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

DEFAULT RULES AND PRIVATE ALTERATIONS

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INTRODUCTION

In *Church, State, and Family*, John Witte offers a masterful overview of the history of religious and political thought about marriage in the West. The book reflects Witte's distinctive and impressive strengths: a vast knowledge of the historical, theoretical, and policy literature; a deeply charitable reading even of positions he questions or opposes; and a careful balancing of views on all sides before settling on a conclusion. In this essay, I focus on Witte's discussion of private ordering. To be more precise, I do not so much take issue with the conclusions he offers as consider how to fill in the gaps on issues left less than fully discussed. In a book that tackles centuries, and at times millennia, of debates over a wide range of issues regarding the family in a few hundred pages, it is unsurprising that not every issue has been fully resolved.

In particular, I consider some views regarding private ordering *at the margins*, involving the modification of state default rules, rather than their wholesale abolition and replacement. In the first part of this review, I summarize Witte's primary discussion of private ordering in family matters, a critique of Martha Fineman's views. In the second part, I expand the discussion to consider less extreme private ordering alternatives, while touching on Witte's views on religious arbitration as presented in the book. The position I ultimately advocate may not be one that Witte can endorse fully, given the suspicion, if not hostility, displayed toward private ordering in his text. Still, my starting point is a general agreement with Witte's views and the values displayed in *Church, State, and Family*, and I hope that this review can be the start of a productive discussion among the many of us who benefit from Witte's ideas.

WITTE ON PRIVATE ORDERING

Witte describes private ordering in family law as being "based on the idea that decisions about intimacy and procreation are altogether matters of private individual preferences and that state law

should function primarily to support private choices within domestic life and to mediate any conflicts that might emerge when private arrangements end" (336). In general, such private ordering can be more or less comprehensive, and the type or extent of private ordering likely affects one's reaction to it. It is both a strength and weakness of *Church, State, and Family* that Witte considers a fairly extreme version of private ordering: Martha Fineman's proposal to remove all state recognition of marriage. Fineman would substitute significant state support for the mother-child (and, occasionally, father-child) dyad, combined with enforcement of contracts between romantic partners (347).[1]

Witte understands the arguments that motivate Fineman's position: a reaction against the sexism and injustice too common in marriage and family life and a concern for how the derivative dependency of caregivers increases inequality. However, he argues that Fineman's solution would create more harm than benefit. Vulnerable parties would either have no protection at all or would be dependent on state welfare and benefit systems, systems that are in practice too frequently either incompetently run, badly underfunded, or both (354–58). There is also the problem of exploitation: "Giving parties too much freedom of contract in marriage and family life . . . 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).[2] Additionally, Witte argues that Fineman's approach undervalues the role of fathers—even fathers who are not the primary caregivers of their children (358–60).

I find Witte's critique of Fineman's position to be persuasive. Like him, I would worry about the consequences for the vulnerable in a legal system that fully followed Fineman's prescriptions. However, one can agree with Witte's rejection of that abolitionist position and still support a less extreme form of private ordering. The possibility of, and support for, such a middle position on private ordering is the focus of the next section.

STANDARDS GOING FORWARD

Witte writes: "Modern doctrines of private ordering have tended to flatten the marital family sphere into a self-defined privatized contract alone with or without default rules, and with or without state support" (363). As mentioned, this describes the extreme proposals one sees from academics and, sometimes, frustrated culture warriors who would prefer the state to stay out of marriage rather than have it dictate terms the advocate in question finds entirely unacceptable (such as same-sex marriage). However, most proposals from lawyers—and, indeed, most family law scholars—about private ordering are not that extreme. They *do* refer to default rules, and they *do* look to set minimum boundaries relating to spousal and public support. Once one rejects complete (or nearly complete) private ordering, but one also allows a place for *some* alteration of state default rules, then the hard work begins of figuring out what kind or level of alterations should be enforced. For example, in contemporary American law, premarital agreements allow parties about to marry to alter their obligations upon divorce, but there are limits to those alterations.

1 See generally Martha Albertson Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies (Routledge, 1995). As Witte points out, there is a tension between Fineman's view of caregivers as highly vulnerable and her advocacy for the simple enforcement of the agreements (actual and potential) caregivers enter (347; see also 361).

2 Obviously, this last concern applies not only to abolitionist views like Fineman's, but also to the more moderate forms of private ordering that I discuss below.

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And co-parenting agreements and open adoption agreements are meant to *protect* family ties, not remove or eviscerate them.

Witte summarizes family law scholar Milton Regan's view about marriage as contract: "A clearly delineated marital contract creates more certainty of a person's status and obligations in an increasingly mobile, anonymous, and diverse world often devoid of local expectations and accountability and customary constraints" (219).[3] This is an argument for the state to maintain an established voluntary status like marriage, and a reason for people to use that status. However, on its face, this *also* seems to be an argument for variations on marriage—in particular, for variations of marriage custom-altered for the needs and preferences of individual couples. These, too, would create "certainty of status and obligations in an increasingly mobile, anonymous, and diverse world often devoid of local expectations and accountability and customary constraints" (219)—and, in the case of some premarital agreements (and covenant marriage,[4] as well), a more detailed and more specific set of terms and obligations than most married couples have.

In all discussions in this area, one needs to keep in mind the background fact that many (likely, most) people are not so much ignorant of the "terms" of state marriage and divorce, as *mistaken* about those terms. That is, many people *think they know* what the rules of marriage and divorce are, but what they think they know is frequently erroneous. One advantage of the kind of private ordering one finds in premarital agreements, open adoption agreements, co-parenting agreements, and the like is that it brings the legal terms of the parties' relationships to their attention in a way that is rarely done for those entering such relationships without an agreement.

As noted, the type of private ordering currently enforced in American states, and the kind most commonly advocated by scholars, is not the all-or-nothing proposition of Fineman and other marriage abolitionists. Rather, the private ordering involves an alteration of existing state default rules, or the authorization of a range of status alternatives, in "packages" (like "covenant marriage" or "domestic partnership"[5]) established by the state (304). So the question we must consider is whether the authorization and use of these forms and alternatives is better—for individuals and for the general social good—than would be a world without them. Witte seems confident that the answer is no: that the harm, both to vulnerable individuals and to society, would outweigh any benefit (which would go, in his view, mostly to the already powerful). Witte writes as follows:

> Private ordering might be well and good in an ideal world where men and women can reliably devise personalized contracts with one another as equals in the open marriage market. It might work when potential partners and parents have formal legal training, highly developed senses of empathy, and uncommonly keen foresight to help them craft domestic deals that are both workable and fair for all parties, not least children and vulnerable dependents who are usually silent parties to the bargain. It might work when state bureaucratic systems have the money and means to work smoothly and efficiently in supporting all caretaker and

3 Here Witte is discussing Milton C. Regan, *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 Notre Dame Law Review 1435 (2001).

4 Covenant marriage is an alternative form of marriage provided and defined by the state. Under covenant marriage (which varies slightly across the three adopting states: see Arizona Rev. Stat. §§ 25-901; Arkansas Code Ann. §§ 9-11-801 to 9-11-811; Louisiana Rev. Stat. Ann. §§ 9:272 to 9:275), couples about to marry, or who have already married, can opt for a more binding form of marriage, where divorce is generally available only on fault grounds or after a significantly longer waiting period than is normally set. Covenant marriage also requires premarital and pre-divorce counseling. In the states that have covenant marriage, only a very small percentage of couples have chosen it.

5 A number of states introduced "domestic partnership" or "civil union" to offer a marriage alternative to same-sex couples, and, in a few states, these were also made available to some opposite-sex couples. This status is, obviously, less necessary now that same-sex marriage is available everywhere in the United States.

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> dependency relationships without defining their form or invading their autonomy. But a good bit of this modern private ordering theory smacks of "elitist law reform" that works better on the blackboard than in the real world. (363–64, footnote omitted)

My view is not quite as negative. Consider a single mother who is surrendering her parental rights so that her child can be adopted by a loving couple, but is torn about the decision, and ultimately would agree only if she could be guaranteed the right to some regular contact with her biological child; the couple who wishes to adopt are willing.[6] Though there is a trend toward recognizing such agreements, it remains the case that roughly half the states would *not* enforce a "contact agreement" ("open adoption agreement") of this sort, and in those states the adoption might not happen. The remaining states *are* willing to enforce this sort of agreement, subject to regulation through judicial approval of the initial agreement and some power to the courts to modify the agreement in the best interests of the adopted child.[7] Where there is greater certainty of enforcement, there will also be a greater likelihood of adoptions going forward.

A similar analysis could be offered about premarital agreements, agreements that purport to modify the rights of the spouses upon divorce or the death of one of the spouses. There are individuals who are interested in marrying but might do so only upon some assurance, for example, that a family business will stay in the family, or that children from a prior marriage will be provided for at a certain level, and do not want these interests put at risk by a possible future divorce action.

We live in a society where, generally speaking, one need not marry to be accepted or even to be successful. One can have romantic partners and even raise children outside of marriage, without scandal or even, in many, and perhaps most, communities, evoking significant social pressure to rectify one's unmarried state. It is thus easier or more available for parties to decide not to marry, or to marry only on terms acceptable to them. The alternative is simply to stay unmarried. As Witte accurately points out, unmarried cohabitation is a sort of "Wild West," where there are few regulations or laws to protect the vulnerable (310, 338). What if the real-world choice is between a couple marrying with a premarital agreement and the same couple remaining together but unmarried? For the more vulnerable member of the couple, being married with a premarital agreement would likely give more protections and more rights than would remaining unmarried (cf. 338).[8] The trick is to create judicially enforced standards to make sure that these agreements are not *so one-sided* that marriage on those terms is worse than no marriage at all. And that, in fact, is basically what we have in the state-law rules on premarital agreements.[9]

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6 They may be reluctant but willing, fearing the interference with the new post-adoption family, but willing to do this if it makes the adoption possible; or they may be enthusiastic and willing, believing that it is in fact in the child's best interests not to lose touch entirely with the child's biological parent(s). I do not think that the type of "willing" involved affects the ultimate analysis.

7 On the rules regarding contact agreements (open adoption), see Brian H. Bix, *Private Ordering in Family Law*, in Philosophical Foundations of Children's and Family Law 257, 265–66 (Elizabeth Brake & Lucinda Ferguson, eds., Oxford, 2018).

8 Of course, the situation may be more complicated. The effects of enforceability of agreements are an empirical matter that likely varies across transaction types. Consider, again, premarital agreements. There may be individuals who would prefer to marry with a predictably enforceable premarital agreement favorable to their interests but would *still be willing* to marry even if those agreements were unenforceable or were unpredictable in their enforceability. There is no data regarding how many or frequent such cases are, and marriage on the state default terms would obviously be preferable to marriage on the terms of a one-sided premarital agreement.

9 The rules vary significantly from state to state, with some regulatory standards creating more robust tests of fairness than others, but arguably all (or nearly all) create significant minimum standards to protect the most vulnerable. See

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Witte states, in the course of his defense of the status quo, "[s]uch a family law system offers templates of fairness and reciprocity that can be modified within reasonable limits to accommodate a couple's unique circumstances" (364). In writing of "modified within reasonable limits," Witte may be merely reminding us that even when agreements waiving or altering state family-law rules are unenforceable, it is still open to couples and family members to modify their family roles and responsibilities among themselves as they think best, within wide parameters. This is true *private* ordering. If Witte's position goes further and encourages *the state enforcement* of private agreements that modify state rules "within reasonable limits," then Witte and I are in general agreement. The debate then is just haggling over the details: how much of an alteration will count as "within reasonable limits."

It may be helpful to keep in mind a sort of private ordering that Witte speaks of with approval in *Church, State, and Family*: religious arbitration. Witte notes that the use of religious arbitration (in family matters or elsewhere, such as commercial matters) should be subject to guidelines and constraints. In particular, Witte argues that religious arbitration should be subject to certain substantive standards and due process minimums (328–33). Just as that sort of private ordering—decision making by a religious and non-state institution on a matter usually given to state institutions—is acceptable when subject to state regulation and oversight, so, I would argue, should *other* forms of private ordering in the family law area (such as premarital agreements, marital agreements, open adoption agreements, and co-parenting agreements[10]) be tolerated, while also being subject to appropriate regulation and oversight.

CONCLUSION

Church, State, and Family offers a robust defense of (mostly) traditional ideas about marriage and family, grounded equally in theological doctrine, moral and political theory, and contemporary empirical research. Witte offers a formidable argument that is easy to admire and difficult to challenge. While Witte is understandably hostile to the abolition of state laws on marriage and family and suspicious of rules that might weaken the protection such laws give the vulnerable, his text hints at appropriate acceptance of private ordering where it can be done with sufficient regulation and oversight.

generally Brett R. Turner & Laura W. Morgan, Attacking and Defending Marital Agreements 361–449 (2nd ed., American Bar Association, 2012).

10 *See* Bix, *supra* note 7.

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