
AGAINST CONCEPTUALISM: ISLAMIC LAW, DEMOCRACY, AND CONSTITUTIONALISM IN THE AFTERMATH OF THE ARAB SPRING

Nimer Sultany*

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ABSTRACT

This article examines the debate over the constitutionalization of shari'a in post-authoritarian Arab regimes. A shari'a clause would empower judges to review the validity of legislation on the basis of Islamic law. Thus, it raises for the first time the potential counter-majoritarian effect of judicial intervention. This article examines the conceptualist-style approach to the question of Islam and democratic constitutionalism. Such an approach, which has hitherto dominated the debate, seeks to show the compatibility of Islam and democracy, or the lack thereof, on the basis of conceptual analysis of abstract concepts like Islam and democracy. The article maps and evaluates the

* Baldy Postdoctoral Fellow in Interdisciplinary Legal Studies, SUNY Buffalo Law School. SJD (Harvard Law School); LL.M. (University of Virginia); LL.M. (Tel Aviv University); LL.B. (College of Management). This article is part of a larger project. I thank Frank Michelman, Mark Tushnet, Duncan Kennedy, Janet Halley, Mohammad Fadel, Noah Feldman, Adam Shinar, and Mohamed Helal for helpful comments on previous drafts. I presented a version of this article in the faculty workshops at Harvard Law School and SUNY Buffalo Law School and benefited from discussions there.

different discursive moves that moderate Islamists, Salafis, and secularists deploy in this debate. Comparing the debates to the U.S. constitutional debates between originalists and living constitutionalists, I show the unacknowledged methodological similarities between the opposing camps. I argue that the contestability of the basic concepts on which the debate is based shows the futility of the conceptualist debate. Furthermore, ignoring contestability, fleeing to abstraction, and falling prey to formalism produce bad normative effects that are detrimental to the debate. Ultimately, I seek to advance a different kind of conversation: a pragmatic, consequentialist-style analysis that takes into consideration prudential and normative arguments for or against the inclusion of shari'a law in the emerging Arab constitutional orders.

I. INTRODUCTION

A. *The Shari'a Clause and the Counter-Majoritarian Difficulty*

This article focuses on conceptual debates surrounding the incorporation of Islamic law (*shari'a*) into the constitutions of Middle Eastern countries as “a source,” “a primary source,” or “the primary source” for legislation against which the validity of ordinary legislation may possibly be reviewed (what I will call henceforth a “*shari'a* clause”). The *shari'a* clause became a visible feature of the constitutional design of many Arab and Islamic countries in recent decades. For example, the Egyptian 1971 Constitution designates Islam as the state’s official religion and — as amended in 1980 and incorporated in the December 2012 Constitution — states that “the principles of Islamic *shari'a* are the primary source of legislation.”¹ Likewise, the Iraqi Constitution of 2005 states that “Islam is the official religion of the state and a basic source of legislation. No law can be passed that contradicts Islam’s settled rules.”² Yet, not all Muslim-majority states have a *shari'a* clause.³

The Arab Spring requires a reexamination of the scholarship that addressed the *shari'a* clause prior to the Arab uprisings. This scholarship assumed that “popular democracy movements are hard to come by in the

¹ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, available at http://www.sis.gov.eg/En/LastPage.aspx?Category_ID=208.

² Intisar A. Rabb, “*We the Jurists*”: *Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. L. 527, 535 (2008) (quoting Article 2, Section 1, Doustour Jomhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005).

³ The cases in Indonesia and Turkey illustrate this idea. Saiful Mujani & R. William Liddle, *Muslim Indonesia’s Secular Democracy*, 49 ASIAN SURV. 575, 575-76 (2009). It should be noted, though, that *shari'a* is applied in the Indonesian autonomous province Aceh. See *Policing Morality: Abuses in the Application of Shari'a in Aceh, Indonesia*, HUMAN RIGHTS WATCH (Dec. 1, 2010), <http://www.hrw.org/en/reports/2010/12/01/policing-morality>.

contemporary Muslim world.”⁴ That assumption and generalization is no longer valid. A reexamination is necessary because constitutional drafters in post-authoritarian Arab states, such as Tunisia, Egypt, and Libya, are facing anew the question of whether to introduce a *shari'a* clause.⁵ This invites the normative question of whether Egyptian, Tunisian, and Libyan constitution makers should incorporate *shari'a* in their emerging constitutional arrangements.

It is a matter of debate whether this constitutionalization of sectarian values is appropriate in plural societies, in which citizens disagree on the meaning of the good life, and whether it is necessary to legitimate and stabilize constitutions. Further, it is unclear what “Islamic law” requires, who will be entrusted with the task of interpreting it, and how one can reconcile these requirements with liberal individual rights that many political theorists and legal scholars consider as a precondition for democratic rule.⁶ The stakes of this question seem high given the attempt to constitutionalize *shari'a*. Surely, *shari'a* can be incorporated in ordinary legislation, a declaratory preamble, or a non-justiciable constitutional clause. Constitutionalization raises the justificatory bar because it seems more consequential than these other modes of incorporation. Laws that might be struck down based on *shari'a* include: a penal code that excludes corporal punishment, such as amputation in cases of theft or stoning in cases of adultery; commercial legislation that permits business lenders to charge interest; legislation that does not require women to wear a veil; and legislation that does not require non-Muslims to pay a head tax. One might reject these implications on democratic or constitutional grounds. However, a growing body of literature argues that *shari'a* does not require any of these outcomes.

The focus of academic scholarship has long been on the compatibility of Islam as a religion with liberal democracy, and the availability of Islamic interpretations that are consonant with prevalent liberal conceptions of rights and democracy. These debates are relevant both to states with a Muslim minority and to states with a Muslim majority. As for the former, scholars discuss the ways in which resources within Islamic law can support basic liberal rights and, thus, allow a scheme of political

⁴ NOAH FELDMAN, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* 19 (2003).

⁵ See, e.g., *Shari'a Should Be 'Main' Source of Libya Legislation, Not Subject to Referendum: NTC*, AL ARABIYA, (July 5, 2012), <http://english.alarabiya.net/articles/2012/07/05/224689.html> (quoting a statement by a senior official of the Libyan National Transitional Council which was addressed to the constitutional drafting committee).

⁶ On the various meanings of *shari'a*, see Nathan J. Brown, *Shari'a and State in the Modern Muslim Middle East*, 29 INT'L J. MIDDLE EAST STUD. 359, 359 (1997). See also Clark Benner Lombardi, Note, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of Shari'a in a Modern Arab State*, 37 COLUM. J. TRANSNAT'L L. 81, 91-96 (1998).

cooperation within a predominantly liberal political order.⁷ In cases where the majority of citizens are Muslims, the question becomes whether the laws governing lawmaking can justly and prudently incorporate religious principles under pluralist conditions (considering not only internal Islamic divisions and non-Muslim minorities, but also atheists).⁸ Some Arab-world scholars insist that political regimes should be secular and that neither *shari'a* nor any other religious law should be part of the constitution.⁹ Seemingly, in accordance with that view, some constitutional regimes in Muslim-majority countries exclude religion from the public sphere.¹⁰

The novelty of the unfolding situation in Egypt and Tunisia compounds the high-stakes of this question. The evolving conditions in these new democracies confront scholars and constitution makers for the first time with the familiar paradox of constitutional democracies, that is to say, the tension between constitutionalism and democracy. This tension is potentially at work when judges have the power to strike down laws because they are inconsistent with constitutional provisions that incorporate Islamic law. But for that power to be seriously counter-majoritarian, popularly elected assemblies should enact the laws. Prior to the Arab Spring, scholars noted the “divorcing of constitutionalism from democracy” despite the long practice of Arab constitution-making.¹¹ Now there is a chance that constitutionalism and democracy can be combined. This may be the immediate effect of the Arab Spring.

Egypt enacted the constitutional provision designating *shari'a* principles as “a primary source” (and afterwards as “the primary source”) for legislation (1971 and 1980, respectively) under authoritarian rulers. Subsequently, and before the Arab Spring, Egyptian judges used the *shari'a* provision in the Egyptian constitution to review legislation. Yet, under the dictatorships in which a regime’s legitimacy is not based on credible processes of majoritarian electoral vote, any talk of tension between democracy and rights is largely theoretical. It is true that even under dic-

⁷ See, e.g., ANDREW F. MARCH, *ISLAM AND LIBERAL CITIZENSHIP: THE SEARCH FOR AN OVERLAPPING CONSENSUS* (2009); KHALED ABOU EL FADL, *ISLAM AND THE CHALLENGE OF DEMOCRACY* (2004); Mohammad Fadel, *The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21 CANADIAN J. L. & JURISPRUDENCE 5 (2008).

⁸ See, e.g., Samuli Schielke, *Being a Nonbeliever in a Time of Islamic Revival: Trajectories of Doubt and Certainty in Contemporary Egypt*, 44 INT’L J. MIDDLE EAST STUD. 301 (2012); *Atheists and Islam: No God, Not Even Allah*, ECONOMIST, NOV. 24, 2012, at 67, 67-68.

⁹ See, e.g., ABDULLAHI AN-NA’IM, *ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF Shari’a* (2008).

¹⁰ See, e.g., BRIAN SILVERSTEIN, *ISLAM AND MODERNITY IN TURKEY* (2011).

¹¹ NATHAN J. BROWN, *CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT* xiv (2002).

tatorships courts can create some space for rights;¹² elections, though predictable, are not entirely insignificant;¹³ and legislatures play a role in the political system.¹⁴ But the judicial deployment of rights hardly can be seen as restricting popular choices. The Arab Spring reverses this situation and promises to realize the potential for this tension. It becomes an example of the “counter-majoritarian difficulty”: who decides when people disagree on the meaning and requirements of constitutional provisions that include abstract religious law?¹⁵

B. *Overview of the Argument*

This article examines the state of the debate on the constitutionalization of *shari'a*. Until now, the debate seems to have been held on highly abstract and heavily conceptualist terms. Scholars advocate for their preferred conceptions of democracy and Islam, offer a theory on how these conceptions relate to each other, and then answer the question of religion's role in a legitimate institutional design.¹⁶ If Islam is compatible with democracy, then this may be a reason to support a *shari'a* clause. If, on the other hand, they are not compatible, then this may be a reason to reject a *shari'a* clause.

In order to evaluate this kind of conceptualist analysis, Part II maps the debates on the reconcilability of Islam with democracy. I survey the three leading attempts to address this question: moderate reconcilers, fundamentalist Salafis, and liberal secularists. I call the discourse of the first group “a discourse of unity” because they reconcile Islam and democracy, whereas I call the last two groups “a discourse of disunity” because they claim that Islam and democracy are incompatible.

Part III evaluates the differences and similarities between these primary positions and argues that none of these attempts succeeds in stabilizing the relationship between these concepts given the contestability of their respective conceptions. Consequently, the debate provides no adequate answer to the propriety of a *shari'a* clause. None of the leading theories offers a compelling answer to the legitimacy question (of “Islamic constitutionalism”) they seek to address. In making this argu-

¹² See, e.g., RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Tamir Moustafa eds., 2008).

¹³ See, e.g., Yoram Meital, *The Struggle over Political Order in Egypt: The 2005 Elections*, 60 MIDDLE EAST J. 257 (2006).

¹⁴ See, e.g., ABDO BAAKLINI, GUILAIN DENOEU, & ROBERT SPRINGBORG, LEGISLATIVE POLITICS IN THE ARAB WORLD: THE RESURGENCE OF DEMOCRATIC INSTITUTIONS (1999).

¹⁵ But see Asem Khalil, *From Constitutions to Constitutionalism in Arab States: Beyond Paradox to Opportunity*, 1 TRANSNAT'L LEGAL THEORY 421 (2010) (arguing that the question is not of a paradox of constitutionalism as much of limiting state power).

¹⁶ See scholarship mapped below in Part II.

ment, I analogize the debate under discussion to long-held U.S. debates on constitutional interpretation in order to show the similarities between seemingly opposed positions. The debate is not merely futile, however. I highlight the bad consequences of ignoring contestability, fleeing to abstraction, and falling prey to formalism.

Therefore, instead of a conceptualist-style analysis, this article seeks to advance a different kind of conversation that is based on a situated and consequentialist-style analysis. The distinction between these two kinds of analyses suggests that conceptualism is overly concerned with determining the debate by analyzing abstract concepts, but it does not suggest that conceptualism is indifferent to consequences. By contrast, the consequentialist-like analysis expresses skepticism about the availability of a priori solutions to value conflicts and focuses instead on the consequences of alternative institutional structures (but it does not suggest that only consequences matter). These consequences are evaluated in accordance with normative and prudential considerations. The Conclusion provides a sketch of how this analysis could look.

In providing this kind of analysis, the article further develops my previous work's arguments. In discussing contemporary left-liberal constitutional and political thought, I critiqued the excessive resort to conceptualism and the resulting pointless debates that do not decide anything of concrete consequence. It is often the case in concrete historical debates that the core aims and values are well enough understood. Hence, what is needed is a contextualized, consequentialist-style analysis. In constitutional and political theory, scholars emphasize the question of legitimacy as in assigning to constitutions a legitimating function in the democratic order. Yet, an acceptable conception of legitimacy remains an elusive quest.¹⁷ Consistent with this view, I do not generalize regarding the legitimacy, or the lack thereof, of Islamic constitutionalism. Such generalizations are likely to founder when confronted with the diversity in practice and the futility of conceptual analysis.

II. MAPPING THE DEBATE

By mapping the contemporary debates in the Arab and Muslim world on Islam's compatibility with democracy, one can detect a virtual structure of these debates.¹⁸ Such mapping organizes separately held debates and connects them. There are studies about debates within Islamic schol-

¹⁷ See, e.g., Nimer Sultany, *The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification*, 47 HARV. C.R.-C.L. L. REV. 371 (2012).

¹⁸ As such, this is not a historical project. For examples of such a project, see BABER JOHANSON, *CONTINGENCY IN A SACRED LAW: LEGAL AND ETHICAL NORMS IN THE MUSLIM FIQH* (1999); WAEL B. HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* (2005); KRISTEN STILT, *ISLAMIC LAW IN ACTION: AUTHORITY, DISCRETION, AND EVERYDAY EXPERIENCES IN MAMLUK EGYPT* (2011).

arship and reformers' efforts,¹⁹ about religious political movements,²⁰ and about constitutional courts.²¹ These studies rarely highlight the connections between these three aspects (theocratic, political, and legal) and rarely map the debate in its entirety to disclose the discursive moves or methodological commitments of the different protagonists.

An exposition of the primary discursive moves in this debate reveals two main groups of discourse: a discourse of unity and a discourse of disunity. The discourse of unity seeks to rationalize away appearances of contradictions, whereas the discourse of disunity highlights these contradictions. The former seeks conceptual convergence of Islam and democracy in a political system, whereas the latter seeks separation.

A. *The Discourse of Unity*

The discourse of unity seeks to show the compatibility of Islam with democracy. This discourse of reconciliation is exemplified in the constitutions of many Islamic and Arab states that incorporate both a *shari'a* clause and a declaration of Islam as the official state religion, as well as a list of liberal and democratic rights like equality and freedom of religion.²² It is manifested in the discourse and writings of moderate Islamic movements, like the Egyptian Muslim Brotherhood; legal scholars, like Abdel Razzaq al-Sanhuri, Tariq el-Bishri, Khaled Abou El Fadl, and Mohammad Fadel; Egyptian religious scholars, like Yussuf Al-Qardawi; Tunisian scholar and religious political leader Rashid Al-Ghannoushi; Egyptian presidential candidate Abdul Mona'im Abu El-Fotouh; and the jurisprudence of the Egyptian Supreme Constitutional Court.²³

These Islamic scholars propagate a "civil state" whose "frame of reference" or background culture is Islamic, but is neither a theocracy ruled by

¹⁹ See, e.g., ELIZABETH SUZANNE KASSAB, *CONTEMPORARY ARAB THOUGHT: CULTURAL CRITIQUE IN COMPARATIVE PERSPECTIVE* (2009).

²⁰ See, e.g., Bruce K. Rutherford, *What Do Egypt's Islamists Want? Moderate Islam and the Rise of Islamic Constitutionalism*, 60 *MIDDLE EAST J.* 707 (2006); Kristen Stilt, "Islam is the Solution": *Constitutional Visions of the Egyptian Muslim Brotherhood*, 46 *TEX. INT'L L.J.* 73 (2011).

²¹ See, e.g., Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 *TEX. L. REV.* 1819 (2004).

²² See, e.g., Rabb, *supra* note 2, at 535-36 (discussing the 2005 Iraqi Constitution).

²³ See, e.g., Rutherford, *supra* note 20 (discussing some of these and other scholars as well as the Muslim Brotherhood); Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 *AM. U. INT'L L. REV.* 379 (2006); MUHAMMAD ABED AL-JABRI, *DEMOCRACY, HUMAN RIGHTS AND LAW IN ISLAMIC THOUGHT* (2009); NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* (2008); Mohammad H. Fadel, *Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights*, 8 *CHI. J. INT'L L.* 1 (2008).

clergy nor a secular state.²⁴ For them, secularism, unlike modernity, “is incompatible with Islamic values.”²⁵ They justify the rule of law and constraints on state power to prevent tyranny, call for accountability of freely-elected leaders, advocate for an independent judiciary, and support a multi-party political system as well as networks of civic organizations. Although *shari’a* constrains democracy, these constraints do not exclude women from running for public office, nor are they interpreted to mandate the violation of rights of non-Muslim minorities.²⁶ Indeed, unity scholars reject interpretations of religious texts that subordinate women.²⁷ They also emphasize tolerance in Islam and defend minority rights.²⁸

These scholars reconcile Islam and liberal rights in two primary ways: discursive universalization and historicism. To achieve universalization, they highlight the underlying, abstract principles of both Islam and democracy; they abstract both concepts from their concrete historical materializations. Abou El Fadl, for instance, writes:

[T]he Qur’an itself does not specify a particular form of government. But it does identify a set of social and political values that are central to a Muslim polity. Three values are of particular importance: pursuing justice through social cooperation and mutual assistance; establishing a nonautocratic, consultative method of governance; and institutionalizing mercy and compassion in social interactions. So, all else being equal, Muslims today ought to endorse the form of government that is most effective in helping them promote these values.²⁹

The main difficulty facing scholars is the seeming tension between the rule of God’s commands (divine sovereignty) and the rule of the people (popular sovereignty). Reconcilers, however, resolve this tension by interpreting popular sovereignty as popular power under constitutional constraints on the one hand, and by interpreting divine sovereignty as

²⁴ See *Al-Qardawi Yujeeb ‘Ala As’aelat al-Mushahedein [Qaradawi Answers the Viewers Questions]*, AL-JAZEERA (Apr. 8, 2012), <http://www.aljazeera.net/programs/pages/a6daa716-5111-4508-8ad4-087715373ae2> (Qatar) (interview with Yusuf Al-Qardawi and transcript); see also Rutherford, *supra* note 20, at 730.

²⁵ Rachid Al-Ghannouchi, *Secularism in the Arab Maghrib*, in *ISLAM AND SECULARISM IN THE MIDDLE EAST* 97, 106 (Azzam Tamimi & John L. Esposito eds., 2000).

²⁶ Rutherford, *supra* note 20, at 712-19. These attempts at reconciliation are by no means limited to Sunni scholars. Iranian Shiite scholars such as Abdolkarim Soroush made similar arguments. See Rabb, *supra* note 2, at 559-61 (summarizing his views).

²⁷ See, e.g., KHALED ABOU EL FADL, *SPEAKING IN GOD’S NAME: ISLAMIC LAW, AUTHORITY, AND WOMEN* x (2001) (criticizing the “misuse and misrepresentations” of the Islamic tradition).

²⁸ See generally KHALED ABOU EL FADL ET AL., *THE PLACE OF TOLERANCE IN ISLAM* (2002); RACHEL M. SCOTT, *THE CHALLENGE OF POLITICAL ISLAM: NON-MUSLIMS AND THE EGYPTIAN STATE* (2010).

²⁹ ABOU EL FADL, *supra* note 7, at 5 (references to the Qur’an omitted).

including popular sovereignty on the other. For them, it is the people who are entrusted with interpreting and applying God's commands that tend to be vague and indeterminate.³⁰

The second move is historicism.³¹ Scholars focus on the context of old religious texts, either to make them relevant to modern day questions or to limit the application of those aspects that are not easily reconcilable with democracy or rights, as in rejecting the second class status of non-Muslims. Rashid Al-Ghannoushi states, for example, that the concept of "ahl al-dhimma" (according to which non-Muslims under Islamic rule should pay a head tax) is a historical construct that should be superseded.³²

Reconcilers are not monolithic and reach different conclusions on a number of issues. Some of them are more liberal than others. Al-Qardawi argues that the differentiation in inheritance between men and women (specifically, that a man gets twice the woman's share),³³ and the requirement that women should wear a headscarf, are clearly and unquestionably mandated by *shari'a*.³⁴ Yet, other scholars like Fatima Mernissi claim that the veil is not required because the Qur'anic verse should be contextualized according to the particular time of, and reasons for, its delivery.³⁵ Mernissi also argues that the Prophet was actually egalitarian with respect to women, but his tradition was distorted by his successors. Mohammad Abed Al-Jabri argues that one should reflect first on the general principles of *shari'a*, and these posit an initial condition of equality

³⁰ FELDMAN, *supra* note 4, at 57-60; ABOU EL FADL, *supra* note 7, at 5-10.

³¹ Mohammad Fadel, *Is Historicism a Viable Strategy for Islamic Law Reform? The Case of 'Never Shall a Folk Prosper Who Have Appointed a Woman to Rule Them'*, 18 ISLAMIC L. & SOC'Y 131 (2011) (distinguishing between two historicizing methods: one based on a progressive interpretation of history and the other based on textual interpretation; claiming that the latter is favorable as it has better chances to gain acceptance amongst Muslims); Anver M. Emon, *The Limits of Constitutionalism in the Muslim World: History and Identity in Islamic Law*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 258 (Sujit Choudhry ed., 2008) (calling for a historicist approach towards *shari'a* and rejecting the ahistorical application of pre-modern *shari'a* with respect to non-Muslim minorities).

³² For some of Al-Ghannoushi's interventions, see *Min Ro'aa al-Shiekh Rashid al-Ghannoushi [Visions of Sheikh Rashid al-Ghannouchi]*, ARABS FOR DEMOCRACY (Jan. 24, 2013), <http://arabsfordemocracy.org/democracy/pages/view/pageId/1023> (Egypt).

³³ See *Al-Shari'ah. . . Ma'anaha wa Mabnaha [Shari'a . . . its meaning and structure]*, ALJAZEERA (Jan. 8, 2012), <http://www.aljazeera.net/programs/pages/79cadc56-6db9-4f28-ad6b-6524b667db5c> (Qatar).

³⁴ *Taghteyat Sha'ar al-Mar'ah [Covering the woman's hair]*, QARADAWI.NET (Sept. 26, 2012), <http://www.qaradawi.net/component/content/article/5835.html> (Qatar).

³⁵ FATIMA MERNISSI, THE VEIL AND THE MALE ELITE: A FEMINIST INTERPRETATION OF WOMEN'S RIGHTS IN ISLAM (Mary Jo Lakeland trans., 1991).

between men and women.³⁶ In the limited areas where there is a differentiation, one needs to consider the context and the rationale for this differentiation, then ask whether this context has changed in ways that invalidate the rationale, and finally, therefore, return to the initial status of equality. The goal of the inheritance arrangements, for instance, was to avoid disrupting the economic balance between the tribes by wealth acquisition through marriage, especially given polygamy and the resulting frictions that this disruption may cause.³⁷ The tribe, however, has long ceased to be the primary unit for social and economic organization in most of the Arab world.

Political movements have translated these scholarly attempts into political programs. Documents released by the highly influential Muslim Brotherhood in the 2005 electoral campaign echo many of these positions. They call for a democratic system of government with free and fair elections and a strong parliament, reject theocratic or priestly rule, seek to constrain presidential power, advocate for repealing Egyptian emergency law, and support judicial independence along with the abolition of exceptional courts and limiting the power of military courts.³⁸

Finally, the jurisprudence of the Egyptian Supreme Constitutional Court (the "SCC") represents such reconciliation. Lombardi and Brown argue that the SCC "ha[s] proposed a theory of Islamic legal interpretation that marries the national commitment to Islamic law with the Court's commitment to liberal constitutionalism."³⁹ It thus supposedly demonstrates that a "progressive court can . . . 'Islamize' state law in a way that is consistent with democracy, international human rights and economic liberalism."⁴⁰ The Court's methodology, however, may not be as developed as Lombardi and Brown suggest, as the SCC never really presented such an elaborate method. In fact, many of the rulings were justified on procedural grounds (functionally avoidance techniques) by claiming that Article 2 cannot be applied retroactively to legislative acts that predated its enactment. The Court's rulings, however, effectively made the *shari'a* clause vacuous by limiting its application. For instance, the SCC rejected the claim that the Egyptian penal code is incompatible with Article 2, given that the penal code refrains from applying an amputation punishment in cases of theft, which is part of the *hudud* code of corporal punishments, a punishment that continues to be practiced in Saudi Arabia today.⁴¹ The SCC also rejected a petition arguing that the penal code's

³⁶ MUHAMMAD ABED AL-JABRI, *AL-DIMOKRATIYYA WA HOQOOQ AL-INSAN [DEMOCRACY AND HUMAN RIGHTS]* 180-81 (1994) (Lebanon).

³⁷ *Id.* at 182-85.

³⁸ Rutherford, *supra* note 20, at 720-26.

³⁹ Lombardi & Brown, *supra* note 23, at 385.

⁴⁰ *Id.* at 386.

⁴¹ Case no. 32/1989/Supreme Constitutional Court, (Egypt), available at <http://hccourt.gov.eg/Rules/getRule.asp?ruleId=3178&searchWords=>.

provision on adultery should be declared unconstitutional because it merely stipulates incarceration rather than corporal punishment.⁴² Similarly, the SCC rejected the attempt to prohibit business lenders from charging interest, which was legal under the Egyptian Civil Code, despite the claim that *shari'a* prohibits usury.⁴³ The SCC also upheld the right of women to divorce their husbands in personal status legislation,⁴⁴ and further protected property rights and economic liberalization.⁴⁵

B. *The Discourse of Disunity*

The discourse of disunity rejects the attempts to reconcile Islam and democracy and claims that these competing concepts are incompatible. There are two main opposing groups in this discourse: Salafis and secularists. Both dissolve the tension between Islam and democracy by rejecting one of these sides and endorsing the other. The Salafis are pro-Islamic dissolvers, the secularists are pro-democracy dissolvers.

1. Salafism

The Salafis are represented by the Al-Nour party in post-Mubarak Egypt and Wahhabism in Saudi Arabia.⁴⁶ Salafism is a loosely used and ambiguous concept.⁴⁷ It often refers to a reformist, fundamentalist movement that emerged in the second half of the nineteenth century and “called upon Muslims to return to the practices and beliefs of their ‘pious ancestors’.”⁴⁸ Salafism accepted “only the earliest scriptural texts (i.e., the Qur’an and the hadith [the corpus of the Prophet’s statements]) . . . as sources of belief and practice.”⁴⁹ Salafis are purists who “advocated sweeping away what they viewed as the divisiveness of the four schools of Sunni law and reviving *ijtihad* to allow believers to directly consult the foundational texts of the faith as guides for their own lives.”⁵⁰

⁴² Case no. 34/1990/Supreme Constitutional Court, (Egypt), available at <http://hccourt.gov.eg/Rules/getRule.asp?ruleId=3187&searchWords=>.

⁴³ Case no. 20/1985/Supreme Constitutional Court, (Egypt), available at <http://hccourt.gov.eg/Rules/getRule.asp?ruleId=330&searchWords=>.

⁴⁴ Hirschl, *supra* note 21, at 1829.

⁴⁵ Lombardi & Brown, *supra* note 23, at 416-17, 425.

⁴⁶ See, e.g., FRANK E. VOGUL, *ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA* (2000).

⁴⁷ Herni Lauziere, *The Construction of Salafiyya: Reconsidering Salafism From the Perspective of Conceptual History*, 42 INT’L J. MIDDLE EAST STUD. 369 (2010).

⁴⁸ Scott S. Reese, *Salafi Transformations: Aden and the Changing Voices of Religious Reform in Interwar Indian Ocean*, 44 INT’L J. MIDDLE EAST STUD. 71, 72 (2012).

⁴⁹ *Id.*

⁵⁰ *Id.* The word “*ijtihad*” often refers to the human process of understanding divine commands (that is to say, what *shari'a* requires from believers) through scriptural exegesis (the Qur’an), the prophet’s statements (“*hadith*”), analogical reasoning (“*qiyas*”), and consensus amongst the scholars (“*ijma*”). See generally Wael B.

Salafis are not monolithic.⁵¹ They are self-proclaimed scriptural literalists who reject later-day innovations by returning to the original texts and criticizing forms of popular spirituality (shrine visits, saint veneration, and Sufism) as “erroneous doctrinal practices.”⁵² Yet, some Salafis accommodate some of these practices while focusing on “individual moral conduct”⁵³ as in “ignorance, superstition, and personal weakness,”⁵⁴ or “gambling and drinking.”⁵⁵ In addition, while some Salafis are quietists who interpret major Islamic concepts in apolitical, social ways and withdraw from political activity, others are radicals who apply these concepts to the political realm.⁵⁶ For the most part, Salafis refrained from political activity prior to the Arab Spring. In the aftermath of the Arab Spring they formed parties and participated in the electoral process.⁵⁷ Yet, Salafis reject the phrase “the civic state” because for them it implies an unacceptable separation between religion and the state.⁵⁸ They reject

Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT’L J. MIDDLE EAST STUD. 3 (1984). Scholars use these four methods to reach what they consider as the correct interpretations and applications of the text. *Id.* The Islamic world is divided into Sunnis and Shiites. *Id.* This divide originates in a political dispute over who is entitled to govern the Islamic community after the Prophet’s passing away. *Id.* Internally these two camps are divided into different schools (“madhab”) that differ in their interpretations and application of the text. *Id.* Most famously the four classical jurisprudential schools are the *Hanafi*, *Hanbali*, *Maliki*, and *Shafi’i*. *Id.* It is often asserted that ijihad was closed in the ninth century and no new schools beyond these four were established. *Id.* That, however, is a misconception because it overlooks the myriad of ways in which scholars have innovated and revised the tradition. *Id.*

⁵¹ Reese, *supra* note 48, at 77.

⁵² *Id.* at 84.

⁵³ *Id.* at 83.

⁵⁴ *Id.* at 84.

⁵⁵ *Id.* at 86.

⁵⁶ Joas Wagemakers, *The Enduring Legacy of the Second Saudi State: Quietist and Radical Wahhabi Contestations of al-Wala Wa-L-Bara*, 44 INT’L J. MIDDLE EAST STUD. 93 (2012).

⁵⁷ For a discussion of Salafism in Egypt, see Ammar Ahmad Fayed, *Al-Salafiyyon fi Misr: Min Shar’aeyyat al-Fatwa ila Shar’aeyyat al-Intikhab [Salafists in Egypt: From the Legitimacy of the Fatwa to Electoral Legitimacy]*, ALJAZEERA (July 16, 2012, 1:34 PM) <http://studies.aljazeera.net/reports/2012/07/201271103413876925.htm> (Qatar). For a discussion of Salafism in Tunisia, see Fabio Merone & Francesco Cavatorta, *The Emergence of Salafism in Tunisia*, JADALIYYA (Aug. 17, 2012), <http://www.jadaliyya.com/pages/index/6934/the-emergence-of-salafism-in-tunisia>.

⁵⁸ Karima Abd al-Ghani, *D. Yasser Burhami Na’aeb Ra’ees Al-Da’awah al-Salafiyya: Nakhtalef ma’aa al-Ikhwana Hawla al-Na’aeb al-Qobti [Dr. Yasser Burhami Vice President of the Salafi Call: We Disagree with the Brotherhood on the Coptic Parliament Member]*, AL-AHRAM (Egypt), July 5, 2012, <http://www.ahram.org.eg/Al-Mashhad-Al-Syiassy/News/158838.aspx> (distinguishing between two meanings of “civic state” – a civilian state (in the sense that its rulers are not military officers), and a non-religious state. Burhami accepts the former but not the latter).

democracy as a form of government because they see it as synonymous with secularism, which they equate with immorality and the lack of Islamic identity, or with bad national or international policies.⁵⁹ For many Salafis, democracy is heresy.⁶⁰

Salafis and moderate reconcilers differ in questions like *riba* (unjust enrichment), *hudud* (corporal punishment), and electing women or Christians for public office. While Salafis prohibit economic actors from charging interest, reconcilers often allow business lenders to charge interest.⁶¹ Salafis insist on corporal punishment, whereas reconcilers like Al-Qardawi reject “the reductionism” of *shari’a* into mere rules on punishment, and lament the Salafi preoccupation with exceptions that apply to delinquents.⁶² Reconcilers interpret *shari’a* to include noble principles like social justice and rights, and aim to reform the individual, the family, and society.⁶³ Salafis argue that a non-Muslim can be neither a president nor a parliament member in a state whose official religion is Islam.⁶⁴ Indeed, in April 2011 they objected to the appointment of a governor for Egypt’s al-Qana district on the grounds that he was Christian.⁶⁵

⁵⁹ Abdel Fattah Madi, *Mashayekh al-Salafiyya wal Demokratiyya [Salafi Sheikhs and Democracy]*, AL-SHOROUK (Egypt), Nov. 17, 2011, <http://www.shorouknews.com/columns/view.aspx?cdate=17112011&id=8337d400-c6c6-44cc-83a6-c8fc3e682a01>.

⁶⁰ “Democracy is heresy because it contradicts the principle of allegiance that was used after the death of prophet Mohamed, whereby people choose their caliph once and then remain loyal to him, said the Salafi Nour Party at a rally in Giza. The party called the campaign of the liberal Egyptian Bloc a campaign of ‘Zionism’ and ‘Freemasonry.’ ‘We must obliterate the liberalism that was introduced by Sadat and Mubarak and reinstate the rule of Islam,’ said Shaaban Darwish, a member of the party’s supreme committee. ‘The liberals have corrupted political life in the last 60 years,’ he added. ‘All they want is to protect their interests with the Americans and the Arabs.’ ‘When we rule, we’ll bring in a lot of money,’ he said. Party candidate Adel Azazy said Islamic laws in Saudi Arabia helped reduce the crime rate substantially.” *Democracy is Heresy, says Salafi Nour Party* AL-MASRY AL-YOUM (Egypt), Dec. 8, 2011, <http://www.egyptindependent.com/node/540666>.

⁶¹ See, e.g., Mohammad H. Fadel, *Riba, Efficiency, and Prudential Regulation: Preliminary Thoughts*, 25 WIS. INT’L L.J. 655, 701 (2008) (“[Riba] is a simple price setting mechanism that by its own terms operates only in emergency or near emergency situations and loses its relevance once that crisis has passed. . . . Islamic transactional law must be primarily understood functionally, rather than as an exercise in fidelity to religiously normative texts.”).

⁶² Al-Ghani, *supra* note 58.

⁶³ See Yusuf Al-Qardawi, *Al-Dostoor wa Marje’aiyyat al-Shari’ah [Constitution and Shari’a]* (Feb. 18, 2007), <http://www.qaradawi.net/2010-02-23-09-38-15/4/4881-2011-07-05-13-54-05.html> (Qatar).

⁶⁴ Al-Ghani, *supra* note 5858.

⁶⁵ *Tathahurat fi Muhafathat Qana bi S’aeed Misr Ihtijajan ‘ala Ta’ayeen Muhafeth Masihi [Demonstrations in Qana District in Egypt’s Countryside Protesting the Appointment of a Christian Governor]*, MASRAWY (Apr. 19, 2011), www.masrawy.com/news/mideast/afp/2011/april/19/4596631.aspx (Egypt).

2. Secularism

If Salafism is a backward-looking movement, secularism is a forward-looking movement. While Salafism could only superficially be called a modernist movement,⁶⁶ secularism seems to fit closely with modernization. Arab thinkers have advocated for secularism since the mid-nineteenth century.⁶⁷ Secularists like George Tarabishi argue that Islamic history should be reinterpreted as part of a project of modernity.⁶⁸ Within this outlook, one can identify secular seeds in Islam, namely the repeated prioritization of the political over the sacred in the power struggle. While Salafis gloss over the history of the Umayyad and Abbasid dynasties and focus on Islam's early formative period (the Prophet and the early caliphs), Tarabishi details the horrors of sectarian warfare and ideological battles (primarily between Sunnis and Shiites, but also in the immediate aftermath of the Prophet's death) that grounded the struggle for power in a religious cloak.⁶⁹ Unlike the reconcilers' emphasis on abstract principles like toleration, and contrary to their portrayal of secularism as a foreign implant,⁷⁰ this reading of history serves as a reminder for the need for secularism within Islam itself.⁷¹ Tarabishi further dismisses the Islamist deployment of "divine sovereignty" as a contemporary ideological projection on the religious text or even an example of false consciousness.⁷² Ultimately, Tarabishi calls for a far-reaching secularization at all levels: the state (the institutional level), society (a long-term pluralistic pedagogical project), and religion (separating the worldly from the spiritual).⁷³

The jurisprudence of the Turkish Constitutional Court echoes some of these views.⁷⁴ The Turkish Constitution emphasizes republicanism,

⁶⁶ See Lauziere, *supra* note 47, at 385 ("The impression that some progressive intellectual entity called Salafism turned into Wahhabism or gave way to a 'neo-Salafiyya' . . . remains as misleading as the conceptual postulates on which it rests. The reification of early 20th-century Salafism as an intrinsically modernist movement of reform is a figment of scholarly imagination that cannot withstand historical scrutiny.").

⁶⁷ See NAZIK SABA YARED, *SECULARISM AND THE ARAB WORLD* (2002).

⁶⁸ GEORGE TARABISHI, HARTAKAT; 'AN AL-DIMOKRATIYYA WAL 'ALMANIYYA WAL MOMAN'AH AL-'ARABIYYA [HERETICS: ON DEMOCRACY, SECULARISM, MODERNITY, AND ARAB INTRANSIGENCE] 34-35 (2006) (Arabic).

⁶⁹ GEORGE TARABISHI, HARTAKAT 2: 'AN AL-'ALMANIYYA KA ISHKALIYYA ISLAMIYYA-ISLAMIYYA [HERETICS 2: ON SECULARISM AS AN ISLAMIC-ISLAMIC PREDICAMENT] 12-89 (2008) (Arabic).

⁷⁰ See, e.g., Azzam Tamimi, *The Origins of Arab Secularism, in ISLAM AND SECULARISM IN THE MIDDLE EAST*, *supra* note 25, at 13.

⁷¹ TARABISHI, *supra* note 68, at 9-11.

⁷² TARABISHI, *supra* note 69, at 35-38.

⁷³ TARABISHI, *supra* note 68, at 92-94.

⁷⁴ See, e.g., Mehmet Cengiz Uzun, *The Protection of Laicism in Turkey and the Turkish Constitutional Court: The Example of the Prohibition on the Use of the Islamic Veil in Higher Education*, 28 PENN. ST. INT'L L. REV. 383 (2010); Ceren Belge,

nationalism, secularism, modernism, and liberal democracy.⁷⁵ The preamble declares that “the principle of secularism” requires that “there shall be no interference whatsoever by sacred religious feelings in state affairs and politics.”⁷⁶ Article 2 states that “The Republic of Turkey is a democratic, secular and social state governed by the rule of law”⁷⁷ Article 4 entrenches this character of the state making it unamendable.⁷⁸ The Turkish Constitutional Court has been committed to the “civilizing mission” of the secular state.⁷⁹ The Turkish Constitutional Court perceives secularism as “the opposite of *Shari’a*,”⁸⁰ and as a modernizing force aiming to transform Turkish society from a pre-modern *umma* (community of Muslim believers) to a modern “nation.”⁸¹ In this vein, the Turkish Constitutional Court supported the ban on wearing *hijab* and struck down bylaws that permitted the practice in universities.⁸² It also disqualified and dissolved political parties that violated the principles of secularism and democracy.⁸³

III. ASSESSING THE DEBATE

A. *The Nature of the Differences*

The differences between the main three positions (Salafis calling for an Islamic state, moderates calling for an Islamic democracy in a civil state, and secularists calling for a secular state that excludes *shari’a* from the constitution) are clear. Yet upon closer examination, these differences are not as wide as may be initially assumed: both Salafis and moderates call for *shari’a* law, but have different conceptions of it. Both moderates and secularists call for individual rights, but have different conceptions of rights. Moderates and secularists are also both driven by the will to modernize, but have different conceptions of modernization: moderates want to modernize *shari’a* so it will continue to be relevant to contemporary conditions, whereas the secularists want to modernize society through

Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey, 40 LAW & SOC’Y REV. 653 (2006).

⁷⁵ See Türkiye Cumhuriyeti Anayasası [The Constitution of the Republic of Turkey], available at <http://www.anayasa.gov.tr/index.php?l=template&id=210&lang=1&c=1>.

⁷⁶ *Id.* at pmb1.

⁷⁷ *Id.* at art. 2.

⁷⁸ *Id.* at art. 4.

⁷⁹ Hootan Shambayati & Esen Kirdis, *In Pursuit of “Contemporary Civilization”: Judicial Empowerment in Turkey*, 62 POL. RES. Q. 767, 778 (2009).

⁸⁰ Uzun, *supra* note 74, at 395.

⁸¹ *Id.*; see also Hirschl, *supra* note 21, at 1852-53.

⁸² Hirschl, *supra* note 21, at 1849-50.

⁸³ *Id.* at 1851-54.

secularization (by getting rid of *shari'a* altogether).⁸⁴ Salafism and radical secularism (like that in Turkey) are two sides of the same coin: both agree that liberal, secular democracy and *shari'a* are incompatible; both dissolve the tension by preferring one side of it; both are preoccupied with women's bodies and dress codes, as the debates on female genital mutilation and the veil exemplify. Finally, both views may lead to a similar effect of "privatizing" belief: Salafis often avoided organized politics and focused on social activism and religious practice, whereas secularists relegate religion to the private sphere rejecting its intrusion into state politics.

Each position in this debate exhibits internal tensions. Salafis reject democracy as popular sovereignty, but accept democracy as a majoritarian process. Indeed, some voices in the post-Mubarak era have expressed an acceptance of democracy as a system of government so long as it does not contravene *shari'a*.⁸⁵ Thus, they do not reject democracy tout court; rather they reject a constitutional conception of democracy. In other words, they reject liberal rights (for example, they exclude women and Copts from the right to be elected or to hold an office). They reject secularism and what they perceive as western influences that undermine Islamic identity.⁸⁶ Salafis further claim that they limit human discretion (by rejecting the proliferation of interpreters and calling for "doctrinal purity"⁸⁷) through originalism (by exclusively consulting the primary sources). They end up, however, empowering the interpreters no less than the moderate religious schools. To the extent that Salafis insist that their method gives clear-cut, objective solutions to social-normative disagreements,⁸⁸ their claim contravenes everyday experience and denies the

⁸⁴ The work of Abdel-Razzaq Al-Sanhuri – who is a reconciler who had a major influence on many of the legal codes of Arab states – demonstrates the tension between Islamicity and modernization or western influences. See Amr Shalakany, *Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise*, 8 ISLAMIC L. & SOC. 201 (2001).

⁸⁵ *We'll Allow a Coptic President when Israel Allows a Muslim One: Salafist Leader*, AHAM ONLINE (Dec. 6, 2011), <http://english.ahram.org.eg/News/28628.aspx> (statements by Egyptian Salafi leader Yasser Burhami).

⁸⁶ See Yasser BaAmer, *Nawazel al-Siyasa' fi Mo'atamar lil Salafiyyen of al-Dawha ['Necessities of Politics' in Salafi conference in AL-Duha]*, ALJAZEERA (May 24, 2012, 2:47 AM), <http://www.aljazeera.net/news/pages/a0eff1aa-cfb8-4403-804d-ada1490ad08a> (Qatar) (reporting a "consensus" on prohibiting women from being elected or holding an office as contrary to *shari'a*, and charging secularism with the responsibility for lack of identity in Arab and Muslim societies given the lack of *shari'a* implementation).

⁸⁷ Reese, *supra* note 48, at 77.

⁸⁸ See, e.g., Olivier Roy, *The Transformation of the Arab World*, J. DEMOCRACY, July 2012, at 5, 10 ("The Salafists, like neofundamentalists the world over, are recasting religion as a code and a set of clear-cut norms disconnected from tradition and culture.").

interpretive, human agency.⁸⁹ Indeed, although Salafism is a backward-looking interpretive movement that venerates the past and tradition, Salafis reinvent this past and this tradition in order to address modern day issues.⁹⁰ Consequently, moderate reconcilers often depict Salafi utilization of the Islamic tradition as “highly selective, unsystematic and opportunistic.”⁹¹

Moderate reconcilers insist on both divine sovereignty and popular sovereignty. In so doing, they are trying to square the circle. They reject both secularism and Salafism. They follow what Al-Qardawi calls *almanhaj alwasatti* (the centrist method).⁹² But this leaves them vulnerable to criticisms from both extremes: Salafis will argue that the moderate reconcilers are insufficiently Islamic/religious, and secularists will argue that the moderate reconcilers are insufficiently liberal.

Indeed, secularists are not simple-majoritarian democrats; they are constitutionalists who would reject simple-majoritarian democracy as a ground for the imposition of religious law (hence their position leads to the paradox of constitutional democracy). In other words, they prioritize constitutionalism over democracy. This allows reconcilers to argue that secularists are not really democrats as they ignore popular will. Feldman, for instance, argues that Turkish-style secularism effectively impedes democracy by refusing to acknowledge the possibility of reconciliation between Islam and democracy.⁹³ It should be noted, however, that reconcilers are also prioritizing constitutionalism over democracy because they deduce rights from religion.

B. *The U.S. Debates Compared*

The preceding mapping and discussion indicates that the competing conceptions of both Islam and democracy are not merely contested but also contestable. Another way to observe this contestability is by comparing these debates to those in the United States. Looking beyond the particular terminology to highlight overlooked connections would undermine the idiosyncrasies of the debate on Islam and democracy. In

⁸⁹ Rabb, *supra* note 2, at 564-65; *see also* Abdullahi Ahmed An-Na'im, *The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law*, 73 MOD. L. REV. 1, 7-8 (2010) (emphasizing human agency in the development of Islamic law).

⁹⁰ Reese, *supra* note 48, at 86; SAMIRA HAJ, RECONFIGURING ISLAMIC TRADITION: REFORM, RATIONALITY AND MODERNITY (2009).

⁹¹ ABOU EL FADL, *supra* note 27, at 175.

⁹² Al-Qardawi, *supra* note 63.

⁹³ FELDMAN, *supra* note 4, at 111; *see also* Asli Ü. Bâli, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52 VA. J. INT'L L. 235 (2012) (arguing that judicial independence and invocations of constitutionalism have undermined democratization in Turkey and imposed an illiberal conception of secularism).

fact, there is a striking similarity between the positions and methodological commitments taken in U.S. debates about the role of judicial review and the U.S. Constitution and the positions taken in these debates on Islamic law and democracy. The comparison may not be far-fetched, considering the reverence with which the U.S. Constitution is held.⁹⁴ Both the Qur'an and the U.S. Constitution are considered, in their respective debates, as authoritative and foundational texts. Moreover, Islamists recognize that it is humans who interpret the scripture to identify—if imperfectly, given human limits—the will of God. Both Islamic and U.S. debates are concerned, among other things, with the best method to understand the authoritative and foundational text's requirements.

Broadly conceived, there are two large opposing methodological camps in the United States that have equivalent counterparts in Islamic debates. The Salafi methodological choices in particular are analogous to some versions of U.S. originalism or textualism, like U.S. Supreme Court Justice Scalia's.⁹⁵ Both advocate for strict, literal, conservative interpretations and applications of old and self-contained texts.⁹⁶ Both advocate for fidelity to these canonical texts.⁹⁷ While these methodological choices are taken within different contexts (religious versus secular), they may have similar religious sources or influences. George Kannar attributes the rise of originalism in the U.S. to the ideological rise of religious fundamentalist revivalism, and traces Justice Scalia's own interpretive methodological commitments to his religious background.⁹⁸ Even more broadly, other scholars trace modern constitutional ideas to scriptural influences.⁹⁹

Another similarity is in the method of constructive interpretation that both the moderate Islamists and Ronald Dworkin or other scholars (supporters of “dynamic interpretation” or “living constitution”) defend.¹⁰⁰ Unlike the literalist-formalist opponents, they both recognize the indeterminacy of textual provisions. Hence, they both identify overarching and underlying principles used to interpret a foundational text. Further, they

⁹⁴ See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); Thomas C. Grey, *The Constitution as Scripture*, 37 *STAN. L. REV.* 1 (1984).

⁹⁵ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997) (espousing a textualist approach that focuses on the text rather than overarching principles and emphasizes the original meaning); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849 (1989) (arguing that the Constitution has “fixed meaning” and the court should not interpret it in ways that conform to “current societal values”).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 *YALE L.J.* 1297, 1309-10 (1990).

⁹⁹ See, e.g., GRAHAM HAMMIL, *THE MOSAIC CONSTITUTION: POLITICAL THEOLOGY AND IMAGINATION FROM MACHIAVELLI TO MILTON* (2012).

¹⁰⁰ See RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985).

are both historicists who take the changing context, and not only the text, into their interpretive account.

Given the methodological similarities, it is not surprising to discover that accusations in Islamic discussions have equivalent counterparts in U.S. constitutional theoretical debates. While Salafis are accused of selective textual interpretation, moderate reconcilers are charged with substituting the interpreter's subjective will for original intent and introduce "judicial intrusion into policy making." Lombardi and Brown write that the Egyptian SCC:

has argued that Islamic law is, for constitutional purposes, a source of general moral principles that must be interpreted anew in every day and age and must take evolving notions of human welfare into account. The embrace of this open-ended type of reasoning permits decisions to turn on subjective conclusions about utility and permits judicial intrusion into policy-making.¹⁰¹

Arguably, the Egyptian SCC's deployment of "so broad and vague" jurisprudential principles gives enormous power to judges that can be used in non-progressive, non-secular ways.¹⁰² Thus, a scholar called upon the SCC to "limit the interpretive flexibility of judges" by showing "limited deference to the legislative interpretation of *shari'a*."¹⁰³

This concern with subjective will is a long-running theme in U.S. debates. Originalists in the United States argue that proponents of constructive interpretations are masking the policy preferences behind their free-wheeling methodological commitments because they are not strictly confined to the text and use vague interpretative principles. For originalists, only originalism secures an impartial approximation of the framers' intent or the original public meaning at the time of enactment. Likewise, John Hart Ely—who rejected textualism because some constitutional provisions are open-ended—condemned the attempt to identify enduring, extra-textual values as illegitimate because external sources (like judge's own values, tradition, natural law, or consensus) are indeterminate and serve for an undemocratic imposition of judicial values.¹⁰⁴

These analogies are helpful not only as aids in highlighting the similarities but also because many of the critiques constructive interpretivists deploy against originalists in the United States, as well as an assessment of the differences between the competing camps, can be utilized in Islamic debates.¹⁰⁵ Dworkin collapses the distinction between theories that claim to be text-bound and non-interpretive theories that resort to

¹⁰¹ Lombardi & Brown, *supra* note 23, at 423.

¹⁰² Lombardi, *supra* note 6, at 122.

¹⁰³ *Id.*

¹⁰⁴ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 43-72 (1980).

¹⁰⁵ See, e.g., Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249 (1997).

general principles.¹⁰⁶ He argues that all theories are interpretive because they negotiate with the text, and all theories are non-interpretive because even textualist theories have to justify their text-bound orientation by reference to extra-textual principles.¹⁰⁷ Likewise, Lawrence Solum explains that the “[t]here is no meaningful distinction” between originalists and non-originalists.¹⁰⁸ On the one hand, “all constitutional theories interpret the Constitution in accord with the intent of the framers and ratifiers.”¹⁰⁹ On the other hand, “originalism is impossible,”¹¹⁰ because the attempt to understand the framers’ intent is mediated by an interpretive tradition.¹¹¹ Ultimately, for Dworkin, original intent is not a matter of discovery but rather of invention.¹¹²

In the Islamic context this means that the difference is not between moderate Islamists who follow a method of “dynamic interpretation” (or non-interpretivism) and Salafis who are textualists (or interpretivists or literalists). In other words, it is not between those who go beyond the text and those who are text-bound.¹¹³ That is only a superficial and declared difference. In fact, the foundational difference between them is the difference in the conceptions of dynamic interpretation and of textualism. They are both interpretivists, they both claim that they are faithful to the original texts (though they have different conceptions of fidelity),¹¹⁴ and they are both reading these texts with modern eyes.

If the opponents’ methodological commitments are not that different after all, then the claim of greater legitimacy (that is to say, more Islamic) that each camp attaches to its method (and therefore the outcomes it leads to) vis-à-vis the other camp is baseless. If the Islamic debates are structurally similar to the U.S. debates, then the question is not uniquely religious or Islamic. The question becomes less of interpretive method, less of religious nature, and less of abstract *a priori* notions of legitimacy.

¹⁰⁶ DWORKIN, *supra* note 100, at 35-36.

¹⁰⁷ *Id.*

¹⁰⁸ Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1603 (1989).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1610; see also Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (emphasizing the indeterminacy of the past and the need to reconstruct it based on contemporary preconceptions).

¹¹² DWORKIN, *supra* note 100, at 39.

¹¹³ Rabb, *supra* note 2, at 561 n.98.

¹¹⁴ See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (arguing that “fidelity” to the text does not necessarily mean unchanging interpretation of the text because interpretation includes meaning and context, and thus non-originalist, dynamic theories can be no less faithful to the text than originalism. On the other hand, strict originalism is not faithful to the text if it ignores the changing context).

C. Contestability, Abstraction, and Formalism

It follows from the preceding discussion that whether the concepts are compatible or not will turn on the conception of Islam (or Islamic law) and the conception of democracy one has in mind. *Shari'a*, constitutionalism, and democracy are all essentially contested concepts.¹¹⁵ As such they have many competing, but defensible, conceptions and it is not implausible to suggest either that they are compatible or that they are incompatible. It will be contingent on one's favored conceptions of the concepts when approaching this question. These highly abstract concepts have been embedded in a variety of institutions and practices over an extended period of time, yet they do not necessarily have determinate meanings. Such practices are not necessarily uniform or coherent. This is not to say that the indeterminacy of concepts like Islam is inherent to the concept itself. Rather, the indeterminacy is a function of the work done by scholarly interventions (like the ones mapped here) to offer defensible and competing conceptions of the concept.¹¹⁶

To assume that the concepts can be shown to be compatible or incompatible by virtue of an abstract notion of these competing concepts (as in the reconciliation move to push *shari'a* to a higher level of abstraction where it can meet universal human rights or democracy) merely hides, rather than resolves, the disagreement about the meaning of the concepts. Thus, it effectively conceals from us the intractability of political conflict over fundamental questions in society and the polity.¹¹⁷ Abstraction may hinder a realistic understanding of societal conflicts. Through abstraction scholars pretend that these questions' resolution is easier than it really is. Abstraction obscures the institutional and material embodiment of ideas. It de-contextualizes them from their specific social, political, and historical conditions. It privileges the potential reconciliation over actual practices that do not necessarily betray such a reconciliation. However, abstract notions that are disconnected from material applica-

¹¹⁵ W. B. Gallie, *Essentially Contested Concepts*, 56 *PROC. ARISTOTELIAN SOC'Y* (n.s.) 167 (1956).

¹¹⁶ In other words, I reject the "global indeterminacy" thesis according to which the concept is essentially or inherently indeterminate (e.g., that it has always been and will always be contestable) and it never determines the outcome in particular disputes. The fact that Islam is contestable does not mean that it is globally indeterminate. Rather, indeterminacy (or determinacy) here refers to the effect that competing legal and scholarly writings achieve in a particular era with respect to a particular concept. Moreover, the very fact that it is the concept of Islam, however contestable, that frames the debate has important exclusion effects from the standpoint of those whose political/normative identity is defined in opposition to Islam. See generally, DUNCAN KENNEDY, *LEGAL REASONING: COLLECTED ESSAYS* (2008).

¹¹⁷ ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 253 (3d ed. 2007).

tions, concrete practices, and real-world institutions are a *carte blanche* that can be deployed in different directions. For example, to claim (as Abou El Fadl does in the above quoted paragraph)¹¹⁸ that Islam embodies values like the pursuit of justice, a consultative form of governance, mercy, and compassion merely invites disagreement regarding each of these abstract notions as well as the possibility of conflict between these values' interpretations and applications. A Salafi might argue, for example, that corporal punishments, like amputation and stoning, are compatible with a retributive notion of justice. In other words, the Salafi merely has a different conception of justice. The Salafi need not disagree with this universalization of *shari'a*, but would disagree with its interpretation and application. For Sayyed Qutb, for example, Islam endorses freedom, social justice, and equality, but equality for him is compatible with differentiated treatment of women.¹¹⁹ So the abstract reconciliation loses its *raison d'être* both because it does not avoid disagreement and because it can lead to an outcome that is incompatible with prevalent notions of human rights and hence is incompatible with a constitutional conception of democracy. Or, suppose that the "pursuit of justice" and "mercy and compassion" lead to conflicting considerations and then different reasonable persons will differ on the weight of these competing values (while some may prioritize justice, others would prioritize mercy). Therefore, this abstract view of Islam can still be internally incoherent. Abstraction merely rationalizes away tensions and contradictions, and denies paradoxes (whether by reconciling competing concepts or resolving the contradiction through expelling one of the concepts). It thus quiets any anxiety that may stem from the simultaneous existence of both concepts and the variety of ways in which they can conflict or align. Ultimately, it is an avoidance technique: it allows scholars to flee from facing contradictions and hence from the need to make hard choices and tradeoffs.

Moreover, to assume that these words have a determinate clear, fixed, or stable meaning and that they dictate certain outcomes through a deductive method is to fall prey to formalism. Like abstraction, formalism suggests an apolitical—or objective—and conclusive resolution of conflicts through logical reasoning that is not susceptible to the open-ended character of political and ideological contestation.¹²⁰ In this vein, Islamic law is perceived as a gapless and autonomous system whose authoritative materials can lead to answers through standard operations of logic. This view ignores human agency (and value choices) of those who interpret and apply the arrangements and practices associated with these concepts.

¹¹⁸ See *supra* note 29 and accompanying text.

¹¹⁹ See LEONARD BINDER, *ISLAMIC LIBERALISM: A CRITIQUE OF DEVELOPMENT IDEOLOGIES* 185-86 (1988).

¹²⁰ See, e.g., Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 496-503 (1988); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 1-2 (1983).

Hence it misrepresents the practice of Islamic law. The Salafis are not the only ones committing the logical fallacy of formalism. The moderate reconcilers commit the same mistake when they pretend that their own resolutions or interpretations are correct whereas the Salafi interpretations are mistaken.

Similarly, to assume that the competing concepts are necessarily incompatible — as in the secularist position — is to fall prey to essentialism by presenting one of the competing concepts (like Islam in general or *shari'a* in particular) as having an immutable essence irrespective of changing times, political developments, and social conceptions. Such essentialism would ignore the efforts of so many reformers in Islamic law (like the ones mapped in this article). On the other hand, to assume that they are necessarily compatible — as in the reconcilers' position — presents a reverse essentialism or a romantic view of one of the concepts. That would ignore the possibility of different practices that can hardly be reconciled with prevailing conceptions of the other concept. This contestability shows that the question is open-ended and the debate regarding compatibility is an object of social and political struggle that is not likely to end any time soon.

The question of compatibility turns out to be contingent on which views prevail at a certain time and place. Asef Bayat argues that the textual and conceptual question of compatibility of Islam and democracy is misconceived.¹²¹ Instead, it should be treated historically and descriptively. It is “individuals and groups who hold social power [that] can assert and homogenize [the sacred injunctions'] truth.”¹²² For Bayat, the question is “under what conditions Muslims can *make* them compatible . . . We, the social agents, determine the inclusive or authoritarian thrust of religions. . . .”¹²³

It is important to recognize that the Islamic tradition is diverse, contradictory, and constantly evolving. Whether the originalists, the moderates, or the secularists will prevail, and become the orthodoxy, is a question that will be determined historically.¹²⁴ The three main groups make the same mistake: ignoring the diverse and contradictory character of the tradition. More important, the contestability of the basic concepts undermines the utility of the debate because scholars are not engaging with each other's arguments when they deploy different conceptions and hence talk about different things. Through definitional fiat, deductive moves, or selective readings of history scholars evade addressing the alleged tension between Islam and democracy.

¹²¹ ASEF BAYAT, *MAKING ISLAM DEMOCRATIC: SOCIAL MOVEMENTS AND THE POST-ISLAMIST TURN* 4 (2007).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See, e.g., Haider Ala Hamoudi, Book Review, 26 *J. L. & RELIGION* 387, 400-01 (2010) (reviewing MARCH, *supra* note 7) (emphasis original).

Islam and democracy are by no means the only contestable concepts in this debate. Talal Asad argues that the distinction between the “secular” and the “religious” is not a fixed distinction upon which we can establish a juridico-political order, because neither of these concepts has a fixed meaning. Indeed, the “secular” is neither a mere continuation of, nor a mere opposition to, the “religious.”¹²⁵ The “secular” cannot be exclusively associated with the prevention of pain, cruelty and suffering through rationality since some forms of infliction of pain on the body have taken secular forms and were justified on secular grounds as when the non-confessional state sends its citizens to war,¹²⁶ practices torture under the guise of security,¹²⁷ or when pain is integrated into the pursuit of pleasure by consenting hedonistic adults.¹²⁸ Nor is the religious to be associated with irrational suffering in which pain is exclusively antithetical to human agency since pain and agency are not monolithic categories and some forms of religious pain might be seen as an expression of agency (by generating a medium for moral choice and action) rather than its denial.¹²⁹ Asad also shows that religious worship and practice may be – no less than secularism – associated with tolerance; and secularism – no less than the religious – is compatible with intolerance.¹³⁰ In modern history, secularism is responsible for wars and violence without recourse to religious justifications/ rationalizations.¹³¹

Indeed, the religious/secular divide is itself contested by participants in the debate. For instance, Al-Qardawi — the moderate reconciler — contests the claim that secularism is distinguished from religiosity because it is, arguably unlike the latter, rooted in rationalism and worldliness. For Al-Qardawi, Islamism is no less rooted in rationalism and worldliness, but it is a “believing rationalism” and a worldliness that maintains a connection with the otherworldly.¹³² In practice, the identification of the secular with the democratic, and of secularization with democratization, is challenged by the fact that secularism can be oppressive and undemocratic as experienced in the pre-Arab Spring Tunisia. The identification is also challenged by the fact that the Arab uprisings (those not led by Islamic movements nor involving religious demands) occurred after

¹²⁵ TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 25 (2003).

¹²⁶ See, e.g., Mark E. Brandon, *War and the American Constitutional Order*, in THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 11 (Mark Tushnet ed., 2005).

¹²⁷ See, e.g., DARIUS REJALI, TORTURE AND DEMOCRACY (2009).

¹²⁸ ASAD, *supra* note 125, at ch. 3.

¹²⁹ *Id.* at ch. 2.

¹³⁰ *Id.* at 7-8, 100.

¹³¹ *Id.* at 11-12.

¹³² Al-Qardawi, *supra* note 63; see also Al-Ghannouchi, *supra* note 25, at 106 (noting that if secularism merely meant the authority of reason then it is compatible with Islam because faith is rooted in “conviction based on reason.”).

decades of alleged Islamization of Arab societies.¹³³ Presupposing a dichotomy between the secular and the religious, then, becomes a different version of the errors of formalism or essentialism. It ignores contestability.

Even if the distinction between the religious and secular were clear, that would not necessarily determine the propriety of a *shari'a* clause. Indeed, even religious scholars may be against the introduction of a *shari'a* clause based on religious grounds. For instance, An-Na'im, who rejects secularism, argues that religious law cannot be enforced by a secular state because such enforcement negates the voluntary basis of religious belief.¹³⁴ In addition, non-Muslim religious persons can object to Islamic religious law. The Coptic Church opposed the Islamization of Egypt in the early 1970s, and more recently they opposed strengthening the *shari'a* clause in post-Mubarak Egypt.¹³⁵ On the other hand, secular and non-Muslim scholars like Noah Feldman, and a minority of Egyptian Copts may support the introduction of a *shari'a* clause.¹³⁶ Thus, the objections to the *shari'a* clause need not reflect a secular/religious divide because opposition to the *shari'a* clause can come from secular Muslims, religious Muslims, or religious non-Muslims. Yet, the clause can garner support from religious Muslims, non-religious Muslims, or secular non-Muslims.

¹³³ Roy, *supra* note 88, at 7. *But see* Khaled Abou El Fadl, *The Language of the Age: Shari'a and Natural Justice in the Egyptian Revolution*, 52 HARV. INT'L L.J. ONLINE 311, 312 (2011), http://www.harvardilj.org/2011/04/online_52_el-fadl/ (claiming that although Islamists have not led the uprisings, *shari'a* "played an important role in fueling and engineering the Revolution").

¹³⁴ An-Na'im, *supra* note 89, at 1-2 (mentioning that he is "personally religious" and that he "personally reject[s]" secularism "as a life philosophy."). For An-Na'im the main conflict is not between Islam and democracy but rather between religious law and state law. "Islamic Law cannot be enforced as state law and remain Islamic Law in the sense that Muslims believe it to be religiously binding. Since the enforcement of Islamic Law through state institutions negates its religious nature, the outcome will always be secular, not religious. In other words, all state law is secular" *Id.* at 2. "The state and all its institutions are by definition secular and not religious, regardless of claims to the contrary." *Id.* at 7.

¹³⁵ Paul Sedra, *Class Cleavages and Ethnic Conflict: Coptic Christian Communities in Modern Egyptian Politics*, 10 ISLAM AND CHRISTIAN-MUSLIM REL. 219, 226 (1999); Sarah El Deeb, *Pope Tawadros II, Egypt's New Coptic Leader, Opposes Religious Constitution*, HUFFINGTON POST (Nov. 5, 2012, 4:16 PM) http://www.huffingtonpost.com/2012/11/06/pope-tawadros-ii-egypt-copt-opposes-religious-constitution_n_2082480.html.

¹³⁶ FELDMAN, *supra* note 4; *Egypt's Constitution: An Endless Debate over Religion's Role*, ECONOMIST, Oct. 6, 2012, at 59 (noting that some Copts demand the application of *shari'a* on all citizens including non-Muslims to circumvent "the conservative Coptic Church's ban on divorce as to accept *shari'a* simply to enjoy its divorce-friendly rules").

It is formalistic to argue that secularism or religious leaning would determine a scholar's position on this issue. In fact, positions on religion and state are not reducible to theoretical and conceptual debates, but rather are influenced by a variety of political considerations. The history of the U.S. Establishment Clause illustrates this point. According to Jeffries and Ryan, Protestants initially supported the separationist view with respect to aid to religious schools given their anti-Catholic sentiments and in order to maintain their dominant position.¹³⁷ Later on, after the desegregation of public schools, Protestants became divided on this issue. Some Protestants (both fundamentalists and evangelicals) deserted the separationist view and instead supported aid to private schools that were established to escape racial integration in public schools.¹³⁸

IV. CONCLUSION

There is a set of arguments for or against a *shari'a* clause. Abstract, essentialist, or formalist arguments are unsuccessful on either side of the debate because they are internally incoherent. The compatibility of Islam with democracy cannot be resolved on a highly abstract level of debate. The availability of defensible and competing answers to the question of Islam's compatibility with democracy undermines the ability to answer the question of a *shari'a* clause through conceptual analysis. Recognizing contestability is necessary to undermine rigidly essentialist and formalist accounts. Additionally, the constitutionalization of *shari'a* is secondary to, and relatively independent of, the compatibility of Islam with democracy. It is true that a democrat is more likely to accept a *shari'a* clause if she finds that Islam is compatible with democracy. In this respect, the reformers' efforts to synthesize Islam and democracy increase the acceptability of a *shari'a* clause. Thus, the *shari'a* clause is riding on the larger theoretical question of the compatibility of Islam with democracy. Nevertheless, the relationship between these two questions is not unidirectional. That is, even if *shari'a* and democracy are incompatible in principle, there might still be normative and prudential reasons for having a *shari'a* clause. Alternatively, regardless of the compatibility of *shari'a* and democracy, there might be prudential reasons why a *shari'a* clause should be excluded from the constitutional design.¹³⁹

¹³⁷ John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 282 (2001).

¹³⁸ *Id.*

¹³⁹ The leading Islamist party in Tunisia has realized this. "According to an Ennahda parliamentarian, the political council made the decision for a number of reasons. One is that the meaning of *shari'a* is varied and the council did not want to leave a vague reference in the preamble up to judicial or public (mis)interpretation. The question of *shari'a* is also not that important to the party when compared with other problems facing the country, such as a stable and well-balanced government. Ennahda wanted to avoid contradicting its preelection platform as well as to signal its

Therefore, the case for or against the introduction of a *shari'a* clause in the constitution should be made on normative and prudential grounds, rather than through an abstract conceptual debate. I provide here a very brief sketch of some of these grounds and will leave an elaborate discussion to another occasion.¹⁴⁰

There are two primary arguments supporting a *shari'a* clause: a normative one and a realist one. The first is a normative endorsement of the reconciliation between *shari'a* and rights as an ideal compromise: on the one hand, constitutions should reflect popular sentiment and the people's identity which prefers *shari'a*; on the other hand, liberal rights like equality and freedom of conscience are required to limit majorities' power. Meanwhile, the realist position maintains that this combination is unfortunate or undesirable but nevertheless dictated by historical circumstances. For the realist this is not a bad deal because it makes the Islamists accept some core liberal values and because *shari'a* itself is manipulable and indeterminate. So the risks might not materialize.

However these arguments fail. Consider their underlying assumptions: First, whether the people in Egypt or in Tunisia want an Islamic constitution is not that evident. It depends on how one detects the popular will. Each method is contestable, including the electoral process. Neither the recent parliamentary and presidential elections in Egypt and Tunisia, nor public opinion surveys, clearly convey a popular sentiment in favor of the *shari'a* clause. And even if that popular will were detected, why should one prioritize the synchronic over the diachronic perspective? And even if we choose the synchronic – that is, what people want now and over the short term – that would not necessarily mean that the constitution is either normatively legitimate or will be stable over time given this choice.

Second, whether and how the constitution should embody people's identity, are also contestable questions. On the one hand, an alternative conception of the constitution would perceive it as a method of governance and procedural resolution of value conflicts. On the other hand, the identity that the constitution is supposed to reflect can be a strictly parochial identity or one perceived in relatively more universalistic terms. In addition, there is no necessity in reflecting this identity in a *shari'a* clause, as it can be reflected in a preamble, or in non-judicially enforceable directive principles.

determination to adopt the constitution by consensus—and the *shari'a* issue had emerged as a red line for the secular parties. And it wanted to demonstrate to the world that including a reference to *shari'a* is not necessary for establishing a democracy that is compatible with Islam.” Duncan Pickard, *The Current Status of Constitution Making in Tunisia*, CARNEGIE ENDOWMENT (Apr. 19, 2012), <http://carnegieendowment.org/2012/04/19/current-status-of-constitution-making-in-tunisia>.

¹⁴⁰ Nimer Sultany, *The Pragmatic Case Against the Sharia Clause in Post-Authoritarian Egypt and Tunisia* (on file with author).

Third, the realist claims that the indeterminacy of *shari'a* belittles the risks of its constitutionalization. Indeed, the Egyptian court—as we saw above—virtually emptied the *shari'a* clause from its possible illiberal implications. However, this interpretive indeterminacy can go either way because the court could be packed with conservative judges and thus depends on who gets to pick the interpreters. In addition, the argument counts on constitutional courts to liberalize societies, but the courts' effect in society may be limited. Moreover, such an argument ignores the effect of religion in private law, like personal status, and criminal laws, including blasphemy.

Fourth, the realist can argue that transparency in the legal order is preferable because secular discourse is also manipulable. Indeed, the U.S. Supreme Court, despite the Establishment Clause, allowed Sunday laws,¹⁴¹ opening legislative sessions with prayer,¹⁴² the public display of Christmas symbols,¹⁴³ and governmental subsidy to religious institutions.¹⁴⁴ However, the question is not merely one of increasing transparency, but also one of effectively increasing religious influence. A regime in which *shari'a* is constitutionalized changes the bargaining power of different groups within the political system. Today's choices are likely to influence future outcomes.

If I am correct that these four assumptions should be rejected, the normative and realist arguments that rely on them must fail. Additionally, there are at least three positive arguments against the inclusion of a *shari'a* clause.

First, considerations of pluralism and religious equality: ten percent of Egypt's citizens are non-Muslims, and 2% of Tunisia's population is either Christian or Jewish. In both states there is a strong secular base. On both an expressive and substantive level, a *shari'a* clause means that the state does not stand from the religious groups at the same distance. The clause is likely to influence the distribution of rights and resources against the backdrop of a sectarian code that does not appeal to all citizens. The counter-majoritarianism of this clause does not limit majority's power to protect an insular and discrete minority, but rather effectively entrenches the interests of a religiously defined majority. It rigs the rules of the political game in their favor.

Second, the entrenchment of a *shari'a* clause is likely to have a polarizing and destabilizing effect. The cases of Egypt and Tunisia show the polarizing potential of this question. When the *shari'a* clause was enacted in Egypt in 1971 the Coptic Church vehemently opposed it and the gov-

¹⁴¹ *McGowan v. Maryland*, 366 U.S. 420 (1961).

¹⁴² *Marsh v. Chambers*, 463 U.S. 783 (1983).

¹⁴³ *Lynch v. Donnelly*, 465 U.S. 668 (1984).

¹⁴⁴ *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

ernment placed the Patriarch under house arrest. The imposition of a religious language on constitutional debates makes them more intractable and a *shari'a* clause will easily become an instrument of de-legitimization, as was the case in the constitutional amendments in Egypt in March 2011. Furthermore, judicial enforcement of the clause is likely to produce a backlash, as shown by the history of the U.S. Supreme Court. Thus, in these highly contentious issues, the constitution should be a mechanism for managing polarization rather than being part of the problem.

Third, a *shari'a* clause is likely to have bad consequences: (1) the dominance of the religious divide and rhetoric marginalizes other questions and may lead to prioritizing religious concerns over other political and socio-economic issues; (2) it is anti-democratic because it offends both the majoritarian and constitutional conceptions of democracy; (3) it is a form of secular escapism because secularists who are delegating these questions to judicial elites seem unwilling or unable to make the necessary effort to advance their ideas which are often divorced from conceptions of distributive justice; finally, (4) it is a de-politicization of essentially political questions by legalizing them and fetishizing constitutionalism – but that neither reduces their intractability nor resolves them.

To conclude, if my arguments are accepted, then a *shari'a* clause should not be part of the emerging post-authoritarian constitutional order in Egypt or Tunisia. The fact that the Tunisian constituent assembly has apparently chosen not to include a *shari'a* clause is a promising sign that indicates that this choice is politically feasible and not a predetermined fate.

I do not consider my arguments as less controversial than the ones I reject. Nor do I think the debate will be less intractable if held on the more concrete level. But if there is a debate to be had on these questions, it is more fruitful to have it on the ground level rather than the abstract level. This call for a situated, descriptively thick, concrete examination avoids the generalizing tendency of conceptual debates, avoids the unwarranted optimism of the normative argument, and avoids the realist's uncritical acceptance of reality. It does not avoid a principled position; it is clear that my arguments contribute to the liberal secular position without falling into its flaws.