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BOOK REVIEW SYMPOSIUM: JOHN WITTE, JR., *CHURCH, STATE, AND FAMILY: RECONCILING TRADITIONAL TEACHINGS AND MODERN LIBERTIES*

THE ROLE OF THE STATE IN REGULATING THE MARITAL FAMILY

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INTRODUCTION

The central goal of John Witte's impressively wide-ranging and admirably countercultural *Church, State, and Family* is to mount a reasoned defense of "the traditional marital household as a natural and necessary institution for the cultivation and preservation of . . . ordered liberty and social stability" (16). Witte recognizes the proliferation today of nontraditional forms of family and marriage, regards some as legitimate expressions of "modern liberty," and does not oppose granting legal space for at least some of them.[1] He argues, first, however, that the neglect or repudiation of the traditional marital household threatens to undermine one of the most valuable sources of personal and social well-being available to modern society, and, second, that recent calls from liberal law reformers for the systematic retreat of the state from marriage and family—for their "disestablishment," or "private ordering"—should be resisted. In the Western legal tradition, he claims,

> [t]he most common argument was that exclusive and enduring monogamous marriages were the best way to ensure paternal certainty and joint parental investment in children, who are born vulnerable and utterly dependent on their parents' mutual care and remain so for many years. Monogamous marriages, furthermore, were the best way to ensure that men and women were treated with equal dignity and respect within the domestic sphere and that husbands and wives, and parents and children, provided each other with mutual support, protection, and edification throughout their lifetimes, adjusted to each person's needs at different stages in the life cycle. (297)[2]

1 See, for example, his remarks on same-sex marriage (373–77), urging those who campaigned against it to focus their energies instead on "improving the culture of the marital family more broadly" (377).

2 He adds, "[t]his latter logic now applies to same-sex couples, too, who have gained increasing rights in the West in recent years, including the rights to marry, adopt, and parent in some places" (297).

As a legal historian, Witte frames his project as a response to "a family law revolution that is upending millennium-long laws and customs of the West" (1). But he situates this specific legal struggle within a capacious and illuminating model of the "multidimensional family" ranging far beyond law. Against a variety of reductive models that "flatten" (187) the family to only one of its dimensions—notably individualistic accounts that see it as a "self-defined private contract" (363)—he presents the family as an institution possessing "natural," "social," "economic," "communicative," "contractual," and "spiritual" features (363).[3] He shows compellingly how all such dimensions traditionally have been, and should be again, simultaneously affirmed and protected by means both of an array of private and public norms and practices and of a dense network of surrounding and supporting ("subsidiary") institutions, without which the family will atrophy internally and fail to generate its distinctive public goods.

The supporting institutions on which he primarily focuses are church and state.[4] I do not interrogate his substantive accounts of the marital family itself (for example, as both a natural and a cultural institution) or his proposals on how churches might interpret it theologically (for example, as "sacramental" or "covenantal"). Instead, I probe a question present throughout the book but not brought to the fore in an extensive or sustained way: *What conception of the normative role of the state in relation to the family underlies Witte's account?*

THE ROLE OF THE STATE

In spite of the vast changes that have taken place in how the responsibility of the state for the family has been understood and practiced, Witte claims, Western societies, churches, and political authorities from classical times until the nineteenth century shared an "integrated" conception of the family according to which an array of institutions must play coordinated roles in supporting it.[5] The specific role of political authorities within that array was extensive and multisided, even as it sought to uphold the marital family as an independent institution to which law should defer and which it was obliged to protect for the sake of the vital public goods it uniquely yielded. Until the last century, most Western states defined, endorsed, incentivized, supported, and regulated the family to a degree that today would be deemed highly intrusive (1, 184). Such states defined marriage in morally thick ways as "an exclusive and enduring monogamous union between a man and a woman with the freedom and capacity to marry each other" (1). They also controlled it through a wide variety of legal instruments. States *prescribed* formal engagements, parental consent, witnesses, registration, licenses, civil and religious solemnization, public procedures for divorce, provision for dependents, dowry and inheritance rights; *discouraged* marriages where one partner was impotent or sexually diseased; *proscribed* consanguineous or underage marriages; *provided for* annulment (in case of "serious impediments") and for adoption (184); *criminalized* "fornication, adultery, prostitution, sodomy, polygamy, incest, contraception, abortion" (1); *rendered tortious* "seduction, enticement, loss of consortium or alienation of the affections of one's spouse" (1);

3 These are overlapping clusters of concerns rather than tightly defined categories.

4 Under "state," I include a range of "political authorities," noting that there is a debate over whether premodern political authorities can properly be called "states."

5 Witte explains that this "integrative" model was the outcome of a "2,500-year running philosophical argument in the West about the nature and purpose of sex, marriage and family life" (4), beginning in the Greco-Roman period, continued in Christianized terms in the middle ages, and extending through the Reformation and well in to the Enlightenment.

and *affirmed* "mutual obligations of care and support for the spouses, their children, and their dependents, with reciprocal rights for spouses, parents, and children" (184).

The substantial retreat from such an extensive regulatory role has been caused by three far-reaching changes: first, the arrival of an extensive set of "modern liberties" bringing greater "freedom, choice and equality" in marriage and family; second, the state's legal adaptation to the massive moral, social, economic, and technological changes brought about by modernization; and third, the assumption by the welfare state of extensive duties of social care previously provided by the family (2–3).[6] The outcome is that today the state is by far the "dominant" institution shaping the family, yet its regulatory remit is much "thinner" than before (9)—it has become both more extensive, but less intensive. Thus, even today,

> [t]he state still sanctions marital formation and dissolution. State laws nudge, facilitate, and reward citizens for creating and maintaining stable marital households. State officials intervene in family disputes and, when necessary, help dissolve marital families, divide marital properties, and reassign parental responsibilities. They protect the rights of family members as well as the sexual liberties of the broader citizenry. And state laws facilitate the transmission of marital and family property to the next generation and provide victims of sexual harm with avenues of personal redress while punishing sexual criminals. (9)

Witte's goal is to defend this still-substantial role for the state and to point to new ways in which it might need to develop. How does he justify and circumscribe such a "thin but dominant" role? What I find is that he periodically invokes a series of interlocking and mutually reinforcing norms to justify state action in particular cases. The most prominent is the defense of the "public goods" of the family, understood in the rich sense of the "common goods" necessary for the protection of human dignity and societal flourishing (sometimes rendered more prosaically as "health, safety and welfare") (370). Witte also seems to assume that there is a subcategory of public goods that fall specifically within the protective and promotional remit of the state, although he does not specify it precisely. He also often couples the family's "public goods" with its "private goods," although it is at times unclear whether the latter also potentially fall within the state's remit. Other key notions make their appearance at various times, as we shall see.

In seeking to "reconcile" traditional views with "modern liberties," Witte expresses no regret at the substantial transfer of family jurisdiction from the church to the state that took place during the modern period (372). Rather he assumes—and argues extensively elsewhere—that modern liberties are normatively justified departures from hitherto confining state regulations.[7] He endorses extensive personal freedoms (of religion, belief, speech, expression, choice of marriage partner, and so on) and institutional freedoms, and the religious impartiality of the state and the freedom of the state from church control (the "twin tolerations"). To the extent that the premodern "collaborative" model of state and church presupposed both the state's authority to prefer or compel a particular faith and the church's authority to directly instruct the state in true religion and morality, then those

6 Cumulatively, these changes have both reflected and furthered a series of "separations:" between marriage and sex, childbirth and childrearing, and between childbirth and parenting, intercourse and biological filiation (3; see 235–36). Some of these separations are, he implies, proper consequences of modern liberties, while others are placing the future of the marital family in jeopardy.

7 Yet he also argues that such departures are themselves in large part fruits of, not repudiations of, the developing Christian tradition. See, for example, John Witte, *The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007); John Witte, *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Grand Rapids: Eerdmans, 2006).

aspects of the model are implicitly condemned by Witte's accounts. He certainly has no desire to restore them.

Yet his case for the embrace of many modern liberties and of a religiously impartial state does not amount to a jettisoning of a "perfectionist" model of the state (in which its task is seen as inculcating virtue among its citizens, pursuant to some substantive conception of the good life), in favor of a "neutralist" liberal model (in which the state refrains from imposing any such conception and merely secures a package of procedural individual rights). He specifically rejects the neutralist model, implicitly construing the debate as one *between rival conceptions of the proper scope of the state's virtue-promoting role*, and the legal instruments best suited to promote it (298–99).[8] That is a critically important construal. It then, of course, invites a substantive account of the particular conception being championed.

Although Witte's remarks on the justification of the state's role are scattered across the book, it is illuminating to organize them in terms of the six dimensions of the "multidimensional family." The first three I consider (not in the order he presents them) turn out to contain crucial goods that are inherently beyond the remit of the state; the state's role here is external and protective rather than constitutive or formative. The latter three engage the state more directly.

THE STATE AND THE SIX "DIMENSIONS" OF THE FAMILY

The Natural Dimension

The "natural" dimension is most evidently beyond the state's remit, rooted as it is in biological, reproductive, associative, and developmental needs arising from "nature" or "creation," over which law has no generative or regulative power. Here Witte retrieves long-standing natural law arguments in defense of the traditional marital family. While these will still carry weight for some, left to themselves they will not be persuasive to many contemporary audiences, so he also shows how such arguments are now being increasingly confirmed by the findings of the social sciences. They are upheld, for example, by evolutionary anthropologists, who argue that practices such as "pair-bonding, biparentality, and long-term co-residency of male and female in support of their dependent offspring" (194) are evident in the earliest human societies; and by sociologists, who mount evidence showing that it is healthier: "(1) to be married or remarried than to remain single, widowed, or divorced; (2) to have two biological or adoptive parents raising a child in a stable household rather than one or none; and (3) to have marital cohabitation rather than nonmarital cohabitation for couples who plan to be together for the long term" (195).

What does all this imply for the role of the state? The goods provided by the natural dimension are public and not only private, thus apparently placing them in principle within the scope of state law. But given that the formation of such goods is itself out of reach of the law, at this point Witte offers only a very general exhortation: "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, gender fluidity, and sexual freedom" (197) (emphasis added).[9]

8 Some contemporary liberal egalitarians are also perfectionists—Stephen Macedo, for example, whom Witte cites appreciatively at 210.

9 He adds, "[a] family-law system must address the natural sexual realities of the entire population, even if our media are fixated on the more sexually adventuresome and exotic" (197).

The Communicative Dimension

The second dimension deemed by Witte as essentially beyond the reach of law is the "communicative" dimension, by which he means the intimate realms of relational nurture, commitment, sharing, formation, celebration, and so forth, arising as many valuable life-goods are pursued, in both marriage and family. On this, again, Witte has no specific suggestions regarding the role of the state: the communicative dimension is evidently above its pay grade. He might simply have echoed the point that this dimension, like the natural one, is one of the many public goods of the family that renders it generally worthy of external state protection but over which the law can or should exercise no formative internal control.

The Spiritual Dimension

Nor does he counsel any regulatory state role over the "spiritual" dimension of the family, and for the same reason. Whether understood "sacramentally" or "covenantally," the family as a "spiritual institution" properly falls outside the reach of state law (305)—law cannot be spiritually generative. Thus, we might note that Western political authorities under Christendom, in spite of their frequent overreach, almost never presumed to administer the sacraments of marriage or baptism. This was not because such sacraments were not seen as public goods, but because the jurisdiction of civil government was seen as "secular" (of the *saeculum*) not "spiritual." Thus, even in premodern times, key public goods were seen as outside the remit of the state—a point underlining why it is important to be able to isolate those that are within that remit.

Witte does, however, pay considerable attention to the particular kinds of support that the church (and, by implication, other religious communities) can perform in offering spiritual nurture to the family. Although a "spiritual institution," the family needs external assistance from many other institutions, not least the church.[10] The church generates its own characteristic spiritual goods that can nurture the internal life of the family and thus shore up its capacity to offer external public goods beyond itself. We might call them the "subsidiary gifts" of the church to the family.[11] The role of the state toward the family as a spiritual institution gets closer specification as Witte unfolds an appealing model of "shared jurisdiction" between state and church. In the course of this discussion, two further criteria for determining the role of the state toward the family emerge: the protection of a "baseline" of protections for individual citizens against religious encroachment and respect for the authority of non-state institutions.

The first emerges from his examination of faith-based family law systems. While appreciative of their contribution, Witte comes out against full-orbed "legal pluralism"—"a fully privatized, faith-based family-law system that people can choose in lieu of state family laws" (304). Such "religious privatization," he argues, "risks the creation of religious sovereign rivals to the modern democratic state" (304). The state cannot "delegate to a religious group the full legal power to govern the domestic affairs of their voluntary faithful in accordance with their own religious laws." He continues:

> No democratic state can readily allow a competing sovereign to govern such a vital area of life for its citizens—especially since family law is so interwoven with other state public, private, procedural, and penal laws, and especially since so many other rights and duties turn on a citizen's marital and familial status. Surely a

10 Indeed, it would seem that the church offers supportive narratives, practices, and resources that enable its members to enjoy the rewards of all three of the dimensions so far treated.

11 Some of these are also discussed under the "social" dimension, for example at 198.

> democratic citizen's status, entitlements, and rights cannot turn on the judgments of a religious authority that has none of the due process and other procedural constraints of a state tribunal. (309)

The state, then, must set "baseline substantive and procedural family-law rules that apply to all citizens" (334).[12] On the other hand, this needs to be balanced against a robust affirmation of the self-governance rights of plural social authorities, including religious ones (305). Thus under the "shared jurisdiction" model, for example, "the state can require marital celebrations, but it cannot dictate the details of the church's wedding liturgy"; it "can require that a marital couple consent to marriage, but it cannot prevent a church from requiring a course in premarital counseling"; and it "can demand that parties get divorced before they can remarry, but it cannot prevent them from choosing a state-licensed religious arbitrator who might add other requirements" (305–06).[13] The state should thus resist the urge to "exercise hegemonic control" (335). This is an area where it is better for the state to "nudge diverse religious communities to accommodate baseline liberal values in their faith-based systems than to leave their members living in exotic isolation and compromising their freedom and capacity to participate in democratic societies" (335).

Witte's conception of the role of the state is unpacked further in his critique of proposals for the "private ordering" of marriage and family. While he insists that the civil rights of individuals cannot be subordinated to those of institutions (church or state), he equally insists that, without the protection of a range of social institutions, such individual rights are rendered fragile: "It is equally dangerous … to place the marital family entirely in the hands of the sovereign individual, guided only by pure freedom of contract. … Giving parties too much freedom of contract in marriage and family life, even if they are guided by religious authorities, ultimately grants too much power to the economically stronger and more selfishly calculating party, and it risks serious harm to minors and dependents (309–10).

The natural, communicative, and spiritual dimensions, then, are beyond the reach of the state insofar as they serve as incubators of uniquely internal goods. Yet these "private" goods have vitally important "public" benefits, so that the state retains a crucial external protective role enabling these extra-legal goods to be successfully generated. What we see Witte doing here, then, in determining the precise role of the state, is engaging in a judicious balancing of the partly converging, partly competing claims of various public (and private?) goods, individual rights, institutional rights, and the wider social ecology in which all the above are embedded.[14] This exercise shows that if we allow the balance to tilt too far in one direction, that role becomes either excessive or reductive, placing both individuals and institutions at risk.

The Social Dimension

From an internal point of view, this dimension refers to "the value and utility of the marital household for reproduction, for socializing children, for curbing promiscuity, for ongoing mutual nurture

12 This is a conclusion many liberals would share. See, for example, Cécile Laborde, "State Sovereignty and Freedom of Association," chap. 5 in *Liberalism's Religion* (Cambridge: Harvard University Press, 2017). They might not share his strong endorsement of a public role for faith-based organizations.

13 The state can also offer additional legal options above and beyond ordinary contractual marriages, such as the "covenant marriages" recognized in a few American states, chosen by those seeking more demanding standards of marital commitment. These are harder to enter and exit but would be wholly voluntary (312). The church could play a role in supporting the parties to such a marriage.

14 The same balancing act is attempted in treatment of shared jurisdiction with charities and schools (315–18), with the rights of ministerial solemnization (318–28), and with religious arbitration as a method of dispute resolution (328–37).

and support" (235). More broadly, the term also includes the larger social ecology just mentioned: both what the family offers society—"the public communal functions and goods of marriage and the family" (186)—and what society offers the family—a dense network of supporting institutions that gather round it, such as professions like law, education, medicine, and counseling, and associations such as voluntary and neighborhood groups (198–202).[15] In this sense, it also functions as a kind of "meta-dimension." Here, again, law seems to operate only indirectly, insofar as it shapes the activities of those other supportive institutions in ways already mentioned (and in ways further elaborated below).[16]

The Economic Dimension

In any event, under the "economic" dimension, Witte treats the "utility and efficiency of stable marital families and family laws for social and economic life" (202).[17] The family is a "source of virtue, discipline, skill, and vocational training central to the success of the broader economic system," and was traditionally the primary means of social security (203). This dimension, too, has long been acknowledged in the Western tradition—not least by its recognition of the family as "a vital conduit to transmit property to the next generation" (203). The state did not directly manage the household economy but, in specifying laws of family property, it framed conducive conditions for the family's economic activities, upholding a wide range of contracts and arrangements governing the ownership and transfer of property among family members, and between families, at marriage and death (203).

The conclusions Witte draws at this point, however, turn out to be, not so much that the state should further reinforce and regulate the specifically *economic* activities of the family as such, but rather that it should heed the insights of *economic theory* regarding the *general social importance* of the family. Broadly accepting the current legal regime of family property law, he offers only a few further suggestions on the former, such as that the legal duties of children to provide for materially needy parents might need to be (re)introduced (220–21).

Pursuant to the social importance of the marital family, the state should, first, encourage *individuals* to enter it: "State law should encourage and channel parties to the marital franchise, and not give cohabitation the legal recognition or normalization that can undermine the signaling power of the marital institution. The state should also increase and highlight the social and cultural rewards of marriage and the benefits and privileges that married couples and their children uniquely enjoy" (208).[18] Witte applauds the "channeling" ("nudging") function of law espoused by behavioral economics, the goal of which is that, via an array of rewards, incentives, licensing schemes, taxes, or other impositions, "the more desirable behavior so encouraged by the state will become more customary, even natural or reflexive, and the undesirable behavior will be viewed as aberrant and perhaps even stigmatized" (209).[19] The channeling function of law also operates at the

15 This supportive network is one of the goods put at risk by ideas of "private ordering" (370).

16 Somewhat oddly, perhaps, the social dimension also includes the state, which, however, is present directly or indirectly in all six dimensions.

17 Witte shows how the economic dimension, like the natural and social, is again being rediscovered today, in this case by a variety of economic theories such as rational choice theory, institutional economics, and behavioral economics.

18 The work of institutional economist Margaret F. Brinig is being cited here.

19 I note that these "nudges" are more sophisticated instances of the less direct, prescriptive, or censorious legal methods that Witte identifies in his historical accounts of state regulation of the family and that I term "discouraging" and "affirming." Nudge theory, then, is not all that new.

institutional level, incentivizing people toward participation in the marital family as a source of key public goods, yet without burdening those who do not. The state should continue to ensure that marriage as an institution "offers various legal benefits, privileges, and rights not available to other domestic unions" and to "set easy default rules for parties who wish to enter this institution, rather than forcing parties to create this legal form from scratch or forgo its legal benefits" (210).

Here Witte introduces yet another criterion justifying state action. He affirms the "expressive" function of family law, still witnessed in legal requirements such as that marriages and the arrival of children be registered with the state. Such requirements are designed to send the message that "the community is invited to support the new couple and family, to respect their new marital bond and family privacy, and to hold these parties accountable to the commitments they have made to each other and their children," and "signal" to wider society and to the state a couple's intentions in marriage (211). The "expressive" theory of law is controversial, of course, but it is at least consistent with a "perfectionist" theory of the state.

The Contractual Dimension

Under the "contractual dimension," Witte includes (again) both the "private" and the "public" goods of marriage.[20] At the heart of these is marital consent (216). The state has consistently deemed consent to be a necessary condition of marriage, implying extensive legal provisions.[21] Here, it is worth underlining a wider point below the surface of this discussion: what the state's requirement of consent amounts to is not that it thereby *creates* the institution of marriage, but that it *defers* to a marriage when it has been validly constituted by the parties' genuine consent; and that, absent such consent, it can deem a marriage legally invalid.[22] Further, law not only recognizes valid consent but also publicly recognizes what are in effect "natural" criteria for fitness to marry, thus, for example, proscribing underage marriage. Witte also notes that key criteria formerly thought necessary are no longer imposed by the state, such as the requirement that prospective spouses be "of comparable social and economic status and age and, ideally (sometimes indispensably), of the same faith" (216). Again, we see that the state's role has evolved considerably in certain respects—reflecting changing perceptions on what count as the "public" goods it is bound to protect—while in others it has remained stable. Indeed, not only the consent requirement, but numerous other marital and familial rights and duties, remain enshrined in Western law, and Witte affirms them.[23]

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20 This is not an entirely felicitous category either, since the state shows up, indirectly or directly in all categories and yet operates essentially through law everywhere.

21 Consent came to be seen as a "civil contract" (218) but marriage was traditionally seen as much more than that. Witte notes that Calvin asserted it was "more than a contract, but it is not less than a contract" (cited at 216).

22 Equally, discussing children's rights, he says, "the state does not create the family or the rights of parents and children; rather, the family has preexisting natural rights that are recognized and affirmed by positive law" (256).

23 Thus,

> lawfully married spouses have automatic contractual duties of mutual support, protection, and care, backed by laws of crime, tort, and divorce. Modern laws still protect basic spousal evidentiary privileges and immunities, joint family property ownership, and rights to make vital health and medical decisions as surrogate for one's spouse and children. American laws still grant a surviving spouse strong claims to the late spouse's estates, insurance proceeds, residual social security and veteran benefits, and other entitlements. . . . [F]amily law creates convenient frameworks of spousal rights and duties to facilitate their relationship and to identify and clarify the reliance and expectation interests they bring to the relationship. (217)

Two further themes treated at length by Witte seem related to the contractual dimension: children's rights and polygamy. His treatment of children's rights (chapter 8) sheds further light on his criterion that the state must set "baseline" norms to protect individuals.[24] Here he offers a stout but critical defense of the United Nations Charter on the Rights of the Child (UNCRC), which contains an extensive and robust list of rights (238). While not legally binding, such rights do enjoin a significant extension in the role of "States Parties" in regulating the family sphere.[25] Their growing recognition has occurred because in the last century "political and cultural leaders around the world became increasingly aware and dismayed by the savagery visited on children," thus establishing "firm new constitutional and statutory safeguards to protect and support children—and instituted ambitious new education, health care, and social welfare programs for children" (239).[26]

Two further insights pertinent to Witte's normative conception of the state's role emerge at this point. The first is that the capaciousness of an independently derived conception of "rights" (one might also add "duties") is a key determinant of one's view of the scope of the state's mandate. Witte endorses a wider range of rights than most American conservatives—not only "freedom" rights but also the "welfare" rights of children (247–48), thus countenancing a much broader remit for state action than they would. On this point, it is also equally important to decide *which* of these rights can and should be legally implemented by states, on which Witte offers this important qualification: "Affirming these children's welfare rights does not necessarily mean that state or federal governments, let alone international government agencies, must be the institutions that vindicate them. Families, churches, neighborhoods, clubs, private schools, private charities, and many other institutions play indispensable roles as well" (248). The second insight is that once the authority of international legal codes is accepted, the role of the state toward the family can no longer be wholly determined by norms arising exclusively from within the nation-state itself. "State sovereignty," then, is limited both from below, by personal rights and by the original authority claims of other social institutions, and, from above, by international political and legal authorities.

Yet further light is shed on Witte's underlying conception of the role of the state in his discussion of polygamy (chapter 9). In this discussion, yet another norm guiding that role comes to the fore, its duty to prevent "harm" (292; see also 287, 294). Traditional arguments against polygamy invariably appealed, not chiefly to scripture or nature, but to the multiple harms it was seen to cause (288). Western law treated polygamy "as a *malum in se* offense—something 'evil in itself'" (291). The common view was that polygamy "routinizes patriarchy, deprecates women, jeopardizes consent, fractures fidelity, divides loyalty, dilutes devotion, fosters inequity, promotes rivalry, foments lust, condones adultery, harms children, and more – not in every case, to be sure, but in enough cases to make the practice of polygamy too risky to condone as a legal option for all" (291; see also 297). What we see here is that, as we engage in the process of defining the category

24 He spends the bulk of the chapter dismantling the arguments of Christians (mostly conservative Evangelicals) who resist this move on the grounds that children's rights are already adequately protected by existing family law and by the American constitution and that an extension would threaten parental authority.

25 Some, however, such as the rights to recreation, rest, and play, might struggle to be defined in a justiciable way—rather like the UNCHR's notorious provision of a "right to paid holidays."

26 Witte thus critiques the US Senate for opposing ratification of the UNCRC and favors "qualified ratification" (242), perhaps entering "reservations, understandings, and declarations," as several other state parties have (246, 251). He offers a balanced assessment of the UNCRC and suggests a number of such "reservations" intended to safeguard parental authority or mitigate against convention "overreach" (273). Witte would add to the UNCRC's list of rights, the right to life of "prenatal children" (242), and he adopts what he calls a "moderate and unsophisticated middle-way position" on abortion (271). He also supports the convention's proscription of "corporal discipline" (253).

of "public goods" for which the state is deemed responsible, we find ourselves simultaneously engaged in specifying a set of "public bads" that undermine them and that the state must act against. For some writers, yet wider public goods were also protected by such laws: polygamy was "a threat to good citizenship, social order, and political stability, even an impediment to the advancement of civilizations toward liberty, equality, and democratic government" (297).[27]

CONCLUSION

In specifying the contemporary role of the state toward the marital family, Witte deploys a range of interlocking, mutually reinforcing, and mutually circumscribing norms that serve to legitimate, direct and limit particular cases of state activity: protection of key public (and private?) goods; protection of a baseline of individual rights (entitlements, statuses); protection of a range of institutional rights, which in turn presupposes a wider account of the self-governance powers of plural social authorities; the expressive role of state law in signaling favored societal behaviors; and the authority of supra-national legal codes. There may be more. I conclude with four remarks on this suggestive ensemble of concepts.

First, Witte shows that a contemporary account of a normative conception of the state's role can benefit enormously from being forged out of a serious critical engagement with historical accounts. Such an engagement shows that key norms we may assume are uniquely modern often have deep historical roots (such as children's rights and the requirement of marital consent), that "traditional" arguments may still have surprising salience even in a modern society (such as "harm" arguments against polygamy and the "subsidiary" role of plural institutions), and that a repudiation of traditional norms (such as premodern claims to church jurisdiction over the family; patriarchal conceptions of marriage) will be more credible the better it is grounded in assured historical understanding rather than presentist prejudices.

Second, contrary to the highly abstract character of much contemporary political theory, the formulation of key norms for how states should govern social institutions like the family relies critically on adequate empirical knowledge of those institutions and their larger societal context. Thus, I noted that in pursuit of the somewhat elusive notion of "public goods," Witte finds himself learning from an encounter with what are often empirically more visible and quantifiable "public bads." His use of key findings of the social sciences on the serious public bads caused by a decline in the marital family is, I suggest, a model of how to engage in evidence-based normative concept-formation in political theory.

Third, his diverse historical and contemporary accounts of state-family engagement remind us of another critical point often overlooked by normative theorists, that the term "state regulation" covers a wide range of types of action and the legal instruments deployed to enact them. For example, I noted that Witte observes a strategic shift in the modern world (following "modern liberties") from directly prescriptive and proscriptive modes of regulation, toward indirect, incentivizing, signaling, and nudging modes. These, of course, are not alternatives, and Witte continues to affirm a baseline set of prescriptions and proscriptions, especially in criminal laws protecting family members against abuse. But Witte's treatment shows that the state has a range of arrows in its quiver, some of which

27 Witte appeals again to the "expressive" role of law here: Criminal laws against polygamy "play an important symbolic and teaching function that the state and its family laws still play in our lives" (294).

are better suited for certain kinds of remedy than others.[28] His measured account of how the state should seek to reduce abortion rates will be controversial to some (on both sides), but is a fine example of this fine-grained regulatory approach.

Finally, a cluster of questions: Does Witte regard any one of his operative central norms as fundamental in determining the role of the state generally and others as derivative or subordinate? If that fundamental norm is something like "defense of public goods," how would he flesh that idea out so that the work it is doing can be made more visible and thus more susceptible to critical testing? How do public goods relate to private goods? And how would he distinguish (what I thought I identified as) the subcategory of public goods for which the state is responsible, from those for which it is not? Or, if "public goods" is, after all, deemed insufficient to the task, several other estimable candidates are available if he thinks he needs one: John Finnis's Thomistic account of "public good" (the "limited common good" of the state);[29] Nicholas Wolterstorff's Pauline notion of the "protective rights-limited state";[30] Oliver O'Donovan's Augustinian idea of "public judgment";[31] David McIlroy, Augustinian account of "justice";[32] Herman Dooyeweerd's neo-Calvinist principle of "public justice."[33] Or does he hold that these approaches are either unfruitful, unnecessary, or too confining, and that political and legal reformers must keep on hand a diverse battery of independently derived norms as they go about the highly complex task of determining the proper scope of state action? Whatever answers he might give to these wider questions, however, he has in this book offered us a highly informative, thoroughly well-documented, and penetratingly searching analysis of an inescapably controversial case of contemporary state action.

28 I note too that Witte's concern is with state *law*, and that the state, while always acting through law, has other policy instruments at its disposal.

29 John Finnis, "The State: Its Elements and Purposes," chap. 7 in *Aquinas: Moral, Political, and Legal Theory* (New York: Oxford University Press, 1998).

30 Nicholas Wolterstorff, "The Rights-Limited State," chap. 13 in *The Mighty and the Almighty: An Essay in Political Theology* (Cambridge: Cambridge University Press, 2012).

31 Oliver O'Donovan, *The Ways of Judgment* (Grand Rapids: Eerdmans, 2005), part 1.

32 David McIlroy, *The End of Law: How Law's Claims Relate to Law's Aims* (Cheltenham: Edward Elgar, 2019).

33 Jonathan Chaplin, "An Active, Limited State," chap. 10 in *Herman Dooyeweerd: Christian Philosopher of State and Civil Society* (Notre Dame: University of Notre Dame Press, 2011).