

# RELIGION AND CONSTITUTIONALISM: LESSONS FROM AMERICAN AND ISLAMIC CONSTITUTIONALISM

*Nimer Sultany\**

## ABSTRACT

*This Article examines the role of religious law in constitutionalism by focusing on Egypt and Tunisia as two main case studies: Egypt is an example of the so-called “Islamic constitutionalism” and Tunisia is an example of a more secular variety. Both cases are analyzed against the backdrop of U.S. constitutional theory and law. I begin by rejecting conceptualist approaches which focus on abstract concepts in order to assess the compatibility of religion, like Islam, with democracy. I show the futility of this kind of debate through a comparison to American debates between “living constitutionalists” and “originalists.” I then elaborate a pragmatic account that assesses the consequences of different institutional arrangements. For that purpose Part I rejects the normative and political-realist arguments supporting the constitutionalization of religion, according to which constitutionalization of religion in a largely-liberal constitution is either an ideal compromise or a historical dictate. I focus on four assumptions that underlie these arguments: that popular acceptance requires Islamic constitutionalism; that people’s identity includes religious law and should be reflected in Islamic constitutionalism; that Islamic law’s indeterminacy belittles the possible risks of its constitutionalization; and that the legal order’s transparency requires an acknowledgment of the religious aspect.*

*Part II considers two of the primary arguments supporting the U.S. Establishment Clause: alienation; political division and distraction; and corruption of religion. The first two arguments have been subjected to growing critiques in the United States. I defend these two arguments by connecting between alienation and internal effects within religious minorities, and*

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\* Lecturer, School of Oriental and African Studies, University of London. SJD (Harvard Law School); LL.M. (University of Virginia); LL.M. (Tel Aviv University); LL.B. (College of Management). I thank Frank Michelman, Mark Tushnet, Duncan Kennedy, Janet Halley, Mohammad Fadel, and Noah Feldman for helpful comments on previous drafts. I presented a version of this Article in the faculty workshops at Harvard Law School, SUNY Buffalo Law School, and SOAS Law School and benefited from discussions there. I wrote the bulk of this Article during my fellowship at the Baldy Center for Law & Social Policy at Buffalo Law School and I am grateful for their support.

*between political division and instability and violence. Specifically, I argue that, first, the constitutionalization of religion is likely to produce an unequal status for religious groups given the pluralist conditions in Egypt and Tunisia. Second, constitutionalization is likely to polarize and destabilize the political system in these states. Finally, this polarization happens for the wrong reasons and may produce bad effects: the dominance of the debate over the constitutionalization of religion may distract the citizenry in these states from addressing other socio-economic and political questions that are not necessarily reduced to concerns over religious law; constitutionalization is an anti-participatory move because it empowers few jurists to make decisions rather than collective decision-making; delegating controversial religious questions to the judiciary is a form of secular escapism; and a constitutionalization of religion is part of a constitutional fetishism which—along with judicial empowerment—unduly legalizes political questions. The implication of these effects is to neglect political responsibility. Thus, the Article ends with a call for a Weberian consequences-driven ethics of responsibility. This ethical stance, in turn, should be part and parcel of the recognition of value pluralism and the attempt to transform politics into an adversarial “agonistic pluralism.”*

*By displacing the conceptualist debate, the Article seeks to avoid the generalizing tendency of conceptual debates; evade the unwarranted optimism of the normative argument; and reject the realist argument’s despondency and uncritical acceptance of reality. Additionally, the Article seeks to demystify Islamic constitutionalism by grounding the discussion in American constitutional debates. Finally, the Article argues against Islamic constitutionalism without falling prey to essentialism.*

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## INTRODUCTION

Since the 2010 to 2011 uprisings, the Arab world has been in flux. The role of religion in politics and constitution-making, in particular, took center stage. The previously banned Islamist movements achieved impressive results in the electoral processes that followed the uprisings—except in Libya—and gained influential positions in the emerging political and constitutional order in Tunisia and Egypt.<sup>1</sup> However, these movements' rule encountered fierce opposition from state institutions and secular political forces. In Tunisia, the opposition demanded the dismissal of the Al-Nahda-led coalition government and the dissolution of the Constituent Assembly after the assassination of two prominent opposition leaders.<sup>2</sup> In Egypt, the opposition expressed growing concerns regarding the increasing role of religion and religious parties in state institutions and in the constitutional order and opposed the Muslim Brotherhood's exclusive approach to governance.<sup>3</sup> On June 30, 2013 mass protests erupted against Egypt's President Mohamed Morsi and the Muslim Brotherhood's rule.<sup>4</sup> On July 3, the army ousted President Morsi, installed a temporary president and a civilian government, and suspended the December 2012 Constitution that Morsi's regime ratified.<sup>5</sup> On August 14, 2013, Egyptian security forces used lethal and excessive force to break pro-Morsi sit-ins and killed hundreds of protesters.<sup>6</sup> Following these events, Islamists attacked Coptic churches across Egypt.<sup>7</sup> Once again, two years after the uprising and

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<sup>1</sup> See *infra* Part I.A.

<sup>2</sup> Carlotta Gall, *Liberal Opposition Leader is Assassinated in Tunisia*, N.Y. TIMES, July 26, 2013, at A4; Carlotta Gall, *Protesters Gather as Slain Tunisian Politician is Buried*, N.Y. TIMES, July 28, 2013, at 12.

<sup>3</sup> See, e.g., Khaled Fahmy, 'We Did Not Risk Our Lives Simply to Change the Players', CNN (July 3, 2013), <http://edition.cnn.com/2013/07/03/opinion/egypt-morsy-khaled-fahmy>.

<sup>4</sup> See, e.g., David D. Kirkpatrick & Kareem Fahim, *By the Millions, Egyptians Seek Morsi's Ouster*, N.Y. TIMES, July 1, 2013, at A1.

<sup>5</sup> See, e.g., David D. Kirkpatrick, *Egypt Army Ousts Morsi, Suspends Charter*, N.Y. TIMES, July 4, 2013, at A1; Abigail Hauslohner, William Booth & Sharaf al-Hourani, *Egypt's Military Ousts Morsi*, WASH. POST, July 3, 2013, at A1.

<sup>6</sup> David D. Kirkpatrick, *Hundreds of Egyptians Killed in Government Raids; Emergency Declared as Sectarian Violence Spreads*, N.Y. TIMES, Aug. 15, 2013, at A1; *Egypt: Security Forces Used Excessive Lethal Force: Worst Mass Unlawful Killings in Country's Modern History*, HUM. RTS. WATCH (Aug. 19, 2013), <http://www.hrw.org/news/2013/08/19/egypt-security-forces-used-excessive-lethal-force>; Amnesty Int'l, *Egypt's Disastrous Bloodshed Requires Urgent Impartial Investigation* (Aug. 16, 2013), <http://www.amnesty.org/en/news/egypt-s-disastrous-bloodshed-requires-urgent-impartial-investigations-2013-08-16>.

<sup>7</sup> Hamza Hendawi, *Egypt: Islamists Hit Christian Churches*, ASSOCIATED PRESS, Aug. 18, 2013, available at LEXIS, International News.

one year after rising to power, the Muslim Brotherhood faced calls for banning it from political participation.<sup>8</sup>

What does the brief rise and fall of the Muslim Brotherhood in Egypt teach us about constitutional law and comparative constitutionalism? What implications will it have for the role of religion in the post-Arab Spring constitutional order? Despite many uncertainties, one fact should be clear: Morsi's ouster is not a clear secular move against religious zealots. After all, the Salafis—who are generally perceived as more religiously extreme than the Muslim Brotherhood—supported the ouster and participated in the post-Morsi transition.<sup>9</sup> Prior to February 2011, Salafis generally theorized against democratic regimes and refused to participate in electoral and party politics.<sup>10</sup> Yet, they participated in the nascent post-Mubarak political order and struck a partnership with the Muslim Brotherhood.<sup>11</sup> Leaving the Brotherhood's sinking ship after June 30, they guaranteed retaining the controversial and most religious clauses of the 2012 Constitution in Interim-President Adly Mansour's constitutional declaration on July 8, 2013.<sup>12</sup>

The tumultuous relationship between religion, politics, and constitutionalism is the subject of this Article. In particular, this Article discusses and comparatively evaluates the question of “Islamic constitutionalism” against the backdrop of American constitutional theory and American debates on religion and constitutionalism. By Islamic

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<sup>8</sup> Crispian Balmer & Yasmine Saleh, *Muslim Brotherhood Faces Ban as Egypt Rulers Pile on Pressure*, REUTERS, August 17, 2013, available at <http://www.reuters.com/article/2013/08/17/us-egypt-protests-idUSBRE97C09A20130817>; Gamal Essam El-Din, *Technical Committee to Propose Radical Changes to Egypt's 2012 Constitution*, AHAM ONLINE (Aug. 18, 2013), <http://english.ahram.org.eg/NewsContent/1/64/79368/Egypt/Politics-Technical-committee-to-propose-radical-changes-to.aspx>; David D. Kirkpatrick, *Egyptian Court Shuts Down the Muslim Brotherhood and Seizes Its Assets*, N.Y. TIMES, Sep. 24, 2013, at A4.

<sup>9</sup> See Patrick Kingsley, *Egypt's Salafist al-Nour Party Wields New Influence on Post-Morsi Coalition*, GUARDIAN (July 7, 2013, 1:37 PM), <http://www.theguardian.com/world/2013/jul/07/egypt-salafist-al-nour-party>.

<sup>10</sup> 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], *Al Jazeera Ctr. Stud.* (2012), for a discussion of Salafism in Egypt. See Fabio Merone & Francesco Cavatorta, *Salafist Mouvement and Sheikh-ism in the Tunisian Democratic Transition* (Ctr. for Int'l Studies, Dublin City Univ., Working Paper in Int'l Studies No. 2012-7, 2012), for a discussion of Salafism in Tunisia.

<sup>11</sup> Kingsley, *supra* note 9.

<sup>12</sup> Compare CONSTITUTIONAL DECLARATION OF THE ARAB REPUBLIC OF EGYPT, 8 July, 2013, art. 1 (“The principles of Islamic Sharia, which include its overall evidences and jurisprudence rules and established sources in the Sunni canons, is the main source of legislation.”) with CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, December, 2012, art. 2 and art. 219; see also Nouran El-Behairy, *President Ratifies Constitutional Declaration*, DAILY NEWS EGYPT (July 9, 2013), <http://www.dailynewsegyp.com/2013/07/09/president-ratifies-constitutional-declaration/>.

constitutionalism, I mean the constitutionalization of religious law in a largely-liberal constitution through empowering constitutional court judges to review the validity of laws on the grounds of their compatibility with Islamic law. As a case study, this Article focuses on Egypt and Tunisia whose histories present different models of the relationship between religion and constitutionalism and whose post-Arab Spring constitution-making processes have followed a different trajectory.

In recent decades, both judicial review and Islamic law became part of the constitutional order in Arab constitutions.<sup>13</sup> Many Arab and Islamic states designate *Shari'a* as “a source,” “a primary source,” or “the primary source” for legislation against which the validity of ordinary legislation may possibly be reviewed.<sup>14</sup> The Iraqi Constitution of 2005, for instance, states that “Islam is the official religion of the State and is a foundation source of legislation. No law may be enacted that contradicts the established provisions of Islam.”<sup>15</sup> The dramatic political changes in Egypt and Tunisia provide rare opportunities for constitution-making in which previously excluded social and political groups can participate. It can be an occasion for reconsidering essential questions like the design of the political system and the role of religion in the constitutional order. Yet, constitution-making processes in deeply divided societies and under conditions of political instability are not moments devoid of partisan politics.<sup>16</sup> The Islamist Egyptian drafters of the 2012 Constitution chose to retain the model of Islamic constitutionalism and followed in the footsteps of the 1971 Constitution, as amended in 1980, whose Article 2 designates Islam as the state’s official religion and stipulates that the “Principles of Islamic Sharia are the principal source of legislation.”<sup>17</sup> Moreover, the drafters of the 2012 Constitution—and the abovementioned July 8, 2013 Constitutional Declaration—sought to increase the religiosity of the draft compared to previous Egyptian constitutions.<sup>18</sup> However, pre-Arab Spring Tunisia did not

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<sup>13</sup> NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 143–45, 161–65 (2002).

<sup>14</sup> See, e.g., Ann Elizabeth Mayer, *Law and Religion in the Muslim Middle East*, 35 AM. J. COMP. L. 127, 138–39 (1987).

<sup>15</sup> Article 2, Section 1, Subsection A, Doustour Jounhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

<sup>16</sup> See, e.g., David Landau, *Constitution Making Gone Wrong*, 64 ALA. L. REV. 923, 980 (2013) (arguing that constitution-making processes should not be idealized).

<sup>17</sup> DRAFT CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT art. 2, 30 Nov. 2012; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, as amended, May 22, 1980, May 25, 2005, March 26, 2007.

<sup>18</sup> David D. Kirkpatrick, *A Vague Role for Religion in Egyptian Draft Constitution*, N.Y. TIMES, Nov. 10, 2012, at A4.

follow the model of Islamic constitutionalism but rather a more secular path.<sup>19</sup> Unlike the Egyptian constitution makers, Tunisians—as we shall see below—chose not to include *shari'a* as a source for legislation even though Islam remains the official state religion.<sup>20</sup>

### A. *Overview of the Argument*

Subparts B and C of this Introduction provide a brief background to the discussion that follows. Subpart B shows the different trajectories that Egyptian and Tunisian constitutionalism have followed vis-à-vis religion and provides a context for these differences. The theory of this Article is based on differentiating between two modes of argumentation—a conceptualist and a pragmatic—for the assessment of Islamic constitutionalism. Subpart C argues that the conceptualist debate is futile given the contestability of the basic concepts on which it is based. To illustrate this contestability, this Article shows the similarity of the methodological commitments of the main sides of the debate to the American debates between originalists and living constitutionalists. The rest of the Article develops a pragmatic account of debate.

The pragmatic and consequentialist framework developed in this Article rests on two prongs. The first prong, developed in Part I, focuses on and rejects some of the main arguments supporting Islamic constitutionalism. This Article divides these arguments into normative and political-realist arguments. According to the normative argument, Islamic constitutionalism is a desirable ideal compromise between popular sentiment and securing rights. According to the political-realist argument, Islamic constitutionalism is undesirable but is the only workable outcome given the historical circumstances. To examine the validity of these arguments, this Article focuses on four underlying assumptions: (1) that popular acceptance requires Islamic constitutionalism; (2) that people's identity includes religious law and should be reflected in Islamic constitutionalism; (3) that Islamic law's indeterminacy belittles the possible risks of its constitutionalization; and (4) that the legal order's transparency requires an acknowledgment of the religious aspect. By drawing on American debates, this Article questions these assumptions and argues that

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<sup>19</sup> Kareem Fahim, *Tunisia Says Constitution Will Not Cite Islamic Law: Party Favors Unity Over Religious Pressure*, N.Y. TIMES, Mar. 27, 2012, at A10.

<sup>20</sup> Article 1, *Dustur al-Jumhuriyya al-Tunisiyya* [Constitution of the Tunisian Republic] of 2014; Fahim, *supra* note 19, at 10.

both the normative and political-realist arguments fail to establish the case for a Shari'a clause.

The second prong of the Article's framework is developed in Part II which argues against Islamic constitutionalism given normative and prudential considerations. American debates on the Establishment Clause have generally focused on three primary arguments: (1) political division; (2) alienation; and (3) corrupting religion.<sup>21</sup> According to the political division argument associated with Chief Justice Burger, state involvement in religious programs is potentially divisive on religious lines and may distract the citizenry from other issues.<sup>22</sup> The alienation argument associated with Justice O'Connor, stipulates that state's establishment of religion alienates part of the citizenry on religious lines and excludes them from the political community.<sup>23</sup> According to the corruption argument associated with theorists like John Locke, Thomas Paine, Thomas Jefferson, and James Madison, state establishment of religion is damaging and corrupting to religion itself.<sup>24</sup>

The political division and alienation arguments are under attack. American scholars like Andrew Koppelman argue that alienation and division are inevitable; that alienation and division are ubiquitous and there is no reason to single out alienation and division on religious grounds; and that constitutional measures cannot prevent alienation and division and in fact may cause alienation and division themselves.<sup>25</sup> This Article contributes to these debates by defending the alienation and division arguments through a comparative and relatively-thick descriptive account of post-Arab Spring Egypt and Tunisia. These political-realist critiques ("life is unfair, get over it!") of the alienation and division arguments fail. First, alienation and division are not products of binary situations, such as alienation/no-alienation and division/no-division. If one perceives alienation and division as inevitable, then one is right to reject an ideal happily-ever-after scenario in which they do not exist. However, the alienation and division arguments do not presuppose or even aim at such an ideal, messianic scenario. If one understands that there is a wide

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<sup>21</sup> See generally Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009) (discussing these three arguments and arguing that the corruption of religion argument is comparatively superior to the other arguments); STEVEN H. SHIFFRIN, *THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS 2* (2009) (arguing that a "religious left" perspective is superior to both the "secular left" and the "religious right," and listing reasons for supporting the Establishment Clause).

<sup>22</sup> Koppelman, *supra* note 21, at 1838–39.

<sup>23</sup> *Id.* at 1839–41.

<sup>24</sup> *Id.* at 1841–42.

<sup>25</sup> *Id.* at 1841.



spectrum/continuum of situations of alienation and division, then some forms of alienation and division—presumably those that are more potentially destructive to the social fabric and the stability of the political system—can possibly be prevented and/or ameliorated. The discussion of the Coptic minority in Egypt in this Article<sup>26</sup> shows that alienation is not merely an emotional or psychological or symbolic condition but is potentially institutionally consequential and disempowering for members of the religious minority vis-à-vis the recognized and established religious institutions. This discussion of Egypt illustrates some of the violent manifestations of polarization along religious lines. Egypt, in this sense, is a cautionary tale to the United States and elsewhere.

Second, the ubiquity of alienation and division on various grounds, such as race and gender, is not a compelling reason for the lack of action regarding any of them. Whether there is something especially bad about religious-based alienation and division that would justify singling it out for special constitutional treatment is a contextual inquiry. The phenomenon of religious revival in various parts of the world including the United States and the forceful introduction of religion to the public sphere requires considering the potential divisiveness of religious questions.<sup>27</sup>

Third, constitutional measures may not prevent religious-based alienation and political division but they may do so occasionally. The fact that they do not prevent them completely and all the time is not an argument for withering away these measures completely.<sup>28</sup> Indeed, the existence of unpunished criminals is not a convincing argument for annulling criminal law. Moreover, the existence or non-existence of legal or constitutional measures addressing the role of religion is a regulatory choice: Lack of regulation is a form of regulation.<sup>29</sup> Categories like religion or race are socially constructed and the law is complicit in this construction.<sup>30</sup>

In this light, this Article argues in Part II that it is preferable to reject Islamic constitutionalism because it is more likely to produce bad effects than

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<sup>26</sup> See *infra* Part II.A.2.

<sup>27</sup> See *infra* notes 397–403.

<sup>28</sup> See, e.g., S. E. FINER, VERNON BOGDANOR & BERNARD RUDDEN, *COMPARING CONSTITUTIONS* 1–5 (1995).

<sup>29</sup> See, e.g., Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 *LEGAL STUD. FORUM* 327 (1991).

<sup>30</sup> See, e.g., Ian F. Haney-López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 *HARV. C.R.—C.L.L. REV.* 1 (1994).

the lack of religious law in the constitution. Specifically, it argues that, first, the constitutionalization of religion is likely to produce an unequal status for religious groups given the pluralist conditions in Egypt and Tunisia. Second, constitutionalization is likely to polarize and destabilize the political system in these states and a judicial involvement might lead to backlash. Finally, this polarization happens for the wrong reasons and may produce bad effects: (1) The dominance of the debate over the constitutionalization of religion may distract the citizenry in these states from addressing other socio-economic and political questions that are not necessarily reduced to or dictated by concerns over religious law; (2) it is anti-participatory because it empowers the few to make decisions rather than collective decision-making; (3) delegating controversial religious questions to the judiciary is a form of secular escapism; and (4) the constitutionalization of religion is part and parcel of a constitutional fetishism which—along with judicial empowerment—unduly legalizes political questions.

As the implication of these effects and arrangements is to neglect and evade political responsibility, Part II concludes this consequences-oriented analysis by calling for a Weberian consequences-driven ethics of responsibility. Discarding the conceptualist debate and advancing a pragmatic debate may not make the debate less intractable, but it is more likely to make it better informed and lead to a better understanding of the stakes. Constitution-makers in states like Egypt and Tunisia have to take responsibility for their choices and these choices should aim at designing constitutional and political orders that are more conducive to human flourishing and for preventing suffering. For the ethics of responsibility to be conducive to these goals it needs to be part and parcel of the recognition of value pluralism—the irreducibility of value conflict—and the transformation of political practice from one based on enemy/friend antagonism to an adversarial “agonistic pluralism.”<sup>31</sup>

Ultimately, this Article seeks to demystify the debate on Islamic constitutionalism by grounding it in debates in American constitutional theory and law. It is also a critique of exceptionalism that scholars grant to “Islamic constitutionalism” and “constitutional theocracies,”<sup>32</sup> as opposed to debates on the Establishment Clause. American scholars who support the Establishment Clause in the United States make a variety of arguments for the establishment

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<sup>31</sup> See generally, CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* (2000).

<sup>32</sup> See RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* (2010); Larry Catá Backer, *Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering*, 16 *IND. J. GLOBAL LEGAL STUD.* 85 (2009), for theories that focus on Islamic-majority states.

of religion elsewhere.<sup>33</sup> This Article shows that there is no reason for such discrimination. Indeed, the term “constitutional theocracy” is misleading because it fails to give an adequate account of the constitutional and political practice of Islamic-majority states and obscures the commonalities between these states and arrangements in Christian-majority states.<sup>34</sup>

## B. A Brief History of Religion and Constitutionalism in Egypt and Tunisia

### 1. Egypt

To evaluate whether post-Arab Spring constitutional documents are more religious than their predecessors—as it is commonly argued with respect to the 2012 Egyptian constitution—one needs to examine the previous Constitutions. The following brief review shows that the short-lived 2012 Egyptian Constitution only partially revises the relationship between religion and constitutionalism in Egypt. It is true that under Morsi’s rule many objectionable religious and conservative manifestations proliferated in the public sphere and parliamentary debates such as debates on whether to discontinue parliamentary sessions during the call for prayer; easing the marriage for minor girls; public praise for female genital mutilation; or the law sanctioning the closure of businesses at 10:00 PM in order to conduce compliance with the dawn prayer.<sup>35</sup> Yet, as far as the Constitution is

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<sup>33</sup> Compare NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 15–16 (2006) (defending the American separation that he considers to be “in sharp contrast to the arrangements of established churches in the [U.S.] framers’ Christian Europe or today’s Islamic world.”), with NOAH FELDMAN, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* (2003) [hereinafter FELDMAN, *AFTER JIHAD*], and NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* (2008) [hereinafter FELDMAN, *THE FALL AND RISE*].

<sup>34</sup> See, e.g., H. E. Chehabi, *Religion and Politics in Iran: How Theocratic Is the Islamic Republic?*, 120 *DÆDALUS*, no. 3, 1991, at 69. Chehabi argues that the theocratic project in Iran was only superficially successful and it eventually failed after Ayatollah Khomeini’s death. *Id.* at 87. For him, “religion and politics did not merge. Instead, politics became more religious and religion became politicized.” *Id.* at 78; see also Yasuyuki Matsunaga, *The Secularization of a Faqih-Headed Revolutionary Islamic State of Iran: Its Mechanisms, Processes, and Prospects*, 29 *COMP. STUD. S. ASIA, AFR. & MIDDLE E.* 468 (2009) (affirming the argument that the attempt to Islamize Iran through a religious jurist-led rule under Khomeini has advanced secularization in Iran by making sacred law more contemporary and worldly and by differentiating between politics and religion).

<sup>35</sup> Jalal Amin, *Daleel Al-Muslim Alhazeen (The Sad Muslim Manual)*, AL-SHOROUK (July 20, 2013), <http://shorouknews.com/columns/view.aspx?cdate=20072013&id=063a00d1-5957-4c0a-bef6-2bacbe461635> (listing these and other examples); see also Dan Murphy, *Egypt’s Muslim Brotherhood Says UN proposal on Women Will Destroy the World*, *CHRISTIAN SCI. MONITOR*, Mar. 14, 2013, <http://www.csmonitor.com/World/Backchannels/2013/0314/Egypt-s-Muslim-Brotherhood-says-UN-proposal-on-women-will-destroy-the-world> (discussing the Muslim Brotherhood’s vehement objections to the recommendations that the Commission on the Status of Women submitted to the United Nations).

concerned, the change is quite limited, despite the exclusive control of the Islamists on the constitution-making process leading to the December 2012 draft.<sup>36</sup>

The main constitutional document in Egyptian constitutional history that established Islam as the state's official religion is the 1923 Constitution, which was approved by King Fouad I under British colonialism.<sup>37</sup> This constitution lasted till 1952, with a brief hiatus between 1930–1935, when the Free Officers revolted against King Farouk leading towards the independence from the British.<sup>38</sup> Article 149 under the section “general principles” states that “Islam is the state's religion and Arabic its language.”<sup>39</sup> This article will be repeated verbatim in all the following constitutions, except in the short-lived constitution of 1958 to 1962 of the unity between Egypt and Syria under President Gamal Abdel Nasser's rule.<sup>40</sup> Other constitutions during Nasser's era—1956 and 1964—included this sentence. The difference is that it moved from the closing sections of the 1923 Constitution to the opening section:<sup>41</sup> Article 5 in the 1964 Constitution under the section “the state,”<sup>42</sup> and Article 3 in the 1956 Constitution under the section “The Egyptian State.”<sup>43</sup> It should be noted that an article making Islam the official state religion is quite common in Arab constitutions, even in so-called “secular states” like Tunisia under President Habib Bourguiba.<sup>44</sup>

Nevertheless, the statement of official religion is declarative and formal and is legally and constitutionally meaningless without the tools and policies to apply it and make it effective and consequential. In fact, Arab constitutions are often referred to as constitutions without constitutionalism, or “nonconstitutional constitutions,” indicating the lack of implementation and

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<sup>36</sup> Kirkpatrick, *supra* note 18.

<sup>37</sup> James Feuille, Note, *Reforming Egypt's Constitution: Hope for Egyptian Democracy?*, 47 TEX. INT'L L.J. 237, 239–40 (2013).

<sup>38</sup> *Id.*

<sup>39</sup> Rescrit Royal No. 42 de 1923 établissant le Régime Constitutionnel de l'Etat Egyptien (Establishing the Constitutional Regime of the Egyptian State), *Journal officiel du gouvernement égyptien*, 19 Apr. 1923, art. 149 (Egypt) (“*L'Islam est la religion de l'Etat; l'arabe est sa langue officielle.*”).

<sup>40</sup> See PROVISIONAL CONSTITUTION OF THE UNITED ARAB REPUBLIC, 5 Mar. 1958 (Egypt) (omitting the provision regarding Islam as the religion of the state and Arabic as the language of the state).

<sup>41</sup> MOHAMED CHERIEF BASSIOUNI & MOHAMED HELAL, AL-JOMHORIYYA AL-THANEYAH FI MISR [THE SECOND REPUBLIC IN EGYPT] 263 (2012), available at <http://shorouknews.com/sites/republicII/> (noting the change in positioning the religion article in Egyptian constitutions).

<sup>42</sup> CONSTITUTION OF THE REPUBLIC OF EGYPT, 23 Mar. 1964, art. 5

<sup>43</sup> CONSTITUTION OF THE REPUBLIC OF EGYPT, 16 Jan. 1956, art. 2.

<sup>44</sup> See Mayer, *supra* note 14, at 135–38.

constraints on state power to guarantee citizens' rights.<sup>45</sup> Indeed, the effect of constitutions is quite limited and is related to the dominant political culture, the efficacy of the political system, and social processes.<sup>46</sup> Nevertheless, limited effect does not mean lack of effect. One of the ways to turn "Islam is the state religion" into reality appeared during President Anwar Sadat's rule.<sup>47</sup> The 1971 Constitution—a constitution that survived in most of its form until early 2011 uprising—included Article 2, which stated for the first time, that "the principles of Islamic shari'a are a principal source of legislation."<sup>48</sup> Sadat included this sentence for two main reasons: First, Islamism rose in Egypt especially after Egypt's defeat in its 1967 war with Israel.<sup>49</sup> Second, Sadat wanted a different source of legitimacy than Nasser—who was a socialist in his orientation and implemented far-reaching redistributive schemes—and he called himself the "pious president."<sup>50</sup> In 1980, Sadat amended this Article to become "the principles of Islamic shari'a are the principal source of legislation."<sup>51</sup> The change from "a principal source" to "the principal source" is supposed to signal a greater emphasis on religious identity and compliance. The reason for this change is the increasing growth of Islamism and religiosity after the Iranian revolution of 1979 and the increasing criticisms of Sadat after he signed the Camp David Accords with Israel in 1979, which led to Egypt's isolation in the Arab and Islamic world.<sup>52</sup>

Yet, again, "a principal source of legislation" is meaningless without tools for applying it. Changing the text to the "the principal" does not change this fact. The application mechanism emerged in 1979 with the establishment of the Supreme Constitutional Court, which has the power to review the constitutionality of laws and regulations, including whether they comply with

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<sup>45</sup> See, e.g., BROWN, *supra* note 13, at 10–13.

<sup>46</sup> *Id.* at 11–13.

<sup>47</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, art. 2, *amended by* May 22, 1980, May 25, 2005, March 26, 2007.

<sup>48</sup> *Id.*

<sup>49</sup> BASSIOUNI & HELAL, *supra* note 41, at 252 (mentioning Sadat's attempt to rehabilitate the regime after the 1967 defeat *inter alia* through introducing a constitution).

<sup>50</sup> See *id.* at 253; *Islam and the State Under Sadat*, ISLAMOPEDIA ONLINE, <http://www.islamopediaonline.org/country-profile/egypt/islam-and-nation-building/islam-and-state-under-sadat>.

<sup>51</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, May 22, 1980, art. 2, *amended* May 25, 2005, March 26, 2007.

<sup>52</sup> Mayer, *supra* note 14, at 138 ("Egypt, by a 1980 referendum, changed its Constitution to make the shari'a "the main source" of legislation, rather than "a main source" of legislation . . . to placate Islamic fundamentalist critics of the Sadat government.").

the principles of Islamic shari'a.<sup>53</sup> The reasons for establishing the Court include the Sadat regime's desire to encourage domestic and foreign investment in Egypt given the dire economic conditions after the War of Attrition with Israel.<sup>54</sup> For that purpose, Sadat wanted to convince investors that he differs from Nasser and will not nationalize or confiscate their property and investments.<sup>55</sup> The Court then was supposed to assure the investors that there is a mechanism for protecting property and economic rights.<sup>56</sup> Indeed, within time the Court reversed many of Nasser's socialist reforms and became a stronghold for economic liberalism and a defender of private property.<sup>57</sup>

However, as far as Article 2 is concerned, the Court emptied it from content and made it a mere parchment barrier. It rejected Islamist attempts to activate this article in ways that would annul legislation. For that purpose, the Court limited Article 2's applicability by stipulating that it cannot be applied retroactively on legislation that predated Article 2; and it interpreted principles to mean only those that are non-controversial and unambiguous.<sup>58</sup> Thus, it seems that Article 2 may be non-consequential if regime-appointed and non-religious judges apply it. In this context, Iraq presents a similar case.<sup>59</sup> Thus, a problematic article in the 2012 Constitution—and the July 8, 2013 constitutional declaration—is Article 4, which empowers Al-Azhar—a respected religious institution of learning—as a supreme authority on interpreting shari'a by granting it a consultative status.<sup>60</sup> Yet, it is not clear from the text when this consultative role applies and how it will coexist with the Court's interpretive power. Moreover, the Muslim Brotherhood sought to ignore this article when it negotiated a loan with the International Monetary

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<sup>53</sup> Law No. 48 of 1979 (Law on the Supreme Constitutional Court), *Al-Jarida Al-Rasmiyya*, 9 June 1979, art. 25, amended by Law No. 168 of 1998 (Egypt); *Supreme Constitutional Court*, ST. INFO. SERV., <http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?CatID=250#> (last visited Apr. 2, 2014) <http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?CatID=250#> (last visited Apr. 2, 2014).

<sup>54</sup> Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 LAW. & SOC. INQUIRY 883, 889–90 (2003).

<sup>55</sup> See Feuille, *supra* note 37, at 241–42.

<sup>56</sup> See Moustafa, *supra* note 54, at 890.

<sup>57</sup> *Id.* at 908–13; see also Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1825–26 (2004).

<sup>58</sup> BASSIOUNI & HELAL, *supra* note 41, at 265–68.

<sup>59</sup> Haider Ala Hamoudi, *Ornamental Repugnancy: Identitarian Islam and the Iraqi Constitution*, 7 U. ST. THOMAS L.J. 692 (2010).

<sup>60</sup> See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 8 July, 2013, art. 29 (Egypt).

Fund, whereas the Salafis sought to activate it in order to prevent the loan on grounds of violating shari'a prohibitions on charging interests on loans.<sup>61</sup>

Another article that relates to religion in the 2012 Constitution is Article 219, which sought to define the interpretative reference materials of traditional Islamic jurisprudence included within the principles of shari'a.<sup>62</sup> An article like Article 219 is likely to influence the modes of argumentation about shari'a.<sup>63</sup> This article was a reaction to the abovementioned Supreme Constitutional Court's jurisprudence.<sup>64</sup> It was a compensation for the Salafis who sought to change Article 2 into a more restrictive language.<sup>65</sup> It sought to limit the discretion of the judges and their ability to manipulate shari'a materials.<sup>66</sup> However, such an attempt is often doomed to failure because it is based on a false distinction between the judicial function (applying the law) and the political function (lawmaking). Judges do not merely apply the Constitution, they have to interpret what it means and requires prior to applying it. Judges will still have discretion to interpret and apply the materials no matter how clear constitutional drafters seek their language to be.<sup>67</sup> It would not necessarily dictate specific outcomes given the diversity of the sources and scholarly disagreements. These allow for gaps, contradictions, and ambiguities that will have to be filled by judicial legislation. In any event, the Constitution ratified in 2014 removes Article 219.<sup>68</sup>

Another noteworthy article in the now-suspended constitution is Article 10, which stipulated that the family is a basic unit of society and that it is founded

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<sup>61</sup> Tom Perry, *Egypt Islamists Say Clerics Must Approve IMF Loan*, REUTERS, Feb. 12, 2013, available at <http://www.reuters.com/article/2013/02/12/us-egypt-islamists-imf-idUSBRE91B1DA20130212>.

<sup>62</sup> DRAFT CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 30 Nov. 2012, art. 219; Clark Lombardi & Nathan J. Brown, *Islam in Egypt's New Constitution*, FOREIGN POL'Y (Dec. 13, 2012), [http://mideastafrica.foreignpolicy.com/posts/2012/12/13/islam\\_in\\_egypts\\_new\\_constitution..](http://mideastafrica.foreignpolicy.com/posts/2012/12/13/islam_in_egypts_new_constitution..)

<sup>63</sup> Lombardi & Brown, *supra* note 62.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Subpart C of the Introduction below analogizes the debate on Islamic constitutionalism to the debate between U.S. originalists and living constitutionalists. In the United States, the ascendance of originalism has led some progressive scholars to adopt and provide a progressive version of it by seeking to bridge the gap between living constitutionalism and originalism and claiming that progressive goals are consistent with original intent or public meaning. See JACK M. BALKIN, *LIVING ORIGINALISM* 3–6, 16–20 (2011). Additionally, originalism can be abused and manipulated with respect to religious questions. See, e.g., Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 727–30 (2009). Therefore, the attempt in Article 219 to force the judges to utilize medieval sources does not necessarily lead to conservative outcomes.

<sup>68</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, February 2014.

on religion, morals, and patriotism.<sup>69</sup> It also stipulated that the state will guarantee the conformity of women's duties towards its family and her employment.<sup>70</sup> This article is surely patriarchal but it is not novel: It is very similar to Article 7 of Nasser's 1964 Constitution<sup>71</sup> and Article 9 of Sadat's 1971 Constitution.<sup>72</sup> Comparatively, it is also similar to Article 41 of the Irish Constitution<sup>73</sup> and Article 7 of the Tunisian Draft Constitution of June 2013.<sup>74</sup> Moreover, Article 11 of the 1971 Constitution conditions gender equality on compliance with the rules (*ahkam*) of Islamic shari'a.<sup>75</sup> The 2012 Constitution does not include such a clause.<sup>76</sup> Thus, the Islamization of the political and constitutional order began with President Sadat rather than with Morsi and the Muslim Brotherhood. This also cautions us against the binary simplifications according to which the Arab world has been divided between Islamists and secular autocrats.<sup>77</sup> I will discuss the dangers of binary divisions amongst reified identities in Part II below.

## 2. Tunisia

Tunisia is the birthplace of Arab constitutions.<sup>78</sup> The first Constitution in the Arab world was drafted there in 1861.<sup>79</sup> The main constitution in Tunisia, however, is the post-independence Constitution of 1959,<sup>80</sup> which survived until the December 2010 uprising. Although the Atatürkist Turkish model influenced President Habib Bourguibah, he did not follow that model by

<sup>69</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 10.

<sup>70</sup> *Id.*

<sup>71</sup> See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 23 Mar. 1964, art. 7.

<sup>72</sup> See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 9.

<sup>73</sup> IR. CONST., 1937, art. 41.

<sup>74</sup> DRAFT CONSTITUTION OF THE TUNISIAN REPUBLIC, 1 June 2013, art. 7.

<sup>75</sup> See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, ch. 2, art. 11.

<sup>76</sup> DRAFT CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 30 Nov. 2012.

<sup>77</sup> Mayer, *supra* note 14, at 147. Mayer writes: "Another indication that many countries of the Muslim Middle East are not secular states is that they have constitutional provisions indicating that the shari'a is either 'a source' or 'the source' of legislation." *Id.* at 138.

<sup>78</sup> BROWN, *supra* note 13, at 3.

<sup>79</sup> CONSTITUTION OF THE TUNISIAN REPUBLIC, 26 Apr. 1861. The British colonizers abolished the short-lived 1882 Egyptian constitution. See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 7 Feb. 1882; Brown, *supra* note 13, at 16–20, 26–29.

<sup>80</sup> CONSTITUTION OF THE TUNISIAN REPUBLIC, 1 June 1959.



declaring the state secular in the Constitution.<sup>81</sup> Unlike the Turks, he did not relegate religion to the private sphere and create a wall between religion and state law and politics.<sup>82</sup> Instead, the 1959 Constitution stipulates in Article 1: “Tunisia is a free, independent and sovereign state. Islam is its religion, Arabic is its language.”<sup>83</sup> Malika Zeghal explains that President Bourguiba believed, first, that modernizing society requires a gradual approach; second, that modernization should include modernizing religion itself through state control and regulation; and third, that the state should develop an emotional attachment in the hearts of its citizens and for that purpose it should use religion.<sup>84</sup> This shows that declaring an official state religion may endanger religion by putting it at the state’s mercy and does not always indicate a theocracy in which religion controls the state (even in Iran).<sup>85</sup>

Zeghal recalls the change in President Bourguiba’s position regarding women’s Islamic dress code: In 1929, at the time of the struggle against French colonialism, Bourguiba defended *hijab* as a resistance tool against French colonization.<sup>86</sup> This position is reminiscent of other nationalist and anti-colonial movements: Partha Chatterjee shows how anti-British Hindu nationalism perceived women and specifically mothers as the carrier for national identity and values.<sup>87</sup> Yet, after independence Bourguiba’s position changed.<sup>88</sup> However, he legally banned *hijab* only in 1981 after the growth of Islamist influence in the aftermath of the Iranian revolution.<sup>89</sup>

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<sup>81</sup> See Malika Zeghal, *Public Institutions of Religious Education in Egypt and Tunisia: Contrasting the Post-Colonial Reforms of Al-Azhar and the Zaytuna*, in *TRAJECTORIES OF EDUCATION IN THE ARAB WORLD* 111, 112 (Osama Abi-Mershed ed., 2010).

<sup>82</sup> *Id.*

<sup>83</sup> CONSTITUTION OF THE TUNISIAN REPUBLIC, 1 June 1959, art. 1.

<sup>84</sup> See Malika Zeghal, *Veiling and Unveiling Muslim Women: State Coercion, Islam, and the ‘Disciplines of the Heart’*, in *THE CONSTRUCTION OF BELIEF: REFLECTIONS ON THE THOUGHT OF MOHAMMED ARKOUN* 127 (Abdou-Filali-Ansary & Aziz Esmail eds., 2012).

<sup>85</sup> Chehabi, *supra* note 34, at 78-81. Chehabi argues that although religion was politicized in Iran, that did not create an institutionalized Church-like hierarchy—especially given the opposition of traditional clergy to their inclusion in the bureaucratic theocratization—. *Id.* at 81-84. After the passing away of Khomeini the separation became clear between political and religious authority given the failure to formalize charismatic leadership. *Id.* at 84-87.

<sup>86</sup> Zeghal, *supra* note 84, at 127, 129–30.

<sup>87</sup> PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES* 116 (1993).

<sup>88</sup> Zeghal, *supra* note 84, at 130.

<sup>89</sup> *Id.* at 137.

Bourguiba had also a different conception of modernization from Egypt's President Nasser.<sup>90</sup> The former marginalized the clerics class, dried up their financial revenue, and closed Al-Zaytuna—the main institute for religious learning—turning it into a mere course of study in secular universities.<sup>91</sup> Nasser followed a different path with Al-Azhar: He retained it as an institution but internally modernized it by including non-religious subjects in the curriculum.<sup>92</sup> Zeghal explains this difference by Nasser's need for Al-Azhar's prestige to enlist it in his regional politics against Saudi Arabia, and the need for the institution to absorb the huge numbers of students in Egypt.<sup>93</sup> Yet, Nasser's reforms and control of Al-Azhar in the 1960s paved the way for Al-Azhar's advent in the 1970s and 1980s as a political player.<sup>94</sup> By the 1990s Al-Azhar would become an influential institution given President Mubarak's need for the legitimacy stamp in his fight against extremist Islamist groups.<sup>95</sup> Modernization, then, “did not produce secularization.”<sup>96</sup>

The Tunisian trajectory explains, in part, the choices that Tunisian constitution makers made in the June 2013 draft of the constitution. The Islamists—in this case Al-Nahda party—are torn between enhancing religion's role in the public sphere and their fear of state's control of religion given their experience prior to the Arab Spring.<sup>97</sup> The draft retains the phrase, “Tunisia is an independent state whose religion is Islam,” and simultaneously declares that “Tunisia is a civil (*madaniyya*) state, based on citizenship, people's will, and supremacy of law.”<sup>98</sup> The draft also makes the state the protector of religion, the guarantor of freedom of belief and neutrality of places of worship so they are not used by political parties, and the protector of the sacred (Article 6).<sup>99</sup> A

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<sup>90</sup> Zeghal, *supra* note 81, at 115–16.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 116; *see also* LEONARD BINDER, ISLAMIC LIBERALISM: A CRITIQUE OF DEVELOPMENT IDEOLOGIES 80 (1988).

<sup>94</sup> Malika Zeghal, *Religion and Politics in Egypt: The Ulema of al-Azhar, Radical Islam, and the State (1952–94)*, 31 INT'L J. MIDDLE E. STUD. 371, 372 (1999) (“Far from having had a negative effect on the ulema's political vitality, the modernizing process radically transformed their political identity because it inadvertently offered them a political forum as well as a basis for the expansion of their educational institution.”).

<sup>95</sup> Tamir Moustafa, *Conflict and Cooperation Between the State and Religious Institutions in Contemporary Egypt*, 32 INT'L J. MIDDLE E. STUD. 3, 12 (2000).

<sup>96</sup> Zeghal, *supra* note 94, at 396.

<sup>97</sup> *See* Malika Zeghal, *Competing Ways of Life: Islamism, Secularism, and Public Order in the Tunisian Transition*, 20 CONSTELLATIONS 254, 261 (2013).

<sup>98</sup> DRAFT CONSTITUTION OF THE TUNISIAN REPUBLIC, 1 June 2013, arts. 1, 2.

<sup>99</sup> *Id.* art. 6.

previous draft included the phrase “[the state] criminalizes all attacks on the sacred” which raised concerns regarding freedom of speech.<sup>100</sup> The June 2013 draft drops the word “criminalization” and vaguely speaks of “protecting the sacred.”<sup>101</sup> Article 73 excludes non-Muslims from eligibility to the president’s position by stating that the candidate must be a Muslim.<sup>102</sup> As we will discuss below, Al-Nahda initially attempted to add a clause similar to the Egyptian Article 2 but the secularist opposition made Al-Nahda change its position.<sup>103</sup> The Tunisian assembly ratified the Constitution on January 26, 2014, which did not include such an article. It is clear that—unlike the Egyptians—the Tunisians did not rush into ratifying a controversial document in a highly controversial process.<sup>104</sup>

### C. *From Conceptualism to Pragmatism*

The first step in this Article’s analytical framework is to distinguish between two major modes of argumentation about Islamic constitutionalism: conceptualist and pragmatic. The conceptualist analysis is overly concerned with determining the debate by analyzing abstract concepts.<sup>105</sup> This has been the dominant mode of argumentation thus far; the debate has been concerned with the question whether Islam and democracy are compatible.<sup>106</sup> In order to assess this conceptualist debate, I map the different positions. There are two primary groups of discourse: unity and disunity. For unity scholars, Islam and democracy are compatible,<sup>107</sup> whereas the disunity scholars find them

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<sup>100</sup> *Tunisia: Fix Serious Flaws in Draft Constitution*, HUMAN RIGHTS WATCH (Sept. 13, 2012), <http://www.hrw.org/news/2012/09/13/tunisia-fix-serious-flaws-draft-constitution>.

<sup>101</sup> DRAFT CONSTITUTION OF THE TUNISIAN REPUBLIC, 1 June 2013, art. 6.

<sup>102</sup> This article existed in previous drafts and was criticized by human rights groups. *See, Tunisia: Revise the Draft Constitution*, HUMAN RIGHTS WATCH (May 13, 2012), <http://www.hrw.org/news/2013/05/13/tunisia-revise-draft-constitution>. In the final ratified version in 2014 the article’s number is 74. CONSTITUTION OF THE TUNISIAN REPUBLIC, 27 January 2014, art. 74.

<sup>103</sup> *See infra* Part II.B.

<sup>104</sup> This does not imply that the constitution-making process has been flawless. *See, e.g.*, CARTER CTR., THE CARTER CENTER ENCOURAGES INCREASED TRANSPARENCY AND PUBLIC PARTICIPATION IN TUNISIA’S CONSTITUTION DRAFTING PROCESS; CALLS FOR PROGRESS TOWARD ESTABLISHMENT OF INDEPENDENT ELECTION MANAGEMENT BODY (May 11, 2012), <http://www.cartercenter.org/resources/pdfs/news/pr/tunisia-statement-051112-en.pdf>.

<sup>105</sup> Nimer Sultany, *Against Conceptualism: Islamic Law, Democracy, and Constitutionalism in the Aftermath of the Arab Spring*, 31 B.U. INT’L L.J. 435, 439 (2013).

<sup>106</sup> *Id.* at 439–46 (developing the argument in greater detail).

<sup>107</sup> The literature attempting to reconcile between Islamic law and democracy, or discussing efforts of scholars and constitutional courts reconciling Islamic law and democracy, is vast. *See e.g.*, MUHAMMAD ABED AL-JABRI, *DEMOCRACY, HUMAN RIGHTS AND LAW IN ISLAMIC THOUGHT* (2009); MUHAMMAD ABED AL-JABRI, *AL-DIMOKRATIYYA WA HOQOOQ AL-INSAN [DEMOCRACY AND HUMAN RIGHTS]* (1994) (Arabic);

incompatible and cannot be united in a political regime.<sup>108</sup> Disunity scholars follow two primary opposite moves: Salafis reject democracy as incompatible with Islam.<sup>109</sup> Secularists—as in the Turkish Constitutional Court—reject Islam as incompatible with democracy.<sup>110</sup> Salafis insist on divine sovereignty,

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KHALED ABOU EL FADL, *ISLAM AND THE CHALLENGE OF DEMOCRACY* (2004); KHALED ABOU EL FADL ET AL., *THE PLACE OF TOLERANCE IN ISLAM* (2002); FELDMAN, *AFTER JIHAD*, *supra* note 33; FELDMAN, *THE FALL AND RISE*, *supra* note 33; ANDREW F. MARCH, *ISLAM AND LIBERAL CITIZENSHIP: THE SEARCH FOR AN OVERLAPPING CONSENSUS* (2009); FATIMA MERNISSI, *THE VEIL AND THE MALE ELITE: A FEMINIST INTERPRETATION OF WOMEN'S RIGHTS IN ISLAM* (Mary Jo Lakeland trans., 1991); ABDULAZIZ SACHEDINA, *THE ISLAMIC ROOTS OF DEMOCRATIC PLURALISM* (2007); Mohammad Fadel, *The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21, 30–42 *CANADIAN J. L. & JURISPRUDENCE* 5 (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); Mohammad H. Fadel, *Riba, Efficiency, and Prudential Regulation: Preliminary Thoughts*, 25 *WIS. INT'L L.J.* 655, 695–700 (2008); Azizah al-Hibri, *Islamic and American Constitutional Law: Borrowing Possibilities or a History of Borrowing?*, 1 *U. PENN. J. CONST. L.* 492 (1999); 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, 389–94 (2006); Bruce K. Rutherford, *What Do Egypt's Islamists Want? Moderate Islam and the Rise of Islamic Constitutionalism*, 60 *MIDDLE E.J.* 707, 726–31 (2006); Kristen Stilt, "Islam is the Solution": *Constitutional Visions of the Egyptian Muslim Brotherhood*, 46 *TEX. INT'L L.J.* 73 (2011).

<sup>108</sup> See 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), for a disunity scholar who is neither a Salafist nor a secularist. See ABDULLAHI AN-NA'IM, *ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A* (2008); see also Hannibal Travis, *Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq*, 3 *NW. U. J. INT'L HUM. RTS.* 4 (2005) (claiming that Islamic constitutionalism is inherently undemocratic). For a Christian equivalent to An-Na'im's faith-based argument for separating state from religion see: DARRYL HART, *A SECULAR FAITH: WHY CHRISTIANITY FAVORS THE SEPARATION OF CHURCH AND STATE* (2006). See *infra* notes 109–110 (discussing Salafist and secularist approaches).

<sup>109</sup> *Democracy Is Heresy, Says Salafi Nour Party*, AL-MASRY AL-YOUM (Egypt) (Dec. 8, 2011), <http://www.egyptindependent.com/node/540666>. For more on Salafism, see generally Henri Lauzière, *The Construction of Salafiyya: Reconsidering Salafism From the Perspective of Conceptual History*, 42 *INT'L J. MIDDLE E. STUD.* 369 (2010); Scott S. Reese, *Salafi Transformations: Aden and the Changing Voices of Religious Reform in the Interwar Indian Ocean*, 44 *INT'L J. MIDDLE E. STUD.* 71 (2012); Joas Wagemakers, *The Enduring Legacy of the Second Saudi State: Quietist and Radical Wahhabi Contestations of al-Walā'Wala Wa-L-Barā'Barā*, 44 *INT'L J. MIDDLE E. STUD.* 93 (2012).

<sup>110</sup> See, e.g., GEORGE TARABISHI, *HARTAKAT: 'AN AL-DIMOKRATIYYA WAL 'ALMANIYYA WAL MOMAN'AH AL-'ARABIYYA [HERESIES: ON DEMOCRACY, SECULARISM, MODERNITY, AND ARAB INTRANSIGENCE]* (2006) (Arabic); GEORGE TARABISHI, *HARTAKAT 2: 'AN AL-'ALMANIYYA KA ISHKALIYYA ISLAMIYYA-ISLAMIYYA [HERESIES 2: ON SECULARISM AS AN ISLAMIC-ISLAMIC PREDICAMENT]* (2008) (Arabic). See Ceren Belge, *Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey*, 40 *LAW & SOC'Y REV.* 653 (2006); Susanna Dokupil, *The Separation of Mosque and State: Islam and Democracy in Modern Turkey*, 105 *W. VA. L. REV.* 53 (2002); Hootan Shambayati & Esen Kirdiş, *In Pursuit of "Contemporary Civilization": Judicial Empowerment in Turkey*, 62 *POL. RES. Q.* 767 (2009); 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), for the jurisprudence of the Turkish Constitutional Court; .

secularists insist on popular sovereignty, and moderate reconcilers insist on both.<sup>111</sup>

This mapping shows the contestability of the competing conceptions of both Islam and democracy.<sup>112</sup> Each one of the three main positions ignores contestability in a different way. Salafis do not reject democracy, if democracy means a simple-majoritarian system; rather, they reject liberal rights.<sup>113</sup> On the other hand, secularists are not majoritarian democrats because they prioritize rights over democracy.<sup>114</sup>

This contestability is also evident in the comparison of these debates to the American debates.<sup>115</sup> After all, in both cases we have a group of scholars and judges offering different interpretations and applications of an old foundational and authoritative text.<sup>116</sup> They compete over which interpretive method is legitimate and would lead to correct interpretations of the text. Salafis are originalists who advocate a literalist reading of the text and opinions of the pious forefathers.<sup>117</sup> They are textualists who see the text as a self-contained unit. They claim that there is a clear-cut, determinate, and fixed meaning of the text.<sup>118</sup> Moderate reconcilers, on the other hand, are like American scholars

<sup>111</sup> See generally Sultany, *supra* note 105.

<sup>112</sup> See W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1956), for a discussion of the meaning of essentially contested concepts.

<sup>113</sup> Sultany, *supra* note 105.

<sup>114</sup> See, e.g., 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).

<sup>115</sup> Sultany, *supra* note 105; Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67 (2006).

<sup>116</sup> The comparison is valid if one recalls the veneration with which many hold the U.S. Constitution. See, e.g., SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984). One should also note the religious origins of modern constitutional ideas. See, e.g., GRAHAM HAMMILL, *THE MOSAIC CONSTITUTION: POLITICAL THEOLOGY AND IMAGINATION FROM MACHIAVELLI TO MILTON* (2012); MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* (2010); JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* (2008) (religious origins of criminal law doctrines). Additionally, judges in supposedly secular states are not immune from religious influences. See, e.g., JAY ALAN SEKULOW, *WITNESSING THEIR FAITH: RELIGIOUS INFLUENCE ON SUPREME COURT JUSTICES AND THEIR OPINIONS* (2006); Stephen M. Feldman, *Empiricism, Religion, and Judicial Decision-Making*, 15 WM. & MARY BILL RTS. J. 43 (2006); George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990).

<sup>117</sup> Sultany, *supra* note 106.

<sup>118</sup> See, e.g., 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,

who advocate a dynamic or constructive interpretation or a living constitution.<sup>119</sup> They emphasize the context, and highlight underlying principles.

But despite the way Salafis and reconcilers represent themselves, their methodological commitments are similar.<sup>120</sup> Both are textualists because they interpret the text; both are originalists because they claim fidelity to the text; and both are dynamic interpreters because Salafis construct the past from a modern perspective and their insistence on fixed meaning despite the changing context makes them arguably unfaithful to the text.<sup>121</sup> If so, the similarity of the interpretive method shows that none of the parties have a better claim for greater legitimacy of their outcomes.<sup>122</sup>

I conclude that the debate cannot be resolved on a highly abstract and conceptual manner. The concepts on which the debate is based are themselves unstable. Scholars are talking past each other when they deploy different conceptions of these concepts.<sup>123</sup> I have found in American constitutional theory that there is no *a priori* way to stabilize the relationship between constitutionalism and democracy.<sup>124</sup> Similarly, in the debate on Islamic constitutionalism I argue that there is no *a priori* way to stabilize the relationship between Islam and democracy.

Therefore, instead of this conceptualism this Article seeks to advance a different kind of conversation that is based on a situated, pragmatic, and consequentialist-style analysis. The pragmatic analysis doubts the availability

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854 (1989) (arguing that the Constitution has “fixed meaning” and the Court should not interpret it in ways that conform to “current societal values”).

<sup>119</sup> See RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985); STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005), for American constructive interpretive methods and living constitutionalism.

<sup>120</sup> Lawrence B. Solum, *Originalism as Transformative Politics*, 63 *TUL. L. REV.* 1599, 1603 (1989) (arguing that there is no meaningful distinction between originalists and non-originalists).

<sup>121</sup> SAMIRA HAJ, *RECONFIGURING ISLAMIC TRADITION: REFORM, RATIONALITY AND MODERNITY* (2009); 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); 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).

<sup>122</sup> Sultany, *supra* note 105, at 454.

<sup>123</sup> *Id.* at 455-460.

<sup>124</sup> 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).

of *a priori* solutions to value conflicts. It does not seek internal conceptual coherence; does not deploy deductive reasoning; and does not examine the compatibility of legal arrangements with ideal visions.<sup>125</sup> Instead, it focuses on the consequences of alternative institutional structures or legal doctrines. These consequences are evaluated in accordance with normative and prudential considerations. Pragmatism should avoid the pitfalls of uncritical acceptance of that which is perceived as “common sense” in order to realize its critical and progressive potential:

By permitting us to concentrate on the human dimension of law, pragmatism frees us from self-created obstacles to human progress and directs our attention to what really matters: doing away with social practices that create unnecessary human misery and promoting practices that nurture human flourishing.<sup>126</sup>

Accordingly, the pragmatic case for or against Islamic constitutionalism should be made on normative and prudential grounds rather than through an abstract conceptual debate. Indeed, even if shari’a and democracy were incompatible in principle, there might still be prudential reasons for supporting Islamic constitutionalism.<sup>127</sup> Alternatively, even if shari’a and democracy were compatible, there might be prudential reasons for not lending one’s support for a constitutional system in the form of Islamic constitutionalism.

## I. NORMATIVE AND PRUDENTIAL ARGUMENTS FOR ISLAMIC CONSTITUTIONALISM

In this Part, I address normative and prudential arguments supporting Islamic constitutionalism and show why they fail. Broadly conceived, there are two main arguments for the constitutionalization of shari’a: a normative, idealistic argument and a political-realist, prudential argument. The normative argument maintains that the combination between shari’a and rights is an ideal compromise in the formation of the constitutional order. On the one hand, a constitution should reflect popular sentiment or the identity of the people. On the other hand, it should also secure rights to constrain majorities when they go astray. A constitution that contains both a shari’a clause and liberal rights (like equality and freedom of conscience) is the best answer to this situation. This

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<sup>125</sup> Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821, 1822 (1990).

<sup>126</sup> *Id.* at 1824.

<sup>127</sup> *See infra* Part I.

argument, then, is optimistic regarding the consequences of the combination between the two elements in a unified structure.

Unlike the normative argument, the political-realist argument does not normatively endorse a shari'a clause. The realist maintains that Islamic constitutionalism is not an ideal, or even a desirable arrangement, but this unfortunate necessary concession is dictated by our judgment regarding what is workable under concrete historical circumstances. This concession to illiberal forces is worthwhile because it achieves a concession from the Islamists as well to endorse liberal rights. It encourages internal debates and the search for common ground, and supports the moderates against the extremists. Additionally, the structure is indeterminate and thus manipulable in liberal directions. Hence, the concession may not be as bad as may be initially assumed.

In what follows I would like to disaggregate these two arguments into four secondary assumptions. I will call these: the arguments from legitimation, identity, interpretive indeterminacy, and transparency. I argue that these two main arguments fall once one questions their supporting arguments and underlying assumptions.

#### *A. Legitimation by Popular Acceptance*

Here the argument is that the constitution should reflect popular sentiment in states like Egypt and Tunisia. Since this sentiment demands an Islamic constitution, the constitution should incorporate a shari'a clause. Such incorporation would legitimate the constitutional order by making it more likely for the general public to accept it. There are many difficulties with this argument: First, whether the people in Egypt or Tunisia want an Islamic constitution is not that evident. It depends on the chosen method for detecting popular will. This method is likely to be controversial. Second, even if one detected popular will, it is unclear why one should prioritize the synchronic perspective over the diachronic perspective. Third, even if one prioritizes the synchronic perspective that would not necessarily mean that the constitution is either normatively legitimate or will be stable over time. I explicate these points in what follows.

##### *1. Popular Will?*

It is unclear how supporters of this argument measure "what the people want." Interestingly, the arguments supporting Islamic constitutionalism have



been propagated when Egypt, for instance, had no fair and free elections that can credibly assess majority wishes.<sup>128</sup> The main pre-Arab Spring example that supporters of Islamic constitutionalism cite is the anticipated victory of the Islamists in the Algerian elections of 1992, which led to a bloody civil war after the army cancelled the elections.<sup>129</sup> Yet, the notion of popular will is highly contested even in well-established constitutional democracies with fair elections. Each method to detect this will is contestable. Scholars question, for example, the ability of electoral systems and representative institutions to convey popular will.<sup>130</sup> I will consider here post-Arab Spring electoral results and public opinion surveys. The point here is not to deny the democratic legitimacy of Islamist-led governments; rather it is only to problematize attempts to deduce from electoral results a clear support to a shari'a clause.

The first Egyptian free elections after overthrowing President Muhammad Mubarak's rule produced mixed results and do not show conclusive support for political Islamists. True, the Muslim Brotherhood and the Salafi Nour party performed impressively in the parliamentary elections. However, the voter turnout was only fifty-four percent of eligible voters.<sup>131</sup> The first round of the presidential elections showed that political Islam does not necessarily have the majority of the votes. In the second round the Muslim Brotherhood candidate received 51.7% of the vote, and he received that only after liberal and left-wing parties sided with him against the candidate of the old regime, who rejected

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<sup>128</sup> FELDMAN, AFTER JIHAD, *supra* note 33.

<sup>129</sup> See, e.g., Editorial, *Democracy Denied in Algeria*, N.Y. TIMES, July 24, 1992, at A24.

<sup>130</sup> Robert Dahl, for example, argues that the electoral system does not really translate majority's wishes.

The only important point to stress here is that in no large nation state can elections tell us much about the preferences of majorities and minorities, beyond the bare fact that among those who went to the polls a majority, plurality, or minority indicated their first choices for some particular candidate or group of candidates. What the first choices of this electoral majority are, beyond that for the particular candidates, it is almost impossible to say with much confidence.

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... We expect elections to reveal the "will" or preferences of a majority on a set of issues. This is one thing elections rarely do, except in an almost trivial fashion.

ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 129–131 (1956). See also Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1019 (1984); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1054 (1988); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 53–55 (1986) (critiquing representative democracy as insufficiently representative of the people).

<sup>131</sup> *Muslim Brotherhood Tops Egyptian Poll Results*, AL JAZEERA (Jan. 22, 2012), <http://www.aljazeera.com/news/middleeast/2012/01/2012121125958580264.html>.

shari'a law.<sup>132</sup> In other words, the 51.7% includes votes of those who reject political Islam. On the other hand, 48.3% of those who voted for the old regime were virtually entirely against the Brotherhood.

The December 2012 referendum on the Egyptian constitution showed a 63.8% majority support for the constitution. Meanwhile, 36.2% percent voted against it. Yet, many parties opposing the Muslim Brotherhood rule boycotted the referendum. Indeed, the 32.9% turnout was very low and can hardly show a compelling support on the Egyptians' part for an Islamic constitution.<sup>133</sup>

Similarly, the October 2011 elections in Tunisia after the overthrow of the former regime resulted in mixed results with Al-Nahda party gaining 41% of the vote and 90 out of 217 seats in parliament.<sup>134</sup> These results forced Al-Nahda to form a coalition with more liberal parties, such as The Congress Party of the Republic and Ettakattol. In addition, Islamist groups like Al-Nahda are internally divided on the question of incorporating shari'a in the constitution:

The decision to avoid mentioning sharia in the constitution was taken by the party's political council, its top deliberative body of about 120 elected members. Of the 80 members who participated in the debate, only 12 voted in favor of shari'a. By contrast, a straw poll of Ennahda members of parliament taken a few days earlier showed a small majority in favor of including sharia.<sup>135</sup>

The ultimate decision to exclude shari'a from the constitution was based on several considerations:

According to an [Al-Nahda] 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

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<sup>132</sup> David D. Kirkpatrick, *Named Egypt's Winner, Islamist Makes History*, N.Y. TIMES, June 25, 2012, at A1. Ahmed Shafiq, the old regime candidate, declared with respect to shari'a: "The application of [shari'a] law is complicated. . . . Civil law is the best choice for Egypt." *Where They Stand—Egyptian Candidates Shafiq and Mursi*, BBC (June 6, 2012), <http://www.bbc.co.uk/news/world-africa-18296326>.

<sup>133</sup> *Egypt's Constitution Passes With 63.8 Percent Approval Rate*, EGYPT INDEP. (Dec. 25, 2012), <http://www.egyptindependent.com/news/egypt-s-constitution-passes-638-percent-approval-rate>.

<sup>134</sup> *Tunisia's Islamist Ennahda Party Wins Historic Poll*, BBC (Oct. 27, 2011), <http://www.bbc.co.uk/news/world-africa-15487647>.

<sup>135</sup> 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>.

and well-balanced government. [Al-Nahda] wanted to avoid contradicting its preelection platform as well as to signal its 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.<sup>136</sup>

Libya, on the other hand, is the only and first example in which Islamists did not win the election in the aftermath of the Arab Spring. A non-Islamist bloc emerged as the leading party in the first Libyan elections after the overthrow of Colonel Mu’ammār Qaddafi conducted in July 2012.<sup>137</sup> Independents occupied the majority of the parliamentary seats.<sup>138</sup>

Surveys of Arab public opinion show division over questions of religion and state. A 2011 comprehensive poll in twelve Arab countries, including Egypt and Tunisia, showed that forty-three percent of respondents supported separating religion from the state, whereas forty-two percent rejected that separation.<sup>139</sup> While fifty-six percent would accept having a religious party in power, forty-five percent agreed with having a party that calls for separating religion from the state in power (two-thirds of Tunisians and fifty-six percent of Egyptians).<sup>140</sup> Although eighty-five percent of the respondents said they were religious, a majority (sixty-six percent) said they were “somewhat religious.”<sup>141</sup> Forty-seven percent said that religious practices are private and should be separated from social and political life, including sixty-three percent of Tunisians and fifty-five percent of Egyptians.<sup>142</sup> And fifty-nine percent said that sheikhs (i.e. religious authorities) should not influence governmental decisions.<sup>143</sup> In another survey, forty-four percent of Egyptians said they preferred that Egypt’s political system would look like Turkey’s.<sup>144</sup>

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<sup>136</sup> *Id.*

<sup>137</sup> David D. Kirkpatrick, *Libya Results to Break an Islamist Wave*, N.Y. TIMES, July 9, 2012, at A1.

<sup>138</sup> Wolfram Lacher, *Fault Lines of the Revolution: Political Actors, Camps and Conflicts in the New Libya*, 2013 SWP RES. PAPER (STIFTUNG WISSENSCHAFT UND POLITIK), no. 4, at 9.

<sup>139</sup> ARAB CTR. FOR RESEARCH & POLICY STUDIES, THE PROJECT OF SURVEYING ARAB PUBLIC OPINION: ARAB SURVEY 2011, at 69 (2012), available at <http://english.dohainstitute.org/release/5083cf8e-38f8-4e4a-8bc5-fc91660608b0>.

<sup>140</sup> *Id.* at 42, 43 figs. 25, 26.

<sup>141</sup> *Id.* at 61, 62 fig. 41.

<sup>142</sup> *Id.* at 62, 63 fig. 42.

<sup>143</sup> *Id.* at 68 fig. 46.

<sup>144</sup> SHIBLEY TELHAMI, ANNUAL ARAB PUBLIC OPINION SURVEY (2011), [http://www.brookings.edu/~media/events/2011/11/21/20arab%20public%20opinion/20111121\\_arab\\_public\\_opinion](http://www.brookings.edu/~media/events/2011/11/21/20arab%20public%20opinion/20111121_arab_public_opinion).

## 2. *Synchronic vs. Diachronic*

Even if one found a non-controversial way to measure popular will, the question remains whether to favor the synchronic perspective over the diachronic. The argument “this is what the people want” relies too heavily on the synchronic perspective—what the people want now and over the short term—and completely ignores the diachronic perspective that acknowledges how these choices change over time. The former is a myopic view of the conditions in Egypt or other Arab or Islamic countries that paints nations with singular colors. Seyla Benhabib notes that external observers tend to see unity and uniformity in society whereas internal social agents tend to see the divisions and struggles.<sup>145</sup> A pragmatic analysis should make room for critical engagement of social agents with their surroundings.<sup>146</sup> Indeed, “what the people want” is an open question to which various actors inside Egypt or Tunisia give different answers. And “what the people want” is likely to change over time. Choices that constitution framers make regarding a shari’a clause are likely to influence developments over time.<sup>147</sup>

The Tunisian example illustrates the preference to a diachronic perspective, and that an alternative institutional design is possible. The main party, Al-Nahda, did not demand the introduction of shari’a into the constitution after the revolution. Al-Nahda’s leader argued that the Tunisian Salafis’ demand for such an introduction is a reaction to extreme secularism of the previous authoritarian regime, and suggested that the democratic process will tame these extremist demands over the long run.<sup>148</sup>

The histories of European and North American secularism as well as Islamic history illustrate the importance of the diachronic perspective. It is not

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<sup>145</sup> SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* (2002).

<sup>146</sup> Singer, *supra* note 125, at 1824.

<sup>147</sup> See, e.g., Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 313–14 (2008) (discussing path dependency).

<sup>148</sup> Al-Asaad Ben Ahmad, *We Fought for Freedom, Not Sharia Law*, AL-AHRAM WEEKLY ON-LINE, Apr. 5–11, 2012, <http://weekly.ahram.org.eg/2012/1092/re4.htm>. Whether political participation leads to moderation and democratization of extremist parties like salafis is not clear, however. See, e.g., Steve L. Monroe, *Salafis in Parliament: Democratic Attitudes and Party Politics in the Gulf*, 66 MIDDLE E.J. 409, 410 (2012) (“First, political participation does not inherently promote democratic attitudes. Despite operating for almost a decade in three parliamentary terms and competing in two competitive elections, Bahrain’s Al-Asalah has consistently obstructed democratic reform. Second, religious ideology does *not* necessarily define democratic attitudes; both blocs [in Bahrain and Kuwait] support the same literalist tendencies and the same broad objective of promoting Islamic governance, yet both espouse contradictory attitudes towards democratic governance in their respective states.”) (emphasis added).

that “what the people wanted” in European and North American countries was from the beginning a secular regime of separation between church and state. Rather, popular endorsement of institutional configurations was the outcome of a long—and, at times, bloody—conflict. Secular forces have not clearly triumphed in Europe and North America, and religion still plays an important role in politics and society, especially in the United States. As Nikki Keddie wrote, “[T]he West was at first no more open to secularization than are parts of the Middle East and South Asia today,” and “the common idea that religion and politics have always been more inextricably intertwined in Islam than Christianity is untrue.”<sup>149</sup> It is ahistorical and essentialist, then, to argue in the case of Muslim societies that “this is what they want” as if this was a self-evident argument. This is especially true given that “the historical Islamic tradition does not offer any definitive model of what the Church-State relationship should be—or even a model of a ‘Church’ in the Western sense.”<sup>150</sup> Ann Elizabeth Mayer writes:

There was no unitary, hierarchical structure like that of the Roman Catholic Church, and there was no Islamic institutional counterpart to the Papacy that could define orthodoxy for the entire community of believers—no institutional counterpart to the “Church”, in other words, that was capable of being “established” in the European sense. As indicated, the closest thing Islam had to a “Church” was the “ulama” [clerics] class itself.<sup>151</sup>

Hence, one would think a separation between religion and state should be theoretically no less acceptable in Islamic-majority states than in Christian-majority states. Yet Noah Feldman argues that “secularism of the Western variety is not a necessary condition of democracy” in order to justify the lack of separation between religion and state under an “Islamic democracy.”<sup>152</sup> This Article is not arguing that all states should follow the same blueprint. It is arguing, however, that first, the Arab present should be historicized because that would prevent the reification of the present. Second, Islamic practice is open to different forms of relationship between religion and state, and considering this openness, the Article questions the attempt to justify the lack of separation as if it were the only or the main available form.

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<sup>149</sup> Nikki R. Keddie, *Secularism & Its Discontent*, DÆDALUS, Summer 2003, at 14, 20–21.

<sup>150</sup> Mayer, *supra* note 14, at 131; see Chehabi, *supra* note 34, at 69 (regarding the lack of church in Shiite Islam.)

<sup>151</sup> Mayer, *supra* note 14, at 132–33.

<sup>152</sup> See FELDMAN, *AFTER JIHAD*, *supra* note 33, at 12.

### 3. *Stability and Legitimacy*

Even if one chooses the synchronic perspective and rejects the diachronic perspective, that would not necessarily mean that the constitution would be more legitimate or stable over the long run. The argument is that the incorporation of shari'a in the constitution would stabilize the political systems in states like Egypt and Tunisia because the citizenry who are predominantly Muslim will accept it. This argument relies on a Weberian sociological account of legitimacy that prizes the fact of acceptance.<sup>153</sup> But this is not the only or the best account of legitimacy. A normative conception of legitimacy would posit normative pre-conditions for assessing the legitimacy of legal-political ordering.<sup>154</sup> It is true that majority support is crucial, but that is a question of stability over the long run rather than a question of legitimacy. It is futile to run away from such normative conditions because supporters of the popular acceptance thesis are also presupposing normative conditions—i.e. whether and when one accepts the fact of majority choices is a value-based question.<sup>155</sup> Furthermore, one cannot simply derive the “ought” from the “is.” It is a logical fallacy to infer from a descriptive statement (that majorities in Arab states support a shari'a clause) a normative conclusion (that a constitution ought to incorporate a shari'a clause).<sup>156</sup>

Indeed, some popular choices may lead to stability, but whether that is legitimate or democratic is a different matter. Our judgment about the desirability of stability is a normative question that relates to our conceptions of legitimacy and democracy.<sup>157</sup> In Egypt, the authoritarian leaders introduced

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<sup>153</sup> See MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 31–38, 212–15 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans, 1978) (1968).

<sup>154</sup> Nimer Sultany, *The Poverty of Constitutional Theory: Justice, Legitimacy, and Legitimation* 177–78 (Apr. 2012) (unpublished S.J.D. Dissertation, 2012) (on file with the Harvard law School Library).

<sup>155</sup> See Frank I. Michelman, *Constitutional Authorship*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 64, 83–85 (Larry Alexander ed., 1998) (arguing that coercion exists not only in the case of the legal ordering, but also in the sociological presuppositions that validate it, and concluding that participation in this coercion should also be justified).

<sup>156</sup> See DAVID HUME, *A TREATISE OF HUMAN NATURE* (David Fate Norton & Mary J. Norton eds., 2000).

<sup>157</sup> *But see* ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009). The authors claim that stability is inherent to the idea of a constitution; and that stability is a good thing because it provides a stable basis for politics, promotes obedience to the law, allows the development of intermediary institutions, and prevents opportunism. *See id.* at 34–35. However, the kind of empirical approach of positive political science the authors adopt is flawed. It follows the rational choice model, which assumes that individuals are self-interested rational actors who have stable preferences—and want to maximize the good things—without examining the formation of these preferences. *Id.* at 7. The authors assume that stability is good and thus recommend ways to maximize stability of constitutions. *Id.* at 88. Yet, there is a difficulty in comparing a large set of cases and only by formally comparing the documents

the shari'a clause as part of the attempt to legitimate their otherwise undemocratic and illegitimate rule.<sup>158</sup> They aimed at consolidating their rule by negotiating with religious institutions, like al-Azhar, and empowering them in return for their support against the more radical Islamic groups.<sup>159</sup> Mubarak's and Tunisia's Zine el Abedin Ben Ali's authoritarian regimes were stable for three decades, and yet they can hardly be considered democratic or normatively legitimate.

#### 4. *Short Constitutional Life Span?*

The lack of long-term durability itself may be used to justify the constitutionization of shari'a, for it suggests that the stakes involved in incorporating shari'a are not that high if one recognizes the short life span of constitutions. Indeed, few constitutions are as old as the U.S. Constitution. One study suggests that the average life span of world constitutions is nineteen years.<sup>160</sup> Egypt had several constitutions whose life span was not particularly long.<sup>161</sup> Tunisia had an early and short-lived constitution (1861) and, after independence, had a constitution (1959) that outlived its Egyptian counterparts, surviving until the 2011 uprising.<sup>162</sup> Despite the relatively short life span of many of these constitutions, this argument is merely speculative. There is no way before hand to ascertain whether the constitution will have a short or a long life span. The rapid changes in Egyptian constitutions reflect *inter alia* a history of colonialism, a revolution against the monarchy, a short-lived

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and their life span with scant attention to their history and politics. This comparative method ignores the difference between sham constitutions and democratic constitutions; it ignores the gap between flexibility in form but entrenchment in effect (as in the case of unconstitutional constitutional amendments in India), and ignores the gap between entrenchment in form and flexibility in effect. Amendments can occur in different ways even if the constitution is not formally amended through a change in the sociological understandings underpinning a constitutional order or judicial interpretation. *See, e.g.,* Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321, 325–28 (2011); *see* Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 145 (Sanford Levinson ed., 1995). Finally, constitutions can endure also because they are ignored in practice. As in states of emergency—despite the increasing occurrence of “emergency” and despite the increasing constitutionalization of emergency—the constitutional provisions regulating states of emergency are not always invoked. *See* John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210, 215 (2004).

<sup>158</sup> BASSIOUNI & HELAL, *supra* note 41, at 263.

<sup>159</sup> *Islam and the State Under Mubarak*, ISLAMOPEDIA ONLINE, <http://www.islamopediaonline.org/country-profile/egypt/islam-and-nation-building/islam-and-state-under-sadat>.

<sup>160</sup> ELKINS ET AL., *supra* note 157, at 1–2.

<sup>161</sup> *See* BROWN, *supra* note 13, at 36–41 (on Egyptian constitutional history). These constitutions include those that date from 1882, 1923, 1930, 1956, 1958, 1964, 1971, 2012.

<sup>162</sup> *Id.* at 16–20 (on early Tunisian constitutionalism).

unification with Syria, and a popular uprising. The 1959 Tunisian Constitution's endurance for half a century is above the nineteen years average and is not, relatively, a short time. A stable democratic regime with peaceful transitions and a flexible constitution might enjoy a longer life span, which is why risk-averse constitution makers who oppose the constitutionalization of shari'a may choose to exclude shari'a out of fear of durability. In addition, for one to evaluate the stakes involved one needs to know how the clause will be interpreted and applied. It may be ignored and hence become a mere parchment barrier. But if it were applied strictly and widely then it may have grave consequences even if it were only for two or three decades.

### *B. Reflecting the People's Identity*

It may be argued that a constitution should reflect the identity of the people, so in a predominantly Muslim state like Egypt or Tunisia, the constitution should be Islamic. One scholar writes:

Muslim states have often incorporated Islamic law into their legal systems, in part, to offer a fixed source for their legal systems and, thereby, for their national identity. . . . Shari'a as [a] political symbol involves the use of historical rules to give substantive content to the political identity of the nation at both the domestic and international level.<sup>163</sup>

Unlike the argument discussed in the previous Subpart, here the argument is that religious law is integral to the people's identity in these states, whether synchronically or diachronically assessed. Thus, religious law is not a mere passing popular sentiment.

#### *1. The Effects of Identity Politics*

There is no dispute that domestic law forms identities, so the question becomes which forms should this legal construction of identities take.<sup>164</sup> Ironically, the attempt to entrench the Islamic majority's identity might be rooted in a perception that the majority's identity is under attack. That is, the majority in such a case would have a minority consciousness because it is often

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<sup>163</sup> 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, 260 (Sujit Choudhry ed., 2008) (footnotes omitted). See also HIRSCHL, *supra* note 32, at 3.

<sup>164</sup> Clarissa Rile Hayward & Ron Watson, *Identity and Political Theory*, 33 WASH. U. J.L. & POL'Y 9, 10 (2010); see generally Martha Minow, *Identities*, 3 YALE J. L. & HUMAN. 97 (1991) (arguing that judges and lawyers construct their own identities when they construct and represent their clients' identities).



the minority that seeks protection given its numerical inferiority and its limited effect on the political system. Accordingly, it may be argued that Islamic identity needs protection not given present conditions inside the state in question but rather given the global conditions of: (1) lack of political and economic autonomy of small and weak states;<sup>165</sup> (2) the cultural hegemony of western and secular ideas that require the preservation of Islamic identity;<sup>166</sup> and (3) the rise in Islamophobia in Europe and North America.<sup>167</sup> Curiously, such an argument shifts the discussion from one internal to the question of citizenship to external to it. Paradoxically, it complains about external vulnerability to justify internal distribution of rights. It is unclear, however, how internal arrangements like a shari'a clause would combat cultural hegemony or economic dependency on the world stage. And even if it did, it is not clear what added value will such a clause have when personal law arrangements are anyway based on religious law and when Islam is already recognized as the religion of the state.

Crucially, the argument mistakes “identity politics” for “identity” and reduces the latter to the former, as the discussion in Subpart II.C below shows. Identity politics refers to demands for recognition, assertions of identity, and cultural expressions to counter the perceived devaluation or misrepresentation of that identity. As such it is distinct from the “politics of recognition” in which *minority groups* express demands to reverse structural injustices within

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<sup>165</sup> See Mayer, *supra* note 14, at 129.

<sup>166</sup> See, e.g., Mayer, *supra* note 14, at 127–30 (describing state Islamization programs as a reaction to westernization/modernization/secularization processes); see also World Conference on Human Rights, Apr. 19–May 7, 1993, *The Cairo Declaration on Human Rights in Islam*, U.N. Doc. A/CONF.157/PC/62/Add.18 (June 9, 1993). The preamble emphasizes the need to combat materialism and preserve Islamic identity:

Reaffirming the civilizing and historical role of the Islamic Ummah . . . and the role that this Ummah should play to guide a humanity confused by competing trends and ideologies and to provide solutions to the chronic problems of this materialistic civilization.

Wishing to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari'ah.

Convinced that mankind which has reached an advanced stage in materialistic science is still, and shall remain, in dire need of faith to support its civilization and of a self motivating force to guard its rights.

*Id.*

<sup>167</sup> See Org. of the Islamic Conference, Astana, Kazakhstan, June 28–30, 2011, *Fourth OIC Observatory Report on Islamophobia: Intolerance and Discrimination Against Muslims*, 38th Council of Foreign Ministers (2011) (claiming there has been a recent increase in discrimination toward Muslims in Europe and the United States).

unfair and unequal socio-political arrangements.<sup>168</sup> The politics of recognition may be reduced to identity politics if it takes the form of “culturalism.”<sup>169</sup> This reduction risks displacing redistributive arguments because it disconnects “economic mechanisms of distribution from cultural patterns of value and prestige.”<sup>170</sup> It also ends up reifying the group’s identity because “it puts moral pressure on individual members to conform to a given group culture. . . . The overall effect is to impose a single, drastically simplified group-identity which denies the complexity of people’s lives, the multiplicity of their identifications and the cross-pulls of their various affiliations.”<sup>171</sup> Even those who argue that all politics is identity politics and should not be idealized as a search for the common good, reject the “pathologies” of identity politics like essentialism, demonization, and victimhood.<sup>172</sup> These pathologies produce similar effects to the reduction of the politics of recognition to identity claims.

The reification effect is evident in this view of Islamic law as integral to people’s identity in post-colonial Arab states. This view overestimates the importance of Islamic law and ignores its hybridity by imagining an idealized authentic law grounded in medieval sources and is unaffected by historicity and uncontaminated by transplants from foreign law.<sup>173</sup>

Giving Islamic law an overarching status analytically in our approach to law in the Islamic world, distorts our understanding of legal phenomena in these countries. Islamic law should be approached as one, but only one, of the constitutive elements of law that has not only been de-centered by the transplant but also transformed. Not only have its rules been reformed, but also its modes of reasoning, and its jurist class. Its treatises have been turned into codes, and its qadis turned into modern judges. Moreover, its internal conceptual organization, has been transformed by being reduced to a rule structure pos-

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<sup>168</sup> IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 102–07 (2000).

<sup>169</sup> See Nancy Fraser, *Rethinking Recognition*, 3 NEW LEFT REV. 107, 111 (2000).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 112; see also Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 115–16 (David Kairys ed., 3d ed. 1998) (discussing the “coherentist” assumptions of identity politics); Richard T. Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in LEFT LEGALISM/LEFT CRITIQUE 38 (Wendy Brown & Janet Halley eds., 2002). Ford argues that cultural rights can be an imprisonment and not only protection, and that rights discourse is “too crude to deal with the complex policy questions generated by cultural pluralism.” *Id.* at 61, 73.

<sup>172</sup> See, e.g., Richard D. Parker, *Five Theses on Identity Politics*, 29 HARV. J.L. & PUB. POL’Y 53, 56–57 (2005).

<sup>173</sup> See Haider Ala Hamoudi, *The Death of Islamic Law*, 38 GA. J. INT’L & COMP. L. 293, 307–11, 323–24 (2010) (detailing the extensive borrowing from foreign law in Arab and Islamic legal systems).

itivized in a code and dependent on state enforcement. Consequently, its normative hold over people has changed.<sup>174</sup>

Ignoring the hybridity of Islamic law is related to another mistake in conceptualizing Islamic law. The legal realists have pointed out the difference between law in the books and law in action and the folly of attempting to separate the law from its practice.<sup>175</sup> Yet a large part of the scholarship on Islamic law ignores this insight by denying the law's historicity.<sup>176</sup> Amr Shalakany considers dominant Islamic legal historiography to be based on four faulty premises. First, it reduces Islamic law to shari'a (i.e. confining the object of inquiry to the exegesis of the sacred texts). Second, it cleanses shari'a from politics and custom (and hence the profane/secular is expelled from the domain of the sacred). Third, it overemphasizes the explanatory power of a simplistic, binary dichotomy between shari'a and politics (and hence divorcing legal theory from legal practice: rather than a unison of theory and practice it presupposes a contrast between theory and practice; rather than understanding legal practices as part of shari'a and its evolution, they are perceived as external to—and a violation of—shari'a). Fourth, it overemphasizes the explanatory power of a simplistic, binary dichotomy between tradition and modernity both under colonialism and in the post-colonial Arab state (i.e. the perceived need to “modernize” and “westernize” given the immutable nature of the “traditional” shari'a given the denial of its historicity).<sup>177</sup> This commitment to what Shalakany calls a “scripturalist” form of legal historiography is evident in reformist scholarship that is critical of the classical orientalist writers on Islamic law because the reformists reproduce these binaries and do not stray far away from these premises.<sup>178</sup> Likewise, the focus on judicial practice and the reality of constitution-making—as in Hamoudi's work on Iraq—rather than on abstract theorizations on “constitutional theocracies,”<sup>179</sup> reveals that the constitutionalization of shari'a serves an identitarian value rather than a controlling substantive legal arrangement.<sup>180</sup>

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<sup>174</sup> Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 823 (2004).

<sup>175</sup> See generally Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

<sup>176</sup> Amr A. Shalakany, *Islamic Legal Histories*, 1 BERKELEY J. MIDDLE E. & ISLAMIC L. 1, 29 (2008).

<sup>177</sup> See *id.* at 9–27.

<sup>178</sup> See *id.* at 59–67.

<sup>179</sup> See, e.g., Ran Hirschl, *Comparative Constitutional Law and Religion*, in COMPARATIVE CONSTITUTIONAL LAW 422–38 (Tom Ginsburg & Rosalind Dixon eds., 2011). Hirschl fails to mention any other legal document in Iran other than the constitution. In contrast to his discussion of the United States, Canada, Germany, Italy, France, and India, he does not mention a single judicial ruling in “strong establishment” states, like Iran, to justify his typology of constitutional regimes' approaches to religion. *Id.* at

## 2. *Identity and the Constitution*

In any event, this identity-based argument is unsuccessful given the contestability of the questions whether the constitution should reflect the people's identity and how. First, there is no necessity in understanding the constitution as the locus for national identity and values.<sup>181</sup> One may side with those scholars who see the constitution as primarily about procedural rules for a functioning government rather than about fundamental values and as the locus of national identity.<sup>182</sup> This understanding seeks to limit the constitutional domain and rejects the necessity to couch all political and social questions in constitutional terms. This might be an attractive approach in cases in which there are deep divisions and violent encounters in identitarian aspects.<sup>183</sup> It may be also more attractive in newly established democratic regimes—as opposed to more established and stable political orders—that have not reached a sufficient equilibrium.<sup>184</sup> A *modus vivendi* agreement on the rules is likely to be easier than agreement on contested values, and is more meaningful than agreement on highly abstract (and hence empty) values.

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434–437. His focus on formal texts is also evident in distinguishing between cases like Ireland, which he includes within “Formal Separation with *De Facto* pre-eminence of One Denomination,” and Egypt, which he includes within “Strong Establishment” or constitutional theocracies. *Id.* at 430–31, 435–37. Although Ireland does not have an Article 2-like text, Catholicism influences its constitutional jurisprudence. *See infra* note 187. On the other hand, although Egypt has this Article in the text it has been judicially interpreted very elastically. Mayer, *supra* note 14, at 131. It is also unclear why Hirschl distinguishes between Israel, which he includes within “Religious Jurisdictional Enclaves,” and Egypt. Hirschl, *supra*, at 433–35. Israel endorses one monotheistic religion and declares itself as Jewish and democratic, (which echoes the claims that so-called “constitutional theocracies” like Egypt are, or can be, Islamic and Democratic). *See, e.g.*, Michael M. Karayanni, *The Separate Nature of the Religious Accommodations for the Palestinian-Arab Minority in Israel*, 5 NW. J. INT’L HUM. RTS. 41 (2006). Finally, although Hirschl argues against the simplistic dichotomy between a secular West and a religious others, he ends up having only Islamic-majority states in the constitutional theocracy model. Hirschl, *supra*, at 438.

<sup>180</sup> *See* Hamoudi, *supra* note 59, at 692, 710.

<sup>181</sup> *See* RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7–8 (1996), for an example for American scholars who interpret the Constitution as a carrier for society’s values and political tradition.

<sup>182</sup> *See, e.g.*, Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045, 1064–65 (2004). Echoing Schauer, Ziad Bahaa al-Dein claims that the discussion in Egypt is imprisoned in a conception of the constitution as inclusive of all societal values and principles. Ziad Bahaa al-Dein, *Al-Dostor Al-Sagheer wa Al-Dostoor Al-Kabeer [The Small Constitution and the Big Constitution]*, AL-SHOROUK (Apr. 12, 2011), <http://www.shorouknews.com/columns/view.aspx?cdate=12042011&id=8a88b28b-4b80-4f00-b291-98cf0db594d0>. Such a conception increases the perceived stakes by the competing parties. It makes the constitution the most crucial document that would govern Egyptian lives for fifty years. *Id.* Instead he calls for a modest view of the constitution..

<sup>183</sup> Schauer, *supra* note 182, at 1064–65.

<sup>184</sup> *Id.* at 1067.

Second, even if one perceives the constitution as embodying the people's identity, it remains to be seen which identity should the constitution endorse. American debates show that there is a choice regarding the best conception of this identity—whether it is aptly conceived in strictly parochial or in relatively more universalistic terms.<sup>185</sup> Post-Communist European constitution makers faced a similar choice between civic and ethnic conceptions of national identity.<sup>186</sup> The more the Egyptian or Tunisian constitutions include Islamic religious provisions, the more their constitutions are parochial and experienced as exclusive by significant parts of the population in these countries.

Third, the national identity need not necessarily be expressed in a shari'a clause. Indeed, constitution drafters have devised different mechanisms—like a preamble or directive principles—to deal with controversial, amorphous, or not easily achievable goals. Some constitutions establish a division of labor in which the cultural aspects of the nation are mostly reflected in the preamble to the constitution rather than in the constitutional provisions themselves.<sup>187</sup> This choice reflects a division of labor between the expressive function of preambles and the function of settling disputes that constitutional provisions serve.<sup>188</sup> Thus, even if one supports the parochial identity-conception of the constitution that should not necessarily lead to adopting a judicially enforceable shari'a clause. It can be merely declaratory.<sup>189</sup> Indeed, Tunisians initially considered the judicially enforceable option before the Islamist leading party decided against the inclusion of shari'a in the constitution. “An internal Ennahda draft was circulated in the weeks following the [electoral] vote that stated in the preamble that shari[']a would be a ‘source among sources’ of

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<sup>185</sup> See, e.g., Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495 (1988).

<sup>186</sup> See Jiří Pfišbaň, *Reconstituting Paradise Lost: Temporality, Civility, and Ethnicity in Post-Communist Constitution-Making*, 38 LAW & SOC'Y REV. 407 (2004).

<sup>187</sup> For instance, the cultural influences of Catholicism are evident in the preamble of the Irish Constitution. See generally IR. CONST., 1937. But they also pervade some of the later provisions, including the directive principles and the characterization of the family and the state's responsibility for children. See IR. CONST., 1937, arts. 41–42, 45. Article 44(1) of the Constitution declares: “The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.” *Id.* art. 44, para. 1. It adds in Article 44(2)(2): “The State guarantees not to endow any religion.” *Id.* art. 44, para. 2, cl. 2. The Fifth Amendment of the Constitution Act removed previous reference to specific religious affiliations and established a special status for the Roman Catholic Church. Fifth Amendment of the Constitution Act 1972 (Act No. 5/1972) (Ir.).

<sup>188</sup> Sanford Levinson, *Do Constitutions Have A Point? Reflections on “Parchment Barriers” and Preambles*, 28 SOC. PHIL. & POL'Y, no. 1, 2011.

<sup>189</sup> *Id.* at 164. However, there are exceptions like Nepal and France where the preamble has an enforceable legal status. *Id.* at 164–65.

legislation.”<sup>190</sup> Eventually, Tunisia ratified a constitution on January 26, 2014. It included the following paragraph in the preamble:

Expressing our people’s commitment to the teachings of Islam, to their spirit of openness and tolerance, to human values and the highest principles of universal human rights, inspired by the heritage of our civilization, accumulated over the travails of our history, from our enlightened reformist movements that are based on the foundations of our Islamic-Arab identity and on the gains of human civilization, and adhering to the national gains achieved by [the Tunisian] people.<sup>191</sup>

Another alternative is to make the shari’a clause part of the “directive principles of social policy” akin to Article 45 of the Irish Constitution and Part IV of the Indian Constitution rather than a judicially enforced article.<sup>192</sup> Here the directive principles would enjoy a higher legal status than merely a declaratory status like the preamble but will still be more flexible than other constitutional provisions.

Fourth, the identity of the nation includes non-Muslims, like the Christian Copts, who are an integral part of the Egyptian nation. It is unclear, then, why the identity of the nation would mean a shari’a clause under such pluralist sociological conditions. A shari’a clause entrenches the majority’s identity rather than the national identity. If constitutional change requires taking into account the different societal interests and hence should lead to a generalization of the constitutional text,<sup>193</sup> then it is doubtful if an Article 2-like language in the Egyptian constitution achieves the required inclusive generalization.

Finally, the fact that a country is predominantly Islamic does not mean that it is monolithic or predominantly religious.<sup>194</sup> As has been observed in the American context: “Americans overwhelmingly . . . identify with a religion. Identity, however, does not necessarily translate into religious activity because not all who identify with a religion frequently attend religious services, or engage in other religious behavior.”<sup>195</sup> It is true that Arab states are deeply

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<sup>190</sup> Pickard, *supra* note 135.

<sup>191</sup> CONSTITUTION OF THE TUNISIAN REPUBLIC OF 2014, pmbl.

<sup>192</sup> Ir. Const., 1937 art. 45; India Const. PART IV.

<sup>193</sup> John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929 (2003).

<sup>194</sup> Ahmed T. el-Gaili, *Federalism and the Tyranny of Religious Minorities: Challenges to Islamic Federalism in Sudan*, 45 HARV. INT’L L. J. 503, 538 (2004)

<sup>195</sup> ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES* US 8 (2012).

influenced by the history of Islamic civilization but that does not necessarily translate into diligent religious commitment. Despite all the talk about “religious revival” whether in Islamic or non-Islamic societies, this revival “may be,” notes Olivier Roy, “new forms of religious visibility rather than an outbreak of religiousness.”<sup>196</sup> One needs to distinguish between conservatism, religiosity, and political Islam. Though they might overlap, they are distinct socio-political phenomena. While it seems true that there is a rise in social conservatism in Arab societies compared with earlier decades—which is also true of the post-1960s United States—and that this conservatism takes at times religious expressions, as in dress codes in the public sphere, one cannot collapse conservatism into religiosity. Not all conservatism or traditionalism is an expression of religiosity. Within religiosity, one needs to differentiate between religious practice and popular forms of faith. Indeed, religious practices are socially significant and at times are experienced as more social than religious. For instance, many non-practicing Muslims would fast during Ramadan—and some would even pray that month—although they are generally non-practicing. The reason seems to be social conformity. One cannot leap to the conclusion that because most people fast most of them are religious. Finally, religiosity, in whatever form, does not necessarily mean that practicing or believing Muslims are committed to the project of political Islam (and hence want a shari’a clause).

### *C. Indeterminacy of Shari’a Interpretation and Liberalization*

The political-realist may argue that shari’a is an abstract concept and would have to be interpreted by constitutional court justices and this interpretive activity and application are inevitably influenced by normative commitments and socio-political considerations.<sup>197</sup> Thus, even if one had fears from a religious clause these fears need not materialize given the elasticity of abstract sacred law, its subordination to political exigency and economic necessity, and the ability of largely secular judges to deploy it in a variety of ways.<sup>198</sup> Max Weber noted, for instance, that:

The needs of economic life make themselves manifest either through a reinterpretation of sacred commandments or through their casuistic by-passing. Occasionally we also come upon a simple, practical elim-

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<sup>196</sup> OLIVIER ROY, HOLY IGNORANCE: WHEN RELIGION AND CULTURE PART WAYS 3 (2010).

<sup>197</sup> See Nathan J. Brown, *Shari’a and State in the Modern Muslim Middle East*, 29 INT’L J. MIDDLE E. STUD. 359 (1997) (for the various meanings of shari’a).

<sup>198</sup> Weber, *supra* note 153, at 577–78.

ination of religious injunctions in the course of the ecclesiastical dispensation of penance and grace. One example of this is the elimination within the Catholic church of . . . the prohibition against usury. . . but without any express abrogation. . .<sup>199</sup>

The experience of the Egyptian Supreme Constitutional Court (“SCC”) shows that the shari’a clause can be largely emptied from its religious content by various interpretive techniques or watered down by limiting its application on procedural and technical grounds. For example, Salafis who claim to be originalists and are literalist in their Islamism argue for the application of “*ahkam*” (rules) and not merely “*mabadi*” (principles) of shari’a.<sup>200</sup> In particular they call for applying “*hudud*” (corporal punishment).<sup>201</sup> In response to these kinds of claims, the SCC used a procedural technique to reject Islamist claims that: (1) The Egyptian penal code is incompatible with Article 2 given that it refrains from applying an amputation punishment in cases of theft;<sup>202</sup> (2) the penal code’s provision on adultery is unconstitutional because it merely stipulates incarceration rather than the “*hudud*” corporal punishment;<sup>203</sup> (3) or, charging interest—which was legal under Egyptian Civil Code—is contrary to shari’a.<sup>204</sup>

Ran Hirschl argues that in a “constitutional theocracy” courts may be designated as a medium for the contestation over religious issues as a strategy of containment in which secular judges legitimate the political order while simultaneously defending it against more radical religious demands.<sup>205</sup> Lombardi and Brown disagree with Hirschl’s thesis arguing that in the Egyptian case the SCC’s jurisprudence “should be considered a *bona fide* contribution to contemporary Islamic thought” and that it cannot be considered “un-Islamic” or “non-religious.”<sup>206</sup> They argue that an argument that the SCC is secularizing Islamic thought implies that some ideas are essentially secular and cannot be made from within the religious tradition itself.<sup>207</sup> However, it seems that Lombardi and Brown are missing the point. It is precisely because the secular and the religious/sacred are not binary opposites that the secular

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<sup>199</sup> *Id.*; see also *id.* at 586–87 (on the abandonment of the prohibition on usury in Christianity).

<sup>200</sup> STEPHANE LACROIX, SHEIKHS AND POLITICIANS: INSIDE THE NEW EGYPTIAN SALAFISM 5 (Brookings Doha Center, June 2012).

<sup>201</sup> *Id.*

<sup>202</sup> Supreme Constitutional Court, Case no. 32, Judicial year no. 10 (Nov. 4, 1989) (Arabic).

<sup>203</sup> Supreme Constitutional Court, Case no. 34, Judicial year no. 10 (February 3, 1990) (Arabic) (Egypt).

<sup>204</sup> Supreme Constitutional Court, Case no. 20, Judicial year no. 1 (May 4, 1985) (Arabic) (Egypt).

<sup>205</sup> HIRSCHL, *supra* note 32, at 3–4.

<sup>206</sup> Lombardi & Brown, *supra* note 107, at 432 (emphasis added).

<sup>207</sup> *Id.*



can be understood as internal to the religious. The fact that there is a genuine disagreement on shari'a amongst religious scholars does not preclude the possibility that the effect of judicial rulings or scholarly interventions is to secularize shari'a. These rulings move positions within shari'a closer to those characteristically identified as secular and liberal in the spectrum of available positions.<sup>208</sup> This does not mean they are necessarily “non-religious”—though some may perceive them as such—because they are (or can be) justified from within the religious canon. But they are certainly less religious from the perspective of the extremes of the secular/religious spectrum.<sup>209</sup> Thus, one may believe that it is a *bona fide* attempt—even though the state judges are not religious scholars themselves—and still see the secularizing effect. Furthermore, Lombardi and Brown seem to ignore ideological conflict in legal interpretation. Judges are not merely engaged in moral disagreement and exposition of sacred texts irrespective of profane policy considerations. It is through these policy considerations that their ideological commitments influence their judicial practice.<sup>210</sup> Ideological conflict is obscured by the *modus operandi* of the SCC, which issues unanimous, unsigned decisions without dissenting opinions.

Despite the forgoing, the indeterminacy-based argument fails. This Article seeks to assess whether non-religious constitutional drafters who are considering to yield to religious demands to enact a shari'a clause should count on the indeterminacy of shari'a to move society towards a liberal, secular democracy (or at least not risk its further Islamization) despite the shari'a clause. This Article argues that one should not.

### 1. *Limits of Judicial Legitimation*

The effect of a constitutional court's legitimating force—while real given the perception of rule of law and semblance of legality—is quite limited.<sup>211</sup>

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<sup>208</sup> Brown, *supra* note 197, at 370.

<sup>209</sup> Indeed Brown himself argues in his earlier writings that:

[T]he meaning of the shari'a has been transformed to the extent that it is the self-proclaimed proponents of the shari'a who insist on viewing it solely [and narrowly] as law [i.e. a body of identifiable rules], whereas more secular writers argue for a broader conception, though it need not always inform actual legal practice.

*Id.*

<sup>210</sup> See generally DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE (1998).

<sup>211</sup> See generally GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008).

This limited effect is more likely in cases like authoritarian regimes in which the constitution is not revered as it is in the United States. Some scholars argue that courts should address the larger public opinion in their rulings in order to reach larger audiences and shape public opinion.<sup>212</sup> However, the efficacy of such appeal to the general public is contingent on many factors. Consider the three possible audiences for this liberalizing discourse: the general public, elites, and Islamists.

*The general public:* the public rarely (if ever) reads court rulings, even the highly publicized ones. This is true even in cases like that of the Egyptian SCC, which produces very short rulings (no more than few pages' long) and their reasoning is devoid of any scholarly sources or extensive discussions of their reasoning that leads them to their conclusions.<sup>213</sup> Even previous rulings of the Court are rarely mentioned in the text of the rulings.<sup>214</sup> As such the SCC seems to be following Cass Sunstein's "minimalism" in the American context by offering "incompletely theorized arguments" to support their rulings in controversial cases.<sup>215</sup> This minimalism is also evident in the fact that many rulings simply avoid the substantive questions and rely on procedural devices. In many cases the SCC rejected petitions on the grounds that Article 2 does not apply retroactively on laws enacted prior to it.<sup>216</sup>

*Elites:* Those members of the elites (lawyers, judges, politicians) who care to read these decisions will find minimal discussion that will hardly persuade them to reconsider their views.

*Islamists:* Islamist activists in the pre-Arab spring era had few reasons to trust a court that is appointed by a regime that oppressed them and did nothing significant to protect their rights and limit the security establishment and the emergency rule.<sup>217</sup> They are also unlikely to be impressed by rulings of civil

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<sup>212</sup> Erwin Chemerinsky, *Judicial Opinions as Public Rhetoric*, 97 CAL. L. REV. 1763, 1783 (2009) (referencing the California Supreme Court).

<sup>213</sup> See, e.g., Supreme Constitutional Court, Case no. 32, Judicial year no. 10 (Nov. 4, 1989) (Arabic) (Egypt).

<sup>214</sup> *Id.*

<sup>215</sup> CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 39–41 (1999).

<sup>216</sup> See *supra* notes 203–05.

<sup>217</sup> Hirschl, *supra* note 57, at 1832. See Sadiq Reza, *Endless Emergency: The Case of Egypt*, 10 NEW CRIM. L. REV. 532 (2007), for more on Egyptian emergency powers.

judges who are not trained in Islamic law and whose rulings do not extensively engage with religious texts and scholarly writings.<sup>218</sup>

More importantly, the secularization and liberalization account is constitutional court-centric,<sup>219</sup> and hence it overlooks other domains of law, like personal law and criminal law.<sup>220</sup> In Egypt, the alleged liberalizing tendencies in constitutional law have co-existed with illiberal tendencies in other areas of the law. The famous case of the Egyptian scholar and academic Nasr Hamid Abu Zayd—whose application of discourse analysis and hermeneutics to the religious text has raised the Islamists' ire—illustrates this point vividly.<sup>221</sup> The Islamists sought in the first half of the 1990s a judicial declaration from the personal status courts (according the shari'a law of "hisbah") against Abu Zayd as an apostate ("murtadd") from Islam demanding his separation from his wife because a Muslim cannot be married to an apostate according to shari'a.<sup>222</sup> The case ended up in the Court of Cassation, which upheld an earlier ruling separating him from his wife.<sup>223</sup> Abu Zayd was forced into exile.<sup>224</sup>

In criminal law, blasphemy laws existed for centuries in Europe and the United States.<sup>225</sup> Only in recent times did they become increasingly rejected as contrary to religious liberty, although traces of these laws have survived through other doctrines.<sup>226</sup> It took the United Kingdom till 2008 to remove the criminalization of blasphemy from its laws, and yet scholars argue that the

<sup>218</sup> 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, 122 (1998) (calling upon Egyptian judges to "demonstrate greater familiarity with the Qur'an, sunna and texts of the legal schools.")

<sup>219</sup> See RICHARD A. POSNER, *OVERCOMING LAW* 214 (1995), for the Supreme Court-centrism in American constitutional theory.

<sup>220</sup> See Mayer, *supra* note 14, at 170–74 (discussing Islamization in criminal law). See Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT'L L. 1043 (2004), for personal law. This is a question that is not unique to Islamic-majority states. See, e.g., PASCAL FOURNIER, *MUSLIM MARRIAGE IN WESTERN COURTS: LOST IN TRANSPLANTATION* (2010); Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231 (2011).

<sup>221</sup> See generally Fauzi M. Najjar, *Islamic Fundamentalism and the Intellectuals: The Case of Nasr Hamid Abu Zayd*, 27 BRIT. J. MIDDLE E. STUD. 177 (2000).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 194; Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 734–39 (2004).

<sup>224</sup> See Najjar, *supra* note 221, at 194.

<sup>225</sup> See, e.g., Courtney Kenny, *The Evolution of the Law of Blasphemy*, 1 C.L.J. 127, 129 (1922).

<sup>226</sup> Sarah Barringer Gordon, *Blasphemy and the Law of Religious Liberty in Nineteenth-Century America*, 52 AM. Q. 682–83 (2000)

spirit of these laws that protects religious belief and institutions is still intact through other legal instruments.<sup>227</sup> Blasphemy laws are enforced in Islamic states like Pakistan.<sup>228</sup> In Egypt many have faced blasphemy charges during recent years under 98(f) of the Penal Code.<sup>229</sup> More recently, during the deliberations leading to the 2012 Constitution, the Constituent Assembly considered whether to constitutionalize the prohibition on blasphemy.<sup>230</sup> Similar developments occurred in Tunisia since the uprising.<sup>231</sup> These developments and practices run contrary to the secularization thesis.

## 2. *Interpretive Authority*

Another reason to doubt the comforting effect of indeterminacy is the independence of the shari'a clause question from the question of interpretive authority. Interpretive indeterminacy can go either way, and not necessarily in a liberal, secular, rights-protecting direction. This ambiguity of what shari'a means can be a reason for excluding it from the constitution given the concerns it may give rise to in various sectors of the population.<sup>232</sup> It is plausible that religious parties that control the parliament and/or the presidency may be able to pack constitutional courts with religiously minded judges that would be able to disrupt the liberalizing and secularizing tendencies of current judicial elites.<sup>233</sup> Egyptian judiciary, for example, accused President Morsi and the Muslim Brotherhood on April 2013 with attempting to replace 3,000 judges by lowering the retirement age from seventy to sixty.<sup>234</sup> Lombardi and Brown

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<sup>227</sup> Russell Sandberg & Norman Doe, *The Strange Death of Blasphemy*, 71 MODERN L. REV. 971, 976 (2008).

<sup>228</sup> See Osama Siddique & Zahra Hayat, *Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINN. J. INT'L L. 303, 310–12 (2008), for a review of Pakistan's blasphemy laws and an argument that they are defective and unjust.

<sup>229</sup> See, e.g., *Egypt Bans 'Blasphemous' Magazine*, BBC (April 8, 2009, 1:00 AM), [http://news.bbc.co.uk/2/hi/middle\\_east/7989016.stm](http://news.bbc.co.uk/2/hi/middle_east/7989016.stm); *Egypt Businessman Naguib Sawiris Faces Blasphemy Trial*, BBC (January 9, 2012, 4:27 PM), <http://www.bbc.co.uk/news/world-africa-16473759>; *Egyptian Court Upholds Accourt upholds ctor Adel Imam's Sentence*, BBC (April 25, 2012, 8:28 PM), <http://www.bbc.com/news/world-middle-east-17832703>.

<sup>230</sup> *Constituent Assembly Proposes Article Criminalizing Blasphemy*, EGYPT INDEP. (July 17, 2012), <http://www.egyptindependent.com/news/constituent-assembly-proposes-article-criminalizing-blasphemy>.

<sup>231</sup> Amnesty Int'l, *One Step Forward, Two Steps Back?: One Year Since Tunisia's Landmark Elections*, 24, AI INDEX MDE 30/010/2012 (Oct. 2012).

<sup>232</sup> See Ben Ahmad, *supra* note 148, for Ghannoushi's explanation in the Tunisian case.

<sup>233</sup> E.g., Haider Ala Hamoudi, *Ran Hirschl, Constitutional Theocracy*, 49 OSGOOD HALL L.J. 151, 152 (2011) (book review). See also Moustafa, *supra* note 54 at 924–26 (discussing the packing of the Court during Mubarak's era).

<sup>234</sup> *Egypt's Morsi Meets with Top Judicial Body Amid Tensions Over Judiciary*, AHARAM ONLINE (Apr. 22, 2013), available at: <http://english.ahram.org.eg/News/69890.aspx>.

acknowledge the possibility of a conservative turn, yet they argue that it “may be checked by a respect for precedent.”<sup>235</sup> This argument, however, underestimates the manipulability of precedent. Precedents are more central to American jurisprudence than in Egypt,<sup>236</sup> and yet they have been manipulated.<sup>237</sup> American experience shows that judges do not need to overrule a precedent explicitly: For example, judges may find a precedent inapplicable to a specific case before them because it is factually different or recognize an exception distinguishing it from the precedent. It follows that precedents are likely to be even less of an obstacle before conservative judges in Egypt where precedent is not as central. Certainly, the practice of the SCC to refrain in general from mentioning precedents in its rulings shows the marginality of precedent.

But there is another way in which conservative Islamists can retain a hold on interpretive authority outside the constitutional court by requiring a certain degree of involvement of theological jurists in legislation. Indeed, the Muslim Brotherhood’s political platform of 2004 called for establishing a religious council elected by the community of religious scholars to advise the executive and legislative branches on matters pertaining to shari’a and it suggested that this advice might be binding on certain issues.<sup>238</sup> During the debates on amending Article 2 in 2012, the Egyptian Constitutive Assembly suggested that the al-Azhar University be consulted for shari’a interpretation issues.<sup>239</sup> The Egyptian Initiative for Personal Rights objected to this amendment declaring that it both encroaches upon the power of elected branches and politicizes al-Azhar.<sup>240</sup> The Salafists opposed this amendment before an eventual agreement on retaining the original phrasing of Article 2 was reached.<sup>241</sup> However, as mentioned above, Article 3 of the December 2012 Constitution requires consulting al-Azhar in matters pertaining to shari’a.<sup>242</sup>

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<sup>235</sup> Lombardi & Brown, *supra* note 107, at 434.

<sup>236</sup> *Id.* at 433.

<sup>237</sup> See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 275 (2008) (“A sponge is not constraining; nor, in the Supreme Court, is precedent. . . . The Court is reluctant to overrule its previous decisions, but the reluctance is prudential rather than dictated by law.”)

<sup>238</sup> NATHAN J. BROWN & AMR HAMZAWY, *BETWEEN RELIGION AND POLITICS* 19–20 (2010).

<sup>239</sup> *Islam’s Status Unchanged in Egypt Draft Constitution, al-Azhar Made Reference*, REUTERS, Nov. 29, 2012, available at <http://blogs.reuters.com/faithworld/2012/11/29/islams-status-remains-same-in-egypt-draft-constitution-al-azhar-made-reference/>.

<sup>240</sup> See Press Release, Egyptian Initiative for Personal Rights, (July 16, 2012), <http://eipr.org/pressrelease/2012/07/16/1453>.

<sup>241</sup> *Islam’s Status Unchanged in Egypt Draft Constitution, supra* note 239.

<sup>242</sup> See *supra* Subpart B.1 of the Introduction.

### 3. *What's the Rationale?*

The forgoing questions the rationale for incorporating shari'a, its indeterminacy notwithstanding. It is unclear why one should have the clause in the first place if one is counting on secular judges and their avoidance devices—as in Bickel's "passive virtues"<sup>243</sup>—or interpretive techniques to make the clause relatively dead or to secularize the political order.<sup>244</sup> Or, alternatively and as suggested above, shari'a can be included either in a preamble statement or a directive constitutional principle or an overridable clause, and then it becomes relatively easier to make the clause ineffective.<sup>245</sup> Or, as in the Turkish case, the Constitution is secular and then there is no need, as in the Egyptian case, to pay lip service to a shari'a clause while secularizing the legal regime.<sup>246</sup> In any event, enacting a shari'a clause while counting on judges to make it practically empty is an invitation for judges to exercise political judgment on the occasions in which they employ restraint or avoidance techniques.<sup>247</sup> Exercising such a political judgment undermines the supposed difference between the judicial branch and the political branches. Therefore, it weakens the justification at the basis of delegating these questions of religion to the supposedly professional and non-political branch.

#### *D. Transparency and Explicit Recognition: Lessons from the U.S.?*

Secular normative discourse is no less prone to indeterminacy than shari'a. Hence, it may be argued (in an opposite move to the previous argument) that it is pointless to exclude an explicit shari'a clause from the constitution when constitutional courts in presumably secular states can indirectly advance religious goals, practices, actors, and institutions. Accordingly, the difference between Islamic constitutionalism in Egypt and American constitutionalism is merely one of degree rather than kind.

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<sup>243</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111 (2d ed. 1986) (1962).

<sup>244</sup> As in Egypt's SCC narrow interpretation of Article 2 and wide discretion of legislature leading to few cases of striking down laws. See Stilt, *supra* note 223, at 726–27.

<sup>245</sup> See *supra* Part I.B.

<sup>246</sup> See Bâli, *supra* note 114, at 240.

<sup>247</sup> Mark Tushnet, *The Jurisprudence of Constitutional Regimes: Alexander Bickel and Cass Sunstein*, in *THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY* 23–43 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005) (claiming that Bickel and Sunstein fail to draw a convincing distinction between law and politics).

### 1. *Religion in the U.S.*

In the United States, there are many manifestations of religion in government, for example on currency and in pledges, courtrooms, and schools.<sup>248</sup> The U.S. Supreme Court has advanced religious goals under the guise of secular rhetoric.<sup>249</sup> For instance, in *McGowan v. Maryland*, the Court held that while Sunday laws requiring the closure of business on Sundays have a religious origin aiming at promoting church attendance, it can be recast as secular as a uniform day of rest.<sup>250</sup> In *Marsh v. Chambers*, the Court upheld the practice of opening legislative sessions with prayers because it is a long-standing and widely-accepted practice that has become “[p]art of the fabric of our society.”<sup>251</sup> On the question of public display of Christmas symbols, the Court held that this display plays a secular function and thus it is not unconstitutional.<sup>252</sup> The Court has allowed the government to subsidize religious institutions in indirect ways, and it has denied that such aid violated the Establishment Clause.<sup>253</sup> Unlike its approach of formal neutrality and color-blindness in race-related equal protection cases, the Court allows more discretion to the government to take religion-conscious decisions “even where the resulting actions arguably discriminate in favor of or against religion.”<sup>254</sup>

The backdoor introduction of positions characteristically identified with conservative religious groups is also manifested in questions related to civil

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<sup>248</sup> See, e.g., Michael J. Perry, *Religion As a Basis of Law-making?: Herein of the Non-establishment of Religion*, 35 PHIL. & SOC. CRITICISM 105, 107–08 (2009) (“There are many different ways in which government in the United States affirms, or has affirmed, one or more religious premises. Here are some prominent examples: in 1954, the Congress of the United States added the words ‘under God’ to the Pledge of Allegiance (‘one nation under God’). Also in 1954, ‘Congress requested that all US coins and paper currency bear the slogan, ‘In God We Trust.’ On July 11, 1955, President Eisenhower made this slogan mandatory on all currency. In 1956 the national motto was changed from ‘E Pluribus Unum’ to ‘In God We Trust.’ The proceedings of many courts in the United States, including the United States Supreme Court, begin with a court official intoning ‘God save the United States and this Honorable Court.’ Some states provided that their public schools should begin the day with Bible reading or prayer. Some state officials, including some state judges, posted the Ten Commandments on government property, such as a public school classroom or hallway, a courtroom wall, or a courthouse lawn.”) (citations omitted)).

<sup>249</sup> See *McGowan v. Maryland*, 366 U.S. 420 (1961).

<sup>250</sup> *Id.* at 434–36422.

<sup>251</sup> *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

<sup>252</sup> *Lynch v. Donnelly*, 465 U.S. 668, 680–85 (1984).

<sup>253</sup> *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011) (holding that taxpayers did not have standing to challenge subsidies provided to a religious organization); *Mitchell v. Helms*, 530 U.S. 793, 835 (2000) (holding that a school-aid program that lends educational materials and equipment to religious schools is constitutional); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002) (holding that school voucher programs that sponsor students who opt for religious schools is constitutional).

<sup>254</sup> Joy Milligan, *Religion and Race: On Duality and Entrenchment*, 87 N.Y.U. L. REV. 393, 396 (2012).

and individual liberties. The infringement of these liberties in ways consistent with views held by conservative religious groups need not invoke religious reasoning. Justice White, writing the opinion in *Bowers v. Hardwick*, upheld the constitutionality of a Georgia law prohibiting homosexual relations in private by invoking neutral notions, including privacy, the Due Process Clause, and whether the Constitution confers a right to engage in consensual sodomy, rather than sectarian religious reasons.<sup>255</sup> In *Lawrence v. Texas*, which overruled *Bowers*, Justice Scalia's dissent focused, at least in part, on respecting the will of the democratic majority and not succumbing to judicial activism in order to affect social change.<sup>256</sup> In *Goodridge v. Department of Public Health*, the state justified its refusal to recognize same-sex marriages on grounds of protecting children's welfare.<sup>257</sup>

The skepticism toward the image of impartial judiciary in cases related to religion and state is by no means limited to the U.S. Supreme Court. Indeed, recent empirical evidence from lower federal courts in the United States suggests that political leanings of judges influence their decisions on Establishment Clause cases. Sisk and Heise show that Democratic-appointed judges are more likely than Republican-appointed judges to uphold Establishment Clause challenges.<sup>258</sup> They write: "In the context of federal court claims implicating questions of Church and State, it appears to be *ideology* much, if not all, of the way down."<sup>259</sup>

## 2. *Transparency and Bargaining Power*

Building on such examples, the argument proceeds, it is preferable to be more transparent about the constitutional arrangements and practices of the country in question. Secular lip service that masks religious and sectarian motivations makes the legal-political order non-transparent to law-abiding citizens. Transparency would alert these citizens to a constitutional change—through judicial interpretation—that they would not otherwise notice.

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<sup>255</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986). Although it should be noted that Justice Burger's concurrence states: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law."

<sup>256</sup> *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).

<sup>257</sup> *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 333–34 (2003). This argument, however, was not successful with the Massachusetts court. *Id.*

<sup>258</sup> Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1204–05 (2012).

<sup>259</sup> *Id.* at 1204 (emphasis in original).



Transparency here would possibly require candor and sincerity in judicial opinion-writing by exposing the real judicial motivations and not their rationalizations.<sup>260</sup> Yet, for others it primarily means a sincere attempt in making arguments that would be acceptable to fellow reasonable citizens who are interested in fair terms of social cooperation and this would mean recourse to general justifications even if other sectarian justifications were available.<sup>261</sup>

However, the argument is unconvincing because the question here involves more than mere transparency. To begin with, the discussion of a shari'a clause (i.e. an establishment clause) differs from that of the Establishment Clause (i.e. an anti-establishment clause). Indeterminacy in the latter, which prohibits state support of religious practices in judicial rulings, allows what an Establishment Clause is supposed to prevent.<sup>262</sup> The situation of a shari'a clause would be the reverse: the clause would prohibit laws contradicting Islamic law and judicial rulings are required to apply it in some way.<sup>263</sup> The malleability of secular discourse, given the ability of judges to manipulate it for religious causes, cannot be a reason to wither away impartiality altogether.<sup>264</sup>

Moreover, a formal constitutional entrenchment of religion may be more religion and not only more transparency. In other words, the explicit recognition and emphasis may make the advancement of religious practices and institutions easier and more natural. Constitutional structures and provisions influence political practice.<sup>265</sup> A regime in which Islamic law is constitutionalized changes the bargaining power of different political groups with respect to different fundamental and controversial issues in the polity. The bargaining power of these groups will be different than in a situation where

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<sup>260</sup> See generally David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987); Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987 (2008), for such an argument. See Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995), for a critique of the candor thesis.

<sup>261</sup> JOHN RAWLS, *POLITICAL LIBERALISM* (1993); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 770 (1997); see Chris Eberle, *Religion and Political Theory*, STAN. ENCYC. PHIL., <http://plato.stanford.edu/entries/religion-politics/> (Oct. 2, 2008) (summarizing the debates in question).

<sup>262</sup> U.S. CONST. amend. 1; See Laura S. Underkuffler, *Through a Glass Darkly*: Van Orden, McCreary, and the Dangers of Transparency in Establishment Clause Jurisprudence, 5 FIRST AMEND. L. REV. 59 (2006), for an argument against transparency, i.e. against the abandonment of the imperfect principle of governmental neutrality towards religion, in the Establishment Clause context.

<sup>263</sup> See *supra* Introduction.

<sup>264</sup> Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 88, 89 (2006) (arguing that the Secular Purpose Doctrine of the U.S. Supreme Court should be retained in order to make sense of the Establishment Clause despite the difficulties and objections the doctrine faces); Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833, 871–72 (1996) (arguing that neutrality privileges the majority's religion).

<sup>265</sup> See generally MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* (2011).

such constitutional straitjacketing is absent. No wonder that it is politically difficult in Egypt to have a constitution without the shari'a clause given that it is already enacted in the previous constitution and is part of the status quo,<sup>266</sup> whereas it is difficult to include a shari'a clause in Tunisia given that it is not present in the previous constitution and is not part of the status quo (although both states stipulated in their constitutions that Islam is the official religion of the state).<sup>267</sup>

To conclude, the four assumptions on which normative and realist arguments rest should be rejected. It follows that the normative and realist arguments fail to establish the case for the constitutionization of shari'a.

## II. NORMATIVE AND PRUDENTIAL ARGUMENTS AGAINST ISLAMIC CONSTITUTIONALISM

I turn now to making the case against Islamic constitutionalism. The arguments I offer below differ from arguments made on grounds of religious value belief (like An-Na'im's that emphasize the voluntary and individualistic nature of belief and hence its incompatibility with coercive enforcement by state law).<sup>268</sup> Additionally, this Article will not distinguish in making the arguments below between different versions of the shari'a clause. The variation in the phrasing of shari'a clauses includes: "shari'a is a source of legislation," or "a primary/principal source of legislation," or "the primary source of legislation," or "one of the main sources." Although it is generally perceived that a language that signals more emphasis is more Islamic or carries more weight (as in the Egyptian amendment to Article 2 from "a primary source" to "the primary source"), in my view that is a misconception. Whether the clause will carry more religious weight and what kind of weight depends on the interpretation and application of the clause as well as the institutional arrangements to enforce the clause.<sup>269</sup> Specifically, it would depend on the effect of the legal actors' work in interpreting these different versions of clauses.<sup>270</sup>

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<sup>266</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007.

<sup>267</sup> CONSTITUTION OF THE TUNISIAN REPUBLIC OF 1957.

<sup>268</sup> *See, e.g.*, An-Na'im, *supra* note 108, at 3.

<sup>269</sup> Mayer, *supra* note 14, at 138 ("[I]t does not appear that the adoption of one or the other wording is actually correlated in practice with the presence of a greater or lesser proportion of shari'a-based rules in a given legal system.")

<sup>270</sup> DUNCAN KENNEDY, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 521 (1986).

In what follows, the Article makes three main arguments: First, a shari'a clause in a pluralist society excludes some citizens and discriminates against them both on the symbolic/expressive and the rights' distribution levels (Subpart A). Second, it leads to polarization that destabilizes the political system and may lead to violence. Thus, it becomes part of the problem rather than a mechanism for conflict resolution (Subpart B). Third, this polarization happens for the wrong reasons and produces bad effects: on the one hand, it has distraction effects because it focuses on the wrong issues and sidelines more important issues, and on the other hand, its resolution is legalized despite its political nature and its resolution is handed over to the hands of the few (Subpart C).

### A. *Alienation and Religious Equality*

#### 1. *Alienation and Exclusion*

Both Egypt and Tunisia are sociologically pluralist countries with sizable non-Muslim religious minorities. Egypt's Christian population (Coptic, Armenian, Catholic, Protestant) is about ten percent of the overall population and there are small numbers of citizens belonging to other religions like Baha'i and Judaism.<sup>271</sup> Only two percent of the Tunisian population is either Christian or Jewish.<sup>272</sup> In both states there is a strong secular base.<sup>273</sup> Declaring Islam as the official religion of the state in Egypt's and Tunisia's constitutions expressively excludes minorities and discriminates against them on the basis of religious affiliation.<sup>274</sup> But that declaration is likely to be expressive and

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<sup>271</sup> It is difficult to find accurate numbers and percentages of Christians in Egypt as the state declines to disclose these numbers and the political sensitivity surrounding this issue. See Abdel Rahman Youssef, *Egyptian Copts: It's All in the Number*, AL-AKHBAR, Sept. 30, 2012, <http://english.al-akhbar.com/node/12728> ("Various numbers are thrown around between these two extremes [3 and 25 million]. Many institutions have come to the conclusion that the number of Christians is closer to 10 percent of the population, that is, about 8 million people. This is an average number used by those who walk a tightrope on this issue."); see also CIA, *Egypt*, in THE WORLD FACTBOOK 2012–13, at 223, 224 (50th Anniversary ed. 2012) [hereinafter THE WORLD FACTBOOK] ("Muslim (mostly Sunni) [ninety percent] 90%, Coptic [nine percent] 9%, other Christian [one percent] 1%").

<sup>272</sup> CIA, *Tunisia*, in THE WORLD FACTBOOK, *supra* note 272, at 735, 736 ("Muslim (Islam - official) [ninety-eight percent] 98%, Christian [one percent] 1%, Jewish and other [one percent] 1%").

<sup>273</sup> Al-Nahar, *Tunisia Puts Arab Spring Back on the Secular Path*, AL-MONITOR (Jan. 13, 2014), <http://www.al-monitor.com/pulse/politics/2014/01/tunisia-arab-spring-back-secular-path.html>.

<sup>274</sup> Mayer, *supra* note 14, at 147.

symbolic,<sup>275</sup> if not accompanied by a shari'a clause. It is such a clause that is likely to materialize the potential for discrimination and exclusion.

It is true that religious tolerance is possible even under a theocracy (as was the case under the Ottoman regime which granted an autonomous status to religious groups with respect to personal status).<sup>276</sup> Indeed, some Islamic scholars have rejected the second-class designation of non-Muslim minorities in an Islamic state.<sup>277</sup> But such tolerance is granted against conditions of inequality in which the different religious groups do not stand at the same distance from the state apparatus. Indeed, such an arrangement enables a religious group to prioritize its interests and subjugate the state structure and public policy to these interests.

The incorporation of shari'a in the Egyptian constitution has not been hitherto a mere formality. The endorsement of state religion may be more aptly compared to England so long as it is merely symbolic and formal.<sup>278</sup> A shari'a clause, however, endangers such formality. A shari'a clause is an instrument of judicial review by which laws in the polity that delineate citizens' rights, benefits, and opportunities are upheld, struck down, or interpreted by the constitutional court from a religious prism. Thus, a shari'a clause goes to the heart of membership in the political community. A shari'a clause does not define membership or condition it on belonging to a religious community and according to criteria decided by religious authorities. That will be a more extreme case and more objectionable. Yet, a shari'a clause symbolizes the political community's fundamental commitment to shari'a although it does not determine what shari'a means and requires in specific cases. Shari'a's constitutional entrenchment is likely to influence the distribution of rights, benefits, and opportunities in the community. As Justice O'Connor writes in her concurrence in *Lynch v. Donnelly* with reference to the Establishment Clause of the First Amendment to the U.S. Constitution:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. . . . Endorsement sends a message to nonadher-

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<sup>275</sup> *Id.* at 137 (noting that "the fact that Islam is or is not formally made the State religion does not by itself have any influence in determining the role Islam actually plays in a given country.").

<sup>276</sup> WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 230–31 (1991).

<sup>277</sup> See generally RACHEL M. SCOTT, THE CHALLENGE OF POLITICAL ISLAM: NON-MUSLIMS AND THE EGYPTIAN STATE 2 (2010); ABOU EL FADL ET. AL., *supra* note 107.

<sup>278</sup> RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 57 (2006) (according to Dworkin, England is formally a religious-tolerant state, but in practice a secular-tolerant state).

ents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.<sup>279</sup>

This sense of exclusion, alienation and inferiority exists with respect to state establishment of shari'a. As the case of Sudan—prior to its ultimate breakup into two states—shows, the Southern Sudanese rejected an Islamic-based federal system in Sudan given their exclusion.<sup>280</sup>

Rejecting the shari'a clause does not mean that religious questions will not be dealt with in the public sphere (such as questions related to free exercise and which forms of religious practice should a state tolerate and accommodate). Nor does rejecting a shari'a clause mean that such a separation between a state and religion would guarantee tolerance or religious liberty or equality between adherents of different religions. Indeed, there are different models of separation and secular states can be oppressive.<sup>281</sup> As Martha Nussbaum argues, the metaphor of “separation” is “confusing” and cannot be understood without the backdrop of liberty (to practice one’s beliefs) and equal respect and concern.<sup>282</sup> Separation of state and religion primarily means that the state as an institutional embodiment of the political community is not synonymous with a religious community.<sup>283</sup> It means that the laws that apply to and affect all citizens qua citizens should not be made with a specific view of compliance to a sectarian religious code. No matter how universal and abstract are these requirements interpreted to be, they still find their genesis, rhetoric, and resources in this partial religious legal tradition. The constitutional court becomes entangled in religious debates, concepts, and sources given its need to provide justifications for its positions from within this religious law.<sup>284</sup> The Egyptian SCC, according to Lombardi and Brown, had to find an interpretive methodology that can be acceptable within shari'a in order to legitimate its liberalizing rulings.<sup>285</sup> The absence of a shari'a clause relieves the SCC from

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<sup>279</sup> Lynch v. Donnelly, 465 U.S. 668 (1984).

<sup>280</sup> El-Gaili, *supra* note 194, at 539.

<sup>281</sup> W. Cole Durham, *Perspectives on Religious Liberty: A Comparative Framework*, in 2 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES (Johan D. van Vyver & John Witte, Jr. eds., 1996)

<sup>282</sup> MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 20–21 (2008).

<sup>283</sup> Ira M. Lapidus, *The Separation of State and Religion in the Development of Early Islamic Society*, 6 INT’L J. MIDDLE E. STUD. 363, 365 (1975).

<sup>284</sup> Lombardi & Brown, *supra* note 107, at 417 (noting that the constitutional court needed to find justification within shari'a in order to justify human rights decisions).

<sup>285</sup> *Id.*

such sectarian and potentially divisive justificatory requirements. The presence of a shari'a clause creates a presumption in favor of such justificatory requirements.

This is not to deny that even secular state courts like those in the United States occasionally cite religious sources in their opinions.<sup>286</sup> Similarly, the Indian Supreme Court justified the Indian "ethos" of secularism (which it equated to toleration) on the basis of religious sources.<sup>287</sup> It is, however, one thing to use such sources occasionally to serve as a secondary and supportive role; it is quite another to make them a primary test for the validity of laws. Additionally, it is one thing to use references to multiple religious traditions (to imply, say, universal applicability of certain ideas), and it is quite another to use one religion exclusively despite societal pluralism.

To understand the problematic nature of a shari'a clause, we need to distinguish between two functions of a counter-majoritarian clause: one that entrenches majority's power and another that restricts it. The problem with a shari'a clause is not with its counter-majoritarianism per se; rather it lies in the way this alleged counter-majoritarianism functions. A shari'a clause might be considered counter-majoritarian in a basic sense: a current majority entrenching its choices against the choices of future majorities, and a group of unelected judges enforcing these choices of the dead on the living. This is the kind of counter-majoritarianism that constitutional scholars seek often to justify by arguing, for example, that it is necessary to protect "discrete and insular minorities."<sup>288</sup> In this sense, there is no difference between this counter-majoritarianism and U.S. counter-majoritarian arrangements.<sup>289</sup> The function of the shari'a clause counter-majoritarianism, however, differs from standard counter-majoritarian constitutional provisions, like an Establishment Clause or an Equal Protection Clause. Courts, especially when not committed to an approach of formal neutrality, can deploy such clauses to achieve a "dualist" function: to protect minorities from discrimination and prevent the

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<sup>286</sup> Adam Shinar & Anna Su, *Religious Law as Foreign Law in Constitutional Interpretation*, 11 INT'L J. CONST. L. 74, 96 (2013).

<sup>287</sup> *Faruqui v. Union of India*, A.I.R. 1995 S.C. 605 (India) (examining the constitutionality of a parliamentary act dealing with a religious dispute between Hindus and Muslims over a religious site.)

<sup>288</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>289</sup> See, e.g., Azizah Al-Hibri, *Islamic Constitutionalism and the Concept of Democracy*, 24 CASE W. RES. J. INT'L L. 1, 17-19 (1992) (claiming that the "antimajoritarian difficulty" in American constitutionalism is not different from that of Islamic constitutionalism). For al-Hibri the unamendability of the Quran does not differentiate it from the U.S. Constitution given that the main instrument for constitutional change is reinterpretation which is available in both the Islamic and the American cases. *Id.*

entrenchment of majorities' power.<sup>290</sup> Yet, a shari'a clause is more likely to achieve the opposite objective: to entrench a religious majority's interests (as defined by its leaders and elites) and discriminate against minorities. If so, this kind of counter-majoritarianism can hardly be defended as consistent with a constitutional conception of democracy because it defeats the purpose of imposing constraints on majorities. A sectarian religious code like the shari'a clause can hardly be defended as a deontological value or a collective interest of all citizens, whether Muslim or not, religious or not.<sup>291</sup>

## 2. *The Dualist Effect of a Shari'a Clause: The Case of the Coptic Minority*

Yet the problematic nature here goes beyond alienation and exclusion. A shari'a clause has a double majoritarian and counter-majoritarian effect on the Coptic minority in Egypt: one is external and majoritarian (the Muslim majority vis-à-vis the Copts in general) and another is internal and counter-majoritarian (empowering the Church vis-à-vis Coptic lay persons). Let us recount briefly the position of the Coptic Church on this clause. Initially, the Coptic Church vehemently opposed President Anwar Sadat's Islamization program, which included Article 2.<sup>292</sup> Paul Sedra writes:

Due to the 'Islamization' program embraced by Sadat, the partnership between Patriarch and President cultivated by [Patriarch] Kirolos was in tatters. By November 1972, in an atmosphere charged with sectarianism, an unauthorized church in the Delta village of Khanka was set ablaze, and [Patriarch] Shenouda sent a hundred priests and four hundred laymen to pray at the site of the arson. The incident displayed the resolve of the Patriarch and infuriated Sadat. Through a series of conferences, Shenouda publicly opposed the efforts of the regime to foreground Islam in the public sphere. The conferences demanded government protection of Christians and their property, freedom of belief and worship, an end to the seizure of Church property by the Ministry of Religious Endowments, the abandonment of efforts to apply Islamic law to non-Muslims, as well as greater Coptic representation in labor unions, professional associations, local and regional councils, and parliament. Ultimately, Shenouda found himself swept up in the purge of purported regime opponents that shortly

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<sup>290</sup> Milligan, *supra* note 254, at 424.

<sup>291</sup> See, e.g., Schauer, *supra* note 182, at 1057.

<sup>292</sup> Paul Sedra, *Class Cleavages and Ethnic Conflict: Coptic Christian Communities in Modern Egyptian Politics*, 10 ISLAM & CHRISTIAN–MUSLIM RELATIONS 219, 226 (1999) (“[Patriarch] Shenouda refused to pledge his loyalty to the regime—particularly one that declared, ‘the principles of Islamic law constitute a major source for legislation.’”).

preceded Sadat's assassination, and he was placed under house arrest at the Monastery of Saint Bishoy.<sup>293</sup>

In the aftermath of these oppressive measures, the Patriarch Shenouda—the head of the Coptic Church—restored a good working relationship with Mubarak's rule akin to the state-church alliance during President Gamal Abdel Nasser's rule.<sup>294</sup> He did not oppose the constitution.<sup>295</sup> But this position did not stem from a change of heart regarding the shari'a clause and the Islamization of the state.<sup>296</sup> Rather, it was based on strategic considerations to foster the status and power of the Coptic Church within the Coptic community vis-à-vis the Coptic laity.<sup>297</sup> This explains his opposition in 2007 to abolishing Article 2.<sup>298</sup> In the aftermath of Mubarak's ouster, the Church's public positions maintained the same considerations. In March 2011 the Patriarch demanded an addition to Article 2 that would address non-Muslims.<sup>299</sup> A year later he expressed his desire to change Article 2 to include a reference not only to "principles of shari'a" but also "principles of other religions."<sup>300</sup> Sedra explains:

To acknowledge the *shari'a* and call for recognition of Coptic personal status law was simply to reinforce the status of the Church as the central institution in Copts' daily lives, as well as his own status as the sole legitimate representative of the Coptic community. Insofar as the power over personal status afforded the power to define the Coptic community, [Patriarch Shenouda] was determined to retain that power exclusively on behalf of the Church.<sup>301</sup>

This account shows that the Church initially opposed—as one would expect it would—the shari'a clause. It withdrew its vocal opposition only after state

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<sup>293</sup> Paul Sedra, *The Church, Maspero, and the Future of the Coptic Community*, JADALIYYA, Mar. 19, 2012, available at <http://www.jadaliyya.com/pages/index/4735/the-church-maspero-and-the-future-of-the-coptic-co>.

<sup>294</sup> *Id.*

<sup>295</sup> Paul Sedra, *Copts and the Power Over Personal Status*, JADALIYYA, Dec. 3, 2012, available at <http://www.jadaliyya.com/pages/index/8741/copts-and-the-power-over-personal-status>.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> Imad Khalil, *Patriarch Shenouda Asks 'Al-Jamal' [Deputy Prime Minister] to Include a Paragraph to the Constitution's Article 2 Regarding Non-Muslims*, AL-MASRY AL-YOUM, Mar. 21, 2011, <http://www.almasryalyoum.com/node/367877> (Arabic).

<sup>300</sup> Jamal Gerges al-Mzahem, *Patriarch Shenouda recommends retaining Article 2 of the constitution*, AL-YOUM AL-SABE'A, Mar. 3, 2012, available at <http://www.youm7.com/News.asp?NewsID=616876&> (Arabic).

<sup>301</sup> Sedra, *supra* note 295.



oppression.<sup>302</sup> And when it did, this change was based on strategic considerations that effectively disempower Coptic individuals by enhancing the institutional power of the Church and its monopoly over Coptic citizens' affairs.<sup>303</sup> It seems then that a shari'a clause would empower religious groups, though unevenly, vis-à-vis citizens. In the public sphere, the dominant group is the Islamic religious group from which the state is not separated. Against this backdrop of Islamization of the public sphere, the Coptic Church enjoys a jurisdiction over Coptic citizens because their religion has been privatized. As Michael Karayanni—who have observed this phenomenon in Israel—notes, the debate on the separation of state and religion in these cases excludes minority members because they are relegated to the multicultural category of minority accommodation.<sup>304</sup> Karayanni also notes the normative implications of such arrangements: the dominance of the majority's views is likely to influence the formation of public norms that have implications for religious questions that concern minority members.<sup>305</sup> Furthermore, this minority accommodation undermines the prospects of liberal reforms in the minority's religious institutions.<sup>306</sup>

It follows, then, that the lack of separation doubly assaults the Coptic citizens—especially those who are not religious—once in the general structure of the state (from which the Copts—whether religious or secular—are excluded) and another in the empowerment of the Church, which chains those who might not seek any institutional affiliation with the Church under different conditions.<sup>307</sup> The Church's power benefited from other factors like the withdrawal of the state's role as a provider of welfare services.<sup>308</sup> This led to Copts' dependency on the Church, which stretched its role beyond the spiritual realm and provided educational and economic assistance.<sup>309</sup> This enabled the Church to become a “cornerstone of the . . . Coptic identity.”<sup>310</sup>

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<sup>302</sup> *See id.*

<sup>303</sup> *See generally id.*

<sup>304</sup> Karayanni, *supra* note 179, at 42.

<sup>305</sup> *Id.* at 68.

<sup>306</sup> *Id.* at 68–69.

<sup>307</sup> *Id.* at 71 (noting the potential implications of a lack of separation in countries where the majority religion acquired political dominance).

<sup>308</sup> MAY MASSAAD, *THE COPTS OF EGYPT: STATE DISCRIMINATION AND EXCLUSION* 12–13 (Sept. 14, 2011) (unpublished manuscript), available at <http://english.dohainstitute.org/release/fddaec13-9515-439b-9fb9-c6078b0d6979>.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at 13.

This arrangement marginalized Coptic individuals and undermined their political participation because the Church mediated their relationship with the state. According to one journalistic account:

For years, Christians largely relied on the Church to secure some protection for their rights, using [Partriach] Shenouda's close relationship with Mubarak. With Mubarak's ouster in a popular uprising last year and Shenouda's death, many have been emboldened to act beyond the Church's hold and participate more directly in the nation's politics to demand rights, better representation and freedom of worship.<sup>311</sup>

The Church's strategic considerations are not necessarily tied to the presence of a shari'a clause. The Church had a similar relationship with the state and similar considerations during Nasser's rule when the constitution did not include a reference to shari'a as a source for legislation and even the reference to Islam as the official religion was absent from the 1958 Constitution.<sup>312</sup> The Church abandoned its opposition to the shari'a clause only when the Sadat regime made it clear that supporting the clause is mandatory. Should the constitutional order lack a shari'a clause the Church will seek to foster its institutional power in a different way. The post-Shenouda Church seems to be moving in that direction: Its representatives boycotted the vote in the Constituent Assembly<sup>313</sup> and opposed the draft of the 2012 Constitution because it was exclusive, "too religious," and because "religious laws have no place in the constitution."<sup>314</sup>

### *B. Political Considerations: Polarization and Backlash*

In both Egypt and Tunisia, a deep distrust colored secular-religious relations in the aftermath of the revolution. The secularists suspected that the ruling Islamist parties are seeking to consolidate their power and establish an autocratic regime.<sup>315</sup> In Egypt, they further accused the Muslim Brotherhood of

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<sup>311</sup> Sarah El Deeb, *Egypt's New Pope Opposes Religious Constitution*, ASSOCIATED PRESS, Nov. 5, 2012, available at <http://bigstory.ap.org/article/egypts-new-pope-says-copts-marginalized-years>.

<sup>312</sup> PROVISIONAL CONSTITUTION OF THE UNITED ARAB REPUBLIC Mar. 5, 1958 (Egypt) (missing the provision regarding Islam as the religion of the state and shari'a as a source for legislation).

<sup>313</sup> David D. Kirkpatrick, *Egyptian Islamists Approve Draft Constitution Despite Objections*, N.Y. TIMES, Nov. 29, 2012, at A6.

<sup>314</sup> El Deeb, *supra* note 311.

<sup>315</sup> See, e.g., *Fatal clashes on Egypt uprising anniversary*, BBC, (January 25, 2013, 4:09 PM), <http://www.bbc.co.uk/news/world-middle-east-21191260>; *Tunisia Braces for Mass Protests*, ALJAZEERA, (Feb. 8, 2013, 8:46), <http://www.aljazeera.com/news/africa/2013/02/20132854423171526.html>.

cutting a deal with the army at the early stages and betraying the revolution.<sup>316</sup> In Tunisia they further argued that state policies emboldened hardline ultra-conservative Salafi groups.<sup>317</sup> The Islamist movements, on the other hand, understood the opposition's moves—especially in Egypt—as an attempt to undermine their rule in order to achieve what the opposition could not achieve through the ballot box.<sup>318</sup> Against this backdrop, a shari'a clause is likely to further polarize the population and lead to intractable and unnecessary disputes that may destabilize the country and undermine the consensus building process needed in constitution-making processes.

### 1. *Polarization and Violence*

Polarization often signals intractable and uncompromising distant positions. It does not necessarily signify uncivil and violent debates.<sup>319</sup> It may occur amongst ruling elites and amongst the general public. Polarization may lead to political stalemate, to short-lived governments, and non-governability. Violence is likely to occur when organized groups and parties seek to recruit the street through mass protests to resolve this stalemate.<sup>320</sup> Randolph Roth convincingly shows that periods of political instability correlate with higher rates of homicide in the United States and Europe:

The three most important correlates of homicide were thus in place in much of the Western world during the Age of Revolution: political instability, a loss of governmental legitimacy, and a decline in fellow feeling among citizens. Together, these conditions created feelings of anger, alienation, and powerlessness that caused homicide rates to spike.<sup>321</sup>

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<sup>316</sup> Sherif Tarek, *Egypt's Muslim Brotherhood and Ruling military: Deal or No deal?* AHARAM ONLINE, (Sept. 28, 2011), <http://english.ahram.org.eg/NewsContent/1/64/22042/Egypt/Politics-/Egypst-Muslim-Brotherhood-and-ruling-military-Deal.aspx>.

<sup>317</sup> Wyre Davies, *Resurgence of revolt where Arab Spring began*, BBC, Feb. 7, 2013, <http://www.bbc.co.uk/news/world-africa-21377369>.

<sup>318</sup> Mohammad Hajjaj, 'Al-Ikhwan': Maseerat Al-Tanahhi Leiskat 'Morsi' Inkilab 'ala Al-Demokratiyya wa Istinsakh le Al-Thawra... [The 'Brotherhood': Resignation marches to overthrow 'Morsi' are a coup against democracy and a cloning of the revolution... AL-YOUM AL-SABE'A, Feb. 11, 2013 (Arabic), <http://www.l.youm7.com/News.asp?NewsID=941521&SecID=12>.

<sup>319</sup> Paul DiMaggio, John Evans & Bethany Bryson, *Have Americans' Social Attitudes Become More Polarized?* 102 AM. J. SOC. 690, 692–93 (1996).

<sup>320</sup> *Id.* at 693; see ADRIENNE LEBAS, FROM PROTEST TO PARTIES: PARTY BUILDING AND DEMOCRATIZATION IN AFRICA 254–56 (2013).

<sup>321</sup> RANDOLPH ROTH, AMERICAN HOMICIDE 145 (2009). Roth writes:

Old neighborhood feuds are also likely to turn murderous during periods of political instability. When governments break down, men kill for what appear to be purely personal reasons, aveng-

The post-Arab Spring developments are consistent with this thesis. The United Nations Office on Drugs and Crime released a study in April 2011 suggesting that homicide rates tripled in Egypt after the revolution compared with 2009 numbers.<sup>322</sup> To the extent that polarization increases the political instability, leads to loss of legitimacy in the eyes of a large segment of the public, and demonization of other groups of citizens then it may well lead to higher rates of violence and ultimately homicide.<sup>323</sup> In post-revolutionary and politically unstable Egypt and Tunisia we have witnessed a recurring return to street mobilization.<sup>324</sup> This tactics led to many incidents of violence between demonstrators belonging to different factions or due to police brutality.<sup>325</sup> The latter further galvanized demonstrators.<sup>326</sup> The dramatic scenes coming repeatedly from Cairo—especially after the June 30 demonstrations and July 3, 2013 coup—with groups of citizens facing each other without the mediation of police forces, and the assassination of opposition leaders in Tunisia are troublesome signs of the potential effects of polarization and instability.<sup>327</sup>

In theory, polarization may have good effects like higher levels of participation in formal politics. However, Egypt witnessed low levels of

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ing wrongs, settling scores, and simply getting rid of people they don't like. They may be moved to do so by lack of sanction. . . , a fear that their enemies will kill them first, or partisanship . . . . Regardless of the motive, these feuds can take on a life of their own and draw in more combatants. Homicide rates can thus reach catastrophic levels during periods of political instability and can remain high for decades. Once learned, homicidal rates are hard to break and can be passed down for generations.

*Id.* at 19.

<sup>322</sup> “Murder rate in Egypt spikes since revolution”, *Egyptian Streets*, April 11, 2014, available at: <http://egyptianstreets.com/2014/04/11/murder-rate-in-egypt-spikes-since-revolution/#sthash.woZkt7kW.dpuf>; United Nations Office on Drugs and Crime, *Global Study on Homicide 2013: Trends, Context, Data* (2014), available at: [https://www.unodc.org/documents/gsh/pdfs/2014\\_GLOBAL\\_HOMICIDE\\_BOOK\\_web.pdf](https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf).

<sup>323</sup> Roth, *supra* note 321 at 19.

<sup>324</sup> KHALIL AL-ANANI, THE ROLE OF RELIGION IN THE PUBLIC DOMAIN IN EGYPT AFTER THE JANUARY 25 REVOLUTION 17 (Apr. 17, 2012) (unpublished manuscript), available at <http://english.dohainstitute.org/file/get/26ee36e7-82c9-432e-80e7-d541dda32253.pdf> (“[I]f this conflict [between secular and religious forces] shifts from the elite and intellectual spheres to the media and popular ones. . . the difference would turn into a dispute, and the conflict into confrontation, and the street would be factionalized and mobilized in a way that could threaten the social fabric of the Egyptian nation. The past months have seen some manifestations of this conflict, set against the backdrop of raising the procedural issue that is related to the matter of drafting a new Egyptian constitution and its mechanisms. The dispute between the secular and Islamic movements has moved from rooms and meeting halls to the media, and taken over the daily conversations of the public, something that has resulted in a deep confidence of crisis between the parties that will not be easy to overcome.”). *Id.*

<sup>325</sup> *Id.* at 18.

<sup>326</sup> David D. Kirpatrick, *Cairo Activist Fighting Tear Gas With Tear Gas*, N.Y. TIMES, Feb. 6, 2013, at A1.

<sup>327</sup> *Id.* at A3.

participation in the referendum on the 2012 Constitution against the backdrop of the call by opposition forces—who are mostly liberal and secular—to boycott the referendum given the Islamist character of the draft and the flawed drafting process.<sup>328</sup> Polarization may lead to low levels of participation when opposition forces are excluded and thus boycott, or when significant sectors of the population feel alienated by the tug of war between government and opposition and by the nitty-gritty politics.<sup>329</sup> In this case, polarization contributes to the loss of regime’s legitimacy in eyes of alienated and disempowered citizens.

## 2. *Polarization and Shari’a*

It is the risk of polarization that led Rashid Al-Ghannoushi and his party to choose not to insist on a shari’a clause in the Tunisian case.<sup>330</sup> Indeed, secularist parties joined forces against the Islamists before al-Nahda declared officially that it does not seek the inclusion of shari’a in the constitution.<sup>331</sup> Its decision not to incorporate shari’a in the constitution “aimed at strengthening the national consensus and helping the democratic transition to succeed by uniting a large majority of the political forces to confront the country’s challenges.”<sup>332</sup> This decision of course does not in itself end polarization because discontent has many sources in post-revolutionary political orders (as in the lack of satisfactory change in the economic situation or unaccountable security forces).<sup>333</sup> And religion’s role does not end by excluding a shari’a clause (since religious sentiments can be channeled through state policies or legislation or sectarian violence).<sup>334</sup> Yet, excluding the shari’a clause sought to allay some of the secular fears in the aftermath of the Tunisian elections. Its inclusion would have added fuel to the fire.

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<sup>328</sup> See *supra* Part I.A.1.

<sup>329</sup> *Egypt’s Flawed Constitution*, N.Y. TIMES, Dec. 26, 2012, at A26 (noting that the low turnout in the referendum “reflects disgust with a political process that included violent street protests and a president who, for a time, asserted dictatorial powers.”)

<sup>330</sup> Ben Ahmad, *supra* note 148.

<sup>331</sup> AFP, Tunis, *Tunisia’s secular opposition unites against Islamists*, AL-ARABIYA NEWS, (Mar. 23, 2012, 6:03 AM) <http://www.alarabiya.net/articles/2012/03/23/202572.html>.

<sup>332</sup> Kareem Fahim, *Tunisia Says Constitution Will Not Cite Islamic Law*, N.Y. TIMES, Mar. 26, 2012, at [1] (quoting Al-Nahda leader).

<sup>333</sup> Lyse Doucet, *Tunisians’ Frustration, Two Years On*, BBC NEWS (Dec. 10, 2012, 10:24 AM), <http://www.bbc.com/news/world-20663981> (explaining Tunisia’s revolution caused by economic discontent).

<sup>334</sup> Amnesty Int’l, *supra* note 231.

In Egypt few secular voices demanded the removal of Article 2 from the constitution.<sup>335</sup> Many secularists signed A petition on February 2011 that demanded the separation between state and religion and the return to the 1923 constitutional provisions that require equality regardless of religious affiliation.<sup>336</sup> Nevertheless, the main dispute was not whether to have the clause, but whether the current clause should be changed to a more Islamist phraseology. This state of the dispute is partially a reflection of the questionable composition of the Islamist-dominated constitution-making committee and the lack of popular participation and public input in the hasty drafting process.<sup>337</sup> Even within this more limited range of the dispute, Salafi calls to drop the word “*mabadi*” (principles) from Article 2 of the constitution (so that “shari’a” itself rather than “principles of shari’a” will be the primary source of legislation) led to heated debates in the committee charged with drafting the constitution.<sup>338</sup> Secular parties and Christian representatives opposed this change and threatened to withdraw from the drafting committee if the text of Article 2 is amended.<sup>339</sup> On the other hand, Salafis threatened in their turn to withdraw from the drafting committee if their demands were not met.<sup>340</sup> On November 9, 2012 thousands of ultra-conservative Islamists marched in Cairo demanding the “implementation of shari’a.”<sup>341</sup> The final draft of the 2012 Constitution left Article 2’s principles of shari’a intact.<sup>342</sup> However, it supplemented it with Article 219 that defined principles of shari’a to include more traditional sources of the Islamic law canon.<sup>343</sup> By doing so, the constitution-makers are ostensibly attempting to limit judicial discretion—

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<sup>335</sup> Wajdi al-Kumi, *Intellectuals Call for Amending the Constitution’s Article 2*, AL-YOUM AL-SABE’A (Feb. 19, 2011), <http://www.youm7.com/News.asp?NewsID=354432&SecID=94&IssueID=153> (Arabic).

<sup>336</sup> *Id.* The group has also created a website calling for a secular state: <http://www.dawlamadaneya.com/ar/>.

<sup>337</sup> *Egypt’s Islamists Rush Through New Constitution*, USA TODAY (Nov. 30, 2012), <http://www.usatoday.com/story/news/world/2012/11/29/egypt-islamists-constitution/1735643/>; Hamza Hendawi & Maggie Michael, *Egypt’s Islamists Rush through New Constitution*, ASSOCIATED PRESS, Nov. 29, 2012, available at LEXIS, International News.

<sup>338</sup> Noha El-Hennawy, *In Battle Over Sharia, Salafis Lay Groundwork for the Future*, EGYPT IND. (July 11, 2012, 11:08 PM), <http://www.egyptindependent.com/news/battle-over-sharia-salafis-lay-groundwork-future-0>.

<sup>339</sup> Al-Masry Al-Youm, *Churches, Salafis Disagree Over New Constitution*, EGYPT INDEP. (July 2, 2012, 10:18 PM), <http://www.egyptindependent.com/news/churches-salafis-disagree-over-new-constitution>.

<sup>340</sup> *Id.*

<sup>341</sup> Marwa Awad, *Islamists Protest for Shari’a as Egypt Debates Constitution*, REUTERS, Nov. 9, 2012, available at <http://www.reuters.com/article/2012/11/09/us-egypt-islamists-protest-idUSBRE8A81AR20121109>.

<sup>342</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 2012, *as amended*, Sept 11, 1971, Mary 22, 1980, Mary 25, 2005, March 26, 2007.

<sup>343</sup> *Id.*

so that, allegedly, judges will have lesser ability to avoid applying shari'a—given the limited deployment of shari'a by the SCC.<sup>344</sup> The mode of argumentation and the boundaries of judicial discretion notwithstanding, the Islamization of the state apparatus and public sphere through an Article 2-style arrangement emboldens radical religious groups in society.<sup>345</sup> As the above-mentioned “implementing shari'a” demonstration shows, populist mobilization pressures the state to implement its declared Islamic commitments.<sup>346</sup> This effect should not be discounted given existing sectarian violence in Egypt in which mere rumors ignite violence against Copts and lead to burning their churches.<sup>347</sup>

This polarization should be avoided given its obvious possible destabilization effects on the political and constitutional system. Ruti Teitel has observed a similar potential for “political divisiveness” in post-Communist European regimes that maintained state support to institutionalized religion.<sup>348</sup> While a shari'a clause does not necessarily in itself create the polarization, it becomes a rallying cry around which polarization is manifested and intensified. Such polarization makes debates more intractable than they would have been otherwise. One reason for this is the possibility of backlash. Even if one accepts Hirschl's “secularization” thesis—that elites delegate religious questions to secular judicial institutions to contain Islamization—one needs to consider the long-term effect of polarization as such strategies may lead to a perception that the religious identity is under attack leading, consequently, organized religious forces to react and mobilize.<sup>349</sup> As the experience of the U.S. Supreme Court shows, judicial intervention (as in progressive rulings like *Roe v. Wade*) may lead to backlash and a rise in the right-wing movement.<sup>350</sup>

Additionally, polarization may be more consequential following democratization processes than under dictatorships. Polarization prior to the Arab Spring was within a repressed political sphere in which a free debate and

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<sup>344</sup> See *supra* Subpart B.1 of the Introduction.

<sup>345</sup> Al-Kumi, *supra* note 335.

<sup>346</sup> Awad, *supra* note 341.

<sup>347</sup> AZMI BISHARA, DOHA INST., CAN WE SPEAK OF A ‘COPTIC QUESTION’ IN EGYPT? 7 (2011).

<sup>348</sup> Ruti Teitel, *Partial Establishments of Religion Post-Communist Transitions*, in *THE LAW OF RELIGIOUS IDENTITY: MODELS FOR POST-COMMUNISM* 103 (Shlomo Avineri & Andras Sajo, eds, 1998).

<sup>349</sup> Keddie, *supra* note 149, at 30 (mentioning the possibility of backlash when state institutions impose secularism).

<sup>350</sup> Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L.L. REV. 373, 389 (2007).

fair elections were lacking.<sup>351</sup> At the time, the state apparatus was not necessarily influenced by political polarization because this polarization was not reflected in electoral processes and changes in the legislature and government. In a post-authoritarian state—with newcomers to the open and free political scene and free elections—a polarization in public opinion would influence electoral outcomes in ways that may destabilize the governmental system. As the risks of polarization become more tangible and likely, the management of such a polarization should be through accepted democratic ground rules. A shari'a clause rigs these rules in favor of one of the competing parties.

Clearly, polarization cannot be avoided altogether in social and political life. As the American abortion debate shows, even long standing constitutional democracies are prone to polarized debates that occasionally take a violent turn.<sup>352</sup> However, it is important that constitutional documents are flexible enough to manage this polarization and to alleviate its radical forms, and not to be seen by a sizeable portion of the citizenry as part of the problem.<sup>353</sup> The constitution should provide a unifying framework for resolving these controversial issues rather than a divisive instrument. As between the possibility of polarization and backlash for having a clause and for not having one, it seems to me that the worse backlash possibilities are likely to materialize in the case of having a shari'a clause. As the case of Sudan shows, making a minority a permanent loser in a majoritarian system that establishes religion causes internal strife and may lead to partition.<sup>354</sup>

This Article realizes that some may see the possibility of polarization in a different direction: that in a country where a large number of people want a shari'a clause, polarization and destabilization may result from the failure to include a shari'a clause. Yet the possibility of polarization, like other prudential arguments, cannot be stripped from both the larger context and

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<sup>351</sup> Ashraf El-Sherif, *Egypt's Post-Mubarak Predicament*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Jan. 29, 2014), <http://carnegieendowment.org/2014/01/29/egypt-s-post-mubarak-predicament/gzg2>.

<sup>352</sup> See, e.g., EYAL PRESS, *ABSOLUTE CONVICTIONS: MY FATHER, A CITY, AND THE CONFLICT THAT DIVIDED AMERICA* (2006).

<sup>353</sup> The Patriarch of the Coptic Church Tawadros II expressed on February 2013 his view of the 2012 Constitution as divisive and discriminatory: "The only common bond between all Egyptians is that they are all citizens. . . the constitution, the base for all laws, must be under the umbrella of citizenship and not a religious one. . . Subsequently, some clauses were distorted by a religious slant and that in itself is discrimination because the constitution is supposed to unite and not divide." *Coptic Pope Tawadros II Criticises Egypt's Islamist Leadership, New Constitution*, AHARAM ONLINE (Feb. 5, 2013), <http://english.ahram.org.eg/NewsContent/1/64/64135/Egypt/Politics-/Coptic-Pope-Tawadros-II-criticises-Egypt-Islamist.aspx>.

<sup>354</sup> El-Gaili, *supra* note 194, at 511.



normative considerations. On the one hand, despite the virtual consensus around Article 2, Egyptian Islamists continued to invoke shari'a to demand its application. It is clear then that they were determined to invoke shari'a regardless of the existence of the text. The reason might be either because what they seek is not merely a textual promise but a full-fledged implementation of shari'a as they see it, and/or because they are engaged in what a politician and columnist called "an illusory war on shari'a" that masks their true motive of maintaining power.<sup>355</sup> In either case, polarization would not be the outcome of the exclusion of the shari'a clause itself.

Moreover, if the absence of a shari'a clause will make it impossible politically to adopt a constitution then delaying its adoption is a better alternative to accepting a bad and highly controversial constitution.<sup>356</sup> The insistence of the Muslim Brotherhood on introducing a controversial and rushed draft to a referendum in December 2012 merely galvanized sectors in the Egyptian population who felt excluded from the constitution making process and alienated from the religious content included in the draft.<sup>357</sup> A spokesman for the National Salvation Front—the opposition's coalition—explained its decision to boycott the referendum: "The referendum will cause further division and polarization and the Front refuses the draft constitution which cements presidential oppression and tramples freedoms and liberties."<sup>358</sup>

The lack of a shari'a clause does not seem as detrimental as its existence. Polarization may be likely regardless of the existence of a shari'a clause (as in Tunisia),<sup>359</sup> but the existence of a shari'a clause increases the likelihood and intractability of this polarization (as in Egypt).<sup>360</sup> The imposition of religious rhetoric on political debate makes it less open for rational exchange and

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<sup>355</sup> D. Amr Shubaki, *La Tosadeko anna Al-Shari'a fi Khatar [Do Not Believe That The Law Is In Danger]*, EGYPT INDEP. (Dec. 10, 2012), <http://today.almasryalyoum.com/article2.aspx?ArticleID=363334>.

<sup>356</sup> Egyptian author and columnist Ahdaf Soueif raised this option in a couple of occasions. Ahdaf Soueif, *Al-Hajah Al-Mulehha Ila Al-Dostoor [The Pressing Need for a Constitution]*, AL-SHOROUK (Sept. 7, 2011), <http://shorouknews.com/columns/view.aspx?cdate=07092011&id=c2e63e7e-2d17-40a5-9bb0-be30f351d0aa> (noting that the question of the constitution itself became one of the most divisive platforms); *Leno'ajjel hatha Al-Dostoor [Let Us Delay . . . This Constitution]*, AL-SHOROUK (Dec. 19, 2012), <http://shorouknews.com/columns/view.aspx?cdate=19122012&id=c1e649e9-b3f6-4539-9991-acc42ad05322>.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> Abdel-Rahman Hussein & Julian Borger, *Egypt Opposition Group to Boycott 'Irresponsible' Vote on New Constitution*, GUARDIAN, Dec. 9, 2012, at 17.

<sup>359</sup> CONSTITUTION OF THE TUNISIAN REPUBLIC, 1 June 1959.

<sup>360</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 2012, *as amended*, Sept 11, 1971, Mary 22, 1980, Mary 25, 2005, March 26, 2007.

resolution because the position with respect to certain proposals is represented as illegitimate (because it is “non-Islamic” or “heresy” or “blasphemy”). A shari’a clause enables and emboldens such an imposition because it is seen as part of the constitutional order, i.e. the highest norms in the country that subordinate politics and lawmaking. In this sense, enacting a shari’a clause provides an instrument of delegitimization of political opponents. Such delegitimization exacerbates polarization.<sup>361</sup>

### C. *Distraction and Fetishism*

A shari’a clause, and its concomitant judicial empowerment given the delegation of religious questions to judicial authority, is likely to have four bad consequences: distraction effects; anti-participatory resolution of conflicts; secular escapism; and constitutional fetishism and legalization.

#### 1. *Distraction*

Polarization goes hand in hand with the reductionism of political discourse to a religion-centric debate and the reification of secular and religious identities in this discourse. Reductionism and reification feed into polarization, which in turn feeds into reductionism and reification in a vicious circle. This state of the political discourse conceals disagreements between and within the two camps on a host of issues because it becomes the primary visible dividing line in society.<sup>362</sup> The increasing polarization after January 25, 2011 and leading to

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<sup>361</sup> Amr Hamzawy criticizes Islamist groups and Salafi shiekhs for delegitimizing liberal and secular parties who call for a civil state. See Amr Hamzawy, *Horoob Al-Mafaheem wa Al-Ta’areefat [Conceptual and Definitional Wars]*, AL-SHOROUK (June 9, 2011, 8:36), <http://shorouknews.com/columns/view.aspx?cdate=09062011&id=284aaf447c-402e-84e5-3eb91fe7e32>, for example, op-eds by academic and politician (rejecting the Islamist equation of “liberalism” with “secularism” and “civil state” with “blasphemy”); *Defa’an an Al-Dawlah Al-Madanyya wa Misr allati Nureed [In Defense of the Civil State and Egypt that We Want]*, AL-SHOROUK (July 31, 2011, 8:33), <http://shorouknews.com/columns/view.aspx?cdate=31072011&id=fea94c0d-b1f5-4f56-b51f-fd4b2e089af1> (calling this Islamist rhetoric divisive and polarizing); *Da’awah li Shoyokh Al-Slafiyya [A Call for the Elders of Salafi Sheikhs Movements]*, AL-SHOROUK (Aug. 13, 2011), <http://shorouknews.com/columns/view.aspx?cdate=13082011&id=c0e90fb1-58dd-4c2b-9239-93001ebc50ca> (claiming that Salafi sheikhs’ rhetoric bears responsibility over violent incidents).

<sup>362</sup> Ziad Bahaa al-Dein, *Al-Indifa’a Nahua Haweyat Al-Istiktab Al-Dini-Al-Madani [The Rush Toward a Religious-Civic Divide]*, AL-SHOROUK (May 24, 2011, 6: 14 PM), <http://www.shorouknews.com/columns/view.aspx?cdate=24052011&id=d4651a4f-49a8-4aa7-8b8e-fee798b0ba2b> (noting that polarization between the religious and secular marginalizes the differences within the secular and liberal camp by positing a generic unifying identity in opposition to the religious). See Perry, *supra* note 61, for disagreement within the religious camp. Salafi Nour party’s critique of the Muslim Brotherhood for approving a loan from the European Investment Bank and seeking a loan from the International Monetary Fund (IMF) because it involves Ribba (which is understood to prohibit charging interest on loans) and hence the actions violate the constitution which requires them to consult the al-Azhar clerics. *Id.* Another indication of the disagreements in the

June 30, 2013 has shifted quickly the major dispute in Egyptian society and politics from one between pro-Mubarak/anti-revolutionary and anti-Mubarak/revolutionary forces to anti-Muslim Brotherhood (including both revolutionary forces and former Mubarak officials and loyalists) and pro-Muslim Brotherhood.<sup>363</sup>

The identities “religious” or “secular” do not necessarily determine one’s views on specific social, economic, and political questions. In fact, there might be some alliances across the secular-religious dividing line on, for instance, the economically conservative-progressive axis. However, the reification of these identities (the secular and the religious) in political debates obscures their tendency to change and shift overtime, the hybridity of Islamic law,<sup>364</sup> and the intertwinement of the secular and religious.<sup>365</sup> Polarization, then, is grounded in a reified and hence mistaken set of categories that misrepresent socio-political reality and conflict. This reification conceals from participants the complex and dynamic reality of these categories and the role of the participants themselves in constructing them in particular ways.<sup>366</sup>

The debates on the shari’a clause, and on religion in general, in Tunisia and Egypt illustrate the danger that the salience of the debate may overshadow and distract attention from a myriad of issues like social and economic issues as well as other questions of constitutional design concerned with political structures and institutions.<sup>367</sup> In Tunisia, Al-Nahda prudently prioritized institutional design and political stability over shari’a. However the distraction potential is still evident given that identity politics—that pits Islamists against secularists—distracts from the original goals of the revolution:

At the socio-economic level, people began to realise that identity politics does not provide jobs or daily bread. The economics associated with it—mainly, in the shape of timid Islamic banking, loans from

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religious camp is the split in the Salafi party. Tarek El-Tablawy, *Egypt Salafi Leader Splits From Nour Party to Form New Group*, *Bloomberg*, (Jan. 2, 2013, 2:40 PM), <http://www.bloomberg.com/news/2013-01-02/egypt-salafi-leader-splits-from-nour-party-to-form-new-group.html>. A further split also occurred in the new party. *Mass Resignations in Egypt’s Salafist Al-Watan Party*, *AHRAM ONLINE* (June 15, 2013), <http://english.ahram.org.eg/News/74006.aspx>.

<sup>363</sup> See, e.g., Hazem Kandil, *Deadlock in Cairo*, 35 *LONDON REV. BOOKS* [LRB], Mar. 21, 2013, available at <http://www.lrb.co.uk/v35/n06/hazem-kandil/deadlock-in-cairo>.

<sup>364</sup> See *supra* Part I.B.

<sup>365</sup> Sultany, *supra* note 106, at 458–59; TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* 25 (2003).

<sup>366</sup> PETER L. BERGER & THOMAS LUCKMAN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 89 (1960) (discussing reification).

<sup>367</sup> See above Part I.B.

Muslim countries and Gulf investment—has not really taken off, and was soon associated in the mind of a large section of the political class with new forms of domination, closely tied to the wider re-Islamisation project. . . Disheartening unemployment, rising prices and pressure for pay adjustments, not to mention compensation of martyrs, the wounded and thousands of former political prisoners, are far beyond what the economics of identity can handle or disguise. . . If there is any meaning to the terms “hijacking” or “stealing” the revolution, this would be it. It consists in displacing the terrain, changing the slogans and inventing a narrative. Identity politics and its attendant economics are not commensurate with the revolution and are therefore seeds for further unrest and continued protest. The Tunisian revolution will fail or succeed depending on how Tunisians will handle this battle and stay on the original grounds of the revolution: work, freedom and dignity.<sup>368</sup>

Egypt’s case was different since it retained the shari’a clause.<sup>369</sup> One commentator argued that the debate is politically pointless because neither of the extreme sides (Salafis who want a stricter version of the shari’a clause and secularists who seek total absence of religion from the constitutional document) is likely to get their declared goals given Egypt’s societal composition and history.<sup>370</sup> But the absence of a shari’a clause from the constitution was not really on the table in the Muslim Brotherhood-dominated constitution-making committee.<sup>371</sup> As I already mentioned, only few marginal public voices opposed Article 2.<sup>372</sup> Another commentator noted that given the abstraction and generality of Article 2 “the real focus should be directed” to the institutional questions of “who is empowered to interpret and implement” the Article.<sup>373</sup> It is these institutional choices that will influence the political stakes involved in the shari’a clause. Yet, it is the debate over the shari’a clause that overshadows these very questions. This point is illustrated in the debate over

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<sup>368</sup> Mohamed-Salah Omri, *The Perils of Identity Politics in Tunisia*, AL-JAZEERA, (Jan. 7, 2013, 4: 15 PM), <http://www.aljazeera.com/indepth/opinion/2013/01/2013127142856170386.html>.

<sup>369</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 2012, *as amended*, Sept 11, 1971, Mary 22, 1980, Mary 25, 2005, March 26, 2007.

<sup>370</sup> Fahmi Howeidi, *La Hia Khilafa aw ‘Ailmanyah [Succession Is Not A Secular OrNeither Caliphate Nor Secularism]*, AL-SHOROUK (July 8, 2012, 8:50), <http://shorouknews.com/columns/view.aspx?cdate=08072012&id=89f2c8bc-2804-448f-b587-86682ea7361c>.

<sup>371</sup> *Id.*

<sup>372</sup> Al-Kumi, *supra* note 336.

<sup>373</sup> Nathan J. Brown, *Egypt’s Constitution: It’s Not Really About the Religious Clauses*, GUARDIAN, (Feb. 15, 2012, 3:00).

the referendum on the constitutional amendments on March 2011.<sup>374</sup> Some Islamists used the shari'a clause to add a religious rhetoric to advance goals that are not related to Article 2. As commentators note, the "imposition of Article 2 on the debate was for the most part the handiwork of the Salafist movement," even though these amendments did not relate to Article 2 and focused on "presidential elections and president's term of office."<sup>375</sup>

Egyptian academic-turn-politician and columnist Amr Hamzawy noted in June 2011 that sectors of the Egyptian population were concerned that political discourse is reduced to the questions of religion and politics. Expressing his agreement with this concern he wrote:

Indeed, there are issues that our political debate does not address in an organized manner like social justice and its relation to the market economy and the particular suggested tools to establish a just society. Also, there is the issue of rebuilding the centralized Egyptian state structure, which is unsuitable for democratic transition, and pushing it towards adopting the principle of elections rather than appointment for public posts, and then a culture of accountability, oversight, and supervision. And this is connected to de-centralization which is a necessary path for just distribution of powers and expertise between the center in Cairo and the governorates and localities. Issues like these are virtually absent from political debate despite its extreme importance . . . .<sup>376</sup>

For Hamzawy, discussing issues like these is more fruitful than "complete exhaustion of energy in a reiterative discussion about religion and politics" that merely reproduces an already clear dispute "between Islamists and liberals, regarding the constitution and elections."<sup>377</sup> A month earlier, Hamzawy criticized sectarian violence and Islamist rhetoric on implementing shari'a, not only because they exclude and harm Christians, but also because the media attention they attract pushes away serious engagement with pressing economic and security concerns.<sup>378</sup> Another Egyptian commentator lamented the lack of

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<sup>374</sup> *Egypt Approves Constitutional Changes*, AL-JAZEERA, (Mar. 20, 2011, 5:57 PM), <http://www.aljazeera.com/news/middleeast/2011/03/2011320164119973176.html>.

<sup>375</sup> Salma Shukrallah & Yassin Gaber, *What Was Religion Doing in the Debate on Egypt's Constitutional Amendments?* AHARAM ONLINE (Mar. 22, 2011), <http://english.ahram.org.eg/News/8267.aspx>.

<sup>376</sup> Amr Hamzawy, *Al-Gha'eb 'an Al-Nikash Al-Siyasi [The Absent From Political Debate]*, AL-SHOROUK (June 2, 2011, 8:17), <http://shorouknews.com/columns/view.aspx?cdate=02062011&id=8ee890a4-799c-41c5-916c-b59c8065ef47>.

<sup>377</sup> *Id.*

<sup>378</sup> Amr Hamzawy, *Al-Muwatana Al-Muhaddada [Threatened Citizenship]*, AL-SHOROUK, (May 5, 2011), <http://shorouknews.com/columns/view.aspx?cdate=05052011&id=4eabb258-43f2-4fa5-a454-c325fd684430>.

the “calm and objective discussion” concerning the draft of December 2012 Constitution: “In the past weeks the subject of shari’a and identity has occupied the central position” leading to a receding “attention to the nature of any democratic constitution” in terms of institutions and checks and balances.<sup>379</sup>

These examples of distraction are lamentable, because this distraction has bad consequences for the marginalized issues. This is not to say that Egyptians did not discuss questions of constitutional design other than the shari’a clause. However, a shari’a clause debate—being a crucial part of identity politics—either frames the general debate by sidelining these issues and hence offering them less spotlight for a healthy discussion, or frames the issues themselves in a misleading way by effectively hindering a serious engagement with them, even when they are admitted to the general debate. Consequently, “framing effects . . . shape what people see as pertinent alternatives . . . what they actually focus on when making a particular decision.”<sup>380</sup> The entanglement of some of these issues with the shari’a clause and its religious overtones makes the debate over them unnecessarily complicated and more intractable than it should be.

Indeed, the lack of serious discussion on questions like social justice had a substantive impact on the issues themselves. As a former constituent assembly member and columnist, Ziad Bahaa al-Dein<sup>381</sup> points out, that although “social justice” occasionally appeared in political parties’ programs in the post-revolutionary period it was too generic and ambiguous.<sup>382</sup> Thus, it lacked clear and programmatic content beyond demanding minimal wage and progressive taxation.<sup>383</sup> Without such content, claims Bahaa al-Dein, it becomes an empty slogan for populist consumption.<sup>384</sup> For instance, political parties that claimed to support social justice also supported the market economy and did not

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<sup>379</sup> Abdel Fattah Madi, *Misr Ba’ada Al-Dostoor.. Ta’azzom am Intikal?* [Egypt After the Constitution. . . Crisis or Transition?], AL-JAZEERA, (Dec. 29, 2012), <http://www.aljazeera.net/opinions/pages/F48D2318-E277-4EDF-80FD-15B3E34F84E5>.

<sup>380</sup> IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 128 (2003).

<sup>381</sup> He became a deputy to the prime minister in the government after the army deposed President Morsi on July 3, 2013. Joel Gulhane, *Ziad Bahaa El-Din Appointed Deputy PM*, DAILY NEWS EGYPT (July 12, 2013), <http://www.dailynewsegyp.com/2013/07/12/ziad-bahaa-el-din-appointed-deputy-pm/>.

<sup>382</sup> Ziad Bahaa al-Dein, *Ishakaleyyat Al-'Adalah Al-Ijtima'aeyyah* [The Problematic of Social Justice], AL-SHOROUK (Feb. 12, 2013), <http://www.shorouknews.com/columns/view.aspx?cdate=12022013&id=c75ed0de-e0aa-4583-aed5-92ad6f6d674e>.

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

explain the relationship between these two agendas.<sup>385</sup> This lack of specification blurs the lines between different parties, since their agendas sound similar.<sup>386</sup> Furthermore, Bahaa al-Dein argues that social justice is impossible in a society that generally lacks a justice based on equal citizenship rights.<sup>387</sup> Indeed, the lack of equality, as our discussion in Part II.A above shows, may be detrimental to a just distribution of resources between citizens, because those are not considered equal in the first place.<sup>388</sup>

The literature on religion, income, and voting suggests another possible effect of distraction. Scholars suggest that voters may vote against their economic and distributive interests given their religiosity.<sup>389</sup> In this sense, voters may prioritize public religious concerns over the policies that are more likely to benefit them, because they do not perceive left-to-center parties as committed to these religious and conservative values.<sup>390</sup> Scholars make these observations even with respect to Western states that do not incorporate religion in the constitution.<sup>391</sup> Thus, it can apply to Egypt's case even when the shari'a clause is absent. Nevertheless, if this literature is correct, and my argument above that a shari'a clause—and its concomitant identity politics—leads to polarization and dominance of religious questions is also correct, then a dominant public debate over a visible and high-profile constitutional article may contribute to pushing voters in the said direction even further.<sup>392</sup>

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<sup>385</sup> Bahaa al-Dein, *supra* note 382.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> See, e.g., THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA (2004); Ana L. De La O & Jonathan A. Rodden, *Does Religion Distract the Poor? Income and Issue Voting Around the World*, 41 COMP. POL. STUD. 437 (2008); John Roemer, *Why the poor do not expropriate the rich: An old argument in new garb*, 70 J. PUB. ECONOMICS 399 (1998); Kenneth Scheve & David Stasavage, *Religion and Preferences for Social Insurance*, 1 Q.J. POL. SCI. 255 (2006).

<sup>390</sup> See generally, e.g., FRANK, *supra* note 389; De La O & Rodden, *supra* note 389; Roemer, *supra* note 389; Scheve & Stasavage, *supra* note 389.

<sup>391</sup> See generally, e.g., FRANK, *supra* note 389; De La O & Rodden, *supra* note 389; Roemer, *supra* note 389; Scheve & Stasavage, *supra* note 389.

<sup>392</sup> The reasons for voting to certain parties and not others are of course many. The text does not suggest that the distraction effects of Islamic constitutionalism are the exclusive or even the primary reason for voting in support of religious movements. For example, Tarek Masoud argues that in Egypt's case the social networks that are available to Islamists are not available to leftist activists, who are limited in labor activism, and this allows Islamists to be more electorally successful than their leftist rivals. Tarek Masoud, *Arabs Want Redistribution, So Why Don't They Vote Left? Theory and Evidence from Egypt*, SSRN, (June 18, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2238165](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2238165).

## 2. *Anti-participatory Arrangement*

Delegating religious questions to a judicial authority is an anti-participatory move, because it transfers the power of decision-making from the hands of the many to the hands of the few. These issues are fundamental questions of collective concern, and influence everyone's lives in the polity. Thus, they need to be the object not only of public deliberation, but also of collective decision-making against the background of a fair and acceptable conflict resolution mechanism that the constitution institutionalizes. The anti-majoritarian role of a shari'a clause cannot be defended by pointing out the existence of many institutions in democracies that do not resort to majoritarian decision-making, such as American executive administrative agencies.<sup>393</sup> First, such institutions are arguably technocratic and professional in ways that cannot be claimed when secular judges are interpreting shari'a: Shari'a is not as 'technical' as inflation rates, and state judges normally have no special expertise in religious law.<sup>394</sup> Second, even these technical institutions can be subject to democratization calls (as in attempts to include public participation in bureaucratic processes of decision making).<sup>395</sup>

## 3. *Secular Escapism*

Judicial empowerment is an escapist tactic used by secular elites who are unable and/or unwilling to make the necessary political effort to advance their ideas through, inter alia, developing, detailing, and implementing the socio-economic programs that make the societal conditions more receptive to secular and liberal ideas.<sup>396</sup> While the secularization thesis—that tied the decline of the religiosity to modernization and rationalization processes—has been under attack,<sup>397</sup> evidence indicates that “the importance of religiosity persists most strongly among vulnerable populations, especially those living in poorer nations, facing personal survival-threatening risks.”<sup>398</sup> In addition, Islamic religious movements have been extensively involved in the social conditions of

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<sup>393</sup> See, e.g., Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4, 54 (2006).

<sup>394</sup> *Id.* at 54 (noting that American agencies have more expertise in technical matters than judges).

<sup>395</sup> See, e.g., Jerry Frug, *Administrative Democracy*, 40 U. TORONTO L. J. 559 (1990); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 412 (2005).

<sup>396</sup> See, e.g., THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS (Peter L. Berger ed., 1999).

<sup>397</sup> See, e.g., *id.*

<sup>398</sup> PIPPA NORRIS & RONALD INGLEHART, SACRED AND SECULAR: RELIGION AND POLITICS WORLDWIDE 4 (2004).



communities and their welfare.<sup>399</sup> Non-religious or secular parties are rarely similarly involved, and are reduced to seasonal contact with their constituencies in electoral campaigns.<sup>400</sup> These secular parties lack, in general, a commitment to an agenda of distributive justice.<sup>401</sup> The abovementioned thin and populist use of the slogan of social justice is an indication of this lack of serious commitment to it by secular and liberal parties. This lack of commitment explains, in part, and feeds into the abovementioned reductionism of political discourse to religious questions.

#### 4. *Constitutional Fetishism and Legalization*

The focus on the shari'a clause in Egypt is symptomatic to the larger phenomenon of fetishism of constitutionalism. Many actors' actions in the post-revolutionary Egyptian politics portrayed this fetishism. The revolution's main aims and grievances were state practices and did not include the question of the constitutional text, as Ahdaf Soueif reminds us.<sup>402</sup> Yet, the constitutional text became a central question. In a rare instance of an army (as opposed to a constituent assembly or the people) issuing a constitution,<sup>403</sup> the Supreme Council of the Armed Forces ("SCAF") issued "constitutional declarations" or "amendments" (March 15, 2011; March 30, 2011; and June 2011), only one of which was subject to a referendum (March 19, 2011).<sup>404</sup> The March 30 amendments—after the referendum—incorporated verbatim many of the 1971 constitutional provisions, including Article 2 (as amended in 1980).<sup>405</sup> SCAF

<sup>399</sup> Masoud, *supra* note 392.

<sup>400</sup> *Id.*

<sup>401</sup> Labor union leaders accused the leaders of the National Salvation Front, which opposed the Muslim Brotherhood, in a meeting on February 16, 2013, of ignoring them and their unions. See Ashraf 'Azzoz, 'Al-Inkath': la Hadith 'an Intikhabat wal Bilad Tanhar... ['Salvation': No talk on elections when the country is collapsing...], AL-YOUM AL-SABE'A (Feb 16, 2013), <http://www1.youm7.com/News.asp?NewsID=947746&SecID=12>; see also Dan Murphy, *Egypt's political elites and their estrangement from the poor*, CHRISTIAN SCI. MONITOR (Feb 19, 2013), <http://www.csmonitor.com/World/Backchannels/2013/0219/Egypt-s-political-elites-and-their-estrangement-from-the-poor> (mentioning that elites within and outside the Muslim Brotherhood are estranged from the poor Egyptians).

<sup>402</sup> Ahdaf Soueif, *Al-Hajah Al-Mulehha Ila Al-Dostoor [The Pressing Need for a Constitution]*, AL-SHOROUK (Sept. 7, 2011), <http://shorouknews.com/columns/view.aspx?cdate=07092011&id=c2e63e7e-2d17-40a5-9bb0-be30f351d0aa>.

<sup>403</sup> The Egyptian army has issued in the past constitutional declarations in the aftermath of the July 23, 1952 Free Officers' coup. See, e.g., *I'alan Dostori men Al-Ka'ed Al-'am lil Kuwwat Al-Musallaha wa Ka'ed Thwarat Al-Jaysh [A Constitutional Declaration from the Chief of the Armed Forces and the Leader of the Army's Revolution]*, SIS (Feb. 10, 1953), <http://www.sis.gov.eg/Newvr/dostorpdf/1953.pdf>.

<sup>404</sup> Neil MacFarquhar, *Egyptian Voters Approve Constitutional Changes*, N.Y. TIMES, Mar. 21, 2011, at A4.

<sup>405</sup> CONSTITUTIONAL DECLARATION OF THE ARAB REPUBLIC OF EGYPT, 23 March 2011.

further amended the declaration in June 2011,<sup>406</sup> without seeking popular approval of the changes.<sup>407</sup>

In June 2011, forty-one parties endorsed a petition demanding “The Constitution First” with millions of signatories.<sup>408</sup> Some actors understood this campaign as an attempt to preempt the possibility of an Islamist rise to power after an election and to bypass the SCAF amendments.<sup>409</sup> Upon assuming power, President Mohammad Morsi followed SCAF’s example and issued his own self-declared “constitutional declarations.”<sup>410</sup> His November 22, 2012, declaration sought to immunize his presidential decrees and declarations from judicial power<sup>411</sup>, immunized the two houses of parliament from judicial dissolution (Article V), and amended the March 30, 2011, SCAF amendments by extending the constitution making period (Article IV).<sup>412</sup> Given public criticism and street violence, President Morsi had to partially rescind this declaration by issuing another “constitutional declaration.”<sup>413</sup> The opposition to Morsi’s declaration was substantive, but virtually no one pondered upon the questionable process in which a party—the president—issues a “constitutional” document, when it is not clearly authorized to do so, “amending” a “constitutional” document that another party—the military—issued, when, again, it is not self-evidently authorized to issue such a supra-political document. Verbal utterances, then, sought to grant these declarations more power than they have, but in reality, they were just political decisions dressed up as supra-political decisions. The goal was to conceal the political

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<sup>406</sup> *English Text of SCAF Amended Egypt Constitutional Declaration*, AHRAM ONLINE (June 18, 2012), <http://english.ahram.org.eg/News/45350.aspx>.

<sup>407</sup> See, e.g., *Constitutional Declaration Can Be Amended Without Referendum: SCAF*, AHRAM ONLINE (May 22, 2012), <http://english.ahram.org.eg/NewsContent/1/64/42325/Egypt/Politics-/Constitutional-declaration-can-be-amended-without-.aspx>.

<sup>408</sup> Ahmad Yassin Mohammad Ali, *41 I’atilafan le Da’am Hamlat Al-Dostoor Awwalan [41 Coalitions Supporting the Constitution First Campaign]*, AL-AHRAM AL-MASA’AI (June 14, 2011), <http://massai.ahram.org.eg/News/34328.aspx>; Haitham al-Taba’i & Asma’a Nassar, *Hamlat Al-Dostoor Awwalan Tajma’a 5 Malayeen Tawkee’a wa Tantather Mosharakat Sharaf [Constitution First Campaign Gathers 5 Million Signatures and Awaits [Prime Minister] Sharaf’s Participation]*, ASHARQ AL-AWSAT (June 23, 2011), <http://www.aawsat.com/print.asp?did=627813&issueno=11895>.

<sup>409</sup> Al-Taba’i & Nassar, *supra* note 408; Ahdaf Soueif, *‘An al-dostoor wa Al-Ta’alof wa Al-Ibda’a [On the Constitution, Harmony and Creativity]*, AL-SHOROUK (July 22, 2011), <http://shorouknews.com/columns/view.aspx?cdate=22072011&id=39a172f4-b872-48d6-8294-f6d5a6df50fd>.

<sup>410</sup> *English text of Morsi’s Constitutional Declaration*, AHRAM ONLINE (Nov. 22, 2012), <http://english.ahram.org.eg/News/58947.aspx>.

<sup>411</sup> Article II states that they cannot be appealed or annulled by judicial power. *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> Abigail Hauslohner & Ingy Hassier, *Egypt’s Opposition Split Over Next Step After Morsi Cancels Decree*, WASH. POST, Dec. 10, 2012, at A11.

nature of these decisions and simultaneously utilize them in an ongoing political struggle. Here, like in the American context, “the use of constitutional rhetoric simply masks political preferences.”<sup>414</sup> This masking may allow “politicians to evade responsibility for their actions.”<sup>415</sup> The fact that President Morsi had to rescind his “constitutional declaration” showed that the attempt to immunize political preferences through such rhetoric has to face the reality of politics. It is mistaken, then, to consider Egypt’s crisis—as many did—as a “constitutional crisis” rather than a political crisis.<sup>416</sup> But this mistake is rooted partially in the self-description of these declarations.

This misconceived overemphasis on—and attempt to hide behind—the constitution has bad effects. As Louis Michael Seidman warns in the American context:

Our obsession with the [U.S.] Constitution has saddled us with a dysfunctional political system, kept us from debating the merits of divisive issues and inflamed our public discourse . . . What has preserved our political stability is not a poetic piece of parchment, but entrenched institutions and habits of thought and, most important, the sense that we are one nation and must work out our differences.<sup>417</sup>

As for the shari’a clause itself, judicial empowerment leads to legalization of essentially political issues, rendering the status quo more natural and just than it actually is.<sup>418</sup> This transfers political questions that are already publicly discussed to a seemingly apolitical body with the power to have the final word. One may think that legalizing these questions prevents an overt moral war. However, this legalization neither resolves them nor reduces their intractability. Addressing them as purely legal questions is a misleading attempt to defuse their political nature and present their resolution as neutral. The legalization of these political questions introduces legal technicalities that are not congenial to a thorough discussion.<sup>419</sup> Ultimately, this legalization fails to de-politicize questions of religion and state, because the gaps, ambiguities, and contradictions in constitutional and legal provisions invite judicial

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<sup>414</sup> Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 657 (1999).

<sup>415</sup> *Id.* at 651.

<sup>416</sup> See, e.g., *Egypt’s Constitutional Crisis*, L.A. TIMES, Dec. 12, 2012, at A16; Q&A: *Egypt Constitutional Crisis*, BBC (Dec. 24, 2012), <http://www.bbc.com/news/world-middle-east-20554079>.

<sup>417</sup> Louis Michael Seidman, *Let’s Give Up on the Constitution*, N.Y. TIMES, Dec. 31, 2012, at A19.

<sup>418</sup> KENNEDY, *supra* note 210, at 236.

<sup>419</sup> See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353 (2006).

policymaking that is influenced by and contributes to political and ideological debates.<sup>420</sup> It may even politicize the constitutional court by making it an object of power struggle between different political actors that are trying to tip the interpretive scales to their favor through packing the court with their preferred judges.

### CONCLUSION

This Article addressed the question of the introduction of a shari'a clause into the constitutions of emerging democracies in the aftermath of the Arab Spring. It addressed the normative and prudential arguments supporting Islamic constitutionalism, trying to cast these arguments in their best light. Tackling the assumptions that undergird these arguments, this Article argued that they eventually fail. Islamic constitutionalism was rejected through normative and prudential reasons. Ultimately, the Article urged a turn from a heavily conceptualist debate to a pragmatic examination. Only through a proper contextualization of the question and a thorough assessment of the consequences of conceptual systems and constitutional arrangements can we approximate an answer. Deploying such examination, the religious clause was read against the backdrop of Egyptian and Tunisian political and constitutional processes. Accordingly, the Article argued that the constitution makers in Egypt and Tunisia are better advised not to include such a clause given its assessment of the stakes involved and the likely implications.

This argument may seem politically unfeasible. That, however, would be a quick conclusion. To begin with, judgments concerning feasibility or practicality or realism are not merely factual judgments devoid of normative judgments and goals. The Article contested the facts that underlie the realist argument either by presenting new facts or by showing how these facts necessitate a normative judgment regarding how one arrives at these facts (e.g., how we should measure popular will). If the realist concedes that a shari'a clause is not an ideal arrangement, then there is a need to identify a desirable alternative arrangement. Once this goal is identified, it can become a regulative idea towards which political action can be oriented. The answer cannot be: "[A]ccept the existing bad arrangement and hope it will change in the future" because, as previously indicated, choices made at the present influence the availability of options in the future. If one disagrees normatively with a shari'a clause then one undermines her own position, at least over the long-term, when

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<sup>420</sup> KENNEDY, *supra* note 210, at 133.

she agrees to it under the banner of *realpolitik*. Ultimately, this *realpolitik* is no more than an apology to the status quo.

As the Tunisian example shows, it is quite realistic to expect at least some of the processes of post-Arab Spring constitution making to result in a constitution that is free of a shari'a clause. Admittedly, in Egypt, the political reality seems more intractable and volatile, but it would be a mistake to take this option off the constitutional table. At a time of constitution making, constituent assemblies should address all the fundamental questions in the polity in order to lay down the foundations for a fair and stable political-legal order. It is unfortunate that at the time Salafis demanded a stricter version of the shari'a clause in Egypt, there was virtually no debate on the prudence of having a shari'a clause in the first place.<sup>421</sup> But as I indicated, this should be understood as part of—and contributing to—larger processes like polarization and constitutional fetishism.

It should be clear, however, that this Article does not consider the arguments it offers as less contestable or indeterminate than the arguments it rejects. Unlike the conceptualist arguments, the arguments offered here do not seek a closure of the debate. This Article proposes them as a reasonable assessment of historical conditions, given a knowledge of the past and a hope for the future. Unlike the move to abstraction—which seeks to avoid disagreement on the ground level by seeking agreement on the abstract level<sup>422</sup>—here, the attempt is to recognize disagreement at all levels. Given the inescapable fact of disagreement, there is a need to advance a more concrete case-by-case examination of the relevant issues given all the circumstances. Disagreement on the ground level is more enlightening than disagreement on the abstract conceptual level, because it is grounded in actual consequences. This nuanced focus seeks to: (1) avoid the generalizing tendency of conceptual debates; (2) evade the unwarranted optimism of the normative argument; and (3) reject the realist argument's despondency and uncritical acceptance of reality.

This contextualization does not imply that one should circumvent a principled position. Quite the contrary, this contextualization is performed against the backdrop of normative principles. Clearly, the arguments in this Article would effectively contribute to the outcomes desired by the liberal secularist camp. However, the arguments advanced here make no claims that

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<sup>421</sup> See *supra* Part II.C.1.

<sup>422</sup> Sultany, *supra* note 105, at 455–56.

Islam and democracy are *a priori* incompatible (or that they are *a priori* compatible, for that matter). Nor do they preach modernization, because the distinction between traditional and modern societies on which this outlook relies is a myopic simplification of reality.

Prior to the Arab Spring, the choice may have seemed limited to secular dictators and Islamic democrats.<sup>423</sup> In the aftermath of the Arab Spring, however, there is no reason to maintain this binary choice: scholars and Arab constitution makers should be able to imagine a political regime that is neither non-democratic, nor religious. Constitution makers, who may still feel uncertain and are reluctant to overcome this binary choice, are advised to consult Max Weber.<sup>424</sup> Weber posits an irreconcilable conflict between the “ethics of ultimate ends”—according to which, the judgment concerning the rightness of conduct is decoupled from its possible consequences—and the “ethics of responsibility”—according to which, the rightness of actions is judged by their potential consequences.<sup>425</sup> As politics requires the deployment of coercive state power, including through law, the application of our convictions and principles requires attention to the consequences given our judgment of the situation. For Weber, a politician must be capable of making hard choices between contradictory ethical demands and taking responsibility for their consequences, even the unforeseen ones.<sup>426</sup> The ethics of ultimate ends avoids making these hard choices and taking this responsibility, given its occupation with rightness of conduct, moral purity, or the salvation of the soul.<sup>427</sup> Weber’s “situated consequentialism”—as opposed to utilitarianism—posits that “causal sequences and outcomes are intelligible to us only from horizons of meaning that are themselves constructed from the vantage point of our ultimate practical values.”<sup>428</sup>

This Article mentions Weber here for three reasons. First, the notion of responsibility is important, because—as the Article shows—the effect of different arrangements and choices is to avoid responsibility. Distraction from fundamental questions evades taking political responsibility for these questions.<sup>429</sup> Secular escapism neglects political responsibility.<sup>430</sup>

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<sup>423</sup> FELDMAN, *AFTER JIHAD*, *supra* note 33, at 20–21.

<sup>424</sup> MAX WEBER, *THE VOCATION LECTURES: SCIENCE AS A VOCATION, POLITICS AS A VOCATION* (David S. Owen, Tracy B. Strong eds., Rodney Livingstone trans., 2004).

<sup>425</sup> *Id.* at 29.

<sup>426</sup> *Id.* at 32.

<sup>427</sup> *Id.* at 29.

<sup>428</sup> PETER BREINER, *MAX WEBER & DEMOCRATIC POLITICS* 178 (1996)

<sup>429</sup> *See supra* Part II.C.1.

Constitutional fetishism allows running away from political responsibility.<sup>431</sup> Legalization and delegation of questions of religion to judges permits avoiding political responsibility.<sup>432</sup> This evasion of responsibility at various levels is connected to the question of Islamic constitutionalism: that the identity politics that focus on constitutionalizing shari'a leads to distraction; that judicial empowerment through a shari'a clause is an escapist secular tactic; that the preoccupation with a shari'a clause is part of constitutional fetishism; and that legalization of religious issues throws the ball from the political arena to the legal arena. Accordingly, the constitutionalization of shari'a hinders acknowledgment of political responsibility.

Second, Weber's situated consequentialism may not necessarily dictate the result this Article advocates, because judgments of consequences and situations differ.<sup>433</sup> However, this Article attempts to provoke a conversation along these lines by providing constitution makers with an analysis of the consequences of the available constitutional arrangements in Egypt and Tunisia. The arguments provided here against Islamic constitutionalism show that there is a choice, because this institutional configuration is not a predetermined fate. They also show that on balance the consequences of excluding shari'a are preferable, and it is this choice that constitution makers should take responsibility for.

Third, Weber's situated consequentialism should be understood against the backdrop of value pluralism, i.e. the existence of irreducible and irreconcilable value conflict.<sup>434</sup> This conflict cannot be resolved by value monism, i.e. by positing a superseding meta-value or super-principle, or through a harmonious conceptual marriage of the competing values (as in "constitutional democracy" or "Islamic constitutionalism").<sup>435</sup> The recognition of the paradoxical existence of constitutionalism and democracy or Islam and democracy and hence the futility of the illusory stability under the hands of *a priori* conceptualism should lead to the continuous openness of the negotiation between the ethical

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<sup>430</sup> See *supra* Part II.C.3.

<sup>431</sup> See *supra* Part II.C.4.

<sup>432</sup> *Id.*; see also MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 76–108 (1991) (discussing the "Missing Language of Responsibility" in American legal and political discourse).

<sup>433</sup> BREINER, *supra* note 428, at 179.

<sup>434</sup> WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 5 (2002).

<sup>435</sup> See generally *id.* (discussing value pluralism and monism).

and political.<sup>436</sup> This pragmatic vantage point provides us with a more accurate reading of modern-day politics that is not consensus-driven but antagonistic. It also emphasizes practice and experience, as opposed to the focus on the argumentative modes and rational resolution of conceptual and moral conflicts that excludes the role of the passions.<sup>437</sup> The recognition of value pluralism may lead from political “antagonism,” in which opponents treat each other as enemies, to “agonistic pluralism” in which politics is adversarial.<sup>438</sup>

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<sup>436</sup> MOUFFE, *supra* note 31, at 140.

<sup>437</sup> *Id.* at 95–97.

<sup>438</sup> *Id.* at 13–14, 102–05.