

265 MFL

Draft

Published as "Response to Reviewers of John Witte, Jr., *Church, State, and Family: Reconciling Traditional Teachings and Modern Liberties*," *Journal of Law and Religion* 34 (2019): 520-528

## Response to Reviewers

John Witte, Jr.

### Abstract

*This article responds to Mark Jordan, Brian Bix, Michael Broyde, Robin Fretwell Wilson and Jonathan Chaplin who offered learned reviews of my volume, Church, State, and Family: Reconciling Traditional Teachings and Modern Liberties (Cambridge University Press, 2019). This volume marshals historical, philosophical, jurisprudential, theological, and social science arguments to defend the fundamental place of the marital family in modern liberal societies. While applauding modern sexual freedoms as a welcome relief from traditional forms of patriarchy, paternalism, and plain prudishness, it also defends the traditional Western teaching that the marital family is an essential cradle of conscience, chrysalis of care, and cornerstone of ordered liberty. The volume thus urges churches, states, and other social institutions to protect and promote the monogamous marital family, including same-sex families. It encourages reticent churches to embrace the rights of women and children, as earlier Christian writers taught. It encourages modern states to promote responsible sexual freedom and stable family relations, as classical liberals in Europe and North America repeatedly said. It counsels modern churches and states to share somewhat in family law governance, and to resist recent efforts to privatize, abolish, flatten, or radically expand the marital family sphere. And the volume invites fellow citizens to get over their bitter battles concerning same-sex marriage and tend to the vast family field that urgently needs concerted attention and action. The five reviewers generously condone the main argument of the book, while offering interesting caveats and elaborations.*

**Keywords:** Marriage, family, children, natural law, natural rights, children's rights, religious arbitration, private ordering, political theory, church-state relations

I am deeply grateful for these probing reviews of my *Church, State, and Family* volume, and much relieved to have survived the strict scrutiny of these five impressive scholars. My deep thanks to my editorial colleagues on the *Journal of Law and Religion*, notably M. Christian Green and Silas Allard, for all their efforts in assembling this book review symposium.

I work mostly as a legal historian, and have been writing on law, religion, and family themes, among others, since the mid-1980s.<sup>1</sup> This hefty new volume, subtitled *Reconciling Traditional Teachings and Modern Liberties*, is my final major work on these themes.<sup>2</sup> It marshals historical, philosophical, jurisprudential, theological, and social science arguments to defend the fundamental place of the marital family in modern liberal societies. While applauding modern sexual freedoms as a welcome relief from traditional forms of patriarchy, paternalism, and plain prudishness, it also defends the traditional Western teaching that the marital family is an essential cradle of conscience, chrysalis of care, and cornerstone of ordered liberty.

The volume thus urges churches, states, and other social institutions to protect and promote the monogamous marital family, including same-sex families. It encourages reticent churches to embrace the rights of women and children, as earlier Christian writers taught. It encourages modern states to promote responsible sexual freedom and stable family relations, as classical liberals in Europe and North America repeatedly said. It counsels modern churches and states to share somewhat in family law governance, and to resist recent efforts to privatize, abolish, flatten, or radically expand the marital family sphere. And the volume invites fellow citizens to get over their bitter battles concerning same-sex marriage and tend to the vast family field that urgently needs concerted attention and action.

Chapters 1-6 sample some of the traditional Western teachings about sex, marriage, and family life offered by Chrysostom and Augustine, Aquinas and Vitoria, Luther and Calvin, and a wide array of Enlightenment philosophers and jurists whose views, built in part on Hebraic, Greek, and Roman sources, helped to shape Western family law. Chapter 7 reconstructs these traditional teaching into a multidimensional theory of the marital family, presenting it as a sphere or globe with natural and spiritual poles, and with social, economic, communicative, and contractual dimensions radiating between these poles. The next five chapters use this multi-dimensional theory of the marital family to parse several hard issues born of the modern sexual revolution – on the rights of children, born and unborn, including non-marital children; on new forms of marriage and new forums of family governance and dispute resolution; and on the place of faith-based family laws in modern democracies. I try to situate these hard issues within the tradition and to find meaningful ways to reconstruct traditional teachings in light of these new challenges and opportunities. After addressing critically the modern social drift away from marriage, and the overt arguments by some scholars to

---

<sup>1</sup> My first article in the field was John Witte, Jr., *The Reformation of Marriage Law in Martin Luther's Germany: Its Significance Then and Now*, 4 *Journal of Law and Religion* (1987): 293-351. My main monographs on point since are JOHN WITTE, JR. FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION AND LAW IN THE WESTERN TRADITION (1997; 2d ed. 2012); JOHN WITTE, JR., GOD'S JOUST, GOD'S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION 295-449 (2006); JOHN WITTE, JR., THE SINS OF THE FATHERS: THE LAW AND THEOLOGY OF ILLEGITIMACY RECONSIDERED (2009); JOHN WITTE, JR. AND ROBERT M. KINGDON, SEX, MARRIAGE AND FAMILY IN JOHN CALVIN'S GENEVA (2005); and JOHN WITTE, JR., THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY (2015). There are also several anthologies and several dozen articles. See <https://www.johnwittejr.com/>

<sup>2</sup> Forthcoming still is JOHN WITTE, JR. AND ROBERT M. KINGDON, *SEX, MARRIAGE AND FAMILY IN JOHN CALVIN'S GENEVA 2: THE CHRISTIAN HOUSEHOLD*.

disestablish or abolish the marital family altogether, I call for the reintegration of church, state, and family, and the reintegration of sex, marriage, and family life in a manner consistent with modern constitutional liberties.

Four of the five reviewers focus on a single chapter that lies at the center of their expertise, and in each case their review adds keen insights to the themes of that chapter. Mark Jordan, a brilliant scholar of religion and sexuality,<sup>3</sup> as well as of Thomas Aquinas and medieval scholasticism,<sup>4</sup> takes up Chapter 2. That chapter analyzes Thomas Aquinas's theory of marriage as both an "office of nature and a sacrament of the church," and the echoes and elaborations of these teachings in neo-Thomist circles in early modern Salamanca. Aquinas argued that our perennial sex drives, long dependent children, and need for paternal certainty and investment have naturally inclined rational humans to develop enduring and exclusive monogamous marriages as the best means of reproduction. Such marriages provide at once for sexual exchange, parental certainty, and joint parental investment in children. These natural conditions have also inclined rational rulers to outlaw fornication, seduction, rape, adultery, polygamy, concubinage, prostitution, and easy divorce, for each such act risks harm to women and children, erodes paternal certainty and parental investment, and dilutes family resources. Neo-Thomists like Francisco Vitoria recast these offenses as abridgements of the natural rights and duties of spouses, parents, and children within the family and society. And Vitoria joined Aquinas in arguing that, for Christians, marriage was also a sacrament, which elevated the natural goods of procreation and marital fidelity into a divine act, modeled on the creative, sacrificial, and faithful acts of God toward humanity and the church. The natural dimensions of the marital family were governed by state law; its sacramental dimensions by church law.

In his review essay, Professor Jordan does a much better job than I in describing the rather anomalous patchwork of Thomistic texts on point. He identifies the different sources, rhetorics, audiences, and methods at work in Aquinas's biblical commentaries, philosophical disquisitions, theological syntheses, critical apologetics, and ethical instructions on sex, marriage, and family life. My appetite to systematize Aquinas's teachings glosses over this textual complexity and underestimates the post hoc work of Thomas's editors. Jordan shows astutely how Thomas' definition of law – as rationally-accessible norms, ordered by reason, directed to the common good, and promulgated by one who has care for the community – encompasses both the universal law of nature

---

<sup>3</sup> See esp. MARK D. JORDAN, *THE INVENTION OF SODOMY IN CHRISTIAN THEOLOGY* (1997); MARK D. JORDAN, *THE SILENCE OF SODOM: HOMOSEXUALITY IN MODERN CATHOLICISM* (2000); MARK D. JORDAN, *THE ETHICS OF SEX* (2001); MARK D. JORDAN, *BLESSING SAME-SEX UNIONS: THE PERILS OF QUEER ROMANCE AND THE CONFUSIONS OF CHRISTIAN MARRIAGE* (2005); MARK D. JORDAN, *TELLING TRUTHS IN CHURCH: SCANDAL, FLESH, AND CHRISTIAN SPEECH* (2005); *AUTHORIZING MARRIAGE: CANON, TRADITION, AND CRITIQUE IN THE BLESSING OF SAME-SEX UNIONS* (Mark D. Jordan, Mark D., Meghan T. Sweeney, and David M. Mellon, eds. 2006).

<sup>4</sup> See, e.g., MARK D. JORDAN, *THE CARE OF SOULS AND THE RHETORIC OF MORAL TEACHINGS IN BONAVENTURE AND AQUINAS* (1993); MARK D. JORDAN, *ORDERING WISDOM: THE HIERARCHY OF PHILOSOPHICAL DISCOURSES IN AQUINAS* (1996); MARK D. JORDAN, *TEACHING BODIES: MORAL FORMATION IN THE SUMMA OF THOMAS AQUINAS* (2017).

and the “New Law of the Gospel.”<sup>5</sup> That keen insight underscores the reality that Thomas’ accounts of the “natural” and “sacramental” dimensions of marriage are more analogous, even continuous, than we often realize, even if they sometimes yield different norms for temporal and spiritual life. Jordan points to the growing dissonance between Thomas’ natural law theory – bolstered by a framework of eternal law, divine law, positive law, customary law, and more – and those of his subsequent interpreters, who often used “natural law arguments” capaciously to press claims that are often better grounded in and argued from other sources. And Jordan nicely confirms that, for Thomas, natural instincts and inclinations about sex, marriage, and family life provide only a “wobbly foundation” for human families; they need the stabilizing influence of other institutions and laws to be effective. Even if “wobbly,” however, these natural human inclinations toward enduring and exclusive pair-bonding strategies of reproduction remained starting premises for later Catholic, Protestant, and Enlightenment teachings about the marital family into the early twentieth century. And these views are now echoed not only by some modern theologians and ethicists, but also by some social scientists and primatologists. The latter describe these natural inclinations as the evolved “deep structure” of survival and reproductive success of our species.<sup>6</sup>

As Professor Jordan recounts from experiences in his own Harvard classroom, arguments from nature and natural law are often dismissed today as old-fashioned, statist, essentialist, artificial, dogmatic, manipulative, or out of touch with evolutionary, epistemological, or political realities. Moreover, the “nature” of human sexuality and gender is now the subject of intense debate and legal dispute in some Western circles and media, making appeals to human nature and natural law doubly suspect for some. While I am sympathetic with some of these criticisms and movements, natural-law theories have been a staple of the Western legal tradition for two and a half millennia, and we would do well to exercise a bit of epistemic humility before dismissing such theories out of hand. Moreover, the basic facts of human nature and sexual reproduction have not changed much for most people. Most humans are still social creatures who crave stable and exclusive intimate relationships over time. Most people still identify as male or female and are attracted to the opposite sex. Most humans still have perennial sex drives -- especially when they are younger and most fertile. Human babies are still born remarkably small and fragile and remain heavily dependent on adults for a very long time. Women usually still bond with their children more readily than do men—unless a man is certain he is the father. And humans still decline in health as they age and become dependent anew on others in their twilight years. These natural conditions of human life and sexuality need to be heeded and addressed in any Western system of family law, even while we now recognize, protect, and in some quarters celebrate new expressions of LGBTQ identity and gender fluidity.

---

<sup>5</sup> Mark D. Jordan, *Pedagogies of Natural Law*, *Journal of Law and Religion* \_\_, \_\_ (2019).

<sup>6</sup> Quoted and discussed in BERNARD CHAPAIS, *PRIMEVAL KINSHIP: HOW PAIR-BONDING GAVE BIRTH TO HUMAN SOCIETY* 10–11, 194 (2008).

Robin Fretwell Wilson is a courageous American family law scholar who has done much to bridge the cultural, political, and academic divides over same-sex marriage and religious liberty.<sup>7</sup> She offers a searching appraisal of Chapter 8, which reviews and evaluates the main arguments against the United Nations Convention on the Rights of the Child (CRC) put forth by selected American Christians. These critics' main arguments are that (1) children, as such, do not have rights; (2) children's rights, even if they exist, are best enforced by local, not international law; and (3) children's rights, as currently defined, inevitably threaten parental rights and religious liberty. While taking these objections seriously, and recommending revisions and qualifications in light of them, I argue that, on balance, the CRC is worth ratifying especially if it is read in light of the pro-family ethic that informs it and many earlier human rights instruments. More fundamentally, I argue that the CRC captures some of the very best traditional Western legal and theological teachings on marriage, family, and children, including a long tradition of children's rights protections that goes back to biblical sources.

While concurring in my argument for children's rights against various Christian critics, Professor Wilson zeroes in on these critics' worries that protecting children's rights will erode parental authority and autonomy. In my chapter, I argued -- rather naïvely, it turns out -- that privileging a child's rights to life, health, safety, and welfare over a parent's authority should be the norm in the event of conflicts, but parental authority should trump for lower-flying conflicts between parent and child at least until a child reaches mid-teens and can start to exercise independent agency. That is the norm in most Western family law systems today. And that is consistent with the child-protective holdings of several United States Supreme Court cases that I knew something about from other work -- *Prince v. Massachusetts* (1944), a staple of American religious freedom case law,<sup>8</sup> and *Levy v. Louisiana* (1968), the first of a series of pathbreaking cases protecting the rights of non-marital children, who had long been pariahs in the West.<sup>9</sup> Yes, I knew a bit about anti-vaccination, faith-healing, and snake-handling cases, but always took them to be esoteric anomalies of fringe religious groups.

I was dismayed to learn how wrong this is. As Professor Wilson clearly documents, here and elsewhere,<sup>10</sup> the very same "state's rights" arguments that

---

<sup>7</sup> RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF FAMILY DISSOLUTION (Robin F. Wilson, ed. 2006); SAME SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello, and Robin F. Wilson eds., 2008); THE CONTESTED PLACE OF RELIGION IN FAMILY LAW (Robin F. Wilson, ed., 2018); RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND (Robin F. Wilson and William F. Eskridge eds., 2019).

<sup>8</sup> 321 U.S. 159 (1944); see further JOHN WITTE, JR. AND JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 135 (4<sup>TH</sup> ED. 2016).

<sup>9</sup> 391 U.S. 69 (1968); see further JOHN WITTE, JR., THE SINS OF THE FATHERS: THE LAW AND THEOLOGY OF ILLEGITIMACY RECONSIDERED 157-60 (2008).

<sup>10</sup> See sources and discussion in Robin Fretwell Wilson and Shaakirrah Sanders, *By Faith Alone: When Religion and Child Welfare Collide*, in THE CONTESTED PLACE OF RELIGION, *supra* note \_\_, at 308-46. See also her related concerns about the abuses of autonomous religious family law systems in Robin Fretwell Wilson, *The Perils of Privatized Marriage*, in MARRIAGE AND DIVORCE IN A MULTI-CULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION 253-83 (Joel A. Nichols, ed., 2012).

Christian federalists have mounted to object to ratification of the CRC have also been used to convert states into “laboratories” of parental abuse of children by some religious parents. Not only are the anti-vaccination and faith-healing cases more common than I thought – yielding scores of preventable children’s deaths per year and fresh outbreaks of old diseases among other innocent children. But American states provide sweeping protections for religious parents whose refusal to provide vital health care would otherwise have them prosecuted for battery, child abuse, (attempted) homicide, and more. Moreover, Wilson shows, all but six American states still protect the rights of religious parents – and sometimes religious teachers and guardians as well – to administer stern corporal punishment against minor children. Many states give unconscionably broad powers to parents to apply “the rod” to their children with startling severity and often with legal impunity. I am grateful, but deeply sobered, to learn all this. Professor Wilson’s account of “America’s commitment to family law isolationism”<sup>11</sup> at the cost of children’s rights makes the case for CRC ratification all the more morally imperative, even if more politically implausible.

As a lawyer, Christian, and father, I simply do not understand this insistence on the right of parents to administer severe corporal discipline to their children. If the law prohibits you from striking a fellow adult with impunity, even though that adult person is capable of self-defense, escape, and private redress, why should an adult be able to strike a child with impunity, especially when many children cannot defend themselves, leave, or turn to others for help? Moreover, mounting social-science data show that even light corporal discipline is largely ineffective for a child’s physical, mental, spiritual, moral, and social development. More aggressive forms of corporal discipline are deleterious to a child’s development and sometimes tempting to harried parents, guardians, and teachers struggling with unruly or unduly recalcitrant children.<sup>12</sup> I read passages like “spare the rod, spoil the child”<sup>13</sup> as prudential proverbs from the ancient world of the Hebrew Bible, not enduring commands of the Christian Gospel for modern Christians. Nowhere does the New Testament enjoin Christians to administer corporal discipline to their children, even though such actions were commonplace in the muscular patriarchal households of the first-century Mediterranean world when the Gospels were compiled. I find it encouraging that a growing number of Christian churches and theologians now urge Christian parents to provide firm and loving nurture and appropriate discipline of children, but without corporal punishment.<sup>14</sup>

Michael J. Broyde has pioneered the development of religious arbitration as a vital form of dispute resolution among co-religionists averse to suing each other in

---

<sup>11</sup> Robin Fretwell Wilson, *Family Law Isolationism and “Church, State, and Family”* \_\_ JOURNAL OF LAW AND RELIGION \_\_, (2019).

<sup>12</sup> For a recent summary of this large literature, see Bernadette Saunders, *Ending the Physical Punishment of Children in the English-Speaking World: The Impact of Language, Tradition, and Law*, in *The Future of Children’s Rights* 151–77 (Michael D. A. Freeman, ed., 2014).

<sup>13</sup> This common aphorism is based on Proverbs 13:24: “He who spares the rod hates his son, but he who loves him is diligent to discipline him” (RSV).

<sup>14</sup> See, e.g., sources and discussion in KATHLEEN MARSHALL AND P.M. PARVIS, *HONOURING CHILDREN: THE HUMAN RIGHTS OF THE CHILD IN CHRISTIAN PERSPECTIVE* (2004).

secular courts. He helped transform the Bet Din in New York into a sophisticated legal tribunal with enviable expertise in both Jewish and secular law. He has generously advised Muslim, Christian, and other religious and cultural communities on how to develop comparably sophisticated forms and forums of religious arbitration. And he has cogently defended the constitutional and cultural place of this and other religious forms of alternative dispute resolution in modern liberal societies dedicated to religious freedom. His 2017 Oxford University Press title, *Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West*, is now the standard text in this field.<sup>15</sup>

Professor Broyde addresses Chapter 10 of *Church, State, and Family*, which draws in part on his work and on our joint family projects in law and religion over the past two decades. This chapter analyses the recent campaign to give religious families the right to choose traditional religious laws instead of liberal state family laws to govern their households. While religious ethics and religious family laws are welcome within churches, I argue, they cannot supplant the state's most basic family laws. That risks the creation of rival political sovereigns, underestimates the need for coercive power that the Western liberal state uniquely wields to enforce any law, and leaves too many political decisions about family status to non-democratically accountable authorities. Religious officials should have the religious freedom to play roles in marital formation, family and childcare, education and social welfare, and marital and family dissolution for voluntary members who wish to use their services. Religious individuals should have the religious right to marry in a religious wedding, to educate children in religious settings, and to use faith-based tribunals to resolve some of their family disputes. But any exercise of religious authority and law in marriage and family life must be done without coercion. And the modern democratic state must still license religious teachers as well as family mediators and arbitrators to ensure they meet minimal constitutional conditions of procedural due process.

Professor Broyde's review focuses on this very last point. He defends faith-based family arbitration, and offers valuable guidelines for success beyond simple adherence to the American Arbitration Act and its regulations. Religious arbitration tribunals, he argues, need to have clean and uniform procedures; clear appellate options; clear choice of law provisions between secular and religious legal regimes; studied practicality and realism born of careful attention to both religious and secular demands on the parties; and arbitrators who are trained in both secular and religious law and have high standing in the religious community of the disputants. Professor Broyde predicts that the kinds of faith-based arbitration that he pioneered for Orthodox Jews in America will likely become more attractive to Christian churches, too, as Western family law becomes increasingly secularized, and churches slip into minority status and lose more of their political clout. Broyde also predicts that as religious arbitration grows, political opposition will grow, too. He thus pushes the case for faith-based arbitration not just on self-serving religious freedom grounds, but with arguments that such

---

<sup>15</sup> See also a nice summary and update in Michael J. Broyde, *Faith-Based Arbitration Evaluated: The Policy Arguments for and against Religious Arbitration in America*, 33 JOURNAL OF LAW AND RELIGION 340-89 (2018).

alternative forms of dispute resolution are good for the state, society, and family. I am no expert on faith-based family laws or religious arbitration, but I find Professor Broyde's arguments and predictions compelling and congenial, and I built on them in constructing chapter 10.

Brian Bix is a prodigious scholar of family law and legal theory, whose marvelous work first alerted me to "The Dangers of Private Ordering" as Chapter 11 is titled.<sup>16</sup> That chapter argues against selected modern family law scholars who call for the abolition or disestablishment of the marital family in favor of the state providing primary support for mothers, children, and other vulnerable parties. Such ideas, while intermittently proposed by great scholars from Plato to Martha Fineman, have also been repeatedly rejected by classical, Christian, and modern liberal writers alike. These ideas risk too much state power, encourage too much non-marital procreation, yield too much sexual predation of the poor and weak, and imperil the rights of children to the care, nurture, and education of both their mother and father. The state should certainly protect and help provide support for the needy and vulnerable, I argue. But it is too dangerous to have the modern state displace families, religious communities, and other voluntary associations in the primary nurture, care, and education of children and other dependents. In the past century alone, the democratic West has seen the rise and fall of fascism and communism, the growing debt and bankruptcy of state governments, and wild shifts in governmental policies and priorities concerning the family. This should be warning enough that, even in the modern affluent democratic West, the state must only supplement not supplant the pro-family work of other social institutions.

Fair enough, says Professor Bix, who is equally unpersuaded by arguments for the abolition of the legal institution of marriage. But, Bix continues, my chapter does not take enough account of the many milder forms of private ordering that have far more currency among family law scholars and practitioners. By focusing on extreme forms of disestablishment and abolition of marriage pressed by a few of the edgiest scholars, I have failed to appreciate the values and attractiveness of private ordering "at the margins" – through premarital arrangements, open adoption agreements, co-parenting arrangements, marital property agreements, and the like.<sup>17</sup> Why not let parties, who are willing and able, make such adjustments for themselves, Bix argues, or at least be made aware of the choices available to them beyond the state's default rules? Since I insist that the contractual dimension of marriage should be maintained for the sake of the couple and the local community, why not give marital parties more freedom to contract if and as they are capable in accordance with local communal standards? Since I am sympathetic to well-regulated private resolution of family disputes and dissolution, why not be equally sympathetic to "private ordering" of family formation, too,

---

<sup>16</sup> See, e.g., Brian H. Bix, *Private Ordering and Family Law*, 23 JOURNAL OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS 249-85 (2010); Brian H. Bix, *Pluralism and Decentralization in Marriage Regulation*, in MARRIAGE AND DIVORCE IN A MULTI-CULTURAL CONTEXT, *supra* note \_\_, at 60-77; Brian H. Bix, *Agreements in American Family*, 4 INTERNATIONAL JOURNAL OF THE JURISPRUDENCE OF THE FAMILY 115- \_\_ (2013); Brian H. Bix, *Marriage Agreements and Religion*, 2016 UNIVERSITY OF ILLINOIS LAW REVIEW 1665-78 (2016).

<sup>17</sup> Brian H. Bix, *Default Rules and Private Alterations*, \_\_ JOURNAL OF LAW AND RELIGION \_\_, \_\_ (2019).

with these same safeguards? Since I support social, religious, and structural pluralism, why not countenance some contractual pluralism here, too, Professor Bix argues? And indeed, why not go a step further, à la Professor Broyde, and give religious communities more of a hand in these private family formation steps, too? As the state's marriage and family laws get ever thinner, these private (religious) arrangements for family formation, maintenance, and dissolution will likely increase, Bix predicts, de facto if not de jure.

Touché! Like Professors Wilson and Broyde, Professor Bix addresses nuances of contemporary American family law practice that lie largely beyond my ken as a legal historian. Bix persuades me that the real worry is not so much about "private ordering" of family life and law, but about "abolition" or "disestablishment" of the family as a legal institution. The two should not be so readily conflated, nor should arguments against the abolition of marriage be so easily extended to private ordering altogether. Bix further persuades me that the experiments I lift up in the volume on covenant marriage and Jewish divorce are but two of many examples of "private ordering" at work today, and they can be more constructive than my critique allows. And he persuades me that my general appetite for pluralism and the valuable role of non-state associations in legal life should make me more sympathetic to these creative privatized forms of both family formation and family dissolution. I still worry a lot, with Professor Wilson, about giving religious communities too much legal power and autonomy over this multidimensional institution of the family. The massive clerical pedophilia scandals, the #MeToo movement, the shocking victim testimonies in recent sex abuse cases, and more underscore anew for me the dangers of sexual abuse in insular settings, whether sanctuaries, locker rooms, celebrity homes, or movie sets.<sup>18</sup> And I still worry that theories of marital pluralism and privatization that are not well grounded ontologically – in the created or natural order or something comparable -- can devolve into a kind of "personal federalism"<sup>19</sup> in family life that risks destruction of the institution. But Professor Bix's caveats and correctives are well taken.

Cambridge scholar Jonathan Chaplin is a leading Protestant political theorist, steeped in the same Reformed (or Calvinist) tradition in which I was raised. This tradition embraces ordered liberty, structural pluralism, covenant fidelity, constitutional democracy, human rights, rule of law, and the need for public and private religious reasoning about fundamentals.<sup>20</sup> Historically, this tradition helped to shape many political and legal ideas and institutions that we now take for granted in the liberal

---

<sup>18</sup> See discussion of sexual child abuse by priests and teachers in John Witte, Jr. *Church, State, and Sex Crimes: What Place for Traditional Sexual Morality in Modern Liberal Societies?* 68 EMORY LAW JOURNAL 837, 842-44, 863-65 (2019).

<sup>19</sup> The term is from Jean-François Gaudreault-DesBiens, *Religious Courts, Personal Federalism, and Legal Transplants*, in SHARI'A IN THE WEST 159-80 (Rex Ahdar and Nicholas Aroney 2010).

<sup>20</sup> See esp. JONATHAN CHAPLIN, HERMAN DOOYEWEERD: CHRISTIAN PHILOSOPHER OF STATE AND CIVIL SOCIETY (2016); JONATHAN CHAPLIN, GOD AND THE EU: FAITH IN THE EUROPEAN PROJECT (2016); JONATHAN CHAPLIN, GOD AND THE GLOBAL ORDER (2010); JONATHAN CHAPLIN, TALKING GOD: THE LEGITIMACY OF RELIGIOUS PUBLIC REASONING (2008); POLITICS AND CHRISTIAN VISION: ESSAYS IN MEMORY OF BERNARD ZYLSTRA (Jonathan Chaplin, ed., 1994).

West.<sup>21</sup> Scholars in this intellectual tradition are also known for their close reading of texts and keen discernment of the values and beliefs – “worldviews” as they sometimes put it -- that animate these texts. Professor Chaplin exemplifies the best of this intellectual and forensic tradition in his brilliant review of *Church, State, and Family* that cuts across several chapters and draws connections that I failed to make. Whereas Wilson and Broyde homed in on the mixed roles of religious communities in family life and law, and Bix on the preferred roles of private parties and contracts, Chaplin focuses on “the normative role of the state in relation to the family”<sup>22</sup> at work in this volume.

Professor Chaplin is right that I do not lay out a full-blown political theory in this volume, or indeed anywhere else. I can again try to hide under the fig leaf that I am a legal historian, but that leaves me vulnerable to charges of eclecticism and inconsistency in my stated efforts to reconcile traditional teachings about the roles of church, state, and family with modern liberties and legal realities. In response, Chaplin generously and ingeniously stitches together the various passages in *Church, State and Family* that describe my view of the modern state’s limited but still critical role in family governance today, a role that is “both more extensive, but less intensive,” as he puts it, than in earlier centuries of Christian establishment.<sup>23</sup> Chaplin uses my integrative theory of the multidimensional marital family to discern the modern state’s remit in family life.

In the volume, I present the marital family metaphorically as a sphere, or a globe. At the bottom of this sphere is (1) a *natural* pole that anchors the natural goods of marriage and the inherent human inclinations, appetites, capacities, and imperatives for sex, marriage, and family life. Radiating up from this natural pole are: (2) a *social* dimension that articulates the public communal functions and goods of marriage and the family, and that recognizes the complex groups of institutions and professions that support and interact with the domestic household and its members, not least the church and state; (3) an *economic* dimension that reflects the union of properties, labor, and entitlements by marriage, the ongoing material rights and duties of spouses, parents, and children during and after a marriage, and the channeling, expressive, and signaling functions of modern family law; (4) a *communicative* dimension, expressed in the public liturgies, celebrations, and symbols that mark the formation of a marriage and the birth or confirmation of a child as well as in the vital private daily communications among spouses, children, and household dependents concerning sex, finance, labor, nurture, formation, social responsibilities, and more; and (5) a *contractual* dimension, expressed in the complex formal promises and provisions that form a marriage and household, and the ongoing obligations that attach to the relationships of husband and wife, parent and child, family and society. At the top of the sphere is (6) a *spiritual* pole that helps binds

---

<sup>21</sup> This is the main thesis of JOHN WITTE, JR., *THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* (2007) that takes up the 16<sup>th</sup> to the 18<sup>th</sup> century story. I am now working on the sequel, “A New Reformation of Rights: Calvinist Contributions to Modern Human Rights.”

<sup>22</sup> Jonathan Chaplin, *The Role of the State in Regulating the Marital Family*, *JOURNAL OF LAW AND RELIGION*, \_\_

<sup>23</sup> *Ibid.*, \_\_.

together the natural, social, economic, communicative, and contractual dimensions of the marital family around sacramental, covenantal, or other transcendent ideals, and stipulates the spiritual inspirations and aspirations that marriage and family life provide for husbands and wives, parents and children, and broader communities.

The modern state's remit reaches directly only into the contractual and economic dimensions of the family, Professor Chaplin makes clear from various passages in *Church, State, and Family*, leaving other institutions and professions to serve the family indirectly, but only to extent that the marital family members choose them, and only in accordance with local, national, and international legal norms and human rights standards. The modern state still operates occasionally with direct proscriptions and prescriptions for family life backed by the threat of coercive sanctions. Sex crimes like rape, infanticide, or polygamy must still be proscribed; default rules and procedures for marital formation and dissolution are still needed. But the modern liberal state, much more than the premodern Christian state or church, usually operates between these hard apodictic poles -- "discouraging and encouraging," nudging and signaling, facilitating and exemplifying conduct that caters to public and private goods of sex, marriage, and family life.

I find Professor Chaplin's account of all this most helpful in clarifying and systematizing ideas that I left too scattered in the book. I appreciate his endorsement of my ample efforts in the book to set modern family questions in reconstructed historical context; to tie abstract political theories to concrete legal issues and empirical social realities; to avoid making false choices between "perfectionist" and "neutralist" accounts of the state; and to view hard modern family and family law questions kaleidoscopically through various disciplinary lenses.

I frankly don't know enough yet to address Professor Chaplin's final queries, asking me about my full theories of goods, judgment, justice, rights, and more, and how my theories stack up against various great scholars whose work has instructed me over the years -- John Finnis, Nicholas Wolterstorff, Oliver O'Donovan, Herman Dooyeweerd, and many others. I am slowly moving from my preferred historical mode of work over the past thirty plus years into more systematic and constructive efforts, which I hope will yield better answers to these questions in due course. *Church, State, and Family* was a bit of an experiment to that end. I have other volumes underway on *Church, State, and Freedom*; *Church, State, and Education*; and *Church, State, and Social Welfare* that experiment with comparable methods of reconciling traditional teachings and modern legal realities. I hope that this "topical method of common law reasoning"<sup>24</sup> will allow me slowly to work out the rudiments of a Christian legal and political theology. This is a bottom-up, historical, empirical, comparative, and interdisciplinary approach to the big questions that philosophers and other theoreticians have wrestled with over the centuries. It aims to retain and reconstruct the best insights and institutions of Western legal traditions, but always be open to reforming and to jettisoning the worst of those

---

<sup>24</sup> This is how my colleague Justin Latterell describes this method.

traditions in light of new knowledge and contemporary concerns. This bottom up approach sometimes produces blurrier lines of reasoning; more slippage between principles, precepts, and practices; and grittier, even messier recommendations and prescriptions for church, state, and society. But I hope it also makes for a Christian legal and political theology that is more realistic, rigorous, and resilient over time and perhaps even across cultures. The generous responses by these five reviewers of *Church, State, and Family* encourage me to continue the experiment.