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# Slicing the American Pie: Federalism and Personal Law

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# Slicing the American Pie: Federalism and Personal Law

*Jeffrey A. Redding*<sup>1</sup>

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[I]n all Suits regarding Marriage, Inheritance, Cast, and other religious Usages or Institutions, the Laws of the Koran with respect to [Muslims], and those of the Shaster with respect to [Hindus], shall be invariably adhered to.

- “Plan for the Administration of Justice” in British-colonial India (1772)<sup>2</sup>

To make an individual's obligation to obey . . . law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is “compelling” - permitting him, by virtue of his beliefs, “to become a law unto himself,” . . . - contradicts both constitutional tradition and common sense. . . . Any society adopting such a system would be courting anarchy . . . . Precisely because “we are a cosmopolitan nation made up of people of almost every conceivable religious preference,” . . . and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

- United States Supreme Court  
Employment Division v. Smith<sup>3</sup>

Petitioners' [mistaken] reasoning . . . will not limit Congress to regulating violence but may . . . be applied equally as well to family law and other *areas of traditional state regulation*. Congress may have recognized this [problematic] specter when it expressly precluded [the law in question] from being used in the family law context. . . . We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is *truly national* and what is *truly local*.

- United States Supreme Court  
United States v. Morrison<sup>4</sup>

## **Introduction**

The present U.S. system of territorial federalism resonates deeply with those systems of “personal law” that are commonly found around the world. Under a personal law system, a state enforces different laws for each of the state’s different religious or ethnic communities - which is one reason such systems have been so heavily interrogated by U.N. and other international organisations for their human rights implications. Similarly, as well, U.S. First Amendment jurisprudence has frowned upon the carving out of religious-group exceptions to generally-applicable law.<sup>5</sup> That being said, the U.S. Supreme Court has also recently given renewed emphasis to state sovereignty<sup>6</sup> and other federal<sup>7</sup> values. As this Article will argue, what results

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<sup>2</sup> Plan for the Administration of Justice in Bengal (Nov. 3, 1772) (on file with author).

<sup>3</sup> Employment Division v. Smith, 494 U.S. 872, 885, 888 (1990).

<sup>4</sup> United States v. Morrison, 529 U.S. 598, 616-18 (2000) (emphasis added).

<sup>5</sup> See, e.g., *Employment Division v. Smith*, 494 U.S. 872.

<sup>6</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598.

<sup>7</sup> Admittedly, there is some disagreement over what “federalism” entails, and also whether the classic example, i.e. the U.S., can indeed be considered “federal.” One oft-recited definition of federalism is provided by William Riker, who has written that “[a] constitution is federal if (1) two levels of government rule the same land and people, (2) each level has at least one area of action in which it is autonomous, and (3) there is some guarantee (even though

from this worship of federalism is a truly American-style personal law system, where territorial communities have taken the place of other personal law systems' religious and ethnic communal constituencies. This being the case, this Article will conclude by questioning recent innovations in American constitutional jurisprudence which devalue religious pluralism, while simultaneously elevating territorial communalism.

Few commentators have recognised the contradiction that inheres in worshipping the sovereignty of California and Massachusetts, for example, while refusing any comparable legal protection to Christians and Muslims (or other religious communities). And, indeed, most American commentators would find it inconceivable that any legal system would extend broad state-like protection to religious communities - even if it *could* do so. This "inconceivability," however, is merely the result of a general reluctance to examine the reality of non-American systems of law and, in particular, the religion-premised personal law systems of countries as diverse as India, Egypt, or Malaysia.

The reluctance to examine foreign legal experience is perhaps - in some heavily qualified sense - understandable, seeing that the unfamiliar often has an "anarchic"<sup>8</sup> quality to it. That being said, such "qualities" are usually ascriptions, and part and parcel of efforts to distract from the chaotic ordering of one's own (sovereign) jurisdiction. In the context of the U.S., then, blinding the legal gaze to foreign "personal law," has only worked to obscure parallel American legal practice (and parallel issues and problems). Given the shortcomings, then, that accompany provincial analyses of the American constitutional system, this Article will use foreign legal experience - and especially that from India - to deepen its analysis of the American system. By examining India's personal law system, this Article will demonstrate deep parallels between this kind of legal ordering and the American federal system. Both systems of law are deeply committed to "anarchy," even while they differ in their commitments to religious versus territorial communalism.

India's personal law system provides a helpful place to start as this Article builds its argument that the U.S.'s federal system strongly resembles a personal law system, and, accordingly, should be the subject of all of the same legal and constitutional inquiry (if not scrutiny) that other instances of legal particularity have been subject to. For one, India's personal law system provides a particularly rich instantiation of how personal law systems operate in practice, containing as it does several different family law codes for India's several different religious communities. For example, under India's constitutionally-sanctioned personal law system,<sup>9</sup> a Muslim citizen will marry and divorce under laws and procedures that are different - both procedurally and substantively - than a Hindu citizen will. Similarly, a Christian will inherit deceased parents' valuables differently than a Parsi will. Many other examples of Indian citizens being treated differently than their fellow citizens, simply on the basis of their religion, abound.

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merely a statement in the constitution) of the autonomy of each government in its own sphere." WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* (1964). While many interpreters of this well-known definition have counted the U.S. as "federal," others have disagreed with this characterisation. *See, e.g.*, Edward Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903 (1994). *See also* discussion *infra* note 114.

<sup>8</sup> *Employment Division v. Smith*, 494 U.S. at 888.

<sup>9</sup> INDIA CONST., art. 44 (not enforceable in courts).

Moreover, India's extant personal law system provide a vivid demonstration of the contingency of the ostensibly sacrosanct communities upon which personal law systems are built. "Hindu," "Muslim," and "Christian" - and, indeed, "religion" itself - have not been stable or static configurations in India's legal system but, instead, have functioned as the living residue of a complex of social, political, and economic forces and interests. The richer understanding of "religious" and "community" (and, in turn, "religious community") that this situation generates will suggest useful parallels to the similarly-constructed - and similarly-contested - territorial communities that one finds in the U.S. The example of India thus allows one to better understand the "secular" aspects to religious community, and how this particular form of secularity tracks the "sacredness" of American territorialism.

In sum, then, the example of India provides an important stepping stone on the path to demystifying and de-essentialising both "religious" and "territorial" communities. Both kinds of community are social, political, and legal constructs and, thus, more similar than they are different. This conceptual "leveling of the field," in turn, will allow us to see - *contra* much conventional legal theorising - how territorial administrations of the law strongly track religious administrations of the law. We will then understand how American federalism resonates deeply with personal law, and how all of the questions, condemnations, and recommendations that have been brought to bear against personal law systems - and religious pluralism - might also apply to the contemporary U.S. worship of territorial communalism.

Part I will begin this Article by providing a definition and description of "personal law." This Part will provide both a brief history of this method of organising law, and also a demonstration of how personal law works in one paradigmatic instance, namely that of India. The specific context of India will provide a platform for a theoretical exploration, in this Part, of the (politically) constructed nature of the religious and ethnic communities that comprise the constituencies for personal law systems around the world. Through this exploration, this Part will also demonstrate the esoteric nature of religious attachment in India - and elsewhere. That religiosity (and, in turn, religious communities) can be "thinner" than most legal theorising realises will then be contrasted with the potential "thickness" of territorialism in Part II.

Part II will build upon Part I's discussion by developing and defending this Article's major argument that the American federal system shares many important similarities with personal law systems. As federalism impacts the administration of many areas of law in the U.S., a thorough discussion of federalism in this Part is impossible. This Part will thus focus on American states' control of family law, with a special focus on marital law (same-sex and otherwise). Important to this Part's argument will be an explanation of how American territorial communities, like ethnic and religious communities, are politically-motivated constructions that have nonetheless managed to achieve a certain sort of loyalty from citizens - as well as a considerable amount of coercive power over these same citizens. This Part's discussion will rely on historical and theoretical arguments about federalism, and also on an assessment of how legal norms concerning the states' conflict of marital laws effectively end up constructing states as entities that both fall short of - and spill over - any simple lines on a map.

Part III will conclude this Article by questioning recent American jurisprudence which has elevated territorial communalism as a value, while devaluing and displacing religious pluralism simultaneously. After first establishing the jurisprudential displacement that I diagnose, this Part will conclude by briefly making two recommendations for American jurisprudence in the future. Thus, while the previous Parts will have situated the American system of federalism in an ongoing global discussion about the issues and problems that personal law systems can present, this Part will conclude this Article by providing an American “legal payoff” to this global contextualisation. Given, then, the benefits that such a global turn in legal theorising can provide, it is to a discussion of non-American personal law that this Article now turns.

It is too early to foresee the final result of the contact and clash of Western civilization and its law with Oriental and native populations and their customs. In the last decades vigorous nationalist movements have spread all over Asia and Africa and are gaining impetus. New independent States have been born and colonialism in its nineteenth-century garb has practically disappeared.

...

The weakening of Western influence, however, has not brought about a revival of the system of personality of the laws. . . . [Indeed,] the personal laws shows [sic] a tendency to dissolve and become part of a new territorial legislation. . . . [T]he tendency to legal uniformity is stronger than that towards the division of humanity into legal systems according to the ethnic, historical or religious peculiarities of the various peoples.

- Professor Edoardo Vitta<sup>10</sup>

## **I. Personal Law Systems**

### **A. Introduction**

As a method of legislating and administering laws, personal law has a long history, dating back (at least) to the time of the Romans. And, indeed, writing in the late-19<sup>th</sup> century, the great German legal philosopher, Freidrich Carl von Savigny, diagnosed two primary historical methods of legal administration: one based on persons’ “race or nationality,” and another based on “territoriality.”<sup>11</sup>

The first method of legal administration, whereby which persons’ race or nationality determines which laws will be applied to them, is commonly referred to today as a “personal law system.” As will be explained in more detail below, under this kind of legal system, law attaches

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<sup>10</sup> Edoardo Vitta, *The Conflict of Personal Laws*, 5 ISR. L. REV. 337, 350-1 (1970).

<sup>11</sup> FRIEDRICH KARL VON SAVIGNY, PRIVATE INTERNATIONAL LAW AND THE RETROSPECTIVE OPERATION OF STATUTES: A TREATISE ON THE CONFLICT OF LAWS AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME 58 (William Guthrie trans., Lawbook Exchange 2003) (1880).

to *persons* and, as they move from one location (or territory) to another, the same law will apply to them. Looking historically, von Savigny explained personal law in this way:

Nationality appears in a greater extent as the ground and limit of legal community among wandering tribes, who have no fixed territory, as among the Germans in the nomadic era. Among them, however, even after their settlement on the old soil of the Roman empire, the same principle long retained its vitality in the system of personal laws, which were in force at the same time within the same state; among which, along with the laws of the Franks, Lombards, etc., the Roman law also appears as the permanent personal law of the original inhabitants of the new states founded by conquest.<sup>12</sup>

Conceptually, von Savigny argued that territorial law “is distinguished from [personal law] by its less personal nature. It is connected with something outwardly cognizable, namely, the visible geographical frontiers; and the influence of human choice on its application is more extensive and immediate than in nationality, where this influence is merely exceptional.”<sup>13</sup> In other words, following von Savigny, one might say that, under a personal law system, one cannot very easily escape the laws that apply to you, since one’s nationality (or race) is something inborn and inherited. However, under a territorial system, the choice of laws is much greater, and human agency has a larger role to play in such a system, i.e. one can just move from one territory to another to escape the application of the former’s laws.

While, as I will discuss in greater detail below, von Savigny’s understanding of the fixity of religion and religious identity<sup>14</sup> is provincial and misinformed, his strict linking of personal voluntarism with the territorial enforcement of laws is one reason that he - and many contemporary liberals - see territorial legal regimes as an advance over personal law regimes. Thus, Von Savigny wrote that territorial laws have “in course of time, and with the advance of civilization, more and more supplanted [personal laws]. The more varied and more active intercourse between different nations, by which the rougher contrasts of nationalities were necessarily removed, chiefly contributed to this result.” In the epigraph opening this Part, as well, Edoardo Vitta echoes von Savigny’s historically-determinist views.<sup>15</sup> And, as we will see below, the liberal discussion in India also proceeds on the assumption that personal law is something that belongs to the past, and is somehow an embarrassing anachronism in a modern world of constitutional egalitarianism. Conversely, territorialism supposedly poses few if any of the same problems.

As much discussion of personal law also makes clear, many people perceive personal law to be the law that the wild, savage, and uncivilised adopt. Whether they be Germanic tribes, or just Asians and Africans, or even (in the case of India) the “pre-constitutional,” people who live under personal law are often perceived to be pre-modern and non-Western.<sup>16</sup>

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<sup>12</sup> *Id.* at 58.

<sup>13</sup> *Id.* at 59.

<sup>14</sup> And ethnicity and ethnic identity.

<sup>15</sup> Ironically, however, even the passage of a hundred years which saw intense globalisation and “intercourse” between (colonising and colonised) nations did not wipe out personal law from the globe.

<sup>16</sup> Clearly, however, such a viewpoint is an ideological one. And, indeed, despite historical characterisations like those of Professor Vitta, it is important to remember that it was the Western colonial powers themselves who had a tendency to initiate and entrench personal law within their African and Asian possessions. Moreover, the entire colonial enterprise itself could be viewed as a meta-form of personal law: one law for the metropolitans, and one

Given such “legal orientalism,” it is perhaps not surprising then that Americans have not been able to recognise their own indulgence in something very similar to personal law. While Americans have been colonisers as well,<sup>17</sup> American colonies have rarely been central to American identity, in the way that European colonies have been to the European self-imagination. And, indeed, if Europeans - with all of their extensive imagining of and participation in empire-building - have been able to convince themselves of their own innocence with respect to personal law,<sup>18</sup> it is not surprising to find that Americans have been able to completely blind themselves to their own active admiration of “personality of the laws.”<sup>19</sup>

That being the case, since personal law - as a specific terminology - does not have strong roots or recognition in this country, in this Part, I will first briefly define the term, and then demonstrate how such a legal system works in practice using the paradigmatic (though not exhaustive) instance of India. Importantly, the example of India will allow for a discussion of how religious (and other) communities participate in shaping the content of contemporary personal law. Just as importantly, this Part’s discussion of India will also demonstrate how the politics of personal law influences the development of those communities which personal law governs or, in other words, the constructed nature of the communities that comprise the constituency for personal law systems. This demonstration will, in turn, be important for Part II’s discussion of the parallels between religious and territorial communities, and the consonance of American federalism with “personal law” - now properly understood.

## B. Basic Definition of “Personal Law”

At a very general level, a “personal law system” is a legal system in which laws or legal norms bind “different” people differently, sorting people into various legal regimes depending on what “type of person” the person is. Thus, in a given personal law system, one set of (e.g. labor) laws might apply to women, while another set of laws would apply to men. Alternatively, in another personal law system, one set of laws might apply to high-caste persons, while a different set of laws would apply to low-caste persons. Another personal law system might distinguish between foreigners and “natives.” Ultimately, then, what is common between these disparate examples, and what characterises all real-world personal law systems, is that the law which applies to one in such a system depends on the “kind of person” one is, instead of on one’s generic citizenship in an undifferentiated polity.

The factors that are important to personhood,<sup>20</sup> and sorting it, may differ from society to society and, thus, from personal law system to personal law system, but all personal law systems allocate legal rights and responsibilities differently to their different “types” of citizens.

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law for the colonised. Thus, if anything, one might suspect that with the “weakening of Western influence,” Vitta, *supra* note 10, at 351, that one would see a revival of territorial administration of laws, instead of the expansion of personal laws.

<sup>17</sup> E.g. the Philippines, Hawaii, Puerto Rico.

<sup>18</sup> *See, e.g.*, Vitta, *supra* note 10.

<sup>19</sup> *Id.* at 351.

<sup>20</sup> I emphasise “personhood” here to suggest that not every law that distinguishes is a personal law, but only those laws that distinguish between socially- and politically-relevant “types” of people. This, obviously, will differ from society to society. For example, “high-caste” and “low-caste” people are relevant types of people in India, in a way



Obviously, legal systems are not all-or-nothing ventures. Indeed, it is more often the case that any given system of law will contain some kinds of law that are personality-specific, while keeping other areas of law universally-oriented. For example, one often finds states administering civil law personally, while criminal law is administered universally (i.e. in the same way for all citizens). Moreover, within any given civil law system, one might find, for example, that the law of contracts is the same for everyone while, in contrast, family law binds people of different religious faiths differently.

Thus, in India, to cite one important example, one finds a common “Indian Penal Code” that is applied to all of India’s citizens. On the civil side of things, one also finds a great deal of commercial law that applies to all Indian citizens’ commercial dealings in the same way. However, with respect to a different domain of Indian civil law, i.e. family law, the Indian state administers different family law codes to persons of different religious faiths. Thus, a Muslim woman who wishes to obtain a divorce from her Muslim husband will use the provisions of the Dissolution of Muslim Marriages Act,<sup>21</sup> while a Christian woman who wishes to obtain a divorce from her Christian husband will follow the Christian Indian Divorce Act.<sup>22</sup>

Where the term “personal law” is used, it is usually used in a positivist sense. In other words, many laws and legal procedures will operate differently for people who are differently situated, but this fact does not mean that all such laws and procedures amount to personal law - at least in the conventionally-understood sense. Thus a tax system which applies to all of a country’s citizens, but which sets different tax rates for waged versus salaried income, is not a “personal law” system - unless it is operating in a social context which considers how one earns one’s living as particularly salient to one’s personhood. Similarly, a criminal law system that defines rape as the “penetration” of one person by another person’s body part is not (part of) a “personal law” system, even to the extent that such a system essentially immunises women from rape charges.<sup>23</sup> More concretely, then, “personal law” is *not* facially-neutral law that implicitly distinguishes between persons, burdening different types of people disparately and indirectly. Conversely, personal law *is* law that purposefully and *on-its-face* declares that one set of rules and norms applies to one politically- or socially-relevant type of people, and that another set of rules and norms applies to a different type.<sup>24</sup>

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that they are not for the vast majority of Americans. Race rather than caste, in this respect, is more central to the American discussion.

<sup>21</sup> The Dissolution of Muslim Marriages Act, No. 8 of 1939, India Code, *available at* <http://indiacode.nic.in/>.

<sup>22</sup> The Indian Divorce Act, No. 4 of 1869, India Code, *amended by* The Indian Divorce (Amendment) Bill, Act No. 51 of 2001, India Code, *available at* <http://indiacode.nic.in/>.

<sup>23</sup> I am, of course, simplifying, but also reflecting the reality that - despite physiological possibilities - women very rarely face allegations that they have forcibly penetrated/raped a man.

<sup>24</sup> My focus here on “facially discriminatory” laws versus those laws which “disparately impact” raises the question of whether personal law is really just another term for “discriminatory law.” Indeed, it goes without saying that, both historically and contemporarily, there have been many instances of states applying explicitly different laws to different social groupings. Moreover, when blacks, for example, have been (harshly) governed by one set of laws and whites (leniently) by another set altogether, or when women have had one set of (explicit) rules and expectations legally applied to them and men another, these situations typically have not been called “personal law systems,” but “discriminatory legal regimes.” That being the case, it might be problematic, then, to understand things like Jim Crow laws as “personal law,” especially to the extent that any effort to utilise complex non-American debates concerning pluralism could obscure an all-too-easy refutation of these bigoted laws.

While, in any given society, there are many aspects to personhood that might be relevant with respect to personal law-making, the aspects that one most often finds personal law systems using to distinguish between people are those premised in religion and ethnicity.<sup>25</sup> And, indeed, in many former British colonies, religion was the primary aspect of personhood that the British deployed in defining and administering family law. While this might suggest that personal law is not just *any* kind of law that facially distinguishes between persons, but only law that distinguishes between people with different kind of *communal* or *kinship* ties (religion and ethnicity being two prime examples of such ties), the term “personal law” has not been strictly restricted (either historically or contemporarily) to such legal situations.<sup>26</sup>

Moreover, as I will discuss in much greater detail below, even if one would wish to strictly define “personal law” to only include systems of law built around religious and ethnic distinctions,<sup>27</sup> one can still recognise that the American system of federalism falls within the

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To answer such concerns, one can - and should - distinguish “discrimination” from “subordination,” with subordination being understood as a specific species of discrimination - one that is generated *externally* to the group being discriminated against. And, indeed, to the extent that blacks and women have been disadvantaged by such discriminatory regimes, there seems to have been no acquiescence to (much less request for) this discrimination. Conversely, in those cases where the push for differential treatment is generated *internally* by a community, we generally do not say that there is subordination at work, even if there is discrimination *simpliciter*.

Of course, this begs the question of how “internal” and “external” should be understood, and whether there are important linkages between the two. In response to this issue, I believe that, while it is important to understand the insidiousness of bigotry, where social prejudice eventually becomes actively participated in by subordinated groups, it is also important to emphasise that communities have many reasons for not wanting to conform with majority norms masquerading as “neutrality.” Thus, sometimes groups *do* want to be treated differently than society (or other groups in society). Whether or not such a desire is “internal” in all the possible meanings of that term, it is one (perhaps imperfect) way of expressing this morally-distinguishable situation.

Ultimately, then, we should say that personal law - as opposed to subordinating law - must be something that the relevant communities have a decisive role in defining and shaping. Given this understanding, then, of personal law, we can understand why it is often also referred to as “community law.”

<sup>25</sup> In most (modern) societies, then, religion and ethnicity seem to be socially or politically-relevant aspects of personhood.

<sup>26</sup> See, e.g., RAMANI MUTTETUWEGAMA, *PARALLEL SYSTEMS OF PERSONAL LAWS IN SRI LANKA* (1997) for a discussion of the quasi-territorial, quasi-ethnic aspects of Sri Lankan personal law.

<sup>27</sup> There are good reasons not to do this. In particular, theoretically disassociating personal law from ethnicity and religion also allows one to more easily see how personal law is distinct from two other related-but-distinct legal regimes, namely those of “traditional law” and “customary law.” Often, all these terms are used interchangeably. While such versatility in linguistic convention suggests that all of these terms are basically equivalent, each of these expressions does have particular connotations that are important when trying to understand the proper parameters of “personal law” itself.

Thus, it should be emphasised that law does not have to be “traditional” in order for it to be “personal.” And, indeed, much personal law is of relatively recent vintage. For example, a great deal of important Muslim personal law in India dates from the 1930s only. See generally Muhammad Khalid Masud, *Apostasy and Judicial Separation in British India*, in *ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS* 193 (Masud et al. eds., 1996) (discussing changes to Indian Muslim divorce law that the British legislated in 1939). Both Christian and Hindu personal law in India have been significantly reformed within the past five years, as well. See The Indian Divorce (Amendment) Bill, Act No. 51 of 2001, India Code, available at <http://indiacode.nic.in/>; The Hindu Succession (Amendment) Act, No. 39 of 2005, India Code, available at <http://indiacode.nic.in/>. Moreover, looking beyond mere *age* as a metric for tradition, it can also be demonstrated that the legal and religious *methodologies* that underlie relatively recent changes to personal law (in India) are often of an “untraditional” sort. See generally Masud, *supra*. In other words, then, much personal law is both new and representative of innovative methods of

general orbit of “personal law.” And, indeed, the internal differences between “federal” systems themselves (and “personal law” systems as well) can be larger than any difference between “federal” and “personal law” systems as a whole. The border between the two different kinds of systems is quite a fuzzy one.

### C. An Example: Personal Law in India

As the preceding discussion has indicated, personal law systems can be found all over the modern world. While often, but not always, the product of European colonial rule, these systems of law have been retained in many post-colonial states. That being said, personal law systems have never been static, and states continue to modify their personal laws, and the legal and political institutions that administer them.

One state where personal law has been an especially vigorous site of legal debate and reform is India. Home to over one billion people and, hence, millions of people each from faiths as diverse as Hinduism, Islam, Christianity, and Sikhism,<sup>28</sup> India’s personal law system - largely premised on distinctions in citizens’ communal religious identities - provides a particularly rich example of such a system of law. Indeed, there are few legal regimes in the world that continually raise as many important and interesting legal and political questions on a regular basis than India’s personal law system has. Thus, while this section’s exploration and discussion of the Indian personal law context is particular, it is largely so because there are few (if any) other national contexts where *so many* of the potential issues concerning personal law come together *simultaneously*.

In this section, then, I will quickly provide an overview of the basic “workings” of the Indian personal law system, before moving on to a discussion of some of the issues and problems that this system has given rise to. In particular, I will discuss how communal and misogynistic politics together help construct the “space” and demarcate the “borders” of the religious communities that comprise the constituencies for India’s personal law system. Religious communities in India - like states in the U.S. - are not pre-political or pre-historical entities, and individuals’ religious identities are never fixed for eternity. Accordingly, the discussion in this section will be used in Part II to draw important parallels between the American federal system and personal law systems such as India’s.

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legal and religious reasoning. Ultimately, then, personal law can be untraditional or traditional and, indeed, is usually a mixture of the two.

Relatedly, personal law may or may not be “customary law.” “Customary” is often used as a synonym for “traditional,” so all of the previous observations concerning the relationship between “traditional” and “personal” law apply here as well. There is another sense, however, to customary law - namely, that customary law is that law which is non-codified. Typically then, courts declare that they will apply customary law when there is no relevant statutory law, or when a situation arises that the relevant statutory law did not envision - in other words, when there is a “gap” in codified legislation.

For the purposes of this Article, however, and reflecting both historical and contemporary usage, it does not matter whether personal law is codified in statutory law per se or not. While, as indicated above, the term “personal law” is usually used in a positivist sense, such law may be contained in legislative acts, or bureaucratic procedures, or judicial precedent (perhaps concerning communities’ traditional law), or any number of other forms. What matters for “personal law,” then - to restate this section’s basic definition - is whether different laws *or legal norms* - whatever their form or provenance - apply to different types of people.

<sup>28</sup> Not to mention, thousands of Jews, Zoroastrians, and adherents of various other smaller religions and sects.

## 1. Basic Workings

India's present personal law system can be traced back (at least) to the 1772 decision by Warren Hastings, the British viceroy for India at the time, to "in all Suits regarding Marriage, Inheritance, Cast, and other religious Usages or Institutions, [apply] the Laws of the Koran with respect to [Muslims], and those of the Shaster with respect to [Hindus]." <sup>29</sup> While one might have expected otherwise from such an ambitious announcement, ultimately, Hastings' decision was only fully implemented in the areas of marriage, divorce, inheritance, and adoption law, and also with respect to the management of religious endowments. Indeed, the British legislated the Indian Penal Code in the 19<sup>th</sup>-century, and this English-law-inspired criminal law code was applied to everyone in India, no matter what their religion. <sup>30</sup> After independence, the post-colonial Indian state decided to continue with this basic split between universally-oriented criminal law, and personally-oriented family law.

Presently in India, the central government legislates the different religious communities' personal laws. <sup>31</sup> Judicially-speaking, there is a single, national judiciary in India, through which all cases can be eventually appealed to the Indian Supreme Court. No religion-specific courts are officially sanctioned. As a result, the Indian Supreme Court, as well as lower courts, often end up interpreting Islamic, Hindu, and Christian personal law. <sup>32</sup>

While it might seem that the Indian *central* government's and *central* judiciary's control over family law is antithetical to any comparison with a "federal" <sup>33</sup> system of government, as with all comparative projects, context is important. Thus, while India's central government has authority to legislate family law for its subordinate (religious) communities, the central government has rarely done so without the active support of the affected communities. Thus, one can characterise India's central government, with respect to personal law, as just an implementing agent. In other words, what a religious community wants with respect to its

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<sup>29</sup> Plan for the Administration of Justice in Bengal (Nov. 3, 1772) (on file with author). For a discussion of this British policy, see Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 *ISR. L. REV.* 101, 106 (2000). See also M.B. HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* (1975).

<sup>30</sup> Preceding this code's legislation in the mid-19<sup>th</sup> century, Islamic criminal law provided the basis of the applicable criminal law that was applied to all of India's citizens. This was a continuation of Mughal precedent and practice. See generally John H. Mansfield, "The Personal Laws or a Uniform Civil Code?", in *RELIGION AND LAW IN INDEPENDENT INDIA* 139 (Robert Baird, ed., 1993).

<sup>31</sup> While there have been recent efforts by Muslim groups to establish a "Muslim Parliament" that would be responsible for crafting enforceable personal law for Muslims, it is still the case - and the foreseeable one into the future - that the national Parliament will be the institution responsible for the legislation of not only Muslim personal law, but also Hindu personal law, Christian personal law, and other communities' personal law. For example, in 1986, Rajiv Gandhi's government passed the Muslim Women (Protection of Rights on Divorce) Act. Interestingly, as well, the Indian constitution specifically empowers the Indian government vis-à-vis the reform of Hindu practices. See *INDIA CONST.*, art. 25, § 2.

<sup>32</sup> Up until 1863, religious scholars of different faiths were assigned to the courts and would give the courts advice on relevant personal law matters.

<sup>33</sup> See *supra* note 7 for a discussion of different conceptions of what it means for a state to be "federal."

substantive personal law, the central government will typically enact, and what the religious community does not want, the central government will not enact.<sup>34</sup>

Of course, describing the basic mechanics of any legal system only tells part of the story. Only through an exploration of some of the particular difficulties and controversies that any given system has confronted, can one provide a more complete picture of the system. Thus, it is to an exploration of some of the problems and issues that India's personal law system - like other personal law systems - has faced that I now turn. In particular, the next section will discuss how India's personal law system has dealt with (or not) communalism, women's equality, and the controversies that develop when people convert.

## 2. Issues and Problems

### *a. Communalism*

One serious problem that personal law systems commonly face is communalism, and the tendency for religious or ethnic groups to assert a type of exclusive ownership over their respective community's personal laws, thereby enabling a politics of survival whenever other people propose changes to these laws. Given a legal beachhead in an otherwise secular state,<sup>35</sup> communities often come to view that beachhead as singularly important to their self-definition. In such a context, then, any attempt by the state to unilaterally legislate a community's personal law becomes an "assault" on the community, with correspondingly dire - and communalistic - reactions.

India's personal law system has been no stranger to such communal controversies and, indeed, communalism was on full display in the well known Shah Bano crisis that consumed Indian politics in the mid-1980s. This national crisis erupted as a result of a decision handed down by the Indian Supreme Court in the case of *Mohd. Ahmed Khan v. Shah Bano Begum*.<sup>36</sup> The basic question presented by this controversial case was whether the Indian Code of Criminal Procedure's requirement that a man indefinitely financially maintain his ex-wife after a divorce - if she is "unable to maintain herself"<sup>37</sup> - was applicable to Muslim men, who supposedly have more limited responsibilities<sup>38</sup> towards their ex-wives under classical Islamic family law.<sup>39</sup>

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<sup>34</sup> It is probably the case that any Indian religious community's veto power is stronger than its "demand power." This may be the result of it being difficult to forge consensus among a community's internal divisions (e.g. sects) on a consensus proposal to change the legal status quo. In contrast, it may be relatively easier for any part of a community - no matter how small - to raise powerful objections to any change in that status quo.

<sup>35</sup> Or, perhaps, a state that is particularly responsive to another, different religious or ethnic grouping. For example, one often finds similar dynamics as described here with Christian communities in Muslim states (e.g. the Copts in Egypt).

<sup>36</sup> *Mohd. Ahmed Khan v. Shah Bano Begum*, (1985) 3 S.C.R. 844.

<sup>37</sup> INDIA CODE CRIM. PROC. § 125.

<sup>38</sup> Under most classical interpretations of Islamic divorce law, it is generally the rule that a man is required to financially maintain his (ex-)wife up until she has menstruated three times, post-divorce. See DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* 182-84, 280-2 (3rd ed. 1998).

<sup>39</sup> Shah Bano was a 73-year-old, Muslim woman who had been divorced after 46 years of marriage by her husband's pronouncement of *talaq*. Her ex-husband was appealing an order by the Madhya Pradesh High Court that he pay a "princely sum" of 25 rupees a month in maintenance to his ex-wife. *Shah Bano*, (1985) 3 S.C.R. at 850.

Ultimately, in this case, the Supreme Court held/found that 1) the Code of Criminal Procedure's requirements superseded any contradictory Muslim personal law rules and requirements,<sup>40</sup> and 2) that nothing in Muslim personal law forbade indefinite maintenance to a divorced wife "who is unable to maintain herself."<sup>41</sup> Arguably, the first holding was sufficient to have settled the dispute in the case at hand and, thus, it was gratuitous and unnecessarily provocative for the Supreme Court to have attempted an interpretation and definition of the Muslim community's personal law.<sup>42</sup>

Provocative as it was, then, this opinion ended up igniting large protests by conservative Muslims across India.<sup>43</sup> Eventually, then-Prime Minister Rajiv Gandhi and his government acquiesced to conservative Muslim demands to pass a law whose goal was the elimination of Muslim - and only Muslim - women's rights to petition for and receive indefinite post-divorce maintenance from their ex-husbands.<sup>44</sup> In response, cries of "appeasement" were effectively raised by Hindu nationalist quarters, which eventually helped lead to the national electoral successes of the Hindu-nationalist BJP political party. These successes, in turn, led to a severe polarisation in Hindu-Muslim relations in India, a corresponding increase in violence between the two communities, and the drawing of new and sharper boundaries between the two communities.<sup>45</sup>

#### *b. Equality*

The Shah Bano crisis, however, was not just a crisis concerning Hindu-Muslim relations. This was also a crisis that also concerned the status of women in India, in both religious and secular communities. And, indeed, as in many other national contexts, personal law in India has been at the center of not only religious politics, but also gender politics.<sup>46</sup>

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More specifically, the two interlinked questions presented by this case concerned 1) whether or not the Code of Criminal Procedure's maintenance requirement overrode any contrary requirements in Muslim personal law, and 2) whether or not the Code of Criminal Procedure's section 127(3)(b) exemption from providing maintenance for persons who have already paid "the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce," INDIA CODE CRIM. PROC. § 127(3)(b), had been satisfied by the payment of dower (*mahr*) to Shah Bano from her husband. *See Shah Bano*, (1985) 3 S.C.R. at 851, 862.

<sup>40</sup> *See id.* at 854-56.

<sup>41</sup> *See id.* at 859-62.

<sup>42</sup> This seems especially the case given that other portions of the Court's opinion took a patronizing tone in regards the content of such personal law. The lead paragraph in this opinion, in fact, includes the following remarks: "[I]t is alleged that the 'fatal point in Islam is the 'degradation of woman'. To the Prophet is ascribed the statement, hopefully wrongly, that 'Woman was made from a crooked rib, and if you try to bend it straight, it will break; therefore treat your wives kindly.'" *Id.* at 849-50.

<sup>43</sup> Counter-protests by a number of dissident Muslim women and their allies also ensued, adding fuel to the fire. *See Kirti Singh, The Constitution and Muslim Personal Law, in FORGING IDENTITIES: GENDER, COMMUNITIES AND THE STATE* 96, 101-3 (Zoya Hasan ed., 1994).

<sup>44</sup> *See The Muslim Women (Protection of Rights on Divorce) Act, 1986, No. 25 of 1986, India Code, available at <http://indiacode.nic.in/>.*

<sup>45</sup> Sometimes quite literally. For example, after the riots between Muslims and Hindus in Gujarat in spring 2002, neighborhoods became increasingly segregated between the two communities in Ahmedabad, the commercial capital of Gujarat.

<sup>46</sup> The situation with respect to women and personal law in India is similar to that found elsewhere. Thus, whether one looks at tribal systems of law in Canada and the U.S., and the ways in which they describe women members'

All communities' personal laws discriminate against women in India. While the Shah Bano crisis concerned Muslim personal law, Hindu women have experienced a number of problems under Hindu personal law, as well. For example, Hindu women have confronted obstacles to inheritance from their families that their male relatives have not. Furthermore, under Christian personal law, married Christian women have been socially disadvantaged by Christian personal law's restrictive divorce regime. While Hindu and Christian personal law have recently moved towards formal equality,<sup>47</sup> there still remains a great deal to be done in *affirmatively* ensuring *substantive* equality between women and men in these communities (and others).<sup>48</sup>

Because of the inequality that personal law both enacts and supports, many feminists in India have concentrated on the need to reform this system of law.<sup>49</sup> Historically, feminists focused their efforts on the legislation of a "uniform civil code" for India, the terms of which would govern all Indian citizens' marriages, divorces, and related family matters. While efforts to legislate this uniform civil code failed as often as simultaneous court litigations challenging the constitutionality of the personal law system did, efforts on both the legislative and judicial fronts continued robustly until the Shah Bano crisis in the 1980s.

At this point, with communalism at a dangerously high level in India, many feminists began to worry that any effort to legislate a uniform civil code in such a majoritarian-moment would result in a Hindu-inflected, yet universally-applicable family law code. Moreover, the feminist movement itself began to face a splintering along communal lines as well, thereby posing new and difficult obstacles for Indian feminist activism and its efforts to secure a truly non-religion-specific, and gender-equitable, "secular"<sup>50</sup> family law. And, indeed, commenting on this post-Shah Bano devolution of family law discussions (and authority) to inward-looking - and male-dominated - religious communities, Indian feminist intellectual Kumkum Sangiri has commented on how

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rights differently (and usually worse) than men's rights, or the recent efforts to restrict women's family law rights in an Iraq which has witnessed a revival of both religious identity and religious personal law, women often fare worse than men under systems of law that distinguish citizens based on their religious or ethnic identity. While it is certainly not the case that *only* under personal law are women treated worse than men - universally-oriented systems suffer from patriarchy as well - it appears that communalism ups the survival stakes for communities. This, then, works to the detriment of women seeing that they have, historically, been symbolically linked to (social) reproduction and, hence, community survival. Under this reading, however, it is communalism - and not necessarily personal law *qua* personal law - that creates incentives for the assertion of men's control over women's bodies and women's decision-making. Moreover, it is certainly debatable whether personal law systems *necessarily* contribute to communalism.

<sup>47</sup> See The Indian Divorce (Amendment) Bill, Act No. 51 of 2001, India Code, *available at* <http://indiacode.nic.in/>; The Hindu Succession (Amendment) Act, No. 39 of 2005, India Code, *available at* <http://indiacode.nic.in/>.

<sup>48</sup> It is important to emphasise here, as well, that the relatively poor status of women in India (and elsewhere) is not just the responsibility and fault of religious communities. And, indeed, it was Rajeev Gandhi's ostensibly secular Congress-party leadership that was responsible for The Muslim Women (Protection of Rights on Divorce) Act. See *See The Muslim Women (Protection of Rights on Divorce) Act, 1986, No. 25 of 1986, India Code, available at* <http://indiacode.nic.in/>.

<sup>49</sup> As well, Hindu nationalists have protested that this system grants Muslims "more" family law rights (e.g. polygamy rights) than Hindus and have, as a result, also sought reforms.

<sup>50</sup> I use "secular" here to denote "non-religion-specific," even though there are other (e.g. French-republican) conceptualisations and actualisations of this concept.

the state has supported patriarchal interests on religious grounds both ideologically and in practice. There is a long history not only of representing the defence of patriarchal arrangements, privileges and/or the sexual regulation of women as the *defence* of religion but also of the interested representations of patriarchal arrangements as religious *rights* by ‘community’ spokesmen. . . . The coding of patriarchy as religion by community spokesmen has been and is by and large shared by the state which selected *denomination* above differential class, caste and regional practices and above an uncompromising [national-level] secularism as the primary basis for defining family laws.<sup>51</sup>

As the next Part will discuss, the American system, as well, prioritises states over the nation in times of heightened gender anxiety.

### *c. Conversion*

India’s personal law system has also had to confront the number of political and legal difficulties that often arise when people “cross borders” and (religiously) convert.<sup>52</sup> Religious conversion in India has a long, rich, and contested history, creating as many political and legal complications as there have been converts - that is, many. There may be no more “religiously mobile” country in the world. Indeed, once one examines the long history of Christian missionary activity in India, as well as the present (and historical) practice of mass, protest-oriented conversions from Hinduism to Buddhism (to cite just a couple of examples), only then can one appreciate why conversion has operated both as a source of great hope in India - but also great fear.

This fear - of both religious conversion itself and the political violence that often accompanies this conversion - has manifested itself in many ways, including the legislation of laws that heavily regulate and restrict religious conversions in India. This fear is also evidenced by important Supreme Court judgments that have looked askance at the - common-enough - phenomenon of Hindu men converting to Islam in order to engage in polygamy.<sup>53</sup>

Such judgments both draw from and contribute to a Hindu-nationalist paranoia as to the (alleged) possibility that Muslims might eventually outnumber Hindus in India if conversion goes unregulated - indeed, if the Indian administration of family law continues to be structured in a way that “encourages” people to abandon Hinduism in favor of Islam and its “advantageous” family laws. And, indeed, these fears have only grown worse as the communal stakes have gotten larger in the post-Shah Bano India. As Hindus and Muslims have grown politically - and religiously - farther and farther apart in a contemporary India (and world) which stresses their differences rather than their similarities, any conversion to Islam essentially becomes another vote for “the enemy.”

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<sup>51</sup> Kumkum Sangiri, *Politics of Diversity: Religious Communities and Multiple Patriarchies*, 1995 ECON. & POL. WKLY. 3287, 3295.

<sup>52</sup> These difficulties are not unique to India and have been witnessed elsewhere, for example in Malaysia. See generally MICHAEL G. PELETZ, RELIGIOUS COURTS AND CULTURAL POLITICS IN MALAYSIA (2002).

<sup>53</sup> See generally Jeffrey A. Redding, *Human Rights and Homo-sexuals: The International Politics of Sexuality, Religion, and Law*, 4 NW. J. INT’L HUM. RTS. 436 (2006) (discussing Indian cases such as Lily Thomas v. Union of India, A.I.R. 2000 S.C. 1650). See also discussion *infra* accompanying notes 144-50.



However, the Hindu majoritarian project in India is not limited to discouraging Hindus from converting to Islam - or, as has happened in the several millions, Christianity and Buddhism. It also extends to unilaterally and legally defining other groups *as* Hindus (for the purposes of constitutional and family law). Thus, Article 25 of the Constitution of India, with no sense of irony, qualifies its religious liberty provisions by declaring that “the reference to Hindus [and Hindu religious institutions] shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion.”<sup>54</sup> One can also find similarly-amalgamative legal moves in the Hindu personal law code, and also a number of Supreme Court decisions.<sup>55</sup>

As such constitutional provisions, legislative acts, and judicial decisions make eminently clear, it is only through crude demarcations and brute implementations of power that India’s religious communities have taken their present-day “shape.” And, indeed, just as odd as it is to consider Sikhism an uncomplicated part of Hinduism, so is it non-obvious as to why India should legally treat all of its 150 million Muslims as the same - despite their several sectarian, lingual, and ethnic differences. Nonetheless, this is what the Indian constitutional and legal system has wrought, and it is how things will remain as long as there is a powerful Hindu nationalist imperative to count as many Hindus as possible, and then to situate them in eternal opposition to a threatening “Muslim other.”

In sum, communalism, women’s equality concerns, and religious conversion have all challenged the functioning and stability of India’s personal law system, as they have in other personal law regimes as well. As the next Part will demonstrate, however, this complex, “anarchic” ordering of things is hardly unique: the American federal system demonstrates many similarly chaotic - and occasionally troubling - qualities.

An American state is not like a nomadic tribe, with membership based on kinship. Nor is it a voluntary association of like-minded people, liked a social club or a civic league. . . . The state . . . is defined by its territory. . . . There are other ways to organize, but we did not choose them.

- Professor Douglas Laycock<sup>56</sup>

I’m elated, and I’m proud to be a New Jerseyan now.

- Victor Aluisse  
Commenting after the New Jersey legislature approved a civil unions bill<sup>57</sup>

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<sup>54</sup> INDIA CONST., art. 25.

<sup>55</sup> *See, e.g.,* Bal Patil v. Union of India, A.I.R. 2005 SC 3172 (India).

<sup>56</sup> Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 316-17 (1992).

<sup>57</sup> *Quoted in* Kareem Fahim, *In New Jersey, Gay Couples Ponder Nuances of Measure to Allow Civil Unions*, N.Y. TIMES, Dec. 16, 2006.

## **II. American-Style Personal Law**

### **A. Introduction**

Given Part I's description and definition of what a "personal law system" is, I will argue in this Part that the American federal system resonates deeply with the personal law systems that one finds all over the globe. Ultimately, then, this Part will clarify the similarities between the two "different" kinds of systems, and also demonstrate that any attachment to maintaining a strict conceptual separation between the systems is theoretically inappropriate.<sup>58</sup>

In this Part, I will concentrate on the personal law aspects of the U.S.'s federalised administration of family law and, in particular, marital law. A focus on this area of law readily lends itself to this Part's main argument in that American states' administration of this area of law, and the moralising tones that accompanies this administration, will help make clearer the analogy between these American territorial communities and the religious and ethnic communities that comprise the constituencies for personal law systems elsewhere. After a very brief overview, then, of the extant diversity in states' family laws, this Part's drawing of an analogy between personal law systems and the American federal family law system will proceed in three parts.

First of all, this Part will discuss how, as in India where politics has played a large role in the boundary-drawing between "different" personal law communities, "territory" and "territorial communities" consist of much more than dirt and lines in the sand. Indeed, American states have a much more attenuated relationship to any physical conceptualisation of territory than is commonly conceived. As this Part will explain, states - unlike the tangible dirt with which they are commonly associated - disappear and re-appear in American history, in a manner which, not coincidentally, is tied to politics. This now-you-see-them-now-you-don't political-artifact quality to American states then echoes with the ways in which (as described in Part I) Indian religious communities' salience increases and decreases in coordination with politics - often of a non-egalitarian sort.

Second of all, this Part will discuss how the American federal system replicates personal law systems in the way that both systems of law make it difficult to convert away from communities of first-instance. For example, in the same way that India's personal law system makes it difficult for, or puts restraints on, anyone who desires to leave the Hindu (family law) orbit, American states - through conflicts-of-laws norms - exert control over their (former) adherents even when they move outside of their (former) state's borders. The first analogical similarity between Indian and American communities focused on how these communities' respective legal systems create and erase - in a political manner - communal borders. This second analogy, then, will follow up on this first point, but concentrate on how, even when borders do exist, they are elastic. In the American context, as in the Indian context, this again means that community borders lack strict correspondence with any (contiguous) patch of dirt.

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<sup>58</sup> Another way of demonstrating this would be to examine the global diversity of both "federal" and "personal law" systems, in the process demonstrating that the internal differences between "federal" systems themselves (and "personal law" systems as well) are larger than any difference between "federal" and "personal law" systems as a whole.

Finally, this Part will discuss the *affective* quality to state communities, both historically and contemporarily. As Victor Aluise vividly demonstrates, people *do* have vibrant identifications with - and pride in - states-as-moral communities. Of course, such attachments are not omnipresent, nor eternal, but this does not mean that they are not real - or dissimilar to how religious persons often identify with their religious communities. In this section, then, as part of analogising state and religious communities, I will interrogate conventional - but misguided - notions of “religion,” “community,” and “religious community” that work to obscure the linkages between religious and territorial identifications. Relatedly, in this section, I will also explain how “territory” itself often operates as a metonym for deeper issues and disagreements - including “moral” ones. Ultimately, then, this section will demonstrate that people’s attachment to territorial communities can be just as morally-premised as people’s attachments to religious communities can be.

Concentrating on these three similarities between the U.S. federal system and personal law systems is warranted, in light of how theorists have distinguished territorial legal systems from personal law systems, and also considering the allegations that many liberal theorists have leveled against personal law systems. As Part I already discussed, one of the primary objections to personal law systems has come from liberal thinkers and their estimation that such systems are both pre-modern and illiberal. The three aspects of American federalism that this Part will focus on, then, will demonstrate that 1) like religiosity and ethnicity, U.S. statehood is a largely intangible quality, whose concreteness largely manifests itself in especially politically-fraught times, 2) U.S. states make exit from their respective jurisdictions either impossible or difficult, and 3) Americans have provincial attachments to their territorial communities, often for deeply moral reasons. Thus, in one way or another, the American federal system (and polity) also demonstrates highly “pre-modern” and/or “illiberal” characteristics. Of course, it is possible that politically-motivated borders that entrap people in a system that they themselves fully support for moral reasons can be liberal. However, if that is the case, generosity of spirit only insists that that possibility be shared with - or denied to - both federal and personal law systems.

While states may not be *the* primary attachment for many American citizens, they continue to play an important role in America’s ongoing civil wars over morality, configuring the imagination and deployment of both political authority and notions of moral belonging in the United States. In this way, then, they function similarly to similarly useful - and similarly unavoidable - religious and ethnic communities in India and elsewhere. This Part, then, will explore the similarities between all of these allegedly disparate types of communities - and their corresponding legal systems - after first giving a brief overview of the reality of family law in contemporary America.

## B. Overview of Contemporary American Family Law

At a very fundamental level, the American federal system divides Americans into different communities, each of which has authority to enforce its own norms with respect to those persons who are members (voluntarily or otherwise) of that community. Thus, the

American federal systems results in one set of family law norms binding Californians, and a different set binding the people who belong to Michigan, Missouri, Massachusetts, and so on.

While there is a great deal of contemporary agreement among the states on certain principles and aspects of family law (e.g. the availability of civil marriage and also no-fault divorce), that has not always been the case, and seems increasingly unlikely in the future.<sup>59</sup>

Whether these emerging differences, or existing ones, are “significant” ones is a political and ideological - and also personal - estimation.<sup>60</sup> For example, many people read the fact that only one American state allows same-sex couples to “marry” (as such) as a significant violation of constitutional guarantees of equality. For others, however, this reality is a minor issue when compared to the general (and not insignificant) accomplishment of equality in opposite-sex marriages in the U.S. Such a trivialising view is one that can be found on the far-right - where the prevalence of homosexuality is feared, but also denied - and also on the far-left - where marriage itself poses serious moral problems and the denial of same-sex couples from its purvey is either unimportant or something to feel grateful for.<sup>61</sup> Similarly, in the Indian context, there are differences between different religious communities’ family laws, but one should not make the mistake of either overplaying, or downplaying, those differences.<sup>62</sup> Different people will see the significance of legal differences differently.

Ultimately, the only thing that can be said safely is that there are different family laws in different states, and that many people understand these differences to concern “morality.” The rest of this section, then, will briefly outline some of these differences in moral outlooks between the different states. By doing so, this section will anticipate the more detailed argument below that the American states are moral communities with moral borders, akin to the religious communities that form the constituencies for many personal law systems. And, indeed, the claim that American states are moral communities would be weakened (though not destroyed) if one could not find evidence of differences between the states in the family laws and polices that each implements. Thus, it is to a brief overview of contemporary family law differences between the states that I now turn.<sup>63</sup>

## 1. Marital Name-Changing

The state laws governing marital name-changing are a good example of family law differences between the states that may strike some people as trivial, but other people as deeply significant. As Elizabeth Emens explains in her comprehensive examination of states’ marital name-changing practices, such laws used to especially impact on women: “Custom became law by a series of cases in the late-nineteenth and early-twentieth century. These cases built dicta

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<sup>59</sup> See, e.g., Tim Craig, *Foundation Wants Stricter Rules for Splits*, WASH. POST, Jan. 5, 2007 (detailing efforts in Virginia to restrict no-fault divorces).

<sup>60</sup> *But see* Laycock, *supra* note 56, at 260 (arguing that most legal differences between the states are insignificant).

<sup>61</sup> See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (2000) (arguing that queer persons should resist the normalising temptations offered by same-sex marriage).

<sup>62</sup> And, indeed, one might note, that communalists have been responsible for both “exaggerating” the differences between religious communities, as well as “minimising” those differences as part of a hegemonic move.

<sup>63</sup> For a more historical overview of such differences, see Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 437-44 (2005).

upon dicta until many states had plainly declared in case law, or by statute, that married women’s ability to engage legally in certain common activities—such as driving or voting—was dependent on her bearing her husband’s name.”<sup>64</sup> Even now, however, there are still significant social costs and benefits attached to taking on (or not) the surname of one’s spouse at marriage. Writes Emens: “[W]omen who decline to take their husbands’ names face not only the potential displeasure of their husband, but negative stereotypes from the wider public. Women who keep their own names are thought by others to be more assertive, more feminist, and more oriented towards their careers than their families.”<sup>65</sup>

These social perceptions are important because, while the contemporary default rule in nearly all states is that both spouses will retain their original names upon marriage, the ability of a *husband* to - unconventionally - take upon the surname of his *wife* can be quite different across the different states’ bureaucracies. As Emens finds, in a number of different states, men face challenges - unique to their gender - if they wish to take on the surname of their spouse:

As a formal matter of law—if a prospective spouse persists across agencies and, ideally, hires a lawyer—changing his name seems harder than changing her name in only seven states; it should be equally difficult to change his name as to change hers in thirty-nine states; and in four states it is unclear if there is a difference in difficulty.

Informally, however, the picture looks somewhat different. From contacts in eleven states it appeared practically more difficult to change his name than to change hers; in thirty it looked practically no less so; and in nine it was unclear. More starkly, in a limited number of calls to county clerks and DMVs in all states, at least one clerk in thirty-eight states indicated that it would be harder to change his name than hers, and in ten states at least one clerk suggested contacting an attorney to attempt a change in his name. In only five states did no clerks contacted suggest that changing his name was harder.<sup>66</sup>

Clearly, then, legal differences still exist between the states with respect to marital gender roles.

## 2. Same-Sex Marriage

While same-sex marriage has been a topic of discussion in American gay and lesbian communities since the 1970s (at least), no real traction for this idea could be found until 1993, when the Hawaii Supreme Court held in *Baehr v. Lewin* that Hawaii’s prohibitions on same-sex marriage possibly violated the Hawaiian state constitution’s guarantees of equality.<sup>67</sup> That being the case, this opinion sparked a great deal of backlash, as a result of which Hawaii ultimately amended its constitution so as to explicitly allow the Hawaii legislature to ban same-sex marriage in that state.<sup>68</sup> The legislature then accepted this constitutional invitation and legislated such a ban.

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<sup>64</sup> Elizabeth F. Emens, *Changing Name Changing: Desk-Clerk Law, Framing Rules, and the Future of Marital Names* 74 U. CHI. L. REV (forthcoming 2007) (citations omitted).

<sup>65</sup> *Id.* at 18 (citations omitted).

<sup>66</sup> *Id.* at 55 (citations omitted).

<sup>67</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). Technically, the Hawaiian Supreme Court decided that a lower court’s dismissal of the case at hand was inappropriate, and that the lower court must review the refusal a marriage license to a same-sex couple which was at issue in this case, using a “strict scrutiny” standard. *Id.* at 87.

<sup>68</sup> *See* HAW. CONST., Art. 1, §23.

Both Hawaii's initial moves towards the legalisation of same-sex marriage, and then its constitutional amendment approach to restricting this form of marriage, would prove prophetic. Indeed ten years after *Baehr*, Massachusetts would grant same-sex couples the right to marry<sup>69</sup> while, around the same time, efforts to constitutionalise same-sex marriage bans accelerated around the U.S.

While Massachusetts remains an outlier state in the American system, and the majority of states have very resolutely banned same-sex marriage from their jurisdictions - 26 states constitutionally restrict marriage to unions of one man and one woman (while 19 statutorily restrict it)<sup>70</sup> - there is still an internal diversity to this (extreme) opposition to same-sex marriage that many people overlook. The following three states' constitutional disapprovals of same-sex marriage demonstrate this diversity:

- 1) Michigan: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."<sup>71</sup>
- 2) Virginia: [O]nly a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.<sup>72</sup>
- 3) Tennessee: "The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state."<sup>73</sup>

Thus, Michigan looks towards future generations, Tennessee aims to replicate historical tradition, and Virginia sweeps in unmarried opposite-sex couples in its extremely thorough attempt to legally de-legitimate anything other than full-on opposite-sex marriage. While all three states refuse same-sex marriage, they do so in significantly different ways.

### 3. Age of Marital Consent

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<sup>69</sup> See *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>70</sup> See HUMAN RIGHTS CAMPAIGN, STATE PROHIBITIONS ON MARRIAGE FOR SAME-SEX COUPLE (2006), available at <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=28225&TEMPLATE=/ContentManagement/ContentDisplay.cfm>; HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE LAW (2006), available at <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=28225&TEMPLATE=/ContentManagement/ContentDisplay.cfm>.

<sup>71</sup> MICH. CONST., Art. 1, § 25.

<sup>72</sup> VA. CONST., §15-A.

<sup>73</sup> TENN. CONST., Art. 11, §18.

Perhaps the most shocking example of moral differences between the American states when it comes to family law concerns the minimum age-of-consent for marriage.<sup>74</sup> While the vast majority of states require marriage participants to be at least 18-years-old if they are marrying without parental consent,<sup>75</sup> most states relax this age requirement - to different extents - if there is parental consent. Thus, while Kentucky requires marriage participants to be 18 with or without parental consent to marriage, its neighbor, Tennessee, allows 16-year-olds to marry with their parents' consent. Hawaii permits 15-year-olds to marry with their parents' consent.

Differential state estimations as to the proper role of parents in children's marital decisions is only one part of the story here, however. Many states which allow the fact of parental consent to relax the minimum marital age requirement do so differently vis-à-vis boys and girls. Thus, with parental consent, Rhode Island allows 14-year-old boys to marry, while girls only have to be 13-years-old. In Massachusetts, the parental-consent disparities are even greater: boys have to be 14, while girls only have to be 12.

Thus, some states allow child marriage for girls, some for boys, and some for both. Some states don't allow child marriage at all, with or without parental consent. For many people, these particular differences between the different states' family laws are very significant ones.

### C. Analogy 1: States Also Have Politically-Motivated Borders

Douglas Laycock is correct when he states, in the epigraph which opens this Part, that states are not built on kinship - at least of any genetic type. However, he is also correct when he notes that our present organization of states is one that "we" chose. Indeed, states did not spring out of the dirt: Americans defined, built, and organised them.

Of course, this construction process was not a pretty one, and every American state has a messy (and often gruesome) history underlying the present configuration of its borders. The vast majority of these histories involve some complex combination of exploration, settlement, and conquest. Yet while the vanquished were diverse - Native Americans, Mexicans, and Hawaiians amongst them - the end result of each convoluted history was an entity that Americans eventually recognised as a "state."

Such a designation is a term of art, bringing certain rights, privileges, and responsibilities. And, indeed, it is the constitution's allocation of various rights, privileges, and responsibilities to states that tells us what "states" are, and how we can recognize them, rather than any specific constitutional definition of these entities.<sup>76</sup>

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<sup>74</sup> All of the data in this section comes from Legal Information Institute, Marriage Laws of the Fifty States, District of Columbia and Puerto Rico, [http://www.law.cornell.edu/topics/Table\\_Marriage.htm](http://www.law.cornell.edu/topics/Table_Marriage.htm) (last visited Apr. 1, 2007).

<sup>75</sup> Interestingly, Nebraska requires marriage participants to be 19-years-old. This is the highest age requirement of all the states. *See id.*

<sup>76</sup> Indeed, one has to wait until Article 4 of the constitution - after Articles 1-3's articulation of the *central* legislative, executive, and judicial branches - for the states to be given any sort of substantive outline or shape. While there are mentions of the States in earlier Articles, it is not until Article 4 that any substance - albeit meager - is given to these entities. Even then, all we get is declarations such as "New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the

Such rights, privileges, and responsibilities include the right to representation in the House of Representatives<sup>77</sup> and Senate,<sup>78</sup> the right to (and responsibility to maintain) a “republican” form of government,<sup>79</sup> the obligation not to “deprive any person of life, liberty, or property, without due process of law,”<sup>80</sup> many other rights and responsibilities as defined by courts<sup>81</sup> and, finally, any “powers not delegated to the United States by the Constitution, nor prohibited by [the Constitution] to the States.”<sup>82</sup> Interestingly, however, and as Laycock himself notes, “[t]he Constitution . . . never quite says . . . that states are territorial.”<sup>83</sup>

Thus, we can know that the District of Columbia is not a state - even though it has territory “not exceeding ten Miles square”<sup>84</sup> - because, among other things, it does not have (voting) representation in the House or Senate.<sup>85</sup> Nor does it have a republican form of government. Similarly, we can also know that Native American tribes are not states, in the constitutional sense.

Ultimately, then, whether or not a given entity holds territory is not the determining factor as to whether it is a state. It *may* be the case that territory is necessary for statehood, but it clearly is not sufficient. And, indeed, it may also *not* be the case that territory is actually necessary: where the U.S. constitution speaks of states and state citizenship using terms like “resid[ing],” “within the Jurisdiction,” etc.,<sup>86</sup> non-territorialised interpretations of such words are not only possible, but commonplace.<sup>87</sup> Given all of this, then, and per Article 4 of the U.S.

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States concerned as well as of the Congress.” U.S. CONST., art. 4, § 3. Interestingly, then, this description of what appears to be sovereign entities then gets undermined (or, at least, counter-balanced) by this same Article’s declaration that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State,” *id.*, art. 4, § 1, as well as the somewhat more opaque guarantee that “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” *Id.*, art. 4, § 2.

<sup>77</sup> U.S. CONST., art. 1, § 2.

<sup>78</sup> *Id.*, art. 1, § 3.

<sup>79</sup> *Id.*, art. 4, § 4.

<sup>80</sup> *Id.* amend. XIV.

<sup>81</sup> E.g. criminal law, family law, etc.

<sup>82</sup> *Id.* amend. X.

<sup>83</sup> Laycock, *supra* note 56, at 317. The full quote here is: “The Constitution thus assumes that states are territorial, but it never quite says so.” *Id.* One might wonder, however, whether it is Laycock himself who is assuming that the states are territorial, if the Constitution itself never says they are.

<sup>84</sup> U.S. CONST., art. 1, § 8.

<sup>85</sup> See Mary Beth Sheridan, *White House Opposes D.C. Vote*, WASH. POST, Mar. 17, 2007 for a discussion of recent debate concerning D.C.’s lack of Congressional representation.

<sup>86</sup> The 14<sup>th</sup> Amendment reads: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State *wherein they reside*. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person *within its jurisdiction* the equal protection of the laws.” U.S. CONST. amend. XIV (emphasis added). Article 4 reads: “New States may be admitted by the Congress into this Union; but no new States shall be formed or erected *within the Jurisdiction* of any other State; nor any State be formed *by the Junction* of two or more States, *or parts of* States, without the Consent of the Legislatures of the States concerned as well as of the Congress.” U.S. CONST., art. 4 (emphasis added).

<sup>87</sup> Douglas Laycock appears to disagree. See Laycock, *supra* note 56, at 316-17. Indeed, he even writes, with respect to Article 4: “Note especially the use of the word ‘Jurisdiction’ as a synonym or metaphor for territory.” *Id.* at 317. How he knows when and whether the Constitution is speaking metaphorically is left unclear.



Constitution,<sup>88</sup> statehood is better understood as a *status* that Congress (sometimes in concert with pre-existing states) bestows upon an entity, with all the aforementioned rights, privileges, and responsibilities accompanying this status.<sup>89</sup>

In sum, there is nothing pre-historic, or pre-political, about statehood. States are historical, political, and constitutional constructions. They may overlap with territory, but they are not just territory - or, at least, any pre-political, dirt-like notion of territory.

The fact that American states, and their borders and powers, are the creation of the U.S. Constitution (and the political processes it authorises) suggest parallels with the way in which the Indian constitution (and its associated political processes) builds and orders India's different religious communities. As Part I discussed, these Indian legal and political religious-construction projects are imbricated with communal politics in India. These communal politics have waned and waxed over India's 60-year history, and religious borders have correspondingly disappeared and re-appeared. In the rest of this section, I will demonstrate how American states have similarly emerged and been submerged according to the political realities of the day.

One political context where American states have a very prominent role is the formal constitutional amendment process. Article V of the U.S. constitution creates an extremely arduous set of requirements vis-à-vis constitutional amendments, especially to the extent that this constitutional article super-adds a *state*-approval requirement on top of the (already difficult) requirement that 2/3 of both houses of the national legislature approve any proposed amendment.<sup>90</sup> When the amendment of the U.S. constitution's formal text is on the political table, then, states have an explicit role - and a very clear presence in American political life.

For this reason, the possibility of formally amending the U.S. constitution - even with respect to immensely important issues - is quite small.<sup>91</sup> And, indeed, it took 52 years after the 14<sup>th</sup> Amendment's enshrinement of "equal protection of the laws" to achieve one very deep - if basic - change to the operation of the American constitutional and political system, i.e. the enfranchisement of women.

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<sup>88</sup> Article 4 reads: "*New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.*" U.S. CONST., art. 4 (emphasis added).

<sup>89</sup> Utah provides an excellent example of this. Examining Utah's history more closely, one learns that it took 39 years, and seven drafting attempts, before the U.S. Congress approved Utah's state constitution, and admitted Utah into the federal Union. See generally Daniel J.H. Greenwood, Kathy Wyer, & Christine Durham, "Utah's Constitution: Distinctively Undistinctive," in *THE CONSTITUTIONALISM OF AMERICAN STATES* 4 (George E. Connor, Christopher W. Hammons eds.) (2006) (SSRN pagination), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=893461](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=893461). Disputes between the federal government and Utah's nascent state government centered not only around the legality of polygamy within Utah, but also even the name of the state: original drafts of the state constitution named the state "Deseret," in line with Mormon (as opposed to Native American) appellations for this part of the country. *Id.* at 2, 5.

<sup>90</sup> Requiring not only the national legislature to approve proposed constitutional amendments (by a 2/3 majority in both the lower and upper house), but also insisting that 3/4 of *state* legislatures approve of proposed amendments before they achieve a place in the constitution. See U.S. CONST., art. 5

<sup>91</sup> See generally SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

As Bruce Ackerman has noted, however, in a recent lecture, the era of formal constitutional amendments is long-over. Writes Ackerman:

A funny thing happened to Americans on the way to the twenty-first century. We have lost our ability to write down our new constitutional commitments in the old-fashioned way. This is no small problem for a country that imagines itself living under a written Constitution. Seventy-five years of false notes and minor chords, culminating in a symphony of silence - and the twenty-first century will be no different. Simply look around you. We are now in the midst of a great constitutional debate about abortion and religion, federalism and the war powers of the presidency. But nobody expects a constitutional amendment to resolve any of these great issues - instead, we only see symbolic gestures on peripheral matters like flag-burning and gay marriage - and even these are going nowhere.<sup>92</sup>

Thus, “constitution writing” in the modern American-era has revolved far less around formal amendments than national law-making and (judicial) opinion-writing.<sup>93</sup> Even here, however, one can see how states have, depending on the political context, reared their heads or, alternatively, buried them underground.

To see how states can still play a very prominent role even with respect to non-Article V constitutional amendment-making, one must shift one’s constitutional focus away from - not only formal *constitutional amendment procedures* - but also formal systems of *law-making* and *judicial decision-making*. In other words, one must examine the subtext of formal laws and judicial opinions, i.e. what was *not* decided just as much as what *was* decided.

Ackerman’s discussion of the 1964 U.S. Supreme Court decision in *Heart of Atlanta Motel, Inc. v. United States*<sup>94</sup> is instructive in this respect. As Ackerman notes, this decision, affirming the constitutionality of the Civil Rights Act of 1964, was decided on Commerce Clause grounds. However, more importantly, at least with respect to constitutional *subtext*, the Supreme Court did *not* decide this case using the 14<sup>th</sup> Amendment. Writes Ackerman:

[T]here was a big problem if Warren had led the Court down [the 14<sup>th</sup> Amendment] path. The [Supreme Court] Conference records show that an equal protection opinion would have provoked a strong dissent from Justice Harlan, and perhaps others. This dissent would have provided a platform for every racist in the country to urge a new round of defiance against the 1964 Act’s effort to break the back of Jim Crow.

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<sup>92</sup> Bruce Ackerman, Holmes Lecture 8 (Oct. 3-5, 2006) (transcript on file with author).

<sup>93</sup> Ackerman thus criticises the extant American constitutional amendment procedure as being inapposite to a modern American consciousness which prioritises citizens’ national identities above and beyond their state identities. *Id.* at 11. With respect to these state identities, Ackerman writes: “America may not be a very civilized place, but it is a civilization. . . . [T]hough you may be living in Montana today, you or your children may be making a life for yourself in Florida or Ohio the day after tomorrow. And if you do put down roots elsewhere, you will find that, despite regional variations, they speak American out there. No need to exaggerate. . . . We remain Pennsylvanians or Oregonians as well as Americans, but the textual promise of the Fourteenth Amendment has finally become a living reality: We are Americans first.” *Id.* at 19-20. While one can agree with Ackerman’s normative prescription here, as I will discuss in greater detail *infra*, I disagree with his diagnosis that modern Americans’ attachments to their states are relatively insignificant.

<sup>94</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

At the greatest egalitarian moment in our history, the Supreme Court of the United States treated the Civil Rights Act as if it involved the sale of hamburger meat in interstate commerce, leaving it to Martin Luther King and Lyndon Johnson to elaborate the nature of the nation's new egalitarian principles.<sup>95</sup>

In other words, one might say that the Court feared that if it were to put equality on the table, (southern) states would feel immensely threatened, and would make their presence known in a manner requiring acknowledgement. By doing so, the states would not only block any chance of non-Article V, judicial modification of the constitutional text (such that non-discrimination laws would be explicitly sanctioned), but they would also be able to insist upon, but never formally approve (by 3/4-majority) any such amendment to the Constitution. Thus, by choosing the Commerce Clause path, the Court hoped that the states would remain quiescent and dissipated, and that the Court could carry on with its informal amendment procedures.

Ultimately, the Court was correct in its political calculations. Moreover, its strategies here were not only successful, but also demonstrative of the now-you-see-them-now-you-don't quality to American states, and their link not to a tangible soil, but to an ephemeral politics. In addition, the Court's maneuvering in this case vividly demonstrates how American states seem to often manifest themselves in particularly sharp and rigid ways when they are confronted with the application of (liberal) equality norms. As the example of the Shah Bano crisis suggests, something very similar goes in India as well, with respect to religious communities. In both the U.S. and India, then, communities - whether they be "territorial" or "religious" - seem to be most solid and sharp-edged when they are confronted with the specter of equality.

While it might be tempting to posit that the American situation is nonetheless different than the Indian one because Indian (religious) communities seem to have had a particularly difficult time accepting *gender* equality - as opposed to *racial* equality<sup>96</sup> - and that this situation has persisted - also unlike the American one - up until the present day, such an assertion would be inaccurate. And, indeed, as the rest of this section will demonstrate, American (territorial) communities have also tended to assert themselves when they feel threatened by the application of gender equality, and this has been true both historically and in the contemporary period.

With respect to history, Reva Siegel, in an important analysis of the American suffragist movement has demonstrated how arguments for federalism and "states' rights" - and, also, "family rights" - played a prominent role in preventing women from obtaining the equal right to vote.<sup>97</sup> As Siegel discusses, the opposition to granting women the right to vote was based on a number of inter-related concerns. Some of these concerns, and their inter-connections, are well-summarised in the following comments of the Senate's "Woman Suffrage Committee":

If the husband is brutal, arbitrary, or tyrannical, and tyrannizes over her at home, the ballot in her hands would be no protection against such injustice, but the husband who compelled her to conform to his wishes in other respects would also compel her to use the ballot if she possessed it

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<sup>95</sup> Ackerman, *supra* note 92, at 43-44.

<sup>96</sup> See Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 499-500 (1995) for a discussion of the problems that American federalism has historically posed for racial equality.

<sup>97</sup> See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and The Family*, 115 HARV. L. REV. 947 (2002).

as he might please to dictate. The ballot could therefore be of no assistance to the wife in such case, nor could it heal family strifes or dissensions. On the contrary, one of the gravest objections to placing the ballot in the hands of the female sex is that it would promote unhappiness and dissensions in the family circle. There should be unity *in the family*.

At present the man represents the family in meeting the demands of the law and of society upon the family. So far as the rougher, coarser duties are concerned, the man represents the family, and the individuality of the woman is not brought into prominence, but when the ballot is placed in the hands of the woman *her individuality is enlarged* and she is expected to answer for herself the demands of the law and of society on her individual account, and not as the weaker member of the family to answer by her husband.<sup>98</sup>

With these comments, one can thus see how concerns about intra-family unity overlapped with anxieties that a lowering of “firewalls” between families - and a consequent enlargement of women’s consciousness to include the concerns of other, extra-familial women - could produce real changes in how the American polity operates.<sup>99</sup> And, indeed, history eventually proved such anxieties to be warranted. For example, in the immediate aftermath of the passage of the 19<sup>th</sup> Amendment, one saw the creation of a Woman’s Bureau in the Department of Labor, the passage of an important infant health act, and also the invigoration of efforts to amend the U.S. constitution so as to allow the legislation of a national marriage and divorce law.<sup>100</sup>

The effort to nationalise family law is particularly interesting for what it says about perceptions of the American states at that time. While the move to nationalise family law was not necessarily motivated by impulses that American feminists would recognise (or endorse) today,<sup>101</sup> what is important to take away here is that feminists in the early 20<sup>th</sup>-century diagnosed not only “family federalism” - but also *state*-premised federalism - as being opposed to women’s interests.

That feminists then would have been so skeptical of the states is not surprising, considering how opposition to the 19<sup>th</sup> Amendment itself was articulated not only in terms of the necessity of maintaining a certain kind of federalism across families,<sup>102</sup> but also in terms of state federalism. Notably, then, opponents of women’s suffrage often used a deliberate double entendre when they argued that “*domestic*” relations, i.e. both the internal affairs of families *and* states, would be disturbed by allowing women the vote.<sup>103</sup> Furthermore, these same opponents

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<sup>98</sup> *Quoted in id.* at 995-96 (emphasis added).

<sup>99</sup> Such anxieties about the power of a united women’s political consciousness found expression elsewhere as well, as the following remarks in a “Debaters’ Handbook” demonstrate: “No man would view with equanimity the spectacle of his wife or daughters *nullifying* his vote at the polls, or contributing their influence to sustain a policy of government which he should think injurious to his own well-being or that of the community.” *Quoted in id.* at 995 (emphasis added).

<sup>100</sup> *See id.* at 1008-09. *See also Marriage and Divorce - Proposed Amendment to the Constitution of the United States: Hearing on S.J. Res. 5, Proposing an Amendment to the Constitution of the United States Relative to Marriage and Divorce Laws Before Subcomm. of the Senate Judiciary Comm.*, 68th Cong. 1 (1924).

<sup>101</sup> The goal here was to *restrict* divorce nationally. *See Siegel, supra* note 97, at 1009 n 192. While not an American feminist goal today, the easy existence of divorce is seen as problematic by many feminists outside of the U.S.

<sup>102</sup> *See text accompanying supra* note 98.

<sup>103</sup> *See Siegel, supra* note 97, at 1000.

conceived of states as *collections of families* (instead of individuals),<sup>104</sup> thereby extending the reach of their arguments for patriarchal familial sovereignty to patriarchal state sovereignty as well. In their opposition to state control over family law, then, feminists of the time very much understood how states understood their self-composition, and how stubborn - and corporal - these states tended to become when confronted with the prospect of gender equality.<sup>105</sup>

In this respect, things have hardly improved in the past 75 years and, indeed, as the 2000 Supreme Court decision in *United States v. Morrison* demonstrates, things may have actually gotten worse.<sup>106</sup> This case concerned the constitutionality of the federal Violence Against Women Act (VAWA)<sup>107</sup> and, in particular, whether Congress had the constitutional authority to legislate this act enabling women (and men) to bring civil suits in either federal or state courts<sup>108</sup> against people who have subjected them to “crimes of violence motivated by gender.”<sup>109</sup>

While ostensibly a case about the specific contours of the Commerce Clause and the 14<sup>th</sup> Amendment, the majority opinion in *Morrison* was clearly written with an eye on more general, contemporaneous disputes concerning federalism and states’ rights. Thus, the Court’s discussion about what qualifies as “commerce” was cursory<sup>110</sup> and, ultimately, over-determined by its more abiding fear that, were it to uphold the Commerce Clause constitutionality of VAWA,

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<sup>104</sup> In a petition filed in a case challenging the constitutionality of the 19<sup>th</sup> Amendment, opponents of women’s suffrage argued as follows: “Women are not the ‘wards of the Nation.’ The family is, however, the foundation of the State and if an arbitrary rule of suffrage is imposed upon the State that may break into and overthrow its whole domestic law it is plain that the State has lost ‘in a general sense the power over suffrage which has belonged to it from the beginning and without the possession of which power . . . both the authority of the Nation and the State would fall to the ground.’” *Id.* at 1006.

<sup>105</sup> Given that patriarchy can - presumably - be found everywhere, it still might seem difficult to understand why early-20<sup>th</sup>-century feminists believed that locating (family law) power in the state as necessarily more problematic than locating it at the national level. Perhaps the best way to understand the reasons for this belief, then, involves not only a comparative inquiry (between state- and national-level institutions and politics), but also an inquiry that focuses on the patterns of American history, i.e. not an abstracted, theoretical inquiry. And, indeed, once one makes the turn towards history, one is immediately confronted with all of the horrific articulations and implementations of “states’ rights” in American history - slavery providing the most vivid demonstration of how federalism often slid into, and overlapped with, inequality and subordination. It would be surprising if this concurrent history of federalism and racism, which led to the 14<sup>th</sup> Amendment, which itself instigated the suffragist movement, was not also on the minds of early-20<sup>th</sup>-century suffragist feminists.

<sup>106</sup> *United States v. Morrison*, 529 U.S. 598, 616-18 (2000).

<sup>107</sup> Violence Against Women Act of 1994, § 40302, 108 Stat. 1941-1942 (1994).

<sup>108</sup> See *Morrison*, 529 U.S. at 668 for a description of this concurrent jurisdiction.

<sup>109</sup> 42 U.S.C. § 13981(b) (1994). In the facts leading up to the *Morrison* decision, Christy Brzonkala alleged that Antonio Morrison and James Crawford sexually assaulted her, causing her to be emotionally disturbed and depressed, which then led her to drop out of college. *Morrison*, 529 U.S. at 602-03. As a result of her suffering, then, Brzonkala brought a VAWA suit against Morrison and Crawford, asking for damages. In response, Morrison and Crawford argued that Congress lacked constitutional authority - either under the Commerce Clause or the 14<sup>th</sup> Amendment<sup>109</sup> - to pass VAWA. The federal district court, and the Fourth Circuit Court of Appeals agreed with them, see *id.* at 604, as did eventually the U.S. Supreme Court.

<sup>110</sup> Thus one finds lazy statements like “Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress’ authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause *always will engender ‘legal uncertainty’*,” *Morrison*, 529 U.S. at 671 (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)), and “While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide

Congress [might] regulate *any* activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under these theories [of “commerce”] . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education *where States historically have been sovereign*. Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.<sup>111</sup>

As Catherine MacKinnon points out, while ostensibly concerned with states’ rights, it is hard to understand how the *Morrison* decision really struck a blow for the allegedly under-siege states, when 36 of these states actually supported VAWA.<sup>112</sup> Moreover, the Court’s opinion is especially troubling because it now appears that even when American states *themselves* are overwhelmingly unopposed to national-level gender-just legislation, the Court will take it upon itself<sup>113</sup> to raise these states from the dead, and use their newly-created vitality - and relevance - to insist that such equality-oriented legislation advance via the more-burdensome Article V constitutional amendment procedure. If this is not federalism as neurosis, it certainly is federalism as fetish.<sup>114</sup> Moreover, it is also a worse situation than that which is found in India with its religious communities.

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these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” *Id.* at 613 (emphasis added).

<sup>111</sup> *Id.* at 613 (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)) (emphasis added).

<sup>112</sup> Catherine A. Mackinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 149 (2000). And, indeed, as MacKinnon points out, *Morrison* fits far less into a consistent pattern of the Supreme Court protecting states’ sovereignty, than it does into a pattern of the Court striking down legislation deemed (at the time, at least) to be socially progressive. *See id.* at 151. For a historical example of the Court’s lack of interest in vigorously protecting states’ sovereignty, one need only examine the Court’s decision in *Wickard v. Filburn*, 317 U.S. 111 (1942). In this case, the Court permitted Congress to regulate the home production of wheat since, according to the Court, when one aggregates this home production across a large number of households, it could affect the operation of the national economy, and thus interstate “commerce.” *See MacKinnon* at 147-48 for a helpful discussion of this case. Justice Souter’s dissent in *Morrison*, as well, noted that “today’s attempt to distinguish between primary activities affecting commerce in terms of the relatively commercial or noncommercial character of the primary conduct proscribed comes with the pedigree of near-tragedy that I outlined in *United States v. Lopez*,” before proceeding to list a number of historical cases in which progressive legislation had been struck down by the Supreme Court on the flimsy pretense that the regulation of things like “manufacturing” and “production” could not proceed under the Commerce Clause and its specific allowance of Congressional regulation of “commerce.” *Morrison*, 529 U.S. at 641-43.

<sup>113</sup> Notes Vicki Jackson: “[One common] kind of argument, often buttressed by appeal to original intention, is that constraints of federalism must be enforced because ‘it’ is in the Constitution. Apart from general questions of the role of originalist methodology in constitutional interpretation, defining the ‘it’ of federalism restraints remains acutely difficult. Although the Constitution does provide some quite explicit constitutional protections for the interests of the states, standards limiting national legislation in substantive matters claimed to be ‘reserved’ to the states do not emerge clearly from the naked text of Congress’s enumerated powers.” Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2215 (1998).

<sup>114</sup> In their well-known article entitled “Federalism: Some Notes on a National Neurosis,” Edward Rubin and Malcolm Feeley argue that the U.S. does not have a real federal system, where (state) communities are truly empowered to resist central government decisions and policies but, instead, possesses a system that is better described as one involving “managerial decentralization.” *See generally* Rubin & Feeley, *supra* note 7. In this “decentralized” system, the states are merely acting as bureaucratic mechanisms for the implementation of an overarching central government policy. *See id.* at 910-11, 946. Write Rubin and Feeley: “[D]ecentralized systems are hierarchically organized and the leaders at the top or center have plenary power over the other members of the organization. Decentralization represents a deliberate policy that the leaders select, or at least approve, based on their view of the best way to achieve their goals.” *Id.* at 911.

Ultimately, then, the above examples demonstrate how American states have both disappeared and re-appeared through American history, as the political exigencies of the moment instigated or required their presence - or lack thereof. In this way, these states parallel the behavior of Indian religious communities, whose salience is also always politically-contingent. Moreover, this ephemeral quality to American territorial communities demonstrates that, like religious communities, there is nothing “essential” or eternal to their existence.

Of course, this is not to say that states - like all other political constructions - are not “real.” States do - at certain times - play a very large part in the American political discussion. The next section, then, will discuss how, when they do exist, states’ borders can be stretched beyond their alleged territorial restrictions to entrap people who want to leave them.

#### D. Analogy 2: States Also Prevent Conversion

As Part I discussed, religious communities in personal law systems often make it difficult for their members to exit their respective communities. In India, this has manifested itself in a way that is particularly amenable to a certain kind of hegemonic Hindu politics. For example, as the case of *Lily Thomas* established,<sup>115</sup> Hindu men in India face criminally liability for bigamy if they try to convert away from Hinduism to Islam, in order to take advantage of (Indian) Muslim family laws permitting polygamy. In other words, one might say that Indian law has erected obstacles to any full or easy conversion in this situation, forcing Hindu men to carry their Hindu

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For the purposes of this Article, it is not important whether Rubin and Feeley are correct or not about the “decentralised” versus “federal” nature of the American setup. What is more important to recognise, with respect to their arguments, is that the goals and means of decentralisation and federalism do not necessarily have to oppose each other. They can co-exist, and the American systems seems to embody such a co-existence. Indeed, one might say that the U.S. system endows states with moral and political autonomy - i.e. engages in federalism - in order to *simultaneously* pursue a particular national agenda.

Of course, the obvious question, then, is: “What overarching agenda, in particular, is being served by federalism?” Or, alternatively: “What policy of the central government is being facilitated by creating a multiplicity of ‘implementing’ and (potentially) conflicting administrative sub-units?”

While any single answer to this question will suffer from the usual problems associated with any attempt to generalise, I believe it is useful nonetheless to think of the ways in which, both historically and contemporarily, the federal system has been used to preserve the “status quo.” What comprises the status quo is multi-faceted - and also inevitably evolving - but, at any point in time, there are dominant political and moral stances that benefit from having a fractured resistance, i.e. federalism, confronting them. Thus, the double-edged dance that federalism engages in, in the U.S., is one where mutually-autonomous political/moral sovereigns underwrite a national - and centralised - status quo. Perhaps ironically, then, the American model demonstrates the consonance of - and mutually supporting nature of - unity and diversity.

One can certainly see how, during the suffragist period, federalism supported the national status quo of no voting rights for women. *See* discussion *supra* accompanying notes 98-105. What is less clear is how one might mesh my reading of federalism’s status quo role with the recent successes of the gay rights movement at the state level (at least, in comparison to the national level). In response, one might hypothesise that the gay rights movement’s state-level (family law) achievements are the result of state-*focused* activism which itself has been the result of a premonition that national institutions (including the Supreme Court) would ultimately raise states’ rights concerns as an obstacle to national legislative efforts - as they historically have with respect to other “gender-related” issues.

<sup>115</sup> *See Lily Thomas v. Union of India*, A.I.R. 2000 S.C. 1650 (India). *See also* discussion *infra* accompanying notes 144-50.

law with them as they convert to Islam, and thereby exposing themselves to bigamy charges when they marry for a second time.

This section will thus discuss how, similar to the Indian system, American states' family laws follow Americans across borders as citizens travel the 50 states. For example, following the common practice as to inter-state marriage recognition - which almost all states adhere to - a state will recognise any marriage which is conducted in another state, as long as the other state's marital laws are properly followed. Conversely, states will *not* recognise any marriage conducted in another state, if such marriage is unlawful in the state where it was conducted. This two-pronged inter-state marital recognition "rule" is commonly referred to as the "place of celebration" rule.

Clearly, the first part of this test will not strike many people as problematic, at least in the same way that Hindu law following a Hindu convert to Islam might. Marital partners generally *want* the legality of their marital agreement to follow them across state borders, and most will view the "extraterritorial" application of marital laws here to be a *positive* thing.

The real problem, especially in today's America, is the extraterritorial application of marriage *disabilities*, i.e. the second part of the "place of celebration" test which insists that an illegal marriage in one state is an illegal marriage in other states as well. For example, imagine a situation where a same-sex couple conducted a marriage in San Francisco during the brief period of time in 2004 when San Francisco Mayor Gavin Newsom was permitting such marriages. Imagine then that this couple moves to Rhode Island in 2008 and applies for their marriage to be recognised there. Since 2004, the California court system has invalidated the San Francisco marriages. Following the "place of celebration" test, then, Rhode Island would consequently refuse to recognise the same-sex couple's marriage, on the theory that since the marriage was illegal in California, it is thus also illegal in Rhode Island.

One might argue that this particular situation is not a perfect analogy to the Indian situation because - unlike the Indian context and an Islamic law that *permits* polygamous marriages - like California, Rhode Island also does not recognise same-sex marriages. Thus, its refusal to recognise an illegal same-sex marriage conducted elsewhere perfectly tracks *its own* refusal to legally recognise such marriages. Consequently, one might say that the California-Rhode Island example is not an example of a communally-premised legal system trying to discourage (territorial) conversions, but just a legal system as a whole trying to discourage certain practices (e.g. same-sex marriage) entirely.<sup>116</sup>

The example of Massachusetts mitigates against this easy conclusion, however. And, indeed, the landmark *Goodridge* precedent,<sup>117</sup> while establishing Massachusetts as the first (and thusfar only) state to recognise same-sex marriage, did not - as was widely feared - turn Massachusetts into a "gay Las-Vegas" where same-sex marriages are issued with flamboyant abandon. Instead, like a number of other states, Massachusetts refuses to marry individuals whose home state does not recognise the type of marriage they are seeking to establish in the

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<sup>116</sup> That being said, a system - such as the U.S.'s - which enforces *systematic* marital law disabilities does provide *no* incentive to conversion (at least in the marital respect), whether that is the system's explicit intention or not.

<sup>117</sup> *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).



forum state (i.e. Massachusetts in this case). In other words, like other states, Massachusetts extends the “place of celebration” rule to not only refuse recognition to marriages illegally *conducted* elsewhere, but to also refuse itself the opportunity to marry people whose home state makes certain marriages illegal. Thus, an Alabama same-sex couple may not marry in Massachusetts since Alabama (explicitly and constitutionally) does not recognise same-sex marriages.

As with India, then, in the U.S., one’s (territorial) identity - and its associated family law - can travel with one, no matter where one (territorially) converts. And like the India example, as well, this operates to (quite radically) remove any incentive to convert.

Moreover, this is not just an issue with respect to (same-sex) marriage, but also one concerning divorce. As a result of the well-known U.S. Supreme Court decision in *Williams v. North Carolina*,<sup>118</sup> any marital spouse may leave the domiciliary home state where they live with their spouse<sup>119</sup> and obtain a divorce in another state - but, as well be explained, only under certain circumstances.

*Williams’* legitimisation of migration for the purposes of divorce was important, for, in the words of one scholar, it

created an incentive for unhappy spouses to forum shop for states with favorable divorce laws. In turn, this created pressure on the states from which these spouses launched their forum shopping expeditions to liberalize their divorce laws. “State divorce laws... gradually converged to the lowest common denominator,” and the resulting “relative uniformity of current divorce law... made migratory divorce an irrelevancy.”<sup>120</sup>

While the eventual congruity in states’ divorce law mitigated, for many years, any further inquiry into the actual modalities - and limitations - of crossing state lines to obtain a divorce, the recent development by some states of “covenant marriages” now requires further examination as to the actual ease - or lack thereof - of migrating for divorce. Covenant marriages are different than “regular” marriages because

the covenant spouses agree to restrict their pursuit of a “no-fault” divorce, and by virtue of the premarital counseling, do so knowingly and deliberately. Divorce in a covenant marriage requires proof of fault in the nature of: adultery; conviction of a felony and a sentence of imprisonment at hard labor or death; abandonment (for one year); physical or sexual abuse of a spouse or child of one of the spouses; or habitual intemperance or cruel treatment. In addition to these fault grounds for divorce, either spouse may obtain a divorce upon proof of living separate and apart for two years. Thus, the covenant marriage law permits an immediate divorce for proof of fault by the other spouse in more circumstances than the law applicable to “standard” marriages. In contrast,

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<sup>118</sup> *Williams v. North Carolina*, 317 U.S. 287 (1942).

<sup>119</sup> Obviously, I am using a simplistic example here, one which assumes that the spouses are living in the same state. While a simplistic fact pattern, it is also one that is common and, moreover, simple enough that one can effectively use it to demonstrate the point I wish to make here.

<sup>120</sup> Katherine Shaw Spaht & Symeon C. Symeonides, *Covenant Marriage and the Law of Conflicts of Laws*, 32 CREIGHTON L. REV. 1085, 1100-01 (1999) (quoting SYMEON C. SYMEONIDES ET AL., CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 428 (1998); Jeanne Carriere, “*It’s Deja Vu All Over Again*”: *The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 TUL. L. REV. 1701, 1720 n.118 (1998)).

in the absence of fault, the covenant marriage law requires significantly more time living separate and apart.<sup>121</sup>

As one can imagine, the rise of covenant marriages in a number of states,<sup>122</sup> has been accompanied by a rise in the number of spouses fleeing their marital domiciliary state for easier divorce regimes elsewhere.

While such divorces are almost certainly obtainable in these other states, it would be wrong to assume that this means that they are always easily obtainable. And, indeed, states require that any person seeking a divorce within their jurisdictions to have first established their domicile in the (new) state. In some states this can be a relatively easy affair, but in others there are minimum residency stays (established in order to provide proof of intent to make the state one's permanent home, i.e. domicile), as well as required oaths as to domicile - upon penalty of perjury. For sure, none of this is insurmountable, but also surely, none of this is required in the marital context.<sup>123</sup> In other words, while it is possible to escape one's "home state" law for purposes of divorce, one cannot do so nearly as easily as one can in the marital context: for some time, the law of one's original state will follow one into the territory of another state.

American states too, then, can be recreated in other American states. And American states, as well, have always enforced a wide range of other American states' laws within their borders. States, then, must be something different than land. While states may overlap with certain pieces of territory, in practice, those territories are both over- and under-inclusive with respect to the states that they are supposed to be equivalent to. In other words, states don't fill up their territories, yet they also messily spill over their (territorial) boundaries. In the next section, then, I will discuss some of the more non-dirt-like qualities of American states and, in particular, their emotional and "affective community" aspects.

## E. Analogy 3: States Also Are Communities

### 1. Introduction

In this section, I will discuss the affective quality to state communities or, in other words, the sense of identification that people have to the state to which they "attach" themselves.<sup>124</sup> Religious communities are often understood as something of a unique species, different than every other type of community - territorial communities included. As this section will explain, however, the respective constituencies for personal law systems and the American federal system, share a great deal in common. These similarities extend to the sense of identification that religious and territorial people (often) demonstrate with their respective communities.

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<sup>121</sup> *Id.* at 1097-98.

<sup>122</sup> *See generally id.* at n. 6.

<sup>123</sup> *See Rhonda Wasserman, Divorce and Domicile: Time to Sever the Knot*, 39 WM. & MARY L. REV. 1, 31-32 (1997).

<sup>124</sup> I am using the word "attach" here in order to indicate that there may be allegiances to states other than the one that - legally-speaking - one belongs to.

As an initial matter, it would seem to be surprising if people did not have some sort of significant identification with their “states of choice.”<sup>125</sup> When lines are drawn between other kinds of jurisdictions, the entities which result are usually imbued or perceived by most everyone as possessing some kind of moral and/or cultural identity, with which others identify or dis-identify. Indeed, it would be hard to think of a country that did not have some sort of moral or cultural identity. This is as true of Switzerland, and its reputation of “neutrality,” as it is for the United Kingdom, with its constantly-expanding ethnic- and cultural-diversity. More locally, as well, people tend to think of cities, or even school districts, as possessing a certain sort of morally- and emotionally-relevant *modus operandi* (e.g. a gay-friendly city, a school district with a strong commitment to the sciences).

Curiously, however, in the American context,<sup>126</sup> “intermediate” (i.e. neither completely local, nor national) governing units are often perceived to be morally-neutral, antiseptic vessels. According to a common view, individual states no longer have morally- or culturally-salient attributes, and people do not identify<sup>127</sup> with this level of governmental organisation. State borders are just “lines on the map,” doing and signifying little of emotional importance. In this respect, Edwin Rubin and Malcolm Feeley have opined that,

[in the U.S., f]ederalism only protects the rights of states, and all, or virtually all, American states are far too large to function as affective communities. If we take the notion of mutual bonds of emotional attachment seriously, it seems clear that we are speaking about small towns or urban neighborhoods, not about our nation-size political subdivisions. . . . When proponents of affective community become specific, they tend to speak about volunteer groups, PTAs, church congregations, farm cooperatives, and urban self-help-programs - all entities that are considerably smaller than a state.

. . .

To be sure, there are affective communities to be found in various parts of the United States: religious groups, Native American tribes, even towns with relatively homogenous populations. Because of the necessarily small size of such communities, they are generally located within the borders of a single state. But they have no particular relationship to the state itself, and we cannot identify any of our states as being uniquely composed of, or identified with, such communities, with the possible exception of Utah.<sup>128</sup>

And Vicki Jackson has written, with respect to the significance of contemporary state lines for the viability of American federalism:

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<sup>125</sup> Again, see *supra* note 124 for an explanation of this choice of terminology.

<sup>126</sup> This is clearly not the case elsewhere. In India for example, each of the 25 states has a distinct history and reputation that are still very much a part of contemporary Indian political and cultural life. However, in the context of the U.S., Will Kymlicka notes that “a deliberate decision was made *not* to use federalism to accommodate the self-government rights of national minorities. Instead, it was decided that no territory would be accepted as a state unless national minorities were outnumbered within that state. In some cases, this was achieved by drawing boundaries so that Indian tribes or Hispanic groups were outnumbered (Florida). In other cases, it was achieved by delaying statehood until anglophone settlers swamped the older inhabitants (e.g., Hawaii; the Southwest).” Will Kymlicka, *Federalism and Secession: At Home and Abroad*, 13 CAN. J.L. & JURIS. 207, 210 (2000). While Kymlicka may be right, historically-speaking, that is not to say that new identities could not emerge - or have not emerged - from the present arrangement of intra-U.S. borders.

<sup>127</sup> Or, in the case of the dissident, dis-identify.

<sup>128</sup> Rubin & Feeley, *supra* note 7, at 940-41, 945.

Enforcing federalism may help maintain the significance of state and local governments as organizing features of identity and participation in public life, and thereby promote structures of tolerance, at least given current demographic distributions. In part because state lines do not necessarily correspond to *lines of ethnic, racial, or religious identity, which can be more deeply divisive*, maintaining the significance of state governments may help foster civic identities that overlap with *more deeply felt identities* in ways that create cross-cutting allegiances. These allegiances, in turn, could increase the prospects for tolerance and accommodation in the face of profound disagreements. In other words, states (and their local governments) may be useful loci toward which to direct political activism and organizing, because *their borders differ from other divisions that more profoundly divide*.<sup>129</sup>

The differences between Rubin and Feeley's, and Jackson's, takes on federalism are significant, and not to be discounted.<sup>130</sup> That being said, Rubin and Feeley, Jackson, and others,<sup>131</sup> strongly resemble each other, especially to the extent that all of these influential theorists believe that the types of communities (e.g. religious, ethnic, tribal) which form the constituencies for personal law systems are necessarily different - i.e. thicker - than the territorial communities which provide the foundation for American (and other forms of) federalism. For Rubin and Feeley, state sentiment and communities are so "thin" as to be non-existent. For Jackson, they may certainly be there,<sup>132</sup> but they are never as deep or more profound - or as divisive - than their religious or ethnic counterparts.<sup>133</sup>

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<sup>129</sup> Jackson, *supra* note 113, at 2221-22 (emphasis added).

<sup>130</sup> For example, according to Rubin and Feeley, states are too large for there to be any substantial overlap between them and any single "affective" community. States may have several different affective communities within them, but there is always some sort of "gap" or disconnect between any such given community and the state, as one's emotional attachments cannot (supposedly) extend beyond a certain, very limited radius. Thus, Rubin and Feeley describe "affective communities" as follows: "Affective communities necessarily consist of small groups; emotional attachment, like the strong force in nuclear physics, are very powerful but tend to operate only over short distances. . . . It is possible, of course, to become emotionally attached to a remote figure, like 'the King,' or an abstract entity, like 'France.' Such relationships, however, lack mutuality. Since the usual image of an affective community involves mutual attachments, personal contact is virtually obligatory. Thus, affective communities constitute that part of the individual consciousness that involves concepts of group membership, personal loyalty, and emotional connection. The sense of participation they offer consists of mutual assistance, sharing, and, less nobly but just as centrally, the exclusion of outsiders." Rubin & Feeley, *supra* note 7, at 938-39. States, then, under this view, appear to be ethereal and balloon-like, and tethered to more-grounded, affective communities only by a very long string.

Jackson, however, seems to accept that people can be attached to large entities - e.g. an ethnicity, or a religion - but she sees state lines, usefully, cutting these larger communities into several pieces. What results is states containing several different, competing groups, all trying to control the state as a way to further their own interests, but ultimately all conceding to a kind of *modus vivendi* of "tolerance and accommodation." Jackson, *supra* note 113, at 2221-22. In invoking this idea of a *modus vivendi*, Jackson differs from Rubin and Feeley in an additional sense as well, in that she sees citizens as *being* interested in their state governments, if only to ensure the ultimate "neutrality" of these governments.

<sup>131</sup> For example, Douglas Laycock, whose comments in this respect open the previous section. *See* text accompanying *supra* note 56.

<sup>132</sup> *See* Jackson, *supra* note 113, at 2221.

<sup>133</sup> Jackson's analysis is problematic here, as well, to the extent that it suggests that attachments to an ethic of "tolerance and accommodation" are amoral, or only "thinly" moral. Indeed, whether one sees such tolerance as the result of bargain and compromise, or a pre-commitment of reasoning beings, moral philosophy - utilitarianism on the one hand, and Rawlsian liberalism on the other - morality is clearly implicated here. That being said, it is far from clear that most states present a rosy picture of tolerance, in the way that Jackson describes it. Certainly, as the

Clearly, then, many important theorists of American federalism are operating with some notion of “religion” (and “ethnicity”) which works to distinguish it, in some essential sense, from “territory.” As this section will proceed to argue, however, this notion is a rather ahistorical one and, along with similarly misguided understandings of “territory,” only works to obscure the many similarities and overlaps between what passes as “religious” versus “territorial” communities - and the respective systems of law built around each. As will be discussed, “religion” is often a thinner reality than commonly perceived while, conversely, “territory” is often thicker. Or, in other words, religion can be flippant, while territory can be deadly serious.

## 2. The Potential Thinness of Religion

With respect to the “lighter” side of religion, while there is a historical tendency in American legal theorising (and jurisprudence) to view religiosity *qua* religiosity as a sort of sincere, stubborn, and supernatural-like experience, such a view of religion and religiosity is not only inappropriately ambitious, but also often wrong “on the ground.” In this regards, Talal Asad’s anthropological work on religious communities around the world is very instructive. In general, Asad is skeptical about approaches to religion that are not contextualised. While the social sciences and humanities have, with time, appreciated the requirement of contextual-sensitivity when discussing terms like “race” (as opposed to, say “caste”)<sup>134</sup> and “gender,” they have been less ready to do so when discussing “religion.” As Asad notes, the result of this decontextualised discussion, is a problematic discussion of religion that “insist[s] that religion has an autonomous essence - not to be confused with the essence of science, or of politics, or of common sense - [and] invites us to define religion (like any essence) as a transhistorical and transcultural phenomenon.”<sup>135</sup>

Unfortunately, transhistorical and transcultural definitions of religion have not just been a benign phenomenon but, instead, have a long tradition of being put to quite questionable uses. In this respect, Asad notes that religious missionaries in the colonial-era, often limited their definition of “real” religion to *belief* systems that *affirmed* some *larger meaning or purpose* to the cosmos. Moreover, as Asad notes, concerning this sanctification of religion:

The requirement of affirmation is apparently innocent and logical, but through it the entire field of evangelism was historically opened up, in particular the work of European missionaries in Asia, Africa, and Latin America. The demand that . . . practices must *affirm something about the fundamental nature of reality*, that it should therefore always be possible to state meanings for them which are not plain nonsense, is the first condition for determining whether they belong to ‘religion.’ The unevangelized come to be seen typically as those who have practices but affirm

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overview of state family law presented earlier illustrates, *see supra* text accompanying notes 67-73, most states have been captured by (so-called) heterosexual interests and are refusing marriages to same-sex couples.

<sup>134</sup> See, e.g., THE CONCEPT OF RACE IN SOUTH ASIA (Peter Robb ed., 1997).

<sup>135</sup> TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 28-9 (1993). It is important to note here that Asad cautions the reader that “[f]rom [all] this it does not follow that the meanings of religious practice and utterances are to be sought in social phenomena, but only that their possibility and their authoritative status are to be explained as products of historically distinctive disciplines and forces. The anthropological student of *particular* religions should therefore begin from this point, in a sense unpacking the comprehensive concept which he or she translates as ‘religion’ into heterogeneous elements according to its historical character.” *Id.* at 54.

nothing . . . or as those who do affirm something (probably ‘obscure, shallow, or perverse’), an affirmation that can therefore be dismissed.<sup>136</sup>

In the U.S. system, the trend of designating - and rewarding - beliefs, doctrines, and practices that seem somehow conscientiously devote as “religious,” is perhaps best represented by the U.S. Supreme Court’s landmark *Wisconsin v. Yoder* decision.<sup>137</sup> This case concerned the constitutionality of the State of Wisconsin’s criminal prosecution of three Amish parents (among them Jonas Yoder) for refusing to send their children (ages 14 and 15) to school. At the time, Wisconsin statutory law required children to be sent to (public or private) school until the age of 16. When the parents refused to comply with this law, they were tried and convicted (and each fined \$5). In response, they brought a constitutional challenge to the Wisconsin compulsory-school attendance law, alleging that this law violated their First Amendment rights to practice their Amish “religion.”<sup>138</sup>

What is perhaps most immediately noteworthy in this case is that the State of Wisconsin, from the outset, conceded that the religious beliefs of Yoder and his co-respondents were “sincere.”<sup>139</sup> Thus, instead of raising the (seemingly obvious) question of whether the Wisconsin Amish were running a church or, instead, a cheap child-labor enterprise (or, perhaps, a secretive cult), the State decided that it was futile to challenge the supposedly “sincere religious” beliefs of the respondents.<sup>140</sup>

The Supreme Court, in its own analysis, also upheld the religiosity of Yoder and his co-respondents’ Amish beliefs, noting that

we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, ‘be not conformed to this world . . .’ This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.

The record shows that the respondents’ religious beliefs and attitude toward life, family, and home have remained constant - perhaps some would say static - in a period of unparalleled progress in human knowledge generally and great changes in education. The respondents freely concede, and indeed assert as an article of faith, that their religious beliefs and what we would today call ‘life style’ have not altered in fundamentals for centuries. Their way of life in a church-oriented

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<sup>136</sup> ASAD at 43.

<sup>137</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>138</sup> For the facts of this case, see *id.* at 207-09. Specifically, two of the parents belonged to the “Old Order Amish religion,” and one belonged to the “Conservative Amish Mennonite Church.” See *id.* at 207.

<sup>139</sup> *Id.* at 209.

<sup>140</sup> Admittedly, this was probably a wise move, considering the enamored view of the Amish that the Supreme Court’s majority obviously possessed. And, indeed, in this respect, the majority takes favorable notice that “the Amish have an excellent record as law-abiding and generally self-sufficient members of society.” *Id.* at 212-13. See also *id.* at 222. This despite the record clearly showing that (at least some) Amish wished to break the law with respects to compulsory education.

community, separated from the outside world and 'worldly' influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform.<sup>141</sup>

Thus, for the U.S. Supreme Court, the Amish people's devotion (to "an entire way of life"), faith (as demonstrated by their reliance on a "literal interpretation" of the Bible), and pietism (in the face of "unparalleled progress" in the "outside world"),<sup>142</sup> demonstrated the *religious* nature of Amish belief and practice.<sup>143</sup>

Another good example of the judicial sanctification of religion can be found in the well-known Indian case of *Lily Thomas v. Union of India*.<sup>144</sup> However, unlike *Wisconsin v. Yoder*, the public facts of this case quite clearly suggest that perhaps not everyone shares a particularly "holy" view of religion and religious identity.<sup>145</sup> And, indeed, this case concerned the

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<sup>141</sup> *Id.* at 216-17.

<sup>142</sup> *Id.* at 216-17.

<sup>143</sup> While it is true, historically, that the U.S. Supreme Court has recognised as "religious" other practices that, in contemporary U.S. culture, are not commonly understood to be as pious as denying an education to one's children, e.g. illegal drug usage in *Employment Division v. Smith*, 494 U.S. 872, 885, 888 (1990), the sacred undercurrents to its construction of religion have had troublesome implications nonetheless.

For example, Judaeo-Christian religious hegemony found a prominent place in *Bowers v. Hardwick*, the Supreme Court opinion upholding the constitutionality of sodomy criminalisation. *See Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring). Indeed, in his concurring opinion in this case, Chief Justice Burger approvingly writes that the "the [majority opinion] notes . . . the proscriptions against sodomy have very 'ancient roots.' Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judaeo-Christian moral and ethical standards." *Id.* Moreover, (homosexual) sodomites' opposition to this religious moralising could find no First Amendment traction and was, instead, only trivialised and mocked, *see id.* at 190 (describing the claimed right to privacy as a "right to engage in homosexual sodomy"), in the process undermining important potential linkages that might be made between sodomy and (a serious) secularism.

Tellingly, as well, when *Bowers* was overturned 18 years later, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the plaintiffs in this case (apparently) only succeeded by making their sexual rendez-vous - and the constitutional issues it raised - look "holy." Wrote Justice Kennedy, for the majority: "The instant case involves liberty of the person both in its spatial *and more transcendent dimensions*. . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a *personal bond that is more enduring*. The liberty protected by the Constitution allows homosexual persons the right to make this choice." *Id.* at 562, 567 (emphasis added). For a critical discussion of *Lawrence* along these lines, see Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004). In this respect, it is also worth noting the *Lawrence* Court's comments with respect to what can be considered "demeaning": "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would *demean* a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Id.* at 567 (emphasis added).

<sup>144</sup> *Lily Thomas v. Union of India*, A.I.R. 2000 S.C. 1650 (India).

<sup>145</sup> For example, one of the Hindu wife's allegations against her husband (in another case which led to this one) were that "THE RESPONDENT . . . HAS CONVERTED TO ISLAM SOLELY FOR THE PURPOSE OF REMARRYING AND HAS NO REAL FAITH IN ISLAM. HE DOES NOT PRACTICE THE MUSLIM RITES AS PRESCRIBED NOR HAS HE CHANGED HIS NAME OR RELIGION AND OTHER OFFICIAL DOCUMENTS." *Id.* at 1655. Evidence that the wife presented in this respect included 1) her converted husband's actual admission to her that his intention in converting was to take on another wife, 2) a birth certificate for a child that was born from this converted husband's second marriage indicating that he had never officially changed his name or religion and, finally, 3) documents indicating that neither the electoral rolls or the documents that the converted husband submitted for an application for a Bangladeshi visa indicated that he had ever officially changed his name or religion. *Id.* at 1655-1656.

constitutionality of efforts to prosecute, for bigamy, Hindu men who had converted from Hinduism to Islam and then availed of Indian Muslim personal law provisions permitting polygamy (a “privilege” denied to Hindus under Indian Hindu personal law).

In *Lily Thomas*, the Indian Supreme Court ultimately decided that any prosecution for bigamy would not violate the constitutional religious liberty rights of the Hindu men.<sup>146</sup> However, as interesting as this *constitutional* outcome is, the different opinions in *Lily Thomas* make a number of even more general, and more interesting, comments concerning what they take the nature of “true” Islam - and, more generally, “true” religiosity - to be. In regards the nature of Islam, the lead opinion in *Lily Thomas* commented that the

plea [by the Jamiat-Ulema Hind, an organisation that supported the men] demonstrates . . . ignorance . . . about the tenets of Islam and its teachings. . . . The violators of law who have contracted the second marriage cannot be permitted to urge that such marriage should not be made subject- matter of prosecution under the general Penal Law prevalent in the country. The progressive outlook and wider approach of Islamic law cannot be permitted to be squeezed and narrowed by unscrupulous litigants, apparently indulging in sensual lust sought to be quenched by illegal means.<sup>147</sup>

Echoing these concerns as to “sensual lust,” the concurring opinion opined that

[r]eligion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a supernatural being; it is an object of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution.<sup>148</sup>

As discussed in Part I, this opinion - and others like it - reflect a larger Indian political discomfort concerning people’s religious conversion and, in particular, conversion away from Hinduism to other religions (including Islam, Christianity, and Buddhism). However, just as interestingly, these opinions also serve to excoriate all-too-common understandings and utilisations of religiosity. As the facts of *Lily Thomas* amply demonstrate - and which the Supreme Court of India desperately wishes to deny - there are material, social, and sexual accompaniments to religion, religious identity, and religious community.<sup>149</sup> Most emphatically, religion is often not the “object of conscientious devotion, faith and pietism.”<sup>150</sup>

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<sup>146</sup> In this respect, the Court wrote that, properly understood, the “[f]reedom guaranteed under Art. 25 of the Constitution is such freedom which does not encroach upon a similar freedom of the other persons. Under the constitutional scheme every person has a fundamental right not merely to entertain the religious belief of his choice but also to exhibit this belief and ideas in a manner which does not infringe the religious right [sic] and personal freedom fo [sic] others.” *Id* at 1666 (Sethi, J.)

<sup>147</sup> *Id.* at 1666-67.

<sup>148</sup> *Id.* at 1660 (S. Saghir Ahmad, J., concurring).

<sup>149</sup> See generally Redding, *supra* note 53, at 462 (discussing sexual and other qualities to common “religious” identifications).

<sup>150</sup> *Lily Thomas*, A.I.R. 2000 S.C. at 1660.



This being the case, it is important to be careful about how one understands religious *communities*, and to not essentialise here either. Not only are there a variety of such communities, with variations to be found between different “religions” and their various “sects,”<sup>151</sup> but also important differences *within* any given religion or sect. Different belief systems - even “religions” - will have different attachments to the profane as opposed to the profound, will have different viewpoints on the utility of wealth and pleasure, will pray either more or less (or never), will penalise/encourage conversion or just not care, will engage in politics or socially withdraw, etc.

In sum, then, we can fairly safely say that different religious communities will have various investments in and involvements with the surrounding world and its denizens. It is then far from clear what is - to paraphrase Vicki Jackson - so necessarily *profound* about religious communities, or the divisions that run between them. Considering this reality, then, it is far from clear on what basis one may sharply distinguish religious communities from territorial communities. Certainly, as already discussed, a number of theorists have tried to argue that religious sentiment is somehow thicker than other sentiments. We now know, however, that religion can sometimes be more transparent than opaque, rational rather than mystical, and sexual rather than ascetic.

That being true, it might still be the case that territorial sentiments are always somehow thinner than religious sentiments - no matter how flippant the latter may be - and that, especially with respect to conflict, religion is more often the source of this problem than territory is. In what remains of this section, I will attempt to undermine the easiness of this assertion by demonstrating the “heaviness” of territory, territorialism, and territorial communities.

## 2. The Potential Thickness of Territory

First of all, with respect to the alleged connection between religion and violence, it is important not to overstate this link. As elsewhere, context matters. Certainly, there are instances where religious communities have peacefully co-existed under different legal regimes within the same overall system.<sup>152</sup> Furthermore, while the stereotypical presentation of religious violence magnifies extremist calls for things like “global jihad” or a “global war on terror,” there are countless more examples of religious conflict playing out in court proceedings, with the pen acting as the sword. While it would be nearly impossible to tally the amount of global litigation where questions concerning the ownership/control over churches and mosques (for example) are being fought out in courtrooms instead of streets, or the number of instances where issues pertaining to religious bigotry, blasphemy, and heresy are being heard by judges instead of neighborhood thugs, one should be reluctant to assume that “religious disputes” are always settled with fists and arms.<sup>153</sup> Sometimes, then, religious pluralism overlaps with violence (typically understood), but in many instances it does not.

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<sup>151</sup> I put these two terms in scare-quotes, to emphasise the constructed nature of both categories.

<sup>152</sup> For example, many states administer variations in Muslim personal law for their populations’ different Muslim *madhabs* (legal schools) and sects without ensuing separatism and/or violence.

<sup>153</sup> Indeed, just because certain kinds of religious disputes never/rarely find their way into American courts - for example, the question of whether or not it is constitutional to bar religious groups from excommunicating their

As to territory itself, disputes concerning it are pervasive, whether these disputes be between two neighbors, or two (emerging) states.<sup>154</sup> Yet despite such pervasiveness, many view the demarcating of territorial borders as somehow unproblematic, presenting little potential for violence.

Such a view seems particularly odd, however, once one takes account of the way that territory often functions as a metonym for deep issues and conflicts. This role for territory is especially evident where different territories have been demarcated (perhaps crudely) in order to separate different communities - as has been the case with (Muslim) Pakistan and (Hindu) India, (Francophile) Quebec, (Communist) North Korea, and any number of Westphalian nation-states. In these situations, one can easily see how maintaining a particular territory is quite deeply linked with, say, preserving a role for Islam in South Asia (e.g. Pakistan and Kashmir), or resisting a globally-hegemonic American capitalism (e.g. North Korea).<sup>155</sup> Disputes over

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members - does not mean that such questions are not legitimate fodder for other legal systems, and that they are not decided according to the "rule of law" as opposed to the "law of the streets." See, e.g., *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*, A.I.R. 1962 SC 853 (India) (deciding the constitutionality, under the Constitution of India, of legislative efforts by the State of Bombay to prevent a Shia community from excommunicating its dissident members). That being said, Robert Cover would find the distinction between what passes as the "rule of law" and that which passes as the "law of the streets" as somewhat artificial. Indeed, in his well-known piece, he calls the U.S. Supreme Court "jurispathic" in the way that its decisions often work to obliterate competing conceptions of the good life that are held by groups. See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

Finally, one should not assume that all rioting that "looks" religious is religious. As will be discussed in greater detail *infra*, sometimes conflict that looks like a particular type of argument (e.g. "Hindu-Muslim") may actually be acting as a surrogate for any number of other issues pertaining to land, class, sexuality, etc.

<sup>154</sup> On this point, Will Kymlicka is illuminating. Write Kymlicka: "[T]he increased acceptance of secessionist mobilization in the West is tied to the fact that secession would not threaten the survival of the majority nation. Secession may involve the painful loss of territory, but it is not seen as a threat to the very survival of the majority nation or state. If Quebec, Scotland, Catalonia or Puerto Rico were to secede, Canada, Britain, Spain and the United States would still exist as viable and prosperous democracies." Will Kymlicka, *supra* note 126, at 223 (quoting Istvan Bibo, "The Distress of East European Small States" in *DEMOCRACY, REVOLUTION, SELF-DETERMINATION* 13, 42 (Karoly Nagy ed., 1991)).

Kymlicka's larger argument is that "Western" states - in particular - have largely managed to contain secessionist movements by their national minorities because these states have learned to view such movements as part of the give-and-take of liberal democracy, and thus something that one has to permit instead of fearing - and overreacting with repression. Writes Kymlicka: "The goal of suppressing secessionist mobilization has long been abandoned, and the presence of secessionists is now taken for granted. The fact that secession is on the political agenda only becomes a matter of grave concern if this threatens our basic liberal values, such as peace, democracy, individual rights, mutual respect, and so on. The evidence to date is that allowing secessionists to compete for political office does not threaten any of these values. On the contrary, it is the attempt to remove secession from the agenda that threatens these values, since this can only be achieved by suppressing political speech and democratic rights, and by increased police surveillance. Such actions are likely to force secessionists underground, where they are likely to become more militant and potentially violent." *Id.* at 214.

Conversely, "[i]n [Eastern and Central European countries] . . . it is widely believed that "the secession of foreign-speaking or minority territories forebodes national death." *Id.* at 223.

Fundamentally, then, Kymlicka suggests that territory can be deeply meaningful and the source of real violence. While he excepts "the West" from the implications of this larger point, his inaccurate description of the situation in the West should not distract one from the larger implications of his work, and how it can help one to understand how territory can operate as a metonym for much larger (or thicker) issues.

<sup>155</sup> On this point, one might also take note of recent events between Spain and Morocco - events which, moreover, suggest that Kymlicka's optimism about Western states is misguided. In 2002, for example, Spain and Morocco

territories and boundaries have, then, quite clearly stood in for larger cultural, lingual, religious, economic, and sexual<sup>156</sup> disputes - whether in the West or elsewhere.

This is not the only way that territories and borders can (and do) function as metonyms, however. More generally, it is also the case that “territory” - and the maintenance of “territorial integrity” - can reflect and represent certain ideological, moral, and political stances.

To understand this potential ideological/moral quality to territory it is first important to recall, from above, how state boundaries have disappeared and re-appeared, and expanded and contracted, throughout American history. At many critical points in history, then, Americans have been asked whether and where their state boundaries exist. Second of all, it is then important to understand how seemingly simple questions vis-à-vis this demarcation of borders can get caught up in much larger/deeper disputes. Dan Kahan and Donald Braman’s work on “cultural cognition” is particularly useful in this respect.

In their well-known work, Kahan and Braman strive to explain how “culture” serves as an intermediary to the interpretation of “facts.” Write Kahan and Braman: “[C]ulture is prior to facts in the cognitive sense that what citizens believe about the empirical consequences of those policies *derives* from their cultural worldviews. Based on a variety of overlapping psychological mechanisms, individuals accept or reject empirical claims about the consequences of controversial policies based on *their vision of a good society*.”<sup>157</sup> With this model of cognition, then, Kahan and Braman explain how seemingly scientific/objective issues - such as global warming - have become politicised, even though one would think that the facts on this issue should speak for themselves. As Kahan and Braman demonstrate, however, certain “cultural

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fought over the control of a large rock-island located in the Straits of Gibraltar. This “islet” had had no human inhabitants for over 40 years, and was located 200 meters from Morocco’s coast. *See* Q&A Spain v Morocco, <http://news.bbc.co.uk/2/hi/europe/2136782.stm> (last visited Apr. 1, 2007). Seven Moroccan soldiers raised the Moroccan flag on the island on July 11, 2002, but were later forcibly kicked off the islet by Spanish soldiers six days later. *See id.*

Additionally, Spain and the U.K. - after more than 300 years - still have never resolved their dispute over another rock, that of Gibraltar. While Gibraltar is commonly described as a strategically-important rock, with Spain and the U.K. both part of an increasingly-united Europe - and the military base that is located on Gibraltar a NATO military base - it is hard to know how the security of the U.K., NATO, Europe, or Spain hinges on whether the U.K. or Spain (or both) controls it. *See* Q&A: Gibraltar's referendum, <http://news.bbc.co.uk/2/hi/europe/2400673.stm> (last visited Apr. 1, 2007). It is also difficult to believe that the political liberties or economic opportunities that the residents of Gibraltar possess would be substantially affected by either U.K. or Spanish control. Indeed, if anything, it would seem that Spanish control would actually be beneficial overall, as such control would eliminate the last vestiges of (British) colonialism within Europe.

<sup>156</sup> For example, there is perhaps nothing more devastating to a political leader’s reputation than when he loses territory to a competitor/enemy state. The loss of territory becomes symbolic of weakness on the behalf of the leader and his state, and both are often considered to have been “emasculated” by this loss of territory. Conversely, the conqueror is perceived to be strong, masculine, and virile. In this latter respect, Victoria Held comments on the Bush administration’s conquering of Iraq as follows: “There’s no doubt that there is a strong macho element in this administration’s unilateralism. Sometimes the macho posturing is for strategic purposes. As Maureen Dowd captured it, ‘in 2000 and 2004, G.O.P. gunslingers played into the Western myth and mined images of manliness, feminizing Al Gore as a Beta Tree-Hugger, John Kerry as a Waffling War Wimp With a Hectoring Wife and John Edwards as his true bride, the Breck Girl.’” Victoria Held, *Terrorism and Military Intervention* (unpublished manuscript, on file with author).

<sup>157</sup> Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149 (2006) (emphasis added).

worldviews of a good society” - including 1) being more or less egalitarian (as opposed to hierarchical), and 2) being more or less individualistic (as opposed to “solidarist/communitarian”) - are statistically-significant predictors of one’s willingness to accept certain empirical realities.<sup>158</sup> Moreover, in a world with an over-abundance of information, and a lack of expertise, individuals will “rely on those whom they *trust* to tell them which . . . claims are serious and which specious. The people they trust, naturally enough, tend to be the ones who share their worldviews.”<sup>159</sup>

Taking Kahan and Braman’s instructive work into account, then, one can better understand how ideological - or, alternatively, moral - issues can readily insinuate themselves into discussions and disputes concerning states’ territory, boundaries, and sovereignty, i.e. the issues that Americans have again and again had to decide throughout history.

While this might be a self-evident point with respect to those great historical debates concerning state sovereignty, slavery, and (women’s) suffrage, and also contemporary debates concerning the extraterritorial application of marital and divorce laws, it is important not to restrict one’s view in this respect to the “obvious” moral debates that states often engage in. Indeed, Kahan and Braman’s insights can be extended to realise the (potential) moral subtext of inter-state disputes about industrial pollution of the Great Lakes and the infringement of maritime borders, or decisions by states about how much to charge out-of-state students for university-level higher education. Ultimately, then, states’ ideological and moral agendas and reputations can infiltrate any number of their decisions and laws.

In sum, territory can be thick and religion can be thin, and there is no simple way to distinguish the two - and their respective communities - along this axis. That being said, there still remains the question of whether one should consider American states, specifically, as “communities” comparable to the religious (and ethnic) communities that one finds in personal law systems. In what remains of this section, I will argue that American states should be considered communities and, moreover, ones that are comparable to the religious communities that form the constituencies for personal law systems. However, as might be expected with a term like “community” (or “society,” “culture,” etc.), there is not much theoretical agreement on how to define this term. Thus, in what follows, I will not attempt to prove the improvable but will, instead, defend the notion of American states as communities by briefly responding to two important potential doubts concerning this proposition. In particular, then, I will briefly respond to claims concerning communities and their alleged a) stability in membership, and b) consensus on community precepts.

#### *a. Stability in Community Membership*

With respect to stability in membership, many have noted how the American federal system encourages - and even values - a certain sort of mobility among its citizens. While there

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<sup>158</sup> Kahan and Braman identify these worldviews as potential explainers of people’s willingness to accept certain empirical findings using the work of Mary Douglas and Aaron Wildavsky. *See id.* at 150-52 (discussing MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE* (1982)).

<sup>159</sup> *Id.* at 153.

are several different values that federalism is said to promote, one is that of providing a variety of jurisdictions where different “experiments in living” can occur.<sup>160</sup> The rational and efficient American citizen can then pick and choose among these different jurisdictions, moving to the one which best matches her value set and/or economic priorities.<sup>161</sup> And, indeed, so strong is the notion that the American population is an extremely mobile one, that it is almost the case that anyone who is immobile comes to be seen as backward, strange - and perhaps even un-American - in their stubborn unwillingness to become a territorial entrepreneur. Given, then, this attachment to mobility in the American context, the following important question presents itself, namely: “How can a state really be considered a community if people are coming and going from it all the time?”<sup>162</sup>

In response to this question, two things can be said. First of all, it must be noted that Americans are far less mobile than the common stereotype suggests. And, indeed, while one finds well-known research organisations declaring that “an essential value of the American lifestyle is the freedom of mobility,”<sup>163</sup> one also finds them simultaneously reporting that 54% of Americans lived in the same residence in 2000 as they did in 1995.<sup>164</sup> Of the people who did move during this 5-year period, 54% of them remained in the same county. Of those who moved counties, 56% of them moved to a county within the same state. Ultimately, then, only 8% of Americans moved between states during the same 5-year period. Moreover, with respect to inter-state migration between 1995 and 2000, this “[m]igration most frequently occur[ed] over short distances, and most migrants to the six highest states came from [adjacent or] nearby states.”<sup>165</sup>

Second of all, one must (again) emphasise that religious community exists simultaneously with religious conversion. As discussed in Part I, there is a great deal of Indian religious mobility, yet no one has seriously suggested that this presents fatal problems for religious community itself. While hegemonic Hindu forces bemoan conversion away from Hinduism, they do not simultaneously suggest that “gainer religions” (e.g. Buddhism, Christianity, Islam) are becoming less cohesive. Indeed the threat that conversion (allegedly) presents here is premised in the worry that these other *communities* are gaining strength in a system premised in communalism. While Hinduism is (again, allegedly) growing weaker, other *communities* are growing stronger.

Finally, on this note, it should also be emphasised that the U.S. is a remarkably religiously mobile country itself - and few people in the U.S. view this mobility as a threat to

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<sup>160</sup> See Erwin Chemerinsky, *supra* note 96, at 528-30.

<sup>161</sup> See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

<sup>162</sup> Of course, equating the decision to stay in one’s state of residence as one relating to “community” raises the question as to whether *stability* - and not *mobility* - is actually what is problematic here from the perspective of community. In other words, it may be the case that because people’s families, jobs, and schools are located within a given state that people stay there, rather than for any “voluntary” reasons. In this case, it would appear that what exists is a ghetto, then, rather than a community.

<sup>163</sup> See Census Scope, United States: Migration & Immigration, [http://www.census.gov/scope/tables/chart\\_migration.html](http://www.census.gov/scope/tables/chart_migration.html) (last visited Apr. 1, 2007).

<sup>164</sup> All data in this paragraph is calculated from data which is found on *id.*

<sup>165</sup> See U.S. CENSUS BUREAU, STATE-TO-STATE MIGRATION FLOWS: 1995 TO 2000 5 (2003), available at <http://www.census.gov/prod/2003pubs/censr-8.pdf>.

religious community either. For example, the comprehensive 2001 American Religious Identification Survey (ARIS) found that 16% of Americans overall report that they have changed their religion in their lifetimes.<sup>166</sup> And, in a more fine-grained analysis, the ARIS reports that

[t]he top three “gainers” in America’s vast religious market place appear to be Evangelical Christians, those describing themselves as Non-Denominational Christians and those who profess no religion. Looking at patterns of religious change from this perspective, the evidence points as much to the rejection of faith as to the seeking of faith among American adults. . . .

Some groups such as Mormons and Jehovah’s Witnesses appear to attract a large number of converts (“in-switchers”), but also nearly as large a number of apostates (“outswitchers”). It is also interesting to note that Buddhists also fall into this category of what one might call high-turnover religious groups.<sup>167</sup>

At the least, then, this American religious mobility is just as significant as any supposed “extreme” American territorial mobility.

#### *b. Community Consensus on Moral Precepts*

If instability in communities’ membership is not itself a threat to the existence of communities - territorial, religious, or otherwise - one might still wonder if the *reasons* for this instability still matter. Indeed, one might think that “sincere” conversions do not threaten the cohesiveness of a community, while “opportunistic” changes in identity do - especially to the extent that newcomers bring values and attachments significantly different than existing community members. With respect to states, then, it might be significant that the U.S. Census Bureau reports that “many [migratory] outflows from cold, wealthy, northern states (e.g., Connecticut, Massachusetts, Michigan, New Jersey, New York, Ohio, and Pennsylvania) ended in Florida.”<sup>168</sup> Given this reality, many will certainly question whether the reasons that motivate many people to move to Florida are sufficient to create “community” - either on their own or in combination with “natives.”

In response to this issue, two things can be said. First of all, taking the idea of territory as metonym seriously (again), it is far from clear that one can easily disassociate the desire to move for things like weather, jobs, or education from other motives. In this respect, it is notable that Northerners are moving in large numbers to Florida - and not Alabama. Clearly, Florida has created an - economic, social, legal - environment that retirees find attractive, at least relative to some of Florida’s nearby states. Similarly, it is far from clear that one should make a sharp distinction between attachments to things like families, jobs, and schools and “morality.” At a very deep level, one’s attachment to one’s spouse,<sup>169</sup> one’s employer,<sup>170</sup> or one’s teachers<sup>171</sup> can

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<sup>166</sup> BARRY A. KOSMIN, EGON MAYER, & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY: 2001 23 (2001).

<sup>167</sup> *Id.* at 25.

<sup>168</sup> See U.S. CENSUS BUREAU, STATE-TO-STATE MIGRATION FLOWS: 1995 TO 2000 2 (2003), available at <http://www.census.gov/prod/2003pubs/censr-8.pdf>.

<sup>169</sup> Thus, it would be odd, for example, to attempt to forcibly disassociate same-sex marriage - and the formation of new kinds of state-recognized, same-sex families - from Massachusetts. Clearly, same-sex couples have migrated to Massachusetts for reasons of family, and it would be hard to characterise this move as “just” for family. And, indeed, while same-sex marriages and family often get marked in interesting and peculiar ways, one should hesitate before assuming that opposite-sex marriages and families don’t carry their own moral imprint as well.

also be understood as attachments to the moral-legal environment which enables these attachments. In other words, there are often - explicit or implicit - moral motivations for moving to moral-cum-territorial communities. Apparently, Florida has created an environment which many people want to make their home.

Second of all, it is unclear that the diversity - if not also frivolity - of a group of people mitigates against it being a community. As discussed above, people join religious communities for all sorts of reasons - many of which relate to family, marriage, and sex. Moreover, many people simply “inherit” their religion from their genetic forbears.<sup>172</sup> In this context, however, very few people challenge the idea that a community nonetheless exists. Furthermore, some religions actually *doctrinally* refuse to inquire into people’s reasons for being (or becoming) a member of the community - yet no one challenges the existence of there being a community nonetheless.<sup>173</sup> Ultimately, when defining what can and cannot be a community, one has to be wary of replicating the attitude of a communal autocrat who insists on - or expects to find - unanimous agreement among community members on their community’s precepts.

As this Part has demonstrated, in three fundamental and important ways, the U.S.’s “territorial” states resemble the religious communities which comprise the constituencies for personal law systems in India, and also elsewhere. That being the case, it is unclear why the U.S.’s federal system of family law administration receives so much less scrutiny than personal law systems do by policy-makers, lawyers, and scholars alike. Each type of system would appear to be as threatening, pre-modern, illiberal - or promising - as the other. In the next Part, I will thus conclude this Article critically examining how recent U.S. case law has attempted to sharply distinguish between the two types of systems. As I will argue, this recent effort to worship territorialism, while condemning religious pluralism, is misguided.

### **III. U.S. Case Law Discussion**

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<sup>170</sup> Different state policies enable (or disable) different employment possibilities. States have different minimum wage laws, different environmental standards, different labor and unionisation laws, and numerous other public policy disparities, all of which impact on employment (and other economic) prospects. Moreover, all of these different types of laws and policies can be characterised as “morality-related,” especially in this day and age of notions like “corporate responsibility.”

<sup>171</sup> With respect to education, different states’ policies enable (or disable) different educational possibilities. To the extent, then, that one state’s curriculum standards include requirements for sex education in elementary school and the teaching of evolutionary theory in high school biology, and another state’s curriculum insists on abstinence-only “sex education” and equal time for discussions of “intelligent design,” we can fairly describe those policy decisions as “morality-based.” We can also do the same vis-à-vis states that tolerate wide disparities in educational quality between rich and poor school districts.

<sup>172</sup> Very few people could claim that the religious community they belong to is the result of their untrammelled free choice, rather than the consequence of how they were raised by their parents and what options they were given at early formative stages in their life. It is the exceptional person who is either exposed to atheism or agnosticism in the course of their religious upbringing, and it is the even more exceptional person who chooses it after a religious upbringing. Given, then, that we identify religious people who were not given the tools to question their faith, and who remain in it for reasons of comfort and familiarity, as nonetheless belonging to a community, it is unclear why we should not extend that assessment of community to those who remain in their territorial unit for similar reasons as well.

<sup>173</sup> E.g. Hanafi Muslims.

The 1972 decision in *Wisconsin v. Yoder*<sup>174</sup> represented the high-point in U.S. Supreme Court solicitude vis-à-vis religious liberty. Enamored with a “religion” that had a long and “successful” history within the U.S., the Court extended itself - and American jurisprudence - in order to protect the Amish from a \$5 fine for denying their children a public high school education. The Amish were religious separatists in this case, and the Court had no problem with that.<sup>175</sup>

Such support for religious groups who do not enjoy broad-based support did not last for long, however. Thus, in the 1986 case of *Goldman v. Weinberger*,<sup>176</sup> the Court refused to extend First Amendment religious liberty protections to a Jewish officer in the Air Force. This officer wished to wear a yarmulke while working as a clinical psychologist for the Air Force, in contravention of an Air Force regulation forbidding the wearing of headgear “[while] indoors except by armed security police in the performance of their duties.”<sup>177</sup> Certainly, the outcome in this case was almost entirely predictable, considering its military context and the Court’s extremely deferential historical stance vis-à-vis the military.<sup>178</sup> That being said, it is also quite clear that the Court feared the “anarchy” that might break out if it ruled in favor of the Jewish officer - with other religious groups subsequently taking advantage of this precedent to press their own claims. In this respect, the following excerpt from Justice Stevens’ concurring opinion is revealing:

If exceptions from dress code regulations are to be granted on the basis of a multifaceted test . . . inevitably the decisionmaker's evaluation of the character and the sincerity of the requester's faith - as well as the probable reaction of the majority to the favored treatment of a member of that faith - will play a critical part in the decision. For the difference between a turban or a dreadlock on the one hand, and a yarmulke on the other, is not merely a difference in “appearance” - it is also the difference between a Sikh or a Rastafarian, on the one hand, and an Orthodox Jew on the other.<sup>179</sup>

This fear, then, of an endless parade of exception-seeking religious groups was again most-famously articulated in the 1990 landmark religious liberty case of *Employment Division v. Smith*,<sup>180</sup> a case which quite famously castigated but never explicitly overruled *Wisconsin v. Yoder*. In the famous epigraph from *Employment Division v. Smith* which opens this Article, then, the Court expressed its fear that allowing “too much” pluralism would be “courting anarchy.”<sup>181</sup>

Interestingly, however, around the same time that this new First Amendment religious liberty jurisprudence solidified, an equally important jurisprudence as to federalism began to take off. Thus, in 1995, in *United States v. Lopez*,<sup>182</sup> the Supreme Court resuscitated Commerce Clause restrictions on the central government’s law-making powers - restrictions that many

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<sup>174</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>175</sup> See text accompanying *supra* notes 137-43.

<sup>176</sup> *Goldman v. Weinberger*, 475 U.S. 503 (1986).

<sup>177</sup> See *id.* at 505.

<sup>178</sup> See, e.g., *id.* at 507.

<sup>179</sup> *Id.* at 512-513.

<sup>180</sup> *Employment Division v. Smith*, 494 U.S. 872 (1990).

<sup>181</sup> *Id.* at 885.

<sup>182</sup> *United States v. Lopez*, 514 U.S. 549 (1995).



people thought the judiciary was no longer really interested in.<sup>183</sup> This case concerned the power of Congress, acting under the Commerce Clause, to criminalise the possession of a handgun on local school properties.<sup>184</sup> The Court ruled that Congress did not have this power, writing as follows:

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. . . . The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that . . . there never will be a distinction between *what is truly national and what is truly local* . . . . This we are unwilling to do.<sup>185</sup>

The following year, in *Printz v. U.S.*,<sup>186</sup> the Court again invalidated a Congressional act on the basis of federalism concerns. This case, concerning the constitutionality of the Brady Handgun Violence Prevention Act's requirement that state (and local) law enforcement officers - as opposed to central government officials - run background checks on potential gun buyers,<sup>187</sup> was not decided using any specific provision of the Constitution (e.g. the Commerce Clause). Instead, in invalidating this Act, the Court relied on "historical understanding and practice, . . . the structure of the Constitution, and . . . the jurisprudence of this Court,"<sup>188</sup> in order to declare the importance of state sovereignty to the American federal system. Wrote the Court:

It is an *essential* attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. . . . It is no more compatible with this independence and autonomy that their officers be "dragooned" . . . into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.

. . .

It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are *fundamentally incompatible* with our constitutional system of dual sovereignty.<sup>189</sup>

While *Printz* instigated a great deal of controversy and opposition, in both political and academic circles,<sup>190</sup> the Court continued on its forward march vis-à-vis federalism in *United States v. Morrison*.<sup>191</sup> Echoing its decision in *Lopez*, the Court again insisted that there were "truly national" and "truly local" spheres of sovereign governance - with family law clearly falling into the latter sphere.<sup>192</sup>

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<sup>183</sup> See, e.g., *id.* at 625 (Breyer, J., dissenting)

<sup>184</sup> Gun-Free School Zones Act of 1990, 18 U.S.C.S. 922(q)(1)(A) (1990).

<sup>185</sup> *Lopez*, 514 U.S. at 567-68 (emphasis added).

<sup>186</sup> *Printz v. U.S.*, 521 U.S. 898 (1997).

<sup>187</sup> Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536 (1993).

<sup>188</sup> *Printz*, 521 U.S. at 905.

<sup>189</sup> *Id.* at 928, 944-45 (emphasis added).

<sup>190</sup> See, e.g., Jackson, *supra* note 113.

<sup>191</sup> *United States v. Morrison*, 529 U.S. 598 (2000). See discussion *supra* accompanying notes 106-14.

<sup>192</sup> *Id.* at 616-18.

The future course of Supreme Court jurisprudence concerning federalism issues is unpredictable. That being said, the Supreme Court seems to have achieved an apogee in its rhetoric concerning the sovereignty of states in its 2002 decision in *Federal Maritime Commission v. South Carolina State Ports Authority*.<sup>193</sup> In this case, concerning the constitutionality of a central government agency's administrative hearing of a complaint by a private company against a South Carolina government agency's decision, the Court wrote: "The preeminent purpose of state sovereign immunity is to accord States the *dignity* that is consistent with their status as sovereign entities."<sup>194</sup> Apparently, states now not only have constitutional rights, but they also seem to possess human rights - e.g. "dignity" - as well.

Clearly, then, the Supreme Court has, in the two decades, denigrated the value of religious pluralism while simultaneously elevating the value of federalism. States get dignity, while religious communities are viewed as divisive and the seeds of anarchy. As this Article has argued, however, there is little theoretical basis upon which to hang the distinction that the Court has made here between religious and territorial communities.<sup>195</sup> Each kind of community is as potentially as empowering or problematic as the other. Given this, in what remains of this Part, I will offer two recommendations as to how Supreme Court jurisprudence might change in the future in order to acknowledge the similarities between religious and territorial communities. While, given the constraints of space, I cannot fully develop these recommendations here, this Part's brief introduction of them will nonetheless provide a helpful starting point for future discussions and research.

The first recommendation is that the Supreme Court, if it is going to endow states with dignity, should do the same with religious groups. While some people may fear the consequences of attaching "state values" to religious communities, given the proper conception of dignity, these fears would seem to be overblown. For example, some people may worry that extending the Court's rhetoric of "sovereignty" - developed in relation to states in the federalism context, along with "dignity" - to religious groups may endow these religious groups with an unchallengeable power to (mis)treat women, dissidents, and others as these groups like. However, as Judith Resnik and Julie Suk argue,

for all states, powerful or marginal, being called to account is not an indignity. Given twentieth century understandings of the dignity of persons and of the dialogic obligations of states, no institution ought to be able to object to having to make arguments . . . about whether or not it has violated rights. . . . Given that democratic governmental action has become synonymous with

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<sup>193</sup> Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002).

<sup>194</sup> *Id.* at 760 (emphasis added). This was not the first time that the Court recognised dignitary interests in preserving (a certain view of) states' sovereignty rights. See, e.g., *In re Ayers*, 123 U.S. 443, 505 (1887); *Alden v. Maine*, 527 U.S. 706, 715 (1999). However, it is the latest, and strongest, statement as to those interests in the modern period.

<sup>195</sup> And, indeed, even if one were to act on the basis of stereotypical - and, as this Article has argued, wrong - conceptions of religious versus territorial communities, one would not necessarily arrive where the Supreme Court has presently arrived. For example, if one were to believe that religious communities involve a tighter and more-committed - or simply more important - bond that that which can be found amongst people who just happen to be neighbors on an arbitrarily-demarked patch of sod, one might conclude that religious communities *deserves* more recognition and support by the state than territorial communities do.

accountable dialogical practice, requiring governments to participate in litigation ought to be understood as enhancing, rather than diminishing, the role-dignity appropriate to sovereignty.<sup>196</sup>

Similarly, then, the Court could (re)extend “dignity” - properly defined - to religious groups, without the fear that these groups would become unaccountable for their actions.

The second recommendation follows closely on the first, and is a more-general recommendation that the Supreme Court begin to think of religious groups as less scary than its present rhetoric of “anarchy” suggests. One way to begin to re-imagine religious communities is to think about the ways in which such communities offer some of the same public benefits that the Court has traditionally recognised with territorial communities. While a recitation of all the benefits which supposedly accrue in federalism is probably best left to the Federalist Papers, two of particular relevance to religious communities might be 1) the ways in which federalism leads to *a more democratic experience* for the people, since the states provide more intimate political spheres than the national stage does, and 2) the ways in which federalism permits several, state-level *laboratories for different public-policy experiments*.

Certainly, some religious groups are larger and more decentralised than even the U.S.’s central government is and, certainly, some religious groups’ experiments in and answers to public policy issues cannot - nor should be - replicated elsewhere. However, that being the case, rich debates concerning the meaning of equality, the prevention of HIV/AIDS, drug use, and the proper limits to political protest - among other numerous other public policy issues - are transpiring within religious communities around the globe, as well as in the U.S. and smaller contexts. These debates, and the experiments in living that they are giving rise to, intersect with “secular” public policy intentions and interventions in important ways.

That being the case, if these public policy goals and interventions are to succeed instead of falter, they need to be developed and enforced in a context-sensitive and open-minded manner. Legally allowing religious communities - in the same way that federalism does so for territorial communities - a base and space from which to participate in the imagination and implementation of public policy, thus, might be vital to this policy’s success. However, practically-speaking, this will never happen if the current jurisprudential rhetoric concerning religious communities never moderates itself, and continues to refuse to acknowledge the important similarities that exist between religious and territorial communities, and also their respective systems of governance.

## **Conclusion**

Both federalism and religious liberty have a long history in the American constitutional tradition. Both were extensively debated at the country’s founding, both have generated a great deal of controversy over time, and both have been the source of great hope and pride. This being the case, one might have thought that their future was closely intertwined as well. As this Article has demonstrated, however, these constitutional values have recently taken very different paths,

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<sup>196</sup> Judith Resnik & Julie Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1961-62 (2003).

with American jurisprudence debasing religious liberty (and pluralism), while worshipping federalism.

A critical scrutiny of this difference in judicial treatment has largely, and sorrowfully, not been undertaken. That being the case, this Article has provided such a critical examination, in the process arguing that there is a way to re-unite the diverging paths of constitutional religious liberty and federalism - but, only, ironically, by taking an altogether different path. And, indeed, only by examining *non-U.S.* legal experience as to personal law, can one begin to much better understand the underlying - yet overwhelming - misconceptions about both religion and territory that inform contemporary U.S. Supreme Court jurisprudence on religious liberty and federalism.

Hopefully, then, the dialogue that this Article has attempted to encourage between the country with the world's oldest constitution (the U.S.), and the country with the world's longest constitution (India), will also lead to a dialogue between territory and religion, and federal and personal law systems.