teachings. He anticipated and articulated a number of important Calvinist theories of law, religion, and human rights that would become axiomatic for the later common law, and indeed for the Western legal tradition altogether.

Milton was at first reluctant to enter the fray of the English Revolution.⁵¹ His father, an Anglican convert from Catholicism, had sent him to Cambridge University to study for the Anglican priesthood. After absorbing the sentiments of his Puritan teachers and observing the practices of the established Anglican clergy, however, Milton concluded that "tyranny had invaded the church," and he "thought it better to preserve a blameless silence before the sacred office."⁵² He resolved instead, upon earning his master's degree in 1632, to remain a layman and to pursue the quiet life of a scholar and poet. It proved impossible for him to stay out of the political discussion for long. Especially when the Long Parliament began its heated deliberations in 1640, the country was dividing sharply between royal apologists and revolutionary agitators. In early 1641, Milton stepped into the fray, firmly on the side of revolution. He described his motivations as follows:

As long as liberty of speech was no longer subject to control, all mouths began to be opened against the bishops; some complained of the vices of the individuals, others of those of the order. They said it was unjust that they alone should differ from the model of the other reformed churches; that the government of the church should be according to the pattern of other churches, and particularly of the word of God. This awakened all my attention and my zeal. I saw that a way was opening for establishment of real liberty; that the foundation was laying for the deliverance of man from the yoke of

⁵⁰ See, e.g., H.F. RUSSELL SMITH, HARRINGTON AND HIS OCEANA: A STUDY OF A 17TH CENTURY UTOPIA AND ITS INFLUENCE IN AMERICA (1914); POLITICAL DISCOURSE IN EARLY MODERN BRITAIN (Nicholas Phillipson & Quentin Skinner eds., 1993); ARIHIRO FUKUDA, SOVEREIGNTY AND THE SWORD: HARRINGTON, HOBBS, AND MIXED GOVERNMENT IN THE ENGLISH CIVIL WARS (1997).

⁵¹ Among countless studies on Milton, see SHARON ACHINSTEIN, MILTON AND THE REVOLUTIONARY READER (1994), JOSEF BOHATEC, ENGLAND UND DIE GESCHICHTE DER MENSCHEN- UND BÜRGERRECHT 58–116 (Otto Weber ed., 1956), ROBERT THOMAS FALLON, DIVIDED EMPIRE: MILTON'S POLITICAL IMAGERY (1995), ROBERT THOMAS FALLON, MILTON IN GOVERNMENT (1993), CHRISTOPHER HILL, MILTON AND THE ENGLISH REVOLUTION (1977), MERRITT YERKES HUGHES, TEN PERSPECTIVES ON MILTON (1965), DENIS SAURAT, MILTON: MAN AND THINKER (1944), and DON M. WOLFE, MILTON IN THE PURITAN REVOLUTION (1941). See also the detailed introductions and appendices in each volume of CPW, *supra* note 1.

⁵² 1 CPW, *supra* note 1, at 823.

slavery and superstition; that the principles of religion, which were the first objects of our care, would exert a salutary influence on the manners and constitution of the republic; and as I had from my youth studied the distinction between religious and civil rights, I perceived that if I ever wished to be of use, I ought at least not to be wanting to my country, to the church, and to so many of my fellow-Christians, in a crisis of so much danger.⁵³

In the course of the next twenty years, Milton published some forty major tracts. The most important for our purposes were five tracts against the Anglican establishment,⁵⁴ four more calling for the reformation of marriage,⁵⁵ a brief tract on education,⁵⁶ a comprehensive book of Christian doctrine,⁵⁷ five tracts on church, state, and tyranny,⁵⁸ a famous manifesto on freedom of speech,⁵⁹ and two more famous defenses of the rights and liberties of the English people.⁶⁰ All these tracts were published between 1641 and 1660. Thereafter, Milton published revised editions of several of them, as well as some brushed-up versions of his student papers. But he devoted most of his last years to completing his two poetic masterpieces, *Paradise Lost* and

⁵³ John Milton, *Second Defense of the People of England*, in 1 CPW, *supra* note 1, at 107–08.

⁵⁴ John Milton, *Of Reformation Touching Church-Discipline in England* (1641), in 1 CPW, *supra* note 1, at 514–617; John Milton, *Of Prelatical Episcopacy* (1641), in 1 CPW, *supra* note 1, at 618–52; John Milton, *Animadversions upon the Remonstrants Defence Against Smectymnuus* (1641), in 1 CPW, *supra* note 1, at 653–735; John Milton, *The Reason of Church-Government* (1642), in 1 CPW, *supra* note 1, at 736–861; John Milton, *An Apology Against a Pamphlet* (1642), in 1 CPW, *supra* note 1, at 867–953.

⁵⁵ John Milton, *The Doctrine of Discipline of Divorce* (1643), in 2 CPW, *supra* note 1, at 217–356; *The Judgement of Martin Bucer Concerning Divorce* (1644), in 1 CPW, *supra* note 1, at 416–79; *Tetrachordon: Expositions upon the Four Chief Places in Scripture Which Treat of Mariage, or Nullities in Mariage* (1645), in 2 CPW, *supra* note 1, at 571–718; *Colasterion: A Reply to a Nameles Answer Against the Doctrine of Discipline of Divorce* (1645), in 2 CPW, *supra* note 1, at 719–58.

⁵⁶ John Milton, *On Education* (1644), in 2 CPW, *supra* note 1, at 357–415

⁵⁷ John Milton, *Two Books of Investigations into Christian Doctrine Drawn from the Sacred Scriptures Alone* (n.d.), in 6 CPW, *supra* note 1, at 117–807. See also his later tract, John Milton, *Of True Religion* (1673), in 8 CPW, *supra* note 1, at 408–40.

⁵⁸ John Milton, *The Tenure of Kings and Magistrates* (1649), in 3 CPW, *supra* note 1, at 184–258; John Milton, *Eikonoklastes* (1649), in 3 CPW, *supra* note 1, at 335–601; John Milton, *A Treatise of Civil Power* (1659), in 7 CPW, *supra* note 1, at 229–72; John Milton, *Considerations Touching the Likeliest Means to Remove Hirelings out of the Church* (1659), in 7 CPW, *supra* note 1, at 273–321; John Milton, *The Readie and Easie Way to Establish a Free Commonwealth* (1660), in 7 CPW, *supra* note 1, at 340–88, 2d ed., 7:396–463.

⁵⁹ John Milton, *Areopagitica; A Speech of Mr. John Milton for the Liberty of Unlicensed Printing to the Parl[i]ament of England* (1644), in 2 CPW, *supra* note 1, at 480–57.

⁶⁰ John Milton, *A Defence of the People of England* (1651), in 4 CPW, *supra* note 1, at 285–537; *A Second Defence of the English People* (1654), in 4 CPW, *supra* note 1, at 538–686. A convenient collection of these and other tracts is provided in the Liberty Fund edition, AREOPAGATICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON (John Alvis ed., 1999) [hereinafter LF].

Paradise Regained.⁶¹ While both these poems echoed his favorite legal and political themes, Milton now cloaked his more strident views in allegory to escape the new Restoration censors.

Many of Milton's writings were chock-full of familiar Calvinist teachings, and studded with generous references to Calvin and the Genevan Reformation and to Theodore Beza, Martin Bucer, George Buchanan, François Hotman, Peter Martyr, William Perkins, Pierre Viret, and other Calvinists.⁶² Milton lauded the insights and sacrifices of the early English reformer, John Wycliffe, and the Marian exiles, Christopher Goodman, John Knox, and John Ponet—all "fathers in the faith we hold."⁶³ He also found inspiring the resistance theology and revolutionary politics of fellow reformers in France, Scotland, and the Netherlands, to which he adverted frequently. Milton crisply summarized Calvinist commonplaces about rights, resistance, and revolution in a famous passage in *The Tenure of Kings and Magistrates* (1649), the first in a series of his tracts that justified the deposition and eventual execution of King Charles:

[A]ll men naturally were born free, being in the image of and resemblance of God himself, and were by privilege above all the creatures, born to command and not to obey; and that they lived so. Till from the root of Adam's transgression, falling among themselves to do wrong and violence, and foreseeing that such courses must needs tend to the destruction of them all, they agreed by common league to bind each other from mutual injury, and jointly to defend themselves against any that gave disturbance or opposition to such agreement. Hence came cities, towns, and commonwealths. And because no faith in all was found sufficiently binding, they saw it needful to ordain some authority that might restrain by force and punishment what was violated against peace and common right. This authority and power of self-defense and preservation being originally

⁶¹ See Barbara Kiefer Lewalski, *To Try and Teach the Erring Soul: Milton's Last Seven Years*, in *MILTON AND THE TERMS OF LIBERTY 175–90* (Graham Parry & Joad Raymond eds., 2002); Barbara Kiefer Lewalski, *Paradise Lost and Milton's Politics*, in 4 *JOHN MILTON: TWENTIETH-CENTURY PERSPECTIVES*, 213–40 (J. Martin Evans ed., 2003). For analysis of the political themes of his poetry, which lie beyond the scope of this Article, see in addition to the foregoing, JOAN S. BENNETT, *REVIVING LIBERTY: RADICAL CHRISTIAN HUMANISM IN MILTON'S GREAT POEMS* (1989), Laura Lunger Knoppers, *Paradise Regained and the Politics of Martyrdom*, 90 *MODERN PHILOLOGY* 200 (1992).

⁶² 3 CPW, *supra* note 1, at 240–58; 2 CPW, *supra* note 1, at 452–62, 477, 484, 506–07. See discussion in HUGHES, *supra* note 51, at 220–39, and MERRITT Y. HUGHES, *Milton's Treatment of Reformation History in The Tenure of Kings and Magistrates*, in *THE SEVENTEENTH CENTURY: STUDIES IN THE HISTORY OF ENGLISH THOUGHT AND LITERATURE FROM BACON TO POPE 247–63* (Richard F. Jones et al. eds., 1951).

⁶³ 3 CPW, *supra* note 1, at 251; see also LF, *supra* note 60, at 72–77, 87–95, 123–24, 177, 200–01, 258.

and naturally in every one of them, and unitedly in them all, for ease, for order, and lest each man should be his own partial judge, they communicated and derived either to one, whom for the eminence of his wisdom and integrity they chose above the rest, or to more than one who they thought of equal deserving. . . .

The power of kings and magistrates is nothing else, but what is only derivative, transferred and committed to them in trust from the people, to the common good of them all, in whom the power yet remains fundamentally, and cannot be taken from them, without a violation of their natural birthright. . . . As the king or magistrate holds his authority of the people, both originally and naturally for their good in the first place, and not his own, then may the people as often as they shall [think] it for the best, either to choose him or reject him, refrain or depose though no tyrant, merely by the liberty and right of free born men, to be governed as seems to them best.⁶⁴

These familiar themes were being widely espoused in Milton's own day by fellow English and Scottish reformers. Milton added further biblical proof texts, historical examples, and colorful rhetorical embroidery to these arguments. Particularly his caustic *First* and *Second Defence of the English People* in their regicide of Charles, both tracts directed against the famous Dutch apologist for monarchy named Salmasius, became a classic formulation and made Milton famous on the Continent. But Milton's main arguments were all Calvinist commonplaces.

More original, and more controversial to his fellow Calvinists, was Milton's theory of religious liberty, domestic liberty, and civil liberty that must prevail in a truly reformed commonwealth. On these issues, Milton sometimes pressed Calvinist premises to startling, even scandalous, conclusions that few Calvinists in the day could countenance and no Parliament would codify. Indeed, some of his proposed reforms did not find theological or legal acceptance until the nineteenth and twentieth centuries.

II. RELIGIOUS RIGHTS AND LIBERTIES

A. *The Laws and Liberties of Conscience*

Milton regarded religious liberty as a God-given and God-directed natural right. By being created in God's image, Milton argued, each person has

⁶⁴ 3 CPW, *supra* note 1, at 198–99, 202, 206.

something of the “image of the mind of God” within him, a conscience or right reason that gives him access to divine truth and direction and a will and capacity to act on that knowledge.⁶⁵ Each person has the law of God written into his or her conscience, heart, and mind. By this law, each person knows the duties owed to God, neighbor, and self. He knows what is right and wrong, good and bad, holy and evil. He knows the cardinal virtues of justice and charity, wisdom and prudence, sincerity and industry. He knows the differences between pride and humility, greed and generosity, envy and love, anger and kindness, lust and continence, gluttony and temperance, sloth and zeal, and other vices and virtues.⁶⁶

Each person, however, has been created with a natural freedom to choose how to act on the knowledge taught by this natural law of conscience. God did not make persons as blind automatons who loved him out of reflex or servile subjects who obeyed him out of fear. Rather than constrain each person under “a perpetual childhood of prescription,” Milton wrote, God “trusts him with the gift of reason to be his own chooser.”⁶⁷ Animals and plants are created simply to obey the laws of nature around them. Persons are created with the freedom to accept or reject the natural laws of conscience or adopt a wide range of conduct in between. That is what it means to be created as an image-bearer of God, with a natural reason and will that reflect something of the reason and will of their Creator.

Many there be that complain of divine Providence for suffering Adam to transgress, foolish tongues! When God gave him reason, he gave him freedom to choose, for reason is but choosing; he had been else a mere artificial Adam, such an Adam as he is in the motions. We ourselves esteem not of that obedience, or love, or gift, which is of force: God therefore left him free, set before him a provoking object, ever almost in his eyes, herein consist his merit, herein the right of his reward, the praise of his abstinence.⁶⁸

None of this changed with Adam’s fall into sin. The natural law of conscience remains inscribed on the conscience of each person, and the natural freedom to act in response to these commandments likewise remains in place. “A kind of gleam or glimmering” of the natural law remains even in the most

⁶⁵ *Id.* at 197, 6 CPW, *supra* note 1, at 133, 353.

⁶⁶ 2 CPW, *supra* note 1, at 514–18; 6 CPW, *supra* note 1, at 128–33, 351–54; 7 CPW, *supra* note 1, at 243–44.

⁶⁷ 2 CPW, *supra* note 1, at 514.

⁶⁸ *Id.* at 527; *see also id.* at 514–21; 3 CPW, *supra* note 1, at 198–206.

evil of men, Milton wrote, and it provides them with some light to shine even in their darkest darkness.⁶⁹ But, because of human sinfulness, this natural light and law of conscience by itself is too dim and diffuse to provide much direction for the earnest pursuit of truth and goodness. To find their way to true virtue, to true love of God, neighbor, and self, persons need the fuller spiritual light of God's Word. To exercise their natural freedom meaningfully, they need supernatural direction. "If there were no God," Milton wrote in rebuke of purely rationalist theories of natural law, "there would be no real dividing line between right and wrong. What was to be called virtue, and what vice, would depend upon mere arbitrary opinion. No one would try to be virtuous, no one would refrain from sin because he was ashamed or feared the law, if the voice of conscience or right reason did not speak from time to time in the heart of every man, reminding him . . . that a God does exist, and that everyone must render to him an account of his actions, good and bad alike."⁷⁰

As both the Bible and other ancient sources make clear, God reminded persons of the natural law of conscience in different ways over time and across cultures. In the time of Noah and his progeny, God largely left persons to live by the natural law of conscience alone—though he occasionally sent angels and oracles, plagues and miracles to drive home his most important commandments. Some ancients, notably the great biblical patriarchs, Noah, Abraham, Isaac, and Jacob, showed that they understood this natural law and could act on it responsibly, especially when God or an angel paid them a visit. But left to their own devices and desires, even these great patriarchs often lived in open violation of the natural law, much to the consternation of God.⁷¹

In the time of Moses, therefore, God elected to give his chosen people of Israel a much fuller reminder and revelation of his law. On Mt. Sinai, God gave the Jews detailed ceremonial, juridical, and moral laws to govern their relations with God, neighbor, and self, to guide their every step on the way to virtue. By the ceremonial law, God taught them how to dress and eat, what rituals and sacrifices to make, how to build their temples and altars. By the juridical law, he taught them the basic rules of how to organize their domestic, political, and spiritual lives. And by the moral law, he taught them a series of "thou shalt" and "thou shalt not" to guide them in their duties of love to God, neighbor, and self. God entered into a covenant of works with the Jews,

⁶⁹ 6 CPW, *supra* note 1, at 516; *see also id.* at 396.

⁷⁰ *Id.* at 132.

⁷¹ 1 CPW, *supra* note 1, at 761–68; 6 CPW, *supra* note 1, at 351–81, 515–20.

promising them eternal blessings if they obeyed this law, eternal curses if they disobeyed. When the people disobeyed, God in his mercy sent them prophets to remind them of the law, to drive them to repentance, and to assure them of forgiveness if they returned to the law. When they disobeyed again, he sent them for a time into exile in Babylon. But he later returned a faithful remnant to the promised land and restored to them the ancient law of Moses and renewed the covenant of works.⁷²

The Mosaic law, while detailed, was only a partial and temporary revelation of God's law, however, Milton argued. The Mosaic law was binding on the Jews alone, and not on other nations. It was tailored to the time and place of the ancient Israelites—first in their exodus, then in their promised land. It was calibrated to break the hardness of heart and habits of sin that the people had repeatedly betrayed when they lived under the law of nature alone. The Mosaic law served, in the words of St. Paul, as a temporary “schoolmaster until Christ came,” a form of elementary instruction and discipline, with detailed rules, procedures, and ceremonies designed to teach the Jews step-by-step how to love God, neighbor, and self, and thus prepare themselves and all people for the coming of Christ.⁷³ As Milton put it in his *Christian Doctrine*:

The Mosaic law was a written code, consisting of many stipulations, and intended for the Israelites alone. It held a promise of life for the obedient and curse for the disobedient. Its aim was to make the Israelites have recourse to the righteousness of the promised Christ, through a recognition of mankind's and therefore of their own depravity. Its aim, also, was that all we other nations should afterwards be educated from this elementary, childish, and servile discipline to the adult stature of a new creature, and to a manly freedom under the Gospel, worthy of God's sons.⁷⁴

Now that the “manly freedom”⁷⁵ of the Gospel of Christ has come, Milton argued, the Mosaic law has been rendered obsolete. Christ fulfilled the Mosaic law in all its particulars, so that no one would be forced to try to fulfill it again. He absorbed the punishment that the Mosaic covenant of works threatened for the disobedient, so that no one would have to suffer its condemnation any longer. And he offered salvation freely to all who have faith, so that no one would be forced to the humility and futility of a salvation by works. The

⁷² 6 CPW, *supra* note 1, at 517–19, 666–715; 7 CPW, *supra* note 1, at 273–321.

⁷³ *Galatians* 3:24.

⁷⁴ 6 CPW, *supra* note 1, at 517.

⁷⁵ *Id.* at 517; *see also* 1 CPW, *supra* note 1, at 588–89.

Gospel of Christ teaches the same fundamental lessons of virtue taught by the law of Moses and by the law of nature—that we must love God, neighbor, and self in all that we do. But the Gospel, and the further exposition of its teachings in the Epistles, instructs us in a very different way than the Mosaic law. The Gospel guides by general principle; it does not govern by specific precept. It sets forth examples and illustrations of how to live by the spirit of the law; it does not set down rules and procedures of how to observe its every letter. It offers the perfect example of Christ to be imitated, but leaves Christ's followers with freedom to follow that example in various peaceable ways under the guidance of the Holy Spirit.⁷⁶

Christ's teaching is "much more excellent and perfect than the law" of Moses, Milton argued.⁷⁷ It is a "pulsing, breathing law," "written in the hearts of believers through the Holy Spirit," not a stiff, formal law, written on "tablets of stone" by the "finger of God."⁷⁸ It is a universal norm intended for all persons, not just a local rule directed to the instruction of a single people. It is an eternal norm that "will last until the end of the world," not just a temporary law assigned in the time of our schooling.⁷⁹ It is a law of freedom, not a law of bondage, a covenant of grace, not a covenant of works. The teaching of Christ provides everyone with a better way to understand more clearly the meaning of virtue and love originally taught by the natural law of conscience. It dispels the shadow of sin that obscures proper understanding of this natural law. It restores in all who accept Christ the free exercise of their natural freedom that was lost in the fall into sin.⁸⁰

Milton returned again and again to this theme of the freedom that is available to all who have faith in Christ. "Christian liberty means that Christ our liberator frees us from the slavery of sin and thus from the rule of the law and of men, as if we were emancipated slaves. He does this so that, being made sons instead of servants, and grown men instead of boys, we may serve God in charity through the guidance of the spirit of truth."⁸¹ To be sure, said Milton, there is a place for detailed rules for actual youngsters who are being educated to understand the "manly freedom" of Christ to be enjoyed when they become adults. Like the ancient Jews, these budding Christians need rules to

⁷⁶ 6 CPW, *supra* note 1, at 415–84.

⁷⁷ *Id.* at 521.

⁷⁸ *Id.* at 523–24.

⁷⁹ *Id.* at 521.

⁸⁰ *Id.* at 521–62; 7 CPW, *supra* note 1, at 258–61.

⁸¹ 6 CPW, *supra* note 1, at 537.

prepare them for their mature life in Christ. But the goal of this rule-bound schooling is not to enslave them in sin or shackle them to a life of works righteousness. It is rather “to repair the ruins of our first parents [Adam and Eve] by regaining to know God aright, and out of that knowledge to love him, to imitate him, to be like him, as we may the nearest by possessing our souls of true virtue, which being united to the heavenly grace of faith makes up the highest perfection.”⁸²

Milton piled up sundry New Testament verses to support his thesis about Christian freedom. “For freedom, Christ has set us free.”⁸³ “You were called to freedom.”⁸⁴ “Where the Spirit of the Lord is, there is freedom.”⁸⁵ “For the law of the Spirit of life in Christ has set [you] free from the law of sin and death.”⁸⁶ “You will know the truth, and the truth will make you free.”⁸⁷ “You will be free indeed.”⁸⁸ You all have been given “the law of freedom” in Christ, “the glorious liberty of the children of God.”⁸⁹ You must all now “live as free men.”⁹⁰

For Milton, the upshot of all these biblical passages was that “the whole Mosaic law is abolished by the Gospel, [for] its purpose is attained in that love of God and of our neighbor which is born of faith and through the spirit.”⁹¹ The Gospel abolishes not only the ceremonial and juridical laws of Moses. After all, these laws prescribe routine actions that any disciplined person can follow if he tries. The Gospel also abolishes the moral laws of Moses, particularly as set forth in the Decalogue. These moral laws are much harder to follow, for they prescribe a way of life that runs directly contrary to our sinful nature. It is the moral law of Moses, not the ceremonial or juridical law, that “disturbs believers and makes them waver.”⁹² It is the moral law that even the most disciplined and devout soul cannot fulfill in every particular. It is the moral law that “enslaves,” “curses,” and “shames” everyone, traps them in their sinfulness, and drives them to despair.⁹³ If there is any part of the Mosaic

⁸² 2 CPW, *supra* note 1, at 366–67.

⁸³ *Galatians* 5:1.

⁸⁴ *Galatians* 5:13.

⁸⁵ 2 *Corinthians* 3:17.

⁸⁶ *Romans* 8:2.

⁸⁷ *John* 8:32.

⁸⁸ *John* 8:36.

⁸⁹ *Romans* 8:21

⁹⁰ 1 *Peter* 2:16; see 6 CPW, *supra* note 1, at 529–39; 7 CPW, *supra* note 1, at 265–72.

⁹¹ 6 CPW, *supra* note 1, at 531.

⁹² *Id.* at 529.

⁹³ *Id.* at 528–29.

law that Christ fulfills on our behalf, Milton thus concluded, it is the moral law. Why would Christ lift only the lighter yoke of the ceremonial and juridical laws that some of us can carry, but leave the heavier yoke of the moral law that will eventually crush all of us in our depravity? That is a false, a nonsensical redemption, said Milton. “It must have been the entire Mosaic law from which Christ redeemed us.”⁹⁴

This was a more radical understanding of Christian freedom from law than was traditional among Calvinists. All Calvinists agreed that the ceremonial laws of Moses dealing with sacrifice, diet, ritual, dress, and the like were entirely abolished by Christ. Most further agreed that the juridical laws of Moses dealing with domestic, political, and religious life were also not per se binding—although perhaps they could still be useful guides for modern life and law. But every Calvinist insisted that the moral law of Moses remains valid and valuable for Christians.⁹⁵ Particularly the Decalogue, Calvinists taught, is the best summary of the natural law of conscience and the clearest source of principles of how to love God, neighbor, and self. As such, the moral law has important “uses” in setting a minimal morality of duty for all persons and a higher morality of aspiration for true believers.⁹⁶ Christ thus preserved the moral law and exemplified its spirit. Christ freed Christians from its curses so that they could be free to try to live by its commandments without fear of condemnation if they inevitably stumbled. The *Westminster Confession* (1647), drawn up by an assembly of leading Calvinist divines from Scotland and England, put these familiar Calvinist teachings in authoritative form in Milton’s day:

The moral law does forever bind all, as well justified persons as others, to the obedience thereof; and that, not only in regard of the matter contained in it, but also in respect of the authority of God the Creator, who gave it. Neither does Christ, in the Gospel, any way dissolve, but much strengthen this obligation.

Although true believers be not under the law, as a covenant of works, to be thereby justified, or condemned; yet is it of great use to them, as well as to others; in that, as a rule of life informing them of the will of God, and their duty, it directs and binds them to walk

⁹⁴ *Id.* at 525–41, 704–15; 7 CPW, *supra* note 1, at 252–56.

⁹⁵ Milton claimed that the Calvinist theologian Jerome Zanchius held similar views to his, *see* 6 CPW, *supra* note 1, at 533, but this is based on a fundamental misreading of Zanchius’ views as I understand them from STEPHEN J. GRABILL, REDISCOVERING THE NATURAL LAW IN REFORMED THEOLOGICAL ETHICS 132–49 (2006).

⁹⁶ On the development of the uses of law doctrine, *see* WITTE, JR., *supra* note 4, at 263–94.

accordingly; discovering also the sinful pollutions of their nature, hearts and lives; so as, examining themselves thereby, they may come to further conviction of, humiliation for, and hatred against sin, together with a clearer sight of the need they have of Christ, and the perfection of His obedience. It is likewise of use to the regenerate, to restrain their corruptions, in that it forbids sin: and the threatenings of it serve to show what even their sins deserve; and what afflictions, in this life, they may expect for them, although freed from the curse thereof threatened in the law. The promises of it, in like manner, show them God's approbation of obedience, and what blessings they may expect upon the performance thereof.⁹⁷

Milton rejected this familiar Calvinist teaching of the uses of moral law. He called it the false teaching of “converted Pharisees” who “believe that the law should still be observed even in Gospel times.”⁹⁸ No person needs the law to be forced to grace or to confess his sin, Milton argued. God's grace is irresistible, and his forgiveness is complete; law has no value in this new economy of salvation. It makes no sense to say that Christians are freed from the curse of the law but still must live under its strictures. For law by its nature, and especially the moral law, condemns the disobedient and their children. Remember God's words in the Decalogue: “For I, the Lord your God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of those who hate me.”⁹⁹ And the moral law is not a voluntary regimen: “Moses imposed the literal or external law even on those who were unwilling to receive it; whereas Christ writes the internal law of God on the hearts of believers through his Spirit, and leads them as willing followers.”¹⁰⁰

Such sentiments led many critics to regard Milton as a radical antinomian. The Westminster Divines likely had Milton and like-minded libertines in mind when they warned solemnly that the spiritual liberty of the Gospel does not give Christians a license for sin or an exemption from authority.¹⁰¹ In their

⁹⁷ WESTMINSTER CONFSSION art. xx (1647), in JOEL R. BEEKE & SINCLAIR B. FERGUSON, REFORMED CONFESSIONS HARMONIZED 131–35 (1999).

⁹⁸ 6 CPW, *supra* note 1, at 534.

⁹⁹ *Exodus* 20:5–6.

¹⁰⁰ 6 CPW, *supra* note 1, at 535.

¹⁰¹ Indeed, one of the Westminster Divines, Samuel Rutherford, was the author of A FREE DISPUTATION AGAINST PRETENDED LIBERTY OF CONSCIENCE TENDING TO RESOLVE DOUBTS MOVED BY MR. JOHN GOODWIN, DR. JEREMY TAYLOR, . . . ARMINIANS, SOCINIANS . . . CONTENDING FOR LAWLESS LIBERTY, OR LICENTIOUS TOLERATION OF SECTS AND HERESIES (1649), a 410-page diatribe against such views. I have not been able to secure a copy of this tract, and am relying on the quotes and analysis of it in JOHN COFFEY, POLITICS, RELIGION AND THE BRITISH REVOLUTIONS: THE MIND OF SAMUEL RUTHERFORD 53, 135, 153, 214–

1647 Confession, the Divines agreed wholeheartedly that “God alone is the Lord of conscience, and hath left it free from the doctrines and commandments of men, which are, if anything, contrary to his word.”¹⁰² But, then they went on to warn:

They who, upon pretence of Christian liberty, do practice any sin, or cherish any lust, do thereby destroy the end of Christian liberty, which is, that being delivered out of the hands of our enemies, we might serve the Lord without fear, in holiness and righteousness before Him, all the days of our life.

And because the powers which God has ordained, and the liberty which Christ has purchased are not intended by God to destroy, but mutually to uphold and preserve one another, they who, upon pretence of Christian liberty, shall oppose any lawful power, or the lawful exercise of it, whether it be civil or ecclesiastical, resist the ordinance of God.¹⁰³

Milton was no antinomian, however, despite his rantings against the “external” moral law. Indeed, he ranted just as loudly against the licentious and the libertines who sought to live by no law at all on the pretext of Christian liberty.¹⁰⁴ For Milton, Christian liberty is not a freedom to do as one pleases. It is liberty to do one’s duties of love to God, neighbor, and self—the original natural duties written into human conscience, now amplified and elaborated by the spiritual duties set out in Scripture. The first and foremost right and duty of every free Christian, therefore, Milton wrote, is “to read and interpret the Scriptures; and by that I mean interpret them for himself” in order to discern “the mind of Christ.”¹⁰⁵ For “the Scripture only can be the final judge or rule in matters of religion, and that only in the conscience of every Christian to himself.”¹⁰⁶ This right and duty to study Scripture is not reserved to the wise and learned, to preachers and theologians who keep the Bible encased in impossible foreign languages and claim a monopoly on what it means. No, it is just as important that “the simple, the poor, the babes [of] every age and sex”

15, 224, 247 (1997). See also SAMUEL RUTHERFORD, *LEX, REX, OR, THE LAW AND THE PRINCE* (Sprinkle Publications 1982) (1644); SAMUEL RUTHERFORD, *THE DIVINE RIGHT OF CHURCH-GOVERNMENT AND EXCOMMUNICATION* (1646). Similar views were offered by another Westminster Divine, Thomas Case, in a sermon, *Spiritual Whoredom Discovered* (1647), preached before the House of Commons and excerpted in WOODHOUSE, *supra* note 24, at 51–52.

¹⁰² WESTMINSTER CONFESION, art. xx, in BEEKE & FERGUSON, *supra* note 97, at 170–73.

¹⁰³ *Id.*

¹⁰⁴ 1 CPW, *supra* note 1, at 579–80.

¹⁰⁵ 6 CPW, *supra* note 1, at 583.

¹⁰⁶ *Id.* at 580.

have access to the Scripture in their own language and study it on their own terms.¹⁰⁷ For God is “requiring from them the ability of searching, trying, examining all things, and by the Spirit discerning that which is good.”¹⁰⁸

The second right and duty of the free Christian is, in fact, to do that which is good—to lead a virtuous life, as those virtues are expounded in Scripture, exemplified by Christ, and explicated by the Holy Spirit. The precise ethics of virtue are for each person to discern and develop on their own, Milton insisted. But the broad outlines of Christian virtue are clear enough to anyone who reads the Scripture or the classic texts of the tradition.¹⁰⁹ These Christian virtues are set out most clearly in the Decalogue and in other moral norms and habits taught by Scripture. Without pausing a moment to say how all this squared with his loud call for the abolition of the moral law, or with his insistence that each person read and interpret Scripture for himself, Milton poured out nearly two-hundred pages of good works and virtuous ethics that a free Christian could and should freely adopt. He worked his way first through the two tables of the Decalogue—setting out in detail, and with a whole tangle of accompanying biblical texts, “the virtues which are related to . . . God,” “the duties towards his neighbors and the virtues connected with this,” and “virtues connected with a man’s duty toward himself.”¹¹⁰ He then worked his way, one by one, through the Ten Commandments to show the principles and practices of virtue that could be found therein and in related passages. His exegesis was sometimes strained, occasionally scandalous. For example, Milton saw no justification for a Sabbath day of worship or rest among Christians, for this was to him an obsolete ritual of the Old Testament Jews that was cancelled by Christ’s law of love.¹¹¹ But he saw no justification for monogamous marriage alone, since polygamy and concubinage were customary in the Old Testament and there was no text directly on point in the Bible to condemn them.¹¹² In these and other passages, Milton revealed no consistent biblical hermeneutic, and he constantly violated his own first (and frankly silly) rule of interpretation

¹⁰⁷ 1 CPW, *supra* note 1, at 566.

¹⁰⁸ *Id.* at 566–67, 579, 585; 6 CPW, *supra* note 1, at 537–39, 574–92, 583–84; 7 CPW, *supra* note 1, at 243–45, 265–67; LF, *supra* note 60, at 439.

¹⁰⁹ In *On Education*, Milton set out the classical Greek and Roman texts alongside the Bible that taught, *inter alia*, the virtuous life on the strength of the natural law. See 2 CPW, *supra* note 1, at 357–415; see also JONATHAN SCOTT, COMMONWEALTH PRINCIPLES: REPUBLICAN WRITING OF THE ENGLISH REVOLUTION 170–90 (2004).

¹¹⁰ 6 CPW, *supra* note 1, at 637–807. The quotations are from the main chapter titles in his *Christian Doctrine*. See also many entries on point his *Commonplace Book*, 1:344–516.

¹¹¹ 6 CPW, *supra* note 1, at 3351–81,

¹¹² *Id.* at 704–15.

that “each passage of Scripture has only a single sense.”¹¹³ But that said, it must also be said that a good bit of his exegesis of the Decalogue and exposition of virtuous Christian living squared easily with the Westminster Catechisms and other conventional English Calvinist handbooks of morality and dogma.¹¹⁴

The third right and duty of the free Christian is to imitate Christ in discharging the three-fold office of prophet, priest, and king.¹¹⁵ Christ is a prophet, Milton wrote, in that he was appointed by his father to “educate his church in heavenly truth and to teach the whole will of his father.”¹¹⁶ Christ is a priest in that “he offered himself to God the father as a sacrifice for sinners, and has always made intercession for us.”¹¹⁷ Christ is a king in that he “rules and preserves, principally by internal law and spiritual power, the church which he has bought for himself.”¹¹⁸ Christians, who are followers and imitators of Christ and who live with the mind of Christ, have the right and duty to discharge these same three offices. Christians, too, as prophets, must educate the church and the whole world about heavenly truth, and the whole will and Word of God. They, too, as priests, must sacrifice for others, pray for them, and care for them as loving neighbors. They, too, as kings, must rule themselves by the same internal law and so share in the ruling and preservation of Christ’s church. “God is decreeing to begin some new and great period in his church,” wrote Milton. “We now under Christ [are] a royal priesthood, as we are co-heirs, kings and priests with him.”¹¹⁹

Ultimately, Milton came closer to traditional Calvinist formulations of the laws and liberties of conscience than his occasional antinomian rantings might suggest. Like Calvinists, he believed in the radicality of human sin and the need for redemption in Christ. He believed in the division between Law and Gospel, between the life of the flesh and the life of the spirit. He believed in stock theological doctrines like justification by faith alone, the supreme

¹¹³ 6 CPW, *supra* note 1, at 581.

¹¹⁴ The *Westminster Shorter Catechism* and the *Westminster Larger Catechism* were standard Calvinist texts in seventeenth-century England and America. See their discussion of the Decalogue in BEEKE & FERGUSON, *supra* note 97, at 130–70.

¹¹⁵ 6 CPW, *supra* note 1, at 430–37.

¹¹⁶ *Id.* at 432.

¹¹⁷ *Id.* at 433.

¹¹⁸ *Id.* at 435.

¹¹⁹ 2 CPW, *supra* note 1, at 553–54; 7 CPW, *supra* note 1, at 286; *see also* 1 CPW, *supra* note 1, at 838–39, 844; 2 CPW, *supra* note 1, at 253–54; 6 CPW, *supra* note 1, at 570–73; 7 CPW, *supra* note 1, at 284–86, 301–03, 319–20 (citing *Genesis* 20:7, *Exodus* 15:20, 19:6; 2 *Timothy* 2:2; 1 *Peter* 2:5–9, 5:3; *Revelation* 1:6).

authority of the Bible, the Christian vocation of all believers, the perennial call to imitate Christ, and the absolute sovereignty of God over all things including the human conscience. While he rejected the moral law as an external law of slavery, he embraced it as an internal law of virtue, which left him with a distinction without much difference. While he rejected the doctrine of the civil, theological, and pedagogical uses of the moral law, he in fact used the moral law in civil, theological, and pedagogical terms to work out his system of virtue ethics for Christians. While he dismissed the Old Testament as a record of slavery from which Christians were free, he in fact parsed every verse of the Old Testament for lessons and examples of virtuous Christian living. On many fundamental questions of the laws and liberties of conscience, Milton differed from the Calvinist tradition more in form than in substance.

B. Church and State

One question over which Milton had real substantive differences with Calvinists of his day, and even more with Anglicans, concerned the role of church and state, separately and together, in governing religious life. Just because he had such a robust view of individual religious liberty and private biblical judgment, he looked askance on many traditional forms of religious life and religious establishment that were imposed on individual Christians. Just because he embraced the doctrine of the prophethood, priesthood, and kingship of all Christians, he viewed with skepticism any laws that abridged the Christian's right and duty to speak, to worship, and to rule within the church. As he translated these arguments about individual religious liberty and Christian office-bearing into strong reforms of church and state, it became clear that these arguments applied to other areas of life beyond church-state relations and to other types of rights besides religious rights. What began as a difference in accent with conventional Calvinists, eventually became a real difference of ideas about the reformation of society, politics, and rights altogether, as we shall in the next two sections. But his arguments started with the church—first the established Anglican Church and eventually the established Presbyterian Church as well.

Milton's attack on the established Church of England came in five early rhetorically violent tracts of 1641 and 1642, whose main themes he elaborated in more sober and general terms in several later writings. Milton first took aim at the legally-established Anglican doctrines, liturgies, and morals of his day. Many of these were, in his view, old Catholic traditions that had been absorbed

into the half-papalist Anglican Church created by Henry VIII a century before. Rather than live by the simple truth of Scripture and the primitive Christianity of Christ and his apostles, Milton argued, the Anglican Church has fabricated a massive network of idle and idolatrous doctrines, false and foolish customs, erroneous and embellished traditions all designed to entangle and strangle the free Christian conscience. Rather than lead Christians in a humble and quiet life of charity, prayer, and Scriptural meditation, the church has adopted all manner of elaborate liturgies, masses, cults, and ceremonies that stink with the “vomited paganism of sensual idolatry.”¹²⁰ Rather than let individual Christians search the Scripture for themselves under the guidance of the Holy Spirit, the church has bound and tied them to calendars and liturgies, rituals and lectionaries, Sabbath days and holy days that smother every breath of private Christian inspiration, imagination, and innovation. Those teachings of Christianity that should be indifferent are made essential. Those that should be left discretionary are made dogmatic. All this error and idolatry masquerading as Christianity, Milton charged, has caused a mighty wrenching and spraining of the text of Scripture and a massive strangling and choking of its teachings of Christian liberty.¹²¹

Milton took even sharper aim at the Anglican clergy who, following their medieval Catholic brethren, lord it over the laity in worldly luxury and moral laxness. “To do the work of the Gospel, Christ our Lord took upon him the form of a servant,” Milton wrote with intended irony. “[H]ow can his servant in this ministry take upon him the form of a lord?”¹²² But lords the Anglican clergy have certainly become—and not just those high clergy who serve in the House of Lords. In every house of worship, Anglican clergy have become landed aristocrats, with vast properties, powers, and prerogatives at their call. Milton railed in disgust at the Anglican clergy of his day. They are “a tyrannical crew,” a “corporation of imposters,” “halting and time-serving” prelates, “Egyptian taskmasters of ceremonies,” “a heap of hard and loathsome uncleanness,” a “whip of scorpions,” “illiterate and blind guides,” “a wasteful band of robbers,” “a perpetual havoc and rapine,” “a continual hydra of mischief and molestation,” “importunate wolves,” “wild boars,” “locusts and scorpions,” “downtrodden vassals of perdition,” and on and on.¹²³

¹²⁰ 1 CPW, *supra* note 1, at 520.

¹²¹ *Id.* at 520–32. See also notes in *id.* at 108–28 and in WOLFE, *supra* note 51, at 45–49.

¹²² See WOLFE, *supra* note 51, at 45–49 (quoting and analyzing Milton).

¹²³ All these foregoing quotes are distilled in 1 CPW, *supra* note 1, at 113.

Milton singled out for special criticism the various clerical privileges and habits that so galled English Calvinists and other dissenters of his day—the Anglican clergy’s exemptions from taxation and immunities from prosecution, the high compulsory tithes and religious taxes that supported their extravagant sanctuaries, sinecures, and cemeteries, their lush clerical gowns, surplices and tippets, their ornate icons, artwork, and altars, all neatly railed off from any touch or use by the laity. He attacked the English church courts, those hated and powerful tribunals that controlled the intimate and interior lives of the laity with their “dreadful works of holy discipline, censure, penance, excommunication, and absolution,” to say nothing of their rapacious fees and fines.¹²⁴ These clerical “leeches” “suck and suck the kingdom” of its life blood.¹²⁵ “What a mass of money is drawn from the veins into the ulcers of the kingdom this way; their extortions, their open corruptions, the multitude of hungry and ravenous harpies.”¹²⁶ What a “loud stench of avarice, simony, and sacrilege”¹²⁷ belches out of these “unctuous and epicurean paunches”¹²⁸ purporting to be Christ’s humble servants in his church, even while living as lavish lords and preying as greedy thieves. All such clerical exploitation violates not only our religious liberty “but all the right[s] we have to our own bodies, goods, and liberties” guaranteed since the Magna Carta (1215).¹²⁹

What makes all this clerical exploitation even worse, Milton continued, is that the clergy are appointed to office without the consent or control of their congregants. The early church was a democratic institution, Milton argued at length, citing very selectively from the ancient sources. Early Christians regarded clergy and laity alike as priests before God, each with different Christian offices and vocations to fulfill in the broader community. Following biblical precedents, they elected them to the offices of priests, deacons, presbyters, or bishops. And these elected clergy were all held accountable to the laity and voted out when they failed in office or became abusive. Indeed, “the voice of the people in episcopal elections” and church governance “was so

¹²⁴ *Id.* at 591.

¹²⁵ *Id.* at 589.

¹²⁶ *Id.* at 591.

¹²⁷ *Id.* at 610.

¹²⁸ *Id.* at 611.

¹²⁹ *Id.* at 593; *see also id.* at 537, 545, 547–48, 554–58, 568–69, 576–77, 589–93, 603, 606, 610–14, 617; 3 CPW, *supra* note 1, at 239–41.

well known” by the third century that even the pagan Roman emperor “desired to have his governors of provinces chosen in the same manner.”¹³⁰

All this changed dramatically in the fourth through sixth centuries, however, when Emperor Constantine and his imperial successors Romanized the church, even as they Christianized the Empire. Particularly damaging was that the emperors elevated the bishops into prelatical monarchs made in their own imperial image. Even more damaging was that the emperors claimed it as their imperial prerogative to appoint and remove these clerical prelates, ending three centuries of clerical elections by and accountability to the people in the pews. “Monarchy and prelacy” were thus brought together into a “most unholy union” whose inevitable progeny would be spiritual tyranny.¹³¹ Soon enough, state-appointed bishops no longer served their flocks in love with “brotherly equality, matchless temperance, frequent fasting, incessant prayer and preaching, continual watchings and labors in [their] ministry.”¹³² Instead, they “forsook their first love, and set themselves up two gods instead, mammon and their belly, then taking advantage of the spiritual power which they had on men’s consciences, they began to cast a longing eye to get the body also, and bodily things into their command.”¹³³

We still maintain this absolute “church tyranny” in the Anglican Church today, Milton charged, even though the state itself has since been partly democratized through Parliamentary elections.¹³⁴ Why can’t church members at least elect local clergy in the same way that political citizens elect local members to the House of Commons? “Should not the piety and conscience of Englishmen as members of the church be trusted in the election of pastors to functions that nothing concern a monarch”—especially since they are already trusted to the election of Parliamentarians whose functions so very much concern the monarch?¹³⁵ Since we “already have a kind of apostolic and ancient church election in our state,” should not at least that much local election also prevail in the “state church”?¹³⁶

¹³⁰ 1 CPW, *supra* note 1, at 544; *see also id.* at 114–15, 539–49, 573–77, 624–52; 6 CPW, *supra* note 1, at 795–96; 7 CPW, *supra* note 1, at 319–20.

¹³¹ 1 CPW, *supra* note 1, at 593.

¹³² WOLFE, *supra* note 51, at 48 (quoting Milton).

¹³³ 1 CPW, *supra* note 1, at 1576–77; *see also id.* at 823–34.

¹³⁴ *Id.* at 823.

¹³⁵ *Id.* at 600.

¹³⁶ *Id.*

And, why indeed, should there be a “state church” and “statute-religion” at all, Milton demanded—now widening his attack to include the emerging Presbyterian establishment in England.¹³⁷ Why should Christianity of any sort be established by human laws? Why should its clergy be ruled by secular magistrates? After all, Christ’s most famous political admonition was to “render to Caesar the things that are Caesar’s, and to God the things that are God’s.”¹³⁸ The early church lived faithfully by this Gospel teaching for three centuries, and thrived and grew despite the bitter persecution of Caesar and his minions. It was the same fourth-century Caesar, Emperor Constantine, who upon conversion to Christianity first defied this basic political teaching of Christ, Milton charged. It was Constantine who first took “the things that are God’s” and made them “the things that are Caesar’s.”¹³⁹ It was Constantine who prescribed the church’s doctrines and liturgies and punished its heretics and enemies. It was Constantine who convened the church’s councils and synods and controlled its polity and property. It was Constantine who appointed the church’s bishops and clerics and collected its tithes and taxes. What Constantine and his successors first established in ancient Rome, the church has maintained for more than a millennium, with only a few brave Church Fathers and early Reformers dissenting. To this day, most Protestants and Catholics alike lie “enthralled” and “seduced” by Constantine’s “lavish superstition”—that the establishment of Christianity by law and that the rule of church by the state are essential to the survival of each.¹⁴⁰

But Christianity does not need laws to survive, nor does the church need the state to thrive. The very opposite is true, Milton insisted. Separation and division—not “conflation and confusion”—of church and state, and of law and faith, are the proper way of Christ.¹⁴¹ We “should not suffer the two powers, the ecclesiastical and the civil, which are so totally distinct, to commit whoredom together, and, by their intermingled and false riches, to strengthen indeed in appearance, but in reality to undermine, and at last to subvert one

¹³⁷ 7 CPW, *supra* note 1, at 257; *see also* 1 CPW, *supra* note 1, at 600. As he put it memorably already in 1646, protesting the state establishment of Presbyterianism, “New Presbyter is but Old Priest writ Large.” *See* WOLFE, *supra* note 51, at 82–83 (quoting Milton). *See further* *Observations upon the Articles of Peace* (1649), in 3 CPW, *supra* note 1, at 259–334 and in *The Tenure of Kings and Magistrates* (1649), 3 CPW, *supra* note 1, at 238, and further notes in *id.* at 1–9, 92–97, 130–36, 196.

¹³⁸ *Matthew* 22:21.

¹³⁹ LF, *supra* note 60, at 157.

¹⁴⁰ 1 CPW, *supra* note 1, at 576; *see also id.* at 551–57, 573–77; 2 CPW, *supra* note 1, at 257–58; 7 CPW, *supra* note 1, at 260–68, 279–80, 290–94, 307–08; LF, *supra* note 60, at 157–58, 162–65, 197–98.

¹⁴¹ LF, *supra* note 60, at 111–12.

another.”¹⁴² Milton returned to this theme again and again, calling it “absurd” that Christians have “not learned to distinguish rightly between civil power and ecclesiastical.”¹⁴³ The Bible makes clear that “Christ’s kingdom is not of this world,” and his church “does not stand by force or constraint, the constituents of worldly authority.”¹⁴⁴ Nor is Christ’s church like some “vine” that “cannot subsist without clasping about the elm of worldly strength,” or some building that cannot support itself “without the props and buttresses of secular authority.”¹⁴⁵ The contrary is true, Milton argued. “[I]t is because the magistracy and church have confuse[d] their jurisdictions” that “all Christendom” has reaped a “bitter harvest” of crusades and wars, inquisitions and pogroms, bloodshed and persecution.¹⁴⁶ It is because church and state have conflated their powers and offices that the church has become “a pontifical despotism decked, under pretense of religion, with the spoils of civil power, which it has seized unto itself contrary to Christ’s own precept.”¹⁴⁷

Christ’s own precept is that that the main foundation of the church and “the complete text” of the Christian faith is the Bible.¹⁴⁸ It is blasphemy for anyone to add to or subtract from the Bible by human laws and traditions in their governance of the church and the Christian faith. Christ’s further precept is that the ruler of this church is not some mighty magistrate or pompous prelate. The ruler of the church is each and every individual Christian who meditates on and lives by the simple truth of the Bible. Every Christian is called by Christ to be not only his prophet and his priest, but also his king and queen, his ruler, within the church. Every Christian has the “Word of God before him,” “the mind of Christ within him,” and “the Spirit of God” to guide him in his understanding.¹⁴⁹ “[N]o man or body of men in these times can be the infallible judges or determiners in matters of religion to any other men’s consciences but their own.”¹⁵⁰ This is “God’s own birthday gift to us,” “the

¹⁴² LF, *supra* note 60, at 406.

¹⁴³ 7 CPW, *supra* note 1, at 253.

¹⁴⁴ 6 CPW, *supra* note 1, at 799.

¹⁴⁵ 1 CPW, *supra* note 1, at 554.

¹⁴⁶ LF, *supra* note 60, at 112; 1 CPW, *supra* note 1, at 253.

¹⁴⁷ LF, *supra* note 60, at 112; *see also id.* at 406–07; 6 CPW, *supra* note 1, at 798–99; 7 CPW, *supra* note 1, at 253, 255. In his *Commonplace Book*, Milton, referring to Machiavelli, wrote, “That the combining of ecclesiastical and political government (when, that is to say, the magistrates acts as the minister of the Church, and the ministers of the Church acts as magistrate) is equally destructive to both. . . . The opinions of men concerning religion should be free in a republic, or indeed under good princes.” 1 CPW, *supra* note 1, at 476.

¹⁴⁸ 7 CPW, *supra* note 1, at 242.

¹⁴⁹ *See supra* notes 75–82, 105–08 and accompanying text.

¹⁵⁰ 7 CPW, *supra* note 1, at 242–43.

true birth-right of every true believer,” the “sovereign prerogative” of every kingly and queenly individual called to rule in Christ’s church.¹⁵¹

But the church is more than the sum of its conscientious royal parishioners, just as the state is more than the sum of its sovereign individual subjects. Here Milton converted the familiar contract theory of the state into a contract theory of the church as well. Just as each state is voluntarily created by a consensual covenant among like-interested individuals, so each church is created by “common consent” among “like-minded believers,” who have “willingly joined themselves in a covenant of union.”¹⁵² Just as political subjects agree to alienate a portion of their natural rights to elected state authorities in order to secure peace, order, and proper rule of law in the community, so church members agree to share a portion of their religious rights with other church members in order to secure proper preaching, discipline, and diaconal care in their communion. Just as citizens of the state may remove elected political officials who betray their office and become tyrants, so parishioners in the church may defrock elected church officials who betray the Scripture and become tyrants or heretics. Just as individuals may choose to enter, leave, or abstain from a local political community without compulsion or deterrence, so individuals may choose to enter, exit, or stay outside the local church without coercion or penalty.¹⁵³

This analogy between the formative contracts of church and state was not perfect, of course. Milton insisted that each church was bound to follow the detailed teachings and examples of the Bible in a way that the state was not. As he read the Bible, this meant that preachers, presbyters, and deacons were fine, but that prelates, bishops, and monks were not. It meant that congregational elections for church offices were required, and that prelatical or political appointments of clergy were barred. It meant that congregational meetings were expedient, but that general councils were unfounded. It meant the voluntary contributions to the church’s coffers were encouraged, but that mandatory tithing of parishioners was banned.¹⁵⁴ It meant that clerical

¹⁵¹ LF, *supra* note 60, at 157; 7 CPW, *supra* note 1, at 262; *see also* 1 CPW, *supra* note 1, at 844; 6 CPW, *supra* note 1, at 797–99; 7 CPW, *supra* note 1, at 242–47.

¹⁵² 7 CPW, *supra* note 1, at 245.

¹⁵³ 3 CPW, *supra* note 1, at 240–47; 6 CPW, *supra* note 1, at 563–74; LF, *supra* note 60, at 111–12; *see also* Victoria Kahn, *The Metaphorical Contract in Milton’s Tenure of Kings and Magistrates*, in *MILTON AND REPUBLICANISM*, *supra* note 48, at 82–105.

¹⁵⁴ Milton was particularly incensed that the Presbyterian establishment sought to collect tithes from all Englishmen. Though he had already denounced mandatory tithing several times, he devoted a long and blistering pamphlet against this practice in 1659. *See* 7 CPW, *supra* note 1, at 273–321.

marriage was allowed, but that mandatory celibacy was not. It meant that clerical proclamations on justice were fine, but that “clerical disturbance in civil affairs”¹⁵⁵ was not. It meant that church cooperation with the state was licit, but that church dependence on the state was perilous. And it meant that spiritual discipline, even “the horrid sentence” of excommunication, was allowed to the church, but that disciplinary actions “against the life or limb, or any worldly possession” of church members were strictly forbidden to and in the church.¹⁵⁶

In scores of pages, scattered over twenty years of publications, Milton sought to prove one-by-one from Scripture that these were the practices and prohibitions that Christ decreed for his church. But he insisted that the exact combination and elaboration of these biblical teachings be left entirely to each congregation’s discretion. He insisted further that each individual Christian be left free to be a church of one so long as he or she lived by the Bible.¹⁵⁷ After all, he reminded his readers, while the organized church is a good institution ordained by Christ, “the church itself cannot, much less the state, settle or impose one title of religion . . . but can only recommend or propound it to our free and conscientious examination.”¹⁵⁸ “No man, no synod, nor session of men, though called the church, can judge definitively the sense of Scripture to another man’s conscience,” he wrote in 1659.¹⁵⁹ Milton—the schoolboy Anglican and one-time Presbyterian—was now a committed Congregationalist, with strong preferences for church democracy and Christian pluralism and little patience for hierarchical and conciliar churches—whether Anglican, Presbyterian, or Catholic in confession.¹⁶⁰

While the church may operate only on the “inner man” and only by “persuasion,” Milton continued, the state may act only on the “outward man” and never for religious reasons.¹⁶¹ The state was ordained by God and is formed by a political contract for the sake of protecting external order and peace and preserving “the people’s rights and liberties”—including notably their religious rights and liberties.¹⁶² The state deals exclusively with “the

¹⁵⁵ 3 CPW, *supra* note 1, at 240–41.

¹⁵⁶ 1 CPW, *supra* note 1, at 847; *see also id.* at 835–47; 3 CPW, *supra* note 1, at 240–41; 6 CPW, *supra* note 1, at 573–613; 7 CPW, *supra* note 1, at 244–47, 258.

¹⁵⁷ 6 CPW, *supra* note 1, at 568.

¹⁵⁸ 7 CPW, *supra* note 1, at 258; *see also id.* at 524.

¹⁵⁹ *Id.* at 247–48; *see also id.* at 258.

¹⁶⁰ *See* 1 CPW, *supra* note 1, at 761–67; 7 CPW, *supra* note 1, at 247–48, 258, 522–30.

¹⁶¹ 1 CPW, *supra* note 1, at 835.

¹⁶² LF, *supra* note 60, at 287.

body and external faculties of man,” “his life, limbs, and worldly possessions.”¹⁶³ State officials may set limits on how a man may use his life, liberty, and property so that the public peace and private rights of others are respected and protected. They may take his goods from him by just taxes or by fine or forfeiture following a proper criminal prosecution or civil lawsuit. They may even use proportionate force and violence against the outer man to punish crimes, to right wrongs, or to wage wars.¹⁶⁴

But state officials have no power to use force or violence against the inner man and his religion. No person has “power to give them such a commission” in devising the terms of their political contract, and so the religious “conscience is not [the] province” of the state.¹⁶⁵ To the contrary, religion is by nature and Scripture the unalienable right of the individual: it cannot be given away or taken away by anyone, especially by a state official. Milton returned to this point repeatedly in the later 1640s and 1650s. “Both our belief and practice, which comprehend our whole religion, flow from faculties of the inward man, free and unconstrained by themselves by nature [and] incapable of force.”¹⁶⁶ “[N]either traditions nor councils nor canons of any visible church, much less edicts of any magistrate or civil session, but the Scripture can be the final judge or rule in matters of religion.”¹⁶⁷ “If any man,” particularly a political official, “shall pretend that the Scripture judges to his conscience for other men, he makes himself greater not only than the church, but also than the Scripture, [which is] a presumption too high for any mortal.”¹⁶⁸

“Christ hath a government of his own,” Milton continued, “sufficient of itself to all his ends and purposes in governing his church; but much different from that of the civil magistrate.”¹⁶⁹ Christ’s government “deals only with the inward man and his actions, which are spiritual and to outward force not liable.”¹⁷⁰ Through this spiritual government, Christ and his church “show us the divine excellence of the spiritual kingdom, able without worldly force to

¹⁶³ 1 CPW, *supra* note 1, at 835–36, 847.

¹⁶⁴ *Id.* at 835–36; 6 CPW, *supra* note 1, at 797–99; 7 CPW, *supra* note 1, at 242–47, 262; LF, *supra* note 60, at 287.

¹⁶⁵ 7 CPW, *supra* note 1, at 242–43; *see also id.* at 255–70 (arguing against religious coercion).

¹⁶⁶ *Id.* at 256.

¹⁶⁷ *Id.* at 243.

¹⁶⁸ *Id.*; *see also* 1 CPW, *supra* note 1, at 844; 6 CPW, *supra* note 1, at 797–99; 7 CPW, *supra* note 1, at 242–47, 256–62; WOODHOUSE, *supra* note 24, at 229–30.

¹⁶⁹ 6 CPW, *supra* note 1, at 612 n.4

¹⁷⁰ *Id.* at 612 n.9.

subdue all the powers and kingdoms of this world, which are upheld by outward [force] only.”¹⁷¹ In this Christian kingdom and spiritual government, “the Gospel should not be made a matter of compulsion, and faith, liberty, and conscience cannot be.”¹⁷² The “civil magistrate has no right” nor can do right “by forcing religious things.”¹⁷³ If he tries, he will get only counterfeit performances and feigned exercises of a false faith.¹⁷⁴

It is no answer to this argument, Milton insisted, to point to the example of Old Testament judges and kings, who did use state law and coercive force to govern biblical Judaism. That was the time of the Law. This is the time of the Gospel. That was a time of “bondage and works,” when believers were “children” for whom “force was not unbefitting.”¹⁷⁵ This is the time of “grace, manhood, freedom and faith; to all which belongs willingness and reason, not force.”¹⁷⁶ That was a time when the king was custodian of the two tables of the Decalogue. This is a time when the two tables of Decalogue are the custodians of us all. That was a time when church and state were united, and when kings had a detailed written law of God to apply and immediate “divine direction” to guide them.¹⁷⁷ This is a time when church and state are separate, and when the law of God lies unwritten in each man’s conscience to be discovered and applied for himself. “If church and state shall be made one flesh again as under the law,” said Milton, “let it be with all considered that God who then joined them hath now severed them.”¹⁷⁸

It is also no answer to cite Romans 13 and other New Testament passages that point out that “the powers that be are ordained by God” and that we must obey them as we obey God.¹⁷⁹ No one doubts that legitimate authorities deserve obedience, Milton allowed, for “without magistrates and civil government there can be no commonwealth, no human society, no living in the world.”¹⁸⁰ But nothing in Romans 13 “gives judgment or coercive power to magistrates . . . in matters of religion.”¹⁸¹ Indeed, a whole series of biblical

¹⁷¹ *Id.* at 612 n.9.

¹⁷² *Id.* at 799.

¹⁷³ 7 CPW, *supra* note 1, at 255.

¹⁷⁴ 6 CPW, *supra* note 1, at 612–14, 797–99; 7 CPW, *supra* note 1, at 255, 262–68.

¹⁷⁵ 7 CPW, *supra* note 1, at 259.

¹⁷⁶ *Id.* at 259.

¹⁷⁷ *Id.* at 260.

¹⁷⁸ *Id.*; *see also id.* at 251–52, 258–60, 271.

¹⁷⁹ *Romans* 13:1.

¹⁸⁰ LF, *supra* note 60, at 166.

¹⁸¹ 7 CPW, *supra* note 1, at 250–51.

passages state the exact opposite. Just read John 4:21–23, Romans 14:5, 9–10, 1 Corinthians 7:23, 9:19, 2 Corinthians 3:17, Galatians 2:16, 4:3, 9–10, 26, 5:13–14, and Colossians 2:8, 16, 23, among many other texts, Milton urged. The force of all these biblical texts read together is that we must obey magistrates, but only so long as they hold to their political contract and stay within their civil jurisdiction—keeping watch over taxes, revenues, crime, warfare and other civil subjects that the New Testament identifies by name. But if magistrates encroach on the spiritual jurisdiction of God, they must be resisted by those whom God has ordained as sovereigns of the spiritual realm on earth, namely, each and every individual Christian armed with the Gospel and its mighty weapon of freedom.¹⁸²

It is finally no answer to say that each nation must have an established faith, and that the state must work to ensure that the national church remains “schismless.”¹⁸³ Nothing in the New Testament commands this, Milton insisted, and nothing in the history of humankind commends it. Indeed, it is far better for the state to tolerate a lively plurality of Christian churches than to impose “a numb and child-like stupidity of the soul, an unactive blindness of mind upon the people by their leaden doctrine” and “to persecute all knowing and zealous Christians” who might read Scripture differently.¹⁸⁴ Rather than let fresh ideas spring forth under the bright light of the Holy Spirit, national religious establishments keep the national church in frozen captivity to a counterfeit and coerced uniformity.¹⁸⁵ This is no way to discover Christian truth or to prevent religious schism in a nation. “The timeliest prevention of schism is to preach the Gospel abundantly and powerfully throughout all the land, to instruct the youth religiously, to endeavor how Scripture may be easiest understood by all men.”¹⁸⁶ Christian truth will come from “a free and lawful debate at all times by writing, conference or disputation of what opinion soever, disputable by Scripture.”¹⁸⁷ If such sincere, honest, and open disputation on Scripture is not only tolerated but encouraged by the state, Milton argued, God will determine what is truth and what is falsehood and

¹⁸² 6 CPW, *supra* note 1, at 611–12; 7 CPW, *supra* note 1, at 250–52, 260–63; LF, *supra* note 60, at 162–68.

¹⁸³ 1 CPW, *supra* note 1, at 783.

¹⁸⁴ *Id.* at 784.

¹⁸⁵ *Id.* at 779–800.

¹⁸⁶ *Id.* at 791.

¹⁸⁷ 7 CPW, *supra* note 1, at 249.

heresy.¹⁸⁸ Indeed, God's truth will eventually come riding triumphantly down "a lane of sects and heresies on each side."¹⁸⁹

The state has but two tasks in policing this lane of Christian truth, said Milton. First, the state must respect and tolerate the religious worship and exercise of each and every sect that is founded and grounded in Scripture—however erroneous their Scriptural interpretation may appear to be. Only sects that are not peaceable and that violate the life, limb, and worldly possessions of their own members or any other can be subject to state sanction and control.¹⁹⁰ But second, the state must outlaw and "extirpate" heretics, whom Milton variously defined as "enemies of the Gospel," and those who "maintain traditions or opinions not probable by Scripture."¹⁹¹ In his earlier writings, Milton hinted vaguely that the class of heretics included Jews, Muslims, "atheists" and those given to "popery, and open superstition."¹⁹² By 1659, he had narrowed his charge of heresy to one: "the papist only; he is the only heretic," for he "counts all heretics but himself."¹⁹³

Before the Reformation, Milton wrote bitterly, Catholics took "the virgin Truth" of Scripture, and "hewed her lovely form into a thousand pieces, and scattered them to the four winds."¹⁹⁴ Since the Protestant Reformation, and despite its lessons, Catholics continue to "exact" their own beliefs and practices "above Scripture" and "against all Scripture" and denounce "anathemas" on any who do not follow the pope and the prelatial councils whom they have put in Christ's place at the head of the church.¹⁹⁵ Catholicism is not so much "a religion, but a Roman principality," "a Catholic heresy against Scripture, supported mainly by a civil, and except in Rome, by a foreign power; justly therefore to be suspected not tolerated by the magistrate of another country."¹⁹⁶ Indeed, "all men who are true Protestants . . . know not a more immediate and killing subverter of all true religion than Antichrist, whom they generally believe to be the pope and Church of Rome. [H]e who

¹⁸⁸ See *supra* notes 65–71, 81–89 and accompanying text; *infra* notes 194–99, 283–88, 305–10, 323–46 and accompanying text.

¹⁸⁹ 1 CPW, *supra* note 1, at 795; see also *id.* at 779–800; 7 CPW, *supra* note 1, at 249–50.

¹⁹⁰ 1 CPW, *supra* note 1, at 847; see also *id.* at 797; 6 CPW, *supra* note 1, at 611–12; 7 CPW, *supra* note 1, at 258.

¹⁹¹ 7 CPW, *supra* note 1, at 249.

¹⁹² 3 CPW, *supra* note 1, at 311–13, 318, 326, 565, 574; see also 2 CPW, *supra* note 1, at 565; 7 CPW, *supra* note 1, at 318–19.

¹⁹³ 7 CPW, *supra* note 1, at 249.

¹⁹⁴ 2 CPW, *supra* note 1, at 549.

¹⁹⁵ 7 CPW, *supra* note 1, at 253–54.

¹⁹⁶ *Id.* at 254.

makes peace with this grand enemy and persecutor of the true church, he who joins with him, strengthens him, gives him root to grow and spread his poison.”¹⁹⁷

Milton’s theory of religious rights and liberties thus remained very Protestant both in inspiration and in application. His theory was based, in part, on a profound critique of the Catholic tradition, and its vestiges as he saw them in his Anglican and Protestant world. Milton denounced, with as much vehemence as Martin Luther had done in his early years, the purported sacramental idolatry, theological superstitions, human traditions, canon laws, ecclesiastical courts, and prelatical hierarchies that for so long dominated the church.¹⁹⁸ He also denounced Constantinianism, that fourth-century superstition that traded the simple truths and democratic structures of the early church for a Latinized and Romanized tyrannical state church wholly abstracted from the Scripture, forcibly imposed on the people, and utterly devoid of anything but greed, corruption, and craven dependence. Since Constantine, the church has suffered “many dark ages, wherein the huge overshadowing train of error had almost swept all the stars out of the firmament.”¹⁹⁹

It was the Protestant Reformation, Milton insisted, that first “struck through the black and settled night of ignorance and anti-Christian tyranny.”²⁰⁰ It was Wycliff, Hus, Zwingli, Luther, Calvin, Bucer, Martyr, Ponet, Knox, Goodman, Gilby, and other reformers who dared to dissent from the religious establishment in order to bring “bright and blissful Reformation (by divine power).”²⁰¹ Through their efforts “the sacred Bible was brought out of the dusty corners where profane falsehood and neglect had thrown it, the schools opened, the divine and human learning raked out of the embers of forgotten tongues.”²⁰² It was the Protestant reformers who used the Bible to “set up a standard for the recovery of lost Truth,” who blew “the first evangelical trumpet to the nations, holding up, as from a hill, the new lamp of saving light to all Christendom.”²⁰³ It was the reformers who gave the church the vernacular Bible, and who claimed it to be the fundamental right and duty of

¹⁹⁷ 8 CPW, *supra* note 1, at 426. See also 7 CPW, *supra* note 1, at 245, 249, 253–54, 429; 8 CPW, *supra* note 1, at 421–40, as well as notes in 2 CPW, *supra* note 1, at 178–81.

¹⁹⁸ See Luther’s critique summarized in WITTE, JR., *supra* note 43, at 53–69.

¹⁹⁹ 1 CPW, *supra* note 1, at 524.

²⁰⁰ *Id.* at 526.

²⁰¹ *Id.* at 524.

²⁰² *Id.*

²⁰³ *Id.* at 525.

each and every Christian to read and interpret the Bible under the inspiration of the Holy Spirit. It was the reformers who called Christians to find their vocations in the world, to answer God's call to be prophets, priests, and kings in imitation and service of Christ.²⁰⁴

While these early Protestant teachings have found ready application in Lutheran Germany and Scandinavia and in Calvinist Switzerland, France, the Netherlands, and Scotland, England has not had "a complete reform" Milton lamented.²⁰⁵ Henry VIII and his successors ultimately replaced one tyrant for another at the head of the church, and retained too many "rotten principles," "popish corruption" and "idolatrous pollutions" of Catholicism.²⁰⁶ But God has "ever had this island under the special indulgent eye of his providence."²⁰⁷ And now God, a century after the Protestant Reformation first broke out, is calling England to a second "further Reformation," a "holier" and "better" Reformation.²⁰⁸ Its "common rule and touchstone is the Scripture" to be applied with "more conscience, more equity, [and] more Protestantly" than ever before.²⁰⁹

This second reformation of religious rights and liberties that Milton envisioned for England, however, was more radical than anything that obtained on the Protestant Continent, and more sweeping than most of his fellow English Calvinists could countenance. For Milton, the achievement of "real and substantial" religious liberty required five major reforms.²¹⁰ First, and foremost, religious liberty required liberty of conscience for all peaceable biblical believers, the liberty of each person to search out and act on the natural law within him and the biblical texts before him without coercion, control, or penalty from either church or state. Liberty of conscience, Milton wrote, is our "dearest and most precious" right.²¹¹ Second, religious liberty meant freedom of the individual to worship, dispute, and publish freely on the strength of his faith, and freedom to enter and exit a church and community of his own choice or to forgo church association altogether. Third, religious liberty meant state toleration of every peaceable church that was grounded, however unusually, on

²⁰⁴ *Id.* at 523–25, 568–69, 703–04, 723, 878; 2 CPW, *supra* note 1, at 550–53; 3 CPW, *supra* note 1, at 240–58.

²⁰⁵ 1 CPW, *supra* note 1, at 529.

²⁰⁶ *Id.* at 703–04.

²⁰⁷ *Id.* at 704.

²⁰⁸ *Id.* at 533; *see also id.* at 524–41, 600–01, 703–04, 723, 795–99.

²⁰⁹ 7 CPW, *supra* note 1, at 248–49.

²¹⁰ LF, *supra* note 60, at 365.

²¹¹ 7 CPW, *supra* note 1, at 456.

a sincere and earnest interpretation of the Bible (Catholics notably excluded). Fourth, religious liberty meant separation of the offices and operations of church and state, leaving the church free to organize and support itself voluntarily and democratically, and relieving the state of the burden of collecting tithes, operating courts, or maintaining properties on the church's behalf. Finally, religious liberty required that there be no legal establishment of a single national religion, but instead a free and open disputation in the nation of a plurality of religions based on Scripture.

Here, in prototypical Protestant form, Milton had set out the core principles of religious liberty that would come to dominate the common law in the following centuries—liberty of conscience, free exercise of religion, equality of a plurality of faiths before the law, separation of church and state, and (outside of England) disestablishment of a national religion.²¹² Each of these five principles of religious liberty set forth by Milton had ardent advocates among other English Calvinists of his day. Some fellow reformers pressed one or two of these principles further than Milton dared, particularly in advocating toleration for Catholics and in criticizing the church's power of excommunication which Milton still supported. But few Calvinists embraced all five of these religious liberty principles together, or cast them in such stridently individualistic terms as Milton. Most Presbyterians and some Independents, such as Samuel Rutherford, Henry Ireton, and John Goodwin, embraced liberty of conscience and toleration for all Protestants and called for some measure of separation between church and state and democratic election within each. But they also still maintained a religious establishment and insisted on state contributions to religion. Some Levellers and Diggers, like Richard Overton and Gerrard Winstanley, went further than Milton in calling for open toleration of Catholics, Jews, and various peaceable non-biblical religions. But even these reformers ultimately did not abandon the idea of a legally-established religion and state-supported church. Only the most radical reformers of his day, John Lilburne, John Saltmarsh, William Walwyn, and Roger Williams, could stand comfortably on every plank of the platform of religious liberty that Milton had built.²¹³ But none anchored this platform as firmly as Milton did—save Roger Williams.

²¹² For American formulations of these concepts, see JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 41–70 (2d ed. 2005).

²¹³ For comparisons of Milton's view with others in his day, see notes in 2 CPW, *supra* note 1, at 53–136; 3 CPW, *supra* note 1, at 1–100; 7 CPW, *supra* note 1, at 27–57, 77–95. See also 3–4 W.K. JORDAN, *THE DEVELOPMENT OF RELIGIOUS TOLERATION IN ENGLAND* (1938); WOLFE, *supra* note 51, at 27–119; HALLER,

Ten years before Milton became active, however, Williams had already left for Puritan New England. Banished from there because of his liberal views, had established his own colony of Providence in 1636. Williams founded Providence as “a lively experiment [for] full liberty in religious concernments” which guaranteed “liberty of conscience” and “the free exercise and enjoyment of all their civil and religious rights” to all peaceable parties. He also in 1643 called for “a wall of separation between the garden of the Church and the wilderness of the world.”²¹⁴ Parliament would eventually group Milton and Williams together as radicals who deserved censorship, as we shall in a moment.

Just because of the radicality of these religious liberty principles taken together, and just because of the suspect theological pedigree of some of these principles and their proponents, Milton’s views did not carry the day in his life time. Indeed, they were often cavalierly ignored by other Puritan reformers.²¹⁵ Even Oliver Cromwell, who supported Milton and appointed him as his Secretary for Foreign Languages, could not adopt his principles for religious liberty despite Milton’s repeated prodding.²¹⁶ The Restoration government in 1660 rejected every one of them out of hand, and returned England to a firm Anglican state establishment, featuring vicious repression of dissenters. But three decades later, in the Glorious Revolution, Miltonian religious liberty principles came to constitutional form in the famous Toleration Act of 1689 and to even more vivid expression in John Locke’s *Letter Concerning Toleration*.²¹⁷

supra note 2, at 1:33–98, 111–14. For representative texts, see 2–3 *id.*; WOLFE, *supra* note 50, at 355–433; WOODHOUSE, *supra* note 24, at 179–316.

²¹⁴ *Plantation Agreement of Providence* (1640) and *Charter of Rhode Island and Providence Plantations* (1663), in 6 FRANCES NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 3205–06, 3211–13 (1909); see also Roger Williams, *Letter from Roger Williams to John Cotton* (1643), in 1 *THE COMPLETE WRITINGS OF ROGER WILLIAMS* 392 (1963). On Williams, see EDMUND S. MORGAN, *ROGER WILLIAMS: THE CHURCH AND THE STATE* (1967); EDWIN S. GAUSTAD, *LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA* (1991); David Little, *Roger Williams and the Separation of Church and State*, in *RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER* 1–23 (James E. Wood, Jr. ed., 1985).

²¹⁵ On Milton’s reputation in his day, see 1 HALLER, *supra* note 2, at 128–39.

²¹⁶ CHRISTOPHER HILL, *GOD’S ENGLISHMAN: OLIVER CROMWELL AND THE ENGLISH REVOLUTION 183–90*, 212–14 (1970).

²¹⁷ See STEPHENSON & MARCHAM, *supra* note 23, at 607–08. See further *infra* notes 357–66 comparing Locke and Milton on religious liberty.

III. DOMESTIC RIGHTS AND LIBERTIES

While Milton's call for the reformation of religious liberty proved three decades before its time, his call for the reformation of domestic liberty would prove three centuries before its time. But a guarantee of domestic liberty was for Milton a "ready and easy" next step in the struggle for "real and substantial liberty" in England—from the liberty of the private prayer closet to the liberty of the private home itself.²¹⁸ In Milton's view, private households of his day, just like individual consciences, were being oppressed by church and state authorities—and on the basis of the same kind of bad theology, superstitious custom, and unjust law. It made little sense to call for the reformation of public liberties in church and state, he argued, without first having the private liberties of the English household in order. "What are all our public immunities and privileges worth, and how shall it be judged that we fight for them with minds worthy to enjoy them, if we suffer ourselves in the meanwhile not to understand the most important freedom that God and nature hath given us in the family."²¹⁹

[T]he constitution and reformation of a commonwealth . . . is, like a building, to begin orderly from the foundation thereof, which is marriage and the family, to set right first whatever is amiss therein. How can there else grow up a race of warrantable men, while the house and home that breeds them, is troubled and disquieted under a bondage not of God's constraining . . . but laid upon us imperiously in the worst and weakest ages of knowledge, by a canonical tyranny of stupid and malicious monks: who having rashly vowed themselves to a single life, which they could not undergo, invented new fetters to throw on matrimony, that the world thereby waxing more dissolute, they also in a general looseness might sin with more favor.²²⁰

This argument had intuitive appeal in Protestant England—and not just because of its popular anti-monasticism. Marriage had been one of the first institutions to be reformed in the sixteenth-century Reformation, and it made good sense to any serious Protestant that a "second reformation" would also need to begin with marriage and the family.²²¹ Moreover, it was a

²¹⁸ 7 CPW, *supra* note 1, at 340; LF, *supra* note 60, at 365.

²¹⁹ 2 CPW, *supra* note 1, at 438–39; *see also* LF, *supra* note 60, at 366.

²²⁰ 2 CPW, *supra* note 1, at 438–39; *see also* 1 CPW, *supra* note 1, at 588; 2 CPW, *supra* note 1, at 431.

²²¹ On the Calvinist reformation of marriage, *see* JOHN WITTE, JR. & ROBERT M. KINGDON, *SEX, MARRIAGE, AND FAMILY IN JOHN CALVIN'S GENEVA I: COURTSHIP, ENGAGEMENT, AND MARRIAGE* (2005). This subsection on Milton's marital reforms is adapted from JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 177–86* (1997).

commonplace among both Anglicans and Calvinists of Milton's day to regard the marital household as the foundation of church and the state and the first school of order, justice, and good citizenship. Already in 1590, William Perkins put it thus: "[M]arriage was made and appointed by God himself to be the foundation and seminary of all sorts and kinds of life in the commonwealth and the church. . . . [T]hose families wherein the service of God is performed are, as it were, little churches; yea, even a kind of paradise on earth."²²² Robert Cleaver opened his famous 1598 tract, *A Godly Form of Householde Governement*, with an oft-repeated maxim: "A household is as it were a little commonwealth, by the good government whereof, God's glory may be advanced, the commonwealth which standeth of several families, benefited, and all that live in that family, may receive much comfort and commodity."²²³ William Gouge premised his massive 1622 tome *Domestical Duties* on the same belief that "the family is a seminary of the church and the commonwealth," and indeed in its own right "a little church, and a little commonwealth, whereby a trial may be made of such as are fit for any place of authority, or subjection in church or commonwealth."²²⁴

It was not so much Calvinist logic as personal crisis, however, that drove Milton to pay close attention to domestic liberty and marital reform. In 1642, just as he had completed the last of his five tracts calling for religious liberty, Milton had gotten married. His new bride, however, had left him within a month of their wedding day, and she and her family repeatedly resisted his attempts at reconciliation. Milton, his early biographer reports, "could ill bear the disappointment he met with by her obstinate absenting: And therefore thought upon a divorce, that he might be free to marry another."²²⁵

English church courts, which had long enjoyed jurisdiction over marriage until the Long Parliament banished them in 1641, maintained the strict medieval canon law that forbade divorce and remarriage. Parties who had been properly married could not divorce on any grounds whatsoever—even in cases of brazen adultery or malicious desertion, which other Protestant nations recognized to be sufficient grounds for divorce and remarriage. Under English law, estranged spouses could separate from bed and board on these grounds.

²²² William Perkins, *Christian Oeconomy or a Short Survey of the Right Manner of Erecting and Ordering a Family According to the Scriptures* (ca. 1590), reprinted in 3 *THE WORK OF WILLIAM PERKINS* 418–19 (Ian Breward ed., 1970).

²²³ ROBERT CLEAVER, *A GODLY FORM OF HOUSEHOLDE GOVERNEMENT* 1 (1598).

²²⁴ WILLIAM GOUGE, *OF DOMESTICAL DUTIES: EIGHT TREATISES* 17, 27 (1622).

²²⁵ 2 CPW, *supra* note 1, at 138.

But they could not marry another person during the lifetime of their spouse without courting charges of bigamy, a serious moral and criminal offense. Their only hope for escape was to find an impediment—such as an incestuous blood tie between them—that would support a judgment of annulment. Annulment was a formal declaration that the purported marriage was null and void from the start, in most cases leaving each party free to marry another.²²⁶ None of these options was available to Milton, and he felt unjustly enslaved in and to his marriage.

Thus, invoking “the right of nature and the liberty wherein I was born,”²²⁷ Milton took his cause to the Parliament—addressing four books to them between 1643 and 1646 in an effort to convince them that he should be allowed to divorce and remarry in such circumstances. In his Address to Parliament, which opened his first tract, *The Doctrine and Discipline of Divorce*, Milton pressed a contractual argument for the right to divorce that followed the exact lines that Parliament had just used to justify their right to revolt against King Charles.

He who marries, intends as little to conspire his own ruin, as he that swears allegiance [to the Crown]: and as a whole people is in proportion to an ill government, so is one man to an ill marriage. If [Parliament] against any authority, covenant, or statute, may by the sovereign edict of charity, save not only their lives, but honest liberties from unworthy bondage, as well may [the married man] against any private covenant, which he never entered to his mischief, redeem himself from unsupportable disturbances to honest peace, and just contentment: And much the rather, for that to resist the highest magistrate though tyrannizing, God never gave us express allowance, only he gave us reason, charity, nature, and good example to bear us out; but in this economical [that is, domestic] misfortune, thus to demean ourselves, besides the warrant of those four great directors, which doth as justly belong hither, we have an express law of God, and such a law, as whereof our Savior with a solemn threat forbid the abrogating. For no effect of tyranny can sit more heavily on the commonwealth, then this household unhappiness on the family. And farewell all hope of true Reformation in the state, while such an evil as this lies undiscerned and unregarded in the house.²²⁸

²²⁶ See details in R.H. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND (1974).

²²⁷ 2 CPW, *supra* note 1, at 580.

²²⁸ *Id.* at 229–30.

This was Milton's argument in a nutshell. The domestic commonwealth, like the political commonwealth, is formed by a contract or covenant between two parties, which may be dissolved if it fails in its fundamental purpose. This is the counsel of the "four great directors"—reason, charity, nature, and experience—in the case of political dissolutions. It is counseled by these same four great directors, as well as by the Bible in the case of marital dissolutions. If such counsel is ignored, the whole commonwealth will suffer and each member within it.

The purpose of forming a political commonwealth is to protect liberty, establish order, and secure peace, Milton argued, adumbrating arguments that he would elaborate in his later regicide tracts. When one or more of these purposes is irreconcilably frustrated, either by the tyranny of rulers or by the crime of subjects, the political commonwealth is broken, and either the rulers or the people may dissolve it—by force of arms, if necessary. Thereafter, the parties may reorganize their political polity in a manner more consistent with the ideal purposes of liberty, order, and peace. It makes no difference that the political covenant between the people and their rulers is silent on the subject of dissolution in cases of frustration of the main purpose of the covenant. For both common sense and natural law are implied in the covenant and dictate that parties not be unconscionably held to bargains that were once right but have now gone irretrievably wrong:

No understanding man can be ignorant that covenants are ever made according to the present state of persons and of things; and have ever the more general laws of nature and of reason included in them, though not expressed. If I make a voluntary covenant as with a man, to do him good, and he prove afterward a monster to me, I should conceive a disobliment. If I covenant, not to hurt an enemy, in favor of him and forbearance, and hope of his amendment, and he, after that, shall do me tenfold injury and mischief, to what he had done when I so covenanted, and still be plotting what may tend to my destruction, I question not but that his after actions release me; nor know I [a] covenant so sacred that withholds me from demanding justice on him. Howbeit, had not their distrust in a good cause, and the fast and loose of our prevaricating Divines overruled, it had been doubtless better not to have inserted in a covenant unnecessary obligations, and words not works of a supererogatory allegiance to their enemy. . . . Protestants have done before, and many

conscientious men now in these times have more than once besought the Parliament to do, that they might go on upon a sure foundation.²²⁹

Milton pressed the analogous argument in seeking “a sure foundation” from Parliament to reject those “prevaricating Divines” against divorce and to grant him a “disobligement” of his marital contract because it had failed in its fundamental purpose.²³⁰ The purpose of forming a marriage, Milton argued, is to foster love, create community, deter lust, and procreate children. Of these purposes, marital love is, by far, the most critical. “Marriage is a covenant,” he wrote, “the very being whereof consists, not in forced cohabitation, and counterfeit performance, but unfeigned love and peace . . . and sweet and gladsome society.”²³¹ “[T]he apt and cheerful conversation of man with woman,” is the “chief and noblest purpose of marriage.”²³² “Where love cannot be, there can be left of wedlock nothing but the empty husk of an outside matrimony”—dry, shriveled, and dispensable.²³³

Milton underscored this priority of marital love by describing marriage as a threefold society—at once religious, civil, and corporal in nature. As a religious society, marriage is a union of soul, spirit, and mind, between husband and wife—a reflection of the perfect love of Adam and Eve in Paradise, an expression of the perfect love between Christ and his church. As a civil society, marriage is a union of the couple’s person and property, in which each spouse vows to support and protect the other in all things until death. As a corporal society, marriage is a union of bodies in intercourse which serves to cool their passion and to conceive children if that is God’s will.²³⁴

God appointed “the religious society” of marriage as “the highest and most excellent,” Milton argued, for it dealt with the essential matters of the soul, the spirit, and the mind.²³⁵ He appointed the corporal society of marriage as the “last and meanest,” for this dealt with discretionary matters of the body and its passions.²³⁶ “We know that flesh can neither join, nor keep together two bodies of itself; what is it then must make them one flesh, but likeness, but

²²⁹ This quote is not from Milton’s divorce tracts but from his *Tenure of Kings*, 3 CPW, *supra* note 1, at 231–32.

²³⁰ 3 CPW, *supra* note 1, at 232.

²³¹ 2 CPW, *supra* note 1, at 254.

²³² *Id.* at 235; *see also id.* at 246.

²³³ *Id.* at 235, 256.

²³⁴ *Id.* at 235–56.

²³⁵ *Id.* at 268–69; *see also id.* at 606–70.

²³⁶ *Id.* at 269.

fitness of mind and disposition, which may breed the Spirit of concord, and union between them? . . . For as the unity of mind is nearer and greater than the union of bodies, so doubtless is the dissimilitude greater, and more individual.”²³⁷ Without agape or soul love, a marriage is dead. Without eros or carnal love, a marriage can live. Think of the marriage of Mary and Joseph.²³⁸

Having posited this hierarchy of marital purposes—from the religious to the carnal—Milton thought it “preposterous ignorance and iniquity” that the law of his day should provide remedies “for the rights of the body in marriage but nothing for the wrongs and grievances of the mind.”²³⁹ Impotence and frigidity could lead to annulment. But frustration of “the superior and nobler ends both of marriage and the married persons . . . looses no persons” from marriage.²⁴⁰ “What courts of concupiscence are these, wherein fleshly appetite is heard before right reason, lust before love or devotion.”²⁴¹ If impotence, frigidity, and other frustrations of the base carnal society of marriage can lead to dissolution, then surely incompatibility, antagonism, and other frustrations of the higher religious society of marriage should lead to dissolution as well. To hold otherwise is to elevate the needs of the body above those of the soul, to privilege marital sex over marital love.²⁴²

Milton thus advocated divorce if either the religious or the carnal purposes of marriage were frustrated. Frustration of the religious purposes of marriage because of irreconcilable incompatibility provided the more compelling case for divorce, he believed. For the community and concordance of the couple’s soul, spirit, and mind was the first and foremost reason God instituted marriage. Adam could not abide isolation, even in the perfection of Paradise; no person can abide it in this vale of tears. And, a person trapped in a marriage with “a mute and spiritless mate” is even lonelier than the unmarried person.²⁴³ The disaffected spouse becomes cold, dark, and sad, growing “not only in bitterness and wrath, the canker of devotion, but in a desperate and vicious carelessness,” falling victim to “dissimulation, suspicion, false colors, false pretenses.”²⁴⁴ In such circumstances, divorce is the better course. Who cannot

²³⁷ *Id.* at 605–06

²³⁸ *Id.* at 268–69, 605–09.

²³⁹ *Id.* at 248.

²⁴⁰ *Id.* at 599.

²⁴¹ *Id.*

²⁴² *Id.* at 239–40, 248–50, 599.

²⁴³ *Id.* at 251.

²⁴⁴ *Id.* at 260, 631.

see “how much more Christian it would be to break by divorce that which is more broken by undue and forcible keeping . . . rather than that the whole worship of a Christian man’s life should languish and fade away beneath the weight of an immeasurable grief and discouragement?”²⁴⁵

Frustration of the carnal purposes of marriage should likewise lead to divorce, Milton argued. In some instances, spouses willfully betray their bodies through adultery, cruelty, desertion, drunkenness, incest, sloth, violent crime, or other pathos that destroys any prospects of intimacy with their spouse. In other instances, one spouse suffers permanent impotence, frigidity, contagion, sterility, or disfigurement that precludes intercourse or conception. Where married parties cannot reconcile themselves to these conditions, they must be allowed to divorce, Milton argued. For, unless the innocent or capable spouse is “heroically virtuous,” he or she inevitably will “despair in virtue and mutiny against divine providence”—testing the neighbor’s bed, visiting the local brothel, or succumbing to various other “temptations, and occasions to secret adulteries, and unchaste roving.”²⁴⁶ Husbands, eager to perpetuate their family name, might be tempted to concubinage for the sake of having children—a temptation to which even the great patriarch Abraham succumbed to his own misery, as well as that of his wife Sarah and his mistress Hagar and her illegitimate son Ishmael.²⁴⁷ And, if the couple already has children, the ills and evils of their marital discord will “undoubtedly redound upon the children . . . and the whole family. It degenerates and disorders the best spirits, leaves them to unsettled imaginations, and degraded hopes, careless of themselves, their household and their friends, inactive to all public service, dead to the commonwealth.”²⁴⁸

“[T]o enjoin the indissoluble keeping of a marriage found unfit against the good of man both soul and body,” Milton concluded, “is to make an idol of marriage.”²⁴⁹ To be sure, “divorce is not rashly to be made, but reconciliation to be persuaded and endeavored.”²⁵⁰ But, if such reconciliation cannot be achieved, it is better to take the painful step of divorce, to avoid even worse pain. This is for the good of the couple, their children, and the broader commonwealth. “[P]eace and love, the best subsistence of a Christian family,

²⁴⁵ *Id.* at 259; *see also id.* at 251–52, 259–60, 589–91, 630–31.

²⁴⁶ *Id.* at 253–54, 632.

²⁴⁷ *See Genesis* 16:1–16, 21:8–21.

²⁴⁸ 2 CPW, *supra* note 1, at 632.

²⁴⁹ *Id.* at 276.

²⁵⁰ *Id.* at 680.

will return home from whence they are now banished; places of prostitution will be less haunted, the neighbor's bed less attempted, the yoke of prudent and manly discipline will be generally submitted to, sober and well ordered living will soon spring up in the commonwealth."²⁵¹

Milton did not spell out the legal ramifications of these views on marriage and divorce. He instead reprinted, with his own long preface, the legal discussion of marriage and divorce in the tract *De Regno Christi* written by Strasbourg reformer Martin Bucer in 1550. Milton endorsed Bucer's conflation of annulment and divorce, his insistence on the equal rights of husband and wife to petition for divorce on proof of cause, and his call for civil courts rather than church courts to handle all marriage and divorce litigation.²⁵² Milton also assembled a rather untidy heap of liberal divorce laws—from the ancient Judaic to the modern Protestant—to demonstrate the purported anachronism of prevailing English law against divorce.²⁵³ Readers who wanted more, Milton said, should read the systematic legal discussion on the subject just published by the distinguished English jurist John Selden.²⁵⁴

Milton directed his main energies to the theological ramifications of these views of marriage and divorce. He spent a good deal of time deconstructing the conventional theological arguments for the indissolubility of marriage—dismissing them all derisively as the kinds of “silly superstition,” “devilish doctrine,” and “heinous barbarism” that a commonwealth dedicated to true liberty could not countenance.²⁵⁵ Catholics first called marriage a sacrament because it is permanent, he argued, and then later insisted that marriage is permanent because it is sacrament, a sign of Christ's union with his church. But this sacramental symbolism of marriage only proves that it is the spiritual, rather than the corporal, union of marriage that is critical, Milton insisted. “For me I dispute not now whether matrimony be a mystery or no; if it be of Christ and his Church, certainly it is not meant of every ungodly and miswedded marriage, but then only mysterious, when it is a holy, happy, and peaceful match. . . . Since therefore none but a fit and pious matrimony can

²⁵¹ *Id.* at 230; *see also id.* at 276, 431, 680.

²⁵² *See* HERMAN J. SELDERHUIS, MARRIAGE AND DIVORCE IN THE THOUGHT OF MARTIN BUCER (John Vriend & Lyle B. Bierma trans., 1999).

²⁵³ 2 CPW, *supra* note 1, at 692–718.

²⁵⁴ *Id.* at 350 (*citing* JOHN SELDEN, DE IURE NATURALI ET GENTIUM bk. 5, ch. 7, *in* 1 JOHN SELDEN, OPERA OMNIA TAM EDITA QUAM INEDITA IN TRIBUS VOLUMINIBUS 498–604 (1726)).

²⁵⁵ 2 CPW, *supra* note 1, at 235, 238, 248.

signify the union of Christ and his Church, there cannot be any hindrance of divorce to that wedlock wherein there can be no good mystery.”²⁵⁶

Continental Protestants argue that marriage is indissoluble because it is a covenant in which God is a party. But this, again, proves only that the spiritual dimensions of marriage are the more pressing, Milton wrote. If marriage is a true covenant among husband, wife, and God, “so much the more it argues the chief society thereof to be in the soul rather than in the body, and the greatest breach thereof to be unfitness of mind rather than defect of body, for the body can have less affinity in a covenant more than human.”²⁵⁷ Moreover, to call marriage a covenant is not to prove its indissolubility; quite the contrary, as is evident from the dissolved political covenants of our time, let alone every private covenant that can be dissolved for cause. “[E]quity is understood in every covenant, even between enemies, though the terms be not expressed. If equity therefore made it, extremity may dissolve it. But marriage, they used to say, is the covenant of God. Undoubted: and so is any covenant frequently called in Scripture, wherein God is called as witness. . . . [T]his denomination adds nothing to the covenant of marriage, above any other civil and solemn contract: nor is it more indissoluble for this reason than any other against the end of its own ordination. . . . But faith they say must be kept in covenant, though to our damage. I answer, that only holds true when the other side performs.”²⁵⁸

Anglicans are even less convincing, Milton charged, for they “dare not affirm that marriage is either a sacrament, or a mystery, though all those sacred things give place to man, and yet they invest it with such an awful sanctity, and give it such Adamantine chains, to bind with, as if it were to be worshipped like some Indian deity.”²⁵⁹ But this is an irrational and silly conformity to one particular of the Catholic tradition which in many other particulars has been rejected.

Both Catholics and Protestants alike argue that marriage is indissoluble because Christ commands that “what God has joined together let not man put asunder.”²⁶⁰ The point of this passage, however, said Milton, is not the prohibition against man’s putting asunder. It is the requirement that God must

²⁵⁶ *Id.* at 607; *see also id.* at 236–37, 591, 601–02, 630–31, 732.

²⁵⁷ *Id.* at 275–76.

²⁵⁸ *Id.* at 624; *see also id.* at 245, 275–76.

²⁵⁹ *Id.* at 277.

²⁶⁰ *Matthew* 19:6 (King James).

join the couple together. “[W]hen is it that God may be said to join,” Milton asked rhetorically; “when the parties and their friends consent? No surely; for that may concur to lewdest ends. Or is it when church rites are finished? Neither; for the efficacy of those depends upon the presupposed fitness of either party. Perhaps after carnal knowledge? Least of all: for that may join persons whom neither law nor nature dares join; ‘tis left, that only then, when the minds are fitly disposed, and enabled to maintain a cheerful conversation, to the solace and love of each other, according as God intended and promised in the very first foundation of matrimony, I will make a help meet for him.”²⁶¹ “So when it shall be found by their apparent unfitness, that their continuing to be man and wife is against the glory of God, and their mutual happiness, it may assure them that God never joined them.”²⁶²

Having deconstructed traditional Christian arguments about divorce, Milton set out to reconstruct a biblical argument for the right to divorce. The key passage, he insisted, is Deuteronomy 24:1–4.²⁶³ There, God proclaimed through Moses: “When a man hath taken a wife and married her, and it come to pass that she find no favor in his eyes, because he hath found some uncleanness in her, let him write her a bill of divorcement, and give it in her hand, and send her out of his house”—leaving both parties free to remarry thereafter.²⁶⁴ “Uncleanness” in this passage, said Milton, means “nakedness or unfitness” of body or of mind.²⁶⁵ It implicates the whole range of corporal and religious grounds for divorce which he had already listed. Of these, religious grounds were the more important, for “what greater nakedness or unfitness of mind than that which hinders ever the solace and peaceful society of the marital couple.”²⁶⁶ The ancient Hebrews had recognized this and built on this passage a comprehensive doctrine of divorce. Their interpretation was followed by the Greeks, the Romans, the early Christian emperors, and many others. This proves, said Milton, that Deuteronomy 24:1–4 is no special rule for the Jews. It is a universal moral law, “a grave and prudent law, full of

²⁶¹ 2 CPW, *supra* note 1, at 328.

²⁶² *Id.* at 276–77; *see also id.* at 328, 650–51.

²⁶³ In his later *Christian Doctrine*, Milton argued that the Mosaic law was a basis only for private virtue, not state policy. *See supra* notes 91–100 and accompanying text.

²⁶⁴ 2 CPW, *supra* note 1, at 242 (quoting *Deuteronomy* 24:1–4 (King James)). I am using the King James Version in this and the next two paragraphs, since Milton’s analysis turns on the exact wording of several of these passages.

²⁶⁵ 2 CPW, *supra* note 1, at 244.

²⁶⁶ *Id.*

moral equity, full of due consideration towards nature, that cannot be resisted; a law consenting with the laws of wisest men and civilest nations.”²⁶⁷

Christ did not abrogate this moral law of divorce in his proclamation in Matthew 19:9: “Whosoever shall put away his wife, except it be for fornication, and shall marry another, committeth adultery; and whosoever marrieth her which is put away doth commit adultery.” This passage must be understood in context, Milton argued. Christ had already said in Matthew 5:18: “Till heaven and earth pass, one jot or one tittle shall in no wise pass from the law, till all be fulfilled.” Moreover, his divorce proclamation was prompted, as Matthew 19:3 reports, by the Pharisees tempting him, and saying unto him, “Is it lawful for a man to put away his wife for every cause?” Christ was giving a direct response to the scheming Pharisees. You, Pharisees, who might “in the hardness of your hearts” abuse the Mosaic law of divorce through inventive interpretation, you may divorce only on grounds of fornication.²⁶⁸ But others, less hard of heart and less prone to casuistry, may do so on the fuller grounds allowed by Moses. Christ’s “rigid sentence against divorce” was designed “not to cut off all remedy from a good man who finds himself consuming away in a disconsolate and unenjoyed matrimony, but to lay a bridle upon the bold abuses of those overweening rabbis.”²⁶⁹ Christ’s words were not a timeless declaration for the church, but a terse denunciation of the Pharisees who were testing him.²⁷⁰

If Christ’s words are so understood, Milton continued, St. Paul’s words can also be understood. In I Corinthians 7:15, Paul writes: “if the unbelieving [spouse] depart, let him depart. A brother or a sister is not under bondage in such cases, but God hath called us to peace.” Paul is not contradicting Christ by adding desertion or disbelief as another ground for marital dissolution, Milton argued. He is simply confirming the traditional Hebrew practice that when the union of spirit between husband and wife is broken by a form of spiritual “uncleanness,” the marriage is broken and the parties are freed from its bonds.²⁷¹ Indeed, Paul goes beyond Moses by granting to both husband and wife alike this freedom to depart from a spiritually broken marriage—a

²⁶⁷ *Id.* at 306; *see also id.* at 239–44.

²⁶⁸ *Id.* at 664.

²⁶⁹ *Id.* at 283; *see also id.* at 661.

²⁷⁰ *Id.* at 283, 621, 636, 661–62.

²⁷¹ *Id.* at 681–83. “Uncleanness” or “indecency” is the term in the Mosaic law of divorce. *Deuteronomy* 24:1.

suitable application of Paul's more general teaching that in Christ there is "neither male nor female."²⁷²

This was the heart of Milton's argument for domestic liberty. Over the next fifteen years, he embroidered these arguments a bit more. He called for the equal rights of men and women both to enter marriages and to exit them through divorce. He called on husband and wives to love, support, and care for each other and insisted that each had a right to claim these expanded conjugal debts from the other. He called for the rights of parents to nurture, discipline, and educate their children in their own faith but with due regard for each child's nature and gifts. He mentioned the need for greater privacy of the home, including, as we shall see,²⁷³ freedom from illegal searches of the home and seizure of private papers. And he speculated, at some length and leisure, whether polygamy and concubinage were, in fact, outlawed by God, though he said clearly that "homosexuality, fornication, violation, adultery, incest, rape, prostitution, and offences of a similar kind run counter" to God's law and cannot be countenanced at all.²⁷⁴

Unlike his writings on religious liberty, which were often ignored in his day, Milton's writings on domestic liberty found instant readership—and mostly of a very hostile sort. Even before he ventured his scandalous speculations on polygamy and concubinage, his readers denounced his permissive theory of marriage and divorce. While many writers could accept the conventional Protestant doctrine of divorce and remarriage in cases of adultery and desertion, they thought Milton's arguments for the right to divorce on grounds of irreconcilable differences alone proved too much. His books were dismissed for holding the "most dangerous and damnable tenets."²⁷⁵ If Milton had his way, his critics charged, "the bonds of marriage [will be] let loose to inordinate lust," and men will inevitably "quit of their wives for slight occasions" to the detriment of the couple, the children, the church, and the commonwealth alike. "[W]hat will all the Christian churches through the world . . . think of our woeful degeneration in these deplored times, that so uncouth a design should be set on foot among us."²⁷⁶

²⁷² *Id.* at 338–39; see *Galatians* 3:28.

²⁷³ See *infra* note 350 and accompanying text.

²⁷⁴ 6 CPW, *supra* note 1, at 757; see also LF, *supra* note 60, at 363–65; 2 CPW, *supra* note 1, at 393–413; 6 CPW, *supra* note 1, at 351–81, 755–57, 781–88.

²⁷⁵ WILLIAM RILEY PARKER, MILTON'S CONTEMPORARY REPUTATION 74–79 (1940).

²⁷⁶ HALLER, *supra* note 24, at 125–26 (quoting criticisms from 1643 and 1644).

The 1644 Parliament not only rejected Milton's call for divorce reform, but moved to censor and burn his *Doctrine and Discipline of Divorce*, along with Roger Williams's *Bloody Tenent of Persecution* and Richard Overton's *Man's Mortallitie*. These books, critics in Parliament and in pulpits pronounced, have converted religious and domestic liberties into "despicable licenses."²⁷⁷ These authors want "a liberty of sensual lusts, and fleshly looseness," a freedom for "Popery, Judaism, Turkism, Paganism and all manner of false religions under pretense of liberty of conscience."²⁷⁸ Their books are chock-full of "Anabaptistical, Antinomian, Heretical, Atheistical opinions, as of the soul's mortality, divorce at pleasure, etc."²⁷⁹ "If any plead conscience for the lawfulness of polygamy; (or for divorce for other cause than Christ and His apostles mention; of which a wicked book is abroad and uncensured, though deserving to be burnt, whose author hath been so impudent as to set his name to it, and dedicate it to ourselves) or for liberty to marry incestuously, will you grant toleration for this?"²⁸⁰ Later English reformers, both theological and legal, would look back to Milton as a prophet, who anticipated many of reforms of English marriage and divorce law from the Matrimonial Causes Act of 1857 forward.²⁸¹ But in his own day, on questions of marriage and divorce, Milton was a prophet with little honor, and no legal influence.

IV. CIVIL RIGHTS AND LIBERTIES

It was the threat in 1644 of Parliamentary censorship of his book on divorce that prompted Milton immediately to widen his reformation program to include other civil liberties, most notably the freedoms of speech and press. These were not entirely new ideas; Milton had already sounded a few of them in his earlier tracts on religious liberty. "Nothing is more sweet to man" than freedom of speaking and writing, he wrote in 1641.²⁸² But for the free born people of England, all free speaking and free publication have long been "pinched," "girded, and straight laced" by "monkish prohibitions, and expurgatious indexes" kept by "some mercenary, narrow-souled, and illiterate

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*; see also *id.* at 78–134; HILL, *supra* note 51, at 130–39, 222–30 (providing later reactions to Milton's views).

²⁸¹ See LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530–1987, at 348–51, 407 (1990); see also *id.* 368–422 (summarizing these later legal reforms); MARY LYNDON SHANLEY, MARRIAGE, FEMINISM AND THE LAW IN VICTORIAN ENGLAND 1850–1895 (1989) (same).

²⁸² 1 CPW, *supra* note 1, at 125.

chaplain.”²⁸³ Censorship is silly and self-defeating for the church, Milton argued. It is silly because censors have “to thrust themselves under disguise into a popular throng [or] to stand the night long under eaves of houses and low windows that they might hear everywhere the free utterances of private breasts.”²⁸⁴ It is self-defeating because “the honest liberty” of free speech is “so dear a concernment as the church’s good.”²⁸⁵ For with it honest men can stand up for the church’s defense and drive her to reform.²⁸⁶ Indeed, the church and the nation would do so much better if they welcomed “the struggle of contrarities,” “the fierce encounter of Truth and falsehood.”²⁸⁷ For “the property of Truth is, where she is publicly taught, to unyoke and set free the minds and spirits of a nation first from the thralls of sin and superstition, after which all honest and legal freedom of civil life cannot be long absent.”²⁸⁸

Milton returned to these arguments in 1643 in his preface to *The Doctrine and Discipline of Divorce*. Even before he had any inkling of the pending censorship of this work, he fumed against those with a “design to envy and cry down the industry of free reasoning . . . and innovation.”²⁸⁹ Why have the censors of church and state “closed up” “the womb of teeming Truth”?²⁹⁰ It is only because she may “presume to bring forth ought, that sorts not with their unchewed notions and superstitions.”²⁹¹ “[Y]ou now have in your hands a great and populous nation to reform,” Milton wrote to Parliament, “from what corruption, what blindness in religion you know well; in what a degenerate and fallen spirit from the apprehension of native liberty.”²⁹²

A. *Freedom of Speech*

It takes a bit of historical imagination and explanation to appreciate the object of Milton’s complaints and the radicality of his vision of “the fierce encounter of Truth and falsehood” through free speech in public. Before 1640 in England, truth was not so much debated as declared, and public platforms and publications for doing so were reserved to those licensed by the

²⁸³ *Id.* at 669.

²⁸⁴ *Id.* at 669–70.

²⁸⁵ 2 CPW, *supra* note 1, at 225.

²⁸⁶ *Id.* at 531.

²⁸⁷ 1 CPW, *supra* note 1, at 795–96; *see also id.* at 669–70; 2 CPW, *supra* note 1, at 561, 723.

²⁸⁸ 1 CPW, *supra* note 1, at 796.

²⁸⁹ 2 CPW, *supra* note 1, at 224.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.* at 224–27.

government. To be sure, England knew the classical Greek and Roman teachings on *rhetorica*, *parrhesia*, and *licentia*, and these ancient ideas were given ample ventilation by scholars of the day.²⁹³ A century before, in the heady days of Henry VIII's reformation, Protestants and humanists alike had exploited these earlier rhetorical traditions as well as the prophetic traditions of the Bible to issue their many sermons and pamphlets. But with the Elizabethan settlement in 1559, and even more with the establishment policies of James I from 1603 on, much of this radical rhetoric was subject to increasing restriction. The dominant legal assumption, though not always the social reality, was that public and published speech required prior government licenses.²⁹⁴

The proper place for freedom of speech, petition, and debate was thought to be in Parliament. There, traditions going back to the thirteenth century gave members license to speak freely, frankly, and forcefully within the confidence of their chambers in order to offer their best counsel to the Crown and to craft the best policies for the Commonwealth. Thus, when King James I and King Charles I suspended the Parliaments for a time and then tried to curtail the speech of its members when called, Parliament rose up in indignant protest. The members issued several striking documents defending these ancient rights of free Parliamentary speech. "The Form of Apology and Satisfaction" of 1604, for example, declared to James I that these Parliamentary "privileges and liberties" were not a "mere privilege" that could be restricted or removed by the Crown. "Full and frank speech" was a "fundamental privilege," "our right and due inheritance, no less than our very lands and goods."²⁹⁵

When King James I again sought to curtail this freedom of speech, Sir Edward Coke confronted him in an epic speech in the House of Commons in 1621. Members of Parliament, Coke declared, have an "ancient right" and "undoubted inheritance" to a "freedom to speak what we think good for government, either in church or commonwealth and what are the grievances" therein that need be redressed.²⁹⁶ Citing the Magna Carta of 1215 and several later medieval statutes and cases, Coke argued that Parliament must represent

²⁹³ See DAVID COLCLOUGH, FREEDOM OF SPEECH IN EARLY STUART ENGLAND 12–76 (2005).

²⁹⁴ See CYNTHIA SUSAN CLEGG, PRESS CENSORSHIP IN ELIZABETHAN ENGLAND (1997); CYNTHIA SUSAN CLEGG, CENSORSHIP IN JACOBAN ENGLAND (2001); David Loades, POLITICS, CENSORSHIP AND THE ENGLISH REFORMATION (1991); S. MUTCHOW TOWERS, CONTROL OF RELIGIOUS PRINTING IN EARLY STUART ENGLAND (2003).

²⁹⁵ See THE STUART CONSTITUTION, *supra* note 17, at 29–35; see COLCLOUGH, *supra* note 293, at 122–23, 138–68 (providing further analysis).

²⁹⁶ THE STUART CONSTITUTION, *supra* note 17, at 31.

and speak for the whole people, and thus that “the freedom of the House is the freedom of the whole land.” “We serve here for thousands and ten thousands.”²⁹⁷ Such views, which landed Coke and other members in prison, figured prominently in the formal Commons’ “Protestation” of 1621 and were echoed again in the many speeches surrounding the Petition of Right of 1628.²⁹⁸ Anyone who wanted more could read with profit the pages on point in Coke’s *Institutes*.²⁹⁹

Even as restricted, the laws governing freedom of speech in Parliament were considerably more liberal than those governing public speech, especially publication. For a private person to print a book was akin to minting a coin; it always required a prior government license. Without a license, the publication was presumed a counterfeit, and printing, selling, or possessing it was an actionable crime.³⁰⁰ King Henry VIII had put such a licensing law in place already in 1530, and this early law was broadened and tightened in a dozen later acts culminating in Charles I’s Star Chamber Decree of 1637.³⁰¹ Under this latter law, the Crown’s Stationers’ Company issued the licenses to print, the Bishop of London or Archbishop of Canterbury office reviewed all books and censored the illicit ones, and the Court of Star Chamber punished the unlicensed printers and authors, sometimes quite severely. The Stationers’ Company had wide jurisdiction to “search what houses and shops (and at what time they shall think fit)” and to seize illegal publications and papers and to seek prosecution of their authors, printers, and distributors before the Star Chamber.³⁰²

This traditional licensing law, though not revoked, ground to a halt during the first years of the Long Parliament, with the abolition of the Court of Star Chamber in 1641. This resulted in a massive torrent of new publications, Milton’s five anti-clerical tracts prominently among them. But on June 14, 1643, the Long Parliament issued a new licensing order in an effort to stamp out the “many false, forged, scandalous, seditious, libelous, and unlicensed Papers, Pamphlets, and Books to the great defamation of Religion and government.”³⁰³ The Order left it again to the Stationers’ Company to issue

²⁹⁷ See COLCLOUGH, *supra* note 293, at 172–81; see also 3 COKE, *supra* note 28, at 1194–1305.

²⁹⁸ See SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 23, at 450–53.

²⁹⁹ COKE, *supra* note 28.

³⁰⁰ See HALLER, *supra* note 24, at 134–42.

³⁰¹ See 2 CPW, *supra* note 1, at 793–96.

³⁰² *Id.* at 796; see also *id.* at 158–64 (providing analysis of the licensing system).

³⁰³ *Id.* at 797–99.

the licenses. But now a dozen Protestant ministers, assigned by Parliament, replaced the Bishop of London as the censors of books on religious matters, and Parliament itself replaced the Star Chamber as the final enforcer of the licensing law.

It was this new law that Parliament sought to enforce against Milton's *Doctrine and Discipline of Divorce*, which he had published without a license. Though Milton was apparently never seriously threatened with arrest, he responded in 1644 with his *Areopagatica: A Speech by Mr. John Milton for the Liberty of Unlicensed Printing*, which would become a classic defense of free speech and free press in the common law tradition. He wrote this tract, as he later put it, "that the determination of true and false, of what ought to be published and what suppressed, might not be in the hands of a few who may be charged with the inspection of books, men commonly without learning and of vulgar judgment, and by whose license and pleasure, no one is suffered to publish anything which may be above vulgar apprehension."³⁰⁴

Milton laid out the argument of the *Areopagatica* in brilliant rhetorical layers. He started with an historical argument that book licensing and censorship were papal tools sharpened by the Inquisition that had no place in Protestant England. Ancient Greece and Rome knew no such system of licensing and censorship, save in cases of outright blasphemy or libel, and the early Church Fathers and Christian emperors held to this policy. It was the medieval Catholic papacy that first introduced the censor and the index of prohibited books—particularly after the invention of the printing press and the publications of early reformers like John Wycliffe and John Hus. This system reached its height when the papacy called on the tyrannous Spanish Inquisition to enforce the decrees of the Council of Trent. These hated inquisitors greatly expanded these "catalogues," and "expurging indexes."³⁰⁵ They "rake[d] through the entrails of many a good author" and invented new hells and purgatories for the many Protestants, whom they tortured and killed for their writings.³⁰⁶

Surely, no self-respecting English Protestant could think of adopting such a system, Milton intoned gravely, conveniently ignoring a century of English Protestants who did. "I am certain that a state governed by the rules of justice

³⁰⁴ LF, *supra* note 60, at 366.

³⁰⁵ 2 CPW, *supra* note 1, at 500, 503.

³⁰⁶ *Id.* at 503; *see also* 1 CPW, *supra* note 1, at 668–72; 2 CPW, *supra* note 1, at 493–505, 529, 537–41, 549–51.

and fortitude, or a church built and founded upon the rock of faith and true knowledge, cannot be so pusillanimous.”³⁰⁷ After all, it was the great leaders of church and state in the Long Parliament who first catalyzed all this “free writing and free speaking.”³⁰⁸ “You cannot make us now less capable, less knowing, less eagerly pursuing of the truth unless you make yourselves . . . less the founders of our true liberty.”³⁰⁹ Surely, “freedom of writing” cannot now suddenly “be restrained by a discipline imitated from the prelates and learned by them from the inquisition.”³¹⁰ Surely, we did not all join the Reformation cause against Catholic censorship and superstition only to “make room for others” to enter “into their seats” and resume censorship “under another name.”³¹¹ Surely, this short “cruise of truth” has not already run its course, leaving “freedom of learning” destined to “groan again” under “old fetters.”³¹²

Milton’s next main argument was that licensing and censorship rules were impractical to implement. As the prior experiment of unlicensed printing had made all too clear, censors simply could not keep up with the pace of publication in England, nor stop the flow of illegal foreign books imported in sundry ships and saddlebags. Even if they tried, most licensors had neither the wit nor the wisdom to judge many of the writings that came before them. Nor could they be expected to sustain their interest or attention in the task, given the volume of work. Even if the licensors could do their work, the printers could not. They would be forever waiting on the bureaucrats to make up their minds and approve the texts. They would never really know whether they needed licenses to reprint old books. Would the Bible, for instance, need a license, and could it honestly get one given its rather graphic language about sin, sex, and violence? Would the Bible have to be abridged, leaving out, say, the Song of Songs with its preoccupation with female anatomy or the steamy passages on Samson and Delilah? What if an author revises his work, or makes a change to the approved copy: were new licenses needed or did the old license need amendment? What if the original licenser was away or had moved on; was a whole new license needed? How much should the printer charge, especially one forced to sit so long on his other literary wares? The mechanics and economics were just impossible, Milton concluded. And

³⁰⁷ 2 CPW, *supra* note 1, at 541.

³⁰⁸ *Id.* at 559.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 541.

³¹¹ *Id.*

³¹² *Id.* at 541–42; *see id.* at 559, 568–69.

ultimately, why should this system be restricted to the printing of books? Will not Parliament inevitably be moved to require licenses for pamphlets, music, art, and poetry, and eventually for unwritten speech, too—sermons, speeches, songs, plays, board meetings, indeed plain talk altogether and everywhere? There is no stop on this slippery slope of licensing and censorship once the perilous first step is taken.³¹³

But the real harm of licensing and censorship is done to the author and even more to the reading public. It is bad enough that the author has to bear the “dishonor and derogation” of having to deal with petty and pecuniary bureaucrats who inevitably will delay and drive up the price of his publications.³¹⁴ It is worse that every author, even a great doctor and professor, has to sit “under the correction of his patriarchal licenser.”³¹⁵ This might well be a “punie” man, half his age and intelligence, who can still tell the author to “blot or alter what precisely accords not with the hidebound humor” that purports to be the censor’s “judgment” on behalf of the government and people.³¹⁶ Many of the best authors will leave England or fall silent, rather than sit “under the wardship of some overseeing fist” or watch their books “bear the scars” of their “fairest print” and most “cunning thoughts” cut out.³¹⁷ Worst of all is that each of these bureaucrats, however incompetent, is made “a judge to sit upon the birth, or death of books.” This is tragic, Milton wrote, with obvious self-reference. For a book holds “the breath of a man’s reason,” the “efficacy and extraction” of his “living intellect.”³¹⁸ It is filled with the “precious life-blood of a master spirit.”³¹⁹ An author “summons up all his reason and deliberation to assist him; he searches, meditates,” and then pours his life, mind, and soul into his writing.³²⁰ Books, therefore, “are not absolutely dead things, but do contain a potency of life in them to be as active as that soul was whose progeny they are.”³²¹ It is “as good almost [to] kill a man as kill a good book; who kills a man kills a reasonable creature, God’s image; but he who destroys a good book kills

³¹³ *Id.* at 523–26, 532–33.

³¹⁴ *Id.* at 532.

³¹⁵ *Id.* at 533.

³¹⁶ *Id.* at 532–33.

³¹⁷ *Id.* at 533.

³¹⁸ *Id.* at 492.

³¹⁹ *Id.* at 493.

³²⁰ *Id.* at 532.

³²¹ *Id.* at 492.

reason itself, kills the image of God, as it were in the eye."³²² Censorship is a "kind of homicide," "sometimes a martyrdom," even "a kind of massacre."³²³

Milton used this startling term "massacre" to signal the grave threat that he thought censorship posed to the English Protestant nation as a whole. The very nature of being a Protestant reformer, Milton argued, is to protest, to challenge, to reform, to fight falsehood with truth. The Protestant Reformation was born in this dialectical struggle about the most fundamental truths of Scripture and nature. The Protestants' strongest weapons in this struggle were their published books. Their best tactics were their open clashes of ideas with Catholics and with each other. And their wisest conclusion was to call their followers to continue the struggle, to be constantly at work at further discovery and reform—*semper reformanda*, always reforming anew, as Calvin had put it. "The light which we have gained" from the Reformation, Milton wrote, "was given us, not to be ever staring on, but by it to discover onward things more remote from our knowledge. It is not the unfrocking of a priest, the unmitering of a bishop, and the removing him from off the Presbyterian shoulders that will make us a happy nation, no, if other things as great in the church, and in the rule of life both economical and political be not looked into and reformed, we have looked so long upon the blaze that Zwingli and Calvin hath beaconed up to us, that we are stark blind."³²⁴

The reformation must go on in the state and society as much as in the church and in the home, Milton insisted. And it must go on with the same methods and insights that earlier Protestants had forged for the reformation of the church—but now writ larger and more generic. The Protestant premises of this new perpetual reformation are these: All have equal access and claim to the truth. All have vocations and contributions that count. All are prophets, priests, and kings with the freedom and duty to proclaim, to pastor, to participate fully in the commonwealth. And all must write and speak, all must read and study the books of their fellows, just as they always read and study the Bible separately and together. England is entering "a new and great period," Milton wrote with mounting excitement, "even to the reforming of [the] Reformation itself."³²⁵

³²² *Id.* at 492.

³²³ *Id.* at 493.

³²⁴ *Id.* at 550.

³²⁵ *Id.* at 553; LF, *supra* note 60, at 365. Detailed references on the need for a "second reformation" can be found in his early writings in 1 CPW, *supra* note 1, at 524–25, 535–36, 568–69, 601–02, 703–04, 707, 723, 795–99; LF, *supra* note 60, at 178–80.

Behold now this vast city; a city of refuge, the mansion house of liberty, encompassed and surrounded with his protection; the shop of war hath not there more anvils and hammers waking, to fashion out the plates and instruments of armed Justice in defense of beleaguered Truth, then there must be pens and heads there, sitting by their studious lamps, musing, searching, revolving new notions and ideas wherewith to present, as with their homage and their fealty the approaching Reformation: others as fast reading, trying all things, assenting to the force of reason and conviction. What could a man require from a nation so pliant and so prone to seek after knowledge. What wants there to such a towardly and pregnant soil, but wise and faithful laborers, to make a knowing people, a nation of prophets, of sages, and of worthies.³²⁶

This was Milton's ideal—a nation where each and every person is unstintingly engaged in the great struggle and debate between Truth and Falsehood in order to bring greater and better reformation to state and society. This great struggle will perforce feature “much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making.”³²⁷ But such factions and differences of opinion in the state and society should be celebrated, much as “schisms and sects” are celebrated in the church.³²⁸ Different private groups and opinions will sharpen and censor each other. Each will reflect new light from above, new angles on truth. So long as we all show “a little generous prudence, a little forbearance of one another, and some grain of charity,” we can all “unite into one general and brotherly search after Truth.”³²⁹ “[O]ut of the many moderate varieties and brotherly dissimilitudes that are not vastly disproportional arises the goodly and graceful symmetry that commends . . . great reformation.”³³⁰

Freedom of speech, of course, brings not only “goodly and graceful” speech but also, at times, evil and harmful speech.³³¹ Bad speech that rises to the level of blasphemy of God, treason against the state, or defamation of another person, Milton insisted, must be subject to “the sharpest justice” against the “malefactors.”³³² But none of this can and should be prejudged by

³²⁶ 2 CPW, *supra* note 1, at 553–54; *see also* LF, *supra* note 60, at 179–80; 3 CPW, *supra* note 1, at 496–97, 516, 533–37.

³²⁷ 2 CPW, *supra* note 1, at 554.

³²⁸ *Id.* at 550.

³²⁹ *Id.* at 554.

³³⁰ *Id.* at 555; *see also id.* at 550–51, 554–55.

³³¹ *Id.* at 555.

³³² *Id.* at 402.

a censor; let the reader make these judgments after the fact of publication. So many books—from the classics to modern day printings—have bad and good speech inextricably intermixed within them. Man is both sinner and saint (*simul iustus et peccator*), and his writings will invariably reflect both qualities. To censor a book is to deny human nature.³³³

To censor a book is also to deny the nature of human judgment. God created all of us as rational creatures, with a reason and conscience to choose a virtuous life and with a promise of eternal reward for those who make wise choices. Every person, from Adam and Eve forward, has been given “the knowledge of good and evil” and is confronted with sin and temptation.³³⁴ God, “though he command us temperance, justice, continence, yet powers out before us even to a profuseness all desirable things, and gives us minds that can wander beyond all limit and satiety. Why should we then affect a rigor contrary to the manner of God and of nature, by abridging or scanting those means, which books freely permitted are, both to the trial of virtue, and the exercise of truth.”³³⁵ Virtue can be better known and appreciated by seeing its opposite in vice. And the choice of a virtuous life is more genuine and praiseworthy when it is real and not artificial. “If every action which is good or evil in man at ripe years, were to be under pittance, and prescription, and compulsion, what were virtue but a name?”³³⁶ “I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary but slinks out of the race, where that immortal garland is to be run for, not without dust and heat. Assuredly, we bring not innocence into this world, we bring impurity much rather: that which purifies is trial, and trial is by what is contrary.”³³⁷

“Truth and understanding,” then, “are not such wares as to be monopolized and traded in by tickets and statutes, and standards” of licensers and censors.³³⁸ Truth comes through revelation not restriction, through persuasion not compulsion, through debate not declaration. Truth comes forth from the individual and collective judgments of each and every private Englishman, who discerns and discriminates for him or herself after hearing and reading all opinions on all sides. “A wise man, like a good refiner, can gather gold out of

³³³ *Id.* at 492, 517–21.

³³⁴ *Id.* at 514.

³³⁵ *Id.* at 528.

³³⁶ *Id.* at 527.

³³⁷ *Id.* at 515; *see also id.* at 514–17, 527–28.

³³⁸ *Id.* at 535.

the drossiest volume, and . . . a fool will be a fool with the best, yea, or without a book.”³³⁹ But most Englishmen are not fools. They are “a free and ingenuous sort of such as evidently were born to study, and love learning for itself, not for lucre, or any other end, but the service of God and of truth.”³⁴⁰ England is “a Nation not slow and dull, but of a quick, ingenious, and piercing spirit, acute to invent, subtle and sinewy to discourse, not beneath the reach of any point the highest that human capacity can soar to.”³⁴¹

Give Englishmen some real education and real intellectual exercise, said Milton. Let “all the Lord’s people . . . become prophets” and preachers, readers and teachers.³⁴² Let the people take up “the study of highest and most important matters to be reformed” by “disputing, reasoning, reading, inventing, discoursing, even to a rarity, and admiration, things not before discoursed or written of.”³⁴³ Give them freedom “to know, to utter, and to argue freely according to conscience, above all liberties.”³⁴⁴ Do all this, said Milton, and “I see in my mind a noble and puissant nation rousing herself like a strong man after sleep, and shaking her invincible locks: Me thinks I see her as an eagle muing her mighty youth, and kindling her undazzled eyes at the full midday beam; purging and unscaling her long abused sight at the foundation itself of heavenly radiance.”³⁴⁵

Part of the point of all this flowing rhetoric about freedom of speech was to prove just how powerful and edifying real free speech could be. Many of Milton’s fellow reformers in his day saw this point exactly, and echoed his views with power and eloquence. William Walwyn, John Goodwin, John Lilburne, Richard Overton, Henry Robinson, Henry Parker, John Robinson, and others offered variations on these arguments for freedom of speech in the 1640s and 1650s, as did an important Leveller petition to Parliament in 1648.³⁴⁶ All these arguments, with Milton’s the most eloquent among them, were important precedents for the eventual protections of freedom of speech

³³⁹ *Id.* at 521.

³⁴⁰ *Id.* at 531.

³⁴¹ *Id.* at 521; *see also* 1 CPW, *supra* note 1, at 125–27, 684–85, 690; 2 CPW, *supra* note 1, at 531, 535–36, 551.

³⁴² 2 CPW, *supra* note 1, at 556.

³⁴³ *Id.* at 557.

³⁴⁴ *Id.* at 560.

³⁴⁵ *Id.* at 557–58.

³⁴⁶ *See* 2–3 TRACTS ON THE PURITAN REVOLUTION, *supra* note 2 (providing sample tracts); LEVELLER MANIFESTOES, *supra* note 51, at 322–30; *see also* HALLER, *supra* note 24, at 146–49 (providing related analysis); Achinstein, *supra* note 51, 32–38.

and press set out in the English Bill of Rights of 1689, and eventually and more fully in American colonial charters and early republican constitutions as well.³⁴⁷

B. *Other Civil Freedoms*

Stripped of its ornate rhetoric, Milton's theory of freedom of speech was at heart his theory of freedom of religion writ large. Freedom of the religious and Spirit-filled conscience now became freedom of the rational and inquiring mind. The devout and faithful parishioner in the pew now became the good and solid citizen on the street. The prophet, priest, and king in the church now became the advocate, worshipper, and ruler in the state. The tolerated plurality of Scriptural interpretations and applications in private now became the open marketplace of true and false ideas competing in the public square. The second reformation of the church now became the second reformation of the commonwealth altogether.

Milton predicated his expanded vision of liberty on the same firm belief that God's truth would triumph once freed from human errors and controls. Just as "all the winds of doctrine were let loose to play upon the earth, so Truth be in the field," Milton wrote; "we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter. Her confuting is the best and surest suppressing. He who hears what praying there is for light and clearer knowledge to be sent down among us, would think of other matters to be constituted beyond the discipline of Geneva, framed and fabricated already to our hands."³⁴⁸ Here again was Milton's favorite theme: the Reformation must go on.

Milton's powerful vision of the place of the individual in society and the state could support many other civil liberties besides those of speech and press. Milton did not reflect upon other civil liberties with nearly the care and passion he devoted to freedom of speech. But here and there in his *Areopagatica*, and more often in his later writings, he ticked off other rights and liberties that followed naturally from his robust view of the individual. Many of these civil rights, too, which were more forcefully articulated by other Puritan pamphleteers in the day, eventually found their way into the 1689 English Bill of Rights and into the bills of rights of later American constitutions.

³⁴⁷ SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 23, at 599–605.

³⁴⁸ 2 CPW, *supra* note 1, at 561–62.

The most important of these were the right of the people to democratic election of political officials and the right to petition these officials once elected. What better place for the people to debate truth and falsehood, said Milton, than in the choice of those who should govern them and protect them in all their rights and liberties. Included in this right to democratic government was the right of the people, through their representatives, to consent to the taxes they paid and to consent to the wars fought and militaries marshaled on their behalf. Also included was the right to Parliamentary oversight of judges and courts to ensure they not become tyrannical or bastions of privilege. Included, finally, was the most fundamental right of the people—the right to dissent from, and if necessary to remove, politicians who no longer served or pleased them. “[T]he right of choosing, yea of changing their own government is by the grant of God himself in the people.”³⁴⁹

Other civil rights naturally followed from this most important right, Milton argued. One was the right to contract and associate with other private persons—not only in marriages and churches, as we have seen, but also in clubs, businesses, guilds, charities, societies, and other associations organized for political, economic, recreational, or other licit purposes. Another was the right of everyone to proper education and to accessible libraries and affordable books. Yet another important right was the right to jury trial in civil and criminal cases. Here, in the adversarial procedures of the courtroom, the great contests of truth and falsehood were fought out in miniature, with the stakes sometimes very high for the life, liberty, and property of the defendant. This right to be judged by a jury of one’s peers, Milton later said, was part of a broader right to a fair trial by “due liberty and proportioned equality”³⁵⁰ in a duly constituted court.³⁵¹

Milton acknowledged that other Puritans of his day had “defended civil freedom more freely” than he had and had spelled out many more essential

³⁴⁹ LF, *supra* note 60, at 63. See Milton’s further endorsement of democratic government and denunciations of hereditary monarchy in *id.* at 60, 70–71, 127–28, 135, 141–43, 148, 154–55, 163–64, 237–38, 244–46, 277, 287, 299–298, 307, 312, as well as his massive screed in *Eikonoklastes*, 3 CPW, *supra* note 1, at 335–601. For analysis of the limitations and reversions of Milton’s views of democracy and republicanism, see Thomas N. Corns, *Milton and the Characteristics of a Free Commonwealth*, in MILTON AND REPUBLICANISM, *supra* note 48, at 25–42; WOLFE, *supra* note 51, at 273–97, 325–36; and CHARLES R. GEISST, *THE POLITICAL THOUGHT OF JOHN MILTON* 71–86 (1984).

³⁵⁰ LF, *supra* note 60, at 422.

³⁵¹ See generally *id.* at 58–61, 79, 262–64, 277, 364–67, 400–12, 421–22, 439–42; 2 CPW, *supra* note 1, at 567–68; 7 CPW, *supra* note 1, at 305, 455–60.

civil rights with greater legal specificity.³⁵² He cited with approval the various proposals crafted by Lilburne, Walywn, Overton and other dissenters of his day to direct readers who wanted more detail.³⁵³ But Milton's real focus was the theology and anthropology of freedom. And his real wish was to impress on his readers "the weightier matters of the law" of liberty.³⁵⁴ The most important lesson for him was this:

that you should not be afraid to listen either to truth or falsehood, of whatever description that may be; but that you should listen the least of all to those, who never fancy that themselves are free, unless they deprive others of their freedom; who labor at nothing with so much zeal and earnestness, as to enchain not the bodies only, but the consciences of their brethren; and to introduce into church and state the worst of all tyrannies—the tyranny of their own misshapen customs and opinions. May you ever take part with those, who think it just, that not their own sect or faction alone, but all the citizens alike should have an equal right to be free. . . .

[Real] liberty be of that kind, which can neither be gotten, nor taken away by arms, and that alone is such, which, springing from piety, justice, temperance, in fine, real virtue, shall take deep root in your minds. . . . Unless by real and sincere devotion to God and man, not an idle and wordy, but an efficacious, an operative devotion, you drive from your minds superstition, which originates in an ignorance of true and substantial religion, you will not want [for] those who will sit upon your backs and upon necks, as if you were beasts of burden. . . . Unless you banish avarice, ambition, luxury, from your thoughts, and all excess even from families, the tyrant, whom you imagined was to be sought abroad, and in the field, you will find at home, you will find within.³⁵⁵

V. SUMMARY AND CONCLUSIONS

John Milton was a great Protestant reformer—a prolific scholar blessed with a longer life and a livelier pen than most of the other great reformers of early modern England. Unlike many others, Milton fought with his pen, not with his sword, and he suffered the ignominy of being mostly ignored in his day, rather than flogged, tortured, pilloried, or imprisoned like many of his

³⁵² LF, *supra* note 60, at 312.

³⁵³ See a good collection in *British Liberty, or the Free-Born Subject's Inheritance* (1766).

³⁵⁴ *Matthew* 23:23.

³⁵⁵ LF, *supra* note 60, at 407–09.

compatriots. Also unlike many others, Milton defied closely-guarded denominational labels—Puritan, Presbyterian, Leveller, Independent, Separatist, Brownist, Digger, Ranter, and other fine-grained variations on English Calvinism. Milton was more interested in finding truth than fighting turf wars over the theological and political niceties, as he saw them, that balkanized so much of his English Calvinist world.

This made Milton a controversial Calvinist in his own day, and he remains so in the eyes of many still today. Milton the poet has always been welcome in most Calvinist circles. With all those elegant verses on God and Satan, sin and grace, law and Gospel, heaven and hell: how could he not be welcome? Even hellfire-and-brimstone Calvinists have always found enough in *Paradise Lost* and *Paradise Regained* to give him a place in their pews, albeit usually near the left exit door. But Milton the prose writer, who is the main subject of this Article: that is a different matter. Yes, the Luther-like clatterings against Catholic superstition, the lovely panegyrics about the Bible, the passionate calls for a new Genevan-style reformation in England, and more have done much to commend Milton to many Calvinists. But even Milton's sympathetic readers, I among them, have always wondered about all that pugnacious and prolix prose—the hundreds of pages of brilliant and bare-fisted rhetoric raining down on all kinds of delicate subjects, the clever deconstructions and reversals of all kinds of settled texts and traditions, the huge piles of Bible verses and historical sources stacked so seductively to buttress all kinds of counterintuitive propositions—including no-fault divorce no less. For many Calvinist readers, all this has always looked a bit too suspicious. Such suspicions were underscored when Milton's massive unpublished *Christian Doctrine* came to light for the first time in 1825. For those who read this text closely, its many controversial passages put Milton not only on the far left bank of the Calvinist tradition, but sometimes squarely in the Arminian, Anabaptist, and even anarchist floodplains beyond. It seemed safer to sail him by and stick with steadier and sturdier seventeenth-century Calvinists like the Divines of Westminster.³⁵⁶

Whatever the merits of these general theological judgments about Milton's work, they are not apt judgments about his contributions to the Calvinist reformation of law, religion, and human rights. On this subject, Milton captured many of the best teachings of the Calvinist tradition better than many of his English peers, and he added several other teachings that would become

³⁵⁶ See Meland, *supra* note 47 (noting and analyzing the range of reactions to Milton).

critical to the development of modern rights doctrines on and in Calvinist terms. Milton distilled and instilled many of the best legal and political teachings that earlier Calvinist reformers had already laid out. These included teachings about human dignity and divine image-bearing, about natural law and the created order, about natural rights and Christian liberties, about subjective rights and social freedoms, about popular sovereignty and political covenants, about rule of law and constitutional order, about political tyranny and the right to resist. On these themes and others, Milton was mostly a faithful and forceful summarizer of the best of the Calvinist tradition. And he cited repeatedly, and with genuine admiration, the texts on point of the great reformers—Calvin and Bucer, Beza and Hotman, Ponet and Goodman, Knox and Buchanan.

In devising his own reformation of rights, Milton seized on what he thought to be the reformers' most important lesson—namely, that the Reformation must always go on. England must not idolize or idealize any Protestant formulations, Milton insisted, even Calvin's. It must develop and deepen, apply and amend them in a continuous effort to reform church, state, and society anew. There can be "no excuse of our delay [in] reforming," Milton wrote already in 1642.³⁵⁷ Milton further seized on what he thought to be a cardinal teaching of Calvinism—namely, that God calls each and every mature person to be a prophet, priest, and king, with natural rights and duties to speak, worship, and rule in church and state, family and society at once. For Milton, the driving forces of England's perpetual reformation, therefore, were not only clerics or magistrates, scholars or aristocrats. The reformers were just as much the commoners and householders, craftsmen and farmers of every peaceable type. Every person was created by God with the freedom of conscience, reason, and will. Every person was called by God to discharge both their private Christian vocations and their public social responsibilities in expression of their love of God, neighbor, and self. This was a form of Christian populism and popular sovereignty that the Calvinist tradition had not put quite so strongly before.

Milton extended traditional Calvinist teachings in defining the religious, domestic, and civil rights and liberties that each person must enjoy in discharging these offices of prophet, priest, and king. Among religious liberties, he defended liberty of conscience, freedom of religious exercise, worship, association, and publication, equality of multiple biblical faiths before

³⁵⁷ 1 CPW, *supra* note 1, at 795.

the law, separation of church and state, and disestablishment of a national religion. Among domestic liberties, he stressed urgently the right to marry and divorce in accordance with the explicit teachings of Scripture alone as he understood it. He also mentioned attendant rights to nurture, discipline, and educate one's children and to have one's private home free from unwanted searches and seizures of private papers and possessions. Among civil liberties, he offered a brilliant defense of the freedoms of speech and press, while also defending the rights to democratic election, representation, petition, and dissent, as well as the rights to private association and to jury trial. He also endorsed warmly many of the more detailed and expansive rights proposals of the Puritan pamphleteers.

Few of these reforms came to lasting constitutional expression in Milton's day, despite some innovative Parliamentary legislation in the later 1640s. Oliver Cromwell's Protectorate government reversed many of these reforms after 1653, and the Restoration government rejected virtually all of them in 1660. But the Puritan reform pamphlets of the mid-seventeenth century, so elegantly synthesized by Milton, provided a fertile seedbed for the growth of rights and liberties in the common law tradition. In the generation after Milton, the Bill of Rights (1689) and Toleration Act (1689), born of the Glorious Revolution, guaranteed at least a measure of the rights of speech, press, religion, and jury trial that he and others had championed, and these guarantees were strengthened by later Parliamentary legislation. In crafting these reform measures, leaders of the Glorious Revolution looked to Milton and to other Puritan revolutionaries for inspiration.

Even when he was not directly cited or quoted, Milton's ideas of liberty were pervasive, in the air. This was true not just of his famous paean to free speech in the *Areopagitica*, which became a new Ur text in the common law canon of freedom and was endlessly cited. Another striking example of Milton's indirect influence can be seen in John Locke's *Letter Concerning Toleration* (1689), a document which would have a monumental influence on American founders like Thomas Jefferson.³⁵⁸ Many of Locke's arguments for religious liberty in this letter track closely those made by Milton already in the 1640s and 1650s.³⁵⁹ Like Milton, Locke aimed to convince the English church

³⁵⁸ Sanford Kessler, *Locke's Influence on Jefferson's "Bill for Establishing Religious Freedom,"* 25 J. CHURCH & STATE 231 (1983).

³⁵⁹ See Winthrop S. Hudson, *John Locke: Heir of Puritan Political Theorists*, in CALVINISM AND THE POLITICAL ORDER 108–29 (George L. Hunt ed., 1965); JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF JOHN LOCKE'S POLITICAL THOUGHT* (2002).

and state of his day to sever their corrosive alliances and to cease their corrupt abridgments of the liberty of conscience.³⁶⁰ “[A]bove all things,” Locke pleaded, it is “necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other.”³⁶¹ The church, Locke wrote, must be “absolutely separate and distinct from the commonwealth.”³⁶² For the church is simply “a voluntary society of men, joining themselves together of their own accord in order to the public worshipping of God, in such manner as they judge acceptable to Him, and effectual to the salvation of their souls.”³⁶³ Church members are free to enter and free to exit this society. They are free to determine its order and organization and arrange its discipline and worship in a manner they consider most conducive to eternal life. “Nothing ought, nor can be transacted in this society, relating to the possession of civil and worldly goods. No force is to be made use of upon any occasion whatsoever: for force belongs wholly to the civil magistrate.”³⁶⁴

State force, in turn, cannot touch religion, Locke argued. The state exists merely to protect persons in their outward lives, in their enjoyment of life, liberty, and property. “True and saving religion consists in the inward persuasion of the mind,” which only God can touch and tend.³⁶⁵ A person cannot be compelled to true belief of anything by outward force—whether through “confiscation of estate, imprisonments, [or] torments” or through mandatory compliance with “articles of faith or forms of worship” established by law. “For laws are of no force without penalties, and penalties in this case are absolutely impertinent, because they are not proper to convince the mind.”³⁶⁶ “It is only light and evidence that can work a change in men’s [religious] opinions: which light can in no manner proceed from corporal sufferings, or any other outward penalties” inflicted by the state. Every person “has the supreme and absolute authority of judging for himself” in matters of faith.³⁶⁷ But not all are welcome to act on their judgments: Catholics, Muslims, and other believers “who deliver themselves up to the service and

³⁶⁰ John Locke, *Letter Concerning Toleration* (1689), in 5 THE WORKS OF JOHN LOCKE 1–58 (12th ed. 1824). Locke wrote two subsequent such letters and had a fragment of a fourth letter underway on his death in 1704. It was the first letter of 1689 that was best known in America.

³⁶¹ *Id.* at 9.

³⁶² *Id.* at 21.

³⁶³ *Id.* at 13.

³⁶⁴ *Id.* at 16.

³⁶⁵ *Id.* at 11.

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 41.

protection of another prince,” wrote Locke, have no place in this community. Moreover, “those are not at all tolerated who deny the being of a God”—for “promises, covenants, and oaths which are the bonds of human society, can have no hold upon an atheist.”³⁶⁸ Every one of these justly famous statements of Locke could have been written by Milton.

Not only later English reformers but also American colonists and later American revolutionaries looked to Milton for inspiration and instruction in their construction of American rights and liberties. In colonial New England, Milton’s ideas of religious and civil liberty helped to liberalize and pluralize the earlier Congregationalist establishments, and some of his writings became standard fare for students at Harvard, Yale, and Princeton in the eighteenth century.³⁶⁹ Both during the American Revolution of 1776 and during the construction of state and federal constitutions over the next twenty-five years, American founders as diverse as John Adams, Thomas Jefferson, James Madison, Thomas Paine, and James Otis cited Milton with reverence and echoed his political writings—most notably his caustic attack on “Constantinian” constructions of church and state, his praise of orderly pluralism and competing factions, and his defense of revolution against royal tyranny.³⁷⁰ As John Adams put it in 1776, John Milton was “as honest a man as his nation ever bred, and as great a friend of liberty” that the common law tradition has seen.³⁷¹

³⁶⁸ *Id.* at 11, 41, 47.

³⁶⁹ See PURITAN POLITICAL IDEAS 1558–1794, at 276 (Edmund S. Morgan ed., Hackett Publ’g 2003) (1965).

³⁷⁰ Tony Davies, *Borrowed Language: Milton, Jefferson, Mirabeau*, in MILTON AND REPUBLICANISM, *supra* note 48, at 254–71.

³⁷¹ John Adams, *Thoughts Upon Government*, in 4 JOHN ADAMS, THE WORKS OF JOHN ADAMS 466 (J.F. Adams ed., 1850–1856); see also 1 *id.* at 463; 2 *id.* at 14; 9 *id.* at 354 (providing Adams’s panegyrics on Milton’s genius). But Adams denounced Milton’s retreat to rule by an oligarchic national Council in his later life. See 4 *id.* at 464–66; *id.* at 120.