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ACCOMMODATING EMPIRE: COMPARING FRENCH AND AMERICAN PATHS TO THE LEGALIZATION OF GAY MARRIAGE [DRAFT]

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I

Dating back to the revolutionary era, France and the United States have vied, sometimes directly, in a longstanding contest for leadership status in the area of human rights. Where gay marriage is concerned, however, it would be more accurate to describe both nations as followers rather than leaders. In late April 2013, about twelve years after the Netherlands became the world's first nation to legalize same-sex marriage,¹ and on the heels of large and passionate protests by social conservatives, France became the fourteenth such country, eliminating the Civil Code's gender-specific language barring equal marriage.² Not to be outdone, the

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1. *Dutch Legislators Approve Full Marriage Rights for Gays*, N.Y. TIMES (Sept. 13, 2000), <http://www.nytimes.com/2000/09/13/world/dutch-legislators-approve-full-marriage-rights-for-gays.html?scp=2&sq=Norway+Gay+Marriages&st=nyt>.

2. See Steven Erlanger, *Hollande Signs French Gay Marriage Law*, N.Y. TIMES (May 18, 2013), <http://www.nytimes.com/2013/05/19/world/europe/hollande-signs-french-gay-marriage->

United States, acting through judicial rather than legislative channels, followed suit in June 2013 with *United States v. Windsor*, striking down the Federal Defense of Marriage Act (“DOMA”).³

It is difficult to tell whether this state of affairs reflects a fraying of the Atlantic revolutionary tradition or is, instead, the very measure of that tradition’s influence. Comparisons between France and the United States in this area of the law are, moreover, complicated to draw for several reasons.⁴ For one, the American human rights tradition has always drawn on state and local in addition to federal energy, and where gay marriage has progressed in the United States, it has been due largely to initiatives at these subnational levels. Second, while it is true that, as of this writing in mid-February 2015, the United States guarantees no national “right to gay marriage,” the American status quo is especially fluid at the moment.

On January 16, 2015, the Supreme Court agreed to decide whether a state must allow same-sex couples to marry.⁵ It is possible to read Justice Kennedy’s opinion in *Windsor*, particularly the portion that discusses the federalist commitment of marriage law to the states,⁶ as leaving room for him to uphold state bans on same-sex marriage.⁷ But the many references to dignity, respect, equality, and liberty in that opinion suggest a different commitment, one more in keeping with the precedents earlier handed down by the authors of *Lawrence v. Texas*,⁸ *Romer v. Evans*,⁹ and other landmark due process and gay rights cases. Moreover, the precedent set by *Loving v. Virginia* (striking down a state ban on interracial marriage),¹⁰ combined

law.html?_r=0.

3. *United States v. Windsor*, 133 S. Ct. 2675, 2680 (2013).

4. For an illuminating, early comparison of the French and American debates over same-sex marriage, see generally Eric Fassin, *Same Sex, Different Politics: “Gay Marriage” Debates in France and the United States*, 13 PUB. CULTURE 215 (2001).

5. Adam Liptak, *Supreme Court to Decide Marriage Rights for Gay Couples Nationwide*, N.Y. TIMES (Jan. 16, 2015), <http://www.nytimes.com/2015/01/17/us/supreme-court-to-decide-whether-gays-nationwide-can-marry.html?ref=topic>.

6. *Windsor*, 133 S. Ct. at 2692–93.

7. By contrast, I think Justice Scalia has the better of the argument with Chief Justice Roberts’ separate dissenting opinion, when Justice Scalia says that the awfully abrupt and awkward final line of Justice Kennedy’s opinion—“This opinion and its holding are confined to those [preexisting] lawful [same-sex] marriages,” *id.* at 2696,—portends little about how Justice Kennedy will come down on the state law issue. *Id.* at 2709 (Scalia, J., dissenting). For Chief Justice Roberts’s take, see *id.* at 2696–97 (Roberts, C.J., dissenting).

8. *Lawrence v. Texas*, 539 U.S. 558 (2003).

9. *Romer v. Evans*, 517 U.S. 620 (1996).

10. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

with the Lesbian, Gay, Bisexual, and Transgender (“LGBT”) movement’s increasingly successful framing of sexual orientation discrimination as a variation on race discrimination, justify a certain optimism about the direction in which we are headed.

When nationwide gay marriage comes to the United States, the French and American paths will have converged to this extent. As in the revolutionary era, the institution of republican marriage will have served the role of making full citizens out of previously disenfranchised persons, with all of the advantages and disadvantages that come from relying on marriage to perform this essential function.¹¹ In the meantime, we are faced with some clear differences in the two nations’ traditions of separation of powers, judicial review, federalism, and equality. Such differences help to explain why France and the United States have followed (and continue to follow) different institutional, procedural, and doctrinal paths to the common end of legalization. A subordination of judicial to legislative power in France dating back to the late eighteenth century, for example, helps to account for why the French Constitutional Council declined an opportunity in 2010 to mandate marriage equality as a matter of constitutional law. And an American federalist tradition with roots in the chartered colonial companies of the seventeenth century¹² helps us to understand why the states (especially, but not exclusively, Massachusetts¹³) rather than federal authorities have been the drivers of change in America.

This essay relates a different story at work, one that can help us to navigate a large and complex task of comparative legal analysis while gesturing at both the differences and the similarities. It is a story that speaks powerfully to the relationship between religious accommodation and antidiscrimination law that is the theme of this symposium. But it does so not from the vantage point of the familiar legal doctrines just mentioned or of other, less specifically legal factors, such as the mobilization of

11. Cf. JANET POLASKY, *REVOLUTIONS WITHOUT BORDERS: THE CALL TO LIBERTY IN THE ATLANTIC WORLD* 231 (2014) (“French revolutionaries assigned republican marriage the task of transforming French citizens.”). On the disadvantages of relying on marriage as a vehicle for the liberation of the LGBT community, see Katherine M. Franke, *Marriage is a Mixed Blessing*, N.Y. TIMES (June 23, 2011), <http://www.nytimes.com/2011/06/24/opinion/24franke.html>.

12. JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* 9–10 (2011); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 163–64 (1996); Philip J. Stern, *Trading Companies*, in *THE PRINCETON COMPANION TO ATLANTIC HISTORY* 452–455 (Joseph C. Miller, 3d., 2015).

13. Kathleen Burge, *SJC: Gay Marriage Legal in Mass.: Court Gives the State Six Months to Comply With Ruling*, BOS. GLOBE (Nov. 18, 2003), http://www.boston.com/news/local/massachusetts/articles/2003/11/18/sjc_gay_marriage_legal_in_mass

LGBT communities in postwar France and America. Instead of due process, equality, fundamental rights, or LGBT mobilization, the history at issue is one of decolonization, immigration, and religious pluralism, above all Christian-Muslim pluralism. Although both France and the United States are nations of immigrants, only in France has the very close nexus between empire and the migration of peoples left a distinctive, explicit, and little-noticed mark on the contemporary law of gay marriage. Understanding that history invites us to decenter, for a moment, the existing narratives about marriage equality and its intersection with constitutionalism.

Mark Mazower has suggested that French debates in 2013 over the legalization of same-sex marriage were part and parcel of a longer “struggle to come to terms with [France’s] dwindling global stature.”¹⁴ The observation rings true, but what exactly is the connection between the two phenomena? Focusing on the recognition of same-sex marriages between nationals and foreigners in the United States and France, this essay looks beneath the postcolonial veil covering gay marriage to consider what the histories of empire, religion, and immigration have to do with it. Under the *Windsor* decision and its implementation by the U.S. Department of Homeland Security, the American federal government now appears to be committed to equal treatment of heterosexual and same-sex marriages between American and foreign nationals.¹⁵ By contrast, the National Assembly’s 2013 reform of the French Civil Code introduced a curiously anachronistic set of conflict of laws provisions that seems to hearken back unmistakably to the French colonial experience.¹⁶ The provisions in question tie a person’s eligibility for marriage to her “personal law,” and then qualify that apparent limitation by permitting French law to override foreign law in the case of a marriage between French and non-French nationals.¹⁷ While same-sex marriage is the context, the provisions are worded entirely in the abstract. A subsequent circular from the Ministry of

14. Mark Mazower, *France’s Struggle is Against Much More Than Gay Marriage*, FIN. TIMES (May 29, 2013, 4:39 PM), <http://www.ft.com/cms/s/0/2d964a70-c7a3-11e2-9c52-00144feab7de.html>.

15. See Press Release, U.S. Dep’t of Homeland Sec., Statement by Secretary of Homeland Security Janet Napolitano on the Supreme Court Ruling on the Defense of Marriage Act, (June 26, 2013), available at <http://www.dhs.gov/news/2013/06/26/statement-secretary-homeland-security-janet-napolitano-supreme-court-ruling-defense> (“[W]e will implement today’s decision so that all married couples will be treated equally and fairly in the administration of our immigration laws.”).

16. These and nearly all other French legal texts referenced in this article can be accessed via <http://www.legifrance.gouv.fr>.

17. See *infra* Part II.

Justice, however, makes clear that France's treaty commitments with its former North African and Indochinese territories, among other nations, bar French nationals and the citizens of these once colonized territories from qualifying for same-sex marriage in France.¹⁸

I consider three contexts for this state of affairs, each raising a related challenge to the definition and jurisdiction of the nation-state: empire, immigration, and religion. The intersection between these contexts highlights just how much is obscured by purely moral, doctrinal, or institutional comparisons of the French and American paths to marriage equality, including a comparison that would emphasize the role of French *laïcité* (which we can imperfectly translate as “secularism”). For what the postcolonial vantage point reveals is a kind of religious exemption at work in what amounts to a recognition of the lingering (either Catholic or Muslim) sacramental content of marriage itself, whether straight or gay.

I conclude with a set of observations about the new American same-sex marriage regime in light of the French comparison. The notion of religious exemptions from civil laws is a very American thing and will become even more so now that *Burwell v. Hobby Lobby Stores, Inc.* is decided.¹⁹ On the other hand, the absence of a *national* matrimonial regime means, by definition, that American same-sex marriage law has no parallel to the French conflicts rules. American law seems to presume, at least in the aftermath of *Windsor*, that immigrants to the United States will be able to partake of the benefits of American law irrespective of the former colonial relationships in which their nations of origin happen to be entangled. That presumption, in turn, can itself be seen as an act of a specifically American imperial legal imagination. It is a vision of empire unencumbered by the particular territorial commitments, fractures, and anxieties that seem to animate the French regime. But it is an imperial vision nonetheless, and it has broad implications for our current battles over gay marriage and immigration reform. On the one hand, the American vision of empire allows both national and state governments to create different kinds of foreigners in law. Consistent with this tradition, the key remaining fronts in the ongoing battle over the legalization of same-sex marriage involve the borders—some geographical and external, others legal

18. MINISTERE DE LA JUSTICE, BULL: NOR: JUSC1312445C, CIRCULAIRE DU 29 MAI 2013 DE PRÉSENTATION DE LA LOI OUVRANT LE MARIAGE AUX COUPLES DE PERSONNES DE MEME SEXE (DISPOSITIONS DU CODE CIVIL), *4–5 [hereinafter CIRCULAR OF MAY 29, 2013].

19. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (holding that closely-held corporations cannot be required to provide contraceptive coverage if the corporations' owners have religious objections to the contraception).

and internal—between state and federal authority. On the other hand, there are signs that LGBT activism and the struggle for same-sex marriage have helped inspire a powerful movement for recognition of the rights of illegal aliens that may lead in the direction of progressive immigration reform in America.

II

For advocates of the same-sex marriage movement, the French method of legalizing same-sex marriage has an appealing simplicity and totality to it. The key change was to Article 143 of the Civil Code, first promulgated under Napoleon in 1804 as the culmination of the revolutionary-era movements to codify the civil laws of France. The new article, adopted by the National Assembly on May 17, 2013, reads as follows: “Marriage is contracted by two persons of different or the same sex.”²⁰ End of story. Contrast that concise provision with the current legal status of American same-sex marriage (as of mid-February 2015): available in thirty-six states and the District of Columbia, prohibited in fourteen states, and no federal rule yet on the constitutionality of a state ban on gay marriage.²¹ This is to say nothing of the various jurisdictional problems stemming from that lack of uniformity, such as the status of a couple married in a state that permits gay marriage but residing in a state that does not. *Windsor* removed these jurisdictional quandaries at the level of federal recognition of same-sex marriages, but they remain at the level at which they are most conspicuous: the state level, where geographical residency (and therefore state and local fiscal rules, among others) takes on concrete meaning. State control over marriage law has a very long history in the United States, as Justice Kennedy ponderously (and not quite convincingly) explains in *Windsor*.²² That control gives the federal authorities a limited, but still important, role in supervising whether state rules of admission to the covenant of marriage comport with national legal norms.

20. CODE CIVIL [C.CIV] art. 143. (Fr.).

21. Erik Eckholm, *Court Upholds Marriage Ban in Four States*, N.Y. TIMES (Nov. 6, 2014), <http://www.nytimes.com/2014/11/07/us/appeals-court-upholds-same-sex-marriage-ban.html?ref=us>.

Depending on the outcome of a contest between state and federal judges in Alabama that is still unfolding as of this writing, the number of permissive states may soon be thirty-seven. See Richard Fausset, *Fresh Challenge to Gay Marriage Increases Confusion in Alabama*, N.Y. TIMES (Feb. 18, 2015), <http://www.nytimes.com/2015/02/19/us/fresh-challenge-to-gay-marriage-increases-confusion-in-alabama.html?hp&action=click&pgtype=Homepage&module=photo-spot-region®ion=top-news&WT.nav=top-news>.

22. See *United States v. Windsor*, 133 S. Ct. 2675, 2689–93 (2013).

Supervision of this kind is also, in a sense, what the new French conflicts rules are about: determining in what circumstances the French national government should or should not override the restrictions on gay marriage that foreign governments may seek to impose on their citizens. But France is not the only former European imperial power to legalize same-sex marriage, and there is nothing inevitable about the particular rules it has adopted to govern marriages between citizens and immigrants. Belgium, for example, which legalized gay marriage in 2003,²³ requires only that one of the spouses be a Belgian citizen or a resident of Belgium for at least three months.²⁴

The French solution to this shared dilemma (if that is what it is) was twofold. First, the National Assembly introduced what was, for purposes of marriage law, a novel provision concerning the so-called *conditions de fond* (substantive conditions) of marriage, that is, the rules, unrelated to sexual orientation, that govern eligibility for marriage generally: “The requisite qualities and conditions for being able to contract marriage are regulated, for each spouse, by his personal law.”²⁵ Nothing could be more foreign to the French revolutionary concept of a civil code. That concept was predicated in significant measure on the idea that, in areas such as family law and private contractual relations that came indisputably under the rubric of the initial 1804 Code, the many person-specific rules, exemptions, and privileges of Old Regime law were supposed to fade away. In the words of one French revolutionary deputy, the Code was a compilation in which, “without distinction of classes or persons, the law addressed itself to all.”²⁶ Under the Napoleonic government, for example, Jews were “emancipated” on condition that they abandon their distinctive rituals. In the language of the time, anything else would risk continuation of their status as “a ‘nation within a nation,’ a ‘state within a state.’”²⁷

At once profoundly retrogressive and radically innovative in terms of this comparison between pre- and postrevolutionary French law, the new rule defining the substantive conditions of marriage sounds abstract

23. Gareth Harding, *Belgium Legalizes Gay Marriage*, UPI (Jan. 31, 2003), http://www.upi.com/Business_News/Security-Industry/2003/01/31/Belgium-legalizes-gay-marriage/UPI-46741044012415.

24. *Getting Married*, PORTAL BELGIUM.BE, http://www.belgium.be/en/family/becoming_a_belgian_citizen_by_marriage (last visited Jan. 10, 2015).

25. CODE CIVIL [C. CIV.] art. 202-1 (Fr.).

26. JEAN-LOUIS HALPÉRIN, *L'IMPOSSIBLE CODE CIVIL 277* (1992).

27. ARNOLD M. EISEN, *RETHINKING MODERN JUDAISM: RITUAL, COMMANDMENT, COMMUNITY* 39-40 (1998).

enough. But it is accompanied by a companion provision, also new to the Civil Code, that makes clear same-sex marriage is the modus operandi of the entire scheme: however, “[t]wo persons of the same sex may contract marriage when, for at least one of them, their personal law or the law of the State in which they have their domicile or residence permits it.”²⁸

A very curious combination of provisions this is. One way of trying to make sense of them is to ask, quite simply, to whom these provisions are meant to apply. It turns out that the answer to this question is not so simple. The requirement that at least one partner in a same-sex marriage have a “domicile or residence” in France has the effect of denying *sans papiers* (“illegal” immigrants or aliens) the benefits of a legally recognized gay marriage. That seems true enough at the level of statutory law, though French case law holds otherwise, on the grounds that marriage is a “fundamental right.”²⁹ It is also apparent that Article 202-1 seeks to protect the right of French nationals to enter into same-sex marriages with the citizens of countries that prohibit same-sex marriage. Such couples who live abroad, in the prohibitive country, have the option of seeking to formalize their French marriage before French diplomatic and consular authorities in that country. Where that is not possible, the Civil Code permits these couples to have their marriage formalized by civil authorities in the French national’s hometown in France.³⁰

But what about same-sex couples of mixed nationality residing in France? As of May 29, 2013, such couples have been divided into two camps: those where one of the partners is the national of a country with which France has a bilateral treaty implicating marriage, and all others. In a circular of that date, the Ministry of Justice announced that the legalization of same-sex marriage “cannot however apply for the *ressortissants* of countries to which France is tied by bilateral agreements that envision that personal law defines the substantive conditions of marriage.”³¹ Because of the superiority of international treaty law over domestic statutory law, the treaties prohibit the French government from “discarding” the personal law of the “*ressortissants*” of such countries.³²

28. CODE CIVIL [C. CIV.] art. 202-1 (Fr.).

29. For a recent order discussing marriage as a fundamental freedom, see CE, July 9, 2014, Rec. Lebon 382145.

30. CODE CIVIL [C. CIV.] art. 171-9 (Fr). This provision was also added by the May 17, 2013 legislation legalizing same-sex marriage in France.

31. CIRCULAR OF MAY 29, 2013, *supra* note 18, at *4.

32. *Id.*

Dominated by the vocabulary of international private law, the circular fits into a long history of French efforts at the transnational regulation of sexuality that scholars such as Judith Surkis have uncovered.³³ The range of regulatory issues raised by such efforts is perhaps greater than meets the eye and begins at the level of definition. Who is a “ressortissant,” for example? The answer seems to overlap largely with nationality, but what about dual nationals (of which there are many)? Or persons who are in the process of acquiring French or other nationality on grounds other than marriage? Does the (foreign) personal law of these individuals get “discarded” also? And what exactly does it mean to “discard” someone’s “personal law”? For that matter, what exactly is the category of “personal law” supposed to mean if it does not mean the law of the nation of which one is a citizen—in which case why distinguish between the collective (national) and the individual (personal)?³⁴

III

These questions are best handled inductively, reasoning upwards from the specific treaties in question. But their significance can be appreciated, in the first instance, by another contrast with the American situation. *Windsor* and its aftermath are best compared not to the 2013 reforms of the French Civil Code—by that standard the United States still lags behind—but to the Ministry of Justice circular of May 29, 2013 clarifying the scope of same-sex marriage in today’s globalized France. It is true that the Supreme Court struck down only section three of DOMA, which had excluded same-sex partners from the definition of “spouse” as that term is used in federal statutes.³⁵ Section two, which relieves states of the obligation to recognize one another’s same-sex marriages, remains good law, though it has been challenged since *Windsor*.³⁶ We still lack clarity, in other words, about how American law, state and federal, will handle the

33. See Judith Surkis, *Sex, Sovereignty, and Transnational Intimacies*, 115 AM. HIST. REV. 1089, 1096 (2010) (“Transnational histories, alongside postcolonial ones, provide one powerful way to unsettle the reified conceptions of national sexual cultures on which contemporary political discussions, most notably regarding Islam and immigration, so often insist.”); Judith Surkis, *Hymenal Politics: Marriage, Secularism, and French Sovereignty*, 22 PUB. CULTURE 531, 551–54 (2010) [hereinafter *Hymenal Politics*] (discussing scholarship that focuses on challenges posed on French legal and social norms by transnational marriages).

34. 1 DOMINIQUE BUREAU & HORATIA MUIR WATT, *DROIT INTERNATIONAL PRIVE* 17–20 (2007). For an introduction to the doctrines and rules of private international law from a French perspective, see *id.* at 17–67.

35. *United States v. Windsor*, 133 S. Ct. 2675, 2694–96 (2013).

36. *Id.* at 2682–83. Section two of DOMA has been successfully challenged in at least one federal court thus far. William Baude, *Interstate Recognition of Same-Sex Marriage after Windsor*, 8 N.Y.U. J.L. & LIBERTY 150, 151, 158–60 (2013).

full range of interstate comity and conflict of laws issues related to same-sex marriage. Although limited to same-sex marriages validly contracted in states that already permit it, the Court's invalidation of section three has nonetheless produced a major new area of uniformity into the law of gay marriage, one that contrasts sharply with the particularistic treatment of mixed couples in France.

Within hours of the *Windsor* decision, the Obama Administration implemented its reform of federal immigration policy to comply with Justice Kennedy's opinion. Deportation proceedings, already suspended, were now vacated in the federal courts, and the way was cleared for the same-sex partners of American citizens to apply for permanent resident status. (It should be remembered that this progress has come only after a decades-long history, ending as recently as the 1980s, during which federal immigration law was interpreted to exclude homosexuals from entering the country on the grounds that they suffered from a "psychopathic personality.")³⁷ Using the unusual method of e-mail, the U.S. Citizenship and Immigration Services began notifying the attorneys of mixed nationality, same-sex couples that their clients' visa applications had been approved. All of a sudden, the barriers that sexual orientation discrimination had long posed to the lives of mixed nationality, same-sex couples in the United States were lifted.³⁸

Notice what has not happened in the aftermath of *Windsor*: the Department of State has not issued an advisory warning Americans that certain of their same-sex marriages may not be valid in light of U.S. international legal commitments. Given the lack of a national law of marriage, once DOMA's section three was suspended, the federal government's role with respect to foreigners and immigrants was confined to the entry process itself.³⁹ It is theoretically possible that American

37. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 15, 24–25, 34 (2013).

38. Julia Preston, *For Gay Immigrants, Marriage Ruling Brings Relief and a Path to a Green Card*, N.Y. TIMES (June 27, 2013), http://www.nytimes.com/2013/06/28/us/politics/for-gay-immigrants-marriage-ruling-brings-relief-and-a-path-to-a-green-card.html?_r=0; Julia Preston, *Gay Married Man in Florida is Approved for Green Card*, N.Y. TIMES (June 30, 2013), <http://www.nytimes.com/2013/07/01/us/gay-married-man-in-florida-is-approved-for-green-card.html>.

39. This said, there is one respect in which American law at the intersection of gay marriage, immigration, and foreign status seems more restrictive than French law. Immigrants to the United States who get married overseas in a country where gay marriage is banned are not eligible for the federal benefits that would otherwise flow from *Windsor*. In certain circumstances, French law permits such consular marriages to be ratified (and thus recognized) in France.

nationals tend not to enter into same-sex relationships with the nationals of countries that prohibit gay marriage, or that they do so at a far lower rate than the citizens of France. Even if so, the absence of international private law obstacles to mixed nationality, same-sex marriages in the United States seems to involve a less hypothetical, more historical explanation: in France, the histories of immigration and empire have intersected to a far greater extent than elsewhere.

IV

Let us now consider the specific treaties at issue in the Ministry of Justice circular of May 29, 2013. A good part of the answer to the interpretive questions raised by these treaties lies simply in the identity of the counterparties themselves. The circular lists the countries at issue in a seemingly random order, the effect of which is to obscure the politics and the history behind the current availability of same-sex marriage in France.⁴⁰ The countries in question (followed by the year of their treaty agreements with France) are the former French North African colony and protectorates of Algeria (1962), Tunisia (1957), and Morocco (1981), the former French Indochinese territories of Cambodia and Laos (1953), the former Yugoslav republics (Bosnia-Herzegovina, Montenegro, Serbia, Kosovo, and Slovenia) (1971), and Poland (1967). The treaties do not implicate the entirety of the former French empire. Vietnam, for example, is absent from the Indochinese category, and the former French colonial presence in India, Senegal, and Madagascar has managed not to leave its trace where the law of marriage is concerned. But the seemingly arbitrary nature of this list is compounded by an even more conspicuous absence: the list excludes any nation that prohibits same-sex marriage (or even criminalizes same-sex conduct) but happens not to have a bilateral treaty with France on the law of persons. The May 29, 2013 circular requires that the ressortissants of these countries—the circular provides a list ranging from Afghanistan at one end of the alphabet to Togo and Tunisia at the other—be warned at their town hall marriage ceremony that their marriage may not be recognized abroad.⁴¹ But the nationals of these countries, which include former French territories such as Maurice, Senegal, and Syria, can still proceed to marry a same-sex French citizen in France.

It is not, therefore, strictly speaking true that the prohibitive treaties align along postimperial lines. Moreover, neither Poland nor the former

40. CIRCULAR OF MAY 29, 2013, *supra* note 18, at *4–5.

41. *Id.* at *6. See also Groupe d'information et de soutien des immigrées (GISTI), *Le mariage des étrangers*, CAHIERS JURIDIQUE, April 2014, at 7.

Yugoslav republics are former colonies of France, yet they are included in the list of countries whose ressortissants may not qualify for French same-sex marriage. But if the immigration-empire nexus does not provide an altogether tidy explanation, it is also hard to dismiss. Consider a more textual way of categorizing the treaties. As a matter of legal intent and (arguably) effect, they fall into two categories, which I will label symmetrical and asymmetrical. The first category comprises those treaties that prohibit discarding the national (and therefore “personal”) law of ressortissants of either of the signatory countries—France or the foreign nation. The asymmetrical category comprises those treaties that specifically and exclusively guarantee the application of *French* law to *French* nationals living (extraterritorially, as it were) in the other country. The question arises, which treaties (with which nations) fall into each category?

Answer: the asymmetrical treaties are all agreements with former French territories. (For this reason, among others, the asymmetrical treaties harken back to the so-called capitulations treaties of the nineteenth-century European empires in North Africa, which aimed to protect Christian subjects from judgment at the hands of Islamic legal systems.)⁴² The symmetrical treaties, by contrast, involve the miscellaneous others: Poland, the former Yugoslav republics, and Morocco—the only former French territory that has a symmetrical accord with Paris.⁴³ “Miscellaneous,” however, is not quite the right word for this latter group, for the symmetrical treaties all involve nations that have seen larger numbers of citizens emigrate to France. This is true of Poles beginning in the 1830s and, with renewed force, after the First World War.⁴⁵ And it is

42. MARY DEWHURST LEWIS, *DIVIDED RULE: SOVEREIGNTY AND EMPIRE IN FRENCH TUNISIA, 1881–1938*, at 31 (2014).

43. Morocco formally became a French protectorate in 1912 with the signing of the Fez Convention. France gradually extended its control over the territory during the 1920s and held it until 1956, when Morocco achieved its independence. EUGENE ROGAN, *THE ARABS: A HISTORY* 135, 296; (2009); ALBERT HOURANI, *A HISTORY OF THE ARAB PEOPLES* 322 (1991). Morocco’s inclusion in the terms of the 2013 circular has a clear post-colonial dimension. But, as Judith Surkis has explained to me, the symmetrical character of Morocco’s treaty with France should be understood in relation to the 1975 passage of “no fault” divorce in France and ensuing conflict of law questions in custody disputes. Similar bilateral conventions were signed with Egypt and Tunisia. Surkis is currently working on the history of the 1981 French-Moroccan treaty. Facebook message from Judith Surkis, Assoc. Professor, Rutgers Univ., to author (Feb. 20, 2015) (on file with author).

45. See Janine Ponty, *La France, destination privilégiée des migrations venues des territoires de la Pologne aux XIX^e et XX^e siècles*, in *POLONIA: DES POLONAIS EN FRANCE DE 1830 A NOS JOURS* 7, 7–9 (Janine Ponty ed., 2011).

true also of the former Yugoslavia, which saw larger numbers of workers immigrate to France between the 1890s and the 1960s.⁴⁶ Again, empire and migration are far from mutually exclusive phenomena. The difference is that the asymmetrical treaties, historically speaking, all addressed the reverse situation: not the emigration of foreigners to France, but of French nationals to the colonies (and, albeit to a lesser extent, the post-colonies).

It was one of the great anxieties of decolonization that the “loss” of French sovereignty would occasion conflicts of law in a host of subject areas, from criminal justice to family law to the disciplining of French military forces. This anxiety provided the context and rationale for the asymmetrical treaties. In the 1950s, the France empire in Indochina (part of the “French Union” that comprised Cambodia, Laos, and Vietnam in addition to France’s other colonies) began to give way to an increasingly significant American presence in Vietnam, one great power replacing another in an area of the world that would prove so critical to postwar American history. The formal transfer of French sovereignty to royal authorities in the three Indochinese states was effectuated in a set of agreements dating to 1953. The French-Cambodia agreement is illustrative. On August 29, 1953, the French high commissioner for Cambodia wrote to the Cambodian prime minister requesting him to “specify how the Royal Government intends to resolve the conflicts of law that will arise before Cambodian national jurisdictions following the transfer of judicial competence to the Royal Government as well as problems related to the personal status of litigants emanating [*ressortissant*] from the French Union.”⁴⁷ (The use of the term “French Union” here signifies that the *ressortissants* in question could hail from any part of the French empire and not just the metropole.)

The Cambodian prime minister responded the same day with a letter assuring the French authorities that Cambodia “intends to apply the rules of private international law to resolve the conflicts of laws that might arise

46. GERARD NOIRIEL, *THE FRENCH MELTING POT: IMMIGRATION, CITIZENSHIP, AND NATIONAL IDENTITY* 102–03, 140 (Geoffroy de Laforcade trans., 1996). For a study of conflicts over the rights of immigrant workers in post-WWI France, see generally MARY DEWHURST LEWIS, *THE BOUNDARIES OF THE REPUBLIC: MIGRANT RIGHTS AND THE LIMITS OF UNIVERSALISM IN FRANCE, 1918-1940* (2007).

47. Loi 59-593 du 22 avril 1959 portant publication des accords entre la France et le Cambodge des 29 août et 9 septembre 1953, des accords entre in France et le Viet-Nam des 16 septembre 1954 et 10 août 1955, de l'accord entre la France et le Laos du 22 octobre 1953 [Law 59-593 of April 22, 1959 adopting the declaration of agreements between France and Cambodia of August 29 and September 9, 1953, and the agreements between France and Vietnam of September 16, 1954 and August 10, 1955, and the agreement between France and Laos of October 22, 1953], *JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.]*[OFFICIAL GAZETTE OF FRANCE], May 3, 1959, p.4758.

before Cambodian jurisdictions. The personal status of ressortissants of the French Union will be determined, following the rules of international private law, by their national law.”⁴⁸

Missing from this diplomatic and legal language are the passions and struggles of the Indochinese decolonization movement, which the Americans would soon inherit from their French counterparts. Not so easy to overlook are the upheavals that led to and coincided with French decolonization in Algeria. After a long and extremely violent war that involved distressingly frequent recourse to torture and terrorism on both sides, representatives of the French government and the Algerian National Liberation Front (“FLN”) met in Évian-les-Bains, in the southeastern Alps region of France. There, they concluded a ninety-three-page set of highly detailed agreements that would lead, following an April 1962 referendum in which only the citizens of mainland France participated, to President Charles de Gaulle’s recognition of Algerian independence in July.⁴⁹ Many of the provisions of the Evian Accords, not surprisingly, spoke to the same anxieties about postcolonial conflicts of laws that animated the French Indochinese agreements. There was one critical difference, however, and it involved an issue deeply rooted in the complexities of French colonialism in North Africa: religion.

Indeed, the history of France’s empire in the Maghreb reveals the extremely close connection between the concept of “personal law,” on the one hand, and relations between the Abrahamic religions of Christianity, Islam, and Judaism, on the other. The maintenance of distinct legal regimes and jurisdictions for adherents of each respective faith was, in a sense, the very warp and woof of French colonialism.⁵⁰ That history is a complicated one and lies beyond the scope of this essay, but the broad contours of the story can be briefly sketched. On the one hand, Algeria was, from 1848 onwards, a “department” of France and thus akin to a domestic territory,

48. *Id.* Given the reference to the “French Union” in this passage, the phrase “national law” should be understood to mean French law for ressortissants emanating from the metropole and (presumably) local law for persons hailing from other parts of the French empire.

49. *Echange de lettres et déclarations adoptées le 19 mars 1962 à l’issue des pourparlers d’Evian, constituant un accord entre la France et l’Algérie* [Exchange of Letters and Declarations Adopted on 19 March 1962 at the Close of the Evian Talks, Constituting an Agreement between France and Algeria], Mar. 19, 1962, Fr.-Alg., 1964 RECUEIL DES TRAITÉS, No. 7395 [hereinafter *Evian Accords*].

50. An important exception was that, under the Crémieux decree of 1870, the “indigenous Israelites” (Jews) of French Algeria were declared to be French citizens. TODD SHEPARD, *THE INVENTION OF DECOLONIZATION: THE ALGERIAN WAR AND THE REMAKING OF FRANCE* xiii (2006).

and a Senatus-Consulte of July 1865 deemed the “indigenous [male] Muslims” of Algeria to be French subjects eligible to become French citizens only if they renounced their allegiance to Islamic personal law.⁵¹ But the administration of day-to-day legal life in the French North African colonies was structured around mutually exclusive jurisdictions specific to the faith of a given subject: thus, French tribunals for French (Christian) subjects, Jewish law for the Jewish community (until the 1870 Crémieux decree, and if not protected as French subjects in places like Tunisia and Morocco), and Muslim courts for the Arab and Berber Muslim population.⁵²

Mary Lewis has shown how, in the case of neighboring Tunisia—conquered by French military forces in 1881 on the grounds that the Ottoman ruler of Tunis was failing to suppress the incursions of rogue tribes across the Algerian-Tunisian border⁵³—the lines between these categories were frequently crossed and manipulated.⁵⁴ From the 1880s to the 1930s, Muslim subjects of the Ottoman bey of Tunis actively sought fiscal and other advantages for themselves by switching between “European,” (Muslim/Jewish) “Algerian,” or (Muslim/Jewish) “Tunisian” personal legal status.⁵⁵ The lines between different religious categories were indeed fixed in French colonial and international private law, but in practice the persons subject to those categories managed to manipulate them in response to the ebbs and flows of European (French, Italian, and British) and indigenous competition for control over both territory and, especially, the costs and benefits of imperial administration.⁵⁶ By the time of the maturation of the independence movement in postwar Tunisia, however, that ability to play off of the rigid boundaries of the colonial law of persons came to an end.⁵⁷ In colonial Algeria, by comparison, it is doubtful whether that ability ever existed in the first place, such was the rigidity of the boundaries separating the Abrahamic faith communities from

51. *Id.* at 31–35. The Senatus-Consulte effectively drew a distinction between nationality and citizen: the Muslim Algerian would become a French national, but not a citizen so long as he continued to follow Muslim law. Only by renouncing Muslim law would he be admitted to the rights of a French citizen. For at least a few years following the 1865 Senatus-Consulte, until the Crémieux decree of 1870, the same distinction between nationality and citizenship was also drawn with respect to Algerian Jews.

52. *See, e.g.,* LEWIS, *supra* note 42, at 37 (describing the “dual justice system”). For a detailed study of the Muslim law courts in French Algeria, see generally ALLAN CHRISTELOW, *MUSLIM LAW COURTS AND THE FRENCH COLONIAL STATE IN ALGERIA* (1985).

53. *See* LEWIS, *supra* note 42, at 1.

54. *Id.* at 28–31.

55. *Id.* at 1–13.

56. *Id.*

57. *Id.* at 165–77.

one another.

The culmination of these trajectories is reflected in the 1957 treaty with Tunisia and the Evian Accords. Tunisia, which achieved independence from France in 1956, agreed in a 1958 judicial accord that “in matters of personal status . . . persons of French nationality are [to be] governed by their national law.”⁵⁸ At Evian, similarly, the FLN agreed that “personal status, including the inheritance regime, of French ressortissants will be governed by French law.”⁵⁹ (The very next provision of the so-called Declaration of Guarantees provided that Algerian law would eventually determine what “civil and political rights” would apply to French nationals remaining on Algerian territory following independence.)⁶⁰

V

In contrast to these agreements, as we have seen, the symmetrical treaties involve “protections” for both French and non-French nationals—“protection” being used in quotation marks because the very notion that one needs to be shielded from the national law of another nation is itself a highly fraught concept that is difficult to untangle from the colonial histories involved. And therein lies one of the difficulties with the May 29, 2013 circular: it treats as timeless and neutral legal principles a set of provisions that may well differ radically as between their original intent or effect and their contemporary application and meaning.⁶¹ Note, first of all, that the agreements in question all predate the emergence of legalized same-sex marriage in Europe and elsewhere. The very notion of using these decolonization agreements as mechanisms for regulating “postmodern” conflicts of law involving gay marriage is therefore questionable.

A related difficulty is that the empire/migration distinction that seems to have produced the two categories of treaties at issue—asymmetrical and symmetrical—has long since broken down. Since the 1960s, indeed to some extent already during the colonial period, the migration flows have

58. Loi 58-86 du 1 février 1958 portant publication de la convention judiciaire entre le France et la Tunisie signée le 9 mars 1957 [Law 58-86 of February 1, 1958 adopting the declaration of the judicial agreement between France and Tunisia signed March 9, 1957] JOURNAL OFFICIAL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 2, 1958, p. 248, art. 2.

59. Evian Accords, *supra* note 49, Déclaration des garanties [Declaration of Guarantees], Part III, art. 6.

60. *Id.* art. 7.

61. CIRCULAR OF MAY 29, 2013, *supra* note 18, at *4-5.

gone in the opposite direction: from the former colonies to the former metropole rather than the other way around. Thus, rules originally designed to shield a preexisting, extraterritorial French *heterosexual* marriage regime—one that sought, above all, to protect French women from polygamous Muslim legal relationships, whether during the colonial era or under postindependence, Muslim North African governments—are now used to deny North African immigrants to France equal participation in the legalization of same-sex marriage.⁶² The result is a disjuncture between original context of the treaties and their contemporary instrumentalization. By definition, the space opened up by that disjuncture cannot adequately be accounted for by either empire or immigration as analytical and historical frameworks. We must therefore have recourse to some additional set of considerations.

Religion and religious difference provide the missing link, which is nonetheless supplemental and related to, rather than exclusive of, the histories of empire and immigration. The key to this interpretation involves recognizing that the May 29, 2013 circular of the Ministry of Justice is doing far more legal work than simply reiterating longstanding principles of private international law (principles that, in any case, are themselves the product of a long history of French legal reasoning). Two dynamics seem to be at work. One, already mentioned, involves the perpetuation of a French colonial tradition of differential personal legal regimes based on a combination of religion and “nationality.”⁶³ The treaties thus protect French (read, Christian and heterosexual) nationals living in predominantly Muslim nations that just so happen also to be former French territories (in this sense, French law is still operating extraterritorially).

Second, and I think even more saliently, the new conflicts rules invoke decolonization-era agreements in order to legitimate a purportedly binding form of deference to the governments of predominantly Muslim nations. Those nations also just so happen to be former French territories that, in the years since independence, have seen large numbers of formerly colonial subjects emigrate to the former metropole. The domestic legal hostility to same-sex marriage and indeed homosexuality in general in these nations—symbolized by a partly mythological image of what “Muslim” law

62. The restrictions reflected in the Circular reflect an additional arbitrariness stemming from decolonization. At the time of independence, Algerians were permitted to elect either “Algerian” or “French” citizenship. Those who happened to elect “Algerian” citizenship have now become subject to the limitations announced in the Circular. On the choice between French and Algerian citizenship at independence, see SHEPARD, *supra* note 50, at 139–68.

63. See *supra* notes 50–59 and accompanying text.

represents—then becomes the rationale for giving “Muslim” law extraterritorial force, so as to prevent an Algerian man, for example, from entering into a same-sex marriage with a French national in France.⁶⁴

What we have here, in other words, is a kind of contemporary Muslim exemption from the French legalization of same-sex marriage. It is not an exclusively Muslim accommodation, since the treaties in question also implicate Polish nations and the Indochinese nations (the former Yugoslav republics, by contrast, have long included large Muslim populations). But the prominence of France’s postcolonial, ongoing relations with North Africa is such that it is hard to describe the Muslim dimension of the new conflicts rules as simply one variation on a larger, more abstract, more secular theme. Indeed, it may well be that the legalization of same-sex marriage has paradoxically revealed—at the level of contemporary international relations—the limitations of *laïcité* (secularism) as the operative norm of theory of French marriage law. The apparent “Muslim exemption” from same-sex marriage suggests that there is still a religious subtext to the institution of *mariage pour tous* (as same-sex marriage is known in France). It is the subtext that pertains to marriage *tout court*, the lingering sacramental content of marriage itself.

VI

This paradox is hardly unique to France. American law has long since purported to treat marriage as an essentially secular, civil institution regulated by state(s) rather than church.⁶⁵ Yet the persistent opposition to same-sex marriage in the United States seems inexplicable except in relation to religious belief, just as the various state constitutional and statutory bans on gay marriage amount, in effect, to establishments of religion.⁶⁶ Equality and due process principles, rather than nonestablishment, have nonetheless assumed a position front and center in the current legal battle over same-sex-marriage.⁶⁷

64. The erection of administrative obstacles to “mixed” or “binational” marriages between persons of French and North African descent has a long history in France. See *Hymenal Politics*, *supra* note 33, at 543 (noting the role of “religious and racial phobias” in “colonial-era discussions of marriages between Europeans and North Africans”).

65. NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 5–6 (2000).

66. See *id.* at 6 (noting that the “Christian religious background of marriage was unquestionably present and prominent” even in the modern regime of secular state control of marriage).

67. This is true not only of the American proceedings but was also true of French litigation in the years before legalization. An ultimately unsuccessful 2010 challenge to the constitutionality of the

Before returning to the American comparison, it is worth pointing out two further potential complications in the French legal landscape that I have outlined here. First, it may be that, since May 2013, we can and should read the new conflicts rules in France as designed to protect (there is that word again) same-sex *French* couples living in territories that forbid gay marriage. Once again, Muslim North Africa stands out in this regard, given the longstanding French expatriate presence there. It is far from clear, however, that this is how the French government today is seeking to use the various treaties specified in the Ministry of Justice circulate. For one, the Ministry of Justice has not explained exactly how or why it is invoking the international conventions at issue, whether symmetrical or asymmetrical.⁶⁸ We are simply meant to understand that France is somehow “bound” by them in the precise way the circular envisions (even though some of the agreements themselves permit France to renounce them on grounds of repugnance to fundamental norms).⁶⁹

Second, it is worth reiterating that the treaties were concluded prior to the rise of same-sex marriage. Third, the number of gay North Africans seeking refuge in France is almost certainly far greater than the number of gay French citizens living in North Africa. For these reasons, it seems doubtful that Justice Minister Christiane Taubira is primarily concerned with the protection of French same-sex nationals abroad. Certainly it is just as likely that the May 29, 2013 circular was designed to avoid agitating the French government’s relations with North African immigrant communities in France, whose views on homosexuality probably tend to overlap to a significant degree with those of French social conservatives.

Even assuming that this is the *modus operandi* of the May 29, 2013 circular, it gives rise to the following contradiction: in order to protect some same-sex couples *from* discrimination at the hands of foreign governments, it is necessary to discriminate *against* others at the hands of

former marriage provisions of the Civil Code relied on equality and fundamental right to marry theories. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-92 QPC, Jan. 28, 2011, J.O. (Fr.).

68. The only statement by a Ministry spokesperson that I have been able to track down suggests, generically, that French enforcement of the treaty provisions is necessary in order to protect French nationals living overseas. See Marie Piquemal, *Un couple gay franco-marocain obtient le droit de se marier*, LIBERATION (Oct. 22, 2013), http://www.liberation.fr/societe/2013/10/22/un-couple-gay-franco-marocain-obtient-le-droit-de-se-marier_941458.

69. On the economic risks of renouncing these treaties, particular those related to decolonization, see the analysis of Mathias Audit as quoted in Stéphanie Trouillard, *Le mariage pour tous en France, mais pas pour tous les étrangers*, FEANCE24.COM, (June 27, 2013), <http://www.france24.com/fr/20130626-mariage-tous-circulaire-exception-pays-etrangers-convention-homosexuels-gay>.

their *own* government. How? By forcing on those others the choice between Algerian (or Tunisian, Cambodian, Laotian, etc.) citizenship without same-sex marriage and French citizenship with it. The upshot is a catch-22 that perpetuates the stark, either-or violence of identity and legal status that has been a consistent thread through the eras of empire, decolonization, and postcolonialism: you are either with us, or you are with them—and, if you are gay, you may well belong, as in this context, to neither.⁷⁰

Meanwhile, thanks in part to the efforts of French human rights collectives such as l'ARDHIS and Les Amoureux au Ban Public, the French judicial system has begun to point towards a way out of the dilemma.⁷¹ In October 2013, the appeals court of Chambéry, in the Savoy region of southwestern France, ruled on the legality of the new conflicts rules in a case involving the attempted marriage of a French national and his Moroccan partner.⁷² Denying the couple a marriage license violates the principles of “French public international order,” the court ruled, citing decisions of the Court of Cassation (France’s highest court for civil and criminal matters) that upheld the “eviction” of bilateral treaties in such

70. Joseph Massad’s important study *Islam in Liberalism* appeared as this article was going through the production process. Massad traces the recent rise of a missionary form of Western gay rights imperialism that condemns Muslim societies for their intolerance of gays and lesbians. JOSEPH A. MASSAD, *ISLAM IN LIBERALISM* 213-274 (2015). I do not see Massad’s analysis clearly reflected in the French legal provisions discussed here (which Massad does not reference); those provisions purport to refrain from imposing a universalist vision of same-sex rights on the rest of the world, albeit only where certain binational treaties are concerned. Again, however, that all-important qualification suggests that Massad is at least partly right, for he also argues that the new sexual citizenship policies of Western Europe presuppose a binary set of heterosexual and homosexual identities that Muslim societies are at once commanded to institutionalize and deemed incapable of tolerating. The effect is to exclude persons associated with those societies from the benefits of the new sexual citizenship precisely because of their “native” countries’ presumed political and cultural hostility to Western norms of sexual emancipation. *Id.* at 216–17, 268–69. See also *Hymenal Politics*, *supra* note 33, at 555 (“The postulation of a regressive and traditional Islam as a distinct social problem provides a powerful way to name an otherwise diffuse menace. Once Islam is designated as a specific (sexual) threat, legal mechanisms can be used to bound and contain it.”).

71. L’ARDHIS advocates for the rights of LGBT immigrants and asylees in France. See ARDHIS, <http://www.ardhis.org> (last visited Jan. 24, 2015). Les Amoureux au Ban Public, whose name is a pun on a song by the famous French singer-songwriter Georges Brassens, has as its mission to advocate for the rights of “mixed” (French-foreign) couples in France. See LES AMOUREUX AU BAN PUBLIC, <http://www.amoureuxauban.net> (last visited Jan. 24, 2015).

72. Cour d’appel [CA] [regional court of appeal] Chambéry, 3ème ch., Oct. 22, 2013, RG 13/02258 (Fr.), available at http://www.impatriation-au-quotidien.com/images/10-textes-de-lois/jurisprudences/cour-dappel/ca_2013/ca_2013-10-22_n13-02258_chambery.pdf.

situations.⁷³ The Chambéry court found especially troubling the anomaly that permits the national of a country where same-sex marriage is barred to marry a French national of the same sex so long as first spouse happened not to hail from a former French territory.⁷⁴ Such an arbitrary disparity amounts to a form of discrimination based on sex or nationality and introduced an “inequality of all before the law.”⁷⁵ The court concluded, therefore that the personal status provision of France’s symmetrical 1981 treaty with Morocco had to be set aside.⁷⁶

Its peculiar terminology notwithstanding, the doctrine permitting “eviction” of a treaty that violates “French public international order” is a frequently invoked principle of French *private* international law, an essentially judge-made body of law that includes cases concerning the interstate recognition of marriages. The doctrine comes in both plenary and attenuated versions, depending on whether the marriage in question was contracted in France or overseas (the stronger, plenary version is reserved for marriages formalized in France). But it has rarely been used to discard a provision of treaty law posing an obstacle to marriage; instead, French courts have used the doctrine most often to annul polygamous and incestuous marriages contracted in France.⁷⁷ Indeed, a leading French treatise on private international law concludes straightforwardly, without referencing the contrary Chambéry decision, that to discard the national law of a foreign, same-sex marriage applicant on the grounds of its incompatibility with public international order amounts to a repeal of new conflicts rules of the Civil Code.⁷⁸

On January 28, 2015, the Cour de Cassation upheld the Chambéry

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* For further commentary on this decision, see Gaëtan Escudey, *Le mariage homosexuel et le « nouvel ordre public international » : un surprenant changement de paradigme! A propos de l'arrêt de la Cour d'appel de Chambéry du 22 octobre 2013*, REVUE DES DROITS ET LIBERTÉS FONDAMENTAUX., <http://www.revuedlf.com/droit-international/le-mariage-homosexuel-et-le-nouvel-ordre-public-international-un-surprenant-changement-de-paradigme-commentaire> (last visited Jan. 24, 2015).

77. PIERRE MAYER & VINCENT HEUZE, DROIT INTERNATIONAL PRIVE 402–04 (11th ed. 2014). *But see* 2 BUREAU & MUIR WATT, *supra* note 34, at 120–21 (arguing that the “progressive inclusion of polygamy in the category of marriage” implies that polygamous unions can be recognized where the personal laws of all spouses permit them). *See also Hymenal Politics*, *supra* note 33, at 550–54 (discussing the conflict between Muslim personal status codes and French law and the challenges posed by the transnational marriages to French legal and social norms).

78. MAYER & HEUZE, *supra* note 77, at 404. The discussion of same-sex marriage in 2 BUREAU & MUIR WATT, *supra* note 34, at 122–23, has been superseded by the 2013 Civil Code reforms. *See also* BERNARD AUDIT & LOUIS D’AVOUT, DROIT INTERNATIONAL PRIVÉ 635 (7th ed. 2013).

appeals court decision, albeit on terms that do not fully resolve the underlying constitutional issue. Following the lead of the couple's attorneys, the Cour de Cassation effectively hoisted the 1981 French-Moroccan treaty by its own petard. Notwithstanding the personal status provision of that symmetrical treaty, another article of the very same treaty (article 4) provided that the law of either party to the treaty could be "discarded" if "manifestly incompatible with public order." And since the new regime of marriage equality is now part of that public order, the marriage must be allowed.⁷⁹ In so ruling, the Cour de Cassation relied on a kind of "internal" norm of public order: internal, that is, to the treaty itself, and hence by definition not repugnant to it – as opposed to an norm of international legal interpretation that could control a treaty regardless of that treaty's content.

It is too early to tell whether this solution to the underlying constitutional norm was too clever by half. In a communiqué attached to the decision, the Cour de Cassation made clear that its ruling had only a limited application. Although describing the right to marry as a "fundamental right," the court observed that same-sex marriage is recognized only by a minority of nations. And it stated that a personal status provision incorporated into a treaty like the 1981 French-Moroccan accord could be discarded only if the "foreign" spouse had an "attachment" to France, which the petitioner in this case had by virtue of his residency in France. Alternatively, the treaty provision can be discarded so long as same-sex marriage in the other contracting state is not "universally rejected," even if it is not authorized.⁸⁰

Perhaps this is what equality sounds like in this context, given the current state of French law and politics. Certainly it is a victory for the plaintiffs in this particular case. But the court's reliance on "pure [treaty] law," as the opinion put it,⁸¹ suggests that some further maneuvering may be ahead. In the meantime, to judge from the growing literature on the

79. Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 28, 2015, Bull. Civ. I, No. 96 (Fr.), *available at* https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/96_28_30981.html.

80. Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 28, 2015, Bull. Civ. I, No. 96 (Fr.), Communiqué relatif à l'arrêt dit du (Fr.), *available at* https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_dit_30975.html.

81. Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 28, 2015, Bull. Civ. I, No. 96 (Fr.), *available at* https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/96_28_30981.html.

relationship between private international law and international human rights law, it appears that governmental efforts to enlist bilateral treaty law so as to oppose or limit reforms aimed at introducing greater social and political equality are increasingly common in France and other European Union member states, notwithstanding countervailing principles of the European Convention on Human Rights.⁸²

VII

That (gay) marriage and the family find themselves at the center of these conflicts and debates over the definition and jurisdiction of the nation should not, by itself, come as a surprise. Bruno Perreau's work on the adoption of children by same-sex parents in France has revealed the centrality of sexuality and filiation to the institutions and ideologies of citizenship.⁸³ To some extent, what I have written here about gay marriage, empire, and immigration follows in these footsteps. Like adoption, marriage law inevitably implicates questions of jurisdiction, competence, and conflict of laws. People adopt children across national boundaries, and they marry across boundaries too. Governments must decide what rules to apply to such familial legal transactions, and the rules they end up choosing disclose a great deal about how both domestic and international law construct model forms of parent, spouse, and child.

What is striking about the new conflicts rules in France is the extent to which they also seem to construct a model form of the "immigrant." For not all boundary crossers are equal under these rules, as we have seen. Moreover, the link between France's history as an imperial nation and its contemporary demographic diversity is such that immigration is never, as it can sometimes seem in the United States, an abstract experience. In America, the ideology of the melting pot implies that all immigrants are

82. On this theme, see Horatia Muir Watt, *Les modèles familiaux à l'épreuve de la mondialisation (aspects de droit international privé)*, 45 ARCHIVES DE PHILOSOPHIE DU DROIT 271, 271 (2001); Horatia Muir Watt, *Concurrence ou confluence? Droit international privé et droits fondamentaux dans la gouvernance globale*, 27 REVUE INTERNATIONALE DE DROIT ECONOMIQUE 59, 59 (2013); 2 BUREAU & MUIR WATT, *supra* note 34, at 119–123; MYRIAM HUNTER-HENIN, POUR UNE REDEFINITION DU STATUT PERSONNEL 454–74 (2004). Hunter-Henin's work is particularly useful for its analysis of the distinct methods by which fundamental rights can affect questions of personal status in international private law.

83. BRUNO PERREAU, THE POLITICS OF ADOPTION: GENDER AND THE MAKING OF FRENCH CITIZENSHIP xi–xiv (Deke Dusinberre trans., 2014). See also Fassin, *supra* note 4, at 230–232 (comparing the rhetoric of marriage and filiation). See generally Eric Fassin, *National Identities and Transnational Intimacies: Sexual Democracy and the Politics of Immigration in Europe*, 22 PUB. CULTURE 507 (2010) (discussing the relationship between sexuality and national identity in the context of the idea "sexual democracy").

capable of shedding their pasts and attaching themselves to the abstract embodiment of citizenship that is defined by the nation's founding documents (I emphasize the word "seem" here because it is not my claim that this ideology has ever captured the actual experience of immigrants to the United States). The republican model of citizenship in France embodies a similar kind of abstract, assimilationist commitment to the nation—particularly as compared to the territorial principle of citizenship that figures in German law.⁸⁴ In practice, however, the republican model has repeatedly shown the particular traces of France's postcolonial condition, most notably the role of Muslim North African immigration, in shaping definitions of what it means to be French.⁸⁵

The headscarf controversy is the classic case in point,⁸⁶ and Perreau's work suggests a link between that debate and the ones over male-female parity and the reform of kinship law. In all three cases, he argues, French law embodies a "quest for anthropological justifications for the nation's political projects," such that the "citizen's gendered body is considered to be the very site from which the social body draws its identity."⁸⁷ It therefore stands to reason that the recent and ongoing debates over the reform of marriage law partake of these same dynamics. It remains striking just how explicitly France's postcolonial condition has inserted itself into the legalization of gay marriage, and just how prominent seems the role of religion and religious exemption in that context.

VIII

Although the message here is critical of French public policy at the intersection of gay marriage, empire, and immigration, it remains the case that, as of this writing, France, not the United States, has legalized gay marriage as a matter of national law. And though American federalism is surely part of that explanation, by now it is clear that the law of American

84. ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 3–6 (1992).

85. *Id.* at 138–164; Nicolas Bancel et al., *Introduction. La fracture coloniale: une crise française*, in LA FRACTURE COLONIAL: LA SOCIÉTÉ FRANÇAISE AU PRISME DE L'HÉRITAGE COLONIAL 9, 28 (Pascal Blanchard et al. eds., 2005).

86. JOAN WALLACH SCOTT, THE POLITICS OF THE VEIL 21–41 (2007) (discussing tensions arising from French nationalism and immigration of Muslims from former French colonies). For a very different take on the headscarf controversy that deemphasizes the postcolonial context, see generally Peter Baehr & Daniel Gordan, *From the Headscarf to the Burqa: The Role of Social Theorists in Shaping Laws Against the Veil*, 42 ECON. & SOC'Y 249 (2013).

87. PERREAU, *supra* note 83, at xii.

federalism does not preclude a decision striking down the existing barriers to gay marriage in some fourteen states (as of mid-February 2015).⁸⁸ There may be something to be said for centralization in the aftermath of empire, in other words.

Moreover, although the United States does not seem to face a conflict of laws issue at the level of international relations as France does, it does face a version of this issue at the level of domestic (state-to-state) law, as the litigation over the DOMA makes clear. What happens, for example, when a citizen of Massachusetts, which permits same-sex marriage, wishes to marry a citizen and resident of the state of Texas, which does not? One possibility is for the Texas resident to become a Massachusetts resident—that would be the “French” solution in this context. But state residency rules are more flexible than national citizenship laws, and few if any of the thirty-six states that currently permit same-sex marriage⁸⁹ actually require residency as a condition of marriage under its laws (in contrast to the rules for divorce in these states, which do require residency). Justice Scalia’s dissenting opinion in *Windsor* points out that, in the aftermath of DOMA’s invalidation, it is not clear how the federal government should treat a validly contracted, out-of-state, same-sex marriage of two persons who reside in a jurisdiction that does not permit same-sex marriage—a phenomenon that is anything but marginal given the right that Americans of whatever sexual persuasion or marital status enjoy to live in whatever state of the union they wish.⁹⁰ *Windsor* itself did not involve this situation, because (although the plaintiffs were married in Ontario, Canada) the state of New York had legalized gay marriage before *Windsor*’s claim was finally adjudicated.⁹¹

Another open question is whether a prohibitionist state must itself recognize a same-sex marriage validly contracted elsewhere. Under current statutory law (section two of DOMA), the prohibitionist states are expressly relieved of such an obligation, but that provision has been challenged since *Windsor*.⁹² Apparently, given that section three of DOMA

88. See *supra* text accompanying note 21.

89. See *supra* text accompanying note 21.

90. United States v. Windsor, 133 S. Ct. 2675, 2708 (2013) (Scalia, J., dissenting). This freedom to move about the country did not always exist. See Elisa Martia Alvarez Minoff, Free to Move? The Law and Politics of Internal Migration in Twentieth-Century America 3-6 (Apr. 24, 2013) (unpublished Ph.D. dissertation, Harvard University) (on file with *Southern California Law Review*) (emphasizing the period from the 1930s to the 1970s as one of gradual transition to a regime of progressively freer internal movement).

91. *Windsor*, 133 S. Ct. at 2682–83.

92. See Baude, *supra* note 36, at 151, 158–60. A Supreme Court decision striking down state

is now declared invalid, Justice Scalia's preferred solution would be to keep these matters out of the hands of the federal government, as different states continue to permit or deny same-sex marriage depending on the results of local political processes.⁹³ That seems untenable, both as a matter of choice of law rules and given where Justice Kennedy seems to be headed on the gay marriage question.

The Supreme Court will resolve these questions by June 2015.⁹⁴ The likely result is a situation in which the United States faces neither an international nor a domestic version of the conflict of laws problem: in other words, an even more uniform and centralized standard for marriage law than is the case in France today. That likelihood, in turn, leads to the final irony of this comparative exercise. The United States, which has never had a national law of marriage or any other form of domestic relations law, will likely soon have a nationwide standard for determining the substantive conditions of marriage. And that standard will (if and when adopted) impose an even greater degree of homogeneity, both outside and inside the nation's borders, than does the regime of the Code Civil.

The drama of the battle over gay marriage is beginning to subside, as even opponents of a national right to same-sex marriage begin to acknowledge that such an outcome is at hand.⁹⁵ There is a kind of justice in that sense of anticlimax. Barring an unexpected adverse opinion by a conservative majority, the final edict will be eloquent and stirring—but it will not be heroic. The heroes and heroines of this fight are not Supreme Court justices: they are lawyers like Mary Bonauto,⁹⁶ and the many gay and lesbian citizens whose courage and determination have made us a better and more humane nation than we once were. I believe this to be true in part because I myself have learned to become a better person (or so I would like to think) thanks to what this controversy has taught me about the meaning of difference and sameness in the matter of human sexuality and love. And there is more to learn. But, as one looks out to the horizon in February 2015, the drama and the struggle over equal marriage in the United States now seem to belong to the past.

bans on gay marriage would moot this issue, among several others.

93. *Windsor*, 133 S. Ct. at 2710–11 (Scalia, J., dissenting).

94. See *supra* note 5 and accompanying text.

95. See *supra* note 5 and accompanying text.

96. *Staff Profile*, GAY & LESBIAN ADVOCATES & DEFENDERS, <http://www.glad.org/about/staff/mary-bonauto> (last visited Jan. 25, 2015).

What, then, will remain of the story told in this essay after the new constitutional settlement has been formalized by further judicial and legislative elaboration? One set of questions worth pondering—whether age or antipolygamy restrictions on marriage ought to be handled any differently (under either constitutional or international private law) than restrictions based on the sexual orientation of the spouses—takes us beyond the scope of this essay.⁹⁷ Two more immediate and directly related concerns come to mind. The first is that there are many kinds of foreigners in American law, and the same-sex marriage debate has exposed how the different kinds of “foreignness” in America intersect with, rely on, reinforce, and also undermine one another.⁹⁸ The meaning of statehood itself, construed as the power to draw lines both between and within different communities of people, is, fittingly, the final ontological and legal front in the battle over gay marriage. One possible reverberation of marriage equality is that, here as in France, it will bring greater awareness of the multiple and overlapping constructions of the stranger that both nations have, collectively, produced.

Perhaps that conclusion strikes too hopeful a note. Even if it is not too hopeful, one might reasonably ask how exactly it might turn out to be the case. That challenge suggests a second and more concrete repercussion of marriage equality, one that centers on the relationship between LGBT activism and the movement to regularize the status of illegal aliens. Interviewed recently on the PBS program “Finding Your Roots,”⁹⁹ the playwright Tony Kushner observed that “[w]hen it came time to understand how to be gay in a homophobic world, I already knew the model to follow because I knew how to be Jewish in an anti-Semitic world.”¹⁰⁰ Something like this intersectional (to use the now familiar term of critical race theory) experience and understanding of discrimination writ large seems to be at work in the recent “coming out” of illegal aliens.¹⁰¹ The very existence of

97. On the polygamy question in America, which does however pose an interesting comparison to the relationship between French and Islamic law past and present, see generally SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002).

98. Cf. Fassin, *supra* note 4, at 232 (hypothesizing, as of 2001, that the French debate over same-sex unions might open into a wider debate about ethnicity, immigration, and feminism in France).

99. *Finding Your Roots: Tony Kushner* (Thirteen Productions LLC Nov. 4, 2014).

100. See Henry Louis Gates, Twitter (Nov. 4, 2014, 9:11 PM), <https://twitter.com/HenryLouisGates/status/529803035245940736> (reproducing the text of the above quote from Gates’s televised interview of Kushner).

101. On intersectionality, particularly as regards the relationship between race and gender discrimination, see generally Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN’S L.J. 103 (1983).

the so-called DREAMer movement, led by and on behalf of undocumented youth, is itself a remarkable development of contemporary American history.¹⁰² Its creative adaptation of the experience of antigay discrimination is another. Rose Cuison Villazor has shown in a recent article that, particularly among undocumented immigrants who came to the United States as young children, the gay and lesbian “coming out” narrative has proven to be an especially powerful precedent and inspiration.¹⁰³

In turn, the choice to identify publicly as undocumented immigrants, despite the risk of deportation, has already become an undeniable force in the ongoing debate over immigration reform.¹⁰⁴ There is no inherent impulse towards an ever-expanding circle of inclusion in American law. But the transsubstantive character of constitutional law means that the rights of one group of persons can never be entirely separated from those of another. If the movement for same-sex marriage concludes by transferring even some of its moral and ideological energy to the cause of immigration justice, it will have served a doubly heroic role.

102. On the DREAMer movement, see Walter J. Nicholls, *The DREAMers: How the Undocumented Youth Movement Transformed the Immigrant Rights Debate* 74–98 (2013).

103. Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 49–65 (2013).

104. See, e.g., Jose Antonio Vargas, *My Life as an Undocumented Immigrant*, N.Y. TIMES (June 22, 2011), http://www.nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html?_r=1&pagewanted=print.&&pagewanted=all.