MARRIAGE AND RELIGIOUS LIBERTY: COMPARATIVE LAW PROBLEMS AND CONFLICT OF LAWS SOLUTIONS

Lynn D. Wardle*

I. INTRODUCTION: COMMUNITIES OF LOYALTY WITH CONFLICTING LAWS

The purpose of this paper is to consider how the legal regulation of marriage impacts upon religious liberty, and vice versa, and how to reconcile conflicts between religious liberty and state marriage regulations. It is an area of increasing (and increasingly sharp) conflicts in a growing number of nations. The conflicts concern competing “jurisdictional” and “choice of law” issues involving competing “sovereign” communities.

Using comparative law, this Article presents the range and complexity of state-versus-religion conflicts and of systemic legal approaches concerning the regulation of marriage that exist in the world today, focusing specifically on two issues: the formation/celebration of marriage generally, and the legalization of same-sex marriage. Having shown the scope of the conflicts between religious and political communities regarding the regulation of marriage, this Article argues that the body of law known as “conflict of laws” (or “private international law”) that is designed and used to decide judicial conflicts concerning the assertion of jurisdiction and the choice of law application in legal disputes involving the interests of multiple sovereigns, provides a valuable model for the resolution of church-state disputes regarding the regulation of marriage.

All human beings have multiple loyalties because they belong to multiple communities. Examples of such communities include national communities, regional/local communities, ethnic or tribal communities, religious communities, professional, vocational, or industrial communities, and family communities (both extended and nuclear). Those communities exercise a form of “jurisdiction,” broadly speaking, over the members of the community,1 meaning “the power or right to exercise authority” and “the power right, or authority to interpret and apply the law.”2 Those communities also have and create rules that the individual

* © 2010 Lynn D. Wardle, Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University, Provo, Utah, USA. This is based on a paper that was initially presented at the International Society of Family Law Regional Conference on Family Law in a Multicultural Environment in Israel, June 7-9, 2009. The research and editorial assistance of Lorie Hobbs and Elizabeth Naegle Harnish is gratefully acknowledged.

1 The submission to the jurisdiction of a community may be largely voluntary, as in the case of religious communities, or largely coercive as in the case of the state asserting unwanted criminal or civil jurisdiction over a defendant in court, or the assertion of jurisdiction may be a hybrid of partly voluntary but partly involuntary.

members of their communities are expected (by the community) to follow; for example, religious commandments and doctrines, family rules (such as “we are hard workers,” “no running in the house,” “we do not use profanity,” and “we take care of each other”), union or shop rules (“no crossing picket lines”), rules of professional responsibility, and public criminal and civil laws.3

Multiple communities may claim an interest in regulating certain behaviors, such as marriage. Thus, families, church communities, and state officials may all claim some jurisdiction over the creation of marriage via family traditions, religious rites, and state laws. The rules of different communities sometimes create diverse, inconsistent, even conflicting, obligations for individuals who belong to multiple communities. For example, when the rules of one community require certain behavior (such as religious celebration), but the rules of another community prohibit that behavior (such as state law requiring state formation first or exclusively), there is potential for conflict between those communities. When membership in multiple communities overlap, that is, when some individuals belong to two or more communities with inconsistent or conflicting rules, a situation of conflicting loyalty is created with the potential for cognitive dissonance that can threaten both individual and community integrity.

This paper focuses on two communities that claim “sovereignty,” to some extent, over individuals. “Sovereign” communities are those that claim “[s]upremacy in respect of power, domination, or rank; supreme dominion, authority or rule,”4 in which there is one decision-maker (individual or collective) who claims to have sovereign “supremacy or rank above, or authority over,” all others.5 First, the State is a sovereign political community claiming external independence and internal supreme authority to govern all people, property and other things within a specific territory. It claims ultimate mortal/temporal authority in a particular region and over the people therein and controls the government in that area.6 Second, religion also is a sovereign community (“quasi-sovereign” may

---

3 The fact that multiple communities may have overlapping jurisdiction, interests, and similar rules (for example, if both family and religious communities teach honesty) means that the pressure on the individual(s) to conform to particular rules may increase.


5 Id.


At a minimum, a sovereign state is expected to have three elements: ‘territory, people and a government.’ A sovereign state must have de facto supremacy and control (at least in some measure) over its territory and people (the internal component). That is, the state represents the supreme source of authority on internal matters. Additionally, a sovereign state must exhibit some

be more a precisely accurate term as a matter of law and linguistics); religions
claim to be the agencies and instrumentalities of God, the Eternal Sovereign. 7
Religion generally is focused on eternal matters,8 but is also concerned with mortal
behaviors and moral choices that have eternal significance. The state generally
claims no authority in matters that pertain to the eternal world, but guards its
ultimate authority in matters that occur or have impact upon its territory, people,
and policies irrespective of their other-worldly dimensions.

When there is significant religious homogeneity in a state, and when liberal
democratic principles prevail, it is assumed that the laws will reflect the values of
the people governed by the laws, and there will be few conflicts between state law
and religious law (though there may be some incongruities). But even in
religiously homogeneous nations, occasions for conflict between state laws and
religious laws can arise involving adherents of minority religions, secularists,
converts, believers in alternative forms or branches of the dominant religious
tradition, or in times of political or cultural change, etc. In nations with vibrant
religious diversity, the potential for such conflicts between law and religion is even
more pronounced.

There are both external and internal incentives for religious communities and
political communities known as states to avoid and resolve conflicts by
accommodation to the interests of the other. Externally, inter-sovereign conflicts
regarding regulation of human behaviors carry the risk of losing the respect,
authority and power necessary for sovereign and quasi-sovereign communities to
survive and function effectively. In a world filled with competing sovereigns,
avoidance and resolution of potentially costly and damaging conflicts with other
sovereign communities about potentially inconsistent regulatory policies is a
matter of prudent power politics. Thus, comity and mutual accommodation
whenever possible are preferred for reasons of external damage control. Religions

7 Perry Dane, The Maps of Sovereignty: A Meditation, 12 CARDozo L. REV. 959, 967-
72 (1991); Cole Durham, Jr. & Elizabeth A. Sewell, Definition of Religion, in RELIGIOUS
ORGANIZATIONS IN THE UNITED STATES 3, 18-22, 31-32 (James A. Seritella et al. ed.,
Carolina Academic Press 2006); see also definition of “sovereign” in OXFORD ENGLISH
DICTIONARY, supra note 4, at B.1 (the term “sovereign” is “[f]req[uently] applied to the
Deity in relations to created things.”); Carol Weisbrod, Family, Church and State: An
Essay on Constitutionalism and Religious Authority, 26 J. Fam. L. 741, 750-52, 769 (1987-
88) (issues involving both states and religions are “constitutional” because of the roles they
play in addressing and regulating core issues of social relations).

8 For example, Jesus told Pilate, “My kingdom is not of this world . . . .” John 18:36
(King James).
have powerful external incentives to teach the members of their communities to obey the laws of the state in order to avoid bringing upon the religious community the wrath of the state, and states have powerful external incentives to accommodate and to teach their citizens to respect the principles and practices of religious communities in order to prevent the growth of unrest, hostility and resistance to the state within particular religious communities.

There are also internal incentives for mutual respect and accommodation in both state and religious communities. For example, protection of religious liberty is not only important to religious communities; states also have important interests in protecting religious liberty because respect for religious conscience is a cornerstone of any liberal democracy. In his famous *Memorial and Remonstrance*, James Madison, a principal architect of the U.S. Constitution of the United States and father of the Bill of Rights, declared that religious duties “must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictates.” He explained why in terms that underscore the connection between protection of religious liberty and the foundations of liberal democracy:

> Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.

Madison clearly understood that if individuals are not loyal to their religious conscience, to their God, and to their moral duty as they see it, it is an utterly irrational folly to expect them to be loyal to less compelling moral obligations of legal rules, statutes, judicial orders, abstract principles of “human rights,” the

---

9 See generally Angela C. Carmella, *Responsible Freedom Under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good*, 110 W. Va. L. REV. 403, 406 (2007) (religious “exemptions are designed not for the exclusive protection of religious freedom, but for the protection of both religious freedom and the socio-political community that provides the conditions for the meaningful exercise of that freedom.”); Weisbrod, *supra* note 7, at 741, 753-55 (endorsing a pluralist analysis of relations between church and state concerning family law, including marriage regulation).


11 Madison, *supra* note 10, at ¶ 1 (“This right is in its nature an unalienable right.”) (emphasis added).
claims of citizenship, and state-imposed civic duties. If you require a person to betray his or her conscience, you have eliminated the only moral basis for his or her fidelity to the rule of law, and have destroyed the moral foundation for democracy.

Thus, it is not surprising that fundamental sources of human rights, such as the Universal Declaration of Human Rights, contain powerful principles

---


[T]he evidence suggests that the theoretical underpinning of the free exercise clause, best reflected in Madison's writings, is that the claims of the 'universal sovereign' precede the claims of civil society, both in time and in authority, and that when the people vested power in the government over civil affairs, they necessarily reserved their unalienable right to the free exercise of religion, in accordance with the dictates of conscience. Under this understanding, the right of free exercise is defined in the first instance not by the nature and scope of the laws, but by the nature and scope of religious duty.


14 Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (Dec. 12, 1948) (“Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”). See also International Covenant on Civil and Political Rights, G.A. Res. 2200A, art. 18, U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Mar. 23, 1976). Article 18 provides, in pertinent part:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
protecting religious liberty as a matter of basic human rights jurisprudence.\textsuperscript{15} Likewise, “[t]he vast majority of the world’s governments have committed themselves to respect religious freedom,”\textsuperscript{16} and most nations identify religious liberty as a fundamental, protected constitutional value (though the extent to which that value is legally protected or effectuated varies widely).\textsuperscript{17}

Conversely, for many religions, respect for and compliance with civil authorities and rules are important values. For example, Jesus Christ taught his followers to “render . . . unto Caesar the things which are Caesar’s; and unto God the things that are God’s.”\textsuperscript{18} Recognition of the separate jurisdiction of, and submission to the legitimate laws of civil authority is a common religious doctrine.\textsuperscript{19}

Conflicts between religions and states concerning their respective regulatory policies may create significant internal cognitive dissonance for religious

\textsuperscript{15} Norman Dorson ET AL., COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 923 (West 2003) (“freedom of religion is the oldest expressly recognized fundamental right . . .” at least “in some countries of the world.”).

\textsuperscript{16} U.S. DEP’T OF STATE ANNUAL REP. ON INT’L RELIGIOUS FREEDOM FOR 1999: EXECUTIVE SUMMARY (Sept. 9, 1999), available at http://www.state.gov/www/global/human_rights/irf/irf_rpt/1999/irf_exec99.html (“For example, 144 countries are parties to the International Covenant on Civil and Political Rights, which acknowledges the right of every human being ‘to have or to adopt a religion or belief of his choice’ and ‘either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.’”).


\textsuperscript{18} Matthew 22:17-21 (King James); Luke 20:21-25 (King James).

communities and for states as well. Thus, there would seem to be internal harmony incentives as well as external relational peace incentives to find a solution to avoid, limit and reconcile disputes that may arise between religious communities and the state over sensitive policies and regulations.

However, the incentives to avoid or resolve conflicts between religious communities and the state over competing policies and regulation may be offset, neutralized or overcome if there are other communities within the state that wish to harm or reduce the influence, power, or prestige of the religious community embroiled in the controversy, or if there are factions within a religious community that see the potential for advantage (such as increase in power) if conflict with the state over that religious community’s policies erupt or continue. For example, some activists in gay and lesbian communities or within particular religious communities may promote state policies that create conflict with a particular (or their own) religious community not only because of their possible lack of regard for religious liberty, but also perhaps in order to reduce the influence of a particular religious community or community leadership (or of religions in general) because those communities are deemed political enemies of gays or gay activists and their political or public policy goals.

II. CONFLICTS BETWEEN RELIGIOUS COMMUNITIES AND STATES OVER MARRIAGE REGULATION

Marriage regulation is the battleground over which many conflicts between religious communities and states have been fought through the centuries, and some of the most intense religion-state conflicts that can be expected in the foreseeable future are expected to concern the regulation of marriage. Religion-state conflicts over marriage regulation have occurred so often, and been so intense, in part because marriage is of great importance to both communities.

A. The Interests of Religion and State in Regulating Marriage

The regulation of marriage has consistently been a matter of great concern to most world religions, throughout history. Marriage embodies, symbolizes, and profoundly influences the moral life and faith of individuals and families. Marital families are the most common (and effectual) unit for cultivating, nurturing and perpetuating the faith community and its doctrines. Marital families also provide the most successful setting in which religious precepts are taught, applied, and reinforced, and the social environment in which an individual’s religious identity is most frequently and successfully developed. So the interest of religious organizations in regulating marriage in ways that conform to, reinforce, and

---

20 See discussion infra Parts II.B., II.C.
provide a home environment for the fullest living and expression of religious faith is obvious.\textsuperscript{21}

In all religious traditions the values of marriage and family are sacred. . . . [R]eligion has assumed the role in history as protector of the deepest human relationships . . . . Indeed, it may be said . . . that monogamous marriage itself as traditionally understood, with its duties and rights and the ethical dimensions of sexual relationships, procreation and child-care, are themselves the creation of religious faith.\textsuperscript{22}

Likewise, the state has a great interest in regulating marriage, for similar reasons.\textsuperscript{23} Marriage is the most common form of, and the most effective foundation for safe, stable, effective families (which are the basic unit of society); in recent centuries, marriage regulation has become a matter of grave concern to the political state because problems with marriage formation and marital failure have undeniably profound and financially significant public and social consequences. For example, a thorough study in 2008 of all of the public (taxpayer) costs of divorce and child-bearing out of wedlock in the United States revealed that the national, state and local governments spend a total of $112 billion in tax dollars every year dealing with the consequences of marital non-formation and marital break-up.\textsuperscript{24} Additionally, family (and thus, marriage) structure and principles have long been believed to be related to government form and principle. For example,


\textsuperscript{22} 2 William W. Bassett et al., Religious Organizations and the Law § 10:2 (2008) [hereinafter “Religious Organizations”].

\textsuperscript{23} See generally From Sacrament to Contract, supra note 21, at 1-15, passim; Howard, supra note 21, at vol. 1, passim, vol. 2, passim; Rayden, supra note 21, at 1-10; Homer H. Clark, Jr., The Law of Domestic Relations in the United States §§ 2.1, 2.2, 12.1 (2d ed., West Pub’g Co. 1988).

\textsuperscript{24} Benjamin Scafidi, The Taxpayer Costs of Divorce and Unwed Childbearing 5-6, 17-21 (Institute for American Values, et al. ed., 2008).
American laws prohibiting polygamy were deemed to trump the religious liberty rights of nineteenth-century Mormons who tried to practice Old-Testament-style plural marriage because the U.S. Supreme Court agreed with the widespread belief that “polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism . . . .” 25 Likewise, after World War II, the Allied Forces compelled the Japanese government to abolish the traditional, patriarchal, extended *ie* (or “house”) family system because it cultivated gender discrimination and hierarchical authoritarianism that some believed detrimentally influenced government structure and militaristic policies. 26

Accordingly, it is not surprising to learn that most nations provide express, substantial legal protection for marriage and marital families. For example, as Appendix I shows, more than 43% of national constitutions (83 of 192 sovereign nations) contain provisions protecting marriage, and over 75% of national constitutions (165 of 192 sovereign nations) contain provisions protecting families, which are the social units that are primarily founded upon marriage.

So, both religious communities and states have strong interests in regulating marriage that arise from the fundamental institutional, practical and conceptual identities and needs of both states and churches. Conflicts between church and state over marriage regulation, between religious community autonomy and individual religious liberty, on one hand, and civil marriage regulation and protection of public interests, on the other, significantly threaten both institutions. Thus, conflicts between marriage regulation and religious liberties can be doubly divisive, both internally and externally discordant, for both church and state. Such conflicts jeopardize state policies and governing integrity as well as the loyalty of some citizens. Likewise, for religious communities, conflicts with the state over marriage regulation pose the potential for crushing repression from a strong

---

26 The postwar Constitution of Japan, promulgated by the Japanese Diet and Emperor on November 3, 1946, and effective May 3, 1947, in conformity with the Potsdam Declaration, expressly embodied notions of equality and individualism under which the hierarchical or “family” system of family organization and governance could not survive. CONSTITUTION OF JAPAN, ch. III, art. 14: “All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin . . . .”; Jun’ichi Akiba & Minoru Ishikawa, *Marriage and Divorce Regulation and Recognition in Japan*, 29 Fam. L.Q. 589, 590 (1995) (the traditional “family system” was abolished after World War II “under the advice and suggestion of the General Headquarters of the Allied Forces (GHQ)”). But see Tatsu Inoue, *The Poverty of Rights-Blind Communalism: Looking Through the Window of Japan*, 1993 B.Y.U. L. Rev. 517, 531 (the reformation of Japanese Family Law was not merely imposed by external forces; within Japan, “leading Japanese intellectuals involved in the postwar enlightenment movement, who were called kindaihugisha (modernists), urged people to accept individualistic values . . . ”). See further Lynn D. Wardle, “Crying Stones”: A Comparison of Abortion in Japan and the United States, 14 N.Y. L. Sch. J. Int’l & Comp. L. 183, 195 (1993) (global population control leaders also insisted on abortion liberalization for the same reasons).
competitor for regulatory supremacy, as well as internal centrifugal tensions between duties to God and to the powers that God has allowed to control the state.

Thus, marriage is one powerfully important relationship that is of profound regulatory interest to, and remains subject to, both legal and religious jurisdiction and regulation. Because marriage is of such enormous interest to both of these “sovereign” communities, individuals and families are very vulnerable to being caught in a tug-of-war between religious and state communities concerning competing marital regulations and conflicting sovereign interests relating to marriage.

When the two “sovereigns” seeking to regulate marriage have divergent policies, some potentially divisive conflicts are inevitable; when their policies are incompatible, serious conflict is certain. Both history and contemporary experience shows that sometimes religious liberty or state family law integrity may be impaired because of such state-religion conflicts over marriage regulation. However, because inter-sovereign conflicts can be very costly (even to the “winning” sovereign), there are rational incentives to avoid and effectively resolve state-versus-religion conflicts over marriage regulation.

B. Religion-State Conflicts over Marriage Regulation in General

The balance and respective roles of religion and state in regulating marriage vary “greatly from nation to nation” so that only a broad-brush outline of the global variety is possible.27 “Different societies and different ages have varied greatly in their approaches to marriage,”28 and that variety continues. The nations fall into three general categories regarding the way they balance state and religious regulation of marriage.

First, there is a “large group of countries where personal status and family relations are primarily government by the religious or customary norms of the group to which one belongs.”29 This group includes (1) countries where separate religious or customary courts decide issues relating to marriage, along side of state tribunals (such as Israel and many Islamic nations); (2) Islamic nations where Islam is the state religion (such as Saudi Arabia); and (3) nations where state judges apply various bodies of religious laws (such as India).30 Many of the nations where only religious marriage is allowed are Islamic nations, but that is the situation in Israel, as well.31

---


29 *Id.* at 19.

30 *Id.* at 19; Dagmar Coester-Waltjen & Michael Coester, *Formation of Marriage*, ch. 3 in *4 INT’L ENCYCLOPEDIA: PERSONS AND FAMILY*, supra note 19, § 3-127, at 79.

31 In the Islamic world, “[t]he traditional view, that marriage is a formal contract between two extended families rather than a religious or public legal act, has survived at
The second broad category of nations includes those where “the basic approach to regulations of marriage and family life is through civil law applicable to all citizens.”

This group of nations is generally considered the most secular, and includes most of the nations of Europe and of the western hemisphere (North and South America).

Additionally, some nations, such as Turkey and Tunisia are in between the two polar models, and have abolished polygamy and adopted some “floor” or baseline of civil marriage law. “It is in the group of countries that lie between the two poles of state religions and state secularism where the most significant changes have occurred,” according to comparative law expert, Mary Ann Glendon.

In some nations members of specific religious groups (usually the historically dominant religion of the region, often a former state church) must be married by religious authorities, but other persons (or inter-faith marriages) may be celebrated civilly. Legal pluralism in marriage law exists in many countries of Africa, especially, where state civil marriage, customary marriage, or sometimes Islamic or Hindu marriage regimes, can apply in a given case.

In all three categories, there is diversity of approach. Even among the most secular (and post-modern) nations, there is significant variation concerning the balance between state and religion in the regulation of marriage. A brief review of national rules regulating the creation of marriage (formation, solemnization, or official celebration) illustrates this point. The nations of the world fall roughly into three categories, corresponding to those described above. Most European nations fall in the civil/secular law category, where marriages solemnized by priests, ministers, rabbis and other clergy have no legal effect. In these nations, parties may celebrate their marriage religiously separate and apart from the performance of the least partially in some jurisdictions.”

However, in most of the Muslim world, “a religious doctrine has developed detailed and formalized rules about how the offer and the acceptance of the marriage contract are to be made.”

In Turkey, Islamic family law was abandoned in 1926, and today Turkish state family law applies to all citizens regardless of religion. Significant steps toward reform have occurred in Egypt, Pakistan and Morocco, but “[i]n multicultural nations with large Muslim populations, such as India, Lebanon and India, proposals for a unified national family law have foundered on the rocks of identity politics.”

In Malaysia, the power of Islamic courts has increased in recent years.

In all three categories, there is diversity of approach. Even among the most secular (and post-modern) nations, there is significant variation concerning the balance between state and religion in the regulation of marriage. A brief review of national rules regulating the creation of marriage (formation, solemnization, or official celebration) illustrates this point. The nations of the world fall roughly into three categories, corresponding to those described above. Most European nations fall in the civil/secular law category, where marriages solemnized by priests, ministers, rabbis and other clergy have no legal effect. In these nations, parties may celebrate their marriage religiously separate and apart from the performance of the least partially in some jurisdictions.”

32 Glendon, supra note 27, § 24, at 19. In Turkey, Islamic family law was abandoned in 1926, and today Turkish state family law applies to all citizens regardless of religion. Significant steps toward reform have occurred in Egypt, Pakistan and Morocco, but “[i]n multicultural nations with large Muslim populations, such as India, Lebanon and India, proposes for a unified national family law have foundered on the rocks of identity politics.”

33 Id. at 20. In Malaysia, the power of Islamic courts has increased in recent years.

34 Id. at 19.

35 Coester-Waltjen & Coester, supra note 30, § 3-120, at 76 (In Cyprus, if both of the persons to be married are members of the Greek Orthodox church, “they have to marry in religious form,” but, for interfaith marriages and marriages of persons of other faiths, either civil or religious ceremonies are permitted.).

36 Glendon, supra note 27, §§ 25-26, at 20-23. (“In Zimbabwe, for example, there are three legally recognized forms of marriage: civil monogamous unions, registered customary marriages, and unregistered customary marriages . . . . In Kenya, where four types of marriages are recognized: civil (Christian), Islamic, Hindu, and Customary. In Nigeria . . . statutory marriages, Islamic marriages, and Customary marriages are recognized . . . .”).
civil ordinance or registration, but only the civil solemnization or registration of marriage has legal effect. France is the prototype; since the French Revolution,

marriage in France has been viewed as a civil contract which can validly be concluded only before the major of a town or another authorized officer of the civil status registry (officier d’état civil). Ecclesiastical marriage (which is still very popular in France) has no legal effects (CC art. 191) and may be celebrated only after the performance of the civil ceremony. 37

The civil-only-marriage model has been followed in many other countries of Europe, including Austria, Switzerland, 38 the Netherlands, 39 Germany (until 2009), 40 and Turkey. Similarly, in Japan (where marriage historically was a matter of family alliance), since the Meiji reforms of the nineteenth century, and particularly since World War II, marriage has been a matter of civil regulation. “Marriage notification by registering with the local family registrar is required for the marriage to be legally valid,” 41 and “[i]f the parties fail to make the required notification [in the koseki], the marriage is void.” 42 Likewise, since the communist revolution in China, marriage has been regulated exclusively by civil authority. 43

Representing the middle category is the United States of America, where the regulation of family relations is primarily a matter of state law, not controlled by the national government, and where, in contrast to the Europe model,

---

37 Coester-Waltjen & Coester, supra note 30, § 3-117, at 74.
38 Id. § 118, at 75.
39 See generally HelpLineLaw.com, Marriage Laws—Netherlands, http://www.helplinelaw.com/law/netherlands/marriage/marriage.php, (last visited June 1, 2009) (“Dutch law only acknowledges civil marriages, performed by a registrar of marriages . . . . Once the civil ceremony is completed the marriage may then be solemnized in a religious ceremony.”).
40 Coester-Waltjen & Coester, supra note 30, § 118, at 75; Germany to Allow Church Weddings Without Civil Ceremony, THE LOCAL GERMANY’S NEWS IN ENGLISH, July 4, 2008, available at http://marriage.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=marrige&cdn=people&tm=78&f=00&su=p284.9.336.ip_&tt=11&bt=0&bts=0&zu=http%3A//www.thelocal.de/society/20080704-12881.html (“Legal experts have pointed out such couples will not have rights to inheritance or alimony, nor will they be able to take advantage of tax benefits for married people.”); Sheri Stritof & Bob Stritof, German Marriage License Information—How to get Married in Germany, http://marriage.about.com/od/germany/p/germany.htm (last visited June 1, 2009).
41 Akiba & Ishikawa, supra note 26, at 591.
42 Note, Japanese Family Law, 9 STAN. L. REV. 132, 144 (1956); Coester-Waltjen & Coester, supra note 30, §128, at 80.
priests, ministers, and rabbis are competent as officers of the state to perform legally valid marriage ceremonies. . . . [T]hey do not need to be specially licensed by the state, but act with sufficient authority to bind the state to all the civil consequences of marriage merely by their being duly ordained, commissioned or authorized by their own churches to perform the ministry of marrying.44

Thus, religious marriages in America are given full legal effect, and clergy may perform marriages that are legal not only for the members of their own congregations, but for anyone who requests them to do so, and they also may “decline to marry anyone they choose without need of civil justification.”45 While state licensing, recording, and witnessing requirements also must be fulfilled, those requirements are the same whether clergy or civil authorities solemnize the marriage. In Australia, a similar marriage regime applies.46 (Interestingly, however, the dissolution of marriage in these states is a state-regulated process, with no legal recognition given to religious divorces, separations, or annulments.)47

In some countries in the middle category, particularly those with a current or historically dominant religion, both civil authorities and clergy of that dominant religion may perform marriages. For example, in Italy both civil marriages and marriages by Roman Catholic priests are legally valid, but marriages performed by clergy of non-Catholic religions have no legal effect.48 In Portugal, only Catholics are exempted from compulsory civil marriage.49 In England and Sweden, marriages performed by civil authorities and the clergy of the former state religions are automatically legal; clergy of other religious denominations may also solemnize marriages that have full legal effect, but the non-favored churches or their clergy must first obtain special permits or affirmatively register in order to be able to solemnize valid marriages.50

44 RELIGIOUS ORGANIZATIONS, supra note 22, at § 11:3, at 11-17.
45 Id. (“In the initiation of marriage, the churches play a powerful role and have virtually unlimited discretion beyond the formalities of state qualifying licensure . . . and . . . registration.”). Many other countries outside of the United States allow clergy to solemnize marriages that have full legal validity and effects. See, e.g., U.S. Dep’t of State, Marriage in the Philippines, http://travel.state.gov/law/citizenship/citizenship_757.html (last visited June 1, 2009).
46 Coester-Waltjen & Coester, supra note 30, § 126, at 78-79.
47 RELIGIOUS ORGANIZATIONS, supra note 22, at § 11:3, at 11-18. Perhaps because the consequences of divorce typically involve determination of financial matters (property, alimony, and child support obligations) and of guardianship responsibilities over third persons (child custody and visitation), the state exercises exclusive jurisdiction over divorce and the incidents of divorce in America.
49 Coester-Waltjen & Coester, supra note 30, § 124, at 78.
In the third category, comprised of some states with strong, if not dominant, religious communities, the creation of marriage is exclusively controlled by religious communities. For example, in the Middle East, “the autonomy of the religions with regard to marriage has been respected” for centuries.\(^51\) Thus, in Israel and many other states in this region today, “[t]he formation of marriage is left to religious regulation . . . .”\(^52\) However, while only religious marriage is allowed in Israel, the state of Israel recognizes for registration purposes secular marriages validly contracted in other jurisdictions.\(^53\)

Thus, in many nations’ legal systems, the parties may choose between a civil or a religious marriage.\(^54\) Again, there is diversity. The state civil law in some of these nations “may leave religious law more or less untouched and confine itself to attaching recognition and legal effects to a hitherto purely religious marriage,” while in other nations “the only marriage known and recognized by secular law is the legal institution defined by secular rules, though this legal marriage may be concluded in a religious or civil ceremony . . . .”\(^55\)

C. Recent Religion-State Conflicts over Same-Sex Marriage

The recent movement to legalize same-sex marriage has spawned a new controversy that not only divides nations from one another, and members of religious communities from one another, but also creates separation between some religious communities and national legal communities.\(^56\) As Appendix I shows, of the 192 sovereign nations recognized by the United Nations,\(^57\) only seven nations (3.6% of all nations) allow same-sex marriage; three of those nations plus ten additional nations (another 5.2%) provide legal benefits to same-sex couples that are largely equivalent to legal benefits provided to married couples but the relationships are not called “marriages”; while another seven nations (another 3.6%) provide some limited benefits to same-sex couples. In summary, less than 13% of the sovereign nations in the world give any significant marital benefits or

---

\(^{51}\) Coester-Waltjen & Coester, supra note 30, § 119, at 76.

\(^{52}\) Id.


\(^{54}\) Id. §§ 123, 125, at 77-78. (Spain and Greece have joined this list recently). See also Inger Dubeck, Marriage in Denmark, in MARRIAGE AND RELIGION IN EUROPE 199, 202-03 (1991) (in Denmark, parties may choose to have religious or civil marriages).

\(^{55}\) Dubeck, supra note 54, at 202-03.

\(^{56}\) RELIGIOUS ORGANIZATIONS, supra note 22, at § 11:4 (the issue of same-sex marriage “strikes deep controversy within the churches and at the intersection of law and religion.”).

status to same-sex couples, and not quite 9% of all sovereign nations give same-
sex couples marital or marriage-equivalent legal status (and these consist of a few
post-modern western European nations and a few of their former colonies). The
language of no national constitution expressly protects or explicitly requires same-
sex marriage (though final courts in two nations have interpreted general
constitutional provisions as mandating legalization of same-sex marriage).58 On
the other hand, thirty-seven nations—19% of 192 sovereign nations recognized by the
United Nations—have constitutional provisions that clearly define marriage as the
union of a man and a woman,59 (and thirty-six of those thirty-seven national
constitutions have been adopted since 1970).60 Additionally, same-sex marriage is
prohibited by statute, case law, or legal custom in scores of other nations that do
not explicitly forbid same-sex marriage in their constitutions.61 “So far as
European human rights law is concerned, the European Court of Human Rights has
stated in dicta that ‘marriage’ in the meaning of the ECHR [European Convention
on Human Rights] art. 12 (the right to marry) means the union of a man and a
woman. . . .”62 Although there is wide diversity among marriage laws around the

58 See Harrison v. Canada, [2005] 290 N.B.R.2d 70 (Can.); Fourie v. Minister of
Foreign Affairs 2005, http://marriagelawfoundation.org/cases%5CFourie%20v.%20Mini
ster.pdf (last visited Apr. 28, 2010).
59 See ARMENIA [Constitution] art. 32; AZERBAIJAN [Constitution] art. 34 (Azer.);
BELARUS [Constitution] art. 32 (Belr.); BRAZIL [Constitution] art. 226 (Braz.); BULGARIA
[Constitution] art. 46 (Bulg.); BURKINA FASO [Constitution] art. 23 (Burk. Faso);
CAMBODIA [Constitution] art. 45 (Cambodia); CAMEROON [Constitution] The Universal
Declaration of Human Rights, art. 16 (Cameroon); CHINA [Constitution] art. 49 (P.R.C.);
COLOMBIA [Constitution] art. 42 (Colom.); CUBA [Constitution] art. 43 (Cuba); ECUADOR
[Constitution] art. 67 (Ecuador); Eritrea [Constitution] art. 22 (Eri.); ETHIOPIA
[Constitution] art. 34 (Eth.); GAMBIA [Constitution] art. 27 (Gam.); HONDURAS
[Constitution] art. 112 (Hon.). JAPAN [Constitution] art. 24 (Japan); LATVIA
[Constitution] art. 110 (Lat.* LITHUANIA [Constitution] art. 31 (Lith.); MALAWI
[Constitution] art. 22 (Malawi); MOLDOVA [Constitution] art. 48 (Mold.); MONTENEGRO
[Constitution] art. 71 (Mont.); NAMIBIA [Constitution] art. 14 (Namib.); NICARAGUA
[Constitution] art. 72 (Nicar.); PARAGUAY [Constitution] arts. 49, 51, 52 (Para.); PERU
[Constitution] art. 5 (Peru); POLAND [Constitution] art. 18 (Pol.); SERBIA [Constitution] art.
62 (Serb.); SURINAME [Constitution] art. 35 (Surin.); SWAZILAND [Constitution] art. 27
(Swaz.); TAJIKISTAN [Constitution] art. 33 (Taj.); TURKMENISTAN [Constitution] art. 25
(Turkm.); UGANDA [Constitution] art. 31 (Uganda); UKRAINE [Constitution] art. 51 (Ukr.);
VENEZUELA [Constitution] art. 77 (Venez.); VIETNAM [Constitution] art. 64 (Vietnam).
60 The other nation with a constitutional provision limiting marriage to male-female
couples is Japan, whose Constitution was adopted in 1947.
61 See generally Wardle, supra note 26, at 443-46; see also infra app. II. In the United
States, as of March 1, 2010, five states (10%) and the District of Columbia allow same-sex
marriage, five (10%) allow marriage-equivalent Civil Unions, and six others grant limited
benefits to same-sex couples; forty-four states forbid same-sex marriage; thirty states have
constitutional prohibitions of same-sex marriage, and nineteen states have constitutional
prohibitions against equivalent civil unions. See id.
world, same-sex marriage is accepted only marginally and allowed in only very few nations, while it is prohibited in the substantial majority of nations (and explicitly forbidden as a matter of constitutional law in about one-fifth of the nations of the world).

There also is growing controversy about the morality of same-sex marriage in religions. Globally, however, the prevailing religious norm is to reject same-sex marriage. Most of the major branches and adherents of the three main “Abrahamic” faiths—Judaism, Christianity, and Islam—reject same-sex marriage as contrary to God’s will, as even advocates of same-sex marriage

Affidavits [opposing legalization of same-sex marriage] . . . were filed on behalf of Judaism (Rabbi and University of Toronto political theorist David Novak), Roman Catholicism (Professor Ernest Caparros, professor of Canon law at the University of Ottawa and Professor Daniel Cere, Catholic political theorist at McGill University), Islam (Abdulla Idris Ali, Past President of the Islamic Society of North America), and Evangelical Protestantism (Professor Craig Gay of Regent College). In each case, focus of the affidavits were: the teachings of the religious perspective with reference to the nature and place of marriage, the need for respect for the other groups and citizens irrespective of their sexual orientations, and concerns about where a reconfigured constitutional norm would place the religious groups themselves.

Id. at n.140. My own Christian faith, the Church of Jesus Christ of Latter-day Saints (often called the “Mormon” church) has firmly stated and reiterated its opposition to legalizing same-sex marriage. See generally Gordon B. Hinckley, President, Church of Jesus Christ of Latter-day Saints, Proclamation of The First Presidency and Council of the Twelve Apostles: The Family: A Proclamation to the World, ¶¶ 2, 7 (Sept. 23, 1995) (“The family is ordained of God. Marriage between man and woman is essential to His eternal plan.”); Newsroom, The Church of Jesus Christ of Latter-day Saints, California and Same-Sex Marriage, June 30, 2008, available at http://newsroom.lds.org/ldsnewsroom/eng/comment
acknowledge. For example, throughout the Islamic world, homosexuality is highly offensive and same-sex marriage and other homosexual family relations are allowed in none of the nearly sixty Muslim nations (many of which are governed or influenced by religious sharia law). Acceptance of gay or lesbian

64 See Justin T. Wilson, Note, Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion, 14 DUKE J. GENDER L. & POL’Y 561, 564-65 (2007) (“The overwhelming majority of support for bans on same-sex civil marriage has come from religious believers . . . .”); Jay Michaelson, Chaos, Law, and God: The Religious Meaning of Homosexuality, 15 MICH. J. GENDER & L. 41, 42 (2008) (“Whether in Biblical times or today, changing the way sexuality is regulated is a threat to the notion of order itself, as construed by Jewish and Christian religion. Arguments about . . . same-sex marriage . . . are arguments about the nature of religion itself . . . .”); id. at 89 (Muslims also see state and religion as “inextricably intertwined.”); id. at 111-12 (same-sex marriage controversy is “not purely a matter of politics or constitutional law, but of religion itself. Even if same-sex marriage is worth the political struggle, the tools best suited to the job of advocacy will be those appropriate to the subject matter: religions reasoning . . . [and] transformative religious experience.”).  


66 Ibrahim B. Syed, Same Sex Marriage and Marriage in Islam, http://www.irfi.org/articles/articles_151_200/same_sex_marriage_and_marriage_i.htm (last visited June 1, 2009) (“the definition of marriage” entails “a man and a woman” becoming a family).
families in the Muslim communities of the world is highly unlikely in the foreseeable future.67

Most mainstream and conservative Christian communities also reject same-sex marriage,68 as do all Orthodox and many Conservative Jewish congregations,69 however, a growing minority of Christian religious communities now “recognize same-sex unions” as marriages or quasi-marital relationships.70 A survey of major religions in America conducted by the respected Pew Forum on Religion & Public Life in the spring of 2008, found that of the major American religious traditions that were surveyed, nine opposed same-sex marriage, two supported same-sex marriage, and six had no official position and their congregations were split.71

---


68 See sources cited supra note 63.

69 Id.; Rabbi Amber Powers, Judaism and Same-sex Marriage, available at http://www.myjewishlearning.com/life/Sex_and_Sexuality/Homosexuality/Same_Sex_Marriage.shtml (last visited July 7, 2009) (reviewing position on same-sex marriage of Reconstructionist, Reform, Conservative, Orthodox Jewish communities; “The Union of Orthodox Jewish Congregations of America . . . has publicly rejected civil and Jewish same-sex marriage.” “[I]n December 2006 the Law Committee of the Conservative Movement voted to accept two teshuvot (positions), one reaffirming [that] the status quo in which the Conservative Movement does not authorize same-sex marriages, and one permitting Conservative rabbis to conduct same-sex commitment ceremonies.” The Central Conference of American Rabbis leading the Reform Movement in 2000 voted to support solemnization of same-sex unions but allowed rabbis to decline to do so, and “avoided the term kiddushin [meaning ‘holy unions’] . . . .” Reconstructionist Movement Jews support same-sex marriage, and many treat them as kiddushin.]. See also Marc D. Stern, Same-Sex Marriage and the Churches, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY 1-58 (2008) (assistant executive director of American Jewish Congress argues that many dimensions of religious liberty will be curtailed if same-sex marriage is legalized).


Opposed to same-sex marriage: Same-sex marriage is forbidden or opposed in the official doctrines or position of the American Baptist Churches in the USA, the U.S. Conference of Catholic Bishops, The Church of Jesus Christ of Latter-day Saints (Mormon), The Evangelical Lutheran Church in America, all branches of Islam, the Lutheran Church-Missouri Synod, National Association of Evangelicals, Southern Baptist Convention, and the United Methodist Church. See id.

No Official position but generally oppose same-sex marriage: Buddhism has no official doctrine on same-sex marriage, and some Buddhists advocate tolerance, nations with large Buddhist populations oppose same-sex marriage); the Presbyterian Church (U.S.A.) has no official position on same-sex marriage but forbids ordination of gay clergy, which has divided the church. See id.
Religious belief seems to be a critical divide on the same-sex marriage issue. Social science studies in the United States have linked religiosity with opposition to same-sex marriage, and non-religiosity with support for same-sex marriage. At one level, the public policy controversy concerning legalization of same-sex marriage reflects different religious and ideological factions acting as citizen to influence public policy. For example, in the United States and Canada, religious communities, usually acting in inter-faith coalitions, have been especially prominent in opposing efforts to legalize same-sex marriage in their respective countries. My own religious faith group, the Church of Jesus Christ of Latter-day Saints, sometimes called “Mormons,” has joined with members and leaders of

No official position or split but generally favor: Judaism is split; with Orthodox congregations forbidding same-sex marriage, conservatives not allowing sanctification but does permit rabbis to perform such unions, while Reform congregations support same-sex marriage; the Episcopal Church has no official position but officially the church opposes amendments barring same-sex marriage; Hinduism has no official position on same-sex marriage and followers are split along cultural lines with Kama Sutra allowing homosexuality; and the National Council of Churches (not a faith community itself) has no official position. See id.

Supports same-sex marriage: The Unitarian Universalists Association of Congregations supports same-sex marriage; and the United Church of Christ supports and advocates for same-sex marriage. See id.


73 See, e.g., Benson, supra note 63 and accompanying text.
other religious faiths in campaigns that were instrumental in achieving passage of state constitutional amendments prohibiting same-sex marriage in several states.\textsuperscript{74} Most recently, it was a religious coalition of various churches and religiously-active voters who succeeded in passing a constitutional amendment in California overturning a state Supreme Court ruling legalizing same-sex marriage.\textsuperscript{75}

Both legal scholars and practicing lawyers have predicted that legalization of same-sex marriage would lead to legal claims against religious organizations, employees, and members of religious faiths that oppose same-sex marriage. For example, Roger Severino has shown how religious institutions in the United States that refuse to recognize same-sex marriage face significant potential civil liability and litigation risk under employment antidiscrimination laws, fair housing laws, and public accommodation laws,\textsuperscript{76} risk loss of government privileges and benefits including tax-exempt status, exclusion for eligibility for social service contracts, exclusion from government facilities and grounds, and exclusion from solemnizing marriages,\textsuperscript{77} and potential civil and criminal liability for violating “hate crimes” and “hate speech” laws.\textsuperscript{78} Likewise, individuals of faith who for reasons of


\textsuperscript{76} Roger Severino, Or For Poorer? How Same-Sex Marriage Threatens Religious Liberty, 30 HARV. J.L. & PUB. POL’Y 939, 957-70 (2007).

\textsuperscript{77} Id. at 972-79.

\textsuperscript{78} Id. at 970-72.
conscience do not wish to facilitate and endorse same-sex marriages risk exclusion from eligibility for employment (by non-hiring and firing) in civil service positions that involve licensure or solemnization of marriage.79

In fact, harassment and persecution directed against religious groups, clergy, and persons of faith opposed to same-sex unions have been increasing in countries where same-sex marriage or civil unions are or are becoming legal. While legal protection against religious bigotry varies from nation to nation, the record of the United Kingdom is instructive. For example, in 2006 Sir Iqbal Sacranie, the General Secretary of the Muslim Council of Britain, was investigated because of comments he made on BBC that homosexual practices were unacceptable in terms of health and morals.80 The Right Reverend Dr. Peter Forster, the Bishop of Chester, was investigated in 2003 for committing a “hate crime” after he told his local newspaper that some homosexuals could change with the help of professional therapy.81 The British government has already forced a Catholic school to retain a principal who openly celebrated a same-sex civil union in violation of basic Catholic moral doctrines.82 In another case, the UK government fined an Anglican bishop who refused to hire an actively and openly gay youth minister.83 Likewise, a government minister in the United Kingdom publically stated in May 2009 that new anti-discrimination laws that will become effective in 2010 will forbid churches from not hiring or from firing church employees (other than clergy) for engaging sexual practices that violate core church doctrines about sexual morality.84

79 Id. at 977-79.
81 See generally Bishops Fight for Right to Criticise Homosexual Lifestyle, supra note 80.
82 See generally Maggie Gallagher, Redefining Religious Liberty: Gay Marriage and the Conflict Between Church and State, NAT’L REV. ONLINE, May 27, 2009, available at http://article.nationalreview.com/?q=MDQwMGU5ZjgwNmFiODcxZDgyNTAxYjVmYzY2ZjViOTY=.
83 Id.
Registrars, civil servants who can solemnize marriages and civil unions, are under particular pressures in the United Kingdom. There have been reports of harassment where “at least one Christian objector [was] forced to resign [from a registrar position for objecting to performing same-sex civil union ceremonies].” Recently, a British pediatrician who for five years had analyzed medical examinations in prospective adoption cases asked to be allowed to abstain from cases involving same-sex couples seeking to adopt; instead she was fired. A notable case involved a British woman registrar and devoted Christian (originally from Africa) who was forced to resign because of on-the-job pressures and negative treatment relating to her request for a religious exemption for performing same-sex unions. She brought suit alleging employment discrimination against her religious beliefs, and won in the lower court. However, on appeal, her victory was overturned.

The Employment Appeal Tribunal in London has recently ruled that a claim by a civil registrar that she could not for religious reasons conduct civil partnerships but would be willing to solemnize opposite sex weddings has been rejected in Islington LBC v Ladele where the Tribunal (chaired by a High Court judge Elias J held the Council X had not taken disciplinary action against their employee for holding her religious beliefs; it had done so because she was refusing to carry out civil partnership ceremonies and that involved discrimination on grounds of sexual orientation).

The interesting reasoning of the appellate tribunal suggests that religious beliefs and convictions of conscience are deemed in British law to be no different than petty animus and personal antipathy. The appellate panel opined that:

88 Posting of Rob Vischer to Mirror of Justice Blog, http://mirrorofjustice.blogs.com/mirrorofjustice/2009/02/civil-unions-vs-marriage-the-european-experience.html (Feb. 25, 2009, 13:24); see also Stiffler, supra note 86 (at the hearing, another Registrar in another city "testified about ‘an unnamed colleague who feared she could be ‘vilified’ as a result [of requesting to not perform same-sex unions].’ Thatcher also spoke of intimidation by the Islington Council in London against anyone who voiced objections to facilitating in same-sex partnerships . . . .”).
The proper comparator was another registrar who refused to conduct civil partnership work because of antipathy to the concept of same-sex relationships, such antipathy not being connected to or based on his or her religious belief. If the tribunal were to be satisfied that such a person would equally have been required to carry out civil partnership duties and would have been subject to a similar disciplinary process if he or she had refused, that necessarily prevented any finding that there had been direct discrimination on grounds of religion or religious belief.89

If the tribunal’s analysis accurately reflects British law, it indicates that religious beliefs and religious liberty for the exercise of them by public employees, enjoy no distinctive legal protection as fundamental human rights in the United Kingdom.

Elsewhere in Western Europe and Canada, similar dilemmas involving church-state conflicts have arisen. In Sweden, Pentecostal Pastor Ake Green was prosecuted, convicted, and forced through years of litigation for quoting from the Bible against homosexual relations. He finally won in the Swedish Supreme Court, where the prosecutor argued that since there were other translations of the Bible that did not use strong condemnatory language, the Pastor had no right to quote from a traditional version.90 In 2009, the Swedish parliament legalized same-sex marriage and included in the law a prohibition against forbidding the refusal of religious marriage to the couple. One report described the new law: “While individual pastors have the right to refuse, the Lutheran church is required to find a willing pastor for each couple.”91

Many similar cases have been reported in other countries, as well.92 In Ireland, during public debate over legalizing same-sex unions, the Irish Council for Civil Liberties warned that Catholic Bishops and clergy who distributed a Vatican publication opposing homosexual relations could be prosecuted for violating a hate speech act.93 Several clergy in Canada, where same-sex marriage is legal, have had

89 Posting of Rob Vischer, supra note 88; see also Stiffler, supra note 86, 88 and accompanying text.
to defend themselves for expressing their opposition to homosexual relations and unions. The British Columbia government-accrediting agency denied accreditation to Trinity Western University, sponsored by the Evangelical Free Church of Canada, for its Teacher Training Program because the school requires students to sign an honor code manifesting their belief in Bible verses that condemn homosexual relations as immoral, and the provincial supreme court affirmed. The Knights of Columbus (a Catholic fraternal society) was held liable and forced to pay damages by the British Columbia Human Rights Commission after it cancelled (very politely and promptly) the rental of its hall for a marriage celebration, when it learned that it was for a lesbian wedding. A complaint seeking $240,000 plus $25,000 in attorney’s fees was filed with the Ontario Human Rights Tribunal in July 2009 against a Canadian Catholic diocese and twelve parishioners by a gay man who was dismissed from his job as a volunteer alter-server when the parishioners complained about his living with a long-time companion whom he describes as his “same-sex partner.” In July 2009, a marriage commissioner in Saskatchewan who declined to marry a gay couple (who were married by another commissioner, then filed a complaint), lost his first appeal from a Saskatchewan Human Rights Commission ruling that he was obliged to perform all civil marriages, that the Canadian Charter of Human Rights did not protect his religious objections, and ordering him to pay $2,500 to the couple.

Even in the United States, despite its strong First Amendment and clear (albeit inconsistent and imperfect) historical commitment to protecting religious liberty, public employees with religious principles opposed to same-sex marriage have been in particular difficulties. For example, in Massachusetts, shortly after same-sex marriage was legalized, “at least twelve dissenting Massachusetts justices of

---

94 See, e.g., Rychlak, supra note 90 (Catholic “Bishop Fred Henry of Calgary, Canada, was investigated by the Alberta Human Rights Commission for doing little more than writing about [Catholic moral] teachings in a newspaper column.”).
95 Trinity W. Univ. v. Coll. of Teachers, [2001] 1 S.C.R. 772 (Can.).
the peace [were] forced to resign for refusing to perform same-sex marriages despite their willingness to continue solemnizing husband-wife marriages.99 Because neither the Massachusetts legislature (nor the Supreme Judicial Court) had authorized any exception for conscience or religious objection, even the Governor of Massachusetts, Mitt Romney, who opposed same-sex marriage, advised the justices of the peace that they had the legal duty to marry all persons who legally applied to them to be married, including same-sex couples, and they could be sued for discrimination if they did not marry same-sex couples.100

Similarly, in California, during the four months during which same-sex marriages were legalized, “civil employees [were] using a Kafkaesque form of civil disobedience [e]xploring the possibility of opting out of facilitation ceremonies for gays and lesbian couples.”101 Several county clerks attempted to make accommodation for deputy county clerks who did not wish to issue licenses to gay and lesbian couples to marry, with mixed results. In San Diego County, 24


Weddings are not really part of a judge’s job. A judge has the authority to marry people, but generally no obligation to marry anybody . . . . There is no doubt that such a judge [who marries someone] is exercising state authority, vested in him in his capacity as a judge, but that is not conclusive, under existing marriage law a clergyman performing a wedding is also exercising state authority. I think that even for a judge, there is such a strong element of personal discretion in presiding over a wedding that is it entirely appropriate to respect his feelings or moral responsibility . . . .


101 Stiffler, supra note 86.
of 112 county employees deputized to perform marriages objected to performing same-sex marriages, but when told that they would be reassigned rather than given case-by-case exemptions, eighteen of the objectors withdrew their objections.\textsuperscript{102} In Alameda County, accommodation was provided for employees who produced a letter from his or her church confirming the claim of religious objection.\textsuperscript{103} In Kern County, the “County clerk’s office stopped offering all marriage ceremonies the day before gay marriage became legal.”\textsuperscript{104} The Merced County Clerk also announced his intent to cease performing marriages, “but later retracted his statement after coming under pressure from county officials.”\textsuperscript{105} In Los Angeles County (largest in California) the County Clerk initially indicated a willingness to accommodate employees who did not feel comfortable performing same-sex marriages, but when that quote appeared in a major newspaper, he clarified (or backtracked) and declared that all employees would be required to perform same-sex marriages or face discipline.\textsuperscript{106} Statewide, a Los Angeles Times survey of all fifty-eight counties in California revealed that twenty-three counties allowed or did not ban county employees from opting out of officiating at same-sex marriages, while in thirty-five counties employees were not allowed to opt out, or there were no reported employee objections.\textsuperscript{107} It is arguable (but not yet decided) that both state and federal civil rights laws requiring religious accommodation in employment would cover at least some county employees who object to

\begin{thebibliography}{99}
\bibitem{102} Craig Gustafson, \textit{County Releases Workers’ Protests on Gay Marriage: Only Six Transferred or were Reassigned}, \textit{The San Diego Union-Trib.}, July 9, 2008, available at http://www.signonsandiego.com/news/metro/20080709-9999-1m9clerk.html (twenty-four employees objected to performing same-sex marriage, believing they would be exempted, but told that they would not be excused but their jobs would be reassigned instead, eventually eighteen relented).
\bibitem{106} Stiffler, supra note 86.
\end{thebibliography}
facilitating same-sex marriage. State court ethics commentators acknowledged
the serious ethical considerations on both sides of this same-sex marriage religious
accommodation dispute. Employment law specialists opine that plausible claims
to accommodation exist under both federal and state laws, and that while some
duty to accommodate may be legally required, carving out same-sex marriage
duties from an existing job description would not be legally required under current
accommodation standards. However, county officials have been counseled to

carefully consider how an accommodation request might affect both
its internal and external operations. If a county makes a claim of undue
hardship [to justify denying a request for accommodation], it should be
prepared to articulate what the hardship is and how it will specifically
affect the county’s ability to provide public services in a religious-neutral
and lawful manner.

Some states allow at least some public employees to decline to perform same-
sex marriages. For example, in Connecticut, where justices of the peace reportedly
“can refuse to perform a civil union just like they can opt not to do a wedding, for
whatever reason,” many decline to officiate or participate.

[I]t’s clear that there is a significant difference between the numbers
of JPs who will officiate at weddings between a man and woman, and
same-sex unions. Stratford reports that 15 of its 41 justices of the peace
have specified they will perform civil unions, while Milford and Ansonia
each name 17 of 24 as willing, according to their respective town clerk
offices.

Some Connecticut Justices of the Peace admit that “they won’t perform same-sex
unions for religious reasons.” Other justices who do not object nonetheless agree
that having the “right to say no [is] . . . a good thing.” However, while Justices

108 Beldner, supra note 103, at 21.
110 Emily Prescott et al., When Firmly Held Religious Beliefs Conflict With the Right to Wedded Bliss, 191 CALIF. PUB. EMPLOYEE RELATIONS J. 5, 7-10 (2008), available at http://www.publiclawgroup.com/test/pdf/wedded_bliss.pdf (“The cases strongly suggest there is no need to accommodate by carving out marriage duties from [one’s] current position.”).
111 Id.
113 Id.
114 Id.
115 Id.
of the Peace in Connecticut are arguably protected in exercising their rights of conscience, other public employees might be found liable for discrimination if they failed to perform same-sex civil unions.116

Likewise, Vermont, the first state to legalize civil unions, also gives its elected Justices of the Peace discretion to decide whether or not to perform civil unions.117 However, in that state arguably “a blanket refusal to do civil unions . . . could be considered illegal discrimination based on sexual orientation.” When Vermont town clerks asserted a religious liberty claim to exemption against being compelled over their religious objections to issue civil union licenses, the Vermont Supreme Court rejected their claim, which it disparagingly described as “highly questionable [the] proposition that a public official—here a town clerk—can retain public office while refusing to perform a generally applicable duty of that office on religious grounds,” and opined that “this proposition . . . is neither self-evident nor supported by any of the cases cited by plaintiffs.”118

In Iowa, after the state Supreme Court legalized same-sex marriage by judicial decree, there were some rumblings of discontent among county employees who did not wish to facilitate same-sex marriage. So an official in the Iowa Department of Public Health “sent notices to Iowa’s 99 county recorders telling them they must comply with a recent Iowa Supreme Court ruling that legalizes same-sex marriage [ordering]: ‘All county recorders in the state of Iowa are required to comply with the Varnum decision and to issue marriage licenses to same sex couples in the same manner as licenses issued to opposite gender applicants . . . .’”119 Supporters of same-sex marriage threateningly labeled civil servants who sought to exercise their rights of conscience “rogues” and scorned a proposal to provide protection for rights of conscience as “blatantly unconstitutional.”120

Elsewhere in the United States, legal actions have been taken against religious bodies, for declining to rent facilities for same-sex union ceremonies,121 and for firing a youth minister who performed a same-sex union ceremony in violation of church doctrine.122 Litigation has resulted from church-affiliated charitable organizations refusing to recognize same-sex couples as married for purpose of

---

116 Id. (The office of “Connecticut Secretary of the State Susan Bysiewicz, said public employees, such as town clerks who give marriage and civil union licenses, are prohibited from discriminating. But justices of the peace are simply nominated by their political parties and are therefore in a different category.”).
117 Id.
118 Brady v. Dean, 790 A.2d 428, 434-35 (Vt. 2001) (emphasis added). The court held that since the Civil Union statute allowed town clerks to appoint as assistant town clerks persons willing to facilitate same-sex unions, there was no valid religious liberty claim. Id.
120 Id.
121 Rychlak, supra note 90.
122 Id. at 337 (discussing Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648 (10th Cir. 2002) (suit by fired youth minister)).
eligibility for student housing,\textsuperscript{123} and refusing to recognize same-sex couples for purposes of “family” membership status,\textsuperscript{124} to name just a few incidents.

Use of the force of law to curtail the faith-based activities of individuals of faith in the United States are too numerous to list. Just a few examples illustrate. In 2008, just weeks after ruling that the state had to legalize same-sex marriage, the California Supreme Court ruled in a suit against a clinic and Catholic doctors who declined on grounds of religious convictions to give assisted reproduction services to a lesbian even though they tried to mitigate by referring her to another physician. The court held that there was no religious exemption, and rejected their defense of free exercise of religion and freedom of expression.\textsuperscript{125} In New Mexico, a Christian couple in the marriage photography business were charged before a human rights tribunal, found guilty of violating the law, and forced to pay over $6,600 for the complainant’s attorney’s fees because they declined on grounds of religious principle to photograph a civil commitment ceremony of a lesbian couple.\textsuperscript{126}

The exercise of political speech, campaigning, and franchise activities against same-sex marriage by persons motivated by religious principles has led to controversy as well. After California voters passed a constitution amendment banning same-sex marriage (identified as “Proposition 8” on the ballot and popularly known as “Prop 8”), supporters of Prop 8 were vilified and harassed, and Mormons, in particular, were singled out and widely blamed by gay activists for the passage of the amendment,\textsuperscript{127} names and addresses of Mormons and others

\textsuperscript{123} Severino, supra note 76, at 334 (discussing Levin v. Yeshiva Univ., 96 N.Y.2d 494 (N.Y. 2001), “In Levin the court held that two lesbian students had stated a valid ‘disparate impact’ claim of sexual orientation discrimination when the university refused to provide married student housing benefits to unmarried same-sex couples.”).

\textsuperscript{124} Id.

\textsuperscript{125} N. Coast Women’s Care Med. Group v. San Diego Super. Ct., 189 P.3d 959, 962 (Cal. 2008). Also in California, non-discrimination laws have been used to force a Protestant adoption agency to provide adoption services to lesbian couples, and to require an Arizona online adoption agency (adoption.com) to cease doing business with Californians because it would not place children with gays for adoption.


\textsuperscript{127} See Janet I. Tu, Mormon Church Targeted for Prop. 8 Support, SEATTLE TIMES, Nov. 10, 2008, available at http://seattletimes.nwsource.com/html/localnews/2008371441_protest10m.html (LDS church targeted by gay activists for blame for passage of Prop 8); Peggy Fletcher Stack & Jessica Ravitz, Thousands in Salt Lake City Protest LDS Stance on
who donated to support Prop 8 were published on the internet,\textsuperscript{128} resulting in a spate of violent threats against, attacks upon, and intrusions upon selected Mormons,\textsuperscript{129} their places of worship,\textsuperscript{130} their communities,\textsuperscript{131} their businesses,\textsuperscript{132}


\textsuperscript{128} See, e.g., Artie Ojeda, \textit{Proposition 8 Protest Targets Mormon Church: Protesters Rally Outside of Mormon Temple in University City}, NBC SAN DIEGO NEWS, Nov. 9, 2008, available at http://www.nbcsandiego.com/news/local/Proposition-8-Protest-Targets-Mormon-Church.html (mentioning a “website was organized to provide details on who donated to the Prop 8.”); Peggy Fletcher Stack, \textit{For Mormons, California’s Prop 8 Battle Turns Personal}, SALT LAKE TRIB., Oct. 24, 2008 (“This week[, Dante Atkins, writing on] the Daily Kos, a politically liberal Web site, published a link to a list of Mormon donors and encouraged people to ‘use OpenSecrets to see if these donors have contributed to . . . shall we say . . . less than honorable causes . . . .’”); \textit{Prop 8 Donors Made Public on Google Map}, HOTSHOT, Jan. 10, 2009, available at http://hotsheet.gynite.com/2009/01/10/prop-8-donors-made-public-on-google-map/ (describing “a google map pin pointing all the donors of Proposition 8 . . . You can zoom in and click to see a donors name, date of donation and amount given. . . . Supporters of Prop 8 have filed a lawsuit to block the public viewing of [the donors’ identities].”); see also Lawrence Jones, \textit{Judge Refuses Anonymity to Prop. 8 Donors}, CHRISTIAN TODAY AUSTRALIA, Jan. 31, 2009, available at http://au.christiantoday.com/article/judge-refuses-anonymity-to-prop-8-donors/5247.htm (suit filed in California to prevent further disclosure of names of donors is rejected); Tim Martin, \textit{Radical Gay Activist Group Plans More Disruptions}, CHI. TRIB., Nov. 20, 2008 (“A Web posting signed by Bash Back!’s Olympia chapter said: ‘The Mormon church (just like most churches) is a cesspool of filth. It is a breeding ground for oppression of all sorts and needs to be confronted, attacked, subverted and destroyed.’”).

\textsuperscript{129} See \textit{‘Gay’ Threats Target Christians Over Same-Sex ‘Marriage’ Ban}, WORLDNET NEWS, Nov. 5, 2008 (“On yet another site, ‘Americablog,’ ‘scottinsf” wrote, ‘Trust me. I’ve got a big list of names of Mormons and Catholics that were big supporters of Prop 8 . . . . As far as Mormons and Catholics . . . I warn them to watch their backs.’”); \textit{Prop 8 Supporters Harassed by Homosexual Activists}, CATHOLIC NEWS AGENCY, Nov. 11, 2008, available at http://www.catholic.org/politics/story.php?id=30497 (Mormon police officer “noted that several of his ward members had received hate mail after their names, religious affiliation, contribution amounts, and addresses were published on a web site inciting Proposition 8 opponents to target the individuals listed. ‘Their houses and cars had been vandalized, their campaign support signs stolen, and opposition signs planted in their place,’ Bishop wrote.”); Peggy Fletcher Stack, \textit{For Mormons, California’s Prop 8 Battle Turns Personal}, SALT LAKE TRIB., Oct. 24, 2008; see also Pro. 8 Passage Spawns Protests, Violence and Vandalism, CHRISTIAN EXAMINER ONLINE, Dec. 2008, available at http://www.christianexaminer.com/Articles/Articles%20Dec08/Art_Dec08_09.html (“[I]n Fresno, [California,] a prominent pastor who campaigned publicly for Proposition 8 received credible death threats . . . The church was also targeted for vandalism.”); \textit{Prop 8 Supporters File Suit After Threats}, CBN.COM, Jan. 10, 2009, available at http://www.cbn.com/CBNnews/516803.aspx (because names of donors to Prop. 8 posted
online, some have been harassed, threatened with boycott, and received death threats, so they file suit to protect privacy of the donation records).

130 See Vandalism Reported at More LDS Buildings, SALT LAKE TRIB., Nov. 12, 2008 (“The windows of two more LDS ward houses have been shattered—the latest in a string of seven buildings targeted by vandals across the Wasatch Front [in central Utah] since last Saturday.”); Steve Gehrke & Jason Bergreen, Prop. 8 Backlash? White Powder Sent to LDS Temples in Salt Lake City, L.A., SALT LAKE TRIB., Nov. 14, 2008 (envelopes containing white powder delivered to two LDS temples); ‘Gay’ Threats Target Christians Over Same-Sex ‘Marriage’ Ban, supra note 129 (“Another website even listed addresses of Mormon facilities. . . . ‘I do not openly advocate firebombing or vandalism. What you do with the information is your own choice,’ wrote Jeremy.”); Chelsea Phua, Mormon Church in Orangevale Vandalized in Wake of Prop. 8 Vote, SACRAMENTO BEE, Nov. 9, 2009, at 1B (“Vandals spray-painted the words ‘No on Prop 8’” at a Mormon church in Orangevale, California, three days after voters passed the amendment); Prop. 8 Supporters Harassed by Homosexual Activists, CATHOLIC ONLINE, Nov. 11, 2008 (police called out to protect Mormon temple in Los Angeles against trespassing gay protesters who wrote anti-Mormon messages on the temple walls); id. (protests also at a Catholic church in Los Angeles, and at Pastor Rick Warren’s Saddleback Church.); Marcus Franklin, Gay Activists Rally Outside Mormon Temple in NYC, SALT LAKE TRIB., Nov. 13, 2008 (“The California vote [passing Prop. 8] has sparked protests in several states, many targeting Mormon churches. Some have been vandalized.”); Jeff McDonald & John Marelius, Prop. 8 Result Energizes Gay-Rights Supporters, SAN DIEGO UNION-TRIB., Nov. 15, 2008 (“Vandalism and chants of ‘Mormon scum’ were reported at some churches. Twice in the past week, the San Diego temple has attracted street protests.”); Jennifer Garza, Are Attacks on Mormon Sites Hate Crimes?, SACRAMENTO BEE, Nov. 15, 2008 (“Sacramento [California] church officials have stepped up security at the Mormon temple in Rancho Cordova. Ten church buildings in the region have been vandalized since the election, said Lisa West, spokeswoman for the church in the Sacramento area. ‘That’s more than we usually get in an entire year.’”); Kiss-in Protest is Held Outside Mormon Temple, THE SAN DIEGO UNION-TRIB., July 23, 2009, available at http://www3.signonsandiego.com/stories/2009/jul/23/short-takes-news-brief-countywide-interest/ (gay protesters stage “kiss-in” noting passage of Prop 8 due to coalition of Mormons and other faiths); see also Attn. Gay America: Prepare to Lock Lips, ADVOCATE.COM, July 27, 2009, http://advocate.com/news_detail_ektid101517.asp (protests outside Mormon temples in Salt Lake City and San Diego; calls for seven-city protest, relating to arrest of gay couple for passionate kissing outside Salt Lake City Mormon temple).

131 See Carrie A. Moore, Owner Says Prop 8 Opponents Hacked into LDS Site, DESERET NEWS, Nov. 13, 2008 (LDS businessman’s online magazine for LDS community hacked into and replaced with lesbian images); Utah, Sundance Film Festival, Targeted for Boycott to Punish Mormons’ Work on Proposition 8, supra note 127 (boycott of Utah state urged).

132 See Moore, supra note 131 and accompanying text; Utah, Sundance Film Festival, Targeted for Boycott to Punish Mormons’ Work on Proposition 8, supra note 127 (urging boycott of business in Mormon area); McDonald & Marelius, supra note 130 (“Some activists are using online boycott lists and other means to target individual donors to the Yes on 8 campaign, including San Diego hotel magnate Doug Manchester and Terry Caster, owner of the locally based A-1 Self-Storage chain [who donated to Prop 8].”).
and their employment, and in numerous vindictive acts of harassment and intimidation by gay and lesbian activists attempting to punish and “pay back” that religious community for its prominent role in overturning the court ruling that had legalized same-sex marriage. Thus, even in a nation with explicit constitutional

133 See Moore, supra note 131 (LDS businessman’s online magazine for LDS community hacked into and replaced with lesbian images); Ed Fletcher, Nationwide Protest of Gay Marriage Ban: Battle Kept Front and Center, SACRAMENTO BEE, Nov. 16, 2009, at A1 (“several people—including the artistic director of the California Musical Theatre—have been targeted because of their contributions to the ballot measure.”); Tami Abdollah & Care Mia DiMassa, Prop. 8 Foes Shift Attention, L.A. TIMES, Nov. 14, 2008, at A1, available at http://articles.latimes.com/2008/nov/14/local/me-boycott14 (describing boycott of restaurant whose LDS manager had donated $100 to Prop. 8, a boycott of a health food chain for owner’s support of Prop. 8, a boycott of a car dealer for support of Prop. 8 and a considered boycott against Cinemark, whose chief executive contributed to Prop. 8); Alison Stateman, What Happens If You’re on Gay Rights’ ‘Enemies List,’ TIME MAG., Nov. 15, 2008, available at http://www.time.com/time/nation/article/0,8599,1859323,00.html (“Scott Eckern, artistic director of the California Musical Theatre in Sacramento, whose $1,000 donation was listed on ElectionTrack, chose to resign from his post this week to protect the theater from public criticism. Karger says a ‘soft boycott’ his group had started against Bolthouse Farms—which gave $100,000 to Prop. 8—was dropped after he reached a settlement with the company. Bolthouse Farms was to give an equal amount of money to gay rights political causes.”); Marcus Crowder, Theatre Exec Eckern, Caught in Prop. 8 Flap, Resigns, SACRAMENTO BEE, Nov. 13, 2008 (Mormon employee for twenty-five years resigns because gays threaten boycott of musical theatre); Rachel Abramowitz, L.A. Film Festival Head Resigns over Prop. 8 Donation, L.A. TIMES, Nov. 26, 2008, available at http://latimesblogs.latimes.com/lanow/2008/11/la-film-festiva.html (Richard Raddon resigns prestigious job after threats of boycott over his donation to Prop. 8). See also Posting of Mandy to Mormon Business Complaints Board (Nov. 10, 2008), available at http://www.complaintsboard.com/complaints/mormon-businesses-c121536.html (“Now do not tip, hire, or do any business with a Mormon. 10% of their income goes to the church that worked tirelessly to take the [sic] civil rights away from people. They are a Nazi organization who only what [sic] their point of view followed. I asked my waiter if he were [sic] a Mormon, when he said he was I did not tip him, telling him, I was sorry but I can not [sic] support bigotry. Google Mormon Boycott, and Utah Boycott and see how you can help.”).

134 Several legal challenges have been threatened or filed against supporters of Proposition 8, including the Mormon Church, for harassment purposes. See, e.g., Jessica Garrison, Mormon Church Reports Spending $180,000 on Proposition 8, L.A. TIMES, Jan. 30, 2009, available at http://latimesblogs.latimes.com/lanow/2009/01/top-officials-w.html (pro-same-sex marriage activist Fred Karger filed a “complaint with the Fair Political Practices Commission after the election alleging that the church officials had not properly disclosed their involvement . . . .”); Gay Rights Group Files Complaint in Prop. 8 Battle, CBS13, Feb. 11, 2009, available at http://cbs13.com/local/mormon.prop.8.2.932928.html (Fred Karger files “a second campaign finance complaint” against the Mormon church); see generally Revoke LDS Church 501(c)(3) Status, available at http://lds501c3.wordpress.com/ (last visited July 17, 2009) (calling for revocation of the church’s status for tax purposes as a tax-exempt charitable religious organization). See also
protection for religious liberty, and a long history of striving to vindicate that basic right, the kinds of emotions triggered by conflicts between religious beliefs and state marriage rules, particularly at this time legitimizing same-sex marriage or marriage-equivalent unions, can have devastating impacts upon church-state relations, tolerance, and protection of fundamental human rights.

III. LESSONS FROM CONFLICT OF LAWS FOR RESOLVING INTER-SOVEREIGN CONFLICTS

A. The Relevance of Contemporary Choice of Law Principles

In the deep and rich body of jurisprudence known as “conflict of laws” (or “private international law”) scholars and judges have wrestled for centuries with how to resolve conflicts between competing legal sovereigns. Conflict of laws deals with three types of inter-sovereign conflicts: those concerning which sovereign’s tribunals properly can exercise judicial authority to hear and decide controversies concerning or affecting persons, property, interests or acts within the territory of or under the control of multiple sovereigns (called “adjudicatory jurisdiction”);135 those concerning which sovereign’s rules of law should apply to resolve such disputes (called “choice of law” or “prescriptive jurisdiction”);136 and those concerning the respect given by one sovereign to the judgments of tribunals of different sovereigns (called “judgment recognition” or “jurisdiction to enforce”).137 Because conflicts between religious communities and state communities involve conceptually similar conflicts between competing “sovereigns” asserting competing claims to loyalty, jurisdiction and conduction-
regulating authority, conflict of laws jurisprudence would seem to be a potentially useful resource to ascertain what principles or approaches successfully used in the civil court conflicts context might be applied to resolve analogous religion-state conflicts regarding marriage regulation.

The branch of conflict of laws called “choice of law” jurisprudence provides a particularly relevant and analogous body of legal conflict rules and analysis when secular and religious marriage rules conflict. Both kinds of conflicts concern primarily the quest to determine which sovereign’s rule of regulation should apply to resolve a dispute when there is an apparent conflict between the governing regulations and interests of the two (or more) sovereigns. That is the essence of “choice of law” dilemmas for which choice of law rules of conflicts law have been developed over many centuries, even millennia.

For the past half-century, a cluster of choice of law approaches that are variations of what, in its basic and initial form (developed by Professor Brainerd Currie) is called “governmental interest analysis,” have been the predominant approaches to resolving choice of law disputes in the United State, and have had

---

138 On the other hand, if the issue concerned which sovereign’s tribunals should hear and decide the controversy, application of jurisdictional principles of choice of law would be more analogous. If the issue concerned recognition of the decision or status conferred by a tribunal or agency of one sovereign in the courts or agencies of another sovereign, the most apt analogy would be to the rules of the judgment-recognition branch of choice of law.

139 For instance, the New Testament is filled with examples of the application two thousand years ago of Roman and other choice of law rules. John 18:31 (King James); Acts 18:14-16 (King James); Acts 16:16-24 (King James); Acts 25:10-12 (King James). Likewise the Old Testament contains some ancient choice of law rules applied over three thousand years ago. See Leviticus 24:22 (King James); Exodus 12:43-45 (King James); Numbers 6:13-21 (King James). A choice-of-law rule governing commercial disputes was discovered in the papyrus wrapping of an Egyptian crocodile mummy. Hessel E. Yntema, The Historic Bases of Private International Law, 2 AM. J. COMP. L. 297, 300 (1953).

140 See Brainerd Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 DUKE L.J. 171 (1959); see also BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 188-282 (1963).

undeniably profound influence upon significant choice-of-law reforms adopted in other nations as well.\textsuperscript{142} The gist of these “interest analysis” approaches is that when issues arise about what sovereign’s laws should apply to a given dispute, the court should examine the governmental interests of each sovereign underlying the respective laws to determine whether application of those laws would further the interests those laws are intended to foster.\textsuperscript{143} If only one sovereign has a bona fide interest in the application of its law to a particular dispute, the apparent conflict between the laws is deemed a “false” conflict.\textsuperscript{144} However, if more than one

either a traditional vested rights or lex fori approach in tort or contract conflicts; all others follow some form of interest analysis; twenty-four states follow the Restatement Second’s (most significant relationships) version of interest analysis approach in tort conflicts and twenty-three states use it in contract conflicts; the other states follow contacts-counting, generic interest analysis, better law or some hybrid interest analysis approach); see also Symeon C. Symeonides, American Choice of Law at the Dawn of the 21st Century, 37 Willamette L. Rev. 1, 43, n.168 (2001) (interest analysis is the dominant mode of choice of law analysis in America today).

\textsuperscript{142} S COLES, supra note 135, §2.27 at 110, 111-18 (describing over twenty national codifications of choice of law and dozens of international conventions on choice of law, and noting that “. . . some of these ideas for reform draw on American approaches which, in turn[,] . . . had often resurrected much earlier European notions, [so] history is now coming full circle.”).

\textsuperscript{143} S COLES, supra note 135, at 5-37. See also WRH, supra note 135, at ch. 2; Katherine Florey, State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation, 84 Notre Dame L. Rev. 1057, 1070-71, 1091 (2009) (summarizing Currie’s interest analysis approach as requiring first examination of forum’s interest and usually requiring application of forum law if such an interest exists); Lea Brilmayer, Interest Analysis and the Myth of Legislative Intent, 78 Mich. L. Rev. 392, 398 (1980) (interest analysis is “pro-resident, pro-forum, and pro-recovery.”); Patrick J. Borchers, The Conflict of Laws and Boumediene v. Bush, 42 Creighton L. Rev. 1, 26 (2008) (“One ground on which to criticize interest analysis is that it has a heavy bias towards application of forum law. The second ground on which to criticize interest analysis is the notion of what counts as an interest is so sufficiently malleable that it is open to manipulation.”).

\textsuperscript{144} See Phaedon John Kozyris, Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides’ ‘Missed Opportunity,’ 56 Am. J. Comp. L. 471 (“The dominance of the purported ‘interests’ of the forum state [in Currie’s interest analysis] meant little more than parochialism and discrimination, i.e., a choice that favors local parties, . . . . Some scholars receptive to interest analysis but concerned by its unilateralism and parochialism denounced the priority of forum state interests. They called for the judge to treat all states of contact equally and to choose the law whose non-application would impair the internal objectives of the laws of the states concerned more than the alternative law.” (citing William F. Baxter, Choice of Law and the Federal System, 16 Stan. L. Rev. 1 (1963)); Symeonides, 22nd Annual Survey, supra note 141, at 299 (reviewing how states resolve “true” conflicts including those that apply forum law); Susan Frelich Appleton, Gender, Abortion, and Travel after Roe’s End, 51 St. Louis U. L.J. 655, 669 (2007) (“Of course, today none of the states strictly follows interest analysis as Professor Currie outlined it. Nonetheless, Professor Currie’s intellectual legacy shines through in popular methodologies like that of the Restatement (Second) of Conflict of Laws’s ‘most-.}
sovereign has legitimate interests in the application of its laws to resolve the dispute, there is a “true” conflict. Generally true conflicts are resolved either by applying the law of the sovereign that the court has determined has “the most significant relationships” to the parties and the issue in dispute, or by application of the law of some sovereign whose connection is assumed by the choice of law rules of the forum state to be the most significant (such as Currie’s preference for the law of the forum—or lex fori, or the law of the place where the injury

significant-relationship’ test, which instructs courts to consider ‘the relevant policies of the forum’ and ‘the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue.’”).

See Appleton, supra note 144, at 669 (In true conflicts today, most American court apply interest-analysis basis “popular methodologies like that of the Restatement (Second) of Conflict of Laws’s ‘most-significant-relationship’ test, which instructs courts to consider ‘the relevant policies of the forum’ and ‘the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue.’”); William A. Reppy, Jr., Eclecticism in Methods for Resolving Tort and Contract Conflict of Laws: The United States and the European Union, 82 TUL. L. REV. 2053, passim (2008) (acknowledging that some eclectic mixing and combining of choice of law approaches, such as classic interest analysis and “most significant relationship” analysis, is appropriate but criticizing outcome-oriented switching from interest analysis to lex loci is indefensible); id. at 2069

(“the European Union (EU) seems committed to the senseless second-look eclecticism [approach in true tort conflicts] . . . . The EU rule for choice of law in cases involving noncontractual obligations, found in a regulation known as Rome II, is . . . . a mix of lex loci and false conflict theory. . . . Rome II’s first look is to the ‘law of the country in which the damage occurs.’ The second look under Rome II is based on a personal-law theory of sovereignty rather than territorialism: ‘However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.’”);

Leigh Anne Miller, Note, Choice-of-Law Approaches in Tort Actions, 16 AM. J. TRIAL ADVOC. 859, 881 (recommending application of forum law under “most significant relationship” analysis “only when it has a significant policy reason for doing so and has the most contacts with the issue.”); id. at 881, n.211 (citing Lee v. Ford Motor Co., 457 So.2d 193 (La. Ct. App. 1984) (using the “most significant relationship” test of Restatement Second “only after an interest analysis reveals a true conflict.”); id. at 868 (“Lex fori is similar to the lex loci delicti doctrine in that it provides a traditional rule for courts to follow. It is also similar to Currie’s [interest analysis] doctrine in that it applies forum law to true conflicts.”).

See generally P. John Kozyris, Interest Analysis Facing its Critics—and, Incidentally, What Should Be Done About Choice of Law for Products Liability?, 46 OHIO ST. L.J. 569, 576 (1985) (“[I]nterest analysis embraces the lex fori in all true conflicts.”); SCOLES, supra note 135, § 2.9 at 29 (“Under Currie’s analysis, the law of the forum necessarily governs in true conflicts . . . .”). However, lex fori is not just Latin for “law of the forum” but is the label of a distinctive choice of law approach, advocated by Professor Albert A. Ehrenzweig. See generally id. §2.10 at 38-43.
occurred—*lex loci delicti*,\(^\text{147}\) or the law of the place of celebration of a marriage—
*lex celebrationis*,\(^\text{148}\) or the law of the parties domicile—*lex domicilii*, etc.).\(^\text{149}\) In choice of law disputes over marriage, for example, both as to formalities and as to validity of marriage, the prevailing rule in the world is *lex loci celebrationis*.\(^\text{150}\)

European choice of law approaches have also evolved, though without going through the theoretical gyrations experienced in American conflicts jurisprudence.\(^\text{151}\) Today,

> most European [private international law] systems have developed very similar solutions for tort conflicts as have American courts, but without a revolution. They have retained some iteration of the lex loci rule, while also accepting the common-domicile exception to it and/or introducing other exceptions that are likely to lead to the same results as those reached by American courts.\(^\text{152}\)

The most influential variation of the “interest analysis choice” of law approach is in the set of law, choice of law reform proposals produced by the

---

\(^{147}\) Michael Ena, Comment, *Choice of Law and Predictability of Decisions in Products Liability Cases*, 34 FORDHAM URB. L.J. 1417, 1431 (2007) (“Upon finding a true conflict of laws, the Indiana court turned to its lex loci delicti rule that pointed to the application of Illinois law in order to resolve the conflict” (citing Hubbard Mfg. Co., Inc. v. Greeson, 515 N.E.2d 1071, 1073 (Ind. 1987))).

\(^{148}\) *Restatement (Second) Conflict of Laws* § 283 (mandating application of *lex loci celebrationis* in most conflicts of law regarding marriage validity); see generally Hans W. Baade, *Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)*, 72 COLUM. L. REV. 329, passim (1972).

\(^{149}\) *Restatement (Second) of Conflict of Laws* §§ 6, 123-423 (1971). See generally *Scoles*, *supra* note 135, at 5-37. See also *WRH*, *supra* note 135, at ch. 2.


(“In Europe, when the applicable law--either the law consensually chosen by the parties or the law objectively determined where no choice of law was made--is the law of a foreign European or non-European country, mandatory rules are applied through reliance on contract law (lex contractus or lex causae). This remains the case as long as there is no true conflict with the mandatory rules. Thus the second subsection of Article 7 limits the freedom of the parties in their choice of law because of the mandatory rules of the forum.”).
American Law Institute in the RESTATEMENT, SECOND, OF CONFLICT OF LAWS.

That “most significant relationship” choice of law approach requires, in the absence of direct legislative directive on choice of law, the court to consider a list of factors including relevant policies of the forum and of other interested states, the relative interests of those states in determination of a particular issue, the parties’ justified expectations, and universal interests such as the values of certainty, predictability, and uniformity. Generally, the court is to apply “the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties . . . .” Most American states follow some variation of the governmental interests analysis approach in at least some choice of law disputes, and many other nations have local variations of those approaches, often utilizing “shortcut” or “rule of thumb” factors to guide and limit judicial discretion in ascertaining which sovereign has the most relevant interest and to increase certainty, predictability, and uniformity.

Likewise, jurisdictional disputes are resolved by reference to the connections between parties and the territories of the sovereigns involved. Those include physical presence of the party in the jurisdiction, property of the party in the jurisdiction, significant acts of the party in the jurisdiction, significant consequences of the acts of the party in the jurisdiction, etc. Thus, in different balance and varying formulations, similar interest-factors (physical contacts, effects, interests, and fairness) are used in the various tests for assertion of adjudicatory jurisdiction as well as for choice of law.

B. The Relevance of Choice of Law Analysis for Religion-State Conflicts over Marriage Regulation

Nearly twenty years ago, legal scholar Perry Dane (now a distinguished law professor at Rutgers School of Law) proposed that rules governing the conflict of laws “provide a useful analogy” for resolving church-state conflicts of authority to regulate that are comparable to jurisdictional and choice of law conflicts. He noted that
both conflicts [law] and [religious] exemption doctrine . . . require the state to undertake the unaccustomed task of fixing boundaries upon the application of its legal system. Conflict of laws rules are devised to prevent parochialism from frustrating the needs of the international system and to promote justice for individuals whose activities cross national borders. Similarly, a coherent and generous scheme of religion-based exemptions would prevent parochialism from unduly constricting the role of religion in society and would promote justice for individuals caught between competing authorities.\footnote{Note, supra note 158, at 367.}

That choice-of-law model for resolving inter-sovereign disputes has particular value in the context of disputes between state law and religious law over the regulation of marriage.\footnote{See generally Jonathon C. Lipson, \textit{When Churches Fail: The Diocesan Debtor Dilemmas}, 79 S. CAL. L. REV. 363 (2006) (applying conflict-of-laws analysis to another church-state issue); \textit{id.} at 369-70} The conflict between regulations of marriage created by a religious community and regulations of marriage created by the state involve conflicts between two “sovereign” communities that claim a strong interest in the regulation of marriage for the good of their particular communities. Interests of both communities and interaction between multiple communities (both of states and of religious faiths) have some claim upon the resolution of the claim. The “interests” of both religious communities and political communities must be considered. “When individuals have conformed their behavior [sic] to or acquired rights under a foreign legal-norm, blind application of domestic law is inadequate, and substantial deference to the foreign system of authority may be appropriate.”\footnote{See also Perry Dane, \textit{The Maps of Sovereignty: A Meditation}, 12 CARDOZO L. REV. 959, 970-73 (1991) (mutual value of groups recognizing other groups’ sovereignty); \textit{id.} at 963 (discussing “why states and other legal communities might recognize each other’s legitimacy, authority, and juridical dignity” and “the limits on such recognition.”).}

The choice of law analogy to conflicts between state marriage regulations and religious community marriage regulations is particularly apt. The tremendous value for mutually beneficial relations of avoiding open, hostile conflicts between church and state communities concerning marriage are notable, and the potential for state-disintegrating effects and religion-destructive consequences of such laws methodology to religious exemption issues).
controversies are well-exemplified by the terribly divisive controversies described below in Part II.C. Those values and risks are quite comparable to the value of avoiding the nation-dividing effects of poorly-considered choice of law rules for interstate and international relations. It is sobering to remember that the most bloody, costly, terrible war fought by the people of United States, the American Civil War, was provoked in no small part by controversies concerning the interstate recognition (or non-recognition) of slaves and slavery by American (state and federal) courts. Some marriage controversies obviously have the potential to spark similar animosities and conflicts between (and within) church communities and states.

C. Lessons from “Comity,” “Ordre Public,” “False Conflicts” and the Resolution of Choice of Law Disputes Between Sovereigns

As noted above, the State has a powerful interest in protecting religious liberty in order to cultivate integrity in its citizens, to encourage people to do what is right because it is a matter of conscience to obey the law, a moral duty (so that they do not have to be compelled by police in all cases). It also engenders more loyalty and support from the members of religious communities when their marriage values and rules are respected. That state interest extends to matters of marriage regulation; the state reaps substantial benefits when it supports marriage regulations of religious communities. Religious communities, obviously, have an interest in receiving state support not only for religious liberty in general but specifically in having the marriage rules and regulations of their religious community recognized and respected legally. That reinforces the integrity and legitimacy of the religious community, not only in the eyes of their own faith community but in the eyes of other members of the political community as well. And, as noted above, both state and religious communities have an interest in avoiding conflicts whereby religious regulations of marriage are not recognized by the state, or state marriage regulations are ignored or defied by members of a religious community.

Since both the State and the interested religious community have an interest in protecting religious liberty in marriage regulation, because accommodating religious liberty in marriage regulation disputes will further the interests of both “sovereigns,” to some extent there is a “false conflict” or an “apparent conflict”

---


163 See discussion infra Part II.C.
that should not bar state accommodation of religious liberty (marriage regulation) in such disputes. A “false conflict” arises when, *inter alia*, “the laws of the involved states are identical, or different, but produce identical results.” 164 An “apparent conflict” exists when “on reflection the conflict is avoided by a moderate definition of the policy or interest of ‘one state or the other,’ or a case in which reasonable men may disagree on whether a conflicting interest should be asserted.” 165 In either case, the formal inconsistency between the regulations of two sovereigns belies substantial harmony and consistency between their respective interests and the results of the application of their regulations.

In many cases, accommodation by the state of facially incompatible religious marriage rules may involve no “true” conflict of laws. Thus, it is not unlikely that it would not really impair any important state interests for the state to respect and accommodate (e.g., recognize and give legal effect to) most marriage regulations of a majority of (but probably not all) religious communities. The only conflict between state and religious regulations in most cases would be a “false” or “apparent” conflict.

From the other perspective, it also is in the interest of both faith communities and political communities to accommodate state interests in responsible marriage formation that will establish stable, healthy, successful, voluntary adult unions and support families that will foster responsible, contributing members of both communities. So, it is likely that it would not really impair any important interests of a religious community to comply with many (probably most, possibly all) marriage regulations of most (probably most, but probably not all) state legal systems. The only conflict in most cases would be a “false conflict.”

When inter-sovereign disputes arise in a choice-of-law context in civil courts, three principles come into play in one form or another in the varieties of “interest analysis.” First, an attempt is made to identify the relative interests of the competing sovereigns to ascertain if the apparent conflict (the facial conflict between the laws of the different sovereigns) is a “false” or “true” conflict. 166

---

164 See SCOLES, supra note 135, at §2.9, at 28 n.16; see also Margaret P. Stevens, *Navigating Choice of Law Issues*, 27–MAR. L.A. LAW. 10, 10 (2004) (“A false conflict obtains if the states involved have identical or nearly identical laws, or if analysis of their interests reveals that both states would apply the same law.”); Brian N. Eisen, *Cross-Training: Sports Litigation and the Conflict of Laws*, 3 SETON HALL J. SPORT L. 41, 101 n.272 (1993) (describing a “false conflict” as one in which “the interests of all ‘concerned jurisdictions,’” supports the same result).

165 Brainerd Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1242-43 (1963) (explaining that “[i]f the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.”); see also SCOLES, supra note 135, §2.9, at 28 n.17 (citing Brainerd Currie, *The Disinterested Third State*, 28 L. & CONTEMP. PROBS. 754, 763-64 (1963)).

166 *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, supra note 165, at 1242-43 (summarizing the six steps of governmental interest analysis,
Second, unless some form of \textit{lex fori} applies (which was the approach Currie recommended in his pioneering work,\textsuperscript{167} but which is no longer generally endorsed by conflicts scholars or followed by most American courts),\textsuperscript{168} if a foreign sovereign has an interest, some degree of deference or “comity” initially is assumed—that is, if minimum requirements are met, the foreign law will be acknowledged, and the continued validity or recognition of the rights, interests or relationships established by the other sovereign will be respected (at least nominally) by other sovereigns.\textsuperscript{169} Third, however, under the \textit{ordre public} principle, or “public policy” exception, if recognition and enforcement of those rights, interests and relationships established by the other sovereign would seriously harm or threaten core, fundamental interests and strongly held policies of the forum sovereign, the rights vested by the other sovereign will not be recognized or allowed, at least to the extent to which comity would seriously undermine the local sovereign’s deeply held and important interests.\textsuperscript{170}

Those steps also describe an approach to resolving conflicts between religious community marriage laws and state marriage laws. First, determine if there really

\textsuperscript{167} Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws, supra note 165, at 1242-43.

\textsuperscript{168} See sources cited supra notes 141-43, and 150-53.

\textsuperscript{169} See, e.g., Florey, supra note 143, at 1121 (“Timberlane-era international choice-of-law principles recognized that courts can apply comity principles to moderate problems of inconsistency and unpredictability that extraterritorial laws can create.”). Terry S. Kogan, Toward a Jurisprudence of Choice of Law: The Priority of Fairness Over Comity, 62 N.Y.U. L. REV. 651, 651-56 (1987) (asserting that American conflict of laws jurisprudence involves balancing both comity and fairness concerns, and suggests a new approach “an approach that makes clear the relative importance of comity and fairness.”). The lasting influence of comity theory in Americans conflicts law reflects the fact that it was founded on comity notions inherited from Huber, via the scholarship of Joseph Story. SCOLES, supra note 135, §2.7, at 18-20. See also Joel R. Paul, The Transformation of International Comity, 71 L. & CONTEMP. PROBS. 19, 20 (2008) (noting inconsistencies in scholarly description of comity). Indeed, the ease with which forum law is overridden by foreign law under “most significant relationship” and other flexible interest analysis choice of law approaches probably underlies much of the irritated criticism of those choice of law methods. But see Allan Erbsen, Horizontal Federalism, 93 MINN. L. REV. 493, 569 (2008) (“A fascinating aspect of horizontal federalism jurisprudence is that comity rules generally do not exist. The Supreme Court cites interstate comity as an ideal, but not as a judicially enforceable mechanism for denying state power in circumstances where capacity exists free from constraint and central control.”).

\textsuperscript{170} See generally Wardle, supra note 162, at 1855-1926 (noting protection of strong local policy interests historically has overridden comity principles in cases involving recognition of controversial domestic relations); David S. Rosettenstein, Comity, Family Finances, Autonomy, and Transnational Legal Regimes, 23 INT’L J.L. POL’Y & FAM. 192, 192-95, 207 (2009) (analyzing use of public policy to override comity in cases involving international divorce and financial incidents; favoring comity except when necessary to protect the forum’s own interests).
is a “true” conflict between the interests of the two sovereigns (state and religion) regarding the marriage regulations that appear to be in conflict. If it can be fairly and accurately determined that the marriage regulation conflict is only a false or “apparent” conflict, the risk of damage to the interests of both church and state would be minimal.

If there is a true conflict, however, the principle of comity should frame the question of whether deference should be given to the marriage regulation of the other sovereign. Traditionally, a lex fori or parochial preference for the policy of the state (forum) would be given, and that still will be a valid and important consideration in any analysis. But forum interests today often give way to the interests of a foreign community, for reasons that have been recognized as important in modern choice of law jurisprudence since the time of Huber, and which historically undergirded policies of deference to rules of local communities under choice-of-law principles from Hellenic times, through the time of the Italian city states, through the time of the Ottoman Empire, to this day. Given the importance of protecting the exercise of religious liberty (for both religious

---

172 Greek cases appear to have applied the law to which the parties had strong connection, such as patriae, or domicile-residence, or language. See SCOLES, supra note 135, §2.2, at 9-10 (describing Greek choice of law cases).
173 See also SCOLES, supra note 135, §2.3, at 10-12 (Italian Statutists distinguished “real” from “personal” laws and applied to questions of personal law the rules of the individual’s home legal system). Earlier, the Roman praetor peregrines had applied a hybrid body of law which included some elements of foreign legal systems in deciding cases among non-Romans. See American Choice of Law at the Dawn of the 21st Century, supra note 141, at 11 (The choice of law “method, which was employed by the Roman praetor peregrinus in adjudicating disputes between Roman and non-Roman subjects, was based on the notion of a constructive blending of the involved laws rather than on a choice from among them. The praetor resolved these disputes by constructing and applying to the case at hand a new substantive rule of decision derived from the laws of both or all involved countries.”).
174 In matters relating to what today we would call personal status, including marriage regulation, Ottoman law under the millet system applied the rules chosen by the individual’s religious community. See Selin Esen & Levent Gonoenç, Religious Information on Identity Cards: A Turkish Debate, 23 J.L. & RELIGION 579, 581-82 (2007-08)

The Ottoman Empire was a multi-religious state; that is, although Islam was the official religion of the Empire, other religions were recognized and protected on the Ottoman lands in accordance with the Millet Sistemi. This system allowed minority religious groups, such as Christians and Jews, to administer their own legal and social affairs in many matters such as marriage, divorce, heritage, religion, and education.

Alain Supiot, Orare / Laborare, 30 COMP. LAB. L. & POL’Y J. 641, 650 (2009) (Ottoman millet system was designed “for coexistence between communities”).
communities and for the state), there should be a clear propensity and willingness of the state to defer in favor of accommodating the marriage rules of religious communities because accommodation generally enhances strong public policies of the state as well as of religious communities.

Borrowing from conflict of laws principles, Professor Dane has recommended a similar approach to religious accommodation by the state. His approach consists of two prongs: determining whether a claim for religious accommodation really involves a religious claim and, if so, whether there is any contrary state interest that should override the presumption of religious accommodation.

The first prong of the proposed procedure is to examine whether a claim to a religion-based exemption was cognizable. This test has three components that, respectively, “define the territories of religious concern, determine whether the claimant has significant connections with one of those territories, and decide whether the source of authority perceived to be sovereign in that territory has an interest in the matter.” Applying that test to a conflict between state and religious marriage regulations, the state authority (court, legislator, etc.) first would examine whether the religious marriage regulation is based upon “a source of authority perceived to transcend both the believer and the state.” Next, the state would examine whether the claimant’s “life context justified his attempt to invoke that authority,” in order to, inter alia, screen out fraudulent claims for religious accommodation based on other motives (such as personal convenience) rather than sincere obedience to divine will. Finally, the third dimension of this prong

---

175 See supra notes 10-20 and accompanying text (describing state and church interests in fostering religious liberty).

176 Note, supra note 158, at 370-75. See also David E. Steinberg, Religious Exemptions as Affirmative Action, 40 EMORY L.J. 77, 78 (1991)

[S]uggest[ing] an analogy between religious exemptions and affirmative action programs designed to benefit racial minorities. The preferential treatment associated with a religious exemption seems to violate the first amendment principle of government neutrality toward religion. However, just as the Court has allowed the use of racial classifications to benefit racial minorities, the Court also should authorize the use of religious exemptions to accommodate members of minority religious groups.

177 Note, supra note 158, at 370.

178 Id.

179 Id. at 371.

An inquiry into the claimant’s life context would . . . include an examination of whether a nexus existed between his particular belief and a general intent to be governed by the religious source of authority. For some religious systems of authority, such an examination could involve an attempt to identify enough overt behaviour [sic] to substantiate the proponent’s claim, without engaging in an impermissible inquiry into the nature of religious orthodoxy.
would “ask whether the specific religious claim fell within the ambit of the religious source of authority,” in order to screen out “claims that were based upon the institutional interests of religious groups rather than upon religious doctrine.”

If the claim for accommodation of a religious marriage regulation passes the first prong and is found to be a \textit{bona fide} religious claim, accommodation still could be denied properly under the “the third-party principle.” That is, in cases in which the state interest in protecting third parties (including the state itself as a third party) is strong and the likelihood of injury to third parties by the accommodation is great. “The principle of third-party injury would arise in cases of direct prejudice to the legal rights of identifiable third parties who were not subject to the religious source of authority.” However, “the existence of a legally prejudiced third party should in some cases be insufficient to deny an exemption [accommodation]. This is most obvious when the injury to the third party is minimal or nominal.” In the case of marriage regulations a third-party injury would apply if accommodation for the religious marriage rule would cause more than minimal or nominal legal or practical prejudice to persons who do not belong to the religion whose marriage rule is being accommodated.

To use concepts familiar to scholars of both family law and conflicts law; if the regulation concerns such matters as formalities (such as whether clergy can perform legal marriages, paperwork that should be filed, reasonable waiting-periods, etc.) it would be highly likely that accommodation of religious communities and their marriage regulations would usually be determined to merit accommodation. In the case of substantive marriage rules, the potential for harm to third parties is greater, and it is not unlikely that some religious marriage regulations would be found not to cause significant harm to third parties and thus justify denial of accommodation of the religious regulation (as in cases of marriages of young boys or girls, polygamy, bride-selling, etc.).

The use of such a systematic and largely objective standard to decide conflicts concerning different marriage regulations of religious communities and the state would reduce the likelihood of seriously divisive conflict between states and religious communities, particularly religious minorities under the authority of the state. It would increase the prospects for mutually beneficial generation of reciprocal loyalties. It avoids unnecessary intrusion upon religious autonomy and reinforces basic principles of human rights. It would reduce the risk of bias and

\footnote{\textit{Id.} at 372.}

\footnote{\textit{Id.} at 373 (“The test of the religious character of a belief would be whether it was perceived to receive its imperative power from the transcendent religious source of authority: only such a status would pose the particular challenge to democratic authority recognized by the competing authorities justification.”).}

\footnote{\textit{Id.} at 373. In a later piece, Professor Dane noted that sexual abuse cases present a clear context in which accommodation almost certainly, and appropriately, be denied. \textit{See} Perry Dane, \textit{Omalous’ Autonomy}, 2004 B.Y.U. L. REV. 1715, 1749 (2004).}

\footnote{Note, \textit{supra} note 158, at 375.}
prejudice tainting or driving decisions about state accommodation or religious communities and their rules concerning marriage.\textsuperscript{184}

IV. CONCLUSION: TOWARD FAIR ACCOMMODATION SOLUTIONS TO CONFLICTS BETWEEN RELIGIOUS COMMUNITIES AND STATES OVER MARRIAGE REGULATION

The proposal made above offers what could be described as a limited deference approach to resolving conflicts between religious communities (and individual members of those communities) and political communities (the State) concerning regulation of marriage. Such an approach accords wide accommodation for the exercise of religious liberty and of individuals’ rights of conscience while protecting basic state interests; the “limited deference” approach.\textsuperscript{185}

\begin{quote}
[A]ccording to limited deference theory, if a group conceives itself to be a religion, or if it conceives of an action or symbol as being religious, the state obligation to respect and protect religion requires that there be a presumption in favor of the claim of that group, action or symbol is religious. . . . [That] carries practical consequences. [That deference by the state should continue] until the presumption of religiousness has been rebutted, or until there is a reasonable likelihood that . . . irreversible or significant harm of types sufficient to override religious freedom will occur . . . .\textsuperscript{186}

Limited deference approaches have particular advantages in terms of basic human rights protection because they “focus attention where it should be focused: not on second-guessing religious judgments, but on assessing whether there are legitimate state factors that justify constraining a particular [concept or practice of religion].”\textsuperscript{187} They focus on the underlying “interests” (to use conflict-of-laws terminology) that are in tension. That is where the analysis should focus, and where the hope for mutual benefit and reduction of conflict lie. Thus, as Professor Michael McConnell has explained, under the principle that all persons owe a prior duty of obedience to their God, before their duty of obedience to the State, the scope of the accommodation of the exercise of religious liberty “is defined in the first instance not by the nature and scope of the laws, but by the nature and scope of religious duty.”\textsuperscript{188}

It is noteworthy that this accommodation approach is consistent with the approach taken by the Hague Conference on Private International Law regarding

\begin{flushleft}
\textsuperscript{184} See generally id. at 376.


\textsuperscript{186} Id. at 70.

\textsuperscript{187} Id. at 83.

\end{flushleft}
inter-country adoption. Under the 1993 Hague Convention on Protection of
Children and Co-operation in Respect of Inter-country Adoption,\textsuperscript{189} generally
known as “the Hague Convention on Inter-country Adoption” it is for each state to
determine and protect its own domestic policies regarding whether to allow
adoption of children by gay or lesbian couples.\textsuperscript{190} There is no universal policy that
is externally set and enforced, but each sovereign is able under the Hague
Convention to assert and protect its own policy regarding that controversial
subject.

Perhaps the deep wisdom of conflict-of-laws jurisprudence can point a way
forward to avoid and resolve conflicts between religious communities and the
state. Such accommodation mutually practiced and reciprocally respected could
strengthen both religious communities and political communities internally and
externally, and lead to stronger nations of more vibrant religions, and to more
virtuous and responsible citizens and communicants.

It is evident that using choice-of-law analysis (interest analysis) to resolve
conflicts between religious communities and states regarding marriage regulations
is context-specific. There is no standard or uniform answer. The outcomes will
vary according to balance of particular state-religion interests, according to the
particular marriage regulation, according to the particular parties and facts, and
according to the particular issue. That may not be entirely satisfying as a matter of
uniformity or ideal in terms of achieving complete predictability or successful in
achieving a system of intellectual simplicity. However, it is may be the most
practical way to accommodate important competing interests of religious
communities and of states in the regulation of marriage.

\textsuperscript{189} Hague Conference on Private International Law, Convention on Protection of
Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M.
\textsuperscript{190} Lynn D. Wardle, \textit{The Hague Convention on Intercountry Adoption and American
Implementing Law: Implications for International Adoptions by Gay and Lesbian Couples
Appendix I

International Legal Status of Same-Sex Marriage and Unions

August 1, 2009

International Status of Same-Sex Marriage/Unions

Allowed:

Same-Sex Marriage Legal in Seven Nations

The Netherlands, Belgium, Canada, Spain, South Africa,# Norway & Sweden**

Same-Sex Unions Equivalent to Marriage Legal in Thirteen Nations (Ten Additional):

- Denmark, Norway,* Sweden,* Iceland, Finland, France, Germany, Luxembourg, Slovenia, South Africa,*# Andorra, Switzerland, UK, New Zealand

Same-Sex Unions Registry & Some Benefits in Seven Nations:

- Argentina, Columbia, Croatia, Czech Republic, Hungary,~ Israel, Portugal

# = South Africa Civil Union law is ambiguous so it is double-counted
* = allow same-sex marriage and marriage-equivalent domestic partnerships
** = recent law may not be in effect yet
~ Recent court decision invalidated part of the law.

International Status of Same-Sex Marriage/Unions

Prohibited:

Thirty-seven (37) of 192 Sovereign Nations (19%) Have Constitutional Provisions Explicitly or Implicitly Defining Marriage As Union of Man and Woman

- Armenia (art. 32), Azerbaijan (art. 34), Belarus (art. 32), Brazil (art. 226), Bulgaria (art. 46), Burkina Faso (art. 23), Cambodia (art. 45), Cameroon (art. 16), China (art. 49), Colombia (art. 42), Cuba (art. 43), Ecuador (art. 33), Eritrea (art. 22), Ethiopia (art. 34), Gambia (art. 27), Honduras (art. 112), Japan (art. 24), Latvia (art. 110 - Dec. 2005), Lithuania (art. 31), Malawi (art. 22), Moldova (art. 48), Montenegro (art. 71), Namibia (art. 14), Namibia (art. 14), Nicaragua (art. 72), Paraguay (arts. 49, 51, 52), Peru (art. 5), Poland (art. 18), Serbia (art. 62), Somalia (art. 2.7), Suriname (art. 35), Swaziland Constitution (art. 27), Tajiksistan (art. 33), Turkmenistan (art. 25), Uganda (art. 31), Ukraine (art. 51), Venezuela (art. 77), Vietnam (art. 64). See also Mongolia (art. 16), Hong Kong Bill of Rights of 1991 (art. 19).
Examples: Article 110 of the Constitution of Latvia now reads: “The State shall protect and support marriage – a union between a man and a woman, . . .” Article 46 of the Constitution of Bulgaria provides: “(1) Matrimony is a free union between a man and a woman. . . .”

Eighty-five (83) Nations have substantive constitutional provisions protecting “marriage”

One hundred forty-five (145) Nations have constitutional provisions protecting “family”

One hundred eighty-five (185) Nations Do Not Allow Same-sex Marriage

One hundred seventy-two (172) Nations Do Not Allow Same-sex Marriage-Like Unions

APPENDIX II

Legal Status of Same-Sex Marriage and Unions in the United States
March 1, 2009

USA- STATUS OF SAME-SEX MARRIAGE/UNIONS ALLOWED:

Same-Sex Marriage Legal: Five (5) USA States + DC:
Massachusetts, Connecticut, Iowa, Vermont, ** New Hampshire** + District of Columbia

Same-Sex Unions Equivalent to Marriage Legal in Five (5) US States:
California, New Jersey, Oregon, Washington,** Nevada**

Same-Sex Unions Registry & Some Benefits in Six (6) US Jurisdictions
Alaska, Colorado, Hawaii, Maryland, Maine, Wisconsin, and District of Columbia

USA- STATUS OF SAME-SEX MARRIAGE/UNIONS PROHIBITED:

Same-Sex Marriage Prohibited by State Constitution Amendment in Thirty (30) States:
(AK, AL, AR, AZ, CA, CO, FL, GA, HI, ID, KY, KS, LA MI, MS, MO, MN, NB, NV, ND, OH, OK, OR, SC, SD, TN, TX, UT, VI, & WI)

Same-Sex Marriage Prohibited by law or appellate court decision in Forty-four States:
(All but MA, CN, IA, VT, NH & NM)
Same-Sex Civil Unions Equivalent to Marriage Prohibited by State Constitution Amendment in Nineteen (19) USA States
(AL, AR, FL, GA, ID, KS, KY, LA, MI, NB, ND, OH, OK, SC, SD, TX, UT, VI, WI)