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Abstract and Keywords

This article explores the scholarly interest in the relationship between constitutions and the Islamic legal tradition. It begins with an overview of constitutional texts and what they say about Islam. It then considers whether the Islamic religion in general, and the shari'a in particular, lend themselves to constitutionalism. Thereafter, it analyzes how a new generation of scholars from other disciplines have joined those older scholarly efforts. More specifically, it examines the shift in focus of recent scholarship from heavily textual methodologies that prioritize specifically religious and intellectual questions, to more contextualized lines of inquiry that address the legal, institutional, historical, and policy implications of Islamic constitutional development. Finally, it looks at three scholarly debates (ones that have been connected to debates among Muslim political and legal thinkers): the relationship between Islam and constitutional texts; who has interpretive authority in such matters; and where debates take place.

Keywords: constitutions, Islam, shari'a, constitutionalism, Islamic law, scholars

A constitutional text can be defined as a formal instrument “whose primary purpose is to order a political society.”¹ Since a constitution is, among other things, a fundamental legal document, the relationship between written constitutions and the Islamic legal tradition is an obvious subject for scholarly attention. And it has become one, though perhaps more gradually than might have been expected. Indeed, scholars have largely followed practice in this regard. But if interest began slowly, it has picked up force and speed in recent years. Over the past century and a half, the relationship between Islamic law and constitutions has moved from a concern for specialists to a central political struggle in many Muslim societies; for scholars of Islam, the topic has similarly moved from a specialized concern to become a major topic of inquiry.

Alongside an interest in constitutional texts, scholars have also shown a growing interest in the related area of study encompassing Islamic forms of constitutionalism—with that term suggesting a range of practices and ideologies based on holding political authorities accountable and limiting government in accordance with clear (generally legal) standards and procedures. While constitutions and written constitutions can be distinct targets of inquiry, they are often intermeshed.

In this essay we will begin by tracing the origins of the scholarly interest in the relationship between Islamic law and constitutions, coming as it did at a time when it attracted primarily specialists in religion and specifically those focused on the classical Islamic heritage and a small number of countries. Until the last two decades, academic interest in the intersection of Islam and constitutionalism was expert and narrow. But pushed by changing political realities and pulled by their colleagues, we will show how a new generation of scholars from other disciplines have joined those older scholarly efforts, themselves hardly abandoned. In particular we will move to a consideration of how the focus of recent scholarship has shifted from heavily textual methodologies prioritizing specifically religious and intellectual questions to more contextualized lines of inquiry exploring the legal, institutional, historical, and policy implications of Islamic constitutional development. Much of this expansion has taken place since the 1990s. It has not simply coincided with a growing political interest in many predominantly Muslim societies in religion and constitutionalism; it has come about

partly in response to that interest. That is, as religious, social, and political forces have focused more on constitutions, and as constitutional arrangements for Islam specifically and religion generally have become more varied and contentious, scholars from a variety of disciplines have noticed and reacted. Of course older textual and interpretive scholarly concerns are still very much present, but are now part of a broader and more diverse set of academic fields. And we will show how these various approaches have sought to understand what the issues are, whose voices are authoritative, and where debates take place.

We will begin with a quick review of constitutional texts: what do they say about Islam? We will then move to a more abstract level, examining whether the Islamic religion generally, and the shari'a specifically, lend themselves to constitutionalism. The remainder of the essay will focus on three scholarly debates (ones that have been connected to debates among Muslim political and legal thinkers): what is the relationship between Islam and constitutional texts; who has interpretive authority in such matters; and where do debates take place?

I. Textual Provisions

Scholars have shown increasing interest in the constitutional language used to refer to Islam in large part because that language has grown stronger and more detailed over time. Muslim-majority states have adopted a variety of constitutional frameworks defining the role of Islam with respect to political authority, sources of law, personal freedoms, and human rights. They have even defined themselves in a starkly different set of terms, ranging from Islamic republics based on divine sovereignty to secular republics to monarchies in varying religious garbs. Of those countries that have adopted religious language in their constitutions, scholarly analysis has focused especially on clauses in two main areas: identity and structure of the state and law.

First, some clauses involve the basic identity of the state. In some constitutional texts, the state is defined as an Islamic one; more commonly, Islam is defined as the official religion or the religion of state. Some constitutions even seek to entrench the principles of Islamic governance and law as immutable and permanent. For example, Iran's constitution defines Islam as "the eternally immutable religion" of the state of Iran,² and Afghanistan's constitution states, "The provisions of adherence to the provisions of the sacred religion of Islam and the republican regime cannot be amended."³ At the other extreme, Turkey has entrenched its secular nature. Article 4 of the Turkish constitution bars amendments to Articles 1 through 3, which define the Republic as secular.⁴

Scholars have noted that the practical implications of such clauses are often unclear, but they have therefore turned specific attention to some more detailed provisions that sometimes bar non-Muslims from the nation's highest office and occasionally extend to other high-level officials, as is the case in Tunisia, Syria, and Pakistan. Related clauses may also require the president and other officials to take an Islamic oath, for example in Yemen, where the constitution requires not only the president but also his ministers and all members of the legislative assembly to pledge fidelity to the Qur'an, in addition to respecting the constitution and safeguarding the Republican system of government.⁵ Some Islamic constitutions go so far as to identify a particular sect of Islam as a prerequisite for public office. For example, only Sunni Muslims are eligible for the presidency in the Maldives,⁶ while only Shafi'i Muslims can serve as prime minister in Brunei.⁷

Second, constitutions in Muslim societies have specific provisions governing law that reference Islamic sources; the variety of language has attracted an enormous amount of scholarly attention. For instance, so called "repugnancy clauses," pioneered by Pakistan, prohibit the introduction of any legislation "repugnant" to the injunctions of Islam. Authority for implementation of such clauses has varied—for instance in Pakistan, the regular courts have sometimes been specifically barred from reviewing legislation in light of this clause; however, Pakistan's constitution does include a justiciable shari'a clause providing for Islamic review of legislation by the Federal Shariat Court, which has the authority to decide whether or not a particular legal provision violates the injunctions of Islam.⁸ Some texts give Islamic jurists the authority to review or invalidate laws deemed to be in conflict with the dictates of shari'a. For example, the constitution of Somaliland empowers the council of 'ulama to decide whether any particular law or policy is consistent with the shari'a.⁹ Egypt's 2012 constitution required taking into account the opinion of senior scholars in al-Azhar on matters related to the shari'a¹⁰; its 2014 successor backed off but still guaranteed the institution state support, independence, and declared it the "main reference for religious sciences and Islamic affairs."¹¹ The constitution of Iran obligates judges to base their decisions on codified Islamic law, and in the absence of written jurisprudence, they may refer to "authentic fatawa" as supplementary sources.¹² Some countries (such as Iran and Saudi Arabia) impose limitations on the adoption of any

treaties or human rights conventions that contradict the shari'a.¹³

More general and increasingly widespread provisions identify the shari'a as either "the" principal source of legislation or "a" principal source of law.¹⁴ Eighteen of the twenty-two countries that define Islam as the official state religion have taken such a step of establishing a constitutional role for Islamic law and jurisprudence, though the precise phrase used and its implied meaning vary greatly. These "source of law" clauses can also be found in several predominately Muslim countries that have not established Islam as the state religion.¹⁵ Some documents carve out a special area for personal status law (ironic in part because the term itself is not borrowed from the Islamic legal tradition), covering the rights and obligations of men and women in matters of marriage, divorce, child custody, and inheritance. Some constitutions—for example those of Egypt (in 1971, though the clause was removed in 2012 and then restored in 2014 without qualification), Bahrain, Yemen, Saudi Arabia, and Iran—guarantee gender equality to the extent that it is consistent with Islamic jurisprudence.

In addition to the most common religious provisions outlined above, Islamic constitutions may also include language requiring that a range of state policies—in areas such as education, commerce, and national defense—comply with the injunctions of Islam. For example, Afghanistan's constitution compels the state to adopt measures to foster religious schools and improve the condition of mosques.¹⁶ Saudi Arabia's Basic Law defines the armed forces as the guardian of Islam,¹⁷ while Yemen's 1970 constitution required the enforcement of Islamic law in business transactions.¹⁸

There is thus a rich and varied set of experiences with bringing Islam into constitutions. How have scholars understood these efforts?

II. Does Islam Lend Itself to Constitutionalism?

The possible constitutionalist nature of the Islamic legal tradition and the way in which modern constitutional texts should therefore make reference to Islam and Islamic law has long been a topic of early interest among legal specialists and constitution writers in several places in the Islamic world working in the first three-quarters of the twentieth century. It was similarly an occasional topic of interest among scholars of Islamic law. But outside of a few locations (such as Iran), Muslims' discussions about the relationship tended to be both highly specialized and muted, and scholarship reflected a technical nature, often with a focus on religious texts and abstract debates about general principles much less than the historical and political context in which they were embedded. And this debate was often abstract, focusing on the compatibility of the shari'a with the emerging practice of writing constitutions. In this section we will present some of the early scholarly debate on the constitutionalist nature of the shari'a as well as a consideration of the scholarly effort to understand initial constitutional experiments in Muslim societies.

A. Growing Interest

Scholars of the classical Islamic legal heritage have gradually showed a growing interest in constitutional aspects of Islamic law. In the nineteenth century, some intellectuals in the Muslim world noted possible parallels between their Islamic legal heritage on the one hand, and emerging European ideas about constitutionalism on the other. This parallelism seeped occasionally into western scholarship on Islamic law as that field was emerging, though it was not a major concern until very recently.¹⁹

Two processes—one political and one scholarly—have contributed to more active scholarly engagement with Islamic law and constitutions over the past three decades.

First, political and legal struggles over fundamental structures and procedures in the postcolonial era have prompted reformers to envision new constitutional orders that increasingly draw inspiration from the shari'a. In the twentieth century, many predominantly Muslim societies have sought to define the place for Islam in general and the shari'a specifically in their constitutional texts, which has thereby occasioned scholarly attention.

Second, the increasing salience of issues of Islam and constitutionalism has attracted a steadily growing group of scholars from a widening range of disciplines (including political science, sociology, history, religious studies, and law). As new disciplines and perspectives have entered the arena, they have brought with them different concerns and methods, leaving the field intellectually enriched but far less coherent. Most of all, they have placed new questions on the scholarly agenda, moving beyond a focus on texts to probing the political context, implications for religious authority, and modes

of enforcement and interpretation.

B. Was Islamic Law Constitutional?

Scholars interested in the classical Islamic legal heritage occasionally stepped back and reflected on the ways in which Islamic legal and political thought could provide intellectual justification for political constraints on rulers and protections for individual rights. They also noted how legal scholars in Islamic societies were carving out a powerful sphere of influence for themselves, from which they could either leverage their expertise to check the authority of temporal rulers or, conversely, find themselves subject to intense pressure to mold their interpretations of Islamic law to serve the will of the powerful.

Historians focusing on Islamic law have long noted the emergence of a distinct Islamic legal tradition, partially distinct from general religious and specifically theological inquiry, by the eighth century CE.²⁰ The derivation of law was distinct not only from other religious fields; it also had some autonomy from politics. Scholars interested in the development of *fiqh* quickly grasped that it was developed in a set of institutions and processes that lay at some distance from governance. But with the rise in Islamic thought and practice of what Marshall Hodgson has termed “shari’a-mindedness”—consciousness of an Islamic moral code based on justice in the private as well as political realm—the possibility of a legal tradition that lay outside of—and could call to account—holders of political authority began to emerge.²¹

Yet scholars have differed on whether to emphasize the parallels with constitutionalism or the differences. Most earlier scholars, such as Joseph Schacht, G.E. Von Grunebaum, and Noel Coulson, evaluated Islamic law through the lens of European constitutional principles and Enlightenment philosophy but dismissed shari’a as underdeveloped in that regard and ill-equipped to regulate or constrain political power.²² Von Grunebaum found Islam to be incompatible with constitutionalism, describing the religion as “permeated by a sense of the autocracy of the Lord.”²³ And “Islamic constitutional law never limited the power of the ruler.”²⁴ Thus, Von Grunebaum described aspects of modern constitutionalism in the Muslim world as alien to Islam: “Ideas of popular representation, constitutional restriction of the executive power, separation of the judiciary and the executive, and the philosophy behind them are importations from the West.”²⁵ But while arguing that constitutionalism is not indigenous to Muslim societies, Von Grunebaum allowed that that traditional Islamic reverence for egalitarianism and individualism provided a strong foundation for the development of a brand of democracy that could coexist with the shari’a.²⁶

But there have been other voices, and more recently their views have been more fully developed. Baber Johansen and other scholars have identified the emergence of a distinct community of jurists outside of the theological realm as the origin of an Islamic moral and legal framework that shared many of the characteristics of modern constitutionalism. Johansen has argued that the Islamic system of ethical and juristic norms known as *fiqh* historically functioned as an abstract social contract—long before the codification of written constitutions—by imposing a normative moral and legal framework on Muslim societies.²⁷ This system of rules “classifies and sanctions human acts, gives ethical and legal guidance to the believers and determines at the same time the rights and duties of the non-believers under an Islamic government,” Johansen writes.²⁸ Bernard Weiss has similarly noted an emphasis in early Islamic scholarship on the rights of private individuals and their entitlement to protection from unjustified interference from governing authorities.²⁹ The use of Islamic scripture to justify limitations on the exercise of state power anticipated future debates on the rights of Muslim citizens and the infrastructure of democratic governance that would intensify centuries later with the codification of written constitutions.³⁰

Scholars have not only tried to understand the Islamic legal tradition by reference to and comparison with categories of non-Islamic origin (like constitutionalism) but also to probe whether some strong features of the Islamic legal tradition might have constitutionalist overtones and implications. Three concepts have drawn particular interest—*maqasid*, *maslaha*, and *siyasa shar’iyya*.³¹

Maqasid refers to the general purposes of shari’a. The term, inherited from premodern jurists, has increasingly been appropriated by reformists seeking to adapt shari’a to modern contexts. Andrew March has documented efforts by reformist scholars to use the theory of *maqasid* to adapt shari’a to changing circumstances and to help adjudicate cases of indeterminacy or conflict between rulings, in a method he describes as “complex purposivism.”³² However, Anver Emon takes a different approach, arguing that the concept of *maqasid* was designed to limit the scope of deliberative reasoning.³³

The concept of *maslaha*, best translated as “public interest,” has been deployed by scholars to facilitate the derivation of legal rules in the absence of clear texts. Felicitas Opwis has traced the development of the concept from its origins in the classical philosophies of al-Ghazali, Fakhr al-Din al-Razi, and al-Qarafi to its increased usage and modern appropriation by leading jurists in the nineteenth century.³⁴ Contemporary debates over the role of *maslaha* have become increasingly polarized between those who believe that *maslaha* should be used as a technique to make shari'a more relevant and practical, and those who fear that this practice will distort the shari'a to serve the interests of its interpreters.

Siyasa shar'iyya refers to the legal authority of Muslim theocracies to supplement the broad legal principles of the Qur'an and other legal texts of sacred origin on points of detail or ambiguity, and to make policy decisions in the public interest. Noah Feldman has explored the ways in which the doctrine of *siyasa shar'iyya* has been leveraged to justify positive law-making under an Islamic contract of governance.³⁵

In all three areas, scholars have been led in some of their interest by recent Muslim attempts, explored later, to ground an Islamic form of constitutionalism in their Islamic legal heritage. Scholars have gravitated between two poles: one which is sympathetic to the attempt and those who see it as doing violence to the original concepts.

If scholars of Islamic law have differed in their willingness to read constitutionalist possibilities into the Islamic legal tradition, none has gone so far as to hold it up as a functional equivalent of modern constitutional texts. Even those who see constitutionalist possibilities in the Islamic legal tradition acknowledge that the actual practice of Islamic societies in the premodern era is unclear, and those scholars who have attempted to uncover how much the law in practice operated in accordance with that propounded by the *fuqaha'* have been forced to develop somewhat tentative conclusions. Further, the reluctance of many members of the premodern '*ulama'* to accept judicial positions has often been taken as a sign that Islamic legal scholarship viewed actual politics with distrust. Overall, when scholars have noted the existence of constitutionalist elements in the Islamic legal tradition, they have generally done so in a tangential manner; it was rarely a central concern and empirical evidence was rare. But where scholars are able to move from theory to practice, especially in some work on the Ottoman period—where documentation is richer—they sometimes suggest a more robust role for Islamic legal specialists in shaping the law in practice. The implication is that the '*ulama'* could deploy Islamic legal norms in a constitutionalist manner. Haim Gerber argues that the diverse practices of autonomous judges and jurists in the Ottoman Empire—operating to a large extent without oversight from state authorities—resulted in significant variation between the implementation of shari'a in different regions and communities, in a phenomenon he describes as “law created by private experts.”³⁶ Scholars have also suggested that rulers who used the regulatory and legal authority granted to them under sometimes permissive scholarly eyes still strove to do so in a manner completely consistent with shari'a-based norms.³⁷

And for those focusing on the nineteenth century, the relationship of the Islamic legal tradition to constitutionalism in general and constitutional documents specifically became more pressing. This is in part because influential writers from various Muslim societies (notably Rif'at al-Tahtawi in Egypt and Khayr al-Din from Tunisia and the Ottoman Empire) showed some interest in European constitutionalist thought and its adaptability to their own domestic settings.³⁸

C. The Impact of Early Constitutional Experiments

The innovation of constitutional texts, presenting themselves as such (or “basic laws”)—in Tunisia, Egypt, the Ottoman Empire, and Iran—forced the issue of the relationship between Islamic law and constitutions on to the political (and thus the scholarly) agenda, drawing scholarly interest from historians and occasionally political scientists. Yet even this significant development initially attracted limited scholarly attention to the relationship between Islamic law and constitutions. First, in all four countries, the initial experiment with a constitutional text was shaky and short-lived. Second, the question of how and when the Islamic shari'a should be integrated into modern constitutional texts did not seem pressing. In one country (Egypt) issues of Islamic law did not arise in constitutional discussions; in another (Tunisia) the constitution itself was expressed in familiar Islamic terms and accompanied by the intellectual efforts of Khayr al-Din to steer Islamic legal and political thought in a constitutionalist (though hardly liberal or democratic) direction, but that example inspired few followers perhaps because the Tunisian constitution had such a short life.

The Ottoman Empire and Iran both experimented with constitutional texts in a more sustained and influential manner and have therefore attracted greater scholarly attention. In the Ottoman Empire in 1876, a fiscally strapped government resorted to adopting a constitution involving an elected parliament and an attempt by that parliament to use oversight tools the document seemed to give it. Suspended after a short period, the Ottoman Constitution of 1876 still had

enormous impact on subsequent constitutional documents in much of the region. The Ottoman Constitution of 1876, which was the first self-described constitutional document promulgated in the Muslim world, did proclaim Islam to be the official religion and occasioned a brief but intense debate among leading religious officials about the appropriateness of writing a constitutional text in an Islamic political system.³⁹ Interestingly, however, the Ottoman experiment has drawn less attention from scholars, and those who have studied it have not focused centrally on any relationship with the Islamic legal heritage.⁴⁰

The early twentieth-century constitutional experiment in Iran, by contrast, has drawn very significant attention from scholars who focus on various angles—including the social, intellectual, political, and economic background. Indeed, the Iranian basic laws of 1905–06 initiated an uneven (and sometimes unhappy) but quite involved history of constitutional texts in that country that continues up to the present. While the Ottoman Constitution of 1876 was very much a product of the political elite, the Iranian experiment—coming also at a time of fiscal and political crisis—was a response as well to popular pressure. And the way in which Iranian struggles over the constitution pulled in Islamic intellectuals and legal specialists—often strongly in support of the Iranian constitutional experiment but with others skeptical and uninterested, and with an important strain actually hostile—has led subsequent generations of scholars of Iran and Islam to give significant attention to constitutionalism as an idea. And perhaps because of the multifaceted nature of the Iranian experiment—one which drew in popular participation and intensive intellectual debates—scholarly interest in the Iranian constitution and contemporary political struggle began to merge textual and intellectual analysis with social, political, and economic analysis from the beginning. Ervand Abrahamian and Said Amir Arjomand, for instance, have led such an interdisciplinary approach focusing on the economic and social infrastructure of Iranian politics and constitutional development.⁴¹

While the Iranian experiment of the early twentieth century has thus drawn interest from scholars in a wide variety of fields, outside of Iran, most of the initial scholarly interest focused less on specific texts and more on the intellectual dimensions of constitutionalism in the Muslim world—unsurprisingly because intellectuals gave great attention to the subject but constitutional texts tended to be fairly laconic on religious issues. And the debate among Muslim intellectuals has been wide-ranging. Beginning in the nineteenth century (and with full force in the twentieth century), the globalization of Islamic intellectual inquiry led to growing interest in the relationship and potential for compatibility between Islam and western liberal rationalism.⁴² As Muslim-majority countries grappled with challenges of state- and nation-building in the postcolonial era, they turned to constitutions as a vehicle for codifying issues of sovereignty, identity, and independence. In the first half of the twentieth century, prominent intellectuals in the Arab world (including the Syrian intellectual Rashid Rida, the Egyptian scholar Muhammad ‘Abduh, and the Egyptian jurist ‘Abd al-Razzaq al-Sanhuri) became increasingly critical of orthodox Islamic legal scholarship as excessively rigid and evinced varying signs of exploring a syncretism between western principles of liberal constitutionalism and the Islamic legal heritage. This generation of thinkers sought to construct new legal and political frameworks in which modern constitutional principles could coexist symbiotically with the shari‘a.⁴³

These early experiments in constitution-writing—occurring before the mid-twentieth century, mainly in the Middle East—sparked formative national dialogues and debates on the role of Islam in the modern state and society, with a range of different outcomes. Over time, the debate over the appropriate role of religion in constitutions has intensified in Muslim-majority societies and scholarly attention has widened considerably; the topic has attracted attention of scholars from neighboring fields (such as political science and law); there has even been growing interest in broader public and policy debates.

And just as the field attracted widening attention, those steeped in the classical Islamic legal tradition—led by scholars like Muhammad Qasim Zaman, Wael Hallaq, and Baber Johansen—have taken a far stronger interest in the past decade in the intersection between classical Islamic scholarship and the modern phenomenon of constitutionalism.⁴⁴ Rather than abandon the field to legal scholars, political scientists, and specialists in public policy, scholars of Islamic religion have broadened the scope of their own scholarship to incorporate insights from and respond to questions first introduced by other disciplines. For example, Anver Emon’s study of the secondary literature on the Constitution of Medina, a document allegedly drafted by the Prophet of which evidence is found exclusively in literary references by historians living centuries after the time of the text’s purported creation, explores the ways in which Muslim scholars have attempted to situate such texts in the political, social, economic contexts in which they were produced.⁴⁵ Nader Sohrabi has argued that two chronologically parallel constitutional revolutions in Iran and the Ottoman Empire in the early twentieth century were “historical products of their time” and must be understood not as isolated and purely local phenomena, but as part of a continuous wave of democratic movements that swept Russia, Mexico, China, Europe, and America in the short

period between the French and Russian revolutions.⁴⁶ Wael Hallaq has studied the ways in which Orientalist and other scholarly paradigms have structured modern understandings of Islamic law, and has recently applied an epistemological methodology to the legal, moral, and constitutional history of premodern Islam to argue that the idea of a modern Islamic state is both impossible and fundamentally self-contradictory.⁴⁷

A fairly new phenomenon, in which scholars combine a specialized legal training with a grounding in the classical tradition, has become notable in recent years.⁴⁸ This disciplinary intermingling has led scholarly interest to focus on three questions: *what* are textual provisions and what does Islamic law say; *who* has authority to decide such questions; and *where* does the debate take place within the breadth of the Muslim world.

III. What Role for the Shari'a?

As written constitutional documents have proliferated in various Muslim societies over the course of the past century and a half, several notable trends have increased the salience of the relationship between the shari'a and constitutionalism in scholarly eyes.

Most obviously, constitutional provisions for Islam have generally grown more extensive over time. Additionally, drafting processes have become more public and at least ritualistically participatory (that is, wider parts of the population have become nominally if not always more effectively involved). In the context of broad-based social movements seeking political reforms and human rights protections, Muslim publics have come to expect and demand that constitutional processes reflect the will of the people rather than the preferences of elites or foreign powers. For example, in the aftermath of the 2003 Iraq War, Ayatollah Ali Sistani issued a *fatwa* proclaiming that the members of the body tasked with drafting Iraq's post-war constitution should be democratically elected and that any draft constitution should be submitted to a popular referendum for ratification.⁴⁹ Finally, widening groups of intellectuals in the Muslim world have increasingly debated the relationship between the shari'a and constitutions. The overall result is that discussions that were restricted to more specialized circles in the nineteenth century burst into full public view in the twentieth century.

Scholarship has reacted to these trends in Muslim societies in two ways. First, and most notably, constitutional provisions on Islam have been analyzed in both historical and comparative fashion. Second, the wide-ranging intellectual debates over shari'a and constitutionalism have generated some cross-over between international scholarly debates and discussions among Muslim jurists, religious specialists, and intellectuals.

A. Exploring and Understanding Textual Provisions

Scholars have probed constitutional provisions for Islam in predominantly Muslim societies by seeking to understand the language used—they have worked historically, examining the origin of specific phrases and cross-nationally with broad comparative work that cuts across a broad swath of cases. More specifically, scholarly analysis on textual provisions has taken three forms.

First, the majority of such analysis has focused on particular cases and probed the effect of such provisions on the legal and political order. By considering precise wording and its implementation by authoritative institutions, such writings have focused on the ways in which Islamic provisions distribute interpretive authority between state, judicial, and religious authorities, and may induce conflict between these competing entities. For example, Saudi Arabia's Basic Law demands unconditional loyalty to the King but simultaneously constrains royal powers in accordance with the Qur'an, thus setting up a confrontation between what Frank Vogel terms "microcosmic judicial *ijtihad*" (defined as inner-directed instance-law linked to a concrete event) and "the macrocosmic ruler's *siyasa*" (meaning outer-directed rule-law, in the form of general, abstract rules issued by a worldly institution that has been delegated limited authority by God).⁵⁰ An example of microcosmic law would be a *fiqh* rule, which is technically a non-binding opinion, as opposed to binding instance-law that is unique to a particular event. In contrast, an example of a macrocosmic law would be a generally applicable law issued by the ruling authorities, such as legislation aimed at improving public welfare. The tension between these two forms of law is rooted in the question of whether an individual Islamic judge (*qadi*) is entitled to reject or invalidate a policy or decision made by the King if the latter is found to have violated injunctions of the Qur'an or the shari'a. Scholars have also looked to the evolving jurisprudence of Egypt's Supreme Constitutional Court (SCC) to explore the question of whether constitutions requiring adherence to shari'a are compatible with universal human rights principles and rule of law. In their study of the SCC's decision-making, Nathan Brown and Clark Lombardi concluded that the SCC has developed over many years a creative theory of Islamic law that interprets Islamic legal norms to be consistent with democracy, international

human rights, and economic liberalism.⁵¹

Iran's constitutional development has been another area of focus for scholars concerned with the impact of shari'a provisions on the distribution of political authority and the relationship of citizens to the state. Chibli Mallat's analysis of the conceptual origins of the Iranian constitution describes a "dual emanation of sovereignty" from two conjoined legitimacies, religious and political, which were fused in the concept of *wilayat e-faqih* "rule by the jurists."⁵² Asghar Schirazi notes that although the Iranian constitution was based on the universality and supremacy of shari'a, the infrastructure of the Islamic state it created borrowed heavily from western institutional models of parliament, the judiciary, and electoral systems.⁵³ Schirazi's work highlights the internal contradiction between the constitution's legalistic and democratic components, which are in tension with the paramount status of shari'a. Schirazi argues that growing recognition of the limitations of Islam as a legal and political basis for government has led to a gradual realignment of the political system in favor of pragmatism and the prioritization of the state's interests and policy agenda over shari'a.

Second, some research has focused on particular cases, but historically oriented—that is, they have explored how constitutional provisions have been products of a country's political history and socio-legal dynamics. Such attempts to understand how provisions related to Islam arose (and often expanded) has revealed that changes in text have not corresponded very directly to significant structural changes in the organization of state power; that is, wording has changed more significantly than structures of governance. Many scholars have cited Pakistan as an example of this trend.⁵⁴ Pakistan's 1956 constitution was forged out of heated negotiations between traditionalists (seeking a stronger role for Islam in the state) and secular modernists. In the end, the two sides agreed on the text of the document but their compromise hollowed out the Islamic provisions with ambiguity. As Afzal Iqbal described the gap between religious rhetoric and reality, "The constitution had an Islamic façade but the hard core was missing."⁵⁵ Other scholars have noted the disjuncture between text and reality in Egypt, where Tamir Moustafa notes that the foundations of the state were long considered to be secular in practice despite the introduction of a constitutional provision that explicitly defined shari'a as the principal source of legislation.⁵⁶ In the case of Indonesia, Arskal Salim notes that predominately secular aspects of the legal system—such as the laws governing marriage—have survived judicial review despite being inconsistent with Islamic marriage law because it is framed with reference to general principles of shari'a, such as the objective of reducing the frequency of divorce.⁵⁷

More recently, some scholars have begun to look more extensively than intensively; that is, they have begun broader comparative work. The fact that the "source clauses" incorporated in modern constitutions show some striking similarities among countries has been cited by scholars as evidence that Islamic constitutionalism is a global as well as a domestically driven phenomenon.⁵⁸ Partly there is evidence of conscious borrowing, in which a provision citing shari'a as "the main source of legislation" in Syria's constitution of 1950⁵⁹ was later adopted by Egyptian drafters of the Kuwaiti constitution. A different version then passed into the Egyptian constitution of 1971. Awareness of these clauses has since set off debates in various countries about whether to include such a provision and how it should be worded.

But even where there has been no conscious borrowing, some have argued that there are common processes at work. For instance, many have noted a significant increase in the number and strength of Islamic constitutional provisions since the 1950s, described by Nathan Brown as "Islamic inflation"—a phenomenon driven in large part by the nation-building efforts of governments seeking to construct cohesive political communities based on a shared religious identity and the more public processes by which constitutions have been written.⁶⁰ Academic analysis of this trend has focused on Islamizing constitutional reforms in the Arab world, chiefly Egypt, Algeria, Kuwait and Yemen, Syria, and Saudi Arabia. Increasingly, constitutions have evolved beyond their original function as technical documents outlining the structure of governing institutions into ideologically charged manifestos aimed at engineering the fabric of Muslim societies to support the political objectives of modern authoritarian states.⁶¹

Third, the standardization of Islamic provisions has allowed some to make some initial forays into broad comparative analysis. This approach was adopted by Tad Stahnke and Robert C. Blitt in their comparative textual analysis of the constitutions of forty-four predominately Muslim countries.⁶² Such work has only just begun, but it has been frequently used in both policy and purely scholarly circles as a way of understanding the variety of approaches used by Muslim societies.

But decontextualized comparative analysis, while useful for understanding the range of possibilities, has recently been supplemented by the far more labor-intensive task of developing a collection of more comparable but contextually and historically grounded studies of a large array of Muslim societies. Rainer Grote and Tilmann Röder have exhaustively

mapped the defining features of Islamic constitutionalism in North Africa, the Middle East, and Central and South Asia in a comprehensive collection of country-specific case studies that draws on the methods of comparative constitutional law, Islamic law, international law, and legal history. Their research also examines the ways in which the key concepts of constitutionalism, including fundamental rights, separation of powers, democracy, and rule of law, may be adapted to an Islamic context, and the prospects for a constitutional “renaissance” in the aftermath of the Arab Spring.⁶³

B. Debates among Intellectuals

As recently as half a century ago, questions about the relationship between Islamic law and constitutionalism were explored by a limited number of specialists in Muslim societies and their debates drew only sporadic scholarly attention. But recent developments have not simply heightened interest in the subject matter but also increased its political centrality—both enriching but also complicating scholarly debate. First, publics have become more involved. The growing adoption of formal (though often merely ritualistic) mechanisms for popular participation in constitutional drafting has occasionally been deepened by truly inclusive processes (there were, for instance, elected assemblies that played very significant roles in the drafting process in Kuwait in 1963 and Iran in 1979). Second, the “Islamic inflation” noted by Brown, in which provisions for Islam have tended to grow more fulsome over time, has increased the degree to which actors taking stands on various religious issues—from Islamic institutions to social movements and political parties—have staked strong constitutional claims.⁶⁴ Third, the wave of political changes (independence; revolutionary upheaval in some countries; regime change in many more) has brought issues of constitutional design and redesign to the forefront of politics and raised fundamental questions about the sources of sovereignty.

The result has been not only a widening (and sometimes quite contentious) debate in Muslim societies but also a set of scholarly attempts to understand those debates. That scholarly interest has probed both the general and the specific: general arguments concerning the compatibility of the shari’a and constitutionalism; and more specific concerns about constitutional elements. In this section we will examine the general scholarly focus on the intellectual debates (and the parallels between discussions among Muslim intellectuals and scholars of Islam), the understanding of specific constitutional provisions, and the analysis of general discussions of sovereignty.

1. Merging of internal and external debates

The scholarly debate on shari’a and constitutionalism centers on the ways in which the classical Islamic legal heritage may be compatible with constitutional and governance principles, and to what extent Islamic law and constitutionalism can be combined. The origins of this discussion—in the nineteenth and early twentieth centuries—were noted above. In recent decades, much of the agenda in many Muslim societies has been set by public intellectuals who have sought to anchor their claims very firmly both in the Islamic tradition and in constitutionalism. By arguing, for instance, that rule by consensus (*shura*) is not merely desirable and advisory for rulers, but obligatory and binding, these intellectuals explore ways of working simultaneously within both an Islamic and constitutionalist framework. Figures like Rashid al-Ghannushi of Tunisia, Tariq al-Bishri and Muhammad Salim al-’Awa of Egypt, ‘Abd al-Karim Saroush of Iran, and Masykuri Abdillah of Indonesia have sought both to locate support in Islamic sources for constitutionalist institutions, principles, and practices and to ground constitutionalism in more recognizably Islamic garb. For instance, al-Ghannushi refutes the notion that the concept of “divine sovereignty” provides a basis for rule of law and government by the people.⁶⁵

Such efforts at constructing what might be called an Islamic constitutionalism are anything but universally accepted. From the religious camp comes some sympathetic interest (Yusuf al-Qaradawi, for instance, has adopted many of their ideas and themes) but also strong concerns that Islamic concepts are being robbed of their content as part of this translation effort. From leftists and liberals also come some expressions of interest. Azmi Bishara, for instance, has written that “calls for the application of Shari’a may express a democratic tendency, or (at least) an opposition to despotism, simply because Shari’a rule implies restrictions on the exercise of political power over and above mere will of rulers.”⁶⁶ At the same time, liberals and leftists worry that constitutionalist ideas lose their content as they are grafted onto religious roots. In studying different versions of constitutionalism in Egypt, Bruce Rutherford notes some degree of convergence between the separate philosophies of Islamic and liberal constitutionalism, but he also argues that the ideal state envisioned by Islamic constitutionalists would be “far more invasive than that found in Western liberal regimes.”⁶⁷

Efforts to develop an Islamic constitutionalism have drawn extensive scholarly interest, and, because they are themselves undertaken by scholars, there is even some cross-fertilization between scholars of Islam and Muslim intellectuals grounding themselves in part in the Islamic legal tradition. Some non-Muslim scholars have echoed the views of the

Islamic constitutionalists. For instance, John Esposito and John Obert Voll have argued that the longstanding Islamic traditions of *shura*, *ijma'*, and *ijtihad* may not have precise equivalents in the vocabulary of western democracy, but they echo the principles of liberal constitutionalism.⁶⁸ Raymond Baker points to the formation of Egypt's moderate Islamist Wasat Party as a manifestation of an emerging reformist school of "New Islamists". And there are skeptics as well. Among non-Muslim scholars of Islamic law, Wael Hallaq has staked out a strongly skeptical position that the shari'a is not only in decline but is actually on the brink of extinction.⁶⁹ Hallaq argues that the advent of the modern nation-state ushered in "the demise of the shari'a" through the attempt to rigidify Islamic law in codified form, to separate the content of law from interpretative techniques formerly used to derive legal rules and norms, and to transfer legislative power from the 'ulama' to predominately secular rulers. And some scholars of human rights have shown a corresponding skepticism that the efforts of Islamic constitutionalists can lead to restrictions on the rights of women and minorities. Citing the example of Saudi Arabia's Basic Law, Anne Mayer argues that Islamic constitutionalism tends to reinforce illiberal constraints on personal freedoms and theocratic authoritarianism.⁷⁰

What is clear is that neither Islamic law nor constitutionalism remain unchanged by the effort to foster a syncretism between them. In that sense, those who seek to understand the relationship between them (even non-Muslim scholars) can easily find themselves as participants shaping the ways that both constitutional arrangements and the Islamic legal tradition are understood and implemented. Perhaps one of the most notable examples of this tendency is Abdallahi an-Na'im, a Muslim scholar at an American university. An-Na'im has argued for a form of Islamic constitutionalism that verges on secularism. Skeptical of the ability and effectiveness of the state to cultivate and enforce ethical behavior, An-Na'im nonetheless claims his approach recovers dormant understandings of the relationship between religion and politics in the Islamic tradition. Al-Na'im's self-proclaimed "retrieval project" aims to challenge the conventional historiographic narrative of Islamic constitutionalism by uncovering a "historical differentiation of state and religious institutions in Islamic societies."⁷¹ Khaled Abou El Fadl has argued far less radically for a more ethically inspired reading of the shari'a, claiming that the meaning of the Qur'an "is not fixed simply by the literal meaning of its words, but depends, too, on the moral construction given to it by the reader."⁷² Among scholars focused on the nexus between constitutionalism and shari'a, Abou El Fadl remains far more anchored in the Islamic legal heritage and far less insistent on an effort to disentangle the shari'a from politics. Tariq Ramadan, whose work has explored the challenge of Muslim expatriate communities living in secular European societies, has argued that integration within western constitutional contexts is possible due to the inherent flexibility of Islamic principles and values. Rather than taking a literalist approach to the revealed texts, Ramadan argues that silences and ambiguities within classical Islamic jurisprudence allow "human analytic reason to stipulate inevitably diverse Islamic rules, through space and time, but ones which are still Islamic."⁷³ While Ramadan's work does not deal explicitly with Islamic constitutionalism, his focus on the compatibility of Muslim communities with European constitutional structures has been used by the political scientist Andrew March to support a theory of "overlapping consensus" between philosophical elements of political liberalism and Islam.⁷⁴

2. The shari'a in the constitutional text

In addition to exploring (and joining) in the general debate about the relationship between the shari'a and constitutionalism, scholars have shown interest in far more specific issues involving constitutional texts. One such issue has been the effort to understand the motivation behind inscribing Islam or the shari'a in constitutions. Scholars, notably Noah Feldman, have focused on the expansion of religious provisions to meet political demands for justice, rule of law, and anti-corruption measures.⁷⁵

But just as striking has been the way some scholars have noted that blending constitutionalism with the Islamic legal heritage may actually empower state authority rather than limit or regularize it. The increasingly extensive provisions for Islam in the constitutions of some states carries the possibility that states will use them to shape religious understandings rather than the other way around. The phenomenon is not unique to Muslim societies. Ran Hirschl, a comparative politics scholar, makes this counterintuitive argument particularly strongly. Hirschl has claimed that the introduction of religious clauses is undertaken to curb what he terms "theocratic" politics: "Turning to constitutional law and courts to bring religiosity under check or defuse its potentially radical edge is a rational choice of action by secularists and moderates."⁷⁶

More modestly—and in a manner that pays far more attention to local context—some have noted that the introduction of Islamic provisions in constitutions has been to promote the consolidation of a strong and cohesive national ideology as the basis for independent statehood. Many scholars have highlighted the functional role of Islamic constitutionalism in advancing nation-building projects in the postcolonial period. Kristen Stilt argues that states do not necessarily adopt

Islamic constitutional clauses to institutionalize a particular brand of Islam, but rather to harness religious rhetoric in support of political or national goals; thus, decisions to integrate Islamic law within an overarching constitutional framework are often driven by economic, social, cultural, and even national security considerations.⁷⁷

3. Popular and divine sovereignty

Another specific area of interest has been exploring the effect of the debate over the source of law engendered by constitutional drafting efforts. The tension between popular sovereignty and divine sovereignty, for instance, is a staple of efforts to understand the post-1979 Iranian constitutional order. Schirazi finds no room for popular sovereignty in the doctrine of *wilayat al-faqih* (rule by jurists). Because political power emanates “from God alone and is transferred from God to the Islamic jurists,” Schirazi argues that the exercise of power “in no way depends upon the voice of the people for its legitimisation.”⁷⁸ Arjomand points out that a number of Iranian religious scholars evinced discomfort with the strong version of *wilayat al-faqih* institutionalized in Iran, given its inconsistency with the doctrine of popular sovereignty, to which the Iranian constitution “pays lip service.” However, these critics of Khomeini were largely suppressed through a campaign of intimidation and character assassination.⁷⁹

In the Sunni world, while the introduction of clauses declaring the shari'a as “a” or “the” source of law (discussed above) has had uncertain practical effects, it has given traditionalists a constitutional foothold to advance their Islamizing agenda, as Nathan Brown and Adel Omar Sherif have argued.⁸⁰ Constitutional language authorizing Islamic judicial review of legislation for compliance with shari'a has emboldened calls for the establishment of religious states and drawn Islamist movements into constitutional discussions.

Finally, legal scholars have addressed how Islamic provisions in constitutions may adversely affect the efficacy of international human rights instruments. Their interest stems from a concern for human rights when Muslim states attach reservations to their ratification of international human rights. International human rights standards allow states to recognize an official religion “if its followers comprise the majority of the population” as long as this arrangement does not violate the civil and political rights of non-believers and adherents of other faiths,⁸¹ but scholars disagree on whether or not women and religious minorities can be adequately protected from discrimination within an Islamic constitutional framework. Such concerns do not only come from non-specialists. Human rights advocates have charged that Islamic constitutional and other legal provisions have undermined democratic development by obstructing the ratification of international human rights treaties on human rights in Islamic states such as Saudi Arabia, Pakistan, and Iran, where religious considerations have been invoked as “the determining factor in voting against or abstaining from human rights initiatives,” according to Rüdiger Wolfrum.⁸² Karima Bennoune has similarly raised concerns about the impact of Islamic fundamentalist movements on human rights law and practice, and criticizes the field of international legal scholarship for tolerating illiberal and even violent applications of shari'a as legitimate cultural or religious practices.⁸³

IV. Who is Authoritative?

Scholarly interest in the intersection of constitutionalism with the Islamic legal tradition has taken on a markedly more practical focus in recent years. While previous scholarship focused on constitutional text and intellectual context, the actual operation of constitutional provisions on Islam—and the realization that they are flexible and can be applied and avoided in many different ways—has begun to draw considerable focus to interpretative authority: who is empowered to speak for the shari'a in constitutional matters?

Some scholars have advanced what appears at first glance to be a sharp challenge to the question in this form. Hallaq, as described above, has argued that the shari'a, untethered from its anchoring in specific techniques and modes of transmission, is fluid and evolves new meanings in relation to changing historical contexts; the idea of enshrining Islamic law in constitutional texts and allowing the institutions of the modern state to interpret and implement it would thus seem to be alien to its nature. From a very different perspective, Lama Abu-Odeh has argued that the law in almost all Muslim societies is legislated, often based on civil law sources, so that the extreme interest in Islamic law in the western academy has fostered what she implies are distracting, antiquarian studies divorced from legal realities.⁸⁴ The implication of Abu-Odeh's view is that the question places far too much weight on the shari'a. Hallaq, on the other hand, emphasizes the role of Muslim jurists in shaping historical interpretations of shari'a and notes that “the particular legal norms to be derived from this moral domain are situational, subject to the never-ending *ijtihad*.”⁸⁵ The implications of Hallaq's view is that the focus on the shari'a and constitutions overstates the degree to which the former informs or guides constitutional practice in a modern state.

While framed very strongly, these critiques serve as a useful corrective more than a cause for intellectual resignation. Hallaq's argument should serve as a reminder that when the shari'a is embodied, interpreted, or applied in the institutions of a modern state, some fundamental shifts take place from the Islamic legal heritage. And Abu-Odeh's practical concern with what the law actually is in practice should encourage scholars to anchor their understandings in current legal, political, and institutional realities. While very different in spirit, there is no logical contradiction between their views and that of Clark Lombardi who insists that scholars take what judges and legislators—employees of the modern state—describe as Islamic law very seriously; to the extent that Islamic law is practiced in many Muslim societies it is done precisely through the actions and interpretations of such individuals. Hussein Ali Agrama similarly views religion and state as intertwined in each other's ostensibly separate realms, and he argues that the shari'a is shaped by "the conditions of secular power and possibility established by a modern state."⁸⁶

The differences among these approaches stand in stark relief with these recent scholarly contributions, but the basic issue underlying them is far older and indeed is intimately connected with the nature of political authority in a society that strives to be governed in accordance with God's will. A strong intellectual and popular consensus in support of this goal amounts to an acceptance that the shari'a—however defined—is binding for individuals and societies seeking to live in accordance with Islamic principles. And this consensus is the basis for the binding nature of the shari'a in Islamic constitutions, as all man-made laws and policies must comply with the injunctions of Islam.⁸⁷

But the location of ultimate sovereignty with God presents a major dilemma for the construction of man-made political systems, and Islamic scholars have been confronted with the challenge of reconciling the principle of divine sovereignty with the necessity of delegating some interpretive and implementing authority to human institutions. As Sherman Jackson has noted, the process by which jurists traditionally acquired religious authority and transmitted it to their students took place "totally outside the apparatus of the state."⁸⁸ Thus, with the rise of Islamic constitutional states, the ruling authorities recognized that sources of religious authority operating outside of the government's jurisdiction posed a potential challenge to their sovereignty and legitimacy. Thus, states endeavored to draw away religious authority from non-state actors and obtain an influential role over the interpretation and application of Islamic law—a trend drawing frequent scholarly attention. Although modern states have attempted to transfer religious authority to elected parliaments and other government officials, their efforts have only been partially successful. State-sanctioned Islam continues to be challenged by entities that resist control by the ruling authorities: religious scholars, judges, and Muslim communities at large. The contestation of interpretative authority among these competing groups represents a serious issue for the sovereignty of modern Islamic states.

Modern states derive their legitimacy from maintaining a monopoly on the creation and enforcement of rules governing their citizens. For this reason, political authorities often view warily the existence of an autonomous Islamic legal realm beyond state control. Of course the autonomy was never complete—scholars of the Islamic legal tradition including Hallaq and Zaman have noted that as early as the Umayyads, rulers began patronizing these elites in an effort to co-opt their religious authority under state control.⁸⁹ The trend toward state encroachment into the religious realm seems to have intensified in many societies in the nineteenth century and continued into the postcolonial period. But it was met with significant resistance from non-state authorities—jurists, *'ulama'*, and religious communities—which challenged the ruling authorities' official interpretation of Islam and sought to promote their own understandings as authoritative.

States in which modern constitutions coexist with Islamic legal traditions have a strong incentive to co-opt or incorporate the latter, so that the state maintains a degree of control over official interpretations of the shari'a. Islamic constitutional states have, to varying degrees, delegated interpretative authority to one or more institutions and bodies: the judiciary, religious scholars (*'ulama'*), parliament and other state officials, or the broader community of citizens. Yet no entity has successfully monopolized the contested realm of interpretative authority; state institutions have competed for control over this domain with religious authorities in a relationship that is both symbiotic and at times antagonistic.

In this section we will explore how scholars have worked to understand how the constitutional structures of the modern state in predominantly Muslim societies empower (or limit) the authority of judges, *'ulama'*, parliamentarians and other state officials, and the community of Muslims to speak authoritatively on behalf of Islamic law.

A. Judges, Constitutional Interpretation, and the Shari'a

The insertion of Islamic provisions into constitutional texts has made judges potentially important actors in determining the ways in which Islamic principles and the shari'a inform, shape, or constrict political authorities. That potential has been

realized in several influential countries, including Pakistan and Egypt, where judicial review has played a powerful role in shaping official interpretations of shari'a, and also functions as a preemptive constraint on law-makers, who have had to adapt to increasingly assertive judiciaries by tailoring new legislation to conform with their rulings.

Thus, scholars have examined the question of whether the expansion of judicial authority over time is more the result of textual changes in Islamic constitutions or the product of increasing activism and initiative on the part of judicial bodies. Martin Lau attributes the rise in the importance of Islam in Pakistan's legal and political realms to "judicial self-assertion" and innovative readings of the shari'a. Lau writes, "It is the flexibility of Islamic law in the hands of Pakistan's higher judiciary which has ensured and fostered the role of Islam in the legal system."⁹⁰ However, Lombardi attributes the expansion of judicial authority more to the introduction of specific justiciable shari'a clauses and the creation of new judicial institutions—such as Pakistan's Federal Shari' at Court—than to assertiveness by individual judges.⁹¹

The focus on judicial and institutional actors is unsurprising since explicit provisions are rare and are often very general on the specific matter of interpretive authority over the shari'a. Saudi Arabia is one of the few Muslim states that defines judges as the authoritative interpreters of the shari'a. In Iran as well, the constitution empowers the Council of Guardians to veto all laws deemed to be in violation of the shari'a, but the Council's status is complicated by the presence of parallel authorities with vaguely defined and often competing mandates: six members of the Council are appointed by the *rahbar* (Supreme Leader), who enjoys sole authority to resolve conflicts between the Council and the *Majles* (Parliament). Separate from the *Majles*, another clerically dominated body—the *Maslahat* Council—has undermined the authority of the Council of Guardians by exercising its independent law-making authority (enhanced by constitutional amendments in 1989) to amend legislation or enact entirely new laws that are not subject to appeal.⁹² More typical, however, is Pakistan, where interpretive authority is vaguely defined and fiercely contested among judges, state institutions, and religious scholars.⁹³

Yet however vaguely defined, the potential role for judges has been anchored in a large number of countries by provisions for the judicial review of the constitutionality of legislation (often through the construction of specialized constitutional courts or councils). Provisions for judicial review rarely mention the shari'a at all, but they effectively bring it within judicial purview. Indeed, the expansion of Islamic constitutional provisions has corresponded to an expansion in the political power of the judiciary. But although judicial bodies have increasingly asserted the right to judicial review and constitutional interpretation, judges are still subject to significant oversight and interference from the executive institutions they should be overseeing. Thus, Islamic constitutions have often enhanced the authority of judges more than their autonomy.

More recent scholarship has linked judicial opinions involving constitutional provisions to more general arguments about the compatibility of Islam with democratic and constitutional principles. Pointing to the cases of Egypt and Pakistan, Lombardi argues, "The courts have developed an interpretation of Islamic law (and of the restraints that Islamic law places on the ruler) that is consistent with many elements of liberal constitutionalism and, in some ways, reinforces it."⁹⁴

B. 'Ulama' and Religious Specialists

Scholarly interest in the sources of interpretive authority has prompted inquiry into the role of the '*ulama*' (Muslim religious specialists) in promoting or challenging the constitutionalization of Islamic law. In different historical contexts, the '*ulama*' have at times functioned as autonomous nodes of religious authority that challenge temporal rulers' efforts to maintain a monopoly on the interpretation and enforcement of shari'a; However, in other cases, the '*ulama*' have enjoyed symbiotic and mutually beneficial partnerships with political authorities. Scholars in the field have focused on the interface between the '*ulama*' and the state to better understand how interpretive pluralism shapes the evolution of Islamic constitutions and their application.

The community of traditionally educated Muslim religious specialists has been active and influential in Muslim societies for over a millennium. Whereas the '*ulama*' once maintained a near-monopoly on authoritative religious knowledge, their privileged status has been challenged, and, some scholars argue,⁹⁵ significantly eroded in the modern era.

The rise of print media, public education, and the expansion of bureaucratic institutions dedicated to regulating all aspects of political life and religious activity have contributed to what Zaman describes as a "fragmentation" of the authority of the '*ulama*'. According to Zaman, the determination of modern states not only to regulate religion but also to frame the relationship between religion and state in constitutional form has deepened the challenge to the traditional

religious specialists, confronting them not only with rivals but also with more heavy-handed oversight by the state.

Two opposing camps of scholars offer divergent views on the extent to which the *'ulama'* have (or have not) adapted successfully to the legal challenges of the modern era. In the first camp are those who regard the *'ulama'* as antiquarians resisting change. The French sociologist Olivier Roy regards the *'ulama'* as bastions of traditionalism who have "endeavored to ignore or disqualify anything new."⁹⁶ In his study of the role of the *'ulama'* in India and Pakistan in the first half of the twentieth century, Syed Zaidi highlights the antagonistic relationship between a traditionalist class of *'ulama'* and the Pakistani Muslim revivalist leader Abul Ala Maududi, who viewed the change-averse *'ulama'* as an impediment to his ambitious legislative agenda envisioning sweeping social reforms.⁹⁷ John Obert Voll argues that the *'ulama'* voluntarily adopted a quietist, apolitical role during the Ottoman era, in which they were co-opted into submission through state patronage.⁹⁸

However, a second camp argues that the *'ulama'* have successfully resisted stagnation by adapting to modern challenges. Zaman, a leading voice within this group, uses the case of Pakistan's Deobandi madrasas to argue that religious scholars have enhanced their influence in a number of Muslim-majority societies by responding to change with activism, flexibility, and innovation.⁹⁹ Asef Bayat chronicles the efforts of modernist *'ulama'* in Egypt to resist British colonial rule. The nationalist-minded *'ulama'* sought to leverage Islam as a platform for innovation and progress in Muslim societies that would enable them to compete economically and politically with their European rivals.¹⁰⁰ Supporting the view of *'ulama'* as agents of social and political change, Mongol Bayat identifies the *'ulama'* as the primary intellectual catalyst that precipitated Iran's constitutional revolution of 1905–09.¹⁰¹

The scholarly debate over the *'ulama'* is directly tied to conceptions of their constitutional role. Both camps acknowledge that the collision of the traditional community of *'ulama'* with the machinery of the modern constitutional state has led to politically portentous struggles in some societies—sometimes replicated within the *'ulama'* themselves. This may have played out most dramatically in Iran. Hamid Algar refers to Iran's Constitutional Revolution (1905–09), which culminated in the formation of an elected parliament, as a case in which the conflict between the *'ulama'* and the bureaucratic state was particularly pronounced.¹⁰² Although a number of prominent reformist *'ulama'* initially supported the revolution, seeing it as a likely tool for meeting public needs in accordance with Islamic principles, some became disillusioned a few years later when a second wave of constitutional reformers sought to disestablish Islam and introduce a secular educational system.¹⁰³ Said Arjomand argues that scholars have underestimated the significance of the *'ulama'*'s opposition to constitutionalism in Iran.¹⁰⁴ Division and debate among the ranks of the *'ulama'* inspired what is recognized as one of the first theories of Islamic constitutional government—without reference to European models—by the Iranian Shi'a religious scholar Muhammad Husayn Na'ini, who argued that in the absence of the Prophet/Imam, it was impossible to fully implement shari'a, thus necessitating the next best temporal alternative: a political system designed to constrain executive power and condition sovereignty on the "performance of duties for the public benefit." In Na'ini's view, this system of limited and responsible government required two features: a constitution and a consultative assembly.¹⁰⁵ A. Hairi is another scholar whose work has highlighted growing clerical opposition to constitutionalism in Iran. Hairi identifies a schism between two rival camps of *'ulama'*: "constitutionalist *'ulama'*" aligned with the bourgeois nationalists who believed that constitutions could be designed in ways consistent with the shari'a and "absolutist *'ulama'*" affiliated with the Royal Court and conservative middle class who rejected constitutionalism as fundamentally incompatible with Islam. This ideological conflict within the *'ulama'* gave rise "to a considerable volume of political literature, both for and against constitutionalism."¹⁰⁶

The fragmentation of the *'ulama'* throughout the Islamic world has allowed specialists who are not products of a traditional religious training to participate in debates. In the early centuries of Islam, the *'ulama'* were less identifiable as a distinct group and that phenomenon might be returning in recent decades. There are, to be sure, numerous formally trained scholars, many of whom occupy positions in officially supported religious institutions. But they are joined as specialized participants in discussions about the relationship between the Islamic legal heritage and the appropriate legal and constitutional order with those from universities, research institutes, and even popular movements. Such specialists adopt a wide range of attitudes toward positive law. On the more permissive end of the spectrum are those such as Rashid al-Ghannushi and Kamal Abu al-Majd, who approach the shari'a as a body of general guidelines flexible enough to accommodate man-made laws, so long as they do not directly contravene the Qur'an or Sunna. Drawing on the work of moderate Islamist thinkers, Bruce Rutherford has suggested that a reform-minded wing within the Muslim Brotherhood is working to accommodate a concept of citizenship and universal civil rights independent of religion within the framework of Shari'a.¹⁰⁷ The arguments of such thinkers—using older concepts such as the *maqasid* of the shari'a or *maslaha*—have now passed into general usage, and mainstream Islamist intellectuals often promote a shift away from literalism and

specific rules and toward an interpretation of abstract principles in ways that advance the common good.¹⁰⁸ Felicitas Opwis explains the growing prominence of the concept of *maslaha* in Islamic scholarship in part as an adaptive intellectual response to the forces of social and political change that provides a mechanism for reforming and modernizing shari'a. While noting the different ways the concept was used in early centuries, she notes that it now "presents jurists with a framework to tackle the problem, inherent in a legal system that is based on a finite text, of bringing to bear the limited material foundation of the law (i.e., Quran and hadith) on everyday life in an ever-changing environment."¹⁰⁹ The effects of such arguments are not merely intellectual but can be constitutional and legal: proponents effectively demand a high threshold of "repugnancy" for invalidating legislation, perhaps reducing the authority of the '*ulama*' relative to temporal law-makers.

But these views are hardly uncontested. The rise of salafism and the increasing willingness of salafi legal specialists to engage in broader debates outside their own circles has introduced a far more textually oriented approach to such discussions, resistant to reading broad themes that might be seen as devices to trump particular shari'a-based rules. Describing the strict textualist mode of salafi thought, Bernard Hakal argues that salafi scholars reject alternative understandings of Islam, which they view as "corrupt deviations from the straight path of Islam."¹¹⁰ And it is not only salafis who view the latitude given to positive legislation very skeptically. 'Abd al-Qadir 'Awda, for instance, a former judge who became active in Egypt's Muslim Brotherhood, tried to develop exacting shari'a-based standards for all laws originating outside of the shari'a; others continue to insist on leaning heavily on the '*ulama*' to articulate strict interpretations of Islamic law that limit expansive interpretations.¹¹¹

C. Parliament and State Officials

In juxtaposition to the '*ulama*' and Muslim specialists who assert interpretations of shari'a outside of the state, parliament and government officials also play an active role in shaping Islamic constitutional doctrine. Scholars have focused on the ways in which state officials and law-makers have strategically deployed the language of shari'a as well as Islamic constitutional reforms to bring about structural changes in political systems—either in an authoritarian or democratic direction. For example, Islamic constitutions have been leveraged to consolidate power in the executive branch through the assertion of divine legitimacy, but have also been deployed by proponents of Islamic democracy to support a redistribution of power in the direction of the legislature.

The effort to construct a constitution that is grounded in Islamic legal principles can be double-edged. On the one hand it can be seen as a way of limiting the authority of public officials and holding them accountable to standards that are not wholly of their own making. But it can also empower those same officials and encourage them to use constitutional provisions on Islam to augment rather than limit their authority. Individual leaders have attempted to bolster their personal Islamic credentials as a basis for advancing their legislative and policy agendas. The king of Morocco has leveraged his religious claims as "commander of the faithful" to promote codification of shari'a-based personal status laws and induce the parliament to accept the interpretations he has favored.¹¹² Whatever its original intent, *wilayat al-faqih* in Iran has had a similar effect of subordinating religious inquiry to political authority. States have attempted to regulate and maintain an official brand of Islam by bringing clerical activities and religious scholarship under the umbrella of state-sanctioned institutions. In post-Attaturk Turkey, the state has attempted to control the role of religion in public life and the legal realm through the official state office for religious affairs known as the Diyanet.¹¹³

Some Islamic constitutionalists have responded to this challenge by seeking to integrate democratic mechanisms into the understanding of an appropriate Islamic constitutional framework, such as those (like Egypt's al-Awwa and Tunisia's Ghannushi) who find divine sovereignty to be compatible with democratically elected legislative bodies. These elected assemblies, they argue, should have the authority to deliberate among multiple potential interpretations of shari'a and apply the rule that best serves the public interest.¹¹⁴ Some strains of recent Shi'i thought can be used to point in a similar direction. Writing on the intellectual background to the Iranian revolution, Chibli Mallat identifies Muhammad Baqir al-Sadr's claim of "dual emanation of sovereignty" from both God and the people, giving rise to a "double-tier separation of powers" in which the people indirectly control the exercise of legislative and executive powers through direct election of their president and parliamentary representations.¹¹⁵

D. Popular Sovereignty

Indeed, the idea that an Islamic constitutional system can blend divine and popular sovereignty has drawn considerable attention among Muslim intellectuals. Some skeptics long maintained that there is no place for popular sovereignty in the

Islamic state. Abdul A'la Mawdudi, the founder of Jamaat al-Islami in Pakistan, concluded that Islam is “the very antithesis of secular Western democracy” based solely on the sovereignty of the people.¹¹⁶ However, beginning in the 1980s and 1990s many religious intellectuals in various Muslim societies became increasingly receptive to the possibility that divine sovereignty does not necessarily contradict popular sovereignty, and that the Islamic principle of *shura* (consultation) provides a basis for engaging the public at large in an inclusive dialogue with both the state and religious establishment. Modern Islamic thinkers have cited the principle of *shura* as evidence of the compatibility of Islam and democracy, suggesting a form of popular sovereignty in which citizens are entitled to share or at least challenge the religious authority claimed by their leaders and elite jurists.

Academic interest in these debates has focused on Pakistan, Egypt, and especially Iran, where the post-1979 constitutional order promised both divine and popular sovereignty; it also seemed to subordinate the state to Islamic law but also put officials in the position to speak authoritatively for Islamic law. Scholarship has focused not only on these paradoxes but also on alternatives to the Iranian experiment that have been offered. Muhammad Baqir al-Sadr, an Islamic scholar executed by the Iraqi regime in 1980, showed far more comfort with democratic mechanisms than Khomeini, though he ultimately swung in support of Khomeini in the immediate wake of the Iranian Revolution. Al-Sadr proposed a unique interpretation of divine sovereignty in which authority is exercised by the people, who are in turn accountable to God.¹¹⁷ A small minority of liberally minded Iranian '*ulama*', including Mohsen Kadivar, pursued this line by challenging the Iranian constitution's delegation of religious and political authority to the scholarly elite, arguing instead for the supremacy of popular sovereignty over *wilayat al-faqih*.¹¹⁸ The Iranian scholar Abdolkarim Soroush believed that Islam was fully consistent with participatory democracy, and argued for a reinterpretation of classical Islamic texts to provide a basis for guaranteeing individual sovereignty, rule of law, and a just system of government based on the obligations of rulers to rights-bearing citizens.¹¹⁹ Soroush promoted a brand of Islamic constitutionalism inspired not by western models of political liberalism, but firmly anchored in and legitimized by classical Islamic jurisprudence. Soroush said in an interview, “An ideal religious society cannot have anything but a democratic government.”¹²⁰

V. Where Does Debate Take Place?

While scholarly interest in the relationship between Islamic law and constitutionalism has broadened and deepened, it still remains highly geographically focused. There are scholars who have examined the issues in a wide range of settings, but (as the previous sections made clear) a very small number of countries have drawn the bulk of scholarly attention: Iran, Egypt, and Pakistan most particularly. Other countries—such as Afghanistan, Iraq, and Indonesia—have drawn sporadic attention as well, often in reaction to specific constitutional transitions. There is a combination of factors that has led to a special interest in these cases: a historically prolonged experience; international attention (and sometimes, as in the cases of Iraq and Afghanistan, direct international involvement); dramatic political contestation on a domestic level; and the scope of international influence (with debates in Pakistan and especially Egypt reverberating outside of the country).

This focus is thus understandable, but it leads to significant gaps. For instance, it passes over an attempt to understand why some predominately Muslim countries have not introduced any constitutional provisions concerning the Islamic nature of the state or official religion. In addition, the focus has been on political systems that are—at least on paper—highly centralized. However, in a number of countries—including Nigeria and Indonesia—constitutional silence on the role of Islam at the national level has given rise to a phenomenon described by Ran Hirschl as sub-national “religious jurisdictional enclaves,” in which a permissive constitutional framework allows local governments to pass Islamic legislation with little resistance from federal authorities.¹²¹ In the case of Indonesia, the province of Aceh was granted a “special autonomy” status that included the right to implement shari'a law as part of a peace agreement with the national government negotiated to end three decades of separatist fighting. In 2009, Aceh law-makers took advantage of this autonomous status to pass a law imposing death by stoning on Muslim adulterers, inspiring other local governments to introduce shari'a provisions and criminal penalties. At least sixty-six local shari'a ordinances have been promulgated and enforced between 2005 and 2010, prompting human rights activists to raise concerns that the federal government's tolerance of local religious laws outside of the constitutional framework is enabling the *de facto* implementation of shari'a-based norms at the national level, even though the constitution makes no mention of it. But despite the increasing codification of shari'a law at the local level, R. Michael Feener has suggested that “the actual implementation of law in the province has been minimal,” raising the possibility of a discrepancy between laws that exist on the books and their lax enforcement in practice.¹²²

Nigeria is another case in which a nominally secular constitution has permitted the establishment of sub-national

jurisdictional enclaves in which local shari'a ordinances have flourished. Nigeria's constitution, while secular and prohibiting the establishment of a state religion, simultaneously allows sub-national units to grant additional jurisdiction to their local courts, leading to a significant expansion in the jurisdiction claimed by shari'a courts.¹²³ As a result, the shari'a has been instituted as a main body of civil and criminal law in nine Muslim-majority states and in some parts of three Muslim-plurality states since 1999.

VI. Conclusion

As constitutional texts have emerged as battlegrounds over the distribution of authority and the role of Islam in Muslim-majority societies, scholarly interest in the intellectual history and historical development of these documents has intensified. The study of the intersection of Islamic law and constitutionalism was initially richer in its focus on broad intellectual themes but is increasingly showing signs of focus on actual practice. This is the outcome of two processes: a growing tendency among scholars of Islamic law toward an extension of their analysis to political and social developments in Muslim-majority societies that were once considered beyond the scope of their field, and heightened interest in the subject from an increasingly wide array of disciplines and methodological approaches. And it might also be said that Lombardi's suggestion that scholars take non-'*ulama*' or "lay Islamist" actors seriously as interpreters and transmitters of Islamic law is gradually winning out.¹²⁴ Scholars concerned with the relationship between the shari'a and constitutions are increasingly expanding their focus to include a wide variety of institutions and actors—particularly Islamic legal professionals and lawyers¹²⁵—whose understandings of Islamic law are competing with those of the clerical elite in an environment of unprecedented intellectual pluralism, in which historical monopolies on interpretive authority are gradually eroding.

The tasks for scholarship in the coming years will be threefold.

First, those writing from different disciplines will have to strive to draw on (and fertilize) each others' work; the time for textual analyses of laws that ignore political context and history or for political understandings that ignore debates among rival religious, ideological, and intellectual visions is past. Increasingly those from different disciplinary perspectives are asking similar questions, but they often seem to be carrying out their discussions in isolation from each other.

Second, the sharply limited geographical focus of past scholarship needs to be widened to encompass a far more varied array of experiences than has previously been noted in much work. Attention has focused on a small number of cases, many of them centered broadly in the Middle East and neighboring regions. This is understandable, since these cases (Egypt, Iran, and Pakistan, for instance) have drawn a disproportionate share of the attention in the Muslim world. But very significant cases (such as Malaysia and Indonesia) as well as the influence of constitutional thought in Muslim-minority societies (such as India and Europe) needs to be more fully integrated within scholarly understandings.

Third, the increasingly transnational aspects of the issue—in which debates and even clauses migrate across national borders—should be a fruitful avenue of inquiry. Scholars of constitutional law more generally have noted a significant internationalization of what had appeared to earlier generations to be primarily a national experience. The same may be taking place within the Muslim world with the development of a transnational set of Islamic approaches to constitutional questions. In a sense, this trend has always been visible since the beginning of the experience with written constitutions in the nineteenth century, but it is only now beginning to receive full attention as a transnational phenomenon.

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Notes:

- (1) Beau Breslin, *From Words to Worlds: Exploring Constitutional Functionality* (Baltimore: Johns Hopkins University Press, 2009), 8.
- (2) Article 12, Constitution of the Islamic Republic of Iran (1979, amended 1989).
- (3) Article 149 (1), Constitution of Afghanistan (2004).
- (4) Article 4, Constitution of the Republic of Turkey (1982).
- (5) Article 161, Constitution of Yemen (1991, amended 2001).
- (6) Article 109(b), Constitution of the Maldives (2008).
- (7) Article 4(5) of the Constitution of Brunei (1959, amended 1984).
- (8) Article 203D(1), Constitution of the Islamic Republic of Pakistan (1973, amended 2015). Article 203D(1) states, "The (Shari'a) Court may, either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decided the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet, hereinafter referred to as the

Injunctions of Islam.”

(⁹) Article 115(1B), Constitution of the Republic of Somaliland (2001).

(¹⁰) Article 4, Constitution of the Arab Republic of Egypt (2012).

(¹¹) Article 7, Constitution of the Arab Republic of Egypt (2014).

(¹²) Article 167, Constitution of the Islamic Republic of Iran (1979, amended 1989).

(¹³) Article 77 of the Constitution of the Islamic Republic of Iran (1979, amended 1989) states that “international treaties, protocols, contracts, and agreements must be approved by the Islamic Consultative Assembly.” Article 26 of the Basic Law of Saudi Arabia (1992) states, “The State shall protect human rights in accordance with the Sharia.”

(¹⁴) e.g. Article 2 of Egypt’s 2014 Constitution states, “The principles of Islamic Sharia are the main source of legislation.”

(¹⁵) The four states that invoke Islamic principles, law, or jurisprudence in their constitutions without having declared Islam as the state religion are Comoros, Gambia, Sudan, and Syria. See Tad Stahnke and Robert C. Blitt, “The Religion–State Relationship and the Right to Freedom of Religion or Belief,” United States Commission on Religious Freedom (March 2005), 9.

(¹⁶) Article 17, Constitution of the Islamic Republic of Afghanistan.

(¹⁷) Article 33, Basic Law of Saudi Arabia.

(¹⁸) Article 152, Constitution of Yemen (1970).

(¹⁹) One example is the work of Ahmad Kamal Abu al-Majd, an influential Egyptian legal scholar trained in part in the United States. See his “Nazarat hawla al-Fiqh al-Dusturi fi al-Islam” [A View Concerning Constitutional Jurisprudence in Islam], lecture delivered January 9, 1962 (Cairo: Matba’at al-Azhar).

(²⁰) Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1999), 4–6 and 23–24.

(²¹) Marshall G.S. Hodgson, *The Venture of Islam, Volume 1: The Classical Age of Islam* (Chicago: University of Chicago Press, 1974), 317–318.

(²²) Joseph Schacht, *Introduction of Islamic Law* (Oxford: Clarendon Press, 1964), 112 and Noel Coulson, *History of Islamic Law* (Edinburgh: University of Edinburgh Press, 1964), 120–121. See also John Strawson’s discussion of Schacht and Coulson: John Strawson, “Islamic Law and English Texts,” in *Laws of the Postcolonial*, eds. Eve Darian-Smith and Peter Fitzpatrick (Michigan: University of Michigan Press, 1999), 112–113.

(²³) G.E. Von Grunebaum, *Islam: Essays in the Nature and Growth of a Cultural Tradition* (Menasha, Wisconsin: George Banta Publishing Company, 1955), 7.

(²⁴) Von Grunebaum, *Islam*, 74.

(²⁵) G.E. Von Grunebaum, *Islam: Essays in the Nature and Growth of a Cultural Tradition* (London: Kessinger Publishing, 1961), 75.

(²⁶) Von Grunebaum, *Islam* (1961), 76.

(²⁷) Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Brill: Leiden, 1999), 61–62.

(²⁸) Johansen, *Contingency in a Sacred Law*, 1.

(²⁹) Bernard G. Weiss, *The Spirit of Islamic Law* (University of Georgia Press, 2006), 182.

(³⁰) See discussion of al-Ghazali’s work in Halim Rane, *Islam and Contemporary Civilization: Evolving Ideas, Transforming Relations* (Melbourne: Melbourne University Press, 2010), 93–96.

- ⁽³¹⁾ See Clark Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of Shari'a Into Egyptian Constitutional Law* (Leiden: Brill, 2006).
- ⁽³²⁾ Andrew March, "Theocrats Living under Secular Law: An External Engagement with Islamic Legal Theory," *Journal of Political Philosophy* 19, no. 1 (2009): 28–51.
- ⁽³³⁾ Anver Emon, *Islamic Natural Law Theories* (Oxford: Oxford University Press, 2008), 258–286.
- ⁽³⁴⁾ Felicitas Opwis, "Maslaha in Contemporary Islamic Legal Theory," *Islamic Law and Society* 2, no. 2 (2005): 182–223.
- ⁽³⁵⁾ Noah Feldman, *The Fall and Rise of the Islamic State* (Oxford: Oxford University Press, 2008).
- ⁽³⁶⁾ Haim Gerber, *Islamic Law and Culture, 1600–1840* (Boston: Brill, 1999), 24. See also Haim Gerber, "The Public Sphere and Civil Society in the Ottoman Empire," in *The Public Sphere in Muslim Societies*, ed. Miriam Hoexter, Shmuel N. Eisenstadt, and Nehemia Levtzion (Albany: SUNY Press, 2002), 66–67.
- ⁽³⁷⁾ Albert Hourani, *Arabic Thought in the Liberal Age 1798–1939* (Cambridge: Cambridge University Press, 1983), 69–76.
- ⁽³⁸⁾ See Carl Brown, "Introduction," in *The Surest Path: The Political Treatise of a Nineteenth-Century Muslim Statesman* (Cambridge: Harvard University Press, 1967).
- ⁽³⁹⁾ Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton: Princeton University Press, 2012), 71.
- ⁽⁴⁰⁾ Robert Devereux, *The First Ottoman Constitutional Period: A Study of the Midhat Constitution and Parliament* (Baltimore: Johns Hopkins University Press, 1964).
- ⁽⁴¹⁾ Ervand Abrahamian, *Iran: Between Two Revolutions* (Princeton: Princeton University Press, 1982). See also Said Amir Arjomand's discussion of economic frustration and social stratification under the Shah's rule as contributing factors to the political awakening that preceded the 1905–11 Constitutional Revolution in *The Turban for the Crown: The Islamic Revolution in Iran* (Oxford: Oxford University Press, 1988), 34–35.
- ⁽⁴²⁾ Muhammad Qasim Zaman, *The 'Ulama in Contemporary Islam: Custodians of Change* (Princeton, New Jersey: Princeton University Press, 2001), 171.
- ⁽⁴³⁾ Nathan Brown, *Constitutions in a Non-Constitutional World: Arab Basic Laws and the Prospects for Accountable Government* (Albany: SUNY Press, 2002), 164. See also, "Introduction," in *Islamic Law and the Challenges of Modernity*, ed. Yvonne Yazbeck Haddad and Barbara Freyer Stowasser, 2–3.
- ⁽⁴⁴⁾ Muhammad Qasim Zaman, *The 'Ulama in Contemporary Islam*; Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005); Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1999).
- ⁽⁴⁵⁾ Anver Emon, "Reflections on the Constitution of Medina," *UCLA Journal, of Islamic and Near Eastern Law* 1 (2001–02): 103–133.
- ⁽⁴⁶⁾ Nader Sohrabi, *Revolution and Constitutionalism in the Ottoman Empire and Iran* (Cambridge: Cambridge University Press, 2011), 2–3.
- ⁽⁴⁷⁾ Wael Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2012).
- ⁽⁴⁸⁾ See Clark Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of Shari'a Into Egyptian Constitutional Law* (Leiden: Brill, 2006); Kristen Stilt, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (Oxford University Press, 2011); Haider Ala Hamoudi, "Thinking Beyond the Original Bargain: Post Ratification Constitution Making and the Case of Iraq," APSA 2012 Annual Meeting Paper, University of Pittsburgh Legal Studies Research Paper No. 2012-26 (2012); Khaled Abou El Fadl, *Islam and the Challenge of Democracy* (Princeton: Princeton University Press, 2004).
- ⁽⁴⁹⁾ Fatwa of Grand Ayatollah Ali al-Sistani, June 26, 2003, as cited in Stefan Talmon, *The Official Documents of the*

Coalition Provisional Authority and the Iraqi Governing Council (Bloomsbury Publishing, 2013), 582.

⁽⁵⁰⁾ Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden: Brill, Leiden, 2010), 297.

⁽⁵¹⁾ Nathan Brown and Clark Lombardi, "Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law," *American University International Law Review* 21 (2006): 379–435.

⁽⁵²⁾ Chibli Mallat, *The Renewal of Islamic Law* (London: Cambridge University Press, 1993), 72.

⁽⁵³⁾ Asghar Schirazi, *The Constitution of Iran: Politics and the State in the Islamic Republic*, trans. John O'Kane (New York: I.B. Tauris, 1997), 17–18.

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