CHAPTER 6

John Witte, Jr.’s Contributions to Legal and Political Thought

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1 Introduction

John Witte’s voluminous corpus has been occupied primarily with a cluster of closely linked concrete legal and constitutional questions, especially church-state relations, religious freedom, family and marriage, and the religious dimensions of human rights and constitutional democracy. These have been accompanied and undergirded by detailed historical forays into, especially, the contributions of the Protestant Reformation to these questions, cumulatively amounting to a substantial independent contribution to the history of political thought.

Witte’s work also presupposes a broad stance on a recurring question in political theory, namely, the determination of the scope of state authority. While most lawyers do not trouble themselves much with this question, Witte is keenly aware of its importance. The state is the body authorized to make and enforce public laws and to oversee an array of private-law relations, concerning religion or anything else. Arguably, every law implies some sort of claim about the scope of state authority. When we ask, why is this law proscribing, prescribing, or permitting that kind of action?, we implicitly ask why the law-making body ordering that class of actions takes itself to be authorized to do so, and whether that assumption is valid both factually as a matter of law and normatively as a matter of principle. Witte’s work speaks powerfully to the issue as it manifests itself in the state’s interface with religion, at a time when the reach of state authority is extensive:

The modern state, for better or worse, continues to reach deeply into virtually all aspects of modern life—through a vast network of laws and regulations on education, healthcare, family, zoning, taxation, workplace, food safety, nondiscrimination, charity, and more. Interaction between
the state and religious individuals and groups is inevitable, as is increased interaction among religious groups in our pluralistic society.¹

The question of the scope of state authority is not only a question about the democratic legitimacy of state authority. For even if we have resolved that issue—for example, by pointing to the outcome of an election or, more fundamentally, to a constitutional provision mandating that governments be popularly elected or to a preamble asserting the supreme authority of “the people”—the matter of how far the writ of democratic authority may run has not yet been resolved. It is a cardinal assumption of a constitutional democracy that not everything a democratically elected government does or seeks to do is necessarily conducive to the public good, or even licit. The question of the scope of state authority cannot be resolved entirely within the fields of either constitutional doctrine or democratic theory, but requires appeal to a broader normative political (and, as will become clear, social) theory. Examining the implications of Witte’s work for the question of state authority can serve as a window on his broader contributions in this field.

Witte has not yet elaborated at length what his own general understanding of the scope of state authority is, although elements of his view frequently surface in his writings. In a symposium on his book Church, State, and Family, I observed that this book does not offer an extended account of the scope of state authority with regard to family and marriage, but rather invokes a series of interlocking and mutually reinforcing norms to justify state action in particular cases of family regulation.² That also seems true of his other writings. This is not a criticism, for Witte writes as a legal historian specializing in American law, not as a legal philosopher or political theorist. And, in any case, a general conception of state authority can be credibly constructed only on the basis of extensive empirical evidence of actual state lawmaking, of the kind Witte supplies in abundance. But the lacuna invites the question of what a

¹ John Witte, Jr., Joel A. Nichols, and Richard W. Garnett, Religion and the American Constitutional Experiment, 5th ed. (Oxford: Oxford University Press, 2022 [2000]), 307. And: “Few religious bodies—and, indeed, few believers—can now avoid contact with the state’s pervasive network of education, charity, welfare, child care, healthcare, family, construction, zoning, workplace, taxation, security, and other regulations. Today’s governments not only enact and enforce laws, but they also make grants, confer licenses, enter contracts, and control access to the civic and economic arenas. And so, both confrontation and cooperation with the modern welfare state are almost inevitable for any organized religion whose adherents and agencies venture beyond quiet worship to public engagement” (ibid., 355).

fuller statement of his assumed conception of state authority might look like. I acknowledge that, in responding to even one theme in such a capacious and creative body of work as John Witte's, it seems churlish to ask for more. Yet he has himself stated his aspiration to present a more systematic account of his legal and political thought, so I am delighted to be able to cheer him on in that task!

The first part of this chapter highlights five themes in early Calvinism that Witte has lifted up and put to work in his own legal and political thinking. The second part continues the story by highlighting Witte's deployment of four central Neo-Calvinist political principles, and showing how they are operative in his contemporary treatments of state authority. The conclusion briefly summarizes his chief contributions.

2 Early Calvinist Inspirations

Witte's extensive writings on the Reformation's impact on law and politics have substantially reinforced the claim that there is such a thing as “Protestant political thought.” He has added valuable grist to the mill of those who hold that such thought, in its early manifestations, is not a mere reprising of scholastic political thought, nor that, in the modern period, it is a mere accommodation to secularizing Enlightenment thought. On the contrary, Protestantism has been an original generative source for modern Western political thought and practice. Witte's historical writings—especially those on (European) Lutheranism, Anglicanism, and Calvinism and (American) Puritanism—have sharpened our awareness of the Protestant distinctiveness of these traditions,

While also deepening our appreciation of the deep diversity in what has nevertheless been a rancorous family.

While Witte’s views on the role of the state draw eclectically from many historical and modern Christian and secular sources, his own affinities lie particularly with sixteenth- and seventeenth-century Calvinism, notably the thought of Calvin, Beza, Althusius, Milton, and the Puritans, and its modern rendition in Dutch Neo-Calvinism. Witte is drawn to these Calvinist thinkers, it seems, in part because they offer accounts that are both deeply grounded in distinctively Protestant convictions and capable of being elaborated in applicable constitutional principles—that is, ones lawyers can work with, as opposed to mere theological or ethical platitudes that cut no ice on matters of positive law. It is hardly surprising that Calvinism, founded by a civil lawyer, turned out more than its fair share of legal thinkers. But it is the cogency, not only the concreteness, of Calvinist arguments that Witte is drawn to, even when he departs from their substantive conclusions. In this section I offer my own interpretive reading of five abidingly significant insights he finds in such sources, accentuating how they speak to questions of state authority.4

First, Calvinist thinkers operate with a more pronounced distinction between ecclesial and political spheres than other Reformation thinkers, yet without lapsing into an Anabaptist dichotomy of church and world that would counsel Christian withdrawal from the exercise of (coercive) state authority. Witte draws particular attention to the way in which the Reformation served to roll back the jurisdictional overreach of the late medieval Roman Catholic Church.5 By the early sixteenth century, the church was still exercising extensive authority over matters of marriage, family, property, and criminal law that, Calvinist thinkers judged, properly belonged to secular civil authorities.6 A major consequence of the Reformation was that many such matters came to be removed from ecclesiastical jurisdiction and transferred to civil authorities (albeit, initially, ones that were required to be “godly”). It is worth noting that such areas had come to be included within church jurisdiction in the Middle Ages because, under the model of the corpus Christianum, it was assumed that church and state were populated by identical constituencies, even while ruled by two distinct authorities. The church, then, was no less “public” than the state, and so was entitled to exercise authority over many temporal matters

4 This reading inevitably passes over many other valuable insights he has retrieved from Calvinism and other sources and exploited to good contemporary effect.
5 Lutherans agreed on that point.
6 “Secular” in the sense of pertaining to matters of justice “of this age” (the saeculum), not “secularist” in the sense of closed to divine revelation.
that were somehow implicated in its specific sacerdotal remit (res mixta). While there were numerous turf wars in the Middle Ages over the precise boundaries of the respective jurisdictions of church and state, the Reformation inflicted eventually fatal damage on the assumption that memberships of church and state were coterminous.\footnote{“Eventually,” because the assumption lingered on for decades after the Reformation. See Richard Hooker, 
*Of the Laws of Ecclesiastical Polity*, ed. Arthur Stephen McGrade (Cambridge: Cambridge University Press, 1989), 130.} “Public” now came to be seen as a wider category than “ecclesial,” and “public authority” more clearly demarcated from church authority.

Second, within the civil realm, Calvinist thinkers offer more complex and compelling accounts than other Reformation streams of thought about the proper balance between claims of state authority, on one hand, and personal and social liberty on the other. The demand for freedom from ecclesial control of spiritual affairs naturally led to demands for greater freedom in civil affairs. The Reformation is often charged with unleashing the emergence of individualism, and some later strands certainly did. But, as Witte amply shows, the clamor for greater personal liberty in spiritual and civil matters was no casting off of social and political obligation, only its recalibration in the light of Luther’s radical recovery of “the freedom of the Christian.”\footnote{Martin Luther, “The Freedom of a Christian” [1520], in *Luther: Selected Political Writings*, ed. J. M. Porter (Philadelphia: Fortress Press, 1974), 25–35.} Thus, we see Calvinist thinkers affirming both the high priority of personal and associational liberties and rights, especially religious ones, and the solemn duty of political authorities, under God, to promote (coercive) civil justice across a whole society, in ways that would indeed curtail illicit claims to liberty.

Normatively, authority and freedom are not pitted against each other. Here Calvinist thought stands apart from forms of Lutheranism that so pitted them. It diverges even further from stands of liberalism that proceed from an imagined individual natural liberty in a hypothetical state of nature. Given such a baseline, the obliging force of political authority then appears as a problem to be solved, usually by some account of consent. Rather, as Witte shows, for Calvinists, while political authority is ultimately grounded in divine authority, so are the liberties and rights of the people; these are not the gift of the state.\footnote{Reformation of Rights, esp. chaps. 3, 4.} A Christian tradition which produced the heretical and authoritarian theory of the divine right of kings also generated the radically liberating idea of the divine rights of citizens. Institutional authority and personal liberty are
simultaneously constituted and limited by the requirements of a God-given order of justice that, in turn, must be specified in the rule of just law.

Calvinist thinkers did not, moreover, construe individual liberty and rights as incompatible with the state's complementary remit to promote public virtue. The task of the state is not confined to the negative, remedial function of enforcing a minimum threshold of civil order by restraining violence, disorder, theft, and so forth. The law could never be salvific, but it could and should prompt the virtuous public behavior necessary for the good order of society. While Witte excludes from the scope of state authority today any remit actively to promote religion, and affirms a wide suite of modern liberties, he rejects the liberal egalitarian claim that the state should or could be neutral toward rival conceptions of the human good. On the contrary, he appears to endorse a limited version of state “perfectionism,” as I think Kuyper did. It would be interesting to know whether and how Witte might elaborate such a defense.

Third, Calvinist thinkers flesh out the content of justice in terms of principles of natural law that, while importantly clarified and deepened by scripture, are yet in principle accessible to all, even those whose reasoning faculties have been corrupted by sin. While Luther pitted freedom against law (except “the law of Christ,” the moral demand of love), Calvin and his followers construed law as central to the larger ordering sovereignty of God over all human life, a sovereignty intended to promote the human good as well as God’s glory. Calvin revived the standing of both natural and positive law in the early Protestant movement. In various historical studies, Witte shows how natural-law principles, and some of their outworkings in constitutional law and political institutions, continued to carry substantial public weight in Western polities, long after the time when the Bible could be cited as a shared public authority.

Fourth, Calvinist thinkers accorded a much higher place to popular political participation than other strands of Reformation thought. Lutheranism and Anglicanism, for example, concentrated extensive spiritual and temporal

10 See Faith, Freedom, and Family, chap. 5.
12 An interesting conversation partner here would be fellow Kuyperian Nicholas Wolterstorff, who claims that Saint Paul offers grounds only for a protectionist, not a perfectionist, view of the state. Wolterstorff does not, however, deny that a perfectionist role might be defended on other grounds. See The Mighty and the Almighty: An Essay in Political Theology (Cambridge: Cambridge University Press, 2012), 101–02.
13 See, for example, The Blessings of Liberty, chap. 4.
authority in monarchs or princes, leaving them more vulnerable to authoritarian lapses (such as Tudor and Stuart Erastianism). Witte shows how Puritan covenant theology was a decisive influence here.\textsuperscript{14} The Puritans argued that the “covenant of works,” long deemed to have been made with Abraham and applying principally to the people of Israel (and codified in Torah), was in fact first made with Adam and thus embraced all humans. It was “a natural relation in which all persons participated,” defining “every person’s role, rights, and responsibilities in the unfolding of God’s plan.”\textsuperscript{15} Puritans also transformed the “covenant of grace,” formerly seen as a unilateral act of divine mercy, into a “bargained contract involving acts of divine will and human will.”\textsuperscript{16} Witte has observed how these advances proved decisive in paving the way for the later affirmation of a general freedom of religious conscience. But he also shows how they generated novel concepts of social, ecclesial, and political covenants that proved formative for Western politics.

The social covenant, for example, established the bonds of a society in which all were bound to display public virtue and contribute to the common good, and all were entitled to benefit from the services supplied by a variety of charitable and educational associations.\textsuperscript{17} Every member shared in the responsibility to sustain a morally virtuous community, and the provision of many public goods was not exclusively, or even primarily, a direct duty of government. The social covenant, which Witte describes as “a recipe for both associational liberty and social pluralism,”\textsuperscript{18} thus also worked against the state’s assuming tasks that could be performed by other agents. Althusius had earlier developed a rich account of multiple types of covenantally constituted public and private bodies, each one exemplifying a functionally specific instance of “symbiotic association” and offering a distinctive contribution to the public good.\textsuperscript{19} Such a model has the effect of simultaneously mandating and distributing authority

\textsuperscript{14} See “Biography and Biology,” an extended account of which appears as chap. 5 of Reformation of Rights, and a brief summary of which is found at Religion and the American Constitutional Experiment, 37–42.
\textsuperscript{15} “Biography and Biology,” 253.
\textsuperscript{16} Ibid., 253.
\textsuperscript{17} Ibid., 256.
\textsuperscript{18} Ibid., 257.
within political institutions, and of circumscribing such authority by affirming
the independent authority of other institutions.

The Puritan political covenant implied, in the first instance, a clearer juris-
dictional separation of church and state than early Calvinists, such as Calvin
and Beza, had been prepared to countenance. For the Puritans, “church and
state were the two principal seats of authority within the broader social com-
community, each formed by a further covenant among those who had already
joined the social covenant.”20 Construed as “two separate covenantal associa-
tions, two coordinate seats of godly authority and power in society,” each bore
“a distinctive calling and responsibility, and ... a distinctive polity and practice
that could not be confounded.”21 At the same time, church and state were to
“cooperate in the achievement of the covenant ideals of the community,” the
state providing material and moral aid to the church,22 and the church both
teaching the faith and making available its own resources for the benefit of the
wider community.23

In America, several of these forms of mutual service were later scaled back
significantly, having been judged to run afoul of either the Free Exercise Clause
or the Establishment Clause (some of these curtailments Witte endorses, oth-
ers not).24 By contrast, another momentous upshot of the Puritan political
covenant—its democratic implications—expanded in significance. In the
political covenant, the people themselves, not only God and ruler, were seen
as party to the covenant by which state authority is grounded and circum-
scribed.25 This tripartite covenant proved to be a crucial feeder for later liberal
social-contract theories founded on popular consent. Such theories, in turn,
facilitated the institution of a system of representative democracy based (in
time) on universal adult franchise.26

20 “Biography and Biology,” 257.
21 Ibid., 258. Thus, for example, “Political officials ... were prohibited from holding ministe-
rial office, from interfering in internal ecclesiastical government, from performing saceri-
dotal functions, or from censuring the official conduct of a cleric who was also a citizen of
the commonwealth” (258).
22 For example, by provision of public lands, the collection of tithes, the granting of tax
exemptions, or the imposition of Sunday or blasphemy laws (ibid., 258).
23 “Biography and Biology,” 259. For example, by making their buildings available for public
uses such as education and the registration of births, marriages, and deaths.
24 The scaling back is extensively documented in Religion and the American Constitutional
Experiment.
26 Ibid., 261. See also John Witte, Jr, ed., Christianity and Democracy in Global Context, repr.
ed. (London: Routledge, 2018 [1993]).
Fifth, the Calvinist recognition that human sinfulness tainted not only personal life but also social institutions—an early anticipation of “structural sin”—led them to establish an array of structural safeguards against the abuse of authority in church and state. For the Puritans, these included term limits, a separation of powers, a federal distribution of authority, legal codification (to make the law clear and accessible to all), democratic election, and the demand that officials be people of faith and virtue. Witte shows that many such ideas were formative on the design of early state and federal constitutions in America.

All five Calvinist insights carry implications for the scope of state authority. The first both legitimates the application of state authority in certain matters of public order that fall outside the unique spiritual jurisdiction of the church, and equally proscribes the state from intruding into those areas of spiritual jurisdiction. The second resists authoritarian construals of state authority by insisting that the same order of civil justice underwriting such authority simultaneously hedges it around with robust individual and associational rights that are not concessions of the state but objective demands to which the state must defer. It also affirms a role for state law in fostering virtuous behavior conducive to the public good. The third implies that determining what justice requires is not the exclusive preserve of those appointed to be (or at least claiming to be) mediators of special divine revelation, but is in principle available to all, thereby democratizing the process by which public normativity was determined. The fourth lays the foundation for the claim that the exercise of governmental authority must be accountable to the people in whose name it is exercised, even if not simply responsive to every popular demand. This point also amounts to the claim that while democracy never guarantees just laws, it is a significant inhibitor of governmental acts that might ride roughshod over the people’s fundamental rights and interests. The fifth tempers the exercise of the will of both people and government by erecting a lattice of constitutional safeguards against potential abuses of authority.

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27 Or, more correctly, a revival of the Augustinian idea that a society can be misshapen by its disordered loves.
29 The fourth and fifth points loom large in Reinhold Niebuhr’s distinctively Protestant account of democracy in The Children of Light and the Children of Darkness: A Vindication of Democracy and a Critique of Its Traditional Defenders (New York: Charles Scribner’s Sons, 1944).
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Kuyperian Trajectories, Then and Now

When we turn to the modern Calvinist sources on which Witte draws, we find substantial continuity with earlier sources, but also striking evolutions. Pride of place here goes to the late nineteenth- and early twentieth-century Dutch Neo-Calvinist church leader, theologian, institution builder, and politician Abraham Kuyper.30 Witte deploys Kuyperian insights selectively, and critically, for his own purposes, acknowledging that it is “increasingly a background orientation” rather than an explicit focus.31 He usually deploys such insights without announcing them as such, not least because they can be and have been grounded in alternative sources, religious and secular. Indeed, very likely he has himself struck upon many such insights in quite other sources. For example, his championing of associational liberty echoes many Tocquevillian themes. In any thinker, we need to distinguish what philosophers of science call the “context of discovery” (the route by which an idea was encountered) and the “context of justification” (the arguments supporting it). So I make no claim that these discrete Kuyperian insights are uniquely Kuyperian or even Calvinist. I do think, however, that when we put together the full package of such insights, we find a model that discloses the special charisms of such origins.

It is important to note that Witte often draws on Kuyperian insights for their relevance to the American context, a task made easier by the fact that Kuyper himself spoke enthusiastically of the formative impact of Calvinism on America.32 We might say that, for Witte, Neo-Calvinism (whatever its flaws) serves as one highly instructive working example of what Calvinist legal and political thought might look like when it encountered the radically altered conditions of a modernity already experiencing advanced secularization and pluralization.33 In what follows, I take my cue from the four central constitutional principles that Witte notes were appreciated by Kuyper as having been most fully realized in America, and which Witte himself commends: freedom of religion; a broader defense of liberties and rights; associational liberty; and

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30 For an accessible introduction to Kuyper’s thought, see, for example, Jessica R. Joustra and Robert J. Joustra, eds., Calvinism for a Secular Age: A Twenty-First Century Reading of Abraham Kuyper’s Stone Lectures (Downers Grove, IL: InterVarsity Press, 2022).
31 Faith, Freedom, and Family, 694.
32 See Kuyper, Lectures on Calvinism (Grand Rapids: Eerdmans, 1931), chap. 3. However, Witte critiques Kuyper’s flattering account of the American tradition (“Biography and Biology,” 251–53).
33 Hence the apt title of James E. Bratt’s biography of Kuyper: Abraham Kuyper: Modern Calvinist, Christian Democrat (Grand Rapids: Eerdmans, 2013).
political pluralism. I indicate how these principles serve as orientations for his treatments of concrete contemporary issues where the scope of state authority is implicated, devoting most attention to the first principle (coupled with the second) and the third (coupled with the fourth).

4 State Authority and Religion

The first principle is a robust commitment to the protection of freedom of conscience and religion, of its various forms of public manifestation, and of its outworking in a regime of “confessional pluralism” in which many religious and secular visions are protected, and in some cases harnessed, in the public realm. These commitments in turn imply “the presumptive equality of all faiths before the law, the disestablishment of religion, and the basic separation of the offices and operations of church and state.” Kuyper takes the tradition forward here by radicalizing ideas already anticipated in later Puritan thought. Thus, against the Dutch Reformed Church (Hervormde Kerk) of his day, he explicitly rejected the earlier Calvinist and Presbyterian principle that the state had a duty to enforce true faith and offer special privileges to the true church. His motto was “a free church in a free state,” under which banner he campaigned tenaciously for a state recognition of confessional pluralism in many sectors of Dutch society. The upshot was a theological model of church-state relations allowing clear jurisdictional differentiation between them, but also many forms of constructive cooperation—modern renditions of the “mutual service” between the two bodies applauded by the Puritans. This did not, however, preclude Kuyper from holding that there might still be a recognition of God in the constitution, and that the state might maintain laws

34 Faith, Freedom, and Family, 695–98; see also chap. 10 therein. Witte expounds Kuyper’s account of these principles more fully in “The Biography and Biology of Liberty.”

35 Witte, The Blessings of Liberty; and Witte, Nichols, and Garnett, Religion and the American Constitutional Experiment. It is worth noting that the specific modern religious freedoms that most contemporary religious commentators, including Witte, endorse are much closer to what Witte identifies in the latter book as the evangelical stream in early America than to the Puritan one (ibid., 42–46).

36 Faith, Freedom, and Family, 696. See also “Biography and Biology,” 245. Elsewhere, Witte lists the six “essential liberties” widely recognized in early America: liberty of conscience; free exercise of religion; religious pluralism; religious equality; separation of church and state; and no establishment of a national religion (Religion and the American Constitutional Experiment, 2).

37 Lectures on Calvinism, 99.
against blasphemy or in support of sabbath observance, conclusions to which Witte is unfavorable.

With great erudition, Witte has traced the historical lineage of these contemporary commitments in the United States, enumerated their detailed legal implications, analyzed their shifting constitutional standing in recent decades, warned of their political and legal fragility, and offered remedies where they are inadequately codified or implemented. Welcoming the new era in America’s experiment with religious freedom since 2012, he cites favorably these illustrations of the Supreme Court’s strengthened protection:

[T]he Court has rejected establishment clause challenges to local legislative prayers and to a large memorial cross standing prominently on state land. It has strengthened the autonomy of religious organizations in making labor and employment decisions. It has insisted that religious and nonreligious schools and students receive state aid equally as a matter of free exercise rights. It has enjoined several public regulations, including certain Covid-related restrictions, that discriminated against religion. It has strengthened the constitutional and statutory claims of religious individuals and groups to exemptions from general laws that burdened conscience. It has insisted that death row inmates have access to their chaplains to the very end. And the Court has even allowed the collection of money damages from government officials who violated individuals’ religious freedom.°

I will not interrogate these specific examples, but simply note their importance for the question of how state authority is circumscribed. Witte celebrates the new era as, overall, a welcome advance in protecting religious freedom. Implicitly, he takes it as evidence of a significant improvement in the (American) state’s “religious literacy.” It reveals that the state is learning better how to recognize the forcefulness, distinctiveness, pervasiveness, and particularity of religious claims and identities in the public realm, and of the variegated social and institutional forms in which they need to manifest themselves. A narrow strict separationism, by contrast, misconstrues religion as a matter of private individual conscience. Ironically, this could lead both to an underestimation of the scope of state authority (for example, by leaving some religious claims unvindicated) and to an overestimation of it (for example, by imposing improper burdens on religious associations).

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38 Religion and the American Constitutional Experiment, 6.
But the state’s heightened religious literacy does not amount to an improper endorsement of religion. Rather it shows the state’s enhanced awareness of religion’s true character both as a universal human impulse and as a powerful public reality that cannot be marginalized, about which the state cannot be blind, and that shapes the state’s performance of its own task. This is a particularly clear example of an important wider consideration. It shows that the determination of the scope of state authority is necessarily bound up with the state’s ability properly to identify the highly complex fabric of the public realm which it is tasked to oversee. The state can govern justly only that which it knows truthfully (even though that truth is fiercely contested in democratic debate).

The point is borne out in relation to the second Kuyperian principle Witte alludes to: the need for a broader defense of liberties and rights, beyond religious ones. While Witte does not set out a general theory of liberties and rights, he does allude illuminatingly to many different kinds of liberties and rights throughout his corpus. More than many other defenders of religious liberties and rights, he shows how these are enmeshed in a mutually supporting array of other indispensable liberties and rights that demand realization, even as they must be judiciously balanced against each other and against a range of duties, powers, and other legal relations. Here he demonstrates the importance of not just religious literacy but a broad rights literacy.

This is especially clear in his work on the family (on which more below), and on human rights. His writings on human rights avoid the abstractness and otherworldliness often plaguing purely philosophical or theological defenses of them. Witte robustly vindicates the concept of human rights against religious critics who decry them as, at bottom, mere assertions of subjective human will, lacking any intrinsic limitation. Yet his wide-ranging work in this area cumulatively shows how human rights are not infinitely inflatable moral claims. Rather, they have been progressively incorporated into positive legal codes that, however imperfectly formulated, serve as highly specific benchmarks for the proper discharge of state authority—it’s use and its restraint. He shows how the legal specification of many human rights applies pressure on state officials to lend exceptional weight to certain fundamental human interests

39 Faith, Freedom, and Family, 697.


that have proved especially vulnerable to state excess or neglect, notably the interests of women, children, vulnerable minorities, or political dissidents. Such a lending weight might demand either active intervention to protect vulnerable interests (the introduction of child-protection laws, for example), or simply inaction: to protect life and liberty, often all that the state has to do is do no harm.

Witte is fully aware that many legal rights are not human rights, that all rights must be continually balanced against other rights and against duties, and that they can be promulgated and enforced only by competent lawmaking authorities. But he shows compellingly how embedding a special class of human rights in law has today become one indispensable means of determining the proper scope of state authority. As he puts it, human rights have become “the jus gentium of our times.” A proper grasp of human rights has become an essential part of the rights literacy that the state, and its citizens, need.

Let me now return to Witte’s treatment of religious freedom, which attends to just the kind of complexity and concreteness alluded to. Witte amply documents the past record of constitutional and judicial confusion on the public place of religion in America, especially the lamentable absence of consistency in much Supreme Court Establishment Clause jurisprudence. Against such a background, we can say that one of Witte’s most significant contributions to an account of the scope of state authority is the formulation of an “integrated understanding of the First Amendment religion clauses.” He captures it thus:

The free exercise clause ... outlaws government proscriptions of religion—governmental actions that unduly burden the conscience, unduly


43 Reformation of Rights, 342.

44 “Few areas of law remain so riven with wild generalizations and hair-splitting distinctions, so given to grand statements of principle and petty applications of precept, so rife with selective readings of history and inventive renderings of precedent. Few areas of law hold such a massive jumble of juxtaposed doctrines, methods, and rules” (Religion and the American Constitutional Experiment, 304). It is, he thinks, approaching greater consistency today (ibid., 305).
restrict religious action and expression, intentionally discriminate against religion, or invade the autonomy of churches and other religious bodies. The establishment clause, in turn, outlaws government prescriptions of religion—actions that coerce the conscience, unduly mandate forms of religious action and expression, intentionally discriminate in favor of religion, or improperly ally the state with churches or other religious bodies. Both the free exercise clause and the establishment clause thereby provide complementary protections to the first principles of the American experiment—liberty of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state, and no establishment of religion.45

Further, he observes (commenting on the Establishment Clause) that such an understanding allows for a clearer account of the “mutual service” that should pertain between state and religion today:

The distinction between religious and political authorities and institutions does not require the exclusion from the public square of faith or of the faithful; it permits healthy and productive cooperation in the pursuit of public goods like education, healthcare, and social welfare. The healthy secularity that the establishment clause, correctly interpreted, promotes means that government officials have no constitutional business interfering in the internal affairs of peaceable and voluntary religious groups, and also means that religious officials have no constitutional business converting the offices of government into instruments of their mission and ministry.46

This is a bold and promising account which I strongly endorse.47 However, as Witte would undoubtedly concede, it leaves unresolved important general questions about the scope of state authority. I mention just two.

45 Ibid., 7; see also 305.
46 Ibid, 307. Further: “Government has no business funding, sponsoring, or actively involving itself in the liturgy, worship, or core religious exercises of a particular religious school, group, or official. Religious groups have no business drawing on government sponsorship or direct funding for their core religious activities. Nor do religious groups have any constitutional business insisting that government cede or delegate to them core political responsibilities. All such conduct violates the principle of separation of church and state and is properly outlawed by the establishment clause” (307).
One is whether religion should continue to be regarded as “special” by the state (as distinct from by religious adherents). Witte echoes the claim of many religious commentators that religious freedom, as the “first freedom,” rightly enjoys a special constitutional standing:

The founders understood that religion is more than simply another form of speech and assembly, of privacy and autonomy; it requires and deserves separate constitutional treatment. The founders thus placed freedom of religion alongside freedom of speech, press, and assembly, giving religious claimants special protection and restricting government in its interaction with religion.48

The claim to the specialness of religion can come in two forms, and Witte seems to endorse both. One is that, as a matter of historical fact, religious freedom has served as an “icebreaker” for the law’s subsequent recognition of many other civil freedoms, such as freedom of speech and freedom of association. This is partly a story about the journey of religious and other freedoms in the West.49 Another is that religious freedom can claim a certain normative primacy over others, insofar as the freedom to express convictions and hold identities that are most fundamental to human life can be seen to undergird and mandate claims to protection of many other deep human concerns. This is a claim about the universality of the specialness of religion. It implies a rejection of the suggestion that religious freedom claims are merely Western constructions that carry less weight in other cultures.

Others claim that according religion special status in law risks releasing religion from the critical scrutiny that its dark sides demand,50 or that religious claims are in any case adequately accommodated under other constitutional protections, such as freedom of conscience, speech, expression, and association.51 The U.S. debate is framed by the fact that religion is indeed accorded elevated constitutional status in the First Amendment. The jurisprudential trend in much of Europe, however, has been toward generic protection, as seen in the emergence of the legal formula of “freedom of religion or belief,” and

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48 Religion and the American Constitutional Experiment, 343–44. See also ibid., 203–05.
49 Witte contrasts the chronology of rights affirmations in Catholicism (where religious rights came last) with that in Calvinism (where they came first). The Reformation of Rights, 330.
50 Religion and the American Constitutional Experiment, 350.
the assessment of conscientious nonreligious belief claims in the same terms as those of religious claims. Debate is ongoing as to whether this is causing a general weakening of religious claims. It shows, again, that determining the scope of state authority presupposes a correct identification, and naming, of the societal realities which the state is called upon to oversee and order accordingly.

The second question is how the state is to resolve conflicts between apparently competing equality claims, both those within the field of religious equality and those between religious equality and other forms of equality. Regarding the first, suppose the state does affirm the use of Christian (or other) prayers in the official business of a state legislature or local government (as distinct from permitting on-site voluntary prayers, but outside official business). As Witte notes, in U.S. law this might be justified on the grounds of either free exercise or history and tradition. Interestingly, he defends the latter on democratic, rather than traditionalist, grounds: “So long as private parties are not coerced into participating in or endorsing this religious iconography, and so long as government strives to be inclusive in its depictions and representations, there is nothing wrong with a democratic government reflecting and representing the traditional religious values and beliefs of its people.”

Critics might suggest that such a decision nevertheless breaches the Establishment Clause. It might implicate the state, if not in “coercing the conscience” of nonprofessing legislators (they could step outside), then at least in “improperly allying the state” with (or endorsing) one faith over others. Against that concern, permitting local legislative prayers might be thought justifiable by appeal to the principle of a vertical distribution of authority across different tiers of government. The argument might be that, up to a point, such tiers are at liberty to apply the Establishment Clause differently, perhaps by enjoying a margin of appreciation in balancing this constraining clause against the more permissive principles of federalism and localism. But how would one go about balancing the two principles, each of which has robust independent legitimacy?

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52 See Faith, Freedom, and Family, chaps. 8, 9.
54 Ibid., 352.
55 There is a growing European debate over how far “tradition” is being invoked to conceal an entrenched privilege enjoyed by a “Christian (or Christian-secular) hegemony,” to the detriment of minorities. See Sophie Anne Lauwers, “Religion, Secularity, Culture? Investigating Christian Privilege in Western Europe,” Ethnicipes 23, no. 3 (June 2022): 403–25. Witte is fully aware of the importance of religious freedom for minorities; see Faith, Freedom, and Family, chap. 22.
Or take a case where the claims of religion seem to run up against other dimensions of the state’s commitments to equality.\(^{56}\) Suppose, for example, that the state may indeed mandate equal access for religious schools to state aid, so as to avoid discrimination against religion.\(^{57}\) Critics might counter that this could skew public funding toward middle-class districts where private religious schools mostly flourish, thereby disadvantaging poorer families and neighborhoods. How is the claim to equal religious treatment to be balanced against the (presumably?) equally important principle of social equality? And might not the federal principle also permit differential regimes of religious school funding across different states or localities; and if not, why not?\(^{58}\)

In both examples, the question is why state authority imposes equal treatment in one case but not the other. A full answer would require a broader account of the principle of the political equality of all citizens, its differentiated applications across a range of instances of law and public policy, and, widening the lens, how the state’s satisfaction of equality claims is to be balanced against a range of other equally if not more compelling state duties.

I do not at all suggest there are easy answers to these questions, nor imply that the prudential application of broad principles of religious freedom will always generate neat resolution in concrete cases.\(^{59}\) Certainly, Witte’s “integrated understanding”—no government proscriptions of or prescriptions of religion—offers a substantial advance in clarifying the permissible scope of state authority in this area. I merely offer two remarks on the clarificatory task.

\(^{56}\) The primary conflict here in recent decades, of course, has been between religious equality or liberty claims and claims regarding sex and gender.

\(^{57}\) See *Religion and the American Constitutional Experiment*, chap. 9.

\(^{58}\) Champions of religious freedom do not, of course, always agree on specific cases. In June 2023, an Oklahoma school board voted to approve an online Catholic public charter school that would serve K-12 students across the state, which would make it the nation’s first publicly funded religious charter school; see Nuria Martinez-Keel, “Oklahoma Board Approves Nation’s First State-Funded Catholic School,” *USA Today*, Jun. 5, 2023. Witte’s co-author Richard Garnett defends the decision on the grounds that governments “may not discriminate against religious institutions that are otherwise eligible for public benefits and contracts”; see Richard Garnett, “Oklahoma Catholic Charter School Passes Constitutional Muster,” *National Review*, Jun. 13, 2023. John Inazu, by contrast, holds that governments are entitled to fund religious charter schools, but not required to; see John Inazu, “Did Oklahoma Just Violate the Establishment Clause?,” substack.com, Jun. 16, 2023.

\(^{59}\) Witte observes that part of the “back-and-forth” on such questions “is typical of any area of constitutional law in action, particularly when it also involves larger questions of federalism, separation of powers, and the nature of judicial review.” *Religion and the American Constitutional Experiment*, 278.
One is that, while a more fully articulated account of state authority would not dissolve tensions about the state’s role in religion, it might serve to bring them into useful conversation with parallel tensions across the many other dimensions of the state’s task where the balancing of multiple complex demands also comes with the territory. Could the case of religious freedom prompt new expressions of sector-specific literacy that might be useful for state regulation of, for example, the business, health, or environmental sectors (or vice versa)?

The other is that Witte’s work clearly points up how the constraints arising from constantly shifting historical and political contexts preclude full consistency in the application of state authority in this area. Witte rightly criticizes, for example, the “unrealistic and ahistorical spirit” of strict separationism in regard to religion and education.60 Even if we could secure broad agreement on an integrated understanding of state authority vis-à-vis religion, these First Amendment border disputes are, in any case, going to be thrashed out agonistically in particular contexts, with rival protagonists employing, or weighting, different principles differently in pursuit of competing intuitions about desirable outcomes. To have that sobering conclusion elaborated across different policy sectors would itself be a useful exercise.61

5 State Authority, Nonstate Associations, and Subnational Bodies

The next Kuyperian principle I want to highlight as one of Witte’s important contributions is his robust affirmation of associational liberty—what Kuyper called sphere sovereignty.62 This is the notion that “standing between the state and the individual, there are many other spheres, structures, or institutions of

60 Religion and the American Constitutional Experiment, 279. And: “Accommodating old religious traditions in modern American public life can sometimes be a bit messy or clumsy. It is always tempting to start over, especially when standing at a clean blackboard, opening a new document, or starting the first page of a new law review article. But as Justice Souter reminded us, ‘The world is not made brand new every morning’” (ibid., 353).

61 Adrian Vermeule’s reflections on the role of “determination” (determinatio) in the application of natural-law principles, in his case mostly within administrative law, may be instructive here. He presents a fairly sanguine reading of judicial consistency in this area. See Adrian Vermeule, Common Good Constitutionalism (London: Polity, 2022); and Cass R. Sunstein and Adrian Vermeule, Law and Leviathan: Redeeming the Administrative State (Cambridge, MA: Harvard University Press, 2020).

authority and liberty [family, church, corporation, school, union, and other voluntary associations] that are important parts of how to order liberty and structure the rule of law in a given society.” The legal rights and powers of such associations are not creations of the state (even where it offers legal forms that recognize them). Independent associations should be seen as jurisgenerative.

Witte’s extensive work on marriage and family, as two tightly related forms of human association, has made a major contribution to this theme. Church, State, and Family, for example, documents how the unique standing of the marital family, as a foundational association for the whole of society, has evolved historically, and argues cogently and at times controversially for a particular set of rights and duties attaching to it. Such rights and duties reflect what he identifies as the six dimensions of the marital family: natural, communicative, spiritual, social, economic, and contractual. These “multidimensional” rights and liberties are not simply asserted by the wills of the separate members but arise from the network of relations (marriage, parenthood, childhood) that constitute a multidimensional association displaying a wide array of inherent needs, interests, capacities, and freedoms (albeit, assuming very different forms in particular instances and across different cultures). The liberty of this association is given by its ontology—a point of general importance for a theory of associations.

Most of Witte’s other contributions in this area arise from his extensive and detailed work on the rights and autonomy of religious associations, especially schools, and churches or other worshipping communities. The liberty of such bodies is, in part, a natural and necessary outworking of individual freedom of religion, since the individual pursuit of religious goals, whether worship, proclamation, social service, or education, typically requires corporate outworking. To this extent, Witte’s account converges with liberal accounts that derive associational rights from individual rights. But his account of religious associations also shows the limits of such liberal accounts. For the

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63 Faith, Freedom, and Family, 696. See also “Biography and Biology,” 246.
64 See, for example, Faith, Freedom, and Family, chaps. 25–37.
65 Church, State, and Family, chap. 7.
66 See, for example, Religion and the American Constitutional Experiment, chaps, 9, 10, 12.
67 “Just as every person has the right to seek religious truth and to cling to it when it is found, so religious communities have the right to teach and hold to their own doctrines. Just as every person ought to be free from official coercion when it comes to religious practices or professions, so religious institutions are entitled to be free to govern their own internal affairs without state interference. Just as every person has the right to select their own religious teachings and authorities, religious organizations have the right to select their own ministers and teachers” (Religion and the American Constitutional Experiment, 339).
corporate pursuit of even individual goals also demands *sui generis* rights to associational self-governance that cannot be derived wholly from the rights of individual members. These corporate rights are essential if associations are to be able to set and sustain their religious identities and purposes, free from fear that individual members might invoke state authority to subvert these identities or purposes on the grounds that they breach their supposed individual rights. As Witte puts it: “Ensuring that religious organizations retain rights as organizations to discharge their own appropriate authority and exercise their own appropriate jurisdiction is a core part of religious freedom.” Thus, religious associations must be free “to organize, structure, and govern themselves in accordance with their religious mission, character, and commitments,” and this in two distinct ways.

First, they voluntarily structure themselves internally in ways that conform to their religious beliefs or desires—or simply accord with what they think will be an effective governance model. Second, religious groups are required to structure themselves for external purposes in a legally sanctioned form so that they may enjoy the rights, benefits, and protections of secular legal status.

Witte underlines the importance of establishing the correct legal form so that religious associations are treated, as far as possible, in accordance with their self-chosen identity rather than being forced to modify it merely for reasons of compliance. He is alert to the ongoing worry regarding “the extent to which the state is defining and shaping the religious structure or merely reflecting (sometimes poorly) the preexisting religious structures that communities of faith have voluntarily created.”

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68 Ibid., 310.
69 Ibid., 311.
70 Religious associations “have the right to be free from undue government interference with, influence over, or control of their internal activities. When religious organizations choose to participate in governmental programs and benefits, they should be allowed to do so equally without the establishment clause acting as an obstacle. When they choose to assist in providing social services, even using government funds, they should be allowed to do so fairly but on their own terms, so long as they do not violate the free exercise rights of the users of their services. When they resort to civil courts for resolution of internal disputes, their internal decisions about internal matters should be respected” (*Religion and the American Constitutional Experiment*, 339–40).
71 Ibid., 313. See also Julian Rivers’s chapter herein, on the limitations of a jurisdictional approach to religious autonomy.
This conception of associational autonomy could usefully be generalized in two ways in the construction of a fuller account of the scope of state authority. First, it might be broadened to include many more (perhaps all) “expressive associations,” including many committed to nonreligious beliefs or identities. Associational religious freedom naturally extends into a general “expressive freedom of association.” Arguably, all the following claims of corporate religious freedom noted by Witte apply prima facie to nonreligious expressive associations:

- churches that seek to keep their property from a dissident faction;
- religious schools that seek to hire like-minded believers and fire those who fall aside;
- voluntary religious student groups that wish to share facilities and funds on an equal basis with nonreligious groups;
- nonprofit social service organizations that seek to serve vulnerable members of society while holding true to their core beliefs;
- and even for-profit organizations and entities that seek to participate in the economic marketplace without sacrificing their convictions.

If so, that might have a bearing on whether the state should regard religious associational rights as special.

Second, expressive associational freedom is but one instance of a generic associational freedom essential to a healthy civil society. The state must facilitate, via a variety of legal and policy instruments, a broad regime of protection and support for multiple independent associations pursuing any number of licit purposes. As Witte has shown, expressive freedom itself rests upon the ability of the association to exercise an array of other associational rights and powers, such as the right to legal personality (necessary for standing), to determine its internal constitution, to own and dispose of property, to enter into employment, service, or other contracts, to choose a location, and to pursue any purposes consistent with its articles of association (where it has them).

While the legal dimensions of this theme have not yet penetrated far into mainstream social and political theory, it only takes a moment’s thought to see how essential such an array of rights and powers is to the proper functioning of bodies like businesses, universities, trade unions, professional associations,

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73 *Religion and the American Constitutional Experiment*, 341.
voluntary bodies, cultural organizations, and many more. Critically, the legally sanctioned forms in which such bodies structure themselves require that the state, again, accurately identify and defer to the entities it is engaging with and not force them into a mold that would skew those identities. Thus, for example, to offer to a university a legal structure designed primarily for a commercial enterprise, or incrementally to manipulate it—for example by perverse financial incentives—to mimic such an enterprise would be an improper exercise of state authority.

A defense of the rights of religious associations would, then, be strengthened were it shown to be one instance of a generic theory of associational rights with wider implications for determining the scope of state authority.74 Such a theory would need to be attentive to the ontology of many distinct types of association. There would, of course, be many commonalities across such associations that might be reflected in shared legal forms—for example, associations of different types being grouped into a single category of charities for tax purposes, or elements of corporate law applying to both for-profit enterprises and social enterprises. But there would be other distinctive elements of associations that the state would need to attend to if its authority were to be exercised appropriately and justly.75 For example, the importance of a legal distinction between a marriage and a privately ordered contract is demonstrated cogently in *Church, State, and Family* (chapter 11). This is not because the state is bound to prefer Christian or traditional marriage, but because it has duties to protect the rights of weaker parties, typically women and children, that might be rendered vulnerable if regulated merely under easily dissoluble interindividual contracts. The importance of a distinction between an expressive and a nonexpressive association is also clear from Witte's argument that associations established primarily to advance religious (or other conscientious) purposes may need specific exemptions not required by others.

74 A significant debate in political theory emerging today concerns how claims to associational autonomy can be reconciled with the claim of the state to “democratic sovereignty.” “Pluralists,” such as those who, like Witte, champion “corporate religious liberty,” sometimes find themselves at odds with “democratic sovereigntyists,” such as liberal egalitarians like Laborde, in *Liberalism's Religion*, chap. 5. The latter argue that, however much the state may defer to associational autonomy, only it retains the final authority to determine the precise legal scope of such autonomy. Witte’s work on sharia councils shows that he broadly accepts this latter claim, but his work on religious associations shows he would argue for wider associational autonomy than many liberal egalitarians.

75 U.S. lawyers will know the fine-grained distinctions between different kinds of association recognized in U.S. law. On the options for religious bodies, see *Religion and the American Constitutional Experiment*, 311–15.
Again, the point applies generally: just as the state’s proper discernment of the societal realities it oversees requires religious literacy when ordering religious matters, so it requires a general associational literacy when ordering the broad range of matters pertaining to many types of association (religious or otherwise). Otherwise it risks neglecting, mistreating, or flattening them.

So far I have considered the state’s role in protecting the integrity and self-governance rights of associations. Witte is aware, too, that associational liberty serves broader societal purposes beyond the protection of these internal features. One purpose is to facilitate the emergence of organized conduits for the forming and flowering of individual capacities, protecting “important opportunities for the individual to flourish in externally guided but self-chosen ways.”

A second purpose is to acknowledge that free, self-governing centers of social power, other than the state, act as “bulwarks against state tyranny,” preserving the independence of civil society against improper state intrusion and, by restraining the state, supporting the effectiveness of the rule of law. These purposes have been amply treated by theorists of civil society, associative democracy, and moral pluralism. This work is relevant in disclosing how individual associations function with larger, complex associative matrices that, as important components of public space, may also require legal protection and support. A third societal purpose, still to be adequately acknowledged in the mainstream, is to protect the unique qualities of religious associations, allowing them to offer contributions to the common good that might not otherwise be forthcoming. As Witte puts it:

[A] healthy understanding of [religion-state] separation enhances and promotes authentic pluralism in society by safeguarding and even celebrating religious organizations’ distinctiveness. In turn, when the law recognizes and vindicates the independence and autonomy of religious institutions, it further empowers and enables them to contribute in a variety of ways to the common good and to the flourishing of all persons....

76 Faith, Freedom, and Family, 696. “Plural social institutions must remain strong for the individual to have places to flourish” (697).

77 Ibid., 696–97. Businesses are not typically included in most definitions of civil society, but the point does not affect my argument at this point.

they are religious, precisely because they engage in sectarian practices, precisely because they sometimes take their stand above, beyond, and against the cultural mainstream, thereby providing leaven and leverage for the polity to improve.\footnote{Religion and the American Constitutional Experiment, 357, 359.}

Associational liberty is a question of the relation between the state and non-state bodies. It gives rise to one kind of pluralism. Importantly, Witte distinguishes this from a very different kind, political pluralism, by which he means the principle of a vertical distribution of political authority across several tiers—what Kuyper calls “orderly federalism.”\footnote{Faith, Freedom, and Family, 697.} The two senses are blended in the thought of Althusius. As Witte shows, Althusius developed a highly original account of “symbiotic association” in which successive tiers of public authority are built up from below by popular consent, partly on the basis of private bodies, such as families and corporations.\footnote{Reformation of Rights, chap. 3.} But given the extent and complexity of state authority today, it is highly important to distinguish the two senses. Associational liberty is the liberty of bodies that are not part of the state and that are constituted to pursue a wide array of purposes distinct from the unique purposes of the state. Political pluralism calls for a particular distribution of authority across different tiers of a single body, the state, which, in all its manifestations and via all its organs, pursues those unique purposes.

Distributing political authority vertically is a typically Calvinist method for ensuring that political power is widely dispersed among office-holders, who, sinners like the rest of us, will always be tempted to concentrate power in their own hands. Kuyper praises the federal principle at work in the formation of the Dutch Republic; and Witte imagines that Kuyper would have celebrated the principle’s codification in the Tenth Amendment of the U.S. Constitution, which “reserves to the states all powers not specifically given to the federal government, as well as to the critical role of state and local governments in sharing the governance of the nation.”\footnote{Faith, Freedom, and Family, 697.} Vertical distributions of political authority have not been an explicit focus of Witte’s work on contemporary issues, although their implications for the regulation of religion crop up in several of his writings.\footnote{On religion and education, for example, he notes, with seeming approval, that “state and local legislatures have used the Court’s relaxed establishment clause scrutiny and greater deference to local lawmaking as an invitation to experiment anew with religion and education” (Religion and the American Constitutional Experiment, 279).}
A fuller defense of such a vertical distribution would be a valuable addition to a contemporary Kuyperian-inspired account of the scope of state authority, not least because Kuyper’s successors both in the Netherlands and, more surprisingly, in North America have not devoted much thought to it.\(^8^4\) Herman Dooyeweerd, for example, writing under a unitary Dutch state, construed the vertical distribution of authority as a prudential matter for the central government to decide pursuant to its task of promoting public justice across the nation as a whole. While he attributed a principled sphere sovereignty to many nonpolitical authorities (families, churches, trade unions, and so forth), he attributed only a contingent autonomy to subnational tiers of political authority, the scope of which, he thought, was properly determined by the national state.\(^8^5\) Such a view might be thought to stand in tension with the historical process by which most federations have been formed, namely, on the basis of the consent of the federating bodies which thought themselves to enjoy an original political sovereignty which was then pooled.\(^8^6\) Few American Kuyperians have lent support to reactionary states’ rights movements, but many have expressed alarm at the massive expansion of federal power in the modern period. So it is an interesting question whether a Kuyperian-inspired account of state authority could come up with any original proposals regarding the just balancing of national, state, and local authorities.\(^8^7\)

6 Conclusion

I have interpreted John Witte’s contribution to legal and political thought primarily through the lens of his readings of early and modern Calvinist sources; there are other possible lenses. I identified five principles arising from early Calvinism and four from Neo-Calvinism that seem to serve broadly to orient his constructive work in these fields. I have also shown how both also presuppose certain commitments in the field of social, and especially associational,

\(^8^4\) His followers in the United States and Canada have concentrated mostly on issues of religious freedom, confessional and associational pluralism, and social justice, saying little about the federal dimensions of these nations’ polities.


\(^8^7\) Canadian Kuyperians have, for example, been foremost in campaigning on behalf of self-governance rights for First Nations communities.
theory. At various points I have gestured toward issues that invite further clarification, elaboration, and integration in possible future work in these areas. The unifying thread in these assessments has been the question, arising in political theory, of the proper scope of state authority on religious and more general matters. This is not the only, perhaps not the primary, question in political theory, but it is one that pervades many others. We are broadly familiar with the family of positions in liberal political theory on state authority (classical liberal, liberal egalitarian, libertarian, and so forth). Much has also been written on the parallel array of stances within Catholicism (various iterations of Thomism, liberation theology, integralism, and more). It seems to me that one of Witte’s major contributions has been to point toward one authentic contemporary iteration of a characteristically Protestant theory of the state. This is marked by a robust defense of individual rights and liberties, of an associational and federal pluralism, and of a broad and multidimensional conception of the public good, all held in a distinctive equipoise. Such a conception shares many particular features with the state as understood in several modern liberal democracies, while diverging from secular liberal views on a number of particulars. But it contrasts with secular liberalism in grounding these features in a conception of the state seen as teleologically ordered to justice and the public good, and covenantally constituted so as to pursue them. As John Witte moves further in his journey from “retrieval” to “reconstruction” (as Rafael Domingo puts it), the prospect of him further elaborating such a Protestant theory is an enticing one.

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89 In “The Role of the State in Regulating the Marital Family,” I suggest some possible conversation partners in that future task (519). Another is the Adrian Vermeule of Common Good Constitutionalism. This book has proved highly controversial, not only because of its content but also because its author is a prominent and bullish advocate of “Catholic integralism” (albeit not in that book). Such integralism is incompatible with Witte’s commitments to equal religious liberty and disestablishment, but Vermeule’s proposal that the purpose of the state is the promotion of the “common good” (as understood in “the classical legal tradition”) seems partly convergent with Witte’s position.