

**Marriage and Religious Liberty:
Comparative Law and Conflict of Laws Perspectives**

by

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Outline

- I. Introduction: Communities of Loyalty with Conflicting Laws and Jurisdiction*
- II. Conflicts Between Religious Communities and States Over Marriage Regulation*
 - A. The Interests of Religion and State in Regulating Marriage*
 - B. Religion-State Conflicts Over Marriage Regulation in General*
 - C. Recent Religion-State Conflicts Over Same-Sex Marriage*
 - D. Some Ways of Resolving Religion-State Conflicts Over Same-Sex Marriage*
- III. Lessons from Conflict of Laws for Resolving Inter-Sovereign Conflicts*
 - A. Twenty-first Century Conflict of Laws Principles*
 - B. The Relevance of Conflict of Laws for Religion-State Conflicts Over Marriage Regulation*
 - C. Comity, “Ordre Public” “False Conflicts” and the Resolution of other Conflicts of Laws Involving Jurisdictional and Choice of Law Disputes Between Sovereigns*
- IV. Conclusion: Towards Fair Accommodation Solutions to Conflicts Between Religious Communities and States Over Marriage*

- I. Introduction: Communities of Loyalty with Conflicting Laws and Jurisdiction*

The purpose of this paper is to consider how the legal regulation of marriage impacts upon religious liberty, 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 “jurisdictions,” and “choice of laws” involving competing “sovereign” communities.

¹ The helpful research assistance of Lorie Hobbes is gratefully acknowledged.

All human beings have multiple *loyalties* because they belong to multiple communities. Examples of such communities include national communities, regional communities, ethnic or tribal communities, religious communities, professional, vocational, or industrial communities, family communities (both extended and nuclear), etc. Those communities exercise a form of “jurisdiction,” broadly speaking, over the members of the community,² meaning “the power or right to exercise authority” and “the power right, or authority to interpret and apply . . . law.”³ Those communities also have and create rules that the individual members of their communities are expected (by the community) to follow, such as 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, rules of professional responsibility, criminal and civil laws, etc.⁴

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, but the rules of another community prohibit that behavior, there is potential for conflict between those communities. When membership in

²The 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.

³See *Jurisdiction* in Merriam-Webster’s Online Dictionary, at <http://www.merriam-webster.com/dictionary/jurisdiction> (seen 26 May 2009); *Jurisdiction* in Oxford English Dictionary (Online), at http://dictionary.oed.com.proxylaw.byu.edu/cgi/entry/50124816?single=1&query_type=word&queryword=jurisdiction&first=1&max_to_show=10 (seen 26 May 2009) (herein “OEDO”) (“1. [P]ower of declaring and administering law 2. Power or authority in general”; Black’s Law Dictionary 991 (4th ed. rev. 1968) (“The word [jurisdiction] is a term of large and comprehensive import”); Law Encyclopedia: *Jurisdiction* (“generally describes any authority over . . . certain persons.”) available at <http://www.answers.com/topic/jurisdiction> (seen 26 May 2009).

⁴The fact that multiple communities may have overlapping jurisdiction, interests, and similar rules (for example, if both family and religious communities teach honesty) the pressure on the individual(s) to conform to particular rules may increase.

the two communities overlaps, that is, when some individuals belong to *both* communities, it creates a situation of conflicting loyalty and 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 “supremacy in respect of power, domination, or rank; supreme dominion, authority or rule,”⁵ in which there is one decision-maker (individual or collective) who claims to have sovereign “supremacy or rank above, or authority over,” all others.⁶) First, the *State* is a sovereign community claiming external independence and internally supreme authority to govern all people, property and other things within a specific territory. It claims ultimate mortal/temporal authority in a particular area and over the people and controls the government in that area.⁷ Second, *religion* is a sovereign community claiming to be the instrumentality of and community obedient to, Deity, the Eternal Sovereign.⁸ Religion

⁵ *Sovereignty* in OEDO, at http://dictionary.oed.com.proxlaw.byu.edu/cgi/entry/50231796?single=1&query_type=word&queryword=sovereignty&first=1&max_to_show=10 (seen 27 May 2009).

⁶ *Sovereign*, in OEDO, *supra*, at http://dictionary.oed.com.proxlaw.byu.edu/cgi/entry/50231785?query_type=word&queryword=sovereign&first=1&max_to_show=10&sort_type=alpha&result_place=1&search_id=1FLz-rMjC8H-9212&hilite=50231785 (seen 27 May 2009).

⁷ Diane M. Ring, What’s At Stake in the Sovereignty Debate?: International Tax and the Nation-State, 49 *Virginia J. Int’l L.* 155, 160 (2008) (“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 de facto external independence; “not the supremacy of one state over others but the independence of one state from its peers.”). *See also State* in OEDO at [http://www.dogpile.com/dogpile/ws/results/Web/california secretary of state proposition 8/1/417/TopNavigation/Relevance/iq=true/zoom=off/_iceUrlFlag=7?_IceUrl=true](http://www.dogpile.com/dogpile/ws/results/Web/california%20secretary%20of%20state%20proposition%208/1/417/TopNavigation/Relevance/iq=true/zoom=off/_iceUrlFlag=7?_IceUrl=true) (seen 27 May 2009) (“**29. a. the state:** the body politic as organized for supreme civil rule and government; the political organization which is the basis of civil government (either generally and abstractly, or in a particular country); hence, the supreme civil power and government vested in a country or nation.”)

⁸ 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, ed.-in-chief, 2006); *See also* OEDO at

generally is focused on eternal matters,⁹ but also is concerned with mortal behaviors and moral choices that have eternal significance.

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 marriage law and religious law. 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, times of political change, etc.. In nations with vibrant religious diversity, the potential for such conflicts between law and religion is even more pronounced.

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,¹⁰ 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.¹¹ 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 influences the moral life and faith of individuals and families profoundly; marital families are the most common (and

sovereign, supra note __, at B.1. (“Freq[ue]ntly applied to the Deity in relations to created things.”).

⁹ For example, Jesus told Pilate, “My kingdom is not of this world” John 18:36 (KJV).

¹⁰ *See infra, Part ***

¹¹ *See infra, Part ***

effective) unit for perpetuating, and cultivating the faith community and its doctrines, the 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 to conform to, reinforce, and provide a home environment for the fullest living and expression of religious faith is obvious.¹²

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.¹³

Likewise, the state has a great interest in regulating marriage, for similar reasons.¹⁴

Marriage is the most common form of, and the most effective foundation for safe, stable, effective families (which are the basic unit of society), and in recent centuries marriage regulation has become a matter of grave concern to the political state (because marriage formation and 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 every year dealing with the consequences of marital non-formation and marital break-up.¹⁵ Additionally, family (and thus, marriage)

¹² **

¹³ WILLIAM W. BASSETT, W. COLE DURHAM, JR., AND ROBERT T. SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW, vol. 2, at § 10:2 (2008) (hereinafter "RELIGIOUS ORGANIZATIONS").

¹⁴ **

¹⁵ Institute for Marriage and Public Policy, [Georgia State] **

structure and principle has long been believed to be related to government form and principle. For example, after World War II, the Allies compelled the Japanese government to abolish the traditional, patriarchal, extended *Ie* (or “house”) family system because it cultivated gender discrimination, and hierarchical authoritarianism that influenced government both structure and policies.¹⁶

Thus, marriage is one relationship that is of great regulatory interest to, and remains subject to, both legal and religious regulation. Because marriage is of such great 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 involving competing regulations and conflicting sovereign interests relating to marriage.

When the two “sovereigns” seeking to regulate marriage have divergent policies, some conflicts are inevitable; when the policies are incompatible, serious conflict is certain, and sometimes religious liberty or state family law integrity may be impaired. Because inter-sovereign conflicts can be very costly, there are rational incentives to avoid and effectively resolve state-versus-religion conflicts including conflicts over marriage regulation.

Thus, protection of religious liberty is not important only to religious communities. States also have important interests in protecting religious liberty because respect for religious liberty of 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 dictate.”¹⁷

¹⁶ **[Crying Stones, SCAFP records from Diet Library]

¹⁷ James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 1, reprinted in *Everson v. Bd. of Ed.*, 330 U.S. 1, 65-66 (Rutledge, J., dissenting) (emphasis added). See generally Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L.

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 a 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.¹⁸

Madison clearly understood that if individuals are not loyal to themselves, to their conscience, to their God and their moral duty as they see it, it is 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 claims of citizenship, and civic virtue.¹⁹ If you require a person to betray his or 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.²⁰

Rev. 346, 428 (2002).

¹⁸James Madison, *Memorial and Remonstrance*, *supra* note ___, ¶ 1, reprinted in *Everson v. Bd. of Ed.*, 330 U.S. 1, 65-66 (Rutledge, J., dissenting) (emphasis added). *Id.* at ¶ 1 (“This *right* is in its nature an *unalienable right*.”) (emphasis added).

¹⁹[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.

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1512 (1990).

²⁰Jefferson agreed. He famously explained: “The rights of conscience we never submitted, we could not submit. We are answerable for them to our God.” Thomas Jefferson, Notes on Virginia, in *The Life and Selected Writings of Thomas Jefferson*, 275 (Adrienne Koch & William Peden eds., 1944), cited in Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. Pa. L. Rev. 149, 164 n. 58 (1991).

Thus, it is not surprising that Constitutional provisions in the national constitutions of many (___) nations identify religious liberty as a constitutional value (though the extent to which that value is legally protected or enforced varies widely). Likewise, protection of marriage is a powerful state interest. As Appendix I shows, and more than 43% of national constitutions (83 of 192 sovereign nations) contain provisions protecting marriage (and over 75% of national constitutions contain provisions protecting families, which primarily are founded upon marriage). So from the internal perspective of the state, conflicts between religious liberty and marriage regulation create an internal tension in addition to the external inter-institutional conflict dimension. Thus, for a state conflicts between marriage regulation and religious liberties can be doubly divisive, both internally and externally discordant.

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.”²¹ Recognition of the separate jurisdiction of, and submission to the legitimate laws of, civil authority is a common religious doctrine.²² So conflicts between religions and the state about marriage regulation also creates some internal cognitive dissonance for religious communities, 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 arise between religious communities and the state over marriage regulations.

However, the incentives to avoid or resolve conflict between religious communities and the state over marriage regulation may be offset or neutralized if there are other communities

²¹ Matt. 22:17-21; Luke 20:21-25.

²² See generally Paul Heinrich Neuhaus, Ze’ev W. Falk, Sir Norman Anderson, J. Ducan M. Derrett, TIK. Krushnamurthy Iyer, & Raymond Verdier, *The Family in Religious and Customary Laws*, Ch. 11 in vol. IV Int’l Encyclopedia of Comparative Law (Persons and Family) §§ 15-18, at pp. 8-9 (2008).

within the state that wish to harm, reduce the influence, power, or prestige of the religious community embroiled in the marriage regulation controversy, or if there are factions within a religious community that see the potential for advantage (such as increase in power) if the conflict over marriage erupts or continues. For example, gay activist communities may promote state marriage policies that create conflict with particular religious communities not only in disregard of religious liberty but also perhaps in order to reduce the influence of a particular religious community (or of religions in general) because those communities are deemed enemies of gays or gay activists.

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.²³ “Different societies and different ages have varied greatly in their approaches to marriage,”²⁴ and that variety continues. The nations fall into two general categories regarding balance between state-and-religion 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.”²⁵ 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 in Saudi Arabia); and (3) nations where

²³ Mary Ann Glendon, *Introduction: Family Law in a Time of Turbulence*, in vol. IV Int'l Encyclopedia of Comparative Law (Persons and Family) § 23, at 18 (2008).

²⁴ Peter Hay, *The American “Covenant Marriage” in the Conflict of Laws*, in *SEX, MARRIAGE AND FAMILY IN WORLD RELIGIONS* 294, 295 (Don S. Browning, M. Christian Green & John Witte, Jr., eds. 2006).

²⁵ *Id.* at p. 19.

state judges apply various bodies of religious laws (such as India).²⁶ Many of the nations where only religious marriage is allowed are Islamic nations, but that is the situation in Israel, also.²⁷

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.”²⁸ This group of nations is generally considered the most secular, and includes most of the nations of Europe and of north and south America.

Additionally, there are many nations in between the two polar models, such as Turkey, Tunisia, and which have abolished polygamy and adopted some “floor” or baseline of civil marriage law. ²⁹ ‘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 authority Mary Ann Glendon. ³⁰ 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.³¹ Legal pluralism in marriage law exists in many countries of Africa,

²⁶ *Id.* at p. 19. Dagmar Coester-Waltjen & Michael Coester, *Formation of Marriage*, ch. 3 in vol. IV Int’l Encyclopedia of Comparative Law (Persons and Family) § 3-127, at 79 (2008).

²⁷ 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 least partially in some jurisdictions.” *Id.* 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.” *Id.*

²⁸ *Id.* at p. 18 (emphasis added).

²⁹ *Id.* § 24, at p. 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, 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.” *Id.* at p. 20. In Malaysia, the power of Islamic courts has increased in recent years. *Id.*

³⁰ *Id.* at p. 19.

³¹ Dagmar Coester-Waltjen & Michael Coester, *Formation of Marriage*, ch. 3 in vol. IV Int’l Encyclopedia of Comparative Law (Persons and Family) § 3-120, at 76 (2008) (In Cyprus, if both of the persons to be married are members of the Greek Orthodox church, “they have to

especially, where state civil marriage, customary marriage, or sometimes Islamic or Hindu marriage regimes, can apply in a given case.³²

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 illustrates this point. In many European nations, marriages solemnized by priests, ministers, rabbis and other clergy have no legal effect; in most of these nations, parties may celebrate their marriage religiously before or after the civil ordinance or registration is performed 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 mayor of a town or another authorized officer of the civil status registry. 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.”³³ The civil-only-marriage model has been followed in many other countries of Europe, including Austria, Switzerland,³⁴ The Netherlands,³⁵ and Germany (until 2009),³⁶ as well as in Turkey, etc..

marry in religious form,” but interfaith marriages and marriages of persons of other faiths either civil or religious ceremonies are permitted.).

³² *Id.* §§ 25-26, at p. 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, four types of marriages are recognized: civil (Christian), Islamic, Hindu, and Customary. In Nigeria, . . . statutory marriages, Islamic marriages, and Customary marriages are recognized” *Id.* at p. 22.

³³ Dagmar Coester-Waltjen & Michael Coester, *Formation of Marriage*, ch. 3 in vol. IV Int’l Encyclopedia of Comparative Law (Persons and Family) § 3-117, at 74 (2008).

³⁴ *Id.* § 118, at p. 75.

³⁵ See generally *Marriage Laws – Netherlands*, at Helpline.com, <http://www.helplinelaw.com/law/netherlands/marriage/marriage.php>, (seen 1 June 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.”).

³⁶ *Id.* § 118, at p. 75. *Germany to allow Church weddings without civil ceremony*, in *The Local Germany’s News in English*, available at

In contrast to much of Europe, in the United States of America (where the regulation of family relations is within the primary authority of the states, not of the national government), priests, ministers, and rabbis are competent as officers of the state to celebrate marriage. . . . [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.³⁷

Thus, clergy in America may perform marriages that are given full legal effect by the states not only for the members of their own churches, but for anyone who requests them to do so, and they also may “decline to marry anyone they choose without need of civil justification.”³⁸ 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.³⁹ (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.)⁴⁰

http://marriage.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=marriage&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 (seen 1 June 2009); *id.* (“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 & Bob Stritof, *German Marriage License Information – How to Get Marriage in Germany*, at About.com: Marriage, <http://marriage.about.com/od/germany/p/germany.htm>, (seen 1 June 2009).

³⁷ RELIGIOUS ORGANIZATIONS, *supra* note __, at § 10:3.

³⁸ *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.”) *Id.* Many other countries outside of the United States allow clergy to solemnize marriages that have full legal validity and effects. *See, e.g.*, http://travel.state.gov/law/citizenship/citizenship_757.html (Philippines) (seen 1 June 2009).

³⁹ Coester, *supra* note __, at § 126, at pp. 78-79.

⁴⁰ RELIGIOUS ORGANIZATIONS, *supra* note __, at § 10:3. Perhaps because the consequences of divorce typically involve determination of financial matters (of property, alimony, and child

In Japan, marriage historically was a matter of family alliance (feudal in some respects) but since the Meiji reforms of the nineteenth century, marriage has been primarily a matter of civil regulation.⁴¹ Likewise, since the communist revolution in China, marriage has been regulated exclusively by civil authority.⁴²

In some states with strong 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.⁴³ Thus, in Israel and many other states in this region today, “the formation of marriage is left to religious regulation”⁴⁴ However, while only religious marriage is allowed in Israel, secular marriages validly contracted in other jurisdictions are recognized in Israel.⁴⁵

On the other hand, in some countries with a dominant religious community, both civil authorities and clergy of that 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.⁴⁶ In Portugal, only Catholics are exempted from compulsory civil marriage.⁴⁷ In England and Sweden, marriages performed by civil authorities and the clergy of the former state religion are automatically legal; clergy of other

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.

⁴¹ Coester, *supra* note __, at §128, at 80; ** .

⁴² *See generally* ** .

⁴³ Dagmar Coester-Waltjen & Michael Coester, *Formation of Marriage*, ch. 3 in vol. IV Int’l Encyclopedia of Comparative Law (Persons and Family) § 3-119, at 76 (2008).

⁴⁴ Dagmar Coester-Waltjen & Michael Coester, *Formation of Marriage*, ch. 3 in vol. IV Int’l Encyclopedia of Comparative Law (Persons and Family) § 3-119, at 76 (2008).

⁴⁵ *Id.*

⁴⁶ U.S. Department of State, http://travel.state.gov/law/citizenship/citizenship_754.html, (seen 1 June 2009).

⁴⁷ Coester, *supra* note __, at §122, at 77.

religions denominations may also solemnize marriages but special permit or registration by the religion is required.⁴⁸

Thus, in many nations legal systems, the parties may choose between a civil or a religious marriage.⁴⁹ 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 marriages 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”⁵⁰

C. *Recent Religion-State Conflicts Over Same-Sex Marriage*

The recent movement to legalize same-sex marriage is very controversial and divides not only nations from one another, but some religious communities from their national legal communities.⁵¹ As Appendix I shows, of the 192 sovereign nations recognized by the United Nations,⁵² only seven nations (3.6 percent of all nations) allow same-sex marriage; three of those nations plus ten additional nations (another 5.2 percent) provide legal benefits to same-sex couples that are largely equivalent to legal benefits provided to married couples; while another seven nations provide some limited benefits to same-sex couples (another 3.6 percent). In

⁴⁸ Coester, *supra* note __, at §122, at 77. *See generally* *Marriage in Sweden*, at Helpline.com, <http://www.helplinelaw.com/law/sweden/marriage/marriage.php>, (seen 1 June 2009); Home Office Identity & Passport Service (UK), *Marriages*, <http://www.gro.gov.uk/gro/content/marriages/>, (seen 1 June 2009).

⁴⁹ Dagmar Coester-Waltjen & Michael Coester, *Formation of Marriage*, ch. 3 in vol. IV Int’l Encyclopedia of Comparative Law (Persons and Family) § 3-121, at 77-77 (2008). (Spain and Greece have joined this list recently. *Id.* *See also* Inger Dubeck, *Marriage in Denmark in Marriage and Religion in Europe 199, 202-203* (1991) (in Denmark, parties may choose to have religious or civil marriages).

⁵⁰ *Id.*

⁵¹ RELIGIOUS ORGANIZATIONS, *supra* note __, at § 10:4 (the issue of same-sex marriage “strikes deep controversy within the churches”).

⁵² United Nations Member States, available at <http://www.un.org/members/growth.shtml> (last seen February 7, 2009) (Montenegro, admitted to the U.N. in 2006, is the latest member state).

summary, less than thirteen percent of the sovereign nations in the world give any significant marital benefits or status to same-sex couples, and not quite nine percent (9%) of all sovereign nations give same-sex couples marital or marriage-equivalent legal status (mostly in post-modern western European nations and a few of their former colonies). On the other hand, thirty-seven nations—nineteen percent (19%) of 192 sovereign nations recognized by the United Nations—have constitutional provisions that define marriage as a conjugal union of a man and a woman,⁵³ (and thirty-six of those thirty-seven national constitutions have been adopted since 1970).⁵⁴ (By contrast, the language of *no* national constitution expressly protects or explicitly requires same-sex marriage.)⁵⁵ Additionally, same-sex marriage is prohibited by statute, case law, or legal custom in many other nations that do not explicitly forbid same-sex marriage in their constitutions.⁵⁶ “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

⁵³ See Constitutions of 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); Columbia (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);* Lithuania (art. 31); Malawi (art. 22); Moldova (art. 48); Montenegro (art. 58); 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 (art. 27); Tajikistan (art. 33); Turkmenistan (art. 25); Uganda (art. 31); Ukraine (art. 51); Venezuela (art. 77); Vietnam (art. 64).

⁵⁴ The other nation with a constitutional provision limiting marriage to male-female couples is Japan, whose Constitution was adopted in 1947.

⁵⁵ However, by creative judicial interpretation of equality provisions, not marriage provisions, courts in Canada and South Africa have distilled a requirement for legal recognition of same-sex marriage. See *Harrison v. Canada*, [2005] 290 N.B.R.2d 70 (Can.); *Fourie v. Minister of Foreign Affairs 2005*, <http://41.208.61.234/uhtbin/cgiisirs/20090220192838/SIRSI/0/520/S-CCT60-04> (S. Afr.).

⁵⁶ See generally Wardle, *A Response*, *supra* note 15, at 443-46; see also App II. In the United States, as of June 1, five states (10%) allow same-sex marriage, six (12%) allow marriage-equivalent Civil Unions, and four 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 App. II.

woman. . . .”⁵⁷ So there is wide diversity about marriage laws around the world, but 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 barred *constitutionally* in about one-fifth of the nations of the world).

There also is growing diversity about the morality of same-sex marriage in religions. Globally, rejection of the practice is the prevailing religious norm overall, globally. In the Islamic world, homosexuality is highly offensive,⁵⁸ and same-sex marriage and other homosexual family relations are allowed in none of the nearly sixty Muslim nations.⁵⁹ Acceptance of gay or lesbian families in the Muslim world is highly unlikely in the foreseeable future.⁶⁰ Most of the major branches and adherents of the three main “Abrahamic” faiths –

⁵⁷ Mary Ann Glendon, *Introduction: Family Law in a Time of Turbulence*, in vol. IV Int’l Encyclopedia of Comparative Law (Persons and Family) at 11. § 15 (2008) (citing *Rees v. United Kingdom* of 17 Oct. 1986 (Eu Ct. Hu. Rts.), Arrêts/Judgments Series A vol 106; *Cossey Case* of 27 Sept. 1990 (Eu Ct. Hu. Rts), Arrêts/Judgments Series A vol. 184). *See also id.* (“In a decision of 2001, invoking the margin of appreciation which allows each country to take local context and sentiments into consideration, the Court held that to deny a homosexual the right to adopt did not violate the anti-discrimination provisions of the ECHR, even if the refusal was expressly based on the applicant’s homosexuality,” citing *Frette v. France* of 26 Feb. 2002 (Eu Ct. Hu. Rts), Reports/Recueil 2002-I p. 345). *See further* MARRIAGE AND QUASI-MARITAL RELATIONSHIPS IN CENTRAL AND EASTERN EUROPE (Lynn D. Wardle & A. Scott Loveless, eds., BYU Academic Publishing, 2008) (most nations of central and eastern Europe do not allow same-sex marriage or marriage-equivalent civil unions).

⁵⁸ *See* Sodomy Laws, Laws Around the World, <http://www.sodomylaws.org/world/world.htm> (last visited Mar. 28, 2007) (listing more than seventy nations where sodomy is illegal and nine nations where it is punishable by death); Jeffrey A. Redding, *Human Rights and Homo-sexuals: The International Politics of Sexuality, Religion, and Law*, 4 NW. U. J. INT’L HUM. RTS. 436, 484–87 (2006); Robert F. Worth, *Gay Muslims Face a Growing Challenge Reconciling Their Two Identities*, N.Y. TIMES, Jan. 13, 2002, at 30 (“In most Islamic societies, homosexual behavior is a crime, punishable in some cases by death.”).

⁵⁹ 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 (seen 1 June 2009) (“the definition of marriage” entails “a man and a woman” becoming a family.)

⁶⁰ *See* Sarah A. Rumage, *Resisting the West: The Clinton Administration’s Promotion of Abortion at the 1994 Cairo Conference and Strength of the Islamic Response*, 27 CAL. W. INT’L L.J. 1, 44–46 (1996).

Judaism, Christianity, and Islam -- reject same-sex marriage as contrary to God's will,⁶¹ as even advocates of same-sex marriage acknowledge.⁶² Most mainstream and conservative Christian communities reject same-sex marriage, as do Orthodox Jewish congregations, but a minority of religious traditions now "recognize same-sex unions" as marriages or quasi-marital relationships.⁶³ A survey in the Spring of 2008 by the respected Pew Forum on Religion & Public Life of major religions in America found that of sixteen major religious traditions that were surveyed, nine oppose same-sex marriage, two support same-sex marriage, and six have no

⁶¹ Helen Alvare, *The Moral Reasoning of Family Law: The Case of Same-Sex Marriage*, 38 Loyola U. Chi. L. Rev. 349, 349-355 (2006) (Abrahamic faiths have different moral reasoning about abortion than others in the debate); Iain T. Benson, *The Freedom of Conscience and Religion in Canada: Challenges and Opportunities*, 21 Emory Int'l L. Rev. 111, 141 (2007) ("the "Interfaith Coalition on Marriage," composed of the national associations of Hindus, Sikhs, Muslims, Evangelical Protestants, and Catholics, applied for and received intervener status in the three provinces where these cases [seeking to legalize same-sex marriages] were originally launched."); *id.* at n. 140 ("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.") *~ Add cites to LDS

⁶² See also Justin T. Wilson, Note, *Preservationism, of the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 Dule J. Gender L. & Pol'y 561, 565 (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 111-112 (same-sex marriage controversy is "not purely a matter of politics or constitutional law, but of religions 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 reasons . . . [and] transformative religious experience.").

⁶³ Mark Strasser, *Marriage, Free Exercise, and the Constitution*, 26 Law and Inequality 59 (2008); Jamal Green, *Divorcing Marriage from Procreation*, 114 Yale L.J. 1989, 1995 (2005); *citing* William N. Eskridge, Jr., *The Case for Same-Sex Marriage* 193 app. (1996) .

official position and their congregations are split.⁶⁴ Studies in the United States have linked religiosity with opposition to same-sex marriage (regardless of religious tradition) and non-religiosity with support for same-sex marriage, so religion seems to be a critical divide on the issue.⁶⁵

At one level, the conflicts are between different religious 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 American and Canada.⁶⁶ My own religious faith group,

⁶⁴ The Pew Forum on Religions & Public Life, Issues, *Religious Groups' Official Positions on Same-Sex Marriage*, (April 2008, revised May 20, 2008), at <http://pewforum.org/docs/?DocID=291> (seen 1 June 2009):

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.

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.

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.

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.

⁶⁵ Melissa Durant, Note, *From Political Question to Human Rights: The Global Debate on Same-Sex Marriage and Its Implications for U.S. Law*, 5 Reg. J. Int'l L. 269, 297 (2007); ** [news reports of studies linking religiosity and family issues – Top6 Duke Bartlett cite].

⁶⁶ See, e.g., Iain T. Benson, *The Freedom of Conscience and Religion in Canada: Challenges and Opportunities*, 21 Emory Int'l L. Rev. 111, 141 (2007) (“the “Interfaith Coalition on Marriage,” composed of the national associations of Hindus, Sikhs, Muslims, Evangelical Protestants, and

the Church of Jesus Christ of Latter-day Saints, sometimes called “Mormons,” helped to form religious coalitions that were instrumental in supporting the passage of marriage amendments prohibiting same-sex marriage in several western states. Most recently in California Mormons in a coalition with Roman Catholic and many Evangelical Protestant faiths were very active in the successful grass-roots campaign to ban same-sex marriage in the most progressive state in the nation.⁶⁷

Attacks directed against persons of faith, religious groups, and clergy have been increasing in countries with same-sex marriage or civil unions are legal. 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.⁶⁸ The Rt. 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

Catholics, applied for and received intervenor status in the three provinces where these cases [seeking to legalize same-sex marriages] were originally launched.”); *id.* at n. 140 (“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.”)

⁶⁷ * * [Get CAL stories]

⁶⁸ See generally, Helen Alvarez, *The Moral Reasoning of Family Law: The Case of Same-Sex Marriage*, 38 Loyola U. Chi. L. Rev. 349, 371 n. 174 (2006) citing *Islam and Homosexuals*, Letter, Times (UK), Jan. 14, 2006, Features, at 22, available at 2006 WLNR 785164 (investigating comments on homosexuality made by Secretary General of Muslim Council of Britain; 22 Muslim groups expressed concerns); See generally, *UK Bishops fight for right to criticize homosexual lifestyle*, available at <http://www.ccfon.org/view.php?id=745> (seen 1 June 2009).

could change with the help of professional therapy.⁶⁹ 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.⁷⁰ In another case, the UK government fined an Anglican bishop who refused to hire an actively and openly gay youth minister.⁷¹ 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 to not hire or to fire church employees (other than clergy) for engaging sexual practices that violate core church doctrines about sexual morality.⁷²

Public employees with religious principles opposed to same-sex marriage have been in particular difficulties. For example, in Massachusetts, after same-sex marriage was legalized and local justices were told that they would have a legal duty to perform same-sex marriages, without any religious accommodation for them, many of them resigned. Similarly, in California, during the four months during which same-sex marriages were legalized, one County Clerk (in San Diego) attempted to make accommodation for deputy county clerks who did not wish to issue licenses to gay and lesbian couples to marry, but there were so many applications for such

⁶⁹ See generally, *UK Bishops fight for right to criticize homosexual lifestyle*, available at <http://www.ccfon.org/view.php?id=745> (seen 1 June 2009).

⁷⁰ See generally Maggie Gallagher, *Redefining Religious Liberty, Gay marriage and the conflict between church and state*, at National Review Online, <http://article.nationalreview.com/?q=MDQwMGU5ZjgwNmFiODcxZDgyNTAxYjVmYzY2ZjViOTY=> (seen 27 May 2009)(also in Top6News).

⁷¹ *Id.*

⁷² Matthew Moore, *Law will force churches to employ gay staff*, London Telegraph, 20 May 2009, available at <http://www.telegraph.co.uk/news/newstopics/religion/5357247/Law-will-force-churches-to-employ-gay-staff.html> (seen 29 May 2009) (government minister says compulsion). See also Helen Alvare, *supra*, *The Moral Reasoning* 38 Loyola U. Chi. L. Rev. at 371 n. 174, citing Chris Traber, *Gay Marriage Debate Over? Another Legal Battle Looming, Clergy Say*, *The Liberal*, June 30, 2005, at 1, available at 2005 WLNR 10884008 (homosexual rights groups in England acknowledge that suits to take away the status of religious groups as registered charities are “a logical next step”).

accommodation that the plan had to be scrapped. In the United Kingdom Registrars are under particular pressure.

[T]he 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 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.⁷³

In Sweden Pentacostal Pastor Ake Green in Sweden 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

⁷³ *Civil Unions vs. Marriage: The European Experience*, (25 Feb. 2009) <http://mirrorofjustice.blogs.com/mirrorofjustice/2009/02/civil-unions-vs-marriage-the-european-experience.html> (seen 1 June 2009).

right to quote from the traditional version.⁷⁴ Many similar cases have been reported in Canada and England.⁷⁵ 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.⁷⁶

Church-affiliated schools are especially vulnerable. For example, in British Columbia, Canada, the 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 behavior as immoral, and the provincial supreme court affirmed.⁷⁷

Use of the force of law to curtail the faith-based activities of individuals of faith are too numerous to list. Just a few examples illustrate. In 2006 an evangelical Christian campaigner was arrested and charged with “using threatening, abusive or insulting words” because he attempted to peacefully distribute handbills that quoted Bible passages condemning homosexuality.⁷⁸ 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

⁷⁴ The Becket Fund, Sweden--Criminalizing Religious Speech--Ake Green, <http://www.becketfund.org/index.php/case/93.html> (last visited Apr. 15, 2008).

⁷⁵ A. Scott Loveless, *Children on the Front Lines of an Ideological War*, 22 St. Louis. Univ. Pub. L. Rev. 371, 391 n.63 (2003).

⁷⁶ Liam Reid, Legal Warning to Church on Gay Stance, Irish Times, Aug. 2, 2003, available at <http://www.ireland.com/newspaper/frontpage/2003/0802/1059775167952f.html>.

⁷⁷ Trinity W. Univ. v. College of Teachers, [2001] S.C.R. 223.

⁷⁸ *Id.*

expression.⁷⁹ In Canada, the Knights of Columbus was held liable and forced to pay damages by the British Columbia Human Rights Commission after it cancelled (very politely, promptly) rental of its hall for a marriage celebration, when it learned that it was for a lesbian wedding.⁸⁰ In New Mexico, an Christian couple in the marriage photography business were charged before a human rights tribunal, found guilty of violating the law, and forced to pay thousands of dollars in attorneys fees because they decline on grounds of religious principle to photograph a civil commitment ceremony of a lesbian couple.⁸¹ After California voters passed a constitution amendment banning same-sex marriage, Mormons were singled out and widely blamed by gay activists for the passage of the amendment (“Proposition 8”), resulting in a spate of violent attacks on selected Mormons, their churches, their homes, and even their jobs, and in numerous vindictive legal complaints by gay and lesbian activists attempting to invoke government sanctions designed to punish and “pay back” that religious community for its prominent role in overturning the court ruling that had legalized same-sex marriage.⁸²

III. Lessons from Conflict of Laws for Resolving Inter-Sovereign Conflicts

A. Twenty-first Century Conflict of Laws Principles

The deep and rich body of jurisprudence known as “conflict of laws” has wrestled for many centuries with how to resolve conflicts between competing legal sovereigns concerning the exercise of adjudicatory jurisdiction, what rules of law should apply to disputes effecting multiple sovereigns, and respect by one sovereign for the judgments of different sovereigns.

⁷⁹ North Coast Clinic __ P.3d __ (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.

⁸⁰ * [NDLRev]

⁸¹ * [NDLRev]

⁸² * * [Get CAL stories]

Because conflicts between religious communities and state communities involving conceptually a conflict between competing “sovereigns” asserting competing claims to loyalty, jurisdiction and conduction-regulating authority, it is not unreasonable to examine whether conflict of laws jurisprudence might provide some useful insights as to how to resolve religion-state conflicts regarding marriage regulation.

In ordinary legal cases between private parties (or public entities in some ordinary commercial and other contexts), disputes over which state sovereign will exercise authority over individuals to interpret and administer the law are called “jurisdictional” disputes.⁸³ Disputes over which law will be applied to decide a particular contested issue are called “choice of law” issues.⁸⁴ Both jurisdictional and choice of law disputes are considered to be matters of “conflict of laws” (also sometimes called “private international law”).⁸⁵

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. 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 (including its policies) or each sovereign underlying the respective laws to determine whether application of those laws would further the interests those laws are

⁸³ See EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS, & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 1-4 (4th ed. 2004) (herein “Scoles”); LYNN D. WARDLE, W. SHERMAN ROGERS, AND L. LYNN HOGUE, INTERSTATE AND INTERNATIONAL CONFLICTS OF LAWS Ch. 2 (2000) (manuscript) (herein “WRH”).

⁸⁴ Scoles, *supra* note __ at 5-37. See also WRH at ch. 2.

⁸⁵ *Id.* A third branch of conflict of laws is judgment recognition and enforcement. While that has some analogous relevance (as when a religious body or state court has rendered a decision, thereby escalating the institutional integrity interests of that “sovereign,”) for simplicity and length limitations this paper focuses on jurisdiction and choice of law.

intended to foster.⁸⁶ 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. However, if more than one 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 the law of the forum – *lex fori*-- or the law of the place where the injury occurred – *lex loci delicti* – or the law of the place of contracting – *lex contractus* – or the law of the place of celebration of a marriage – *lex celebrationis* – or the law of the parties’ – *lex patriae* – or the law of the parties domicile -- *lex domicilii*, etc.).⁸⁷ 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*.⁸⁸

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 American Law Institute.⁸⁹ 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

⁸⁶ Scoles, *supra* note __ at 5-37. *See also* WRH at ch. 2.

⁸⁷ American Law Institute, Restatement, 2d, Conflict of Laws §§ 6, 123-423 (1971). *See generally* Scoles, *supra* note __ at 5-37. *See also* WRH at ch. 2.

⁸⁸ Lennart Palsson, Ch. 16, Marriage and Divorce, in Vol. 111, Private International Law , in Int’l. Encyclo. Compar. L. §§ 19-20 (1978).

⁸⁹ American Law Institute, Restatement, 2d, Conflict of Laws §§ 6, 123-423 (1971).

certainty, predictability, and uniformity, etc.⁹⁰ 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”⁹¹ 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..⁹² Thus, in different balance, similar 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 Conflict of Laws for Religion-State Conflicts Over Marriage Regulation

Nearly twenty years ago, legal scholar Perry Dane 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.⁹³ 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

⁹⁰ *Id.* at §6.

⁹¹ *Id.* at §§6(2), 145, 188.

⁹² See generally THE AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW, THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 421-423441-470 (1986)

⁹³ Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 *Cardozo L. Rev.* 959, 970-73 (1991); Perry Dane, Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 *Yale L.J.* 350, 365-73 (1980).

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.⁹⁴

That 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. 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 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.”

95

C. *Comity, “Ordre Public” “False Conflicts” and the Resolution of other Conflicts of Laws Involving Jurisdictional and 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, the encourage people to do what is right because it is a duty (and not wait to be compelled by police in all cases). That interest extends to matters of marriage regulation. Religious communities have an interest in protecting religious liberty for

⁹⁴ *Id.* at 367.

⁹⁵ *Id.* at 366-67.

their integrity, as well. Since both the State and the interested religious community have an interest in protecting religious liberty in marriage regulation, to accommodate religious liberty in marriage regulation disputes will further the interests of both “sovereigns” and there is a “false conflict” or “apparent conflict” that should not bar accommodation of religious liberty in such disputes. Likewise, it 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.

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. Second, if a foreign sovereign has an interest, some degree of deference or “comity” initially is assumed – that if minimum requirements are met, the continued validity or recognition of the rights, interests or relationships established by the other sovereign will be respected by other sovereigns. Third, however, under the *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.⁹⁶

⁹⁶ See generally Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-jurisdictional Recognition of Controversial Domestic Relations*, 2008 B.Y.U. L. Rev. 1855-1926.

Borrowing from conflict of laws principles, Professor Dane recommended a similar three-step approach to religious accommodation.

The first step of the proposed procedure would be to examine whether a claim to a religion-based exemption was cognizable. The 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.

. . . .

If a religious system of authority were involved, the test would next consider whether the claimant's life context justified his attempt to invoke that authority. One element of this inquiry would involve the screening of fraudulent claims,

. . . . 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 to substantiate the proponent's claim, without engaging in an impermissible inquiry into the nature of religious orthodoxy.

Finally, the test would ask whether the specific religious claim fell within the ambit of the religious source of authority. 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.⁹⁷

[*ADD analysis applying conflicts approach to SSM & marriage creation issues.]

IV. *Conclusion: Toward Fair Accommodation Solutions to Conflicts Between Religious Communities and States Over Marriage*

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 that accords wide accommodation for the exercise of religious liberty and of individuals rights of conscience while protecting basic state interests is the “limited deference” approach.⁹⁸

[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 occur⁹⁹

⁹⁷ Dane, *supra* note __, at 370-72.

⁹⁸ Cole Durham, Jr. & Elizabeth A. Sewell, *Definition of Religion* in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES 3, 33-70, 81-83 (James A. Seritella, ed.-in-chief, 2006).

⁹⁹ *Id.* at 70.

This limited deference approach has particular advantages in terms of basic human rights protection because it “focuses 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].”¹⁰⁰

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.”¹⁰¹

It is noteworthy that this accommodation approach is consistent with the approach taken by the Hague Conference on Private International Law regarding intercountry adoption. Under the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption,¹⁰² generally known as “the Hague Convention on Intercountry 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.¹⁰³ 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 can point a way forward to avoid and resolve conflicts between religious communities and the state. Such mutual accommodation

¹⁰⁰ *Id.* at 83.

¹⁰¹ Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1512 (1990).

¹⁰² Hague Conference on Private International Law, Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption, available at http://www.hcch.net./index_en.php?act=conventions.text&cid=69 (last seen March 1, 2007), reprinted in 32 I.L.M. 1134 (1993).

¹⁰³ Lynn D. Wardle, *The Hague Convention on Intercountry Adoption and American Implementing Law: Implications for International Adoptions by Gay and Lesbian Couples and Partners*, 18 Ind. Int’l & Comp. L. Rev. 113, 113-52 (2008).

mutually practiced and reciprocally respected could strengthen both faith and political communities internally and externally and lead to stronger nations of more vibrant religions, and more virtuous and responsible citizens.

Using interest analysis to resolve conflicts between religious communities and states is context-specific. There is no standard or uniform answer; the outcomes will vary according to balance of particular state-religion interests and according to the particular issue. That may not be simple or satisfying entirely as a matter of uniformity or complete predictability or intellectual simplicity. But it is may be the most practical way to accommodate important competing interests of communities of faith and of state in the regulation of marriage.

Appendix I

International Legal Status of Same-Sex Marriage and Unions

1 June 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), Columbia (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 (ark. 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

1 June 2009

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

Same-Sex Marriage Legal: Five (5) USA States:

Massachusetts, Connecticut, Iowa, Vermont,** and Maine**

Same-Sex Unions Equivalent to Marriage Legal in Six (6) US States:

California, New Hampshire, New Jersey, Oregon, Washington**, Nevada**

Same-Sex Unions Registry & Some Benefits in Four (4) US Jurisdictions

Hawaii, Alaska, Maryland, 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, ME & 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)