Where Religions Hide: Nationalism in France, India, and the United States

by

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What We Look For

In every case we are confronted with the limits on audibility by which the contemporary public sphere is constituted. There is always a question: should I listen to this or not? Am I being heard or misconstrued?… And this means that the regulation of the visual and audible field is crucial to the constitution of what can become a debatable issue within any version of the “legitimate” sphere of politics.¹


It is at her centre, where her truest children dwell, that each communion is really closest to every other in spirit, if not in doctrine. And this suggests that at the centre of each there is something, or a Someone, who against all divergences of belief, all differences of temperament, all memories of mutual persecution, speaks with the same voice.²

-C.S. Lewis, *Mere Christianity*, 1945

On What Follows

Nations do not breed conflict, nationalisms do. The Thirty Years’ War (1618-1648) pitched Catholics and Protestants against each other not simply because of their different religious convictions, but because of how each of Europe’s many states desired to represent those beliefs as the viewpoint of the state itself. The American and French Revolutions at the close of the 18th century pitted revolutionaries against the British and French states not because of high import tariffs or economic struggles, but because of how each had limited the

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revolutionaries’ abilities to express themselves within the government. Monarchies, fascist dictatorships, and, especially today, Western democracies have all attempted to mediate the place of nations within a state. It was out of this—the West’s long history of conflict over what interests should be represented by the state—that German judge and legal scholar Ernst Böckenförde’s seminal question about democracy emerged: “to what extent can peoples united in states live exclusively on the basis of the guarantee of the freedom of the individual without a uniting bond that is antecedent to that freedom?” Böckenförde was not the first to pose such a question, though he was one of the earliest non-theologians to answer in the negative. The antecedent value enshrined in Western democracies, he concludes, is secularism.

This project takes up just a small part of the difficult task of answering that question. By reviewing three democracies in the Western democratic tradition—France, India, and the US—it traces the difficulties these states have encountered in fulfilling one of the fundamental promises of democracy: “protection also against the tyranny of the prevailing opinion and feeling, against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct… to compel all characters to fashion themselves upon the model of its own.” The chapters articulate a phenomenon that, it is suggested, is common to democracies in the Western tradition. All three examples are united in the presence

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of a majoritarian religion whose conception of nationalism informs how the state
defines, understands, and accommodates minority religious nations. Where these
examples differ, they do so mostly on question of form: what their efforts to
accommodate the national identity of minority religious nations actually look like.
Each helps to demonstrate the overall historical trend this project proposes.

The chapters in this work exhibit a roughly uniform structure. Each explores
a state in the Western democratic tradition and the history by which a majority
religious nation came to define the government’s approach to other religious
groups—that is, the nationalism it enacts. They show how state claims of
evenhanded treatment actually mask the advance of those nationalist leanings. The
first chapter focuses on the legacy of the Catholic Church in France. It outlines the
history that cultivated the governing principle of laïcité, a religious nationalism that
favors Catholic practices of religion, yet claims to be neutral. In India, whose
colonial legacy marks it as within the Western tradition of democracy, the project
considers the ways that Hindu principles have transformed general family laws.
Finally, the third chapter considers Protestantism in the US and how Protestant
understandings of religion dictate the state’s attitude towards religious groups
during legal and legislative processes.

Next, each chapter turns to the state of a minority community with religious
ties. In each place, it shows how the mainlining of the majority religion’s conception
of nationalism has affected minority religious nations. To lend urgency to the state’s
relationship to these minority religious nations, every chapter highlights the menace
of sub-group oppression. In France, it argues that Catholic beliefs about religious signs aggravated the government’s fear of in-group discrimination among Muslims on the question of women wearing headscarves. This worry led to a series of state actions that purported to affect all religious groups equally, but actually targeted Muslims specifically. For India, which contrasts strongly with the French approach in its effort to maximally accommodate all religious differences, the chapter outlines how the state’s efforts to accommodate religious difference allowed a system of laws that oppress Muslim women to emerge. Finally, in the US, this work shows how black churches that fall within the parameters of Protestant nationalism receive considerable advantages from the state that are then deployed among black communities to attract and retain members, even while certain church practices plainly exploit women and gay men. In sum, the project shows how the quiet power of majority religious nations has either precluded states from accommodating religious pluralism without allowing in-group discrimination, or prevented them from warding against in-group discrimination without relinquishing accommodationist aspirations.

*Nations, Nation-Building, and Nationalisms*

Though this project takes Böckenförde as a useful starting point, its thesis is less general than his attempt at an answer. It is not a goal to reveal the superiority of one approach to religious accommodation over others. Indeed, although the following chapters highlight their flaws, each of the three approaches considered
here has merit as a theory of accommodating pluralism among religious nations.

Nor, in contrast to thinkers like Jürgen Habermas, who advocates the suppression of religious dogmatism in state-level decisions, does this project weigh the value of religious belief in political decision-making. Instead, the following chapters will argue that, while states within the Western democratic tradition claim to treat religions evenly, they actually promote the conception of nationalism favored by a majority religious nation. Further, once established, this nationalism either misreads other religious groups by overlooking how practitioners understand their religion and, instead, focuses on scripture alone; or, it pushes other religions into its own mold of how religious groups should exist. Either of these two outcomes becomes particularly troubling when considered alongside the risk of in-group discrimination that hyper-permissiveness may engender. Namely, a consequence of these states’ adoption of the majority religion’s conception of nationalism is their hampered ability to nurture religious pluralism without also countenancing discrimination within minority religious nations.

In their interactions with religious nations, Western democratic states engage in a process of, as Benedict Anderson famously termed it, imagining. Communities are bound together by rituals, beliefs, or histories that members deem to be universally shared within a group. When these traits are generalized to the group as a whole, they evolve from elements of a particular identity into a collective character. As Anderson explains, “all communities larger than primordial villages of
face-to-face contact are imagined.” That is, because individuals rarely have in common all the features of their personal identity that they might consider shared—or, at least, are unable to verify that these aspects are truly ubiquitous—the group that they ascribe universal traits to is their own invention. Consider, for instance, a religious community. Members not only hold in common the identifying features of their religion, such as stylized methods of worship or dietary restrictions, but also agree fundamentally that these features amount to a religion and not something else entirely. Where certain members deviate in outlook from their colleagues, the group nevertheless imagines itself united. It assumes common ground.

The end product, an imagined community, holds another, more common moniker: a nation. Nations, as the term is deployed here, exist apolitically and inexhaustibly. They are apolitical in that they do not necessarily imply any involvement in politics or with governmental institutions—although, as in every example set out herein, they quite often do. It is not the case that every nation comprises a state, or even that every state recognizes the nations it contains. In the US, for instance, the state strives to remain blind to the many national religious identities it contains as part of a countrywide policy of disengagement. Further, identification with a given national identity does not automatically connote primacy of that identity, or otherwise preclude association with additional nations. Individuals can view themselves as members of multiple national communities, even where those commitments appear to clash; simply, membership in nations is

inexhaustible. By this definition, just as members of a religious group may separately belong to, say, political groups, an individual may associate with two religious communities even when those communities are understood to be exclusive by the individual themself. The same person might attend Shabbat services on Friday and wake up for Catholic Mass on Sunday.

A related feature of this process is the drive to circumscribe communities with firm boundaries that distinguish one nation from other nations. To produce a nation, it is not sufficient for members of a group to merely believe that they share things in common. Instead, in order for a given constellation of rituals, beliefs, and histories to plausibly develop significance, its meaning must exist in contrast to communities that might otherwise have formed, or that do already exist. Here, Anderson’s writing again proves instructive. As he argues “no nation imagines itself coterminous with mankind... the most messianic nationalists do not dream of a day when all the members of the human race will join their nation.”6 In the cases of France, India, and the US, the majority religious groups take elements of their own identity and contrast that against their understanding of identities that differ from their own. They, thus, not only frame their own groups, but describe other groups as well.

At this point, readers might rightly question the conceptual purchase of as expansive a definition of nations as the one proposed here. Under the above, a nation simply denotes any instance when an individual considers themself

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6 Anderson. Imagined Communities, 7.
connected to others through a shared aspect of their identities that exists over and above the inborn qualities of humans. The above never stipulates that members either behave in accordance with their identification—thus, someone who considers themself Christian might never attend church or even vocalize their connection to a nation of Christians—or requires that the other members of a nation accede to how others classify them. Certainly, nations where members jointly accept their inclusion together will produce materially different behaviors among members than ones where members are either ignorant of or opposed to their grouping. Yet, nations that are defined by outsiders are not disqualified simply because members do not share that understanding. The distinction proposed here would be between etic and emic nations: respectively, nations as understood by onlookers and ones imagined by the members themselves. These two types of nations will reemerge frequently in later chapters, but neither classification indicates any necessary features of a nation besides its beginnings. A religious nation, then, is any nation that either understands itself as religious, or that is perceived by other actors to be religious.

Left here, many free-floating associations could classify as nations and all people who consider themselves to be members of a larger group would be nation-builders. To some extent, our relaxed definition of a nation would concur. Countless national identities fill our world. It is, however, worth offering two clarifying points that may provide needed distinction between nationhood and rogue affiliation. First, membership in a nation is marked by a high degree of attachment
that is unmatched by associations that are merely casual or transitory. Whether expressed by members or presumed by onlookers, nationhood entails a strong devotion to the components parts of its general identify. Without undertaking the quixotic task of crafting a specific threshold for attachment, beyond which an association would graduate to nationhood, the nation may simply be considered a stronger iteration of the association—its weaker counterpart.

Second, nations must bear the shadings of Anderson’s imaginative process. There must exist some imaginative undertaking to distinguish a nation from just the accurate understanding of an individual with knowledge about his neighbors. Philosopher Ernest Gellner explains that “nations as a natural, God-given way of classifying men... are a myth... [nation-building] sometimes takes pre-existing cultures and turns them into nations, sometimes invents them, and sometime obliterates pre-existing cultures: that is reality.” Nations, then, are not located in what individuals know to be true, but, instead, inhabit the spaces where imagination reigns. As they are unmarried to any objective understanding of history or culture, they are created in equal parts in opposition to what exists, and as extensions of it. A corollary of this condition is that many nations are numerically large or geographically disparate, for they must include members who are in some way remote from each other. Crucially, the act of invention should be understood as neither lessening the value of these communities, nor marking them as unreal. As

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this project will show, communal identities can carry great influence in shaping the lives of both members of that community, and those outside it.

A final clarifying point concerning the parameters of a nation notes that the imaginative process of nation-building is not coterminous with nationalism. Put simply, nationalism is the political activity of positioning nations relative to the state, whereas nation-building is the antecedent project of creating nations themselves. Nationalism constitutes a specific belief about the proper orientation of politics and nations to each other. As philosopher Ernest Gellner explains, nationalism is “primarily a principle which holds that the political and the national unit should be congruent.” To this, historian Eric Hobsbawm has added that, under nationalism, a citizen’s political duty “overrides all other public obligations, and in extreme cases all other obligations of whatever kind.” Some later thinkers, like sociologist John Hall, have expanded Gellner’s and Hobsbawm’s formulation to include different ways that politics and nations might relate to each other—over an above the sublation of particular identities by the needs of the state. As Hall writes, “nationalism is not one but many.” Yet, even this broadened meaning sets nationalism squarely apart from nation-building, for the latter must always precede the former.

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These chapters do, in various forms, make use of the terms religion and secularism, though readers will notice that the work stops short of conclusively defining either. For communities or actions that are presented as religious in character, the definition that this work employs centers around how their context defines them. This may turn on the state’s etic understanding of certain groups as religious, or the emic understanding of the groups themselves. Where the etic and emic interpretations of a practice, group, or conviction as religious diverge, this work will clarify which understanding it relies on. In similar fashion, it does not concretely define secularism, though the term appears often. As used here, secularism, like religion, is defined by its context. To an extent, it parallels, and even refines, the above definition of nationalism, for it mediates the relationship between the state and specifically religious nations—in contrast to nationalism’s more general consideration of all nations’ orientation to the state. However, secularism often connotes of the absence of religion from the public sphere. While this auxiliary meaning may help discussions in certain instances, as in the US, religious nationalisms vary widely and, in France especially, not all are bolstered by this additional classification. This work, therefore, tends to speak of nationalism or religious nationalism in place of secularism, but, where the term appears, care is taken to clarify its contextual meaning.

Each example considered here engages with both religious nationalism and religious nation-building. The French Catholic, Indian Hindu, and US Protestant formulations of the state all draw, first, from an understanding of these different
identities as characteristic of nations and, only after this, take up questions of politics. It is in the moment when these identity groups pivot from nation-building to nationalism that each encounters the challenges of secularism. Specifically, in their variegated approaches to accommodating different religious national identities at the state-level, each struggles to maintain a commitment to Western democratic values without relinquishing the traits that comprise their own religious identity.
~Chapter 1~

Guillotines And Headscarves: Muslim Women In The French State

Take this veiled woman. She is an admirable woman. She is courageous and dignified, devoted to her family and her children. Why bother her? She harms no one... So why go on whining about the wearing of the veil and pointing the finger of blame at these women? We should shut up, look elsewhere and move past all the street-insults and rumpus. The role of these women, even if they are unaware of it, does not go beyond this.¹¹

-Charlie Hebdo, “How Did We End Up Here,” 2016

Introduction

In 1989, the headmaster of Collège Gabriel Havez, a French public school in the Oise department, expelled three girls for disobeying an agreement between the school and the girls’ parents. This incident, eventually termed l’affaire du foulard or the headscarf affair, sprung from the girls’ desire to wear headscarves to school in accordance with their Islamic faith. The Conseil d’Etat—the highest court in France—found in favor of the school in a court case that year. Citing the French principle of laïcité, the Conseil held that religious “liberty does not permit students to exhibit signs of religious belonging which... by their ostentatious or combative character... would constitute and act of pressure, provocation, proselytizing, or propaganda.”¹² Yet, this ruling did little to settle debate that grew out of this

incident. Instead, the dispute over the right to wear headscarves in public continued well past an incident in November, 1996—when twenty-three more girls across the country were excluded from their schools on the same grounds—and through a climactic 2004 vote against the permissibility of wearing headscarves or any ostentatious religious imagery in official public spaces. The clash among these girls, the state, and their schools ignited tangled discussions about the French state’s fundamental obligations to its citizens with respect to accommodating religious differences despite perceived discrimination within those communities.

More precisely, L’affaire du foulard challenged the French state to reconsider the bounds of its guiding philosophical principle of laïcité. As the clash between the school and these girls expanded and began to implicate other actors, the parameters of this term as a Constitutional touchstone and social norm began to shift. This chapter examines the liberal democratic norms in play from the 1989 affaire through to the 2004 vote. It begins by sketching a history of the French state’s engagement with religion in the French Revolution (Section I) and during the Third Republic (Section II). Section III examines the philosophical stakes raised by l’affaire du foulard and shows how the history set down in Sections I and II affected the French state’s ability to balance a desire to preserve religious freedom against fears of in-group discrimination among Muslim communities. It shows how the particularities of the French situation eludes an effort to dismiss l’affaire du foulard as simply a question of the religious and the secular colliding, but, instead, begins to frame this project’s
ultimate aim: a reconsideration of how majority religious nations come to define religious nationalism among democratic states in the Western tradition.

Section I: Revolutionary Roots of Laïcité

The Conseil d’Etat’s 1989 ruling in favor of Collège Gabriel Havez’s right to exclude the girls on the basis of their ostentatious religious wear turned on the constitutional principle of laïcité. This concept is set out in Article II of the French Constitution, which states that “France is an indivisible, laïque, democratic, and social republic.” That crucial second factor—laïcité—is, however, absent from the French national motto of “liberty, equality, and fraternity.” That the term is absent from the national motto belies its significance: France closely adheres to the doctrine of laïcité at both the legislative and judicial levels. As in other common law systems, the precise contours of the term have shifted with the generally accepted social understanding, but the fundamental conceptual salience has remained a constant feature of the French state. This section outlines the meaning of the term laïcité and locates its genesis in the early stages of the French Revolution.

Given the absence of any direct English analog or static meaning, defining laïcité proves a difficult task. Many have wrongly attempted to map it onto the United States equivalent of separation of church and state, or a German

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13 French Constitution, 1958, Article 1I. Translation my own and, therefore, rough. Laïque, which I contend has no English analog, has been left unchanged. Laïque and laïcité are different conjugations of the same word. Original French reads as follows: “la France est une République indivisible, laïque, démocratique et sociale.”

understanding of secularization. These understandings do deal with some of the same issues raised by *laïcité*, but differ in form. Namely, whereas these U.S. and German proxy concepts deal with a continual process of permissive space-clearing, French *laïcité* functions restrictively. As Historian Leora Auslander explains, “German political forms have endorsed the importance of local, regional, and... religious difference.”¹⁵ In her view, German secularization works to mediate the relationship between individuals and the state such that individuals enjoy freedom to exercise their particularized identities. Similarly, in the U.S. the division between church and state tends to work so as to constrain state actions to facilitate citizens’ development of their own particularized identities.

France, by contrast, treats *laïcité* as an enjoinder to affirmatively assimilate citizens into a single, French national mold. Auslander traces the history of French attitudes towards deviant identities and finds that the state has “always demanded conformity to French norms of its citizens; it has never understood itself to be a hybrid culture and earlier immigrants were treated badly until they assimilated.”¹⁶ *Laïcité*, then, proves more than a passive exclusion of religious symbols and ideas from public spaces. Instead, it directs the state to affirmatively oust religion from these spaces. Thus, multiculturalist philosopher Seyla Benhabib concludes, *laïcité* “can be understood as the public and manifest neutrality of the state toward all kinds of religious practices, institutionalized through a vigilant removal of sectarian

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¹⁶ ibid., 305.
religious symbols... from official public spheres.”öl An optically neutral doctrine, 

\textit{laïcité} seeks to eschew religion from the public sphere in the interest of preserving a more unified French state.

The vision of the French public sphere as inhospitable to religion traces its roots back to 1789 with the Estates General and the French Revolution. There, French revolutionaries mounted a major challenge to the entrenched authority of the Catholic Church and, through this challenge, laid the foundation for the political philosophy that would later become \textit{laïcité}.öl In 1789, in the wake of tremendous pressure from the French nobility, and on the advice of his finance minister Étienne Charles de Loménie de Brienne (1787-1788), French King Louis XVI (ruled 1774-1791) convened a meeting of the Estates General.öl With its roots in a 1308 conflict between Philip IV of France (ruled 1285-1314), the Estates General involved an assembly of three representative groups or estates. Each estate reflected a French social group: the Clergy comprised the First Estate, French nobility the Second Estate, and commoners the Third Estate.

It was not until 1614, however, that the Third Estate truly gained political clout in the body’s proceedings. That year, King Louis XII faced a similar financial crisis to the one that precipitated the 1789 convention of the Estates General. Specifically, the Crown had covered significant deficit spending by selling stations of

\begin{footnotesize}

\textsuperscript{17} Seyla Benhabib. \textit{The Rights of Others} (Cambridge: Cambridge University Press, 2004), 186.


\end{footnotesize}
nobility to commoners who had won financial means through trade or military service. As the Crown began to run out of offices to sell, and facing mounting resistance from the nobility to the dilution of their station, the Estates General was called upon to solve the financial problems. That year, the Third Estate demonstrated its ability to both resist the other two parties—mounting a successful resistance to the Frist and Second Estates’ unified opposition to the continued sale of nobility ranks. Although the sale of such stations was ultimately ended, the Third Estate won notable concessions from the nobility with a significant reduction in tax exceptions and social privileges that the Second State previously enjoyed.

The establishment of the Third Estate’s political clout dovetailed with a growing rejection of the Clergy’s privileged status in the proceedings. That year, the Bishop of Comminges, Gilles de Souvray (in office 1614–1623), gracelessly insulted the entirety of the Third Estate by advising them to wear decent clothing and admonishing them to remember to follow the King’s customs. Especially given the alliance between the clergy and the nobility, the insult caused upheaval among the Third Estate in 1614 and, a century and a half later, the same distrust of the clergy within the Third Estate endured. Facing another financial crisis, the Estates General convened in 1789. That year, however, the Third Estate demanded double representation to reflect the fact that they spoke for the significant majority of the French population. Although they won that concession from Jacques Necker (1732-

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1804), the Chief Minister of the French Monarch and principal organizer of the 1789 Estates General, a growing alliance between the clergy and the nobility prompted the Third Estate to depart from the Estates General and form the National Assembly—namely, to begin the Revolution.

The history outlined above offers key insights into the origins of the French state’s institutionalized mistrust of religion when considered in conjunction with the writings of the time. The Third Estate’s political opposition to the clergy began the development of a national policy of laïcité, and the Third Estate’s success in establishing itself as a powerful political group explains how that national attitude began to overtake French politics. In his seminal essay What Is The Third Estate? (1789), Emmanuel Joseph Sieyès (1748-1836)—a political leader and one of the major thinkers who drove the French Revolution through to the coronation of Napoleon Bonaparte (ruled 1804-1814, 1815)—outlines the pre-revolution ideology of the Third Estate with respect to the clergy. In considering the standing of commoners within the Catholic Church, Sieyès bitterly reflects that “it needs no detailed analysis to show that the Third Estate everywhere constitutes nineteen-twentieths of them, except that it is loaded with all the really arduous work, all the tasks which the privileged order refuses to perform.”

Considering just the reactions of the Third Estate with respect to social slights by the clergy, though, gives an incomplete rendering of the sentiments of

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laïcité that burgeoned during the Revolution. Instead, the leaders of the Third Estate advocated a platform that included both reductions in social privileges to the clergy and the nobility, and, crucially, significant restrictions on the state‐given rights of the clergy. On July 12 of 1790, after the Third Estate broke from the Estates General to form the National Constituent Assembly, that separate body passed the Civil Constitution of the Clergy (CCC). This move called for a significant restructuring of the Catholic Church in France. The CCC dismissed fifty bishops and appointed several others, required oaths of loyalty to the French state form all future bishops, and established an electoral process for the selection of clergy members. With this, the National Assembly took a major step towards ingraining laïcité within the French state, though the doctrine remained inchoate. Both the CCC itself, and the public reaction to its publication illuminate this development.

Perhaps the most notable aspect of the CCC is the wording of the vow of loyalty. New clergy members were required to swear “to be loyal to the nation, the law, and the king, and to support with all his power the constitution decreed by the National Assembly and accepted by the king.” This vow definitively subordinates the obligations of every clergy member to the church to their obligations to the French state. In this way, even as the National Assembly refrained from completely eliminating the political rights of the clergy—indeed, the electoral process for bishops may have brought the church closer to the public sphere—it firmly

established that any religious presence in France would continue along French lines and place the interests of the state before the interests of the church. Although neither the 1790 oath, nor any of the follow-up vows that the National Assembly required of the clergy in 1791 and 1792, fully eschewed religion from the public sphere in the robust fashion put forth by laïcité, the early Revolutionary period shows clearly its beginnings.26

Public assessments of the CCC contemporary to its passage refine the above. In an analysis of the *Journal Encyclopédique*, a French periodical that published from 1790 until 1793 and gained significant popularity among the Third Estate, historian Joan Lenardon outlines the shifting beliefs about political religion. Its authors, she writes, “do not regard [the church] as a part of revelation, but rather as a historical phenomenon whose progress can be traced through the use of the False Decretals... as well as the papal precedent of legitimating the exercise of political sovereignty.”27

The *Journal Encyclopédique*, and by extension the Third Estate, here, display a keen mistrust the presence of religious institutions within the political sphere. Specifically, they draw a direct line from a series of 9th century forgeries that Catholics used to preempt a budding secularist movement in Britain—the False Decretals—to efforts by the church to justify its involvement in politics in the 18th century.28

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The *Journal Encyclopédique*, however, offers a significantly more measured perspective than the bloodlust that often guided the Revolutionaries in their treatment of the clergy. Reflecting on the Revolutionary period, First Bishop of Vincennes Simon Bruté (1779-1839), writes in his memoir that “the priests, as was to be expected, were the particular objects of their hatred, and the greatest caution and most secret hiding places could not save them from the grasp of a host of informers and blood-thirsty monsters.”

The two lead banners of a 1794 festival to commemorate revolutionary triumph mirror the ferocity with which Revolutionaries sought to extinguish religion from the new state. The first pennant suggests a careful and rational approach to reform, reading “reason guides and enlightens us;” whereas the second, following close behind, cries “Death to the Tyrants.”

Likewise, historian Lynn Hunt explains that “on the one hand, there was the exhilaration of a new era; on the other, a dark sense of foreboding about the future.”

The CCC and the public reaction to its passage demonstrate both the growing feeling at the time that the church’s involvement in French politics should continue only if the church placed French national interests before those of religious nations, and a fundamental skepticism that the Catholic Church would, in good faith, conform to that condition.

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Section II: Reviving The Revolution

Although the hostile roots of French religious nationalism stretch back to the 18th century, it was not until the beginning of the 20th century that political laïcité began to take hold. In 1801, Napoleon Bonaparte (1769-1821), then the First Counsel of the French Republic, joined with Pope Pius VII (reigned 1800-1823)—whose predecessor died in 1799 while in a French prison—in signing the Concordat. Although it preserved some of the changes from the early 1790s, like oaths of loyalty and state authority in appointing bishops, the Concordat also recognized Catholicism as the majority religion and used state money to provide salaries for the clergy. In effect, the Concordat froze the orientation of the French state to religion at a liminal point in the political reification of laïcité. This section considers a pivotal midpoint in the centuries that separate the Revolution from l’affaire du foulard—the 1905 Law of the Separation of Churches and the State. This second historical landmark helps fully render the political and social understandings of laïcité that buoyed the French state through l’affaire du foulard.

Just as the First Republic (1792-1804) acted to control behaviors it saw as inimical to the state, the Third Republic (1870-1940) passed the 1905 Law in an effort to, again, constrain the Catholic Church. The Law called for a comprehensive reordering of the relationship between religious groups and the French state. It ended state financing of clergy salaries and returned ownership of properties bought

using public funds from the church to the state. Throughout the three decades of
the Third Republic, legislation calling for further separation of church and state had
circulated through the Chamber of Deputies—the French legislative assembly. Until
the 1905 Law of Separation, however, these proposals lacked sufficient support to
gain traction among members in the Chamber.

This changed in 1904. That year, Pope Pius X (reigned 1903-1914) ignited a
political scandal when he fiercely denounced a visit from the French President to the
Italian King. Just a year later, the Chamber passed a resolution calling for the
reconsideration of the relationship between the French state and the church. Its first
perambulatory clause reads, “whereas the attitude of the Vatican has rendered
necessary the separation of church and state.” Former Prime Minister Henri
Brisson’s (in office 1885-1886, 1898) remarks in the wake of the scandal neatly
capture anticlerical views on the church in the wake of an accompanying papal letter
in which Pope Pius X threatens political sanctions. In 1907, he wrote that the
Catholic Church had bucked the Concordat’s fetters and become an “intimidating,
powerfully concentrated force which marches today like a regiment.” Here, Brisson
links the church to its 18th century counterpart. He suggests that it, once again, has
grown into a controlling force that threatens to dominate the French state without

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36 Verhoeven, “‘An Encouraging Precedent,’” 462.
intervention. Had he only called for more bloodshed, his same remarks could have been made to similar effect in 1790 during discussions of the CCC.

As it happened, though, the 1905 Law resolved a much calmer deliberation of the relationship between the French state and religion that the CCC had. The Law set out to remove religion from the public sphere, not to destroy the church. As then-Senator, later Prime Minister from 1917-1920, Georges Clemenceau (1841-1929) argued during a 1902 debate on separation, the anticlerical movement did not set out to impede citizens’ liberty of conscience. Instead, anticlericals sought to emancipate the state from the might of the Catholic Church that Birsson outlined. As Clemenceau explains, "we do not wish to destroy a single belief in a single conscience; but we wish and we are able to destroy everything that pertains to the Roman [Catholic] government."37 Drawing from the history of French mistrust of religion that stretched back to the Revolution, then, the anticlerical movement seized on the political opening that Pope Pius X created in 1905 to push forward a more fully realized version of political laïcité.

Certainly, the 1905 Law did not constitute an establishment of laïcité in the contemporary sense. Indeed, the term would have held a communicated an intent that diverged substantially from the goals of the 20th century anticlericals.38 Nevertheless, the passage of the Law shows both a clear continuation of a political tradition that began during the French Revolution, and established the legal

precedent that guided French treatment of religion through to the 1958 authorship of the Constitution of the French Republic. Notably, neither the CCC nor the 1905 Law fully erased the political legacy of the Catholic Church. Throughout the authorship of these and other, complimentary laws involving the place of religion in the French public sphere, the Catholic Church ably penetrated decision-making circles and rallied political will around its interests. As the following section will demonstrate, the consequence of Catholic mobilization around these changes was an enduring preference for Catholic expressions of belief still skews legal and political treatments of religion in France—that is, its version of religious nationalism. The legacy of laïcité, then, at once flows from a deep mistrust of religion, and a, partially inadvertent, preference for one religion over others. Section III outlines the consequences that a dichotomy between the root of the mistrust in the Catholic Church and Catholics’ asymmetric insulation from anticlerical regulations has had on French society.

Section III: Islam’s Trojan Horse

L’affaire du foulard, then, entailed much more than a simple clash between the state’s attempt to remove religious imagery from certain spaces, and a religious groups’ resistance to that effort. It involved a conception of the proper place of religion within a liberal democratic society that began centuries before with the

French Revolution and had undergone refinement during the intervening years.

Nevertheless, the perception that *l’affaire du foulard* involved no more than a tension between public and private interests guided the decisions of an investigatory commission in 2003, and a 2004 vote by the French National Assembly. On July 3, 2003, France’s now-earlier president Jacques Chirac set up a commission to review *laïcité* and its application. The group, named the Stasi Commission after its chair, Bernard Stasi, spent six months drafting its report and concluded that “today the issue is not any more freedom of conscience, but public order... The space of the school must stay for them a space of freedom and emancipation.”

It encouraged the French National Assembly to pass legislation cementing the 1989 Conseil ruling against ostentatious religious symbols. The following year, 2004, in a vote with 494 for, 36 against, and 31 abstentions, the National Assembly did precisely that.

The National Assembly presented this vote, and the ensuing changes to French law, as part of an evenhanded treatment of religions. Because the law applied to every religious practitioner, they argued, it was understood as many as content-neutral. Indeed, in the preamble to the Act, proponents of the ban on religious outerwear were careful to include clauses to encourage equality. One perambulatory clause, for instance, calls for the “coeducation of all teachings,

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particularly in sports and physical education,” regardless of religious affiliation.\textsuperscript{42} On this basis, many interpreted this vote as the National Assembly taking a stand against all religions. As French public intellectual Luc Ferry stated in an interview, “[the law] will keep classrooms from being divided up into militant religious communities.”\textsuperscript{43} Here, both Ferry and the National Assembly argue that the law will actually strengthen the bonds of French society by warding against religious fragmentation. Further, Neither the National Assembly, nor Ferry, suggest in their appraisals of the 2004 Act that it might affect religious communities asymmetrically, for the law does not, in its text, single out any specific religious groups.

That interpretation of the Act’s effects, though, takes a too abstract view of \textit{l’affaire du foulard}, and misses peculiarities in the French situation. First, the girls engaged in a conscious and political, rather than passive and apolitical, act. In 1989, prior to their decision to return to school wearing their headscarves, the three coordinated with Daniel Youssouf Leclerq, the head of Intégrité and ex-president of the National Federation of Muslims in France. Both organizations focus on preserving and promoting Muslims identities in France.\textsuperscript{44} Following the initial act of resistance in 1989, and continuing through the 2004 vote, Leclerq and other Islamic-advocacy groups publicly pressured politicians to support the girls and opposed the decisions by the Counseil d’Etat and National Assembly. On his blog,

\begin{itemize}
\item \textsuperscript{42} Law No. 2004-228. March 15, 2004.
\item \textsuperscript{43} Luc Ferry via Elaine Sciolino, “French Assembly Votes”, 2004.
\item \textsuperscript{44} Benhabib, \textit{Rights of Others}, 187.
\end{itemize}
Leclerq describes the vote as a moment where France “confiscated and perverted without shame human rights and laïcité.”\(^4^5\) Notably, Leclerq’s and others’ groups do significant work not just with Muslim groups already in France, but also with growing immigrant comminutes from North and West Africa. By acting as agents of these political organizations in 1989, the girls demonstrated the public-political nature of religious practices—Muslim and otherwise.

Second, and more significantly, in resisting the ban on ostensibly religious clothing, the girls did not act against a neutral and removed political tradition. In an examination of European responses to international terrorism today, Anna Triandafyllidou, Tariq Modood, and Nasar Meer gloss this link: “secular Christian identity assertiveness… is an ideology that goes back to the Enlightenment (though more the French rather than the British or German).”\(^4^6\) For them, European notions of secularism did not imagine a secular state to be one in which religions and politics inhabited fully different spheres, but rather as on wherein Christianity could thrive behind a smokescreen of governmental neutrality. As Section II suggests, the 1905 Law of Separation did not insulate the French state from the powerful pressures of the Catholic Church. Instead, under the auspices of neutrality, it allowed for the continued provision of state support to Catholic religious groups.\(^4^7\)


As a contemporary extension of the above historical tradition, Article II of the 1958 Constitution, the Conseil d'Etat’s 1989 ruling, and especially the 2004 Law all worked to erect a state-religion relationship that asymmetrically treated Muslims as compared to Catholics. As Auslander writes, “secularism in France... is largely accommodating of Christianity but only partially of other religions.” Under the law, for instance, small crosses and other subtle images that tend to characterize Christian expressions of faith are permitted, but comparatively visible headscarves are not. The total effects of this legal arrangement, explains anthropologist Myanthi Fernando, means that “when Muslim French demand the kind of accommodations offered to other religious communities in France... they are reminded that France is a secular country where proper citizenship requires the separation of religious and political life.” The reminders that Fernando speaks of constitute the state’s policy of affirmatively eliminating religion from the public sphere—that is, laïcité.

Further, debates from 1989 and 2004 about the effects of a ban on Muslim women show that the French polity was generally conscious of the potential for uneven impacts. Perhaps most obviously, the debates about the passage of a law banning “signs of religious belonging which... by their ostentatious or combative character... would constitute and act of pressure, provocation, proselytizing, or propaganda” rarely, if ever, focused on the ways in which non-Muslim symbols

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49 Fernando, The Republic Unsettled, 11.
might rise to the level of undue provocation.\textsuperscript{50} Instead, just as the movement in support of the 2004 Law focused on Muslim veiling, so, too, did the national conversation immediately prior to its passage. The Stasi Report, besides warning about the hypothetical dangers of religious pressure, focuses much of its analysis on Muslim headscarves specifically. While it gives almost no mention of women who voluntarily chose to wear a veil, the report states the Commission’s great sensitivity to the “cry of distress” of women who were forced by their communities to veil or face ridicule as “whores, adulterers, or shameless women.”\textsuperscript{51} Given the direct connection from the Report to the 2004 Law, the focus on Muslim women specifically suggests that the motivation behind the Law was not to ban all religious signs, but rather to ban Muslim ones.

Despite the Commission’s claims to the contrary, headscarves did not generally indicate coercion. This is evident in an important fact that most writings on \textit{l’affaire du foulard} miss: only a small minority of Muslim women actually wear the headscarf.\textsuperscript{52} Surely, if coercive behavior plagues French Muslim women as both liberal and conservatives critics of the headscarf suggest, we would expect to find much larger rates of veiling. Insofar as we do not, this provides strong circumstantial evidence that links between veiling and coercion are either weak, or manufactured. Beyond this, though, many Muslim women did indeed view the veil

\textsuperscript{50} Ruling of the Counsell d’Etat on November 27, 1989.
\textsuperscript{52} Fernando. \textit{Republic Unsettled}, 186.
as non-coercive. In a series of interviews with French Muslim women, Fernando confirms that. She highlights a quote given by one French Muslim women, Amara, as suggesting that veiling is “‘taking up one’s femininity.’”\(^\text{53}\) That is, just as makeup and skits allow some women to feel more feminine, for Amara the headscarf allows her to affirm her own identity as a woman. Not only does she not feel pressure to wear the headscarf, but state actions that might hinder her ability to veil would actively undermine her liberty to constitute her own identity.

The Law’s allowance for small religious signs confirms its targeted nature. Namely, the 2004 Law careful caveats that religious signs that are either small in size, or that do not classify under any of the four purposes it sets down—that is, pressure, provocation, proselytizing, or propaganda—are permissible in the public sphere. The Law, then, did not endeavor to target all religions, but rather certain types of religions. In an interview conducted three years before his successful campaign for the French Presidency, Nicholas Sarkozy (in office 2007-2012) demonstrates precisely this intent. He states, “I do not see that the Republic has to risk continuing to receive imams who speak not a word of French and who defend an Islam incompatible with our values... The veil must be rejected if it is an instrument of domination.”\(^\text{54}\) Like the Stasi Commission and the writers of the 2004 Law, Sarkozy stops short of advocating the full elimination of religion from the French public sphere. Instead, by arguing that only some versions of Islam accord

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\(^{53}\) Fernando. Republic Unsettled, 213.

\(^{54}\) The Stasi Report, 2005.
with French ideals, he states in clear terms that the French state should differentiate among religious traditions.

There was, however, some effort to mask the asymmetries of the 2004 Law. For one, the Law itself contains general phrasing to suggest an inclusive intent: wearers of large Christian crosses with excessive dimensions, for instance, would face restriction. Facialy, then, all sorts of religious practitioners might find the behaviors restricted. Similarly, interviews with erstwhile members of the Commission indicate a desire to preserve a public image of equal regard for all religions. One anonymous Commission member interviewed with Melanie Adrian in 2011. When considering ways to reduce pressure from male peers, he communicated a sense of helplessness on behalf of the French state. In his words “the other solution was to go to the peers who pressure, especially the males. So, so what do you do?... Saying, ‘please don’t pressure your colleague...’ It would have no impact.”55 In the interview, then, former Committee Member maintained that serious consideration went into a method of eliminating pressure to wear veils, rather than simply banning veils outright.

The Commission Member’s remarks, though, contain a peculiar and telling contradiction. A central purpose of the 2004 Law was to preserve French identity by instilling basic French values among French youth—namely, to support the assimilation of all students into a French archetype. At the same time, the

55 Melanie Adrian. Religious Freedom at Risk: The EU, French Schools, and Why the Veil was Banned (Switzerland: Springer International Publishing, 2016), 103.
Commission Members argues that there is no way to educate these schoolboys or somehow push them into, say, the French mold of a citizen who does not bully others. Thus, even as the Commission called for elimination of the headscarf from public places in order to change how Muslim girls relate to French identity, it forwent similar efforts to change the behavior of other children that pertained to the same issue by labeling them unsolvable. The selective willingness to encourage or force students to change their behavior suggests a bias against the Muslim girls who suffered under the ban and, moreover, indicates the flawed effort to mask the Law’s lopsided effects. Further, the eventual text of the Stasi Report focuses both on the effects that veiling has on Muslim girls, and on the perceived effects it has on other students. Insofar as that second consideration weighed in the Commission’s discussions about headscarves, the suggestion that simply eliminating pressure to veil would have obviated the need for the law seems implausible and may indicate an effort to conceal the Law’s targeted intent.

Indeed, many political groups that organized in support of the ban on headscarves held that a distinction between women who chose to veil and ones who were forced to was immaterial. Remarks by the, now erstwhile, French President Jacques Chirac from 1991 typifies one extreme extension of this sentiment. Chirac is quoted decrying Islamic practices in North Africa: “how do you think a French worker feels when he sees on the landing a family with a man who has maybe three or four wives, about 20 kids... no wonder the French worker across the landing goes
While Chirac’s statement demonstrate his own personal prejudices over and above simply concerns for public order, his reasoning mirrors that of the Conseil d’État and National Assembly. Namely, like the latter two bodies, Chirac contends that even were French Muslims to demonstrate that women made a meaningful choice in veiling, the practice itself places them eminently at odds with their peers’ freedom of conscience.

Even some organizations that cast themselves as feminist sidelined the actual experiences of Muslim women in favor of their own interpretation of veiling. Anne Vigerie of the Cercle d’étude de reformes féministes (Feminist Reform Study Circle) and Anne Zelensky of the Ligue du droit des femmes (League of Women’s Rights), two prominent activists on the issue who identify themselves as feminists, argue precisely this point in a jointly-authored newspaper article from 2003. In their view, “wearing the veil isn’t a sign of religious belonging. It symbolizes women’s place in Islam as it is understood by Islam itself: shrouded in shadow, relegated to submission to men. The fact that women choose to wear it does nothing to change its meaning.”

Vigerie’s and Zelensky’s views offer two insights. First, they confirm the general attitude of disregard for the French Muslim women who affirmatively chose to wear headscarves—a sentiment that, as above, surely invaded the discussions of the Stasi Commission. Second, though, the authors explicitly dismiss

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the lived experiences of Muslim women in France as incidental as against their reading of certain texts that they associate with Islam. As the subsequent chapter’s evaluation of British colonial attitudes in India will show, the tendency to discount religion-as-practice in favor of religion-as-scripture characterizes many Western approaches to religion.

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Bracketing this general point, it is clear that participants in both the Stasi Commission and the passage of the 2004 Law sought to excise Muslim religious symbol from the public sphere, even as they publically presented their actions as equal. To the extent that pro-ban messaging on l’affaire du foulard constituted a false

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narrative, it drew significant criticism even from human rights figures who echoed calls to assimilate Muslim women into French society. Jean-Pierre Dubois, the president of the Human Rights League, for one, argues that “in attacking a symbol, the law eradicated the visibility of the integration problem, but it has not solved the problem itself... once more, we have stigmatized them.”

Not only did the outcomes of 2003 and 2004 single out a minority religious group, they did so in a manner that still permitted majoritarian expression of faith in the form of small crosses characteristic of Catholic religious apparel. Thus, in 1989 and 1996, the Muslim schoolgirls acted not as agents of religious liberty generally against an anti-religious state, but rather as agents of a particular minority religion against a Catholic majority whose values and principles were encoded in an ostensibly neutral state philosophy.

Conclusion

It would, however, to be wrong to understand these points as indications that the French state worked as a conscious agent of Christianity throughout the scarf affair. Rather, the state’s actions purposefully targeted Muslim communities, but merely had the effect of not transgressing against Catholic ones. Fernando neatly illustrates this distinction: “the tensions of secularism... are asymmetrically distributed... [such that] Muslims, seen as incapable of separating religion from

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politics, become the sources of contradiction, rather than secular rule itself.” This distinction is instructive in considering the variegated interests at state in this conflict. Namely, it clarifies the state’s interest in French unity, not Christian triumph. For the Conseil d’Etat, constitutional stipulations regarding the principle of laïcité, not a vested interest in Catholic supremacy, guided their ruling. Certainly, though, this decision was informed by the norm-forming power of the French Catholic majority. Because of the Catholic Church’s prominent role in laïcité’s two centrally formative periods—the Revolution and the 1905 Law of Separation—French Catholics enjoyed tremendous clout in setting the interpretive parameters with respect to laïcité. The differentiation here is important. Although the Conseil d’Etat and Stasi Commission weighed the French Catholic position in their actions, neither body acted in conscious service of that religious group. Both bodies did, however, act to specifically limit the forms of expression that Muslim women had access to. Put differently, the French state’s actions during l’affaire du foulard worked to undercut the one, but not to augment the other.

Indeed, the French state’s actions with respect to Muslim women constitute an instance of etic nation-building. Insofar as it ignored the vocal protests of Muslim women who chose to veil out of personal choice and, instead, came to regard the practice of veiling as characteristically oppressive, the French state invented the French Muslim nation. Even beyond this, though, the state’s approach to the veil as an extension of a religious practice at all contributed to its project of

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etic nation-building. Here, Asad’s analysis again proves pivotal. A headscarf, he argues, is not essentially a religious sign. Philosopher Martha Nussbaum makes this point cleverly. By pointing to ski masks and scarves in the winter, she finds “the idea that face covering makes trust and social cohesion impossible is quite ridiculous.”61 Instead, the French state made them so through a process that Asad calls signification, but we might understand as etic nation-building. The state, he explains, “takes certain signs to have ‘religious’ meaning by virtue of their synecdochic relation to systems of collective representation:” religious nations.62 After its etic rendering of this practice as religious, the state then makes the additional move of ascribing evocative meaning to headscarves. As Asad writes, “what is evoked is not a ‘headscarf’ but ‘the Islamic veil…’ a shrouded difference waiting to be unveiled, to be brought into the light of reason, and made indifferent.”63 To this list of three progressions, one might add a fourth: to be overtaken by Catholic religious nationalism.

Taken together, the above suggests that laïcité both defined l’affaire du foulard, and l’affaire du foulard helped to define laïcité. This process, Fernando contends, typifies the relationship of the French state to laïcité: “the secular formation called France must continually reconstitute itself as a cohesive entity.”64 In this case, two crucial aspects of this reconstitutive process became clear. First, the French state’s

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63 ibid., 504.
64 Fernando. *The Republic Unsettled*, 12.
interest in national unification around a single identity has the effect of tolerating certain demonstrations of religious identity while excluding others—in this case, it allowed Catholic practices, but not Islamic ones. The concept of laïcité that undergirded this interest, further, draws continually from the religious nationalism of socially potent groups. This happened historically with the 1905 Law of Separation and the 1958 Constitution, but also contemporaneously throughout the French state’s decisions during l’affaire du foulard. As a consequence of the above, the actions of the French Muslim girls must be understood not as general religious resistance to state intervention, but rather as the response of a particular minority religious nation to an adverse and asymmetric form of nationalism they felt, and were actually, targeted by.

In the French case, then, because of the majority religious nation’s sway in defining the state’s version of religious nationalism, unsubstantiated fears about in-group discrimination led to a plainly harmful treatment of a minority religious nation. In the next chapter, we observe the opposite. There, the majority religious nation’s version of religious nationalism led to high levels of accommodation for religious differences, but came at the expense of in-group discrimination among a minority religious nation. In both cases, the pernicious effect of a majority religious nation’s monopoly on defining the state’s conception of religious nationalism is apparent.
Reading Faith: Scripture, Laws, And Religion In India

We wanted the music of Veena or Sitar, but here we have the music of an English band. That was because our constitution makers were educated that way. I do not blame them rather, I would blame those people, or those of us, who entrusted them with this kind of work.\(^{65}\)

-Kengal Hanumanthaiah, 1949

Introduction

Just as the trajectory of French principles of laïcité began with three schoolgirls’ efforts to win free religious expression within the classroom, the codification of Indian religious law commenced two centuries earlier in a classroom of a different sort. In 1784, Charles Wilkins (1749-1836) won relief from his station as senior-merchant in Calcutta for the East India Trading Company.\(^{66}\) With this freedom, he set to work on the first translation of the Bhagavad Gītā from Sanskrit to English. Within a year, it had been published by the Company and translated into French and Russian.\(^{67}\) The translation came just as the East India Company fought to reinforce its control of Indian trade. In 1785, Warren Hastings (1732-1818) was recalled from his position of Governor General of India, which he had held since


\(^{67}\) ibid., 48.
1772, to face trial about misconduct by the Company. The trial involved a clash of ideologies and pitted Hastings against Edmund Burke (1729-1797) over the question of Company—and, by extension, British—control in India.

The coincidence of Wilkins’ translation and Hastings’ trial involved fundamental questions about Indian religious jurisprudence that would carry through independence and into present day. For Burke, the Company’s presence in India constituted a severely immoral abridgement of India’s sovereignty. In his seminal speech, “The Naboob of Arcot’s Debts” (1785), Burke condemned British actions. In an opprobrium against the Company, he decries their actions and recalls how “a storm of universal fire blasted every field, consumed every house, destroyed every temple.”68 Burke’s remarks challenge Company control of India for its military destruction, but also denote what he viewed as the unjust disregard for Indian values and principles. Here, the timeline of Wilkins’ translation proved crucial. Hastings, responding to Burke’s challenge, drew from Wilkins’ translation of the Bhagavad Gītā to defend the common ground between Indian and British beliefs. Hastings argued that the translation revealed “a theology accurately corresponding with that of the Christian dispensation, and most powerfully illustrating its fundamental doctrines.”69 With this, the two ignited a debate over the role of different religious values, the proper sources of religious authority, and the comparative importance of religious belief and universal ethical principles.

This chapter traces these enduring questions well past Hastings’, Burke’s, or even the East India Company’s time. It continues this project’s central goal: to explore the methods by which states balance the recognition of different schemas of religious belief against the importance of universal laws and the risks of in-group discrimination. Towards this end, this chapter divides into four sections. Section I considers the development of India’s civil code from the late colonial period through to present day. Specifically, it examines the treatment of Hindu family laws as a site of rule-making through custom, as well as contestation about the wellbeing of women. Section II builds on this analysis by suggesting that, precisely because of its roots in the customs of the majority religion, Hindu law was able to weather substantial changes without losing its claim to be authentically Hindu. Finally, Section III traces crucial changes in the 1970s that cast Hindu laws as foundationally Indian. These first three sections provide a foundational assessment of the general status of women in India, and a point of comparison for the key argument of the chapter that Sections IV and V develop.

These latter two sections consider the development of Muslim civil codes since the late colonial period until the late 1980s. They explore the ways that this minority religion navigated theological challenges about the sources of religious authority, and ethical concerns about in-group discrimination against women. The history shows that since the 1930s, Indian Muslim leaders relied on the same tactics and principles that undergird French Muslims’ defense of veiling some fifty years later. Specifically, Section IV traces early efforts by Indian Muslims to create a solid
community before independence. Section V shows how these efforts allowed Indian Muslims to defend their community after independence by offering a cohesive set of values that could appeal to universalist legal conceptions even as they contrasted with them. Finally, Section VI adopts a different lens—that of the Indian state—to highlight the ways that Indian Muslim’s community-building tactics succeeded in winning enduring state recognition despite contrarian Constitutional mandates. The chapter concludes by distilling salient points about how the state has worked to balance the need for this recognition against the risks of in-group discrimination.

Section I: Hindu Law

In the decades immediately before and after India won independence from Britain in 1947, a series of legal reforms foregrounded the development of the Hindu Code. These laws supplemented Indian jurisprudence in a fashion that limited the role of local custom in determining legal outcomes. This section traces the growth of those laws from their early roots in the legal province of local custom in India. Specifically, it illustrates the ways that Indian lawmakers crafted Hindu family laws to preserve essential aspects of Hindu identity, while protecting Hindu women from unfair legal practices. This section, then, contributes in two ways to the chapter’s arguments about how the Indian state negotiated the protection of Muslim women while legally recognizing the precepts of the minority religion of Islam. First, it shows the manner in which family laws bear outsized impacts on Indian women. This point reappears in subsequent sections and relies on the
foundation included here. Second, the development of the Hindu Code provides useful contrast with the development of Muslim family law. This chapter argues that the Hindu Code relied on custom, not strict community organizing or textual interpretation, in its creation. Sections IV and V will outline the divergent history of the Hindu Code’s Muslim counterpart.

Especially after the establishment of the British Raj (1858) in the wake of the Sepoy Rebellion (1857), British penal codes and legal processes began to more formally supplant local rules in governing the legal rights of Indians. However, though the criminal code was universalized, civil codes left room for separate religious legal codes for certain civil issues principally involving marriage, divorce, and inheritance. Where the British civil code ceded jurisprudence to religious groups, tremendously complex legal standards developed. For instance, Hindu laws encompassed two major schools of legal thought—Mitakshara and Dayabhaga—but also accommodated numerous sub-schools. The sheer quantity of different legal statutes that might apply to a civil claim made by a Hindu meant that, in many civil cases, the appropriate legal framework turned only on local custom. In Byah Ram

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71 The chief cleavage between these two legal frameworks is which 12th century jurist they derive from. The Mitakshara school of thought is based on Vijñāneśvara’s commentaries on the third to fifth century Sanskrit text on Hinduism, Yagnavalkya Smriti. The Dayabhaga school of Hindu legal thought draws from the work of Jimutavahana. Perhaps the most salient practical difference between the two turns on a father’s right to control property, with the former system granting fathers significantly diluted rights relative to the latter. Under Mitakshara law, for instance, sons may legally claim property from the other males in the family by birth, whereas, under Dayabhaga law, such claims only emerge after their father’s death. See Dinshaw Fardunji Mulla and Satyajeet A. Desai. Mulla Hindu Law 21st Edition (New York: LexisNexis, 2013) and also Ludo Rocher. Studies in Hindu Law and Dharmaśāstra (Cambridge: Anthem Press, 2012).
Singh v. Byah Ugar Singh (1870), for instance, the courts noted explicitly that Mitakshara law “subordinates in more than one place the language of texts to custom and approved usage.”\textsuperscript{72} The jurisprudential default in most family law cases, then, turned not on the letter of the law, but on local attitudes towards how an issue ought to be resolved.

In one sense, this system of laws neatly captures the purpose of allowing different religions to set up legal codes. Namely, as with French laïcité, a facially neutral legal code necessarily disfavors certain groups insofar as it omits their beliefs about how laws ought to resolve disputes. In the Indian case, though, the pre-independence system of localized jurisprudence seems to evade the problems raised by exclusionary laws by ceding authority to local practice. Further, the particular issues that it allows local control over—namely, laws regarding the family—appear low-stakes in their economic substance, but crucial in their relationship to Hindu religious nations. Ostensibly, family rites of marriage, divorce, and adoption carry little weight in terms of material impacts on citizens’ lives. The state, for instance, likely has little interest in the manner that a wedding ceremony occurs or the specific praxes that define it.\textsuperscript{73} The salient state interests regard cohabitation for census and resource allocation purposes, not whether the couple


\textsuperscript{73} This should not, however, be taken as an argument against the basis of the Indian state’s interest in activities like child marriage and marital rape, which also fall under family law. To the contrary, Section II of this chapter carefully considers the history of these and similar family laws as clear instances where the state had an interest in family life over and above simple pecuniary stakes.
exchanged a ring or stepped on a wine glass. Conversely, these sorts of major life passage events carry tremendous importance for the individuals involved in carrying them out. It means a great deal for a couple to earn legal recognition of their matrimony because they performed the specific set of rites they believe cosmologically, and therefore ought legally, constitute a marriage, but very little to the state to see that they wed in one manner but not another.

This reasoning, though, misses the actual importance of these types of laws for Indian women. Namely, while these family laws bear only tangentially on some groups of citizens, most Indian women depend on these life passage events for their livelihood. Though we lack statistics from the pre-independence India, we do know that, in 2007, Indian women working for cash ranged from 49% to just 10% and literacy rates among women lagged 25% behind those for men. Indeed, even where Indian women are able to participate in the market, their access is often curtailed by restrictive family practices: only one in three women could physically go to the market without permission from family that same year.\(^{74}\) If we assume that the status of women has improved or, minimally, flatland during the intervening centuries, it follows that one consequence of these barriers to economic participation is the outsized importance of life passage events regulated by family law. As Srimati Basu notes, “family law may be seen as the overdetermined site of

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\(^{74}\) Geetanjali Gangoli. *Indian Feminisms: Law, Patriarchies and Violence in India* (Burlington: Ashgate, 2007), 2.
Muslim women’s visibility while every other issue in their lives fades away.”

Put differently, to the extent that local customs constrict pathways to economic independence, the importance of women’s access to alimony, dowries, and inheritance from their husbands grows correspondingly.

It was in response to and recognition of the importance of family law, especially inheritance, that the Central Council of State—the Indian upper house of parliament under British colonial rule—passed the Hindu Women’s Property Act (HWPA) in 1937. This law allowed widows to inherit shares of their husbands’ estates, with the caveat that the estate return to the male’s family when the female inheritor died. It allowed female family members who outlived the male head of the household to continue to live off of his estate after his death, though it restricted their ability to gift and spend parts of it. After independence, the Hindu Succession Act (HSA) of 1956 built on the HWPA’s changes. Under the HSA, widows could fully inherit from their husbands, thus supplanting the bounded access to the estate until their death that they had under the HWPA. As the ruling in a 1979 court case involving the HSA notes, this change constituted “a step in the direction of practical recognition of equality of the sexes and means to elevate women from a subservient position in the economic field.”

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Section II: Malleability of Hindu Law

The above legislative changes raise several questions about Indian religious jurisprudence. Perhaps the most central of these to this project is what implications the alterations had on Hindu communities. That is, if the motivating idea undergirding the allowance of problematic legal practices within family law turned on principles of recognized difference, perhaps the effort to ameliorate the problems that did arise came at the expense of that recognition. It is possible that the government’s efforts to right the disadvantages that Hindu family law saddled women with cut against the theological core of a Hindu religious nation. Indeed, citing the *Manusmriti*, generally translated as the *Laws of Manu*, some Hindu legal theorists have put forward precisely this argument. In one Hindu casebook, the author basis his opposition to women's property and inheritance rights in Manu saying that “three persons, a wife, a son and a slave are declared by law to have in general no wealth exclusively their own; the wealth which they may earn is regularly acquired for the man to whom they belong.”

In this author’s view, and by the scripturalist heuristic popularized during the early days of British colonial rule, it is possible that without these allowances Hindu family law must relinquish its claims to indeed be Hindu at all.

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80 A related question raised by this discussion is how these high-level legal debates on Hindu theology and jurisprudence actually affected Hindu religious communities. While it would be unfair to suggest a complete severance between the two, the nontrivial distance of these debates from the actual worlds of the Hindu laity might mark them as a site of etic nation-building even though the discussants themselves are Hindu. Section II touches on this question in its suggestion that these conversations
At the time, political leaders and commentators echoed these concerns. President Rajendra Prasad (in office 1950-1962), for instance, was involved with a series of public clashes with Nehru over the HSA especially. In a letter he authored during these debates, he argues against passing laws that change property rights in families. In his words, “new concepts and new ideas are not only foreign to the Hindu law but are susceptible of dividing every family.” Here, Prasad’s concern is twofold. On one hand, he mirrors the above thinking and expresses concerns about the fundamental incommensurability of these reforms with established Hindu laws. On the other, he cites fears that the changes will injure Hindu families over and above any tension with Hindu theology itself. A political cartoon from 1947 mirrors this worry:

affected the Indian state’s understanding of religious nationalism and, so, had at least the second order effect of shaping the Hindu religious nation.

81 “Prasad or Kalam, Cong takes the snub.” The Telegraph. June 1, 2006.
It reads, sardonically, “without malice some Delhi girls have demonstrated in favor of the Hindu Code Bill” and underscores this false innocence by featuring women binding men to trees and saying (from left to right) “give me half share immediately,” “I will divorce you,” and “marry me without dowry.” Ambedkar lounges in the treetops above.\textsuperscript{82} Taken together, the cartoon and Prasad suggest two ways that changes to Hindu personal law might render what remains no longer Hindu.\textsuperscript{83} First, it might drive it away from Hindu scripture or, second, it might undermine the structures that bind communities together as Hindu.

One easy answer to the above draws from the nature of religious practice. Certainly, any attempt to constrain religion or tether it to a definition will rightly meet easy pushback. It may not be simply challenging, but indeed impossible to render a rigorous definition of what is or is not religious. Here, I use the term in its legal sense and locate it squarely within the relationship that a set of practices and beliefs might have to the Indian state and the state’s definition of religion. So defined, religions, in a practical sense, involve more than simply reading and abiding by scriptural dictates. Sociologist Peter Berger offers instructive epistemological foundations for this understanding. Drawing from Emile Durkheim’s discussion of

\begin{itemize}
\item \textsuperscript{83} Some British administrators shared this sense. As Bina Agrawal, an economist, shows, before the Act’s passage, British administrators were instructed to refrain from intervening in property disputes involving women’s claims to ownership. She quotes one such administrator, who summarizes his own experience with these disputes. “The customary law,” he offers, “backed by the full force of the colonial administrators, safeguarded the landed property from a woman’s possession.” Bina Agrawal. A Field of One’s Own: Gender and Land Rights in South Asia (Cambridge: Cambridge University Press, 1994), 206.
\end{itemize}
anomie, Berger argues that societies everywhere create canopies of meaning—the title of his seminal work where this discussion occurs—or a nomos to ward against the terror of meaninglessness. He further argues that this reality-making process occurs in direct reaction to external influences and concludes that: “religion is the human enterprise by which a sacred cosmos is established.” For Berger, religion exists as a necessary social product, not a static divine object, and, thus, its tenants at once exhibit epistemic malleability and practical fixity: religions can change if their contextualizing society does, but, like society itself, they often resist change. Religions are not immutable, just stubborn.

One need not find the whole of Berger’s argument compelling to recognize its usefulness with respect to the status of Hindu family law in the wake of the HPWA and HSA. Regardless of the social or divine origins of Hindu beliefs about family law, Berger is right to point out the malleability in many religious practices and beliefs. Far from existing as static social realities, religions tend to change to reflect and accommodate the lived realities of practitioners. This may be especially true at the community level where many practices that constitute an individual’s understanding of religion turn on custom and tradition rather than institutional dictate. In the Indian context, where legal claims made by Hindus even in the wake of the HPWA’s and the HSA’s changes often hinge on local understandings of what

constitute a marriage or divorce, Berger’s conclusion seems particularly apt. Werner Menski, a scholar of Hindu law, shares this view. When considering the bearing that changes like the above legislation had on practices previously marked as Hindu, Menski offers that “religious traditions, however, have also experienced development and modernity... not just in India, a re-appraisal of the role of religion and of ‘tradition’ within the context of post-modernity is currently underway.”

Bracketing the worthy but separate project of exploring Menski’s understanding of modern and non-modern, the key takeaway from his and Berger’s work is that the outlined changes in Hindu family law certainly do not mark those new laws as no longer Hindu as a necessary result.

The central question, then, must consider how Indian Hindus themselves understand the implications of the legal changes on their recognition by the Indian state. Here, the Kerala Joint Hindu Family System (Abolition) Act (HFSA) of 1976 offers an instructive history. Though only passed—and, therefore, only legally binding—in the Indian state of Kerala, this law took up the legacy of inheritance left by the HPWA and the HSA. The HFSA attempted to correct for certain provisions of the HSA that left Hindu women under Mitakshara law without inheritance should the male head of household die intestate. It did this by changing the property claims of family members from joint tenancy, a legal setup by which a family shares in an estate without all controlling portions of it, to tenancy in common, whereby all

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beneficiaries of an estate may leverage some legal claims of property ownership.\textsuperscript{87} This change sought to mitigate potential abuses in power by younger males within a family who might make legal claims to inheritance at the expense of immediate family members, especially women. One consequence, for instance, is that daughters may claim dowry expenses from the inheritance shares of all her brothers, proportional to the sizes of those shares.\textsuperscript{88}

While the HFSA did make important changes to an inheritance process that skewed against many Hindu women, the total weight of the Act threatened the Hindu nature of the inheritance system. Besides changing the legal status of property claims by family members from joint tenancy to tenancy in common, the HFSA repealed a dozen previous laws concerning family law practices for Hindus in Kerala. The changes continued a long pattern of legislative progression that, as one Indian legal scholar writes, “sounded a death-knell to the joint family system.”\textsuperscript{89} While legal scholars differ on the precise definition of a joint family—some even suggesting that a nuclear family might qualify—the general understanding is a family of two or more households that share land and live together.\textsuperscript{90} The problem raised by the Act and its surrounding legislative context is that it has the effect of eroding this tradition. While these changes do not bear directly on issues of Hindu theology, the community-level effects of the legislation helps to illustrate the risk of

\textsuperscript{87} Menski. \textit{Indian Family Law}, 305-10.
\textsuperscript{88} The Kerala Joint Hindu Family System (Abolition) Act, 1975.
\textsuperscript{90} Menski. \textit{Indian Family Law}, 312. See also Note 7.
legislation that alters the legal conditions of Hindus in India. Namely, attempts to preserve state-level recognition of community practices while warding against in-group discrimination may threaten the integrity of the affected community.

Section III: Dissolving the Hindu/Indian Divide

The year 1976 brought substantial legal changes to the orientation of Hinduism to the Indian state even beyond the challenge posed by the HFSA. That year, the Indian Parliament considered an amendment to the 1955 Hindu Marriage Act (HMA) that purported to align it more closely with the 1954 Special Marriage Act (SMA), which principally governs marriages between non-religious individuals or individuals wishing to marry outside their religion or caste. The Act itself dovetails with the legislative debates that occurred in the lower house of India’s Parliament—the Lok Sabha—and illustrates a general blurring of the division between Hindu nationalism and Indian nationalism. This fusion came just as Parliament passed a constitutional amendment in reaction to the invocations of a state of emergency by Prime Minister Indira Gandhi (in office 1966-77, 1980-84) a year earlier. The growing union of the two nationalisms invaded constitutional debates and shaped subsequent developments in Muslim family law. It is worth briefly sketching these developments here, as they will lend important coloring to the next sections, especially Section IV.

The rhetoric of the 1976 Lok Sabha debates over the HMA shows a gradual equation of the Hindu religious nation with the Indian nation. Even as the 1976
debates advanced a new conception of certain marriage practices—like marriage before puberty and bigamy—as subject to universal norms, those norms were often evoked alongside overtly Hindu imagery. For instance, Shri Chandra Shailani, an MP, argued “according to Indian culture and tradition, marriage is a sacred and eternal bond. When a man and a woman can enter into marriage, our culture and our civilization tells them that only death can separate the two.” There, Shailani construes marriage as a sacred ritual, and relies on religious language about the supernatural inseverability of a married couple. In Indian Feminisms (2007), Geetanjali Gangoli highlights Shailani’s language, writing that “the elision between ‘Hindu’ high caste understanding of marriage and ‘Indian’ marriage indicates that a number of assumptions are made about what it means to be Indian.” The debates over HMA in the Lok Sabha, then, indicate a movement away from a strict divide between Hindu personal laws and Indian ones.

The changes to the Indian Constitution carried out during the mid-1970s show a similar pattern to the above legislative trends. With the 42nd Constitutional Amendment Act (1976), the Indian Parliament offered a new definition of citizenship. Specifically, the Act introduced Article 51A, which listed what it calls the fundamental duties of Indian citizens. These duties typify the erosion of a divide between Hindu principles and those of the Indian state. Menski highlights this,

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92 Gangoli. Indian Feminisms, 37.
93 ibid., 37.
writing that “Article 51A reads like a catalogue of Hindu dharma, emphasizing the obligations and duties of all citizens, as opposed to their individual rights.” To the extent that the new Constitution calls for a more communitarian understanding of citizenship, it presents Hindu values as Indian. At the same time, however, Article 51A explicitly cites goals of interreligious respect and cultural unification. These two aims, then—the explicit establishment of Indian values, and the implicit coding of those values as Hindu—shows a general move towards a Hindu conception of Indian civil identity. The ideological underpinnings of Article 51A mirror the developments in the Lok Sabha surrounding the HMA, and indicate a broader reconstitution of India legal principles in relation to personal law. Put differently, by the end of the 1970s, the Indian legal landscape had moved nearer to a Hindu one.

Section IV: Colonial Muslim Law

Throughout the changes in Hindu family law, Indian Muslims worked to protect and develop their own separate system of civil laws governing personal legal questions. The trajectory of these laws, however, followed a separate historical path and present notable differences in content and effect from the Hindu Code. This section takes up these dissimilarities as instructive and uses them to further the project of exploring the duel aims of recognizing religious difference, while protecting in-group minorities from oppression. As in the above analysis of Hindu civil laws, the section foregrounds the experiences of Muslim women as particularly

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reflective of that challenging project. However, in distinction from the above, it attends to the additional considerations posed by Islam’s status as a minority religion in India—albeit a quite large one.

Like the Hindu Code, Muslim family law finds its genesis in colonial India. Just as Hastings’ and Wilkins’ pushed to translate and codify Hindu texts to establish Hindu civil laws, Muslim family law saw a steady trend towards scripturalism under British rule. In part, these changes stemmed from modifications in the structure of the Indian legislature during the early part of the 20th century. Namely, before 1919, the democratic power of different religious groups was extant, but inchoate. Reflecting on that history, the 2nd Marquess of Reading, Gerald Isaacs (1889-1960), suggests that “by this Act of 1861, the subsequent Indian Councils Act of 1892, and the Morley-Minto Reform of 1908 the democratic principles of representation and popular election were introduced into the Indian constitution.”95

The gradual move towards democracy galvanized religious nations by transforming them into political organizations with particularized agendas relating to religious nationalism in India. Indeed, as historian David Lilly argues, by 1909 “in India... nationalism was already a powerful force.”96

It was not until 1919, however, that these emerging principles fully unfurled. That year, British Parliament passed the Government of India Act, a bill designed to

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95 Marquess of Reading. “The Progress of Constitutional Reform in India.” *Foreign Affairs.* Vol. 11, No. 4 (1933), 613.
significantly increase the ability of Indian political organizations to participate in lawmaking. This change came in the wake of recommendations by Edwin Montagu, the Secretary of State for India (in office 1917–22), and Lord Chelmsford, the Viceroy of India (in office 1916–21), contained in the Montagu-Chelmsford Report. The Report, as presented to the House of Commons, argues for the “increasing association of Indians in every branch of the administration, with a view to the progressive realization of responsible government in India as an integral part of the empire.”97 These changes gave extant political parties like the Indian National Congress (INC) and Muslim League the authority to craft a new legal apparatus in India that moved beyond the system of community practice that previously guided legal questions.

Even as the 1919 Act afforded new opportunities for self-rule to Indians, it forced political parties—especially religious ones—to set down more concrete platforms and aims. For Muslim parties, like the Muslim League, this was not a new challenge. For instance, even before the 1919 Government of India Act, Muslim lawmakers had won appeals to British lawmakers that turned on the cogency and centrality of the Quran to Islamic family law. Though he would leave the INC in 1913 to join the Muslim League and later come to serve as Pakistan’s first Governor General, in 1911 Muhammad Ali Jinnah (1876-1948) had just won election to the Imperial Legislative Council as a Muslim representative from Bengal. There, he

introduced the Mussalman Wakf Validation Act, which insulated Muslim families from state regulations on inheritance on the basis that Quranic interpretation showed that such inheritance qualified as a *wakf* or charitable, religious gift.\(^9\) This change restricted the Privy Council’s ability to interference with questions of inheritance and, instead, held that “it shall be lawful for any person professing the Mussalman faith to create a *wakf* which in all other respects is in accordance with the provisions of Mussalman law.”\(^9\) This enshrined the Hanafi interpretation of the Quran as the basis of inheritance law, often to the detriment of female claimants.\(^1\) Jinnah’s involvement in this early debate foreshadowed future legislative clashes over the proper treatment of *wakf* by the Indian state that continued through independence and partition.

However, Jinnah’s treatment of the Quran as a final basis of Islamic law also marked a salient shift in Indian legal treatment of Muslim family law. Namely, just as political groups in India found themselves tasked with providing more robust policy platforms, Jinnah positioned Islam as a religion premised on a single, interpretable text, rather than a consortium of local traditions. This attitude followed Jinnah through his involvement in the Muslim League, and became a key aspect of subsequent developments in Muslim family law. Jinnah’s scriptualist stance guided political debates in the late 1930s over reforms to Indian civil codes.

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In 1927, Katherine Mayo, an American, published a book titled *Mother India*. In it, Mayo delivers an opprobrium against what she views as ethically indefensible treatment of women in India by Muslim and Hindu legal practices.\textsuperscript{101} The work gained remarkable traction both in the United States and in Britain: by 1950, it had sold nearly 400,000 copies and it saw reprints in 1970 in Britain, 1984 in the U.S., and 1986 in India.\textsuperscript{102} Her central contention, which flowed through her subsequent, though less influential, writings, posited that that Britain should not afford India independence for fear of the wellbeing of women.

Mayo’s work left lasting imprints on Muslim political organizations, and the constellation of Muslim personal laws. Perhaps the most immediate effect of the work was the passage of a new version of the 1919 Government of India Act.\textsuperscript{103} Unlike its 1919 counterpart, the 1935 Act substantially restricted the lawmaking authority of the Indian government. Namely, at several points, the Act contains lengthy strings of limitations on the authority of the Indian government with respect to decisions made by the British Parliament, any criminal process, or actions taken by the Governor General of India—who, at the time, was a British Earl.\textsuperscript{104} Insofar as the 1935 Act, then, preserved the Anglo-Muslim system of customary law, it threatened the political gains made by Jinnah during the 1911-13 debates about *wakf* reforms.

\textsuperscript{102} ibid., 4.
\textsuperscript{103} Newman. “Law Reform in Late Colonial India,” 94.
\textsuperscript{104} “Government of India Act” (1935), 7, 189, & 208.
Thus, although the changes didn’t directly affect the province of the Validation Act, it ignited a new campaign by Jinnah and the Muslim League to revise Muslim family law. They, again, appealed to the legislature to restrict the Privy Council’s reliance on custom to adjudicate court cases involving questions of Muslim personal laws. Notably, Jinnah and his confederates invoked Mayo’s arguments about the needs of women in their advocacy for legal reforms. Together, the Muslim League launched a campaign for the repeal of customary laws and the introduction of a comprehensive interpretation of sharia law in its place. They argued, “the state of Muslim Women under customary law is simply disgraceful… [but] the introduction of the Muslim Personal Law will automatically raise them to the position to which they are naturally entitled.”105 This campaign proved a success and, in 1937, the India Legislative Assembly passed the Shariat Application Act to replace the Anglo-Muslim system of custom in issues of Muslim family law.

Taken together, just a decade before independence and partition, Muslim family law exhibited important differences from its Hindu counterpart. Chiefly, Muslim family law linked back to controlling texts. Certainly, debates about the precise meaning of the texts preserved room for statutory discussions and subsequent developments within Muslim civil codes. However, by 1937, the Muslim League firmly established the centrality of scripturalism within the Indian understanding of what did and did not count as Muslim. This differed substantially

from the pre-independence status of Hindus, for whom the legal changes in their system of family law developed mostly around custom, not scriptural heuristics. Additionally, Hindu family law developed in order to shield women from what the state viewed as unjust Hindu customs and Hindu groups only took up those laws as properly Hindu in the wake of the changes. In contrast, Muslim groups campaigned for separate legal codes on the explicit basis that laws based in the Quran and Hadith best defend women’s wellbeing.

Section V: Muslim Laws After Independence

The organizational structure and scriptualist orientation of Muslim political groups like the Muslim League endured through independence and partition in 1947. As above, the decade immediately following independence saw the establishment of a robust system of Hindu personal laws, collectively know as the Hindu Code, that overrode local custom in an effort to protect Hindu women. In establishing these new parameters for Hindu personal law, the Indian state acted in a fashion consistent with the notion that, insofar as Hindus constituted the majority religious nation and their religious laws derived from local norms rather than some standard text, the distinction between private belief and public policy was slight—that is, it embraced Hindu religious nationalism. Muslims, by contrast, leveraged their status as a strongly defined minority nation and their orientation around select

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texts as a static basis for emic nationhood to ward against etic changes to their own religious nationalism’s providence in their system of personal laws. This section explores the political maneuvers of Muslim leaders as the representatives of a minority religious nation in the wake of independence through to the 1986 debates following the controversial court case of *Mohammad Ahmed Khan v. Shah Bano Begum* (1985).

After independence, Muslim groups fought fiercely to prevent any changes to the existing system of Muslim personal law. Drawing on their success in building political support even in districts with large Hindu populations and unification of different political organizations, Muslim leaders were able to form an influential voting block in the post-independence Indian Constituent Assembly. This influence endured through the 1950 transition from Constituent Assembly to Parliament. From their influential position, Muslim leaders launched a successful campaign to preserve Muslim personal law during the debates about changing Indian civil codes throughout the 1950s. In these, Muslim leaders were able to use the scriptualist understanding of Muslim laws established before independence. Writing on the debates, Zoya Hasan aptly notes the consequence of the tactics employed by Muslim leaders to position their community during the ensuing debates. She writes, “by defining Muslim identity entirely with reference to a strict set of laws, any change is ruled out because the survival of cultural identity depends

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on a codified identity.”¹⁰⁹ Put differently, Muslim leaders drew from the legislative legacy of the 1913 Validation Act and the 1937 Shariat Act to immunize Muslim nationalism against adverse reforms to religious personal law.

These efforts resonated with Hindu leaders, over and above the political incentives of the INC in allying with the Muslim League. That is, even strong voices of opposition to religious personal laws like Minister of Law and Justice Bhimrao Ramji Ambedkar (in office 1947-51), noted the peculiar status of Indian Muslims. In a speech to the Constituent Assembly in 1948, Ambedkar argues that

No one need be apprehensive of the fact that if the State has the power, the State will immediately proceed to execute or enforce that power in a manner that may be found to be objectionable by the Muslims... sovereignty is always limited, no matter even if you assert that it is unlimited, because sovereignty in the exercise of that power must reconcile itself to the sentiments of different communities.¹¹⁰

Prime Minister Jawaharlal Nehru (in office 1947-64) opposed changes to Muslim family law in similar fashion. Through Nehru generally held less tightly to his opposition to different systems of religious family law, he nevertheless argued in 1950 that “we do not dare touch the Muslims because they are a minority and we do not want the Hindu majority to do it.”¹¹¹ Taken together, the statements of Ambedkar and Nehru helpfully illustrate the success of Muslim leaders’ political defense, while also highlighting its most resonant contentions.

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In 1985, some decades after the elision of Hindu and Indian values outlined in Section III began, this stance faced a potent legal test. That year, the Indian Supreme Court ended a six-year saga of legal clashes surrounding maintenance payments in a divorce case. The case involved debate not just over the proper structure of family laws, but of the providence of Muslim laws in general civil code cases. In 1975, Mohammad Ahmed Khan, an affluent Muslim man living in Madhya Pradesh, divorced his wife of forty-three years, Shah Bano. Under the general civil code, Khan was required to provide maintenance payments to support his erstwhile wife, but not under Muslim civil codes. The case, then, was controversial for two reasons. First, the initial award by the lower court granted Bano relief despite Khan’s protestations that Muslim family law, not the Hindu civil code, applied. Even so, Bano was awarded only a fraction of the amount she requested—just Rs. 25 a month of the Rs. 500 she petitioned for—suggesting that Khan’s argument did carry some weight.\textsuperscript{112} Subsequent appeals by Bano to the Madhya Pradesh High Court and then by Khan to the Supreme Court ultimately raised that figure to Rs. 179 in the final 1985 ruling. Second, the initial divorce process and the Supreme Court’s eventual ruling involved Muslim philosophies of family law. Namely, Khan used a divorce practice called triple talaq, whereby a man wishing to divorce his wife only needs to declare divorce three times in one setting for it to carry legal weight—

a practice that still exists as a source of debate in India.\textsuperscript{113} Beyond this, the Supreme Court ruling relied on Quranic verses to justify its decision.

Forged as it was at the intersection of religious communal precepts and state-level judicial interests, the \textit{Shah Bano} case typified the clash between a minority religious nation’s desire for accommodation, and the pressure of a majority culture’s contrarian version of religious nationalism. In the ensuing debates over the proper treatment of Muslim family law, the \textit{Shah Bano} case became a proxy for the two opposed camps. The Court itself, in the all-Hindu bench’s ruling on the case, quoted Allama Mohammad Iqbal (1877-1938), a prominent Muslim philosopher whose works influenced the Pakistan Movement during partition. Using his words, it offered that “the question which is likely to confront Muslim countries in the near future, is whether the law of Islam is capable of evolution.”\textsuperscript{114} Muslim groups in India erupted. Thousands protested by picketing and even burning effigies of Supreme Court justices.\textsuperscript{115} Writing to capture the phenomenon, one Indian newspaper likened the protests to the Sepoy Rebellion, stating that “not since... the great upheaval of 1857 has a single non-political act caused so much trauma, fear and indignation among a community.”\textsuperscript{116} Even as some Muslims rallied against the ruling as evidence of the state invading legitimate personal laws, some sided with

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\textsuperscript{115} ibid., 1095.

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calls for legal change within Islamic family law. At the same time, non-Muslim political leaders in India struggled to manage the reactions on both sides.

The above newspaper excerpt, then, gets the story only half-right: though the reaction was fractious, it was not a product of apolitical events. In 1985, the Indian newspaper *Inquilab* published a letter that purported to be a transcription of Bano’s oral assertions and bore her thumbprint as proof. The circumstances of its production, however, are contested, as some suggest it was coerced, as Bano was illiterate. Nevertheless, even if Bano was mislead during its production, its contents are notable. In it, Bano is quoted as denouncing the 1985 ruling as “contrary to the Quran and Hadith and… an open interference in Muslim personal law.” It then goes on to explicitly disassociate from the ruling, still using Bano’s voice. Whether Bano truly authored the letter or not, its publication underlines the political nature of the ruling.

Just as Bano’s own circumstance grew from a long history of political development dating back to India’s colonial past, the ruling itself invited political reaction. The political crescendo of the reaction came eleven months later when Prime Minister Rajiv Gandhi’s government (in office 1984-1989) passed the Muslim Women (Protection of Rights on Divorce) Act (MWPRDA) in 1986. In a striking move, the Act reversed much of the Supreme Court’s decision by exempting Muslim women from the 1973 law Bano had used to claim relief and, instead, granting only “fair and reasonable provision” during *iddat*—a period following divorce or spousal

death during which a Muslim woman is precluded from remarrying.\textsuperscript{118} However, the ruling also contained language calling for the development of a Universal Civil Code (UCC) as substitute for different systems of family law.\textsuperscript{119} This proposal, with roots stretching back to independence, offers final insights into the framework of religious nationalism in India from the perspective of the state itself.

\textit{Section VI: Sidestepping Religion Through A Uniform Civil Code}

On its face, the Indian Constitution confers clear guards against unequal treatment based on gender to citizens. Article 14 contains a catchall provision stating that “the State shall not deny to any person equality before the law or the equal protection of the laws… on grounds of religion, race, caste, sex or place of birth.”\textsuperscript{120} Article 15 mirrors this language, but promises protections against discrimination, rather than assurance of equal treatment. Finally, Article 21 grants citizens protections of life and liberty that Indian courts treat as a general right to live in dignity.\textsuperscript{121} Considered in historical isolation, these provisions suggest a meaningful consideration of the status of minority groups, especially women, by the Constituent Assembly when ratifying the Constitution. The inclusion of both a negative guarantee of non-discrimination and a positive extension of equality under

\textsuperscript{118} Basu. “Separate and Unequal,” 503.
\textsuperscript{120} Indian Constitution, Article 14.
\textsuperscript{121} Subramanian. “Changes in Muslim Family Law in India,” 638.
a system of laws constitutes a robust legal foundation upon which Indian women might pursue rights claims and ward against unjust treatment.

However, citing the issues with Hindu and Muslim laws set out above, many charge that the strength of the Indian Constitution’s protections for women is belied by its historical context and practical legacy. This section expands on the problems set out in earlier sections as it considers a UCC—one proposed resolution to the problems of Hindu and Muslim family law. It illustrates both the motivating interests at play in pushing for the UCC, and the difficulties faced by its proponents in the Indian context. Specifically, in the wake of the *Shah Bano* case and the Supreme Court’s urging, many Indians again raised the possibility of a UCC as a solution for in-group discrimination. By mapping out the historical trajectory of the UCC from its genesis in the crafting of the Indian Constitution, the section will argue that eliminating religious family laws is not a meaningful option for Indian lawmakers. Namely, precisely because Hindu principles moved into mainstream jurisprudential theories in the 1970s, a transition to a UCC would not eschew religious values, but, instead, merely privilege some. As a consequence, lawmakers must look to different methods to resolve the frictions that plague the present system of separate religious civil laws.

The tension between the state’s desire to recognize religious communities by ceding control over certain areas of law, and the real risks of in-group discrimination those accommodations might facilitate, is typified in the national-level conversation that immediately followed Indian independence. In 1949, many of the Indian state’s
founding leaders like Nehru and Ambedkar considered the need to balance the state's two interests in the Hindu Code Bill (HCB). Ambedkar, explicitly noted the two interests at stake in the crafting of the HCB. The Bill, he suggests, “had a duel purpose... [the first of which was] to elevate the rights and status of Hindu women.” Ambedkar saw a fundamental tension between religious recognition and in-group minority rights that he hoped to correct for.

Soon after he expressed these views on the HCB, though, fractious debates about the framing of religious legal codes and the Indian Constitution led Ambedkar to resign as Chief Law Minister. In 1949, during the writing of India’s new Constitution, Ambedkar became one of the most vocal advocates for a UCC instead of separate civil laws for different religious groups. In the debate, Ambedkar expressed opposition to the idea of recognizing these different legal systems. During one debate at the Constituent Assembly, Ambedkar challenged the idea that religion should be given special legal treatment, asking “what are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, discriminations and other things, which conflict with our fundamental rights.” Ambedkar, then, saw more than a tension between the two aims: he saw an irreconcilable contradiction.

This view, seemingly shared by Prime Minister Nehru, led to the inclusion of Article 44 in the Indian Constitution. That Article stipulates that “the state shall

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endeavor to secure for the citizens a uniform civil code throughout the territory of India.”\textsuperscript{124} However, no successful legislative push to establish a UCC has yet occurred in India. This may be explained by a variety of reasons. One notable factor is the powerful religious influences that affect the Bharatiya Janta Party (BJP) and the Congress Party, as well as the many smaller political organizations within India. Leaders in these parties often play on the religious preferences of their electorates to win votes and maintain their office. They may dress differently depending on which religious group they are hoping to court and, even when they do not explicitly mention a given religion, they invoke the language and principles of different religious groups.\textsuperscript{125} The importance of performing, as with the INC, or authentically having, as is the case with the BJP, a strong religious identity to secure legislative power reveals the difficulty any political movement would have in trying to reify the aims set down in Article 44.

Additionally, it is likely that any UCC that might win passage would simply enshrine Hindu values in laws that purport to be universal. One Indian legal scholar, Shabbeer Ahmed, explains the overriding importance of Hindu religious interests. Writing specifically on the implications of a UCC on Hinduism, he argues that “practices among Hindus are far more important than any law of the country.”\textsuperscript{126} Just as French laïcité claims universality while promulgating Catholic

\textsuperscript{124} Indian Constitution, Article 44.


values, an Indian UCC would privilege Hinduism at the expense of Islam. Put differently, whatever problems the *Shah Bano* ruling legitimately raised would become mainstream as the Indian judiciary worked to erode the Muslim community in India.

**Conclusion**

The political difficulties encountered by moves to erect a UCC stem from the long histories of Hindu and Muslim legal traditions in India. As Hindu leaders framed India’s version religious nationalism as tacitly religious, their Muslim counterparts worked to mark their own religious nation as distinct. That is, Muslims argued that universal principles would merely serve as proxies for Hindu principles and, so, would violate their religious liberty. These arguments have held resonance through to the present day. For instance, the Aam Aadmi Party (AAP), a political movement in India that began in 2012 and won impressive victories in Delhi on a reformist platform, carved out space in their platform for different religious groups. Ashutosh, the AAP spokesman, clarified this stance on 2016, stating that “we are not against Uniform Civil Code, but it should have special provisions for Muslims, Christians and other minority religious groups.”

Even the leftist AAP, then, recognizes the real risk of Hindu values steamrolling Muslim ones in the creation of a UCC.

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127 Editorial Staff. “AAP will implement Uniform Civil Code with special provisions for Muslims: Ashutosh” *Junta Ka Reporter* (July 1, 2016).
At the same time, the above sections illustrate the ways that Muslim women in India may require legal succor. Although the Muslim League won supporters during independence by presenting themselves as defenders of women, the Shah Bano case and the continued practice of triple talaq make clear that the discussion of Muslim women’s wellbeing does not end there. Instead, as with France, the Indian state must endeavor to respect minority religious nations, like Muslims, without allowing accommodation to countenance pernicious in-group discrimination. In this, the state ought avoid simply substituting Muslim values with Hindu ones—as through a UCC—while remaining cognizant of the historical development of Muslim identity. Namely, recognizing that, although Muslim personal laws developed around views of the Quran as statically true for all Muslims, the same changes that Hinduism underwent in the 1930s and the analysis Berger gives of religious changes abstractly suggest that Indian lawmakers may find more malleability within Islam than the history suggests. Indeed, to the extent that the Indian state already has accomplished this, it has done so despite the tendency of the majority religious nation’s conception of religious nationalism to railroad state behavior.
Chapter 3

Moneyed Embrace: Black Churches And Spiritual Refugees

What I call the autoimmune consists not only in harming or ruining oneself, indeed in destroying one’s own protections... Autoimmunity is more or less suicidal, but, more seriously still, it threatens always to rob suicide itself of its meaning and supposed integrity. 128

-Jacques Derrida, Rogues, 2005

Religion in America takes no direct part in the government of society, but it must be regarded as the first of their political institutions; for if it does not impart a taste for freedom, it facilitates the use of it... I do not know whether all Americans have a sincere faith in their religion (for who can search the human heart?) but I am certain that they hold it to be indispensable to the maintenance of republican institutions. 129

-Alexis de Tocqueville, Religion in America, 1835

Introduction

In the US, political leaders often do not or cannot separate their commitment to a religious nation from their political activities, though many endeavor to. In his autobiography, President Jimmy Carter (in office 1977-1981), a self-described born-again Christian, records his own personal struggles to understand such a separation. As he writes, “I came to realize after holding public office how ambiguous the line is between the secular and the sacred.” 130 The US model of religious nationalism—a phrase which, by our definition, denotes the

state’s attitude towards interactions with religious nations—exhibits aspects of the troubling entanglement with religion at both ends of what might be seen as a nationalist spectrum that India and France bookend. At one end, French laïcité calls for excising religion from the public sphere. Opposite it, India’s conception of nationalism includes the state-level enforcement of religious family laws. The US sits squarely in the middle, but encounters the issues of each. Namely, even as the US rejects certain obvious violations of the divide between the state and religion, the politics of religion remain potent.

Some, like religious anthropologist Talal Asad, links this to the influences of religious nations in the democratic process. He argues that religious nations constitute “pressure groups” that leverage popular sentiment, economic means, and media connections to sway elections and coax officeholders to favor policies that accord with their conception of nationalism.131 As he writes, “historians have traced this recurring pattern of American nationalism from the end of the eighteenth century—that is, from the foundation of the republic—to the present.”132 This chapter draws from Asad’s unnamed historians to explore the liminal status of US religious nationalism. It argues, first, that the US privileges community groups, especially religious ones, that conform to a Protestant model. It begins by examining an example of etic nation-building in the court case of Warner v. City of Boca Raton (2001). Through this example, it shows how legal processes involve the

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132 ibid., 7.
state in the act of defining religion. This has produced a series of etic religious
declarations—that is, religious groups shaped by state policy, rather than the preferences
and beliefs of members of the nation themselves.

The etic framework they apply, moreover, embodies a distinctly Protestant
version of religious nationalism. Under this, a nation that claims to be religious
must link its activities back to a centralize institution, like a church, and a series of
clearly defined tenants, as in scripture. As Winifred Sullivan argues, even where
political leaders extoll religious pluralism, “the diverse American religions they
celebrate all look a lot like evangelical Protestantism.”\footnote{Winnifred Sullivan. The Impossibility of Religious Freedom (Princeton, NJ: Princeton University Press, 2005) 42.} This paradigm sets up the
rest of the chapter’s exploration of black churches and black social movements.
Black churches, it argues, fit neatly within the Protestant model of religious
nationalism. This confers access to both economic support from the state, as well as
special consideration by legal and political actors. The confluence of economic
means and firm social standing—a direct consequence of the Protestant version of
nationalism that black churches are able to conform to—has enabled the black
church to grow into a fixture of many black communities in the US. At the same
time, many black churches in the US expropriate the labor of black women and gay
Gospel singers.

This chapter, then, argues that black church alignment with Protestant
nationalism in the US has a duel effect. On the positive side, it extends agents of
social change in black communities an avenue to pursue their ends by lessening the otherwise immense resistance they encounter. On the other, black churches often exploit women and queer people. Further, church-based welfare programs cajole black people, especially indigents, into unavoidable entanglement with these churches. Most saliently, and in keeping with this project’s central argument, the chapter links the majority religious nation’s vision of religious nationalism to incidents of in-group discrimination. Section I sets out the theoretical formulations of US legal definitions of religious nations. From there, Section II works backwards to provide a historical account of religious nationalism’s development in the US. Section III builds on this definition to highlight how black churches’ capacity to ably conform to the framework set out in Sections I and II has drawn in poor black citizens and exerted near-monopolistic control over social programming that focuses exclusively on black citizens’ wellbeing. Finally, Section IV identifies several ways that black churches invite the same concerns raised in the foregoing chapters relating to the consequences that arise when a majority religion controls a Western democratic state’s religious nationalism: the danger of in-group discrimination among minority religious nations.

Section I: Proving Belief

The relationship between government and religion in the United States stands apart from France and India principally in the public attitude towards belief. There, as in France and India, the constitution ostensibly distances religious nations
from most governmental policies, but the majority religion’s conception of nationalism often governs state actions. In some instances, the apertures in the division between religious nations and the US state present in conspicuous fashion: “in God we trust” adorns courtrooms and currency, presidents and members of Congress ceremonially include the Bible in their oaths of office, and organizations that exist purely for religious purposes qualify for 501(c)(3) tax exempt status. At the same time, with deference to the constitution, the US court system has worked as a bulwark against obvious unequal treatment of religion groups. As recently as this writing, US courts have issued injunctions against two executive orders issued by the Trump Administration on the basis that “the removal of the petitioner and others similarly situated violates their rights to Due Process and Equal Protection guaranteed by the United States Constitution.”

Perhaps the key to the US’ struggle to mediate the relationship between religious nations and state policymaking turns on US understanding of secularism—or, by the lexicon proposed in this work, of religious nationalism. Reflecting on the US, Asad restates the common view that “in America the population is largely religious but the federal state is secular.” Namely, although many religious nations cohabitate in the US, the state remains carefully aloof from their activity. As

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136 Note that Asad does not endorse this perspective. Instead, his words simply help illustrate, in clear terms, a common view that he summarizes in his own writings. Asad. *Formation of the Secular*, 5.
the Supreme Court famously declared in *Everson v. Board of Education* (1947), “the First Amendment has erected a wall between church and state. The wall must be kept high and impregnable. We could not approve the slightest breach.”¹³⁷ In this way, the view concludes, the version of religious nationalism at play in the US is one where the state neither favors, nor disfavors religious nations. Certainly, this view is correct in its characterization of religious sentiments among the general population: most US citizens classify themselves as members of some religious nation.

The above understanding of religious nationalism in the US falters chiefly in its suggestion that religious nations do not also participate in politics. To the contrary, religious national groups drive US politics. In the 112th Congress (2011-13), for instance, fully 93% of members in a poll identified as either Protestant (57%), Catholic (29%), or Jewish (7%)—each significantly over-representing national demographics—and a national poll showed that the largest percentage (53%) of respondents said that knowing a candidate was an atheist would make them less likely to vote for them.¹³⁸ Famously, Jerry Falwell (1933-2007) defended the integration of religious nations with policymaking. Falwell worked as an impactful leader on issues of religious nationalism in his capacity as a Southern Baptist preacher and a founder of the Christian Right—a political faction centered

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around religious values. Famously, Falwell argued that “you cannot separate the sacred from the secular. Everything is sacred to God.” For Falwell and many others in the US, simply holding political office does not abrogate duties to one’s religious nation. Instead, Falwell would argue, it merely gives members of religious nations new tools with which to promote that group’s ideals.

Despite the polar tugs of the US state’s commitment to remain detached from religious affairs, and the population’s insistence on religious considerations in the political process, the US has not yet been pulled to either end of the spectrum of religious nationalism. Nevertheless, the Protestant majority has managed to shape the state’s definition of and approach to other religious nations. This section begins by briefly rehearsing Sullivan’s seminal illustration of the Protestant underbelly of state-level conceptions of religious nationalism. Although Sullivan begins her work by outlining the backdrop of civil religion in US society, this section begins by sketching the case of Warner v. City of Boca Raton (2001) and then illustrating how it fits into the broader framework of US secularism. It then builds on Sullivan’s foundational work by examining the theoretical conclusions that a Protestant cosmology gives rise to. Religions in the US, it ultimately shows, must serve a dominantly secular purpose to receive state consideration, but must first fit into a Protestant mold to even be considered religion.

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The *Warner* case neatly typifies the challenges posed by any effort to pin religious freedom in the US to any static set of parameters. In it, the petitioners—city residents in Florida—sought judicial relief against a municipal enjoinment to remove different grave decorations that city residents had place on or carved into gravestones. These decorations accumulated over a fifteen-year period in violation of a city ordinance that was not enforced until nearly ten years after passing. The city residents, represented by the Florida branch of the American Civil Liberties Union (ACLU), argued that the placement of certain decorations constituted a religious practice under the 1998 Florida Religious Freedom Restoration Act (FRFRA). In their reply brief to the court, they argue that certain grave coverings both mark the gravestones as religious sites, and ward against secular tendencies to disregard their sacred character. As they write, “In an increasingly secular society, in which many people casually walk on graves... covering the grave to prevent people from casually walking on it becomes an important means to protect the traditional religious practice.” The petitioners, here, chose to emphasize the importance of this practice as a defensive act—that is, a method of protecting what they considered to be a plainly religious practice.

The case, indeed, came to hinge on whether the grave decorations constituted an essential avenue for practitioners to exercise their beliefs. In its eventual opinion authored by Judge Kenneth Ryskamp, the eleventh circuit court

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held that “conduct that amounts to a matter of purely personal preference regarding religious exercise does not fall within the ambit of the Florida RFRA.” Instead, the opinion clarified, only religious practices that constitute immutable religious tenets qualify for FRFRA protection. Much like the scripturalist drivers that guided Wilkins’ and Hastings’ efforts to translate and disseminate Hindu texts in the early period of British colonial rule in India, the distinction that Judge Ryskamp’s opinion draws indicates that legal recognition of a religious practice must trace back to some clear canonical or institutional mandate to prove that it is indeed essential. In this, it draws on the wording of the FRFRA to develop what Judge Ryskamp came to treat as a quadripartite test for immutability. As the RFRA reads, in determining whether a practice is compulsory or merely personal preference,

a court should consider whether the practice: (1) is asserted or implied in relatively unambiguous terms by an authoritative sacred text; (2) is clearly and consistently affirmed in classic formulations of doctrine and practice; (3) has been observed continuously, or nearly so, throughout the history of the tradition; and (4) is consistently observed in the tradition as we meet it in recent times.

Judge Ryskamp’s privileged treatment of the above language as a dispositive test for FRFRA protection runs against the views of some prominent political leaders and theologians contemporary to the court case. In an amicus brief given to the eleventh circuit court—after the tenth circuit found against the petitioners—Florida Governor Jeb Bush (in office 1999-2007) argues against Judge Ryskamp’s

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143 Warner v. Boca Raton.
bounded definition of protected religious practice. Bush rejects Judge Ryskamp’s reliance on the compulsory belief standard to define what the FRFRA means when it extends protections to actions that are substantially motivated by religious belief. Far from constituting a litmus test for weight of the views, Bush writes, “what the language excludes are claims that are not in fact... genuinely and sincerely based in a religious belief, and claims that are motivated by a secular belief or philosophy, as opposed to a religious belief.”

Bush, then, proposes a significantly more expansive definition of protected religious practice than Judge Ryskamp’s bounded statutory interpretation allows.

At the same time as he developed this expansive argument, Bush would have found strong allies in the religious studies academy. Just a year after Bush filed his amicus brief, Robert Orsi, a scholar in religious studies, delivered a strong defense of a non-institutionalized view of religion in an address to the Society for the Scientific Study of Religion. In his remarks, Orsi considers the value of lived religion—that is, religion “as it was discussed and practiced, inflected and constituted within these bonds of friendship, family, and memory, within the worlds of work and school.”

With his enjoinment to regard religion in this manner, Orsi directs scholars and politicians alike to consider religion as culture, not as sacrosanct canon. The immediate consequence of this in terms of the Warner case, then, is that “a particular practice in fact may be caught in the tension between conscious and

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unconscious motivations and desire, or between now and then, here and there, hopes and memories.” Namely, practices are never categorically compulsory or substantial, but, instead, are always conditioned by the context in which they are undertaken. Though stated in different terms, Orsi’s support of lived religion in 2002 neatly compliments Bush’s argument for a treatment of substantial motivation that is untethered from strictly scriptualist legal traditions.

Judge Ryskamp’s ruling, then, delivered a blow to the legal status of lived religion as advanced by Bush, and the theoretical construction of a religious nation set out by Orsi. In its place, Judge Ryskamp introduced a definition of religion as a structured act, characterized by rigid beliefs and tenants that derive from a central organization. This framing, argues Sullivan, continued a longstanding US legal tradition that foists Protestant parameters on all other religions. Protestantism, she contends, holds that a fair legal treatment of religion would “focus on religious opinions rather than religious acts. It should be enough... that one’s opinions are free.” Thus, for a court to intervene on behalf of a religious practice, the practitioners would need to demonstrate that the proscribed act constituted an act of belief. Put differently, they must prove that their actions constitute not merely a religious act, but physicalized religious belief. The dichotomy between religious practices and physicalized belief that Sullivan illustrates eludes easy classification. Nevertheless, their separation constitutes a central aspect of the US’ Protestantized

category of religion; and, in his opinion on the Warner case, Judge Ryskamp relied on precisely such a division to come to a ruling.

Essentially, the debate among the legal system, political leaders, and theologians constituted a fight over an etic or emic treatment of religious nations in the US. On the one hand, some representatives of the latter two groups advocated for a version of religious nationalism that allowed religious nations to define themselves on their own terms—that is, without needing to prove that their beliefs derive from something other than the religious nation they understand themselves as belonging to. On the other, Judge Ryskamp rendered an outsider opinion on what a religious nation ought to look like. In this, he drew from a version of religious nationalism that tested the importance of a religious belief by considering its connection to scripture and institutions, not its relation to the individual practitioner. Crucially, Judge Ryskamp’s ruling did not constitute a discrete incident, but, rather, continued a broader trend within the US legal system. In her assessment of legal cases that involve defenses built around motivating beliefs, political theorist Sarah Song writes that “in American law... [some legal defenses] rely on deeply rooted cultural understandings about what constitutes reasonable behavior.”149 In those cases, she continues, courts assess the whether such traditions exist by turning to texts and institutions.150

Section II: Protestant Religious Liberty In The US

At this point, the above claim that the US legal category of religion reflects Protestant foundations may seem incredible: surely, the Protestant tradition centers on a move away from centralized church authority, not its reassertion. Through the Reformation, Protestantism symbolized rejection of the Roman Catholic Church’s teachings—especially with respect to papal indulgences. Martin Luther’s (1483-1546) *95 Theses* (1517) sought to reassert true Christianity as something that all individual Christians could proffer claims to, regardless of their positioning with respect to the Church.151 Even today, as social theorist Giorgi Areshidze argues, “the cultural pressures that modern democracy generates liberate individual rationality and nurture and attitude that questions the inerrancy of revelation.”152 In other words, Protestantism today operates near to its historical origins in its prioritization of individual access to divinity. Ostensibly, this runs directly counter to the version of Protestantism Sullivan and others identify in the *Warner* case, and US religious trends broadly.

Here, Robert Putnam’s and David Campbell’s *American Grace* (2010), which provides a robust assessment of Protestant trends in the US, offers crucial insights. In it, they argue that US Protestantism at once supports the sorts of individualized

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access to the divine—that is, non-institutional religion—that defined Protestantism’s origins, while simultaneously promoting a strong sense of religious community. Specifically, they argue that, within religious groups, “everyday personal relationships give rise to politically meaningful communities.”\textsuperscript{153} Far from marking a trend towards private religious practices by believers acting in isolation, then, US Protestantism simply constitutes a novel manner of comprising a political community. Namely, through individual access to the divine, religious individuals have built firm communities that are all guided by devout participation in the activities of their community—like churchgoing—but whose identity as Christians is not limited by those activities.\textsuperscript{154}

Thus, the Warner case—however instructive—only highlights one aspect of US legal treatment of religion. It shows that religion in the US must link back to some larger institution, text, or set of institutions to warrant an exception to the US’ separation of religious nations from state activities. However, the broader point that Sullivan’s conclusion regarding the Protestant treatment of religion in this case contributes to concerns not just the internal prerequisites that religions must meet, but the external roles that they fill. Specifically, as Putnam and Campbell illustrate, a strong sense of religious nationhood undergirds US Protestantism. Even in the 1980s, this understanding of US religio-political trends carried weight. In a robust evaluation of those trends, Robert Fowler argues that the community orientation of


\textsuperscript{154} ibid., 24.
Protestantized US religion “provides an escape from liberal culture... where individualism, competition, this worldly pragmatism... do not hold sway.”

Instead, Fowler eventually concludes, the ultimate influence of Protestantism on US religion has been the emergence of the institutional links that Sullivan nearly lays bare in her appraisal of the Warner case.

Fowler’s argument, although made some thirty years ago, still bears on today’s religio-political landscape. In a wide-ranging visitation of US Christianity’s development, journalist Ross Douthat suggests that Christianity continues to operate “as a driver of assimilation and a guarantor of social pace.” Citing the same reasons that scholars from Fowler through Putnam and Campbell to Sullivan identify, Douthat concludes that US religion’s Protestant context has reemphasized the actions of individual believers in relation to their community and the practices it expects. In part, this allows the state to cite a secular purpose in its treatment of religious groups—that is, if supporting a religious activity has the additional effect of supporting a secular end, the state may sidestep issues of religious promotion. This was the motivating reasoning in the Supreme Court’s ruling on Sherbert v. Verner (1938), where the Court held that the government could involve itself in religious activity only if it demonstrated a compelling state interest. Even as they allow for distinct individual expression of belief’s myriad contours, then, US legal

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157 In its ruling on the Sherbert case, the Court also introduced a narrow tailoring requirement to ensure any law affecting a religious nation only do so insofar as it needs to in order to fulfill its goal. This was replaced by the least restrictive means test by the Religious Freedom Restoration Act (1993).
notions of religion are Protestant in their focus on the community's wellbeing and
the insisted importance of interpreting scripture. That is, US treatment of religion is
Protestant insofar as the law expects that religions are schemas of belief that are
both tethered to a larger organization, and oriented around a goal of community
betterment.

This Protestant tint of US legal definitions of religion complicates the public
financing process of some religious programs. In 2001, for instance, President
George W. Bush’s (in office 2001-2009) first executive order created the Office of
Faith-Based and Community Initiatives (OFBCI), an organization that was
preserved but renamed by President Barack Obama (in office 2009-2017). The
OFBCI gives funds directly to churches to sponsor programs like anti-recidivism,
student-empowerment, and economic development campaigns.158 In his remarks
prior to authorizing the order on January 29, 2001, Bush presented his vision of
what he called compassionate conservatism: “when we see social needs in America,
my administration will look first to faith-based programs and community
groups.”159 By drawing a parallel between faith and community groups, Bush
suggests that the two share in structure. Namely, he implies that the two types of
programs are comparable insofar as both a specifically Protestant orientation
towards the community. Further, Bush illustrates the desire of political leaders to

158 “Innovations in Compassion: The Faith-Based and Community Initiative: A Final Report to the
Armies of Compassion,” The White House (December, 2008).
159 George W. Bush. “Remarks on Signing Executive Orders With Respect to Faith-Based and
financially and politically support religious nations. Groups seeking state funds, though, need to demonstrate the above—a Protestant-style institution and focus.

Taken together, religious nations in the US who aspire to receive recognition by the state must meet two tiers of scrutiny. First, even to classify as religious, a group must evince a clear link between any specific practices to a broader pool of community belief. This requires the presence of both an institutional core and a clear set of tenets, generally set down in some authoritative scripture. This initial step qualifies the group as a religious nation and exempts it from invasive governmental activities like taxation or the removal of grave markers as in the Warner case. Second, to affirmatively receive state support, the religious nation must show that it is oriented towards improving its community—that is, filling a secular purpose. This may occur at a theoretical level, by advancing US ideals of liberalism or democracy—as outlined above—or concretely, by providing tangible social gains to a community. In both cases, though, the Protestant dictums of religious nationalism demand some provable community orientation from religious nations. The sections that follow treat the history of black churches as a fruitful resource for illustrating the US’ middle status as a state that at once strongly asserts secular principles, but still desires to support religious activity and, therefore, makes great allowances for religious groups that fit the Protestant mold.
Section III: Black Churches As Mediators Of Social Change

Black churches exemplify the Protestant conception of a religious nation. Reacting to the deep history of discrimination against black individuals and organizations, black churches have fully conformed to the state’s expectations for religious nations. Buoyed by the desire of many politicians to support the activities of religious nations that conform to the above parameters, this careful structuring has allowed black churches to grow into prominent institutions and secure significant government considerations. Their success in accumulating social and economic clout comes in sharp contrast to many black social movements that focus on alleviating the hardships black citizens face at the structural and social levels. Unlike the many black churches that receive government funding and recognition, these movements run up against myriad disadvantages ranging from a dearth of black wealth and income to general social biases against black people.

The contrast between black churches and other black social movements has significantly impacted the members of many black communities. This section illustrates how black churches fit the Protestant mold of religious nations and, consequently, receive direct economic assistance from the state. It shows, further, how many black social movements lack precisely the advantages that black churches have come to enjoy, and proposes this contrast as a key reason black churches attract black social movements. The chapter’s final section (Section IV) builds on this one. It examines problems of in-group discrimination within the black church that undermine much of the progress that activists hope to achieve. Ultimately, it
concludes that Protestant religious nationalism has dovetailed with the clout religious nations hold in the US to undermine the wellbeing of black women and queer people.

First, though, it is crucial to clearly define black churches, which are different from both black religion as a general category, and Christianity broadly. Although 80% of black citizens belong to some Christian religious denomination, scholars like Hans Baer, a political scientist, and Merrill Singer, an anthropologist, exclude all “white-controlled religious organizations, such as the Catholic church, various mainstream Protestant denominations, the Seventh Day Adventists, and the Jehovah’s Witnesses” from their definition of black churches.\textsuperscript{160} The justification on which their classification turns is the assumption that black churches embrace some formulation of black integrationist and black nationalist ideologies, and that these ideologies are peculiar to black churches. Put differently, a church qualifies as a black church insofar as it draws from black integrationism and black nationalism in a manner than cannot be duplicated by non-black churches. Practically, this just means that black churches display a specific focus on the issues faced by black communities. Defined this way, about seventeen million black citizens belong to distinctly black churches—approximately 40% of the overall black population in the

United States.\footnote{Note that the membership information used for this calculation relies on snapshots taken from some time in the past—up to 60 years ago, in one case. This reflects the best information I could access that followed the restrictions outlined above regarding what organizations do and do not qualify as black churches. See Baer and Singer, \textit{African American Religion}, 56.} Within this statistic, about 75% belong to urban churches and 25% to rural ones.\footnote{Eric C. Lincoln and Lawrence H. Mamiya. \textit{The Black Church in the African American Experience} (Durham: Duke University Press Books, 1990), 141.}

From this, we gain a general understanding of black churches as urban, Christian institutions with ideologies differ from other churches that might share similar cosmologies. The distinction between a church’s ideology and cosmology, as it is made here, hinges on a differentiation between a canonized set of beliefs about God and the universe—its cosmology—and the goals of the organization with respect to its earthly context—its ideology. Conversely, two religious organizations with substantially different cosmologies would both still classify as black churches by Baer’s and Singer’s definition. Black Pentecostals, for instance, differ significantly in their religious praxes from black Baptists, but both groups’ churches would be counted as black churches because their ideology involves elements that relate specifically to the general social status and history of black people in the US. In this way, black churches are at once uniform and heterogeneous and to speak of the black church as a single entity would be to speak of an imagined community. Here, mentions of black church indicate the collection of churches that fit with the above definition. Care is, of course, taken to distinguish truly ubiquitous features of black churches from trends that only appear within some black churches, however prominent those trends may be.
From the responsiveness to historical events its ideology occasions, it follows that the black church has, over time, adjusted to fit US legal expectations of a religious nation. The history and contemporary shape of the black church confirms this. Even the early seeds of the black church that slaves sewed in hush harbors—secret meetings where slaves gathered to worship in a manner that combined African traditions with Christian teachings—later grew into institutionalized church practices in concert with the US state's and society's expectations for religious nations. During slavery, black religious activities were highly scrutinized by white slave owners who feared the enlargement of the black collective consciousness.  

This led black religious leaders to incorporate Christian themes into their worship styles in an effort to win slave owners’ approval for both material support, like small houses that served as churches, and simply the license to preach openly.  

As black church history Juan Floyd-Thomas explains, the black church first developed as “an effort by enslaved Africans to safeguard themselves against the disruption of their religious worldviews... through a complex process of enculturation, adaptation, and assimilation [to white Christianity].”  

In this way, the early origins of the black church reflect a minority religious nation’s strategy to preserve its identity. Further, only after encountering a need to appeal to white religious expectations of both


164 ibid., 24.

165 ibid., 6.
cosmology and its norms about worship, did that religious nation assume the form of the majority religious nation.

Since this early genesis, both the expectations in the US and the way the black church meets them have shifted. Today, many black churches enjoy direct funding from the state as well as direct legal affirmation of their status as well within the state’s understanding of religious nationhood. That is, per the preceding sections, a religious nation in the US must demonstrate the presence of an institutional core and a clear set of tenets, generally set down in some authoritative scripture, for the state to regard it as such. Further, to receive state support, the religious nation must show that it is oriented towards improving its community—that is, filling a secular purpose.

Many churches work to promote community wellbeing by targeting the material disadvantages experienced by black citizens. This aim is executed through a large number of social programs that run out of black churches. In 1999, for instance, sociologist Andrew Billingsley studied 635 black churches along the East and West Coasts, and found that “419 of those churches provide 1,685 specific family-support services.”\footnote{Andrew Billingsley. \textit{Mighty Like A River: The Black Church and Social Reform} (Oxford: Oxford University Press, 1999), 90.} Of these, 40% dealt with basic needs assistance, or the provision of clothes, food, and shelter to impoverished families.\footnote{ibid., 90.} Many of these efforts dovetail with careful political efforts to mobilize black voters—as through “Souls To The Polls” drives—and lobby for governmental support. Through these
programs, black churches have successfully courted financial and juridical governmental support. With regards to the former, the OFBCI gives some $600 million to black churches annually to carry out charitable programing. Even given this lofty figure, the OFBCI has received criticism for not allocating enough to black churches.168

The black church often enjoys unique legal privileges because of its status as a religious nation. One example of church work from 1993 typifies this. That year, a group of fifteen black boys at a Georgia high school were arrested for fighting at school. The fifteen faced up to a month in prison, a sentence which would have forced them to repeat a year of school. The local Reverend, Reverend Tillman, of the African Methodist Episcopal (AME) Church—the oldest black church consortium in the United States—intervened and asked for the boys to be released into his custody. Certainly, this request placed Reverend Tillman, and, by extension, the entire AME Church, in a position of substantial risk should the boys continue to engage in misconduct. For the charitable sentiments it conveys, it should be lauded. Nevertheless, the event shows the unique legal recognitions that the black church enjoys.

In releasing fifteen boys into the custody of individuals who were not their parents or legal guardians, the judge in that case communicated tremendous juridical confidence in the black church. Judges only rarely release juvenile offenders

into the custody of individuals who are not their legal guardians.¹⁶⁹ Thus, this judge's decision to release fifteen amounts to not just an emphatic statement of one person’s trust in the black church, but a legal recognition of this status. The judge’s own understanding of the black church reflects the beliefs of many black communities themselves. As sociologist Eric Lincoln and theologian Lawrence Mamiya write, “it is a common convention in the black community that the church is the oldest and most stable institution.”¹⁷⁰ It is worth noting that, partially as the result of church-funded tutoring programs for the remainder of that year, six years after the incident fourteen of the fifteen were either enrolled in college, or held steady jobs.¹⁷¹

The above highlight two elements of the black church’s standing that help explain its ability to sustain itself as the pillar of black communities that Lincoln and Mamiya characterize it as. First, church programs target young folks by promising rare economic prospects. Next to the direct provision of resources to poor families, the most common programs offered by the black church are youth-oriented programs that aim to increase graduation rates, reduce crime, decrease instances of single motherhood, and, crucially, bolster the economic prospects of black children.¹⁷² As Hans Baer, an anthropologist, explains, “the ministry has been

¹⁷⁰ Lincoln and Lawrence. The African American Experience, 137.
¹⁷¹ Billingsley. Mighty Like A River, 105.
¹⁷² ibid., 91.
one of the main avenues for social mobility in the African American community.”

Residents of ghettoized black communities face diminished access to jobs and, even when black individuals are able to find job openings, social stigmas about blackness either prevent them from getting hired, or force them to accept lower salaries.174

However, though, many church programs have proved quite effective in according economic opportunities to black youths, some have had the additional effect of tethering black people, especially younger folks, to their local church.175 Namely, as individuals benefit from church services like afterschool programs for their children and material assistance programs like food drives, they find themselves drawn into a relationship with the black church. Because the black church maintains a primary commitment to spreading the love of God, beneficiaries from back church services encounter unspoken reciprocal obligations that induce participation in black church praxes by offering benefits. This sets up a troubling relationship wherein black citizens’ material wellbeing depends on their demonstrations of faith. That is, because black citizens face severely limited

174 Philosopher Elizabeth Anderson’s The Imperative of Integration delivers a comprehensive overview of black economic woes. Specifically, she argues that a cocktail of unfair housing practices—such as segregated public housing projects and the perverse incentives relators face when showing properties that lead them to preserve segregated neighborhoods—an absence of black wealth or income, and the broad social stigma against black people has prevented integration and, instead, established a series of black ghettos across the US. As she writes, “hypersegregation causes marginalization—extraordinarily high rates of unemployment in black ghetto communities. It deprives these communities of the resources—tax revenues, social and cultural capital—they need to support the education of their youth. This tends to confine ghetto residents to menial jobs and makes them vulnerable to exploitation.” Elizabeth Anderson. The Imperative of Integration (Princeton: Princeton University Press, 2010), 85. See also Charles Mills. The Racial Contract (Ithaca: Cornell University Press, 1997), especially page 42.
175 ibid., 91.
economic options, what opportunities they do encounter carry outsized weight. By targeting black youths, who have the highest rates of unemployment even within black communities, black churches can induce participation in church programing over and above whatever is strictly required to receive the benefits of church programs. Subsequently, when the direct economic incentives to participate in church activities fade, many still feel connected to their church and choose to continue to engage with it. The allure of unusual economic opportunities ties black youth to the church in the short term, and the connection they then form keeps them there for in the longer term.

Similarly, the governmental recognition that the black church enjoys politically and legally has led many black social movements to work through black churches. Many black social movements, especially ones that focus explicitly on the issues black people face, face immense opposition from the US political and legal systems. In part, this involves a process of etic nation-building whereby negative stigmas about black people come to define any effort that attempts to center around their issues exclusively. Namely, “although the stigmatizing images of blacks that inform stereotypes… mostly reflect ideas about underclass black residents of inner city ghettos… these images undermine the standing of blacks of all economic classes.” The notion of blackness, then, serves as an etic nation insofar as people

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177 Anderson. The Imperative of Integration, 85.
map their observations of some black people onto a nation that includes all black citizens. For this reason, *Black Skins, White Masks* (1967), Afro-Caribbean philosopher Frantz Fanon’s (1925-1961) seminal work, states that “we are aiming at nothing less than to liberate the black man from himself.” Fanon at once advocates for the actual removal of black people from ghettos, and calls for the eradication of blackness as a meaningful social marker.178

Despite Fanon’s aims, the stigma of blackness has endured and, today, assails many black social movements and welfare organizations. The programs they carry out warrant the qualifier of black, for they focus specifically on the problems faced by black communities. Often, this designation draws the ire of non-black groups who charge whatever undertaking with either encouraging segregation by not including other races, or committing reverse racism by not engaging with issues faced by other races as well. When protests are involved, leaders are often labeled violent thugs with little regard given to if they advance a peaceful agenda, or not. The black church, by contrast, enjoys the high regard of US political groups and governmental institutions on a broad scale. This favors insulates them from many of these attacks. Its unique standing in this respect has led welfare programs and movements to involve themselves with the church that otherwise might not have. As the volume of community programs that run through them grows, black churches can attract more members and claim more funding from the government for those programs.

To be clear, these outcomes do not reflect some concerted effort by black churches to swindle young black people and black activists into associating with them. Certainly, some leaders of black churches do sanction the use of these programs to reassert church values. Reverend Stewart, a black church theologian and fourth-generation AME minister, furnishes a strong endorsement of this induced participation as a just end for the black church. As he writes, “African-American spirituality has not only facilitated the formation of black consciousness, community, and culture and unified the black self and the communal self into a meaningful framework for existence, it has also given value and legitimacy to African American life.”

By his view, the church has and must continue to use its influence to attract and retain members or it risks the extinction of black communities generally. He aims at the maintenance of a distinctly black nation, not, say, the cultivation of a racially transcendent Christian nation. Conversely, a survey of black clergy revealed that 63% hold that the black church does not have a different mission than the white church. These folks would disagree with Reverend Stewart’s desire to preserve a spirituality that is distinctly black and, instead, favor that racially transcendent Christian nation. These two views correspond to competing pulls of black nationalists and black integrationists mentioned earlier when this chapter defined the black church, but also show the non-uniformity in motivations behind shaping these programs.

Bracketing black church leaders’ assorted motivations, we see that the process by which black youths and black social movements become tethered to the church follows directly from the US’ Protestant nationalism. Even as the state aspires to only fund religious nations whose programs have secular ends, it is nevertheless clear that the context within which those programs exist has the effect of leveraging economic pressures or social rank to cajole individuals into joining a religious nation. Specifically, the black church’s successful alignment with the government’s conception of a religious nation has enabled the church to receive direct financial support from the US government, earn unusual legal considerations, and, ultimately, to thrive as an organization. Thus, in the US, the state’s desire to remain aloof from the activities of religious nations allowed the majority religious nation’s conception of nationalism to infect its legal and legislative activity. This then strengthened the black church, a religious nation—precisely the opposite outcome as what the state had hoped for. The next section considers some of the harms that black churches have inflicted on women and gay men as instances of ingroup discrimination within a minority religious nation that, through the process outlined above, has flourished under Protestant nationalism.

Section IV: Strings Attached: Problematizing The Black Church

Shadowy imperfections in the black church’s social agenda have clouded the brilliance of its achievements as a change agent. Undoubtedly, black churches have caused tremendously positive changes among black communities in the US. They
deserve laurels for having made major contributions to reducing teen motherhood, adolescent drug use, and crime among the communities it has operated in. Yet, even as these churches worked to empower black people as a group, sub-groups within the black community found themselves further marginalized by church structures and beliefs. Most prominently, women and queer people have suffered under black church programs and within black church congregations. This section considers each of these groups in turn and concludes by assessing the institutional appendages that keep them, like black youths and activists, wedded to the church.

Many black churches depend on the energies of black women to sustain themselves, but exclude female voices in crafting church doctrine or making decisions for the congregation. As the significant majority in most black church congregations, women are encouraged to provide an audience for black men to minister to, as well as to give money to black churches.¹⁸¹ Renita Weems, a professor of theology and ordained minister in the AME Church, emphasized the importance of women’s involvement at the congregational level in a 2010 interview. In her view, "black women are the backbones of their community and without them a lot of charitable work would not get done, social justice on the ground would be diminished and outreach to poor people would be severed."¹⁸² Women in the black

¹⁸¹ A 2009 Pew Research Center poll found that “African-American men are significantly more likely than women to be unaffiliated with any religion (16% vs. 9%)... [and that] more than eight-in-ten black women (84%) say religion is very important to them, and roughly six-in-ten (59%) say they attend religious services at least once a week. No group of men or women from any other racial or ethnic background exhibits comparably high levels of religious observance.” Pew Research. “A Religious Portrait of African-Americans.” Pew Research Center. January 30, 2009.
chuch do not just passively receive church teachings, but, instead, labor to bring black churches in line with the objectives their doctrines introduce. They fill the role of both audience members and foot soldiers for the black church.

Yet, to a great extent, black women lack authorship over the doctrines they receive and the agendas they carry out. Specifically, women are often excluded from actual positions of individual authority among the church clergy. In an article for the *Huffington Post*, womanist theologian Eboni Truman captures this problem as it relates to church leadership. She considers a recent National Baptist convention held to discuss race at which no women from black congregations were invited, even though women comprise a substantial majority of black church membership. As she argues, “while the gifts and labor of black women are consistently exploited in black churches, they are regularly excluded from leadership and critical conversations at the highest denominational levels.”¹⁸³ In Truman’s view, even as black churches depend on a foundation of black women to survive, they are denied access to positions of authority within black churches.

For some theologians, the chasm between black women’s energy and the control over how that energy simply marks one point in a long history of exploitation. On this point, the prominent French philosopher Luce Irigaray’s thinking is instructive. In her consideration of micro-economies built around endogamy—the practice of marrying within one’s group—she outlines the ways in

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which human laws have reduced women to the status of mere laborers, while elevating men to positions of control over that labor. In her words, “endogamy would thus forbid commerce with women. Men make commerce of them, but they do not enter into any exchanges with them.” Her reasoning turns on an understanding of human and divine law. Completely unencumbered divine law, she argues, emancipates women from their relegation to the family and allows for the cultivation of female-centered spiritualties. Presently, though, human law has perverted divine law such that behaviors and structures that purport to accord with divine law, actually serve the interests of the controlling group: men. Thus, “women’s work in the service of divine law is alienated labor: its product is enjoyed by a woman’s kinsmen and their fellow citizens, but not by women themselves... since they do not have public agency to preserve, and do not participate in community beyond the family.”

Insofar as many black churches stand atop black women’s labor, but deny them access to leadership positions, they constitute precisely the micro-economy Irigaray inveighs against. In their teachings, many black churches do actually preach endogamy. Reverend Lester Baskin, a minister based in Memphis, admonishes women that it may be "ok to look outside of the church for a partner, but it's dangerous, land of like mixing oil and water, they just don't gel... I would not marry

anyone if I am saved who is not saved, that just wouldn't work.”\textsuperscript{186} In at least some black churches, then, Irigaray’s critique lands precisely. Importantly, though these methods of exploiting black women did not begin in black churches, black churches gave them new shadings that mark them as distinct extensions of black churches. As womanist theologian Kelly Brown Douglas explains, “it is important to understand that Black sexuality is not simply a reaction to or a reflection of this destructive culture.”\textsuperscript{187} Although she notes that “the manner in which Black women are treated in many Black churches reflects the Western Christian tradition’s notion of women as evil,” the black church has not been totalized by these sexist ideas.\textsuperscript{188} Instead, black churches have imbibed sexist tendencies, embraced some, and augmented others. Black churches, then, must accept culpability not for the mere existence of anti-black-women misogyny that penetrates their thinking, but, rather, for its endurance.

Like women, queer people face marginalization by the black church. In fact, to a substantial extent the church-based victimization of queer black people derives from the same factors that cause black female suffering: a fear of sexuality and a commitment to highly gendered social roles. Again, much of this stems from the circumstances that surround and define the black church: “given a heterosexist society that considers homosexuality as best abnormal and at worst perverted, Black

\textsuperscript{188} Douglas. Sexuality and the Black Church, 83.
people have various ways to denounce homosexual practices in the Black community,” Douglas explains. However, as above, these harms persist within an institution that fights for some social changes, but not others. This attitude of selective justice constitutes an implicit endorsement of bigoted beliefs, which the words and actions of black churches render explicit.

Like women, queer men in many black churches suffer economic exploitation. The black church benefits financially, from record sales, and non-financially, from increased membership from the work of queer gospel singers from gospel music. Because singers are trained by the church, managed by the church, and supported by church choirs; black churches receive significant funds from artists’ musical success. All told, income from gospel music constitutes one of the two largest revenue streams for the black church. At the same time, though, pervasive anti-gay norms within black churches have produced toxic environments for these singers. E. Patrick Johnson—a gay, black gospel singer and professor—captured this dilemma in a 2012 interview with Corey Dade for National Public Radio: "on the one hand, you’re nurtured in the choir but you also have to sit through some of those fire and brimstone sermons about homosexuality being an abomination.” As recently as November 2015, Kirk Franklin, another gay black gospel singer, issued a public apology on behalf of the black church, stating “I want

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to apologize for all of the hurtful and painful things that have been said about people in the church that have been talented and gifted and musical, that we've used and we've embarrassed.” Johnson’s and Franklin’s language reveals the troubling predicament that gay gospel singers encounter within black churches. On the one hand, those churches offer them an outlet to express their faith; on the other, this expression requires them to conceal parts of their identity.

Explicit homophobia has aggravated the problems raised by this contradiction. Even as some gospel singers who are open about their sexuality have taken a stand against homophobia within the black church as a whole, many influential church leaders remain steadfast in their opposition to queerness. In his article on Johnson, Dade suggests black church leaders’ opposition to homosexuality has gained such note that “African-Americans have become the public face of resistance to same-sex marriage, owing to their religious beliefs and the outspoken opposition of many black pastors.” One popular blog that focuses on the black church, called A Toast 2 Wealth, typifies this attitude in its reaction to the publication of a private sex tape by black gospel singer Kevin Terry. The editors of the blog write, “this is really the lowest of the low... Kevin Terry has not only compromised himself but he’s compromised and shamed the church and the people who follow him. He has also compromised those who have worked with him.”

193 Dade. “Complex Relationship.”
These remarks came as a capstone to a four-part opprobrium alleging that Terry’s and others’ queerness has tainted the black church. As with black church misogyny, then, black heteronormativity has led to an exploitative relationship between the church and gay men. Just as many black churches benefits from the financial and non-financial contributions of its female membership, but denies them ownership over those contributions, so, too, do others accept the labor of queer folks, while, at best, denying them public recognition as queer or, at worst, publically defaming them.

A further attack from black churches levied against queer individuals charges them with threatening the overall wellbeing of black people. As Douglas explains, “nonheterosexual coupling has also been attacked for being nonproductive, and, as a result, homosexuality has been deemed genocidal for the black race.”¹⁹⁵ This has translated into substantive harms endured by queer black people. Billingsley, when discussing the black church’s response to the HIV/AIDS crisis in the 1980s, notes “some initial hesitation” to involve the church with preventing a disease that disproportionately affects black people.¹⁹⁶ This framing belies the lethargy that governed the black church’s response to a disease that was perceived to be a gay illness: during the HIV/AIDS crisis, queer black people suffered real harms because of church inaction that derived from pervasive anti-gayness.

¹⁹⁶ Billingsley. *Mighty Like A River*, 111.
Conclusion

In the US, instances of exploitation within a minority religious nation link back to the majority religion's conception of religious nationalism less directly than in either France or India. Instead of directly influencing the state's tendency to accommodate religious nations or tolerate in-group discrimination, Protestant religious nationalism’s effects on the black church only appear when care is taken to regard its context. In this case, that involves a consideration of black citizens’ material statuses and their interplay with the promises of prosperity many black churches can credibly make. The significant majority of black churches operate in urban settings where ghettos are common and many black people suffer under the poverty trap they create. Amid this, black churches offer economic and social support programs that draw in members who are sometimes forced by economic circumstance to interact with the church. The Protestant version of religious nationalism encourages state support for these programs, but prevent the state from closely scrutinizing their effects on church communities themselves. This setup has allowed many black churches that exploit women and gay men to reassert their clout among black communities by using state funds, but prevented the government from also weighing the discriminatory outcomes when considering whether or not to allocate them. In effect, it blinds the state to the outcomes of the state’s own policies.
~Conclusion~

What We See

We shall be as a city upon a hill, the eyes of all people upon us.¹⁹⁷


Where We Have Come To

If this project has failed, readers will now expect an endorsement. Noting the spectrum of religious nationalisms that the three chosen examples fall along and their various approaches to religious pluralism, they will, at this point, look to place one state’s vision over those of the other two. Yet, it is the hope of this author—and a central aim of this project—that readers having made it to this final section will, to the contrary, now find themselves considering not which model is superior, but rather how Western democratic states generally can escape the phenomenon this work articulates. Far from constituting three comparable examples—united, perhaps, only insofar as each involves a clash between states with majoritarian religions and minority ones—the foregoing analyses describe a shared historical process. This concluding chapter draws together the trends that the previous chapters establish to excavate religion from each stage of that process.

Initially, a majority religious nation’s vision of religious nationalism engulfs the state's own conception of how it should relate to the plurality of religious nations it contains. In the US, Protestant religious nationalism was able to channel an existing desire among the state to support religious groups to support its own ends by encouraging a two-tiered test for, first, recognition as a religious group and, second, state support itself. In India, Hindu religious nationalism triumphed after a long political struggle with Islamic religious nationalism and, after partition, asserted itself as essentially Indian by merging with the civil code. Importantly, though, this first step does not require conscious design for the majority religious nation to, nevertheless, overtake the state. In France, for instance, in the course of French Catholics’ struggle to endure a history of popular opposition, they twisted sentiments to target just the expressions of religion that they themselves would survive without, but could not fully reassert the control it once enjoyed. Thus, the establishment of a religious nationalism that favors Catholics arose as a historical contingency, not a chosen path. In all cases, though, the majority religious nation comes to dictate state attitudes towards other religious it exists alongside.

So consumed, the state then forcefully denies that it favors this, or any, version of religious nationalism. Instead, states attempt to conceal the elevated status of majority religious nations behind a smokescreen of even treatment. As we have seen, the Council d’Etat and, later, the Stasi Commission both couched their conclusion that headscarves were dangerous, but crosses were harmless, in the language of equal treatment. Similarly, the US claims to only support religious
nations in service of secular outcomes, but the contexts within which some religious programs operate helps those religious nations grow and, to an extent, force citizens to join them. Even where the state admits involvement with religious nationalism in a general sense, it denies prioritizing the version favored by the majority religious nation over alternatives. In India, Hindu principles directed the authorship of the civil code and minority religious groups, like Muslims, have needed to struggle against its gradual encroachment on their own systems of personal law.

Ultimately, this leads states to misread religious practices and flounder because of it. Namely, the majority religious nation’s formulation of religious nationalism, having taken hold, drains the state of its capacity to realize the two seemingly compatible ends or accommodating religious pluralism and preventing discrimination. The three examples considered here whipsaw between, on the one hand, accommodating minority religious nations while discriminatory practices take root in those nations, and, on the other, warding against in-group discrimination while countenancing the policies that restrict the religious liberty of minority religious communities. In the first case, Indian aspirations to permit religious difference have stranded indigent Muslim women without succor, while, in the US, the state has nurtured the black church by funding welfare programs that run through black churches that exploit the labor of women and gay men. In the second, French fears of women being coerced to wear headscarves undermined religious pluralism.
This work has presented this phenomenon as a fixture of democracies in the Western tradition that have majority and minority religious groups, but more remains to be said. Although it is this author’s strong suspicion that this general statement is accurate, it would require examinations of more democracies within the Western tradition to prove that this is a trend, rather than coincidentally the case in the three explored here. Likewise, to prove a connection to Western democracies, similar appraisals would need to be done of non-Western democratic states to show that this is not bound up with all democracies, and of non-Western non-democratic states to prove that what is observed and articulated here is not just something inherent to every state. More perspectives from practitioners of both minority and majority religions must be collected and compared with the views of political and legal leaders. Even so, with what this project contains, perhaps that work has now begun.


Hanumanthiaiah, Shri Kengal. “Speech to the Constituent Assembly.” November 17, 1949.


_____ “Prasad or Kalam, Cong takes the snub.” *The Telegraph.* June 1, 2006.


