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CHURCH, STATE, AND FAMILY

This book defends the fundamental place of the marital family in modern liberal societies. While applauding modern sexual freedoms, John Witte, Jr. also defends the traditional Western teaching that the marital family is an essential cradle of conscience, chrysalis of care, and cornerstone of ordered liberty. He thus urges churches, states, and other social institutions to protect and promote the marital family. He encourages reticent churches to embrace the rights of women and children, as Christians have long taught, and encourages modern states to promote responsible sexual freedom and family relations, as liberals have long said. He counsels modern churches and states to share in family law governance, and to resist recent efforts to privatize, abolish, or radically expand the marital family sphere. Witte also invites fellow citizens to end their bitter battles over same-sex marriage and tend to the vast family field that urgently needs concerted attention and action.

John Witte, Jr. is Woodruff Professor of Law, McDonald Distinguished Professor of Religion, and Director of the Center for the Study of Law and Religion at Emory University. He edits the Cambridge Law and Christianity Series and the *Journal of Law and Religion*. He has published 260 articles and 32 books, including the following Cambridge titles: *Law and Protestantism* (2002); *The Reformation of Rights* (2007); *Christianity and Law* (2008); *The Sins of the Fathers* (2009); *Christianity and Human Rights* (2011); *To Have and to Hold* (2012); *The Western Case for the Monogamy Over Polygamy* (2015); and *Christianity and Family Law* (2017).

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RECONCILING TRADITIONAL TEACHINGS AND
MODERN LIBERTIES

JOHN WITTE, JR.

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For

My Chicago Teachers From Afar

Don S. Browning[†]

Jean Bethke Elshtain[†]

Martin E. Marty

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Preface

This book is not about abortion and contraception, or insurance and prescription coverage for the same. Nor is it about same-sex marriage, transsexuality, or public bathrooms. Nor is it about bakers, photographers, or flower shops who claim religious freedom exemptions from servicing same-sex weddings. Nor is it about punishing or denying tax benefits to religious communities that exclude people because of their sexual practices. These and other such issues are front-page news these days in Western lands. And they are subjects of massive popular media coverage and academic literature.

It is healthy for modern democracies to have the freedom, courage, and means to debate such issues with vigor but without violence, and with full ventilation of what is at stake in these battles but full assurance that we can still live together despite our deep differences. We must not underestimate this remarkable luxury we enjoy in the modern West. In centuries past, debates on the fundamentals of faith, freedom, and family triggered civil wars. Now they trigger landmark cases, statutes, and political elections. But eventually we move on to other issues and reconcile with our new neighbors, remembering anew that “good fences make good neighbors.”

While I touch on these themes, too, my main ambition is to invite readers to consider another kind of reconciliation as well – that between traditional teachings about sex, marriage, and family life and modern liberties. My aim is to retrieve and reconstruct some of the traditional Western arguments about the integration of sex, marriage, and family life. My further aim is to make reasoned arguments about the continued value and validity of traditional family values in modern liberal democracies dedicated to sexual liberty and equality. This is no small task – in part because so much of this rich history has been forgotten or distorted in our modern culture wars, and in part because so many of the battles are about the future, not the past. But it’s wise to remember

that liberal democracies are dedicated to the rule of law, and such dedication demands respect for tradition and precedent. In a rule-of-law state, we abandon the time-tested teachings and practices of the past only with trepidation, only with explanation, and only with full understanding of what is at stake as we jettison old traditions and institute new ones.

The first six chapters sample some of the traditional teachings of the West about sex, marriage, and family life among leading Church Fathers, medieval scholastics, early modern Protestants, and Enlightenment philosophers and jurists – all of whom strongly shaped the family teachings of the Western legal tradition. Chapter 7 serves as the fulcrum of the book. It reconstructs traditional teaching into a multidimensional theory of the marital family sphere, with natural and spiritual poles, and with social, economic, communicative, and contractual dimensions radiating between these poles. The next five chapters use this multidimensional theory of the marital family to parse several hard issues born of the modern sexual revolution – on the rights of children, including nonmarital children born and unborn; 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 of reconstructing traditional teachings in light of these new challenges. After addressing critically the modern social drift away from marriage, and the overt arguments by some scholars to fracture or to 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.

This volume is dedicated to three great mentors from the University of Chicago – Don S. Browning, Jean Bethke Elshtain, and Martin E. Marty – whose lives and writings have been great sources of inspiration and instruction to me. All three of these great scholars were uncommonly kind and encouraging to me when I first ventured onto the scholarly scene thirty-plus years ago as a young law professor interested in the interaction of law and religion in the Western legal tradition. All three were generous collaborators and participants in sundry projects and conferences on these topics convened by our Center for the Study of Law and Religion at Emory University. And all three contributed huge libraries of writings that remain invaluable to any person looking for wisdom in this field.

Don Browning was a particularly generous supporter of my historical work on the family. We met for the first time in 1988, at a family conference he had organized. A couple years later, he invited me to participate in his marvelous Religion, Culture, and Family project at the University of Chicago and to

write a book on the history of law, religion, and the family in the Western tradition. From then on, we worked together on various family projects, both at Chicago and at Emory, until his too-early death in 2010. During this period, Don was the dean of interdisciplinary family studies in North America. He led a dozen major research projects that brought hundreds of scholars around a common table and thousands of participants to public forums. He published a dozen volumes of his own, catalyzed the publication of some six dozen volumes by others, and masterminded the production of a major PBS video on marriage. He graced distinguished lecterns and pulpits around the world, addressing everything from kin altruism among the ancient Greeks to children's rights in the modern United Nations. He brought all the main axial world religions into dialogue with his own tradition of Christianity, and brought many of the social sciences, humanities, and professions into interaction with his own disciplines of theology and ethics.

A cardinal theme of Browning's work was that marriage and family life had to be structured with an ethic of "equal regard." For Browning, this was, in part, an internal family ethic that calls husband and wife to equal respect for the dignity and well-being of the other, equal devotion to the procreation and nurture of their children, equal access to public and professional life, and equal sacrifice for the health, safety, welfare, and happiness of each other, their children, and so far as possible their parents, grandparents, and other needy relatives. "Equal regard" was also, in part, an external family ethic that calls churches and states to give special protection and support to families as equally vital institutions for a healthy society. Families are ancient, natural, and irreplaceable cradles of conscience, chrysalises of care, and cultivators of good citizens, Browning argued. They cannot and should not be eroded by condoning transient troth nor diluted by encouraging marital diversity. This "equal regard" ethic, which Browning traced to some of the earliest classical and Christian traditions of the West, is captured most poignantly today in Catholic sacramental and Protestant covenantal models of marriage and family life.

A second cardinal theme of Browning's work was his call for church and state to take seriously the powerful pressures of modernization that are dramatically changing marriages and families and undermining their ability to perform customary cultural tasks. In particular, he documented closely the dramatic increases in rates of nonmarital cohabitation and single parentage; significantly lower marriage rates and higher divorce rates; the growing impoverishment and exploitation of girls and women; and the striking disparities in the well-being and achievements of children from intact and broken homes. Most Western countries, he showed, have had the wealth and welfare systems

to cushion the blows of this marital and family disruption – although those blows are now landing harder with the modern welfare state on the economic ropes and under ideological attack in several quarters. But, in most undeveloped and developing countries today – and in most poorer communities in Western countries, too – the breakdown of traditional marriage, family, and kinship structures born of modernization has been very hard on men, women, and children alike.

By “pressures of modernization,” Browning meant the new forms of “technical rationality,” “structural differentiation,” “political secularization,” and “cultural individualism” that have emerged prominently over the past century – specialized concepts that he unpacked in several volumes, especially his *From Culture Wars to Common Ground*, 2nd edn. (2000) and *Marriage and Modernization* (2003). Browning knew well that modernization has also brought many positive changes to families. Higher incomes and better lifestyles for large numbers of families are major advances. Greater protections for the rights of women and children within and beyond the home are signature achievements. More food, better health care, enhanced education, improved working conditions, growing environmental care, and greater cultural opportunities – increasingly protected by constitutional and international human rights norms – are all parts and products of modernization that have improved the lives of billions of people over the past century. But Browning also showed that many of these positive consequences of modernization are radically uneven in their distribution today – not only between advanced and less advanced nations but also within advanced Western societies. Even in the affluent West, those with fewer means and less education have faced much more dramatic family disruption and consequent personal, social, and economic fallout. Moreover, across the board, modernization itself has introduced a number of sharp new separations into the sexual field that have been particularly hard on women and children – separations between marriage and sex; between marriage and childbirth; between marriage and child-rearing; between childbirth and parenting; between childbirth, sexual intercourse, and biological filiation; and between sexual expression and human contact altogether. His “equal regard” theory of the family was part of his effort to promote the reintegration of sex, marriage, and family life.

Don Browning’s deep insights are at work throughout this volume. We had hoped to put our ideas together in a coauthored volume, but Don was taken to his eternal reward before we could get the volume far enough along. I have since published in Don’s own name a few pieces that he principally wrote for this coauthored volume. I have also written and published in both our names two articles that we worked on a bit together – one on Emil Brunner, and a

second on children's rights – and include herein updated excerpts from the latter in Chapter 8. But Don worked at several theoretical octaves above my low pitch as a legal historian. I tried hard to create the coauthored volume we had hoped to write, and I sought counsel from several leading scholars who knew Don's work and/or current family law – including Brian Bix, Margaret Brinig, Lew Daly, Christy Green, Russell Hittinger, Timothy Jackson, Elizabeth Marquardt, Stephen Pope, Jean Porter, and Philip Reynolds, all of whom were kind enough to provide detailed comments on our first few partial draft chapters. But I just could not understand or intuit Don's complex thought well enough to piece together responsibly the remaining shards of his work into a coherent volume on the family. So, instead, I dedicate this volume in part to Don's memory, and cite his work generously throughout these pages.

Jean Bethke Elshtain offered comparably valuable insights that have also been deeply influential for me and many others. I first met Jean in 1991, when she joined Jimmy Carter and Desmond Tutu to keynote a four-day conference in our Law and Religion Center at Emory University on "Christianity and Democracy in Global Context." One by one, in that lecture, she parsed the many false dialectics of public versus private, male versus female, individual versus community, church versus state – calling instead for a more integrative and inclusive political theory that harmonized these dialectics in creative new ways. One by one, she summoned the great minds of the Western tradition – Aristotle, Augustine, and Aquinas; Luther, Tocqueville, and Bonhoeffer; Stanton, Addams, and Arendt; Niebuhr, Murray, and John Paul II – to show how Christianity had shaped and could still shape the foundational ideas and institutions of democracy, human rights, constitutional order, and rule of law.

What she made especially clear in subsequent lectures and writings is that the foundation of a healthy democracy is a healthy marriage and family system. The family, she argued, is the foundation of virtue and values, loyalty and loving, caring and sharing – indeed the most basic institutional fulcrum we have to balance public and private, individuality and community, rights and duties in our personal and collective lives. And much like the death of the proverbial "canary in the coal mine," the breakdown of the modern family spells deep trouble not only for individual men, women, and children who are deprived of natural kin networks, but also for the larger institutions of law, politics, and society that build on the foundation of the stable family.

Elshtain pointed to a litany of causes for the breakdown of the family in America and elsewhere in the West. Prominent among them in her assessment are these: the massive social dislocation and fracturing of families born of World War II, the Korean War, and the Vietnam War; the rapid suburbanization of our cities and centralization of our workplaces that have separated

work from home, and parents from their day-cared children; the ever heavier demands on middle- and lower-class workers to produce more with less, shrinking the time and energy they have for their spouses and children; the sharp ideological attacks on marriage, family life, and child-rearing by critical feminists; the rise of sexual libertinism in public and private; and the glorification of sex and the sexual body, among many other factors. She also has laid the blame squarely on the state's family laws and policies that have not only accommodated but sometimes accelerated the breakdown of the traditional family in recent decades, especially in constitutional cases. We need a "workable new public philosophy," she argued, and a responsible new state legal policy that "locates families within a supportive web of human, social ties," and that begins "with a simple but essential affirmation: that some form of familial tie and mode of child-rearing is essential to attain the minimal bedrock of human social existence" and that the traditional two-parent family is best suited for this end.

Behind Don Browning and Jean Elshtain for long stood a scholarly giant, Martin E. Marty, who brought these two great scholars to the University of Chicago and who supported them assiduously in their work separately and together. I owe a special debt of thanks to Marty for putting me in contact with both Jean and Don. It was Marty who encouraged Jean to give that memorable keynote lecture at our "Christianity and Democracy" conference in 1991, and the two of them graced our Emory lecterns half a dozen times in the two decades thereafter until Jean's sad passing in 2013. And it was again Marty who recommended me to Don's Religion, Culture, and Family Project on whose advisory board he sat. In the ensuing years, Marty has often reviewed, foreworded, and contributed chapters to our Law and Religion Center publications, stood at our lecterns, led our seminars, reported on our conferences, and opened countless doors to us with foundations, publishers, and project participants. It was a special treat to have Marty join me in 2003 to direct our big Emory project on "The Child in Law, Religion, and Society" and to create as part of that project his own masterwork on *The Mystery of the Child*.

Marty's endlessly creative mind, vast wisdom, and voluminous writings have long been an inspiration to me, as they have been to many thousands of others. Particularly his high piles of historical books, always enlivened by keen insights, elegant and accessible prose, and clever interdisciplinary methodology, have set high aspirational benchmarks about how to write history and how to use historical insights wisely in assessing modern churches, states, and societies and urging apt reforms where needed.

In one of our seminars, Marty told the funny but poignant story from American history of "an incident in which visitors came upon a tarred-and-

feathered refugee as he ran away from the up-in-arms citizenry of a small town. Asked what had led him to this terrible treatment, he declared that an argument had arisen about the Monroe Doctrine and his attitude toward it ... He said he believed in the Monroe Doctrine, he lived by the Monroe Doctrine, he would die for the Monroe Doctrine; he just did not know what was in it."

Marty told the story to show how fundamental beliefs, values, and ideals can often shape our thought, language, actions, and loyalties reflexively and uncritically. This has bearing on issues of sex, marriage and family life, Marty pointed out. "Do Christians really know why we have structured our sex, marriage and family lives the way we have? Or are we just following Scripture and tradition reflexively?" In turn, do modern reformers really know what's at stake in the destruction of millennia-long institutions of marriage and the family or in "the complete liberation of the libido?" Or are we, like the tarred-and-feathered supporter of the Monroe doctrine, just following the mantras of liberty, equality, and autonomy reflexively, uncritically, and without real understanding? The church, state, and academy can and should do better to understand and teach its members what is at stake on both sides in the great battles over sex, marriage, and family life today, Marty urged. This volume is a modest contribution to that end.

I wish to thank Ambassador Alonzo L. McDonald, Mrs. Suzie McDonald, Mr. Peter McDonald, Dr. Robert Pool, and their colleagues at the McDonald Agape Foundation for their generous and continued support for my scholarly work, and the privilege of allowing me to serve as the McDonald Distinguished Professor at Emory University. I would also like to thank Dr. Chris Coble and his colleagues at the Lilly Endowment for their generous support for the research and writing of this volume. It has been a special joy to do this work in conversation with my many colleagues in the Center for the Study of Religion at Emory University, which has been generously supported by Emory's President James W. Wagner, Provost and now new President Claire Sterk, and Dean Robert A. Schapiro. Among my Center colleagues I want to thank especially those who were kind enough to comment on individual chapters in this volume – Professors Frank S. Alexander, Abdullahi An-Na'im, Michael J. Broyde, Rafael Domingo, Mark P. Goldfeder, M. Christian Green, Peter Hay, Jon P. Gunnemann, Timothy P. Jackson, Joel A. Nichols, David Partlett, Michael J. Perry, Philip L. Reynolds, Brent W. Strawn, Steven M. Tipton, Michael Welker, and Barbara Woodhouse. I want to thank Dr. Justin Latterell for his excellent research work on this volume, aided by Peter Wosnik, Jessica Floyd, Cai Roman, Adam McDuffie, Denise Wesley, and

Bobby Howard. And I owe special thanks again to Amy Wheeler for her ongoing excellent administrative masterwork on this and many other projects, to Dr. Gary Hauk for applying his deeply refined editorial skills to all these chapters in draft form, and to Anita Mann for her financial management of the grant supporting this and other projects.

This volume echoes, elaborates, and updates several of my earlier writings and anthologies on the history of law, religion, and family in the Western tradition and beyond. The main titles include:

- *From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition*, 2nd edn. (Westminster John Knox Press, 2012) [1997]
- *Covenant Marriage in Comparative Perspective* (Wm. B. Eerdmans, 2005) (coedited with Eliza Ellison)
- *Family Transformed: Religion, Values, and Family Life in Interdisciplinary Perspective* (Georgetown University Press, 2005) (coedited with Steven M. Tipton)
- *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Wm. B. Eerdmans, 2006), pp. 295–449
- *Sex, Marriage, and Family in the World Religions* (Columbia University Press, 2006) (coedited with Don Browning and M. Christian Green)
- *To Have and to Hold: Marrying and Its Documentation in Western Christendom, 400–1600* (Cambridge University Press, 2007) (coedited with Philip L. Reynolds)
- *The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered* (Cambridge University Press, 2009)
- *Sex, Marriage and Family in John Calvin's Geneva* (Wm. B. Eerdmans, 2005) (with Robert M. Kingdon)
- *The Western Case for Monogamy over Polygamy* (Cambridge University Press, 2015)
- *Christianity and Family Law: An Introduction* (Cambridge University Press, 2017) (coedited with Gary S. Hauk).

I have cited to the pages in these volumes that offer further elaboration or documentation of a point made more cryptically in this volume. Chapter 9 herein, on polygamy, distills and updates the argument of my earlier monograph on this topic. Some of the chapters herein also draw on, and occasionally duplicate, as noted, a few passages in more recent articles and book chapters, including:

- “The Nature of Family in Seventeenth-Century Liberal Protestant Thought: Hugo Grotius and John Selden,” *Illinois Law Review* (2017), 1947–69
- “Martin Luther” in John Witte, Jr. and Gary S. Hauk (eds.), *Christianity and Family Law: An Introduction* (Cambridge University Press, 2017), pp. 195–210 (with Steven Ozment)
- “Why Two in One Flesh: The Western Case for Monogamy Over Polygamy,” *Emory Law Journal*, 64 (2015), 1675–746
- “The Family of Nature, the Nature of Family: The Surprising Liberal Defense of the Traditional Family in the Enlightenment,” *Emory Law Journal*, 64 (2015), 591–676
- “Who Governs the Family? Marriage as a New Test Case of Overlapping Jurisdictions,” *Faulkner Law Review*, 4 (2013), 321–49 (with Joel A. Nichols)
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After thirty-plus years, I have written what I can on the history, law, and theology of the marital family. I offer this volume as my final word on these themes before moving on to other scholarly fields. It has been deeply satisfying to have the privilege of writing on these topics right in the middle of the greatest revolution of sex, marriage, and family life that the West has seen since the Protestant Reformation. It has been deeply encouraging to see so many other great scholars around the globe who are continuing the “apt and

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cheerful conversation” on marriage and family life that churches, states, and societies all so urgently need. And it has been most gratifying of all to enjoy the blessings of a wonderful family life with my parents, my three sisters and their families, and my bride and our two daughters and their families. My family has been my greatest source of joy, hope, and love in this life, and for that gift I give my greatest thanks.