

SLICING THE AMERICAN PIE: FEDERALISM AND PERSONAL LAW

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I.	INTRODUCTION	943
II.	DIVERGING TRENDS IN U.S. JURISPRUDENCE ON RELIGION AND TERRITORY	949
III.	PERSONAL LAW SYSTEMS	954
	A. “ <i>Personal Law</i> ”	957
	B. <i>Personal Law in India</i>	961
	1. <i>Basic Workings</i>	963
	2. <i>Issues and Problems</i>	966
	a. <i>Communalism</i>	966
	b. <i>Women’s Equality</i>	968
	c. <i>Conversion</i>	970
IV.	AMERICAN FEDERALISM AND PERSONAL LAW	972
	A. <i>Overview of Contemporary American Family Law</i>	975
	1. <i>Marital Name-Changing</i>	976
	2. <i>Age of Marital Consent</i>	978
	3. <i>Same-Sex Marriage</i>	979
	B. <i>Similarities Between States and Religious Communities</i>	981

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- 1. *States Are Dynamic Political Creations* 981
- 2. *States Also Discourage Conversion* 992
- 3. *States Can Also Be Communities* 998
 - a. *The Potential Thinness of Religion* 1000
 - b. *Stability in Community Membership* 1011
 - c. *“Moral” Consensus on Community Precepts*. 1014
- V. CONCLUSION 1017

[I]n all Suits regarding Inheritance, Marriage, 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.

Bengal Governor General Warren
Hasting’s Plan for the Administration
of Justice (1772)¹

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 Div. v. Smith*²

Petitioners’ reasoning . . . will not limit Congress to regulating violence but may . . . be applied equally as well to family law and other *areas of traditional state*

1. A Plan for the Administration of Justice (1772) (on file with author).
2. 494 U.S. 872, 885, 888 (1990) (citations omitted).

regulation . . . Congress may have recognized this 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*³

I. INTRODUCTION

U.S. First Amendment jurisprudence has frowned upon the carving out of religious-group exceptions to generally applicable law.⁴ Nonetheless, the U.S. Supreme Court has also recently given renewed emphasis to state sovereignty⁵ and

3. 529 U.S. 598, 615-18 (2000) (emphasis added).

4. See, e.g., *Employment Div.*, 494 U.S. 872 (addressing the meaning of the Free Exercise Clause of the First Amendment to the U.S. Constitution). For a case that viewed religious exceptions to generally applicable law much more favorably, though in the context of the Establishment Clause, see *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987). For the Supreme Court's own observations as to the interpretive interconnection of these two First Amendment clauses, see *Wisconsin v. Yoder*, where the Court noted:

A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. . . . [However, t]he Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses "we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully traversed."

406 U.S. 205, 220-21 (1972) (citations omitted).

5. See, e.g., *Morrison*, 529 U.S. 598; *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454 (2007) (indicating that special standing rules exist for state litigants because a state has "sovereign prerogatives" and an "independent interest. . . in all the earth and air within its domain") (quoting *Georgia v. Tennessee*

other federal values.⁶ Few commentators, however, have recognized the potential contradiction that comes with, on the one hand, worshipping the sovereignty of California or Massachusetts, for example, while, on the other, refusing any comparable legal status to Christian and Muslim (and other) religious communities. Indeed, most American⁷ commentators would probably find it difficult to understand why any legal system would extend broad state-like protection to religious communities, or even how any legal system could do so. This difficulty of comprehension is, however, less the result of any scarcity of jurisdictions that do the “unimaginable” and “impossible,” than it is the consequence of American legal education’s inward-looking pedagogy.

This Article aims to open a discussion between those multiculturalist legal systems that are largely territorially premised, and those that are largely religiously premised. It will do so by working to de-exoticize an important form of religiously premised legal ordering that is, for the present moment, largely found in locations physically distant from the United States. While there are many ways to proceed with such a de-exoticization project, this Article does so by demonstrating how the present U.S. system of territorial federalism is not a species

Copper Co., 206 U.S. 230, 237 (1907) (Holmes, J.)). See also discussion accompanying *infra* notes 146-54.

6. Admittedly, there is some disagreement over what “federalism” entails and also whether the classic example, i.e. the United States, can indeed be considered “federal.” One oft-recited definition of federalism provides 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 merely a statement in the constitution) of the autonomy of each government in its own sphere.”

WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 11 (1964). While many interpreters of this well known definition have counted the U.S. as “federal,” others have disagreed with this characterization. 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 154. Michael Burgess has argued that American “federalism” is a relatively unique species of federalism, even if its conceptual and historical “influence is inescapable and incontrovertible.” MICHAEL BURGESS, *COMPARATIVE FEDERALISM: THEORY AND PRACTICE* 75 (2006).

7. For stylistic reasons, I will be using “American” to mean “of the United States” throughout this Article.

apart but, instead, actually resonates with systems of “personal law” that are commonly found around the world in places as diverse as India, Pakistan, Egypt, and Malaysia. Under a personal law system, a state enforces different laws for each of the state’s different religious (or ethnic) communities. Accordingly, this Article will demonstrate in detail how American territorial communities share with personal law systems’ religious communities more than is typically acknowledged.

The uniquely American reluctance to examine foreign legal experience⁸ is in some sense understandable, seeing as the unfamiliar often has an “anarchic” quality to it.⁹ However, the historical blinding of the American legal gaze to foreign personal law has only worked to obscure the possibility that there are American legal practices which resemble those in personal law systems (for better or worse). Given the rich interpretive possibilities that are opened up by moving away from the usual, provincial analyses of the American federal system, then, this Article will use foreign legal experience—and especially that from India—to deepen and broaden analysis of both the American system and personal law systems. By examining India’s personal law system, this Article will suggest important resonances between this kind of legal ordering and the American federal system. While there are important differences between these kinds of legal ordering,¹⁰ their over-

8. As well as the uncommonly secular reluctance to take seriously religion, much less religiously premised systems of law. In this respect, Saba Mahmood writes:

The reason progressive leftists like myself have such difficulty recognizing . . . aspects of Islamic revival movements . . . owes in part to our profound dis-ease with the appearance of religion outside of the private space of individualized belief. For those with well honed secular-liberal and progressive sensibilities, the slightest eruption of religion into the public domain is frequently experienced as a dangerous affront, one that threatens to subject us to a normative morality dictated by mullahs and priests. This fear is accompanied by a deep self-assurance about the truth of the progressive-secular imaginary, one that assumes that the life forms it offers are the best way out for these unenlightened souls, mired as they are in the spectral hopes that gods and prophets hold out to them.

SABA MAHMOOD, *POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT* xi (2005).

9. See *Employment Div.*, 494 U.S. at 888.

10. Perhaps most importantly, the national government’s prerogative to *preempt* (territorial and religious) communities’ laws operates somewhat dif-

looked similarities suggest that one should not and cannot view them as fundamentally different “types.”¹¹

This Article does not take a position on the advisability of either federal or personal law systems, nor does it advance any specific legal reform project. Instead, it is hoped that the comparative dialogue that this Article engages in, as well as the

ferently in the two countries whose legal systems will be the focus of this Article: the United States and India. Of course, it also goes without saying that the eighteenth-century genesis of the American federal Constitution, and the heavy role that debates over slavery played in the formulation of that Constitution, are significantly different than the history that lays behind the Indian Constitution and personal law system. All of this does create important differences between these two systems' operations. That being said, this Article's claim is emphatically *not* that the American federal system operates the *same* as the Indian personal law system does, but only that there are potentially overlooked similarities between the two systems of law that deserve a great deal more open-minded exploration and investigation.

11. In general, it is a bad idea to rely heavily on typologies and “familial” groupings of legal systems. Systems of law tend to be extremely mixed in origin, and also heavily contested, making any grand sorting of them both problematic and partisan. See Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 677 (2002) (arguing that “we have learned to look beyond legal systems and families as static and isolated entities,” and that “[c]onscious of their historical contingency and ongoing development, we have come to think, in a more dynamic fashion, primarily of *legal traditions*”); see also Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L. L. J. 221, 251 (1999) (“Moreover, the increased movement of persons, products, popular culture and capital across borders calls into question the division of ‘West’ and ‘Non-west.’ . . . The refusal to engage non-European materials on grounds that they are too ‘different’ to understand, for example, is increasingly difficult to defend in a world where legal rhetoric and practices in many societies share a singular vocabulary.”).

And, indeed, while I magnify the religiously premised personal law aspects of Indian law in this Article, there is also an intertwined system of territorial federalism operating in India, giving its legal system a somewhat mixed character. See, especially, INDIA CONST. (1950), Parts I, XI-XII, and Sch. VII, to appreciate the nature of this federal system in India. The list of matters over which both the central government and state governments share “concurrent” legislative authority includes: “Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.” *Id.* Sch. VII, List III, Item 5. In this way, one gets territorial-cum-religious statutes such as the Kerala Joint Hindu Family System (Abolition) Act of 1975. Nonetheless, this is still personal law, though at a jurisdictional level different than the national one.

intriguing commonalities between legal systems that it suggests, will lead to a new and mutually enriching dialogue between territory and religion, federal and personal law systems, and also recent and diverging trends in American First Amendment and federalism jurisprudence.¹²

With respect to this Article's inter-systemic comparative project, India's personal law system is especially illuminating in that it provides a particularly rich example of how personal law systems operate in practice. And, indeed, India's personal law system incorporates several different family law codes for India's several different religious communities. For instance, under India's constitutionally sanctioned¹³ personal law system, a Muslim citizen divorces under different laws than a Hindu citizen.¹⁴ Similarly, a Christian inherits deceased parents' valuables differently than a Sikh.

Moreover, India's extant personal law system provides a particularly 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 understandings of "religion" and "community" that are generated by the Indian context open up intriguing parallels to the United States' similarly

12. Writing about the purposes of comparative law, Nora Demleitner writes: "Comparative law has another opportunity to carve out an important niche for itself. In a multicultural society and a more integrated world, its inquiries should pursue the ultimate goal of overcoming prejudice and stereotyped notions of other cultures and legal systems." Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737, 739 (1999).

13. See INDIA CONST., art. 44 (unenforceable in courts).

14. It is important to note that the Special Marriage Act, No. 43 of 1954, available at <http://indiacode.nic.in/fullact1.asp?tfnm=195443>, does technically allow "any two persons" to marry in India without having to utilize any of the explicitly religiously premised family laws. However, "the Act has not been well publicized and there seems to be a manipulation to subvert its provisions." FLAVIA AGNES, *LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA* 97 (1999). In other words, this Act is effectively a dead-letter law in India and cannot be considered a defining aspect of India's family law system, or a real option for India's more secularly oriented citizens.

constructed, and similarly contested, territorial communities. Thus the example of India allows one to better understand “secular” aspects of religious community and how this secularity resonates with “sacred” aspects of American territorialism.

In sum, an examination of India’s personal law system provides an important stepping stone on the path to demystifying and de-essentializing both “religious” and “territorial” communities, thereby opening up the possibility of comparative analysis of their respective legal roles.¹⁵ Both kinds of community are social, political, and legal constructs and are, to invoke Benedict Anderson, “imagined communities.”¹⁶ This conceptual “leveling of the field” can then allow one to see, in contrast to much conventional legal theorizing, how territorial administrations of the law can share intriguing and important similarities with religious administrations of the law.

Part II begins this Article by briefly providing context for this Article’s diagnosis of a need for more inter-systemic dialogue. It does so by demonstrating how, within the influential American jurisdiction, legal discussions about territorially premised federalism have proceeded largely independently of legal discussions of religiously oriented legal multiculturalism. As this Part discusses, over the past two decades, the U.S. Supreme Court has denigrated the value of religious pluralism while simultaneously elevating the value of federalism. States get dignity and accommodation, while religious communities are viewed as divisive and the seeds of anarchy.

Part III, crucially, offers a definition and description of “personal law.” This Part provides both a brief history of this method of organizing law, and also a demonstration of how personal law works in the paradigmatic (though not exhaus-

15. As it presently stands, the common view that religious and territorial administrations of the law have absolutely nothing in common completely shuts down even *preliminary* comparative analyses of the two “kinds” of administration of law. As Gunter Frankenberg notes, this is unhelpful because “[b]oth universalism and relativism tend to reproduce the dichotomy between the self and the other; they are *non-dialectical* in the sense that they either come up with ‘bad’ abstractions or with *no abstractions at all*.” Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT’L L. J. 411, 415 (1985) (emphasis added).

16. BENEDICT R. ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6 (1991) (offering as a proposed definition of the nation “an imagined political community—and imagined as both inherently limited and sovereign”).

tive) instance of India. Through this exploration, this Part also demonstrates the esoteric and political nature of religious attachment in India and elsewhere. That religiosity (and, in turn, religious communities) can be “thinner” than most legal theorists realize will then be contrasted with the potential “thickness” of territorialism in Part IV.¹⁷

Part IV will build upon Part III’s discussion by developing and defending this Article’s major argument that the American federal system and personal law systems appear to share a number of intriguing similarities. As federalism has an impact on the administration of many areas of law in the United States, a comprehensive discussion of American federalism in this Part is impossible. This Part thus focuses on American states’ control of *family law*, with a special focus on marital law. It posits that one might view American territorial communities, like religious communities in personal law systems more generally, as 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 those same citizens. This Part’s discussion relies on historical and theoretical arguments about federalism and the nature of community, and also on a demonstration of how U.S. legal practice concerning conflicts of (marital) laws effectively constructs American states as legal and moral entities that both fall short of and spill over any simple lines on a map.

Part V will very briefly conclude this Article by suggesting a couple of future areas of research and inquiry about both federalism and personal law, as well as the legal norms and conventions that shape both forms of value pluralism.

While this Article focuses on the benefits that a global turn in legal theorizing can provide, it first turns to a discussion of American constitutional jurisprudence.

II. DIVERGING TRENDS IN U.S. JURISPRUDENCE ON RELIGION AND TERRITORY

The 1972 decision in *Wisconsin v. Yoder*¹⁸ represents a high-point in U.S. Supreme Court solicitude for religious

17. In this Article, I will be synonymously using variations of “thick,” “heavy,” and “strong,” and, conversely, “thin,” “light,” and “weak.”

18. 406 U.S. 205 (1972).

liberty and the accommodation of religious groups' dissident practices. 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 fourteen and fifteen) to school. At the time, Wisconsin statutory law required children to be sent to public or private school until the age of sixteen. When the parents refused to comply with this law, they were tried, convicted, and each fined five dollars. In response, they brought a constitutional challenge to Wisconsin's compulsory school attendance law, alleging that this law violated their First Amendment rights to practice their particular Amish "religion."¹⁹ Enamored with a "religion" that had a long and "successful" history within the United States, the Court extended itself and American First Amendment jurisprudence in order to protect the Amish litigants from a five dollar fine for denying their children a public high school education. The litigants were religious separatists, and the Court had no problem with that.²⁰

This kind of expansive accommodation of religious groups did not last for long, however. In the 1986 case of *Goldman v. Weinberger*,²¹ the Court refused to extend First Amendment religious liberty protections to a Jewish Air Force officer who wanted to wear a yarmulke in contravention of an Air Force regulation forbidding wearing headgear "[while] indoors except by armed security police in the performance of their duties."²² Moreover, in the infamous 1990 religious lib-

19. 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." *Id.* at 207.

20. See *infra* text accompanying notes 186-91.

21. 475 U.S. 503 (1986).

22. See *id.* at 505. While the outcome in this case was predictable considering this case's military context and the Court's historical deference to the military, see, e.g., *id.* at 507, the Court did fear the "anarchy" that might break out if it ruled in favor of the Jewish officer and other religious groups subsequently took advantage of this precedent to press their own claims. In this respect, Justice Stevens' concurring opinion is revealing:

If exceptions from dress code regulations are to be granted on the basis of a multifactored 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

erty case of *Employment Division v. Smith*,²³ the fear of an endless parade of exception-seeking religious groups motivated the Court to state that legally accommodating too much (non-territorial, religious) pluralism would be “courting anarchy.”²⁴ While two recent major Supreme Court decisions indicate that the Court may be shifting towards a less alarmist view of religious accommodation,²⁵ it is also possible to read both decisions as instances of the Court reluctantly going along with a strong popular demand (demonstrated and given voice by Congressional legislation) for religious accommodation; it is not clear at all that the Court itself relishes religious liberty or will work proactively to protect it absent outside pressure.²⁶

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.

Id. at 512-513.

Finally, it is important to note that, in reaction to the *Goldman* decision, Congress passed a statute guaranteeing that “a member of the armed forces may wear an item of religious apparel while wearing the uniform [unless] the wearing of the item would interfere with the performance [of] military duties [or] the item of apparel is not neat and conservative.” 10 U.S.C. §§ 774(a)-(b).

23. 494 U.S. 872 (1990). This decision never explicitly overruled *Wisconsin v. Yoder*, instead distinguishing it as a “hybrid” case involving “a free exercise claim connected with a communicative activity or parental right.” *Id.* at 882.

24. *Id.* at 888.

25. See *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (holding that the Religious Land Use and Institutionalized Persons Act of 2000 does not violate the First Amendment’s Establishment Clause); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (holding that the Religious Freedom Restoration Act of 1993 is applicable to the federal government and protects the Christian Spiritist religion’s members from being criminally prosecuted for their use of the hallucinogenic drug *hoasca*).

26. In this respect, *Cutter v. Wilkinson* concerned the constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. § 2000cc), which was passed in wake of the public uproar sparked by the Court’s unpopular decision in *Employment Division v. Smith*. Moreover, in *Cutter*, the Court found no problem with limiting the RLUIPA’s protections to “bona fide faiths,” *Cutter* at 723-24, and the Court also went out of its way to emphasize that it “[has] no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns” and that “prison security is a compelling state interest, [with] deference [] due to institutional officials’ expertise in this area.” *Id.* at 722, 725 n.13.

Around the same time of the Supreme Court's landmark *Employment Division v. Smith* decision, equally important federalism jurisprudence emerged. In 1995, in *United States v. Lopez*,²⁷ the Supreme Court resuscitated Commerce Clause restrictions on the national government's lawmaking powers, restrictions which many people thought the judiciary was no longer really interested in enforcing.²⁸ The following year, in *Printz v. United States*,²⁹ the Court again invalidated a Congressional act on the basis of new-found federalism concerns.³⁰

Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal was also a case that was decided in wake of the public uproar generated by *Employment Division v. Smith*. Furthermore, in *Gonzales*, the Court emphasized that the drug use at issue here was really no different than peyote use, which Congress had moved to more broadly permit after the *Employment Division v. Smith* decision. See 42 U.S.C. § 1996a(b)(1). Wrote the Court: "If such use is permitted . . . for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how [one] can preclude any consideration of a similar exception for the 130 or so American members of [this religion] who want to practice theirs." *Gonzales*, 546 U.S. at 433.

27. 514 U.S. 549 (1995). Some might date the beginning of this federalism revolution to 1992, with the decision in *New York v. United States*, 505 U.S. 144 (1992).

28. See, e.g., *id.* at 625 (Breyer, J., dissenting). This case concerned the power of Congress, acting under the Commerce Clause, to criminalize the possession of a handgun on local school properties through the Gun-Free School Zones Act, 18 U.S.C. § 922(q)(1)(A) (1990). The Court ruled that Congress did not have this power:

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.

Lopez, 514 U.S. at 567-68 (emphasis added).

29. 521 U.S. 898 (1997).

30. This case, concerning the constitutionality of the Brady Handgun Violence Prevention Act's requirement that state and local law enforcement officers run background checks on potential gun buyers, Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-59, 107 Stat. 1536 (codified as amended at 18 U.S.C. §§ 921-30), was not decided using any specific provision of the Constitution such as the Commerce Clause. Instead, in invalidating this Act, the Court relied on "historical understanding and prac-

While *Printz* instigated a great deal of controversy and opposition, in both political and academic circles,³¹ the Court continued on its forward federalist march in *United States v. Morrison*.³² Echoing its decision in *Lopez*, the Court insisted again in *Morrison* that there were “truly national” and “truly local” spheres of sovereign governance, with family law clearly falling into the protected latter sphere.³³

While the future course of Supreme Court jurisprudence concerning federalism issues is unpredictable, the Court seems to have achieved an apogee³⁴ in its rhetoric concerning the sovereignty and importance of states in its 2002 decision in *Federal Maritime Commission v. South Carolina State Ports Authority*.³⁵ 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

... the structure of the Constitution, and . . . the jurisprudence of this Court,” *Printz*, 521 U.S. at 905, in order to declare the importance of state sovereignty to the American federal system:

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.

Id. at 928, 944-45 (emphasis added).

31. See, e.g., Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2215 (1998).

32. 529 U.S. 598 (2000). See also discussion *infra* accompanying notes 146-54.

33. *Morrison*, 529 U.S. at 616-18.

34. Certainly, the Supreme Court seems to have taken a step back from rigorously protecting states’ rights with its decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), but the future still remains unclear. For discussion of this case, see Thomas W. Merrill, *Rescuing Federalism after Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823 (2005).

35. 535 U.S. 743 (2002).

consistent with their status as sovereign entities.”³⁶ Apparently, states now not only have constitutional rights, but they also seem to possess international human rights like “dignity.”

Over the past two decades, the Supreme Court has denigrated the value of religious pluralism while simultaneously elevating the value of territorial pluralism. States get dignity and accommodation, while religious communities are viewed as divisive and the seeds of anarchy. While Congress has partially remedied the effects of the Court’s First Amendment jurisprudence, exhibiting somewhat more solicitude for religious liberty and religious accommodation than the Court,³⁷ the disconnect between the Court’s attitudes towards religious and territorial communities is still very much worth examination and critical analysis.³⁸ The next Part begins such examination and analysis.

III. PERSONAL LAW SYSTEMS

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 nineteenth century, 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.”³⁹

36. *Id.* at 760 (emphasis added). This was not the first time that the Court recognized dignitary interests in upholding (a certain view of) states’ sovereignty rights. See, e.g., *Ex parte Ayers*, 123 U.S. 443, 505 (1887); *Alden v. Maine*, 527 U.S. 706, 715 (1999). However, it is one of the most recent and strongest statements as to those interests in the modern period.

37. See text *supra* accompanying notes 22, 25-26.

38. There are also very real practical concerns here. Because of *Congressional* action, one might say that there is presently a basic consonance in the legal protections that religious communities and territorial communities (*qua* states) enjoy vis-à-vis the federal government. However, it is entirely possible that Congress will one day step back from its present role as “protector” of religious pluralism and liberty, thereby forcing the Court itself to directly consider whether Congressional disdain for the sovereignty of religious communities will be allowed to proceed in the way that Congressional disdain for the sovereignty of the states was often historically tolerated by the Court.

39. FRIEDRICH KARL VON SAVIGNY, PRIVATE INTERNATIONAL LAW AND THE RETROSPECTIVE OPERATION OF STATUTES: A TREATISE ON THE CONFLICT OF

The first method of legal administration, whereby persons' race or nationality determines which laws will be applied to them, is commonly referred to today as a "personal law system." Under this kind of legal system, law attaches to persons, and as they move from one location or territory to another, the same law applies to them. Looking historically, von Savigny described the operation of personal law as follows:

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.⁴⁰

As much discussion of personal law makes clear, many people perceive personal law to be the law that the wild, savage, and uncivilized adopt. Whether they be Germanic tribes, or just Asians and Africans, or (in the case of India) the "pre-constitutional," people who live under personal law are often perceived to be pre-modern, non-Western, and illiberal.⁴¹

LAWS AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME 58-59 (William Guthrie trans., Lawbook Exchange 2003) (1880).

40. *Id.*

41. For example, von Savigny himself 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." *Id.* at 59. In other words, von Savigny seems to be saying that under a personal law system, persons cannot very easily escape the laws that apply to them, since 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. In short, one can just move from one territory to another to escape the application of the former's laws.

While, as discussed in greater detail below, von Savigny's understanding of the fixity of religion and religious identity (and ethnicity and ethnic identity) is misinformed, his strict linking of personal voluntarism with the terri-

This is the case even though it was often Western colonial powers themselves who entrenched personal law systems through edicts like the eighteenth-century "Plan for the Administration of Justice" in India.⁴²

Given such "legal orientalism," then, it is perhaps unsurprising that Americans have not been able to recognize the ways in which their own federalized legal system potentially shares important similarities with personal law systems. Indeed, "personal law," as a specific term, does not have strong roots or recognition in the United States. That being the case,

territorial enforcement of laws is one reason that he and many contemporary liberals see territorial legal regimes as an advance over personal law regimes. For example, von Savigny himself 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." *Id.*

Echoing von Savigny's historically determinist and political views, a more contemporary scholar, Edoardo Vitta, has described the post-colonial period as follows:

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.

Edoardo Vitta, *The Conflict of Personal Laws*, 5 ISR. L. REV. 337, 350-51 (1970). Finally, as discussed *infra* Part IIIB(2) (b), India's liberal democratic constitution and many of India's liberal feminist activists also conceive of personal law as an embarrassing anachronism that should be eliminated in a modern world of constitutional egalitarianism. Conversely, Indian territorial federalism seems to pose few if any of the same problems.

42. See *supra* text accompanying note 1. Moreover, the entire colonial enterprise itself could be viewed as a meta-form of personal law: one law for the metropolitans and one law for the colonized. Thus, if anything, one might suspect that the "weakening of Western influence," Vitta, *supra* note 41, at 351, should bring a revival of territorial administration of laws, instead of the strengthening or expansion of personal law systems.

this Part first briefly defines this legal term of art, and then demonstrates how such a legal system works in practice using the instance of India. An examination of India allows for a discussion of how religious communities participate in shaping the content of contemporary personal law. This discussion, in turn, demonstrates how the politics of personal law influences conversely the development of those communities which personal law governs. This demonstration is important for Part III's discussion of the parallels between religious and territorial communities and of the similarities that American federalism and personal law systems appear to share.

A. "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 the "type of person" involved. In a given personal law system, for example, a different set of labor laws might apply to women than to men, to high-caste than to low-caste persons, or to "natives" than to "non-natives."⁴³ The factors that are important to personhood⁴⁴ may differ from society to society. As a result, any given personal law system might look unlike any other such system. However, what characterizes all "personal law" systems is that the law which applies to one in such systems depends on the "kind of person" one is, instead of on one's generic membership in an undifferentiated polity. While the personhood aspects that most personal law systems

43. From a global perspective, all states' legal systems are personal law systems, at least to the extent that they depend on essential types like "the citizen" and "the foreigner." For a relevant discussion drawing interesting parallels between states' multicultural policies and global legal pluralism, see PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* 130-31 (2007). While this Article focuses on the theoretical overlaps between territorial and personal law systems, its concern is not primarily with this "meta-situation" but, instead, the theoretical one that obtains when one examines the various ways in which states administer their laws *internally*.

44. I use the word "personhood" here to emphasize that not every law that distinguishes between persons 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 that they are not for the vast majority of Americans. Race rather than caste, in this respect, is more central to the American discussion.

use to distinguish between people are those premised in religion and ethnicity, personal law is not just that law that distinguishes between people with different kinds of communal or kinship ties (religion and ethnicity being two prime examples of such ties). The term “personal law” has, in fact, not been strictly limited (either historically or contemporarily) in this way.⁴⁵

45. See, e.g., RAMANI MUTTETUWEGAMA, PARALLEL SYSTEMS OF PERSONAL LAWS IN SRI LANKA 3-5 (1997) (discussing the quasi-territorial, quasi-ethnic aspects of Sri Lankan personal law).

There are also good theoretical reasons to disassociate personal law from ethnicity and religion, strictly speaking, in that this disassociation permits 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 emphasized 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) (Hereinafter MASUD, ISLAMIC LEGAL INTERPRETATION) (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, available at <http://indiacode.nic.in/>; The Hindu Succession (Amendment) Act, No. 39 of 2005, available at <http://indiacode.nic.in/>. Moreover, looking beyond mere *age* as a metric for tradition, it can also be demonstrated that untraditional legal and religious *methodologies* underlie any number of personal laws (in India). See generally MASUD, ISLAMIC LEGAL INTERPRETATION. In other words, then, much personal law is both new and/or representative of innovative methods of 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.

Legal systems are not all-or-nothing ventures; 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, states might administer civil law personally, yet criminal law universally (i.e. in the same way for all citizens). Moreover, within any given civil law system, the law of contracts might be the same for everyone while, in contrast, family law might bind people of different religious faiths differently.

For example, the Indian Penal Code applies throughout India to all of India's citizens (with the exception of those in the disputed territories of Jammu and Kashmir).⁴⁶ On the civil side of things, a great deal of commercial law applies to all Indian citizens' commercial dealings in the same way. However, with respect to a different domain of Indian civil law, family law, the Indian state often administers different family law codes to persons of different religious faiths.⁴⁷ 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,⁴⁸ while a Christian woman who wishes to obtain a divorce from her Christian husband will follow the Indian Divorce Act for Christians.⁴⁹

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. To restate this section's basic definition, then, what matters for "personal law" is whether different laws or *legal norms*, whatever their form or provenance, apply to different types of people.

46. The Indian Penal Code, Act No. 45 of 1860, *available at* <http://india.code.nic.in/>.

47. There are many areas of Indian law that affect families which are *not* administered along religious lines, however. *See, e.g.*, Protection of Women from Domestic Violence Act, No. 43 of 2005, *available at* <http://indiacode.nic.in/>. That being said, marriage, divorce, and inheritance law are largely administered in this way and, for the purposes of this Article, I will be considering these areas of law part of "family law."

48. The Dissolution of Muslim Marriages Act, No. 8 of 1939, *available at* <http://indiacode.nic.in/>. There is also a great deal of uncodified Muslim personal law embodied in judicial precedents.

49. The Indian Divorce Act, No. 4 of 1869, *available at* <http://indiacode.nic.in/>.

Where the term “personal law” is used, it is usually used in a positivist sense. 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. A tax system that 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 livelihood to be particularly salient to personhood. Similarly, a criminal law system that defines rape as the “penetration” of one person by another person’s body part is not necessarily part of a “personal law” system, even to the extent that such a system essentially immunizes women from rape charges.⁵⁰ “Personal law” is not facially neutral law that implicitly distinguishes between persons, burdening different types of people disparately and indirectly. It is law that purposefully and *on-its-face* declares⁵¹ 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.⁵²

50. 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.

51. This can be by statute or via judicial declaration. *See, e.g.*, discussion *supra* note 45.

52. 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. 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.” This 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 utilize complex non-American debates concerning pluralism could obscure an all-too-easy refutation of these bigoted laws.

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.

This quality of personal law reveals, at a very high level, how the United States' federalized administration of family law might very well share a number of similarities with personal law systems. And, indeed, in the United States, there are different family laws for people of different states. Before discussing the United States in greater detail, however, it is worth exploring some other important aspects of India's complicated-yet-paradigmatic personal law system.

B. *Personal Law in India*

As the preceding discussion has indicated, personal law systems are 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. However, personal law systems have never been static, and states continue to modify their personal laws and the legal and political institutions that administer them.

Personal law has been subject to especially vigorous legal debate and reform in India, which has a population of over one billion people from faiths as diverse as Hinduism, Islam, Christianity, and Sikhism.⁵³ 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. While this section's exploration and discussion

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 emphasize 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."

53. Not to mention, thousands of Jews, Zoroastrians, and adherents of various other smaller religions and sects.

of the Indian personal law context is somewhat particular, it is so largely because there are few (if any) other national contexts where so many of the potential issues concerning personal law come together simultaneously.

This section 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 to which this system has given rise, focusing on the ways in which communal and misogynistic politics together help construct the “space” and demarcate the “borders” of India’s religious communities.⁵⁴ As this discussion will illustrate, religious communities in India—like territorial state communities in the United States—are not pre-political or pre-historical entities, and individuals’ religious identities are not permanently fixed.

54. Admittedly, there is always the danger in presenting the “salient” aspects of a given legal system that one is choosing those aspects of the system which are most convenient for one’s analysis. See Pierre Legrand, *On the Singularity of Law*, 47 HARV. INT’L L. J. 517, 522 (2006) (Hereinafter Legrand, *Singularity*). Moreover, without endorsing Pierre Legrand’s implicit locating of “scholars,” I believe that

[s]cholars who engage in comparative work about law face an exigent challenge. . . . [Being] prepared to intervene as interpreters for *another* legal culture, they need to amplify their appreciation for different structures of meaning, to the point where they will ultimately be in a position to report on discrepant cognitive processes in an apperceptive mode. . . . The act of explicating or ‘restaging’ a legal culture in this way introduces a number of questions [. . . including whether] the sentiment of sensitivity to cultural differences [is] ever more than an illusion[.]

Pierre Legrand, *Comparative Legal Studies and Commitment to Theory*, 58 MOD. L. REV. 262, 262 (1995) (emphasis added).

Taking these concerns into account, while what I am presenting here is only a brief overview of India’s personal law system, I am trying to present—in a somewhat open-ended way which provides room for others’ additions, deletions, and critique—those aspects of this system which figure prominently in contemporary *Indian* discussions of it. See Legrand, *Singularity*, at 526 (“[T]he interpreter [should] . . . actively engage with the law-text[s] in an effort to elucidate [them] on its own terms, as such—or, at least, with as much ‘as-suchness’ as is possible given the cultural/traditional embeddedness of the discourse.”). Of course, there are other important aspects to the discussion in India about personal law, including those concerning the existence of non-state articulations and enforcements of personal law. These non-state legal phenomena are the subject of other ongoing research commitments of mine, and inform this Article’s present focus on the Indian state’s version of personal law.

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]."⁵⁵ 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, as well as in the management of religious endowments. Indeed, the British legislated the Indian Penal Code in the mid-nineteenth century, and this English-law-inspired criminal law code was applied to everyone in India who was under the direct rule of the British, no matter what their religion.⁵⁶ After independence, the post-colonial Indian state decided to continue this basic split between universally oriented criminal law and personally oriented family law.

Presently in India, the central government (and, to a much lesser degree, state governments⁵⁷) legislates on different religious communities' personal laws. Furthermore, there is a single, national judiciary in India that enforces this legislation, as well as the large amount of uncodified religious personal law that is found in judicial precedents. With the exception of a special Parsi bench of the Bombay High Court,⁵⁸ no

55. A Plan for the Administration of Justice (1772). 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).

56. Preceding the enactment of this code in the mid-nineteenth century, Islamic criminal law provided the basis for 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).

57. See discussion *supra* note 11.

58. For a discussion of debates surrounding the contemporary mechanics of this special bench, see Swati Deshpande, *Parsis Debate Separating Divorce Cases from HC*, *THE TIMES OF INDIA*, Feb. 26, 2004, available at <http://timesofindia.indiatimes.com/articleshow/520185.cms>. For historical background on the establishment of this special bench, see Mitra June Sharafi, *Bella's Case: Parsi Identity and the Law in Colonial Rangoon, Bombay and*

religion-specific family law courts are officially sanctioned. As a result, the Indian Supreme Court, as well as Indian lower courts,⁵⁹ often end up interpreting and enforcing Hindu, Muslim, and Christian personal law. Importantly, however, India also considers itself to be a constitutionally and legally secular state.⁶⁰ While Indian secularism does not look like other important instances of secularism (for example, American, French, or Turkish), it is nonetheless motivated by a commitment to respecting and protecting equally different religious faiths and communities. This underlying intent (if failure in practice) to respect religious pluralism, combined with the sheer size of India as compared to far-less-populated articulations of secularism, give serious weight to India's claim to be a "secular" state.

While it might seem that the Indian central government's and national judiciary's control over religious communities' family law is antithetical to any comparison with a "federal"⁶¹ system of government, as with all comparative projects, socio-political context is important. For example, while India's central government has authority to legislate family law for India's religious communities, the central government rarely does so without the support of the affected communities. The central government is quite sensitive to the demands of religious groups⁶² and what a religious community will not consent to with respect to its personal law, the central government is reluctant to enact.⁶³ At the very least, the relationship between

London, 1887-1925 168-69 (Nov. 2006) (unpublished Ph.D. dissertation, Princeton University) (on file with author).

59. All family law cases can be appealed through a system of lower courts and High Courts to the Indian Supreme Court.

60. See, e.g., INDIA CONST., Preamble (declaring India to be a "sovereign socialist secular democratic republic").

61. See *supra* note 6 for a discussion of different conceptions of what it means for a state to be "federal."

62. This is evident from the Shah Bano crisis. See discussion *infra* Part III(B)(2)(a).

63. For example, the enactment of The Indian Divorce (Amendment) Bill in 2001 essentially equalized the availability of divorce for Christian women and men in India, and also introduced the possibility of divorce by mutual consent. While this new law was an impressive achievement, it took a decade of concerted activism to achieve with any number of starts and stops, many the result of governmental reluctance to legislate changes in Christian personal law without there being a clear pan-Christian-sectarian consensus on the need for changes. See Press Release, Catholic Bishops' Conference of

the government and religious groups in India can be characterized as “fraught,” with a delicate dance required when it comes to legislation and judicial decisions that affect religious communities’ personal law.⁶⁴ Ultimately, whatever preemptive powers the Constitution, judiciary, and central government have in India with respect to religious communities, personal laws are, as in the United States with territorial communities’ laws,⁶⁵ far from absolute.

Of course, describing the basic mechanics of any legal system tells only 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. It is to an exploration of some of the more prominent problems and issues that India’s personal law system, like many other personal law systems, has faced that this Article now turns.⁶⁶ In particular, the next section discusses how India’s personal law system has dealt with commu-

India, National Council of Churches in India, Joint Women’s Programme, Christians Hail the Indian Divorce Amendment Act 2001 (Sept. 2, 2001), available at <http://www.wfn.org/2001/09/msg00000.html>. See also Manpreet Singh, *India: Hindu Government Moves to Change Christian Divorce*, CHRISTIANITY TODAY, Mar. 5, 2001 (discussing the kinds of obstacles the central government faces when legislating in the area of personal law), available at <http://www.christianitytoday.com/ct/2001/march5/21.33.html>.

64. For example, see *Danial Latifi v. Union of India*, A.I.R. 2001 S.C. 3958, a very awkward Supreme Court decision that, while attempting to subject Indian Muslim personal law to Constitutional equality norms, refused to outright declare this personal law unconstitutional. See generally Jeffrey A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 VA. J. INT’L L. 759, 821-23 (2004) (discussing the details of this decision). It is probably the case that any Indian religious community’s veto power vis-à-vis the central government is stronger than its “demand power.” This may be the result of it being difficult to forge consensus among a community’s internal diversions on any 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.

65. See *infra* text accompanying notes 101-17 for discussion of instances in which U.S. Constitutional equality norms do not apply apparently to the states. See also Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1036 (1977) (describing how the Warren Court “structured a dialogue on the future of constitutional requirements . . . in which state and federal courts were required both to speak and listen as equals”).

66. See discussion *supra* note 54.

nalism, women's equality, and the controversies that develop when people are religiously mobile or convert.

2. *Issues and Problems*

a. *Communalism*

One serious problem that personal law systems commonly face is communalism, and the tendency for religious groups to assert a type of exclusive ownership over their respective community's personal laws, thereby enabling a politics of survival when people outside the community propose changes to these laws. Given explicit legal recognition in an otherwise secular state,⁶⁷ religious communities often come to view that particular legal recognition 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 controversies. The Shah Bano crisis that consumed Indian politics in the mid-1980s 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*.⁶⁸ The question presented by this 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"⁶⁹ was applicable to Muslim men, who supposedly have more limited responsibilities⁷⁰ toward their ex-wives under classical Islamic family law.⁷¹

67. 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 "Islamic" states (e.g. the Copts in Egypt).

68. (1985) 3 S.C.R. 844.

69. INDIA CODE CRIM. PROC. § 125(1)(a).

70. 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, 280-82 (3d ed. 1998).

71. Shah Bano was a seventy-three year old Muslim woman who had been divorced after forty-six years of marriage by her husband's pronouncement of *talaq*. Her ex-husband was appealing an order by the Madhya Pradesh

Ultimately, the Supreme Court determined that 1) the Code of Criminal Procedure's requirements superseded any contradictory Muslim personal law rules and requirements⁷² and 2) nothing in Muslim personal law forbade indefinite maintenance to a divorced wife "who is unable to maintain herself."⁷³ Arguably, the first holding was sufficient to have settled the case, and it was gratuitous and provocative for the Supreme Court to have interpreted the Muslim community's personal law. 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.⁷⁴

The opinion ignited large protests by conservative Muslims across India.⁷⁵ Eventually, then-Prime Minister Rajiv Gandhi and his government acquiesced to conservative Muslim demands to pass a law to eliminate Muslim—and only Muslim—women's rights to petition for and receive indefinite post-divorce maintenance from their ex-husbands.⁷⁶ 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 polarization in Hindu-

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.

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 section 127(3) (b) of the Code of Criminal Procedure, which exempts persons from having to provide maintenance when they have already paid "the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce," 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.

72. *Id.* at 854-56.

73. *Id.* at 859-62.

74. The lead paragraph in this opinion, in fact, included the following remarks: "it 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.

75. 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, 101-03 (Zoya Hasan ed., 1994).

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

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.⁷⁷ These communal problems, and the challenges they present for legislation and judicial decisionmaking in the area of personal law, persist today.

b. *Women's Equality*

The Shah Bano crisis was not just a crisis concerning Hindu-Muslim relations. It also concerned the status of women in India, in both religious and secular contexts. As in many other national contexts, personal law in India has been at the center of not only religious politics, but also gender politics.⁷⁸

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. 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,⁷⁹ there still remains a

77. 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. See Dionne Bunsha, *Five Years After Godhra and the Pogrom*, THE HINDU, Feb. 28, 2007, available at <http://www.thehindu.com/2007/02/28/stories/2007022802811000.htm>.

78. While it is certainly not the case that only under personal law systems are women treated worse than men, 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.

79. See The Indian Divorce (Amendment) Bill of 2001. See also The Hindu Succession (Amendment) Act of 2005.

great deal to be done in affirmatively ensuring substantive legal equality between women and men in these communities.⁸⁰

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. 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.⁸¹ While efforts to legislate this uniform civil code failed, 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 dangerous high, 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 fracturing of efforts along communal lines, which posed new obstacles for Indian feminist activism and its efforts to secure a gender-equitable, “secular”⁸² family law. Given this situation, one approach that gained a considerable degree of support among Indian feminists during this time was to work on changing attitudes concerning family and family law *within* each of the different religious communities in India. The thinking was that by doing so, Indian feminists could help build “progressive” religion-specific constituencies. These could then be used to rally for changes within each separate community’s personal law, thereby obviating the need for a universally applicable civil code. In hindsight, however, this “internal reform” option never really had much prospect of

80. It is important to emphasize 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 Rajiv Gandhi’s ostensibly secular Congress Party leadership that was responsible for The Muslim Women (Protection of Rights on Divorce) Act of 1986.

81. This terminology comes from INDIA CONST., art. 44, which reads: “The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.”

82. I use “secular” here to denote “non-religion-specific,” even though there are other (e.g., French-republican) conceptualizations and actualizations of this concept.

widespread success considering, among other factors, the size and diversity of India's religious communities and the relatively meager financial resources of Indian feminists and their allies. And, indeed, this approach has achieved very little legislatively.⁸³

c. *Conversion*

India's personal law system has also had to confront the political and legal difficulties that often arise when people "cross borders" and change their religion through conversion.⁸⁴ 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. India is perhaps one of the most "religiously mobile" countries in the world. 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),⁸⁵ one can appreciate how religious mobility and conversion have operated both as sources of great hope in India and of great fear.

This fear of religious mobility and conversion, and the political violence that can accompany them, has manifested itself in many ways, including the legislation of laws that heavily regulate and restrict 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.⁸⁶

Such judgments draw from and contribute to a paranoia in Hindu-nationalist quarters that Muslims might eventually outnumber Hindus in India if the Indian administration of

83. For an exception, see *supra* discussion note 63.

84. 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).

85. See, e.g., BBC News, Dalits in Conversion Ceremony (Oct. 14, 2006), http://news.bbc.co.uk/2/hi/south_asia/6050408.stm (last visited Aug. 2, 2008).

86. 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 192-98.

family law continues to be structured in a way that supposedly encourages people to abandon Hinduism in favor of Islam and its allegedly advantageous family laws. According to this way of thinking, the “inducement” to convert from Hinduism to Islam can only increase if there are no legal obstacles or regulations put in the way of conversion. Such fears have only worsened as the communal stakes have grown in post-Shah Bano India. As Hindus and Muslims have moved 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.”

However, the Hindu-nationalist majoritarian project in India is not just limited to discouraging Hindus from converting to Islam, Christianity, or Buddhism. It also extends to unilaterally and legally defining other groups as Hindus for the purposes of constitutional and family law. For example, 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.”⁸⁷ One can also find similarly amalgamative legal maneuvers in the Hindu personal law code, and in a number of Supreme Court decisions.⁸⁸

As these constitutional provisions, legislative acts, and judicial decisions make eminently clear, it is through implementations of power and crude demarcations that India’s religious communities have taken their present-day “shape.” Just as it is odd to consider Sikhism an uncomplicated part of Hinduism, it is odd to treat all of India’s 150 million Muslims as the same despite their several sectarian, lingual, and ethnic differences. Nonetheless, this is what the Indian legal and political system has wrought.

In sum, communalism, women’s equality concerns, and religious mobility and conversion have all challenged the tranquility and stability of India’s personal law system, as they have in other personal law systems. As the next Part argues, however, the Indian system’s complex, “anarchic” ordering of things is hardly unique, and the American federal system ap-

87. INDIA CONST., art. 25, Explanation II.

88. *See, e.g.,* Bal Patil v. Union of India, A.I.R. 2005 S.C. 3172.

pears to share intriguing similarities with it and, indeed, personal law systems more generally.⁸⁹

IV. AMERICAN FEDERALISM AND PERSONAL LAW

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 Laycock⁹⁰

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

Victor Aluise⁹¹

Given Part III's definition and description of personal law systems, this Part argues that the American federal system resonates more deeply with personal law systems than is typically acknowledged. This Part highlights important and overlooked similarities between the two systems, and also suggests that any attachment to maintaining a strict conceptual or political separation between the systems is theoretically inappropriate.⁹²

89. Much of what follows in the next Part is an attempt to see American federal practice through a set of non-American eyes. In that sense, it is an argument that provides a "flip" to the usual methodological stance of assessing/judging "foreign" practice through haughty American paradigms. Nora Demleitner has noted that "[w]hile the differences between common law . . . and civil law countries . . . have been the subject of comparative *law* analysis, the legal systems of countries in Africa, the Middle East, and to a lesser extent, Asia, have frequently been delegated to the realm of *anthropology*." Demleitner, *supra* note 12, at 743. With those words in mind, the next Part aims to examine American legal practice atypically through anthropological eyes.

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

91. Kareem Fahim, *In New Jersey, Gay Couples Ponder Nuances of Measure to Allow Civil Unions*, N.Y. TIMES, Dec. 16, 2006, at B1 (quoting Victor Aluise who made comments after the New Jersey legislature approved a civil unions bill).

92. 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 inter-systemic difference between "federal" and "personal law" systems. On the diversity of global federalist thought and practice, see generally BURGESS, *supra* note 6.

This Part concentrates on the personal law aspects of the United States' federalized administration of family law and, in particular, marital law. A focus on this area of law readily lends itself to one of this Article's overarching goals, in that American states' administration of this area of law, and the moralizing tones that accompany this administration, will help make clearer the similarities between these American territorial communities and the religious communities that comprise the constituencies for many personal law systems. After a very brief overview, then, of the extant diversity in states' family laws, an accounting of intriguing similarities between personal law systems and the American federalized family law system proceeds in three parts.

First, this Part discusses how, as in India where politics has played a large role in the border-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 conceptualization of territory than is commonly conceived. As this Part demonstrates, states, unlike the tangible dirt with which they are commonly associated, disappear and re-appear in American history, in a manner that is tied to politics. This now-you-see-them-now-you-don't political-artifact quality to American states echoes the ways in which (as described in Part II) Indian religious communities' salience increases and decreases in coordination with politics—often of a non-egalitarian sort.

Second, this Part discusses how the American federal system resonates with personal law systems to the extent that both systems of law make it difficult to move or convert away from communities of first-instance. For example, in ways reminiscent of how India's personal law system makes it difficult for people 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 similarity between Indian and American communities focuses on how these communities' respective legal systems politically create and erase communal borders. This second similarity 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 In-

dian context, this again means that community borders lack strict correspondence with any (contiguous) patch of dirt.

Third, this Part discusses the community-like quality to states, both historically and contemporarily. As Victor Aluise vividly demonstrates, many people *do* have proud identifications with states as moral communities.⁹³ Of course, such attachments are neither omnipresent nor eternal, but this does not mean that they are not real, or a species apart from how religious persons often identify with their religious communities. This section, then, as part of its project of suggesting similarities between territorial and religious communities, will question conventional but misguided notions of “religion,” “community,” and “religious community” that work to obscure the linkages between religious and territorial identifications. Ultimately, then, this section suggests that people’s attachments to territorial communities like American states can be just as morally premised as people’s attachments to religious communities are and, as a result, also suggests that maintaining a sharp theoretical divide between these types of communities is unjustifiable.

Concentrating on these three similarities between the U.S. federal system and personal law systems is warranted in light of how theorists have distinguished pluralistic territorial legal systems from personal law systems and also considering the allegations that many theorists have leveled against personal law systems.⁹⁴ The three aspects of American federalism that this Part will focus on, then, demonstrate that 1) similar to religiosity, U.S. statehood has a largely intangible quality, whose concreteness largely manifests itself in politically fraught times, 2) U.S. states make conversion from their respective jurisdictions either impossible or difficult, and 3) Americans have attachments to their territorial communities, often for moral reasons. Thus, the American federal system (and polity) can also demonstrate highly “pre-modern” and/or “illiberal” characteristics. While it is possible that politically motivated borders that entrap people in a system that they themselves fully support for moral reasons can be liberal, that possibility should be shared with, or denied to, both federal and personal law systems.

93. See *supra* note 91.

94. See *supra* note 41.

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, they function like similarly useful, and similarly unavoidable, religious communities in India and elsewhere. This Part explores potential similarities between these allegedly disparate types of communities and their corresponding legal systems, after first giving a brief overview of the reality of family law pluralism in contemporary America.

A. *Overview of Contemporary American Family Law*

At a fundamental level, the American federal system divides Americans into different communities, each of which has a great deal of authority to enforce its own family law norms on those persons who are members (voluntarily or otherwise) of that community.⁹⁵ One set of family law norms binds Californians, and a different set binds 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 no-fault divorce), that has not always been the case, and seems increasingly unlikely in the future.⁹⁶

Whether such differences are significant is a political, ideological, and personal estimation.⁹⁷ For example, many people read the fact that only two American states allows same-sex couples to marry as a significant violation of Constitutional guarantees of equality. For others, however, this reality is a minor issue when compared to the general accomplishment of equality in opposite-sex marriages in the United States. Such a trivializing view can be found on the far-right, where the preva-

95. For a discussion on the involuntary aspects of American territorial membership, see *infra* note 202.

96. See, e.g., Tim Craig, *Foundation Wants Stricter Rules for Splits*, WASH. POST, Jan. 5, 2007, at B3 (detailing efforts in Virginia to restrict no-fault divorces). See also discussion *infra* note 166 regarding some states' legislation of a "covenant marriage" option.

97. But see Laycock, *supra* note 90, at 260 (arguing that most legal differences between the states are insignificant).

lence of homosexuality is both feared and denied, and also on the far-left, where marriage itself poses serious moral problems and the denial of same-sex couples from its purview is either unimportant or welcome.⁹⁸ Similarly, in the Indian context, there are differences between different religious communities' family laws, but one should not make the mistake of either overstating or downplaying those differences.⁹⁹ Different people will see the significance of legal variation differently.

Ultimately, the only safe thing that can be said 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 briefly outlines some of these differences in moral outlooks between the different states. By doing so, this section anticipates the more detailed argument below that the American states can be viewed as moral communities with moral borders, akin to the religious communities that form the constituencies for many personal law systems. Because the claim that American states are moral communities would be weakened if one could not find evidence of differences between the states in the family laws and polices that each implements, this Article now turns to a brief overview of contemporary family law differences between the states.¹⁰⁰

1. *Marital Name-Changing*

State laws that govern 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 laws, such laws used to especially affect women:

Custom became law by a series of cases in the late-nineteenth and early twentieth century. These cases

98. See generally MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (2000) (arguing that queer persons should resist the normalizing temptations offered by same-sex marriage).

99. And, indeed, one might argue that communalists have been responsible for both "exaggerating" the differences between religious communities, as well as "minimizing" those differences as part of a hegemonic move.

100. 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).

built dicta 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.¹⁰¹

When formal laws change, social attitudes often do not. Indeed, gendered social perceptions attached to taking on (or not taking on) the surname of one's spouse at marriage¹⁰² continue to exert significant force over the operation of this area of family law, even if not in a formal way. While the contemporary default legal rule in nearly all states is that both spouses will retain their original names upon marriage,¹⁰³ a man who wants to take on the surname of his wife after marriage can face legal and/or bureaucratic obstacles significantly more burdensome than a woman who wishes to take on the surname of her husband, depending on which state's laws apply. As Emens' research shows, in addition to there being formal legal differences in some states with respect to "unconventional" male marital name-changing, a significant number of states' bureaucratic agencies also create obstacles¹⁰⁴ for this kind of particular name change.¹⁰⁵ In both more-formal and

101. Elizabeth F. Emens, *Changing Name Changing: Desk-Clerk Law, Framing Rules, and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 772 (citations omitted).

102. According to Emens, "women who decline to take their husbands' names face not only the potential displeasure of their husband [sic], 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." *Id.* at 779 (citations omitted).

103. *Id.* at 812.

104. Emens calls this "desk-clerk law," writing:

One of the most striking results of this inquiry into marital names was the degree to which federal, state, and local government clerks gave inaccurate, incomplete, contradictory, or normative responses to specific questions about legal options. These officials, without any specifically delegated discretion, effectively make the rules for many individuals through *desk-clerk law*.

Id. at 824 (citation omitted).

105. Emens further reports that:

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

less-formal ways, then, some legal differences persist between the states with respect to marital name-changing. Moreover, these differences appear to reflect moral differences about the respective roles (for example, dominance versus submissiveness) of men and women in a marital relationship.

2. *Age of Marital Consent*

Perhaps the most striking example of moral differences between the American states when it comes to family law is the minimum age of consent for marriage.¹⁰⁶ While the vast majority of states require marriage participants to be at least eighteen if they are marrying without parental consent,¹⁰⁷ many states relax this age requirement to different extents if there is parental consent. Thus, while Kentucky requires marriage participants to be eighteen with or without parental consent to marriage, its neighbor, Tennessee, allows sixteen-year-olds to marry with their parents' consent. Hawaii permits fifteen-year-olds to marry with their parents' consent.

The states' different estimations as to the proper role of parents in children's marital decisions are only one part of the story. Many states that 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 fourteen-year-old boys to marry, while girls only

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.

Id. at 821-22 (citations omitted).

106. For a chart comparing various aspects of state marriage laws, see the Legal Information Institute, Marriage Laws of the Fifty States, District of Columbia and Puerto Rico, http://www.law.cornell.edu/topics/Table_Marriage.htm (last visited Aug. 2, 2008).

107. Interestingly, Nebraska requires marriage participants to be nineteen-years-old. *Id.* This is the highest age requirement of all the states. *See id.*

have to be thirteen years old. In Massachusetts, the parental-consent disparities are even greater: Boys have to be fourteen, while girls only have to be twelve.

Thus, some states allow child marriage for girls, some for boys, and some for both. Some states do not 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 from a moral perspective.

3. *Same-Sex Marriage*

While same-sex marriage has been a topic of discussion in American gay and lesbian circles for several decades,¹⁰⁸ no real traction for this idea was 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.¹⁰⁹ The opinion sparked a great deal of backlash, and Hawaii amended its constitution explicitly to allow the Hawaii legislature to ban same-sex marriage in that state.¹¹⁰ The legislature then accepted this constitutional invitation and legislated such a ban.

Both Hawaii's initial move toward the legalization of same-sex marriage and its constitutional amendment approach to restricting this form of marriage would prove prophetic. Ten years after *Baehr*, Massachusetts granted same-sex couples the right to marry¹¹¹ while, around the same time, efforts to constitutionalize same-sex marriage bans accelerated around the United States. Similarly, California's recent decision to provide marriage licenses to same-sex couples¹¹² has been matched by Michigan's decision to strictly interpret its constitutional prohibition of same-sex marriage such that not

108. For a discussion of an earlier legal controversy concerning gay marriage, see Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1761-64 (2004).

109. 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 state's refusal to issue same-sex marriage licenses using a "strict scrutiny" sex discrimination standard of review. *Id.* at 87.

110. See HAW. CONST. art. I, § 23.

111. See *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

112. See *In re Marriage Cases*, 43 Cal. 4th 757 (2008).

only same-sex marriages but also state-sponsored health benefits for domestic partners are now constitutionally barred.¹¹³ One step towards same-sex relationship equality in the United States seems to be countered continually by one step away from this equality.

While Massachusetts and California remain outlier states in the American system, and the majority of states have very resolutely banned same-sex marriage from their jurisdictions—twenty-six states constitutionally restrict marriage to unions of one man and one woman while nineteen statutorily restrict it¹¹⁴—there is still an internal diversity to this extreme opposition to same-sex marriage that many commentators 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.¹¹⁵

2) Tennessee:

The historical institutional 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 pro-

113. *See* Nat'l Pride at Work, Inc. v. Governor of Michigan, 481 Mich. 56 (2008).

114. *See* Human Rights Campaign, *Statewide Marriage Prohibitions* (May 30, 2008), http://www.hrc.org/documents/marriage_prohibitions.pdf; Human Rights Campaign, *Relationship Recognition in the U.S.* (July 22, 2008), http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf.

115. MICH. CONST. art. I, § 25.

visions of this section, then the marriage shall be void and unenforceable in this state.¹¹⁶

3) 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.¹¹⁷

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-legitimize anything other than full-on opposite-sex marriage. While all three states refuse to recognize same-sex marriage, they do so in significantly morally different ways.

B. *Similarities Between States and Religious Communities*

1. *States Are Dynamic Political Creations*

Douglas Laycock is correct when he observes, in the epigraph which introduces this Part, that states are not built on kinship—at least of any genetic type. However, he is also correct when he notes that the present organization of states is one that “we” chose. States did not spring out of the dirt: Americans defined, built, and organized them.

Of course, this construction process was not a pretty one, and every American state has a messy if not 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

116. TENN. CONST. art. XI, § 18.

117. VA. CONST. art. I, § 15-A.

history was an entity that Americans eventually recognized as a “state.”

Such a designation is a term of art, bringing certain rights, privileges, and responsibilities. And it is the Constitution’s allocation of various rights, privileges, and responsibilities to states that tells us what “states” are, and how one can recognize them, rather than any specific constitutional definition of these entities.¹¹⁸

Such rights, privileges, and responsibilities include the right to representation in the House of Representatives¹¹⁹ and Senate,¹²⁰ the right to and responsibility to maintain a “Republican” form of government,¹²¹ the responsibility not to “deprive any person of life, liberty, or property, without due process of law,”¹²² many other powers and responsibilities as defined by courts,¹²³ and any “powers not delegated to the United States by the Constitution, nor prohibited by [the Constitution] to the States.”¹²⁴ Interestingly, however, and as Laycock himself notes, “[t]he Constitution . . . never quite says . . . that states are territorial.”¹²⁵

118. Indeed, one has to wait until Article IV of the Constitution—after Articles I–III articulate the *central* legislative, executive, and judicial branches—for the Constitution to give the states any sort of outline or shape. While earlier articles mention the states, it is not until Article IV that the Framers gave any substance, albeit meager, to these entities. Even then, Article IV only provides that “[n]ew 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. IV, § 3. While this description implies that states are sovereign entities, Sections 1 and 2 undermine (or counter-balance) such a notion by declaring, “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State,” *id.* § 1, and also guaranteeing that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” *Id.* § 2.

119. U.S. CONST. art. I, § 2.

120. *Id.* § 3.

121. U.S. CONST. art. IV, § 4.

122. U.S. CONST. amend. XIV, § 1.

123. For example, these powers concern criminal law, family law, etc.

124. U.S. CONST. amend. X.

125. Laycock, *supra* note 90, at 317 (“The Constitution thus assumes that states are territorial, but it never quite says so.”). 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.

Thus, one can know that the District of Columbia is not a state—even though it has territory “not exceeding ten Miles square”¹²⁶—because, among other things, it does not have voting representation in the House or Senate.¹²⁷ Nor does it have a republican form of government. Similarly, one 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 it might 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],” and “within the Jurisdiction,”¹²⁸ non-territorialized interpretations of such words are not only possible but commonplace.¹²⁹ In light of all of this, and per Article IV of the U.S. Constitution,¹³⁰ 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.¹³¹

126. U.S. CONST., art. I, § 8.

127. For a discussion of recent debate concerning D.C.’s lack of Congressional representation, see Mary Beth Sheridan, *White House Opposes D.C. Vote*, WASH. POST, Mar. 17, 2007, at A1.

128. See U.S. CONST. amend. XIV, § 1; art. IV, § 3, cl. 1.

129. See, e.g., *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (holding that a Delaware corporation was sufficiently present in the State of Washington such that the corporation could be subject to the jurisdiction of that state). Douglas Laycock, however, appears to take issue with such non-territorialized interpretations. See Laycock, *supra* note 90, at 316-17. Indeed, he even writes, with respect to Article IV: “Note especially the use of the word ‘Jurisdiction’ as a synonym or metaphor for territory.” *Id.* at 317. Of course, whether and when the Constitution speaks metaphorically is a subject of great and vociferous debate.

130. See U.S. CONST. art. IV § 3, cl. 1.

131. 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* 649 (George E. Connor & Christopher W. Hammons eds., 2008) (2006). 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

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 authorizes suggests parallels with the way in which the Indian Constitution and its associated political processes build and order India's different religious communities. As Part II 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 sixty-year history, and religious borders have correspondingly disappeared and re-appeared. The remainder of this section demonstrates how American states have also emerged and been submerged according to political realities and requirements of the day.

One political context in which American states are given a very prominent role is in 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 three-fourths *state*-approval requirement on top of the already difficult requirement that two-thirds of both houses of Congress approve any proposed amendment.¹³² 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. At other times, however, they have far less presence.

Because of Article V's strenuous requirements, the possibility of formally amending the U.S. Constitution, even with respect to immensely important issues, is quite small.¹³³ This

line with Mormon (as opposed to Native American) appellations for this part of the country. *Id.* at 652.

132. See U.S. CONST. art. V.

133. See generally SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006). Indeed, it took fifty-two years after the Fourteenth 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, namely the enfranchisement of women. For more discus-

is perhaps particularly true in the modern era, so much so that one might reasonably believe that the era of formal constitutional amendments is long over.¹³⁴ “Constitution writing” in the modern era seems to revolve far less around formal amendments than around national lawmaking and judicial decisionmaking.

Non-Article V constitutional amendment-making, however, also demonstrates the ways in which states’ presence depends on the political context, with states occasionally rearing their heads but at other times burying them underground. To see this alternating presence of states, one must shift one’s focus away from not only formal constitutional amendment procedures but also explicit lawmaking and judicial decisionmaking. One must examine the subtext of formal laws and judicial opinions: One must examine what was not decided just as much as what was decided.

Bruce Ackerman’s discussion of the 1964 U.S. Supreme Court decision in *Heart of Atlanta Motel, Inc. v. United States*¹³⁵ 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 Fourteenth Amendment. Writes Ackerman:

[T]here would have been a big problem if Warren had led the Court down [the Fourteenth Amend-

sion on the very high obstacles that Article V amendments to the Constitution face, see Roderick Hills, *The Folly of the Article V Amendment Process* (Mar. 13, 2008), <http://prawfsblawg.blogs.com/prawfsblawg/2008/03/the-folly-of-th.html> (last visited on Aug. 2, 2008).

134. As Bruce Ackerman writes:

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. . . . 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.

Bruce Ackerman, 2006 Harvard Law School Oliver Wendell Holmes Lecture: *The Living Constitution* (Oct. 3-5, 2006), in 120 HARV. L. REV. 1738, 1741 (2007).

135. 379 U.S. 241 (1964).

ment] 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 inaugurate a new era of race relations in this country.

. . .

[A]t 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, Jr., and Lyndon Johnson to elaborate the nature of the nation's constitutional commitments.¹³⁶

In other words, the Court feared that if it were to put constitutional equality on the table, (Southern) states would have felt immensely threatened and would have made their presence known in a manner requiring acknowledgement. These states would not only have obstructed judicial efforts to modify the constitutional text to explicitly sanction non-discrimination laws, but they would also have insisted upon—but never formally approved—any like-minded formal amendment to the Constitution. 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 non-Article V constitutional amending.

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 of American states, and their link not to a tangible soil, but to an ephemeral politics. The Court's maneuvering in this case also provides a vivid demonstration of how American states often manifest themselves in particularly sharp and rigid ways when they are confronted with the application of liberal equality norms.

In both the United States and India, communities, whether "territorial" or "religious," seem to be most solid and

136. Ackerman, *supra* note 134, at 1780-81.

sharp edged when they are confronted with the specter of liberal equality.¹³⁷ As the rest of this section discusses, American territorial communities have tended to assert themselves not only when they feel threatened by the enforcement of racial equality norms but, like Indian religious communities, also when gender equality looms. Moreover, not only has this been true historically but, as with India, it remains true contemporarily.

With respect to history, Reva Siegel, in an 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.¹³⁸ As Siegel discusses, the opposition to granting women the right to vote was based on a number of interrelated concerns. Some of these concerns and their interconnections are well summarized 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 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 promi-

137. See Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 499-500 (1995) (discussing the problems that American federalism has historically posed for racial equality). For a discussion of the Indian situation, see *supra* Part III(B)(2).

138. See generally Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and The Family*, 115 HARV. L. REV. 947 (2002).

nence, 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.¹³⁹

Clearly, concerns about intra-family unity overlapped with anxieties that a lowering of “firewalls” between families could produce real changes in women’s consciousness and, thus, how the American polity operates.¹⁴⁰ History eventually proved such anxieties to be warranted. For example, the immediate aftermath of the passage of the Nineteenth Amendment included 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 to allow the legislation of a national marriage and divorce law.¹⁴¹

The effort to nationalize family law is particularly interesting for what it says about feminist perceptions of the American states at that time. While the move to nationalize family law was not necessarily motivated by impulses that American feminists today would recognize or endorse,¹⁴² what is important to take away here is that feminists in the early twentieth century

139. *Id.* at 995-96 (quoting S. REP. NO. 48-399, pt. 2, at 6-7 (1884)) (emphasis added).

140. 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.” *Id.* at 995 (quoting Edward D. Cope, *Relation of the Sexes to Government*, in DEBATER’S HANDBOOK SERIES: SELECTED ARTICLES ON WOMAN SUFFRAGE 123, 126 (Edith M. Phelps ed., 2d ed. 1912)) (emphasis added).

141. *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).

142. The goal here was to *restrict* divorce nationally. *See* Siegel, *supra* note 138, 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 United States, especially in those places where many material and social benefits attach to marriage.

viewed both “family federalism” and *state*-premised federalism as opposed to women’s interests.

That feminists then would have been so skeptical of the states is not surprising, considering how opposition to the Nineteenth Amendment was expressed not only in terms of the necessity of maintaining a certain kind of federalism across families,¹⁴³ but also in terms of state federalism. In this respect, 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.¹⁴⁴ Moreover, these same opponents conceived of states as collections of families (instead of individuals)¹⁴⁵ thereby directly connecting their arguments for patriarchal familial sovereignty with arguments for (patriarchal) state sovereignty. In their opposition to state control over family law, then, feminists of the time very much understood how states understood their molecular self-composition, and how stubborn and corporal these states tended to become when confronted with the prospect of gender equality.

In this respect, things have not improved much in the past seventy-five years; as the 2000 Supreme Court decision in *United States v. Morrison* demonstrates, things may have actually gotten worse.¹⁴⁶ This case concerned whether Congress had the constitutional authority to legislate the Violence Against

143. See *supra* text accompanying note 139.

144. See Siegel, *supra* note 138, at 1000.

145. In a petition filed in a case challenging the constitutionality of the Nineteenth 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 (quoting the Plaintiff’s brief at 98-99, *Leser v. Garnett*, 258 U.S. 130 (1922)).

146. 529 U.S. 598, 616-18 (2000). See generally Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 870-92 (2004) (critiquing *Morrison* and its insistence that all U.S. family law has traditionally been a matter of local jurisdiction).

Women Act (VAWA),¹⁴⁷ which enabled women and men to bring civil suits in federal or state court¹⁴⁸ against people who subjected them to “crimes of violence motivated by gender.”¹⁴⁹

While ostensibly a case about the specific contours of the Commerce Clause and the Fourteenth Amendment, the majority opinion in *Morrison* was clearly written with an eye on more general, contemporaneous disputes concerning federalism and states’ rights. The Court’s discussion about what qualifies as “commerce” was cursory¹⁵⁰ and overshadowed by its more abiding fear that, were it to uphold the Commerce Clause constitutionality of VAWA,

Congress could 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

147. Violence Against Women Act, Pub. L. No. 103-322, tit. IV, § 40302, 108 Stat. 1902, 1941-42 (1994) (codified at 42 U.S.C. § 13981 (2000)).

148. See *Morrison*, 529 U.S. at 668 (describing this basis of concurrent jurisdiction).

149. 42 U.S.C. § 13981. 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. 529 U.S. at 602-03. As a result of her suffering, 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 Fourteenth Amendment to pass VAWA. The federal district court and the Fourth Circuit Court of Appeals agreed with them, *id.* at 604-05, as did eventually the U.S. Supreme Court.

150. For example, one finds unhelpful statements in this opinion 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 610 (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)) (emphasis added). Similarly, at another point, the Court writes tautologically: “While *we need not adopt a categorical rule* against aggregating the effects of any noneconomic activity in order to decide 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).

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.¹⁵¹

As Catherine MacKinnon points out, while ostensibly concerned with states' rights, it is hard to understand how *Morrison* really struck a blow for (allegedly) besieged states, when thirty-six of the fifty states actually supported VAWA.¹⁵² Moreover, the Court's opinion is especially troubling because it now appears that even when American states themselves are overwhelmingly quiescent in the face of federal government gender-just legislation, the Court will take it upon itself¹⁵³ to raise these states from the dead and use their manufactured vitality and relevance to insist that such legislation advance via the more burdensome Article V constitutional amendment proce-

151. *Id.* (quoting *Lopez*, 514 U.S. at 564) (emphasis added).

152. 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. *Id.* at 151. 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." 529 U.S. at 641-43 (Souter, J., dissenting).

153. 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.

Jackson, *supra* note 31, at 2215.

ture. If this is not federalism as neurosis, it certainly is federalism as fetish.¹⁵⁴

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, American states seem to behave in a way reminiscent of Indian religious communities, whose salience is also often both politically contingent and fraught when it comes to the application of equality norms. This ephemeral quality to American territorial communities suggests that, like religious communities, there is nothing “essential” or eternal in their being.

Of course, this is not to say that states or territorial communities, like all other political constructions, are not “real.” States do at certain times play a significant role in the American political discussion. The next section discusses how, when states do exist, their borders can be stretched beyond their alleged territorial restrictions to entrap people who want to leave them.

2. *States Also Discourage Conversion*

As Part II discussed, religious communities in personal law systems often discourage mobility and conversion, making it difficult for community members to exit and participate fully in the life of another community. In India, this has often manifested itself in conjunction with a Hindu-nationalist politics. For example, as the case of *Lily Thomas* established,¹⁵⁵ Hindu men in India face criminal liability for bigamy if they try to

154. In their article entitled *Federalism: Some Notes on a National Neurosis*, Edward Rubin and Malcolm Feeley, see *supra* note 6, argue that the United States 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 “managerial decentralization.” In this kind of system, the states are merely acting as bureaucratic mechanisms for the implementation of an overarching national government policy. See *id.* at 910-11, 946. According to 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.

155. See *Lily Thomas v. Union of India*, A.I.R. 2000 S.C. 1650. See also discussion *infra* accompanying notes 192-98.

convert away from Hinduism to Islam in order to take advantage of Indian Muslim family laws permitting polygamy. In this respect, one can say that Indian law erects obstacles to any easy or “full” conversion in this situation, forcing Hindu men to carry their Hindu law with them as they convert to Islam, thereby exposing themselves to bigamy charges should they marry for a second time.

This section will discuss how, similar to the Indian system, American states’ family laws follow Americans across borders as Americans travel the fifty states. For example, following the Restatement (Second) of Conflict of Laws,¹⁵⁶ the vast majority of states recognize any marriage conducted in another state as long as that marriage was conducted consistently with the other state’s marital laws.¹⁵⁷ This is commonly referred to as the “place of celebration” rule. Many states also follow the “converse” rule, in that they do not recognize a marriage conducted in another state, if it was unlawful in the state where it was conducted.¹⁵⁸

The basic “place of celebration” rule will not strike many people as problematic, at least not in the same way that people might worry in India about Hindu law following a Hindu who converts to Islam. Marital partners generally *want* the legality of their marital agreement to follow them across state borders,

156. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971).

157. This is “unless [the marriage] violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of marriage.” *Id.* While this exception has historically allowed states to refuse to acknowledge marriages that, for example, teenagers obtained by crossing state lines to marry under “age of marital consent” rules that their “home” state did not permit, this exception has been rarely enforced. See Willis L. M. Reese, *Marriage in American Conflict of Laws*, 26 INT’L & COMP. L. Q. 952, 955 (1977). That is, this exception was hardly an issue until same-sex marriage reared its head. See Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 14-15 (2005).

158. That being said, some states do not follow this converse rule. These states will recognize a marriage between their domiciliaries which has been conducted in another state, whether or not the marriage was valid under that state’s laws, as long as the marriage would have been valid if conducted in the domiciliary state. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1969 (1997).

and most will view the “extraterritorial” application of marital laws here to be a *positive* thing.¹⁵⁹

The real problem, especially in the contemporary United States, is the extraterritorial application of marriage *disabilities*. The extraterritorial application of marriage disabilities has recently posed serious problems for same-sex couples who traveled (or wish to travel) from other states to Massachusetts to obtain a marriage license. While the landmark *Goodridge* precedent¹⁶⁰ established Massachusetts as the first state to recognize same-sex marriage, it did not, as was widely feared, turn Massachusetts into the “Las Vegas of same-sex marriage”¹⁶¹ where same-sex marriage licenses are issued with flamboyant abandon to nonresidents.

Instead, Massachusetts, in the spirit of inter-state comity, has refused to marry any couple whose so-called home state does not permit same-sex marriage.¹⁶² In other words, Massachusetts extends the converse of the “place of celebration” rule not only to refuse recognition to marriages illegally *conducted* elsewhere, but also to refuse *itself* the opportunity to marry people whose home state makes certain marriages illegal. Thus, Massachusetts will not marry an Alabama same-sex couple since Alabama, explicitly and constitutionally, does not allow same-sex marriage.¹⁶³ As the lead opinion in the Massachusetts legal decision confirming this point of law noted: “[I]t is rational, and hopeful, for the Commonwealth to believe that if it adheres to principles of comity and respects the

159. See generally ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* 106-12 (2006) for a discussion of “migratory marriages” and “visitor marriages” and the different legal policy dilemmas raised by each.

160. *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

161. See Pam Belluck, *Romney Won't Let Gay Outsiders Wed in Massachusetts*, N.Y. TIMES, Apr. 25, 2004, at A1 (quoting Mitt Romney).

162. Massachusetts law states: “No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.” Uniform Marriage Evasion Act, MASS. GEN. LAWS ch. 207, § 11 (2007).

163. See Human Rights Campaign, *supra* note 114.

laws of other jurisdictions, then other jurisdictions will . . . recognize same-sex marriages of Massachusetts couples.”¹⁶⁴

This thus-far constitutional state court decision, as well as the laws of four other states who have “marriage evasion” statutes similar to the Massachusetts statute analyzed here,¹⁶⁵ provide quite a vivid demonstration of the ways in which American federalism’s concern for inter-state comity parallels the consequences of moral communalism elsewhere. Like their religious counterparts in India, Massachusetts and Alabama (and other states), by ensuring that the enforcement of marital laws crosses territorial borders, appear to conspire to ensure that people are not able easily to escape their communities of first instance. Ultimately, then, while territorial mobility and conversion is certainly possible within the American system, there are nonetheless burdensome standards (for example, full residency) and significant obstacles to this mobility and conversion which are troubling and problematic for reasons similar to those that make the Indian regulation of religious mobility and conversion troubling and problematic.

This American hostility to forum shopping, or “territorial conversion,” can also be found in other basic federalism conventions concerning family law. For example, a pair of U.S. Supreme Court decisions from the 1940s¹⁶⁶ concerning “Nevada divorces” firmly established that a state court only has to

164. *Cote-Whitacre v. Dept. of Pub. Health*, 844 N.E.2d 623, 645 (Mass. 2006).

165. These four states are Vermont, *see* 15 VT. STAT. ANN. tit. 15 § 6 (2007); New Hampshire, *see* N.H. REV. STAT. § 457:44 (1979); Illinois, *see* § ILL. REV. STAT., ch. 5, ¶ 217 (1996); and Wisconsin, *see* WIS. STAT. § 765.04 (2007).

166. *See Williams v. North Carolina*, 317 U.S. 287 (1942) (Hereinafter *Williams I*); *Williams v. North Carolina*, 325 U.S. 226 (1945) (Hereinafter *Williams II*). In the words of one scholarly article, *Williams I*

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. “[S]tate divorce laws. . . gradually converged to the lowest common denominator,” and the resulting “relative uniformity of current divorce law. . . made migratory divorce an irrelevancy.

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)).

give force to a divorce decree of another state court if that *other* state was the actual domicile of the divorce-seeker. Moreover, in these two decisions, the Court held that whether or not domicile was established in the *other* state is a decision that the *original* state can decide without any fear of real federal court oversight.¹⁶⁷ Ultimately, these two U.S. Supreme Court

While this eventual convergence in states' divorce laws 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 of migrating for divorce. Covenant marriages are different from "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, in the absence of fault, the covenant marriage law requires significantly more time living separate and apart.

Id. at 1097-98.

The rise of covenant marriages in some states, *see id.* at 1087 n.6, will likely see increasing numbers of spouses attempting to flee their marital domiciliary state for easier divorce regimes elsewhere. While such divorces are most likely obtainable in many states, it would be wrong to assume that this means they are necessarily easily obtainable. All states require that any person seeking a divorce within their jurisdictions to have first established their domicile in the state. In some states this can be a relatively easy affair, but in others there are minimum residency stays, *see generally* *Sosna v. Iowa*, 419 U.S. 393 (1975), as well as required oaths as to domicile upon penalty of perjury. While none of this is insurmountable, none of it is required in the marital context. *See generally* Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 WM. & MARY L. REV. 1, 29-32 (1997). Moreover, and as discussed elsewhere in this section, this divorce law situation demonstrates again how home state law can follow one into the territory of another state, at least for some time.

167. See Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 523-24 (2008) for the argument that

[t]he *Williams* Court did not resolve an urgent inter-state conflict. It simply sidestepped the fight. And while the *intent* of this judicial sidestepping may have been admirable, its *effect* risked something

decisions work together to discourage states from making territorial conversion too easy. The situation is particularly fraught for any innovative outlier state: If citizens of other states can “too easily” travel to this state to take advantage of its innovative family law policies, other states can just refuse to enforce this state’s innovative policies. “Domicile” will, and can, simply be found non-existent by these more traditional states. This then works to discourage innovator states (e.g., Massachusetts) from trying too hard to attract new members or even visitors. Once again, territorial mobility, conversion, and competition are discouraged and encumbered.

In the United States then, as in India, the family law associated with a person’s communal identity can follow that person around, even when that person has left his or her community of first instance. In India, the legal regulation of religious mobility and conversion has arisen out of the anxiety, controversy, and violence that have often accompanied this mobility and conversion.¹⁶⁸ In many ways, this regulation represents a treaty between religious communities, where risk aversion compels all communities to agree to not undermine each other by attempting to acquire each other’s members.¹⁶⁹ While the legal regulation of religious and moral affiliation is offensive to the American ear, American federalism conventions potentially implement something similar. Whereas “insincere conversion” is the harm to be avoided in the Indian

rather strange: Each state court could rethink any other state court’s judgment. With no clear or predictable “full faith and credit” standard, state courts could manipulate “full faith and credit” at their whim. Each state court, that is, could determine what “full faith and credit” meant for itself.

168. See discussion *supra* pp. 20-21.

169. In a parallel vein, Catharine MacKinnon has written:

Sex equality standards govern laws [in India]. . . . When they do not, because the laws are denominated “personal,” the term is revealed as code for exemption - an exemption deal men make with one another . . . [such] that some men will allow other men to relate to women on their own terms in exchange for those other men’s allowing the others to have the same relation to their women on their own terms. It is as if men agree to civil peace among one another on condition of respecting each group’s cherished mores for inequality of the sexes—at the expense of each group of women.

Catharine A. MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects, and ‘Personal Laws’*, 4 INT’L J. CONST. L. 181, 197-98 (2006).

personal law system, “forum shopping” is conceived of as the harm that American federalism has to guard against. Ultimately, the anxious cooperation and federalism conventions that govern relations between Massachusetts and Alabama (and other states) appear eerily similar to the anxiety and legal regulation that governs relations between Hindus, Muslims, and Christians (and others) in a personal law system.

As this section has also demonstrated, American states are often recreated in other American states, in that states enforce other states’ laws within their own borders. Consequently, states must be something other than just land. Following Richard Ford, one might call states, or their borders, “practices.”¹⁷⁰ While states may overlap with certain pieces of territory, those territories are both over- and under-inclusive with respect to their (supposedly) corresponding states. In other words, states don’t fill up their territories, yet they also messily spill over them. The next section will discuss some of the more non-dirt-like qualities of American states and, in particular, their community-like aspects.

3. *States Can Also Be Communities*

As Part III discussed,¹⁷¹ legal theorists have distinguished religious personal law systems from territorial federal systems because of the supposedly fundamentally different nature of the communities which provide the foundation for each type of legal system. As this section explains, however, this sharp and essential distinction between religious and territorial communities is hard to justify theoretically. Like some religious communities, territorial communities can be imbued with

170. Writes Ford:

Jurisdiction is a function of its graphical and verbal descriptions; it is a set of practices that are performed by individuals and groups who learn to ‘dance the jurisdiction.’ . . . This does not mean that jurisdiction is ‘mere ideology,’ that the lines between various nations, cities and districts ‘aren’t real.’ Of course the lines are real, but they are real because they are constantly being made real, by county assessors levying property taxes, by police pounding the beat (and stopping at the city limits), by registrars of voters checking identification for proof of residence. Without these practices the lines would not ‘be real’—the lines don’t preexist the practices.

Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 856 (1999).

171. See discussion *supra* note 41.

moral and cultural salience. And like some territorial communities, religious communities can be the result of opportunistic mobility. In other words, religion can be flippant, while territory can be deadly serious.¹⁷²

172. While it is obvious that disputes concerning territory are pervasive, many nonetheless view the demarcating of territorial borders as somehow unproblematic, presenting little potential for violence, at least in comparison to the problems which result from drawing religious borders. See, e.g., John McGarry & Brendan O’Leary, *Iraq’s Constitution of 2005: Liberal Consociation as Political Prescription*, 5 INT’L J. CONST. L. 670, 674, 676 (2007) (discussing disagreements over drawing “purely administrative” territorial versus sectarian religious borders for new Iraqi governorates). However, I believe that such a view relies too much on an overstatement of the link between religion and violence. As elsewhere, context should matter. Certainly, there are many instances where religious communities have peacefully co-existed under different legal regimes within the same overall system. 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.

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.

Finally, just because certain kinds of religious disputes never or 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 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 S.C. 853 (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. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 40-44 (1983). Sometimes, then, religious pluralism overlaps with violence (typically understood), but in many instances it does not.

a. *The Potential Thinness of Religion*

In order to make the sharp distinction between territorial and religious attachments and communities that many theorists do, one has to operate with some notion of “religion” that distinguishes it from “territory.” As this section argues, however, commonplace legal notions which do so tend to be ahistorical and obscure intriguing commonalities and overlaps between what passes as “religious” versus “territorial” communities—and the respective systems of law built around each “kind” of community.

While this section and the following ones will focus on the commonplace but mistaken legal notions that stress the heavy and thick¹⁷³ seriousness of religion and religious community—as this is the main obstacle to viewing this type of community as “normal” and not a species apart from territorial community—a few words are also warranted vis-à-vis the odd ways in which American federalism discourse often distinguishes American territorial communities from religious communities, in the process morally sterilizing and immunizing these territorial communities from critical analysis. As this section and the followings ones will briefly discuss, (American) territorialism is not always a thin¹⁷⁴ attachment, to be distinguished from the always already thickness of religiosity.

In this respect, then, when lines are drawn between jurisdictions, the entities that result are usually imbued or perceived by most everyone as possessing some kind of moral or cultural identity, with which people identify or choose to avoid identifying. Locally speaking, people tend to think of cities, or even school districts, as possessing a certain sort of morally and emotionally relevant *modus operandi* (for example, a gay-friendly city or a school district with a strong commitment to the sciences). Globally speaking, it would be hard to think of a country that does not have some sort of dominant 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. It is also true,

173. Again, in this Article, I am variously and synonymously using variations of “thick,” “heavy,” and “strong,” and, conversely, “thin,” “light,” and “weak.”

174. See *supra* note 17 for a discussion of this term and its synonymous usages in this Article.

of course, where different territories have been demarcated crudely in order to separate different and conflicting communities—as has been the case with (Muslim) Pakistan and (Hindu) India, (Francophone) 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, like Pakistan and Kashmir, or resisting a globally hegemonic American capitalism, such as North Korea.¹⁷⁵

175. It is important to state here that it is not only “Eastern” states which have divisive and antiquated moral or cultural identities, in contradistinction with a modern, peace-loving, and secular West. On this issue, Will Kymlicka is illuminating if also distressing:

[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, *Federalism and Secession: At Home and Abroad*, 13 CAN. J.L. & JURIS. 207, 223 (2000) (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. *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.

While, fundamentally, Kymlicka recognizes that territorial communities can be deeply meaningful and, thus, perhaps more similar than dissimilar to religious communities, his exception of “the West” from his theoretical point is misguided. In 2002, for example, the Western state of Spain fought with Morocco 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* BBC News, Q&A Spain v Morocco (July 18, 2002), <http://news.bbc.co.uk/2/hi/europe/2136782.stm> (last visited Aug. 2, 2008). Six 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. *Id.*

Additionally, Spain and the U.K., after more than 300 years, still have never resolved their dispute over the rock of Gibraltar. While Gibraltar is commonly described as a strategically important rock, with Spain and the

Curiously, however, in the American context,¹⁷⁶ “intermediate” governing units—those that are neither completely local nor national—are often perceived to be morally neutral, antiseptic vessels.¹⁷⁷ According to a common view, individual states no longer have morally or culturally salient attributes, and people do not identify¹⁷⁸ with this level¹⁷⁹ of government-

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 BBC News, Q&A: Gibraltar’s Referendum (Nov. 8, 2002), <http://news.bbc.co.uk/2/hi/europe/2400673.stm> (last visited Aug. 2, 2008).

176. This is clearly not the case elsewhere. In India for example, each of the country’s states has a distinct reputation that is very much a part of contemporary Indian political and cultural life. However, in the context of the U.S., Will Kymlicka describes how

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).

Kymlicka, *supra* note 175, at 210. 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.

177. With respect to vessels and territoriality, Michael Burgess argues that

A survey of territoriality in the mainstream literature on federalism and federation strong suggests an uncritical and excessive reliance upon the concept. . . . But it is in reality a composite term that incorporates an amalgam of socio-economic and cultural elements encapsulated in a spatial organisation. It is therefore wrong to construe territoriality as if it is something akin to an empty container that stands in its own right as an independent variable set apart from other patterns of social cleavages having political salience. . . . ‘[T]erritoriality’ should not be oversimplified.

BURGESS, *supra* note 6, at 141.

178. Or, in the case of the dissident, choose to avoid identifying.

179. One commonplace claim is that whatever importance state identifications had for Americans previously has been replaced by identification with cities and other “local” governments. Edward Rubin and Malcolm Feeley, for example, contrast the emotional bonds between people in “small” towns versus the allegedly impossible ones in the United States’ “nation-size political subdivisions.” See discussion *infra* note 180. This argument has many problems, not least the fact that it does not take account of the fact that there are states “with far smaller populations than many cities—say, Ne-

tal organization. State borders are just “lines on the map,” accomplishing and signifying nothing of moral or emotional importance, or at least nothing nearly as morally and emotionally significant as that which national, local, or religious borders accomplish.¹⁸⁰ Again, however, this seems to be an anoma-

braska, Vermont, or Rhode Island.” Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 221 J. L. & POL. 187, 203 (2005). Of course, it also goes without saying that attachment to one’s home city does not preclude attachment to one’s home state (or country).

180. For example, Edward Rubin and Malcolm Feeley have argued that:

[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.

Rubin & Feeley, *supra* note 6, at 940-41, 945. Somewhat similarly, Vicki Jackson has written:

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*.

Jackson, *supra* note 31, at 2221-22 (emphasis added).

Jackson, unlike Rubin and Feeley, seems to accept that people can be attached to large entities (e.g. an ethnicity or religion), but she sees state lines, usefully, cutting these entities into several pieces. What results is states containing several different, competing groups, all trying to control the state

lously American and outlying view concerning the significance of territory.¹⁸¹ Moreover, as the discussion below concerning American territorial mobility suggests,¹⁸² it is a view of American territorialism that does not find ready support in facts on the ground.

In contrast to a great deal of American federalism discourse concerning territorialism, American legal theorizing and jurisprudence often view religiosity *qua* religiosity as a sincere, stubborn, and strongly felt experience—and thus quite unlike an allegedly scientific, secular, and weak territorialism. This view of religiosity, however, is not only inappropriately ambitious but also often wrong on the ground. Talal Asad's anthropological work on religious communities around the world is instructive in this respect. In general, Asad is skeptical about approaches to religion that are not deeply contextualized. While the social sciences and humanities have, with

as a way to further their own interests, but ultimately all conceding to a kind of *modus vivendi* of "tolerance and accommodation." *Id.* at 2221-22. This significant difference notwithstanding, Rubin and Feeley, Jackson, and others, strongly resemble each other to the extent that all believe that the types of communities (e.g. religious, ethnic, tribal) that form the constituencies for personal law systems are necessarily thicker than the territorial communities that provide the foundation for American federalism. For Rubin and Feeley, state sentiment and state communities are so thin as to be nonexistent. For Jackson, they may certainly exist, *see id.* at 2221, but they are never as deep or more profound—or as divisive—as their religious and ethnic counterparts.

While space limitations prevent a longer discussion of this, it is also worth mentioning that Jackson's analysis is problematic to the extent that it suggests that attachments to an ethic of "tolerance and accommodation," *id.* at 2222, are either amoral or only thinly moral. Morality is clearly implicated here, whether one sees such tolerance as the result of a utilitarian negotiation or a Rawlsian liberal commitment of reasoning (and reasonable) beings. Moreover, it is far from clear that most states present a rosy picture of tolerance in the way that Jackson describes it. Certainly, as the overview of state family law presented earlier illustrates, *see supra* text accompanying notes 95-100, most states have been captured by (so-called) heterosexual interests and are refusing marriage licenses to same-sex couples.

181. It should be noted that this view is also one that many Americans might themselves disagree with. See, for example, CAROL STACK, *CALL TO HOME: AFRICAN AMERICANS RECLAIM THE RURAL SOUTH* (1996) for an ethnographic study of African-Americans reverse-migrating back to the South or, in the words of one informant, "your proving ground, the place where you had that first cry, gave that first punch you had to throw in order to survive." *Id.* at xvi.

182. *See* discussion *infra* pp. 48-40.

time, appreciated the requirement of contextual sensitivity when discussing terms like “race” (as opposed to, say, “caste”)¹⁸³ and “gender,” they have been less ready to do so when discussing “religion.” As Asad notes, the result of this decontextualized discussion is a problematic notion 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.”¹⁸⁴

Unfortunately, transhistorical and transcultural definitions of religion have not just been a benign phenomenon, but instead have a long tradition of being put to dubious 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 observes about the 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

183. See, e.g., *THE CONCEPT OF RACE IN SOUTH ASIA* (Peter Robb ed., 1998).

184. TALAL ASAD, *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* 28-29 (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.

practices but affirm nothing . . . or as those who do affirm something (probably 'obscure, shallow, or perverse'), an affirmation that can therefore be dismissed.¹⁸⁵

In the U.S. system, the ideologically partisan phenomenon of designating and rewarding as "religious" beliefs, doctrines, and practices that seem somehow conscientiously devout and serious is perhaps best represented by the U.S. Supreme Court's landmark *Wisconsin v. Yoder* decision.¹⁸⁶

What is 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."¹⁸⁷ Instead of raising the seemingly obvious question of whether the Wisconsin Amish were running a church, a cheap child-labor enterprise, or a separatist cult, the State decided that it was futile to challenge the supposedly "sincere religious" beliefs of the respondents.¹⁸⁸

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

[W]e 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 wit-

185. *Id.* at 43.

186. 406 U.S. 205 (1972). See text *supra* accompanying notes 18-20.

187. *Id.* at 209.

188. *Id.* Admittedly, this was probably a wise move, considering the enmored 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, 222. This finding, however, overlooks the fact that the record clearly showed that (at least some) Amish often broke the law with respects to compulsory education.

nesses 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 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.¹⁸⁹

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")¹⁹⁰ demonstrated the religious nature of Amish belief and practice.¹⁹¹ This decision, however, had to work hard to reach this conclusion: Alternative understandings and expressions of re-

189. *Id.* at 216-17.

190. *Id.*

191. While it is historically true that the U.S. Supreme Court has recognized practices as "religious" that contemporary American culture does not typically understand 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), there are undercurrents to the Court's construction of religion elsewhere that echo those found in *Yoder*.

For example, in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring), the Supreme Court opinion upholding the constitutionality of sodomy criminalization, Chief Justice Burger approved of how 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.

ligiosity are not only present in the United States but, as the discussion below amply demonstrates, also in India.

Partisan judicial efforts to sanctify religion are on ready display in the well known Indian case of *Lily Thomas v. Union of India*.¹⁹² The facts of this case quite clearly suggest that not everyone in India shares a particularly “holy” view of religion and religious identity.¹⁹³ This case concerned the constitutionality of efforts to prosecute for bigamy Hindu men who had converted from Hinduism to Islam and then availed themselves 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 concluded that any prosecution for bigamy would not violate the constitutional religious liberty rights of the Hindu men.¹⁹⁴ However,

Again, then, beliefs that are old and “firmly rooted,” *id.*, are more religious than those that are not.

Tellingly, as well, when *Bowers* was overturned eighteen 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 generally Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004).

192. A.I.R. 2000 S.C. 1650.

193. For example, one of the Hindu wife’s allegations against her husband (in another case which led to this one) were that “[t]he Respondent . . . has converted to Islam solely for the purpose of re-marrying 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 (original in capital letters). 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 nor 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.

194. In this respect, the Court wrote that, properly understood, the

as interesting as this constitutional outcome is, the different opinions in *Lily Thomas* make a number of even more interesting comments concerning what they take as the nature of “true” Islam and “true” religiosity. Regarding the nature of Islam, the lead opinion in *Lily Thomas* commented that the:

plea [by an organization 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.¹⁹⁵

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

[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 of [sic] others.

Id. at 1666.

195. *Id.* at 1666-67.

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.¹⁹⁶

As discussed in Part III, this opinion and others like it reflect a larger Indian political discomfort with people's religious mobility and conversion and, in particular, movement away from Hinduism to other religions (including Islam, Christianity, and Buddhism). However, these opinions also serve to excoriate all-too-common understandings and uses of religiosity. As the facts of *Lily Thomas* amply demonstrate—and as the Supreme Court of India desperately wished to deny—there are material, social, and sexual accompaniments to religion, religious identity, and religious community.¹⁹⁷ Most emphatically, religion is often not the “object of conscientious devotion, faith and pietism.”¹⁹⁸

It is also important to be careful about how one understands religious communities and not to stereotype here either. Not only are there a variety of such communities, with variations to be found between different religions and their various sects, but also important differences within any given religion or sect. Different belief systems and religions have different attachments to the profane as opposed to the profound, have different viewpoints on the utility of wealth and pleasure, pray either more or less (or never), penalize or encourage conversion or just do not care, engage in politics or socially withdraw, and so forth.

In sum, different religious persons and communities have various investments in and involvements with the surrounding world and its denizens. It is, then, far from clear what is so necessarily profound about religious communities or the divisions that run between them.¹⁹⁹ Accordingly, 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, and

196. *Id.* at 1660 (S. Saghir Ahmad, J., concurring).

197. See generally Redding, *supra* note 86, at 462 (discussing sexual and other qualities common to “religious” identifications).

198. *Lily Thomas*, A.I.R. 2000 S.C. at 1660.

199. See discussion *supra* note 191.

especially American territorial ones. However, as both Asad's work and real-world litigation demonstrate, religion can sometimes be more transparent than opaque, rational rather than mystical, and sexual rather than ascetic.

Territory can be thick and religion can be thin, and there is no simple way to distinguish the two, or their respective communities, along this axis. That being said, additional questions remain concerning whether one can consider American states, specifically, as "communities" comparable to the religious communities that one finds in personal law systems. The next two sections will continue to make the argument that American states *qua* American states can be considered communities and, moreover, ones that are intriguingly similar to the religious communities that form the constituencies for personal law systems. However, as might be expected with a term like "community" (or "society" or "culture"), there is not much theoretical agreement on how to define this term, and this Article does not attempt to reconcile its various interpretations. It will, instead, propose that American states can also be "communities" by briefly responding to important potential doubts concerning this proposition. In doing so, it will problematize two important claims concerning communities and their alleged 1) stability in membership, and 2) "moral" consensus on community precepts.

b. *Stability in Community Membership*

The American federal system is often said to encourage a certain sort of mobility among its citizens. One of federalism's oft-stated values is a variety of jurisdictions where different "experiments in living" can occur.²⁰⁰ The allegedly rational and efficient American citizen can then pick from among different jurisdictions, moving to the one which best matches her values and/or economic priorities.²⁰¹ So strong is the notion that the American population is mobile, then, 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 this quasi-ideological attachment to American mobility, the following important question

200. See Chemerinsky, *supra* note 137, at 528-30.

201. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

presents itself: “How can a state be considered a community if people are coming and going from it all the time?”²⁰²

Two replies must be given. First, Americans are far less mobile than the common stereotype suggests. While a well known research organization declares that “an essential value of the American lifestyle is the freedom of mobility,”²⁰³ it simultaneously reports that 54% of Americans lived in the same residence in 2000 as they did in 1995.²⁰⁴ Of the people who did move during this five-year period, 54% of them remained in the same county. Of those who moved counties, 53% of them moved to a county within the same state. Ultimately, then, only 8% of Americans moved between states during the same five-year period. And their inter-state migration “most frequently occur[ed] over short distances, and most migrants to the six highest states came from [adjacent or] nearby states.”²⁰⁵

202. 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.

203. See Census Scope, United States: Migration & Immigration (2000), http://www.censusscope.org/us/chart_migration.html (last visited Apr. 1, 2007).

204. All data in this paragraph is calculated from data which is found on *id.*

205. See U.S. CENSUS BUREAU, STATE-TO-STATE MIGRATION FLOWS: 1995 TO 2005 (2003), available at <http://www.census.gov/prod/2003pubs/censr-8.pdf>. Measuring American inter-state mobility over the long term is difficult and, as a result, reliable data of this kind is not easy to obtain. That being said, year-by-year mobility data is available for each of the years between 1947 and 2006. This data is largely consistent with the five-year data presented here, while also suggesting that American inter-state mobility over the past sixty years has, if anything, actually declined. See U.S. CENSUS BUREAU, ANNUAL GEOGRAPHICAL MOBILITY RATES, BY TYPE OF MOVEMENT: 1947-2006, available at <http://www.census.gov/population/socdemo/migration/tab-a-1.pdf>. While all of the data presented here does not *prove* that Americans are (surprisingly) “immobile,” it is suggestive of as much.

This lack of mobility should not be entirely surprising, given that territorial identities . . . cannot be well understood as either voluntary or natural. To take an extreme but illustrative example, we do not believe that blacks living in the Jim Crow south volunteered for their subordinate condition. . . . Nor, to take a contemporary exam-

Second, religious community exists simultaneously with religious conversion. As discussed in Part II, there is a great deal of Indian religious mobility, yet no one has seriously suggested that this presents fatal problems for the idea of religious community itself. While Hindu nationalist forces bemoan conversion away from Hinduism, they do not simultaneously suggest that “gainer religions” (like Buddhism, Christianity, and Islam) are becoming less cohesive. The threat that conversion allegedly presents here is premised on the worry that these other communities are gaining strength in a system premised on communalism. While Hinduism is allegedly growing weaker,²⁰⁶ other communities are growing stronger.

Similarly, the United States is a remarkably religiously mobile country itself, and few people in the United States view this mobility as a threat to the idea of religious community *qua* community. The comprehensive 2001 American Religious Identification Survey (ARIS) found that sixteen percent of Americans overall report that they have changed their religion in their lifetimes.²⁰⁷ The ARIS further 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 con-

ple, is it plausible to describe the jurisdictionally wrapped bundle of inferior public services and high taxes that confront the ghetto poor as chosen. Even middle-class suburbanites only nominally choose the consequences of their residency in a jurisdiction. In tight housing markets people take what they can find and afford, while in weak housing markets people scramble for property that will hold its value. These economic constraints are overwhelming for most people.

Ford, *supra* note 170, at 899-900.

206. Even this may not be true: Communities and groups may be stronger if they are composed of very like-minded people with few interlopers.

207. Barry A. Kosmin et al., American Religious Identification Survey: 2001, at 23 (2001), *available at* http://www.gc.cuny.edu/faculty/research_briefs/aris.pdf.

verts (“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.²⁰⁸

Certainly, there are “gainer religions” and “loser religions” in the United States, but the idea of there being religious community itself is not in question, despite some religions presently losing members. Moreover, given that American religious mobility is as significant as any supposed American territorial mobility, if community can co-exist with mobility in the religious context, there is little reason to worry that it cannot do so in the territorial context as well.

c. “Moral” Consensus on Community Precepts

If instability in communities’ membership is not itself a threat to the idea of community—territorial, religious, or otherwise—one might still wonder if the *reasons* that underlie instability nonetheless matter. It might be the case that “sincere” conversions do not threaten the idea of community, while “opportunistic” changes in identity do, especially to the extent that newcomers bring values and attachments significantly different from those of existing community members. With respect to states, for example, 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.”²⁰⁹ Given this reality, one might wonder whether the apparent reasons that motivate many people to move to Florida are sufficient to create a “community” premised on anything other than sun-worship.

Before too quickly dismissing the possibility of Floridian community, a helpful thought-experiment might ask: “Why *are* people moving to Florida, instead of the comparably sunny and warm community of Alabama?” In response to this question, one plausible answer is that Florida—at least in comparison to Alabama—has created an economic, social, and legal environment that retirees find *relatively* attractive. Moreover,

208. *Id.* at 25.

209. STATE-TO-STATE MIGRATION FLOWS, *supra* note 205, at 2.

to the extent that people are moving to Florida, in particular, for things like jobs, schools, and families, it is far from clear that one should or can make a sharp distinction between people moving for these things and people moving for the legal and moral structures which enable their relationships with their employers,²¹⁰ their teachers,²¹¹ and their lovers.²¹²

All of these kinds of attachments can be understood as, at a minimum, attachments to the moral-legal environments which enable them or, as is often the case, disenable the alternatives. In other words, there are often—explicit or implicit—moral motivations for moving to territorial entities. Apparently, Florida, more so than Alabama, has created a moral-legal environment which people want to make their home. Ultimately, one can consider both Florida and Alabama as moral entities, or even moral communities, if very different ones at that.

Second, the diversity or frivolity²¹³ of a group of people does not make them necessarily less of a community. As dis-

210. Different state policies enable (or disable) different employment possibilities. States have different minimum wage laws, different environmental standards, different labor and unionization laws, and numerous other public policy disparities, all of which affect employment (and other economic) prospects. Moreover, all of these different types of laws and policies can be characterized as “morality-related,” especially in this day and age of notions like “corporate responsibility.” See SPIRO, *supra* note 43, at 147 (discussing the moral implications of different corporate policies).

211. 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 related to “morality.” We can also do the same vis-à-vis states that tolerate wide disparities in educational quality between rich and poor school districts.

212. For example, same-sex couples have migrated to Massachusetts for reasons of family, and it would be hard to characterize this move as “just” for family and “irrelevant” from the perspective of “morality.” Moreover, 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 do not carry their own moral imprint as well.

213. On the importance of frivolous and trivial things nonetheless marking important differences, Richard Ford has asked:

Why do we insist on maintaining fifty separate state governments, with their inconsistent and cumbersome state laws, state bureaucra-

cussed above, people join religious communities for all sorts of reasons—many of which relate to family, marriage, wealth, and sex. Moreover, many people simply “inherit” their religion from their genetic forbears.²¹⁴ Given all this, 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, but no one challenges the existence of those religious communities despite the apparently different motivations for people joining or staying in them.²¹⁵ 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 the community’s precepts.²¹⁶

As this Part has posited, the territorial states of the United States appear to share a number of intriguing similarities with the religious communities found in personal law systems. Accordingly, both the United States’ federalized system of family law and personal law systems would seem to share any number

cies, flags, license plates, mottoes and state birds? An important reason is that many Americans think that the states have separate characters worth preserving and that the citizens of each state are different from those of the others and should, at least for certain purposes, be able to act based only on the views of insiders.

Ford, *supra* note 170, at 848 (emphasis added).

214. Very few people could claim that the religious community to which they belong 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 lives. It is the exceptional person who is either exposed to atheism or agnosticism in the course of his or her religious upbringing, and it is the even more exceptional person who chooses it after a religious upbringing. Given that we grant that religious people who were not given the tools to question their faith and who remain in it for reasons of comfort and familiarity belong to a “community,” it is unclear why we should not extend that assessment to those who remain in their territorial unit for similar reasons as well.

215. An example of such a religion would be Islam. See PEARL & MENSKI, *supra* note 70, at 121-28 (discussing Islamic legal traditions that require simply a belief in the oneness of God, and that Muhammad is a prophet of that God, in order to be considered a “Muslim”).

216. See Roderick Hills, *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 222-23 (2003) (arguing that internal diversity of a group does not exclude it from being an “expressive association”).

of threatening, pre-modern, illiberal—or promising—qualities.

The next Part concludes this Article by briefly suggesting a couple future areas of research on both federalism and personal law which are opened up by recognizing the similarities, and not just the differences, between these two “types” of legal systems.

V. 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.

As a result, one might have thought that Constitutional norms and conventions governing federalism and religious liberty would have remained closely intertwined. As Part II has demonstrated, however, they have not. One important question guiding future research, then, might be: How exactly would American jurisprudence and legal practice have to change if territorial communities and religious communities were to be treated equally under the law?

For example, to treat both kinds of communities equally would suggest that the Supreme Court, in addition to the states, would have to endow religious groups with “dignity.”²¹⁷ That being said, 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 mistreat women and dissidents. On this point, however, Judith Resnik and Julie Suk have argued that:

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 accountable dialogical practice, re-

217. See discussion *supra* accompanying notes 36-38.

quiring governments to participate in litigation ought to be understood as enhancing, rather than diminishing, the role-dignity appropriate to sovereignty.²¹⁸

Whether or not the Court could extend “dignity,” properly defined, to religious groups, without the fear that these groups would become unaccountable for their actions, is a question worth exploring in future research. It is also research that would greatly benefit from comparative experience, as the example of India in this Article amply demonstrates.

Another research question that would greatly benefit from comparative experience is: How much accommodation of pluralism can legal systems engage in before “anarchy” breaks out?²¹⁹ With American federalism, a prevalent thought has been that, with respect to some public-policy issues at least, the more “legal laboratories,” the better. How religious communities might also act as beneficial laboratories is a question worth exploring, then, as is the question of whether any legal system can *simultaneously* legally accommodate large numbers of territorial, religious, *and* other types of community laboratories. While the United States appears to manage adequately with its recognition of fifty separate territorial communities, one might wonder how India (or any country) would fare if it were to enforce fifty different religious communities’ family laws, perhaps in addition to those generated by a territorially premised federal system.

In addition to the questions raised here, there are many other questions that the comparative dialogue that this Article has sought between the country with the world’s oldest written constitution (the United States), and the country with the world’s longest constitution (India), can generate. It is hoped that these questions, in turn, will lead to an even more enriching dialogue between territory and religion, federal and personal law systems, and also U.S. jurisprudence concerning federalism and that concerning the First Amendment.

218. 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).

219. See *Employment Div. v. Smith*, 494 U.S. 872, 885, 888 (1990).