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The Theocratic Challenge to Constitution Drafting in Post-conflict States

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THE THEOCRATIC CHALLENGE TO CONSTITUTION DRAFTING IN POST-CONFLICT STATES

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INTRODUCTION

Over the past few decades, principles of theocratic governance have gained enormous public support in developing polities worldwide. The countries experiencing this resurgence of religious fundamentalism are diverse, spanning the globe from central and southeast Asia to north and sub-Saharan Africa and the Middle East. The Khomeini-led revolution in Iran is perhaps the quintessential manifestation of this broad trend,[1] but newspaper headlines report almost weekly on religious fundamentalist insurgency in countries as diverse as Morocco, Pakistan, and Indonesia. Moreover, a process of "Islamization" of laws has taken place in dozens of subnational jurisdictions: twelve northern Nigerian states led by Zamfara state;[2] Zanzibar, an island formally part of Tanzania that enjoys wide legislative autonomy;[3] the states Kelantan and Terengganu in Malaysia, where the Parti Islam Semalaysia formed a government in the 1990s;[4] and Pakistan's Northwest Frontier Province, where the Muttahida Majilis-i-Amal party has ruled since 2003.[5] Religious parties have gained a tremendous popular following in countries as diverse as Egypt,[6] India,[7] Bangladesh,[8] Nigeria,[9]

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1. *See* 2 ENCYCLOPEDIA OF POLITICS AND RELIGION 755 (Robert Wuthnow ed., 2d ed. 2007) [hereinafter 2 POLITICS AND RELIGION].

2. *Id.* at 662.

3. *See* Marc Lacey, *Tourists and Islam Mingle, Not Always Cozily*, N.Y. TIMES, Mar. 6, 2002, at A4.

4. *See* 2 POLITICS AND RELIGION, *supra* note 1, at 582.

5. *Id.* at 689.

6. *See* 1 ENCYCLOPEDIA OF POLITICS AND RELIGION 266 (Robert Wuthnow ed., 2d ed. 2007)

Algeria,[10] and Turkey.[11] The sweeping win of the pro-Islamic AK Party in Turkey's July 2007 general election further illustrates this trend.[12] Meanwhile, religion continues to play a key role in European politics, from Catholic Ireland[13] and Poland[14] to Orthodox Serbia.[15] Evangelical Pentecostalism has become prevalent in Latin America.[16] A similar trend can be seen in North America, where religious fundamentalism, primarily the Christian Right, has become a significant political force.[17]

The theocratic wave is a major source of friction in today's world. Iraq and Afghanistan are two obvious examples, but there are, alas, many others. The mass atrocities in Darfur are linked to Islamic fundamentalists coming to power in Sudan in the late 1980s.[18] In northern Africa, a vicious decade-long war between the French-backed government of Algeria and the Islamic Salvation Front erupted after Islamists won the first multiparty election in that country in the early 1990s.[19] In the Horn of Africa, Somalia, Eritrea, and Ethiopia are entangled in a bloody religion-related cycle of sectarian violence.[20] Hezbollah (the "party of God") now threatens to overthrow the state's fragile multiparty coalition in Lebanon.[21] The struggle between the nationalist Fatah movement and the religious Hamas movement has effectively split the Palestinian

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[hereinafter 1 POLITICS AND RELIGION].

7. *See id.* at 414.

8. *See* Saad Eddin Ibrahim, Editorial, *Islam Can Vote, If We Let It*, N.Y. TIMES, May 21, 2005, at A13.

9. *See* 2 POLITICS AND RELIGION, *supra* note 1, at 662-63.

10. *See* 1 POLITICS AND RELIGION, *supra* note 6, at 24.

11. *See* 2 POLITICS AND RELIGION, *supra* note 1, at 896.

12. *See* Sabrina Tavernise, *Governing Party Scores Big Victory in Turkish Vote*, N.Y. TIMES, July 23, 2007, at A3.

13. 1 POLITICS AND RELIGION, *supra* note 6, at 434-36.

14. 2 POLITICS AND RELIGION, *supra* note 1, at 720-22.

15. *See id.* at 958-59.

16. *See* Paul Freston, *Contours of Latin American Pentecostalism*, *in* CHRISTIANITY REBORN: THE GLOBAL EXPANSION OF EVANGELICALISM IN THE TWENTIETH CENTURY 227-32 (Donald M. Lewis ed., 2004).

17. 2 POLITICS AND RELIGION, *supra* note 1, at 908.

18. *See id.* at 856-57.

19. *See* 1 POLITICS AND RELIGION, *supra* note 6, at 24.

20. *See* 2 POLITICS AND RELIGION, *supra* note 1, at 839.

21. *Id.* at 551-52.

people.[22] Moreover, this theocratic surge has other indirect effects on conflict areas: because political stability in Morocco and Algeria has become a primary interest of the West in the post-9/11 reality, international efforts to resolve the conflict over Western Sahara—approximately two-thirds of which is controlled by Morocco and the other third, also known as the Sahrawi Arab Democratic Republic, is actively supported by Algeria—have sunk into oblivion.[23] In short, it is hard to overstate the significance of the fundamentalist turn in late twentieth and early twenty-first century politics.

In this Article, I explore several key aspects of constitutionalism in a theocratic world. I begin by identifying the challenges posed by the theocratic surge to canonical power-sharing, consociational models for mitigating tensions in multi-ethnic polities. Second, I define the concept of "constitutional theocracy" and its emergence as a new form of governance over the last few decades. In the Article's third Part, I survey five constitutional responses to the problem of "religion and state" and examine a few innovative legal developments employed by countries in the Islamic world to hedge the challenge of constitutional theocracy. In the fourth Part, I explore the secularizing role of constitutional courts and jurisprudence in predominantly religious polities. Examples are drawn from Egypt, Pakistan, Turkey, Israel, Nigeria, Malaysia, and other polities facing deep social and political tensions along the secular/religious divide.

I. THE THEOCRATIC CHALLENGE TO CONVENTIONAL POWER-SHARING MECHANISMS

The literature on constitutional design and engineering is voluminous. Its canonical tenor suggests that when constitutionalization is seen as a pragmatic "second order" measure—as opposed to instances of constitutionalization involving a more principled, first order "we the people" outlook—it may help institutionalize attempts to mitigate tensions in ethnically divided polities through the adoption of federalism, secured representation, and

22. *See id.* at 692-93.

23. *See, e.g.*, ERIK JENSEN, WESTERN SAHARA: ANATOMY OF A STALEMATE 30, 115-21 (2004).

other trust-building and power-sharing mechanisms.[24] Surprisingly, however, although there are many examples of discussions of the mitigating potential of constitutional power-sharing mechanisms to ease rifts along national, ethnic, or linguistic lines, scholars of comparative constitutional design have given little attention to the increasing divisions along secular/religious lines. From an analytical standpoint, the secular/religious divide differs in at least four respects from these more obvious and commonly addressed markers of identity.

First, more than any other divisions along ascriptive or imagined lines, the secular/religious divide cuts across nations otherwise unified by their members' joint ethnic, religious, linguistic, and historical origins. In this sense, the secularism/religiosity factor, or other closely associated distinctions such as universalism versus parochialism, is closer in nature to less visible categories such as income deciles, social class, or cultural milieu than it is to other kinds of markers such as race, gender, or ethnicity. Nationalist Catalans, Flemish, or Quebecers see themselves as autonomous people with a unique cultural heritage, language, and history that is distinct from that of Spaniards, Valons, or Anglophone Canadians, respectively.[25] By contrast, most cosmopolitan *and* traditionalist Egyptians define themselves as members of the same nation, speak the same language or dialects of it, treasure the Pharaoh dynasty, and share the same ancestral ties.[26] Importantly, however, some Egyptians are close adherents of religious directives, while others follow them more casually.[27]

Second, the territorial boundaries of the secular/religious divide are often blurred. Although residents of certain regions within a given country may be more prone to holding theocratic views than

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24. The works that propose various versions of this "consociational" approach are too numerous to cite. Two prominent exponents of this line of thought are Donald Horowitz and Arend Lijphart. *See generally* DONALD HOROWITZ, ETHNIC GROUPS IN CONFLICT (2000); AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION (1977).

25. Dominique Arel, *Political Stability in Multinational Democracies: Comparing Language Dynamics in Brussels, Montreal and Barcelona, in* MULTINATIONAL DEMOCRACIES 65, 68-89 (Alain-G. Gagnon & James Tully eds., 2001).

26. *See* NILOOFAR HAERI, SACRED LANGUAGE, ORDINARY PEOPLE: DILEMMAS OF CULTURE AND POLITICS IN EGYPT 136 (2003).

27. *See* U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM 2001, at 421-29 (2001), *available at* http://www.state.gov/documents/organization/9001.pdf.

residents of other regions, this divide is not neatly demarcated along territorial lines, as is often the case with ethnic or linguistic boundaries. Proponents of theocratic governance may reside in peripheral towns, or in blue collar neighborhoods at the outskirts of large urban centers. But they may also reside within a few bus stops from bastions of modernism such as art galleries, universities, shopping malls, or government buildings. This is in stark contrast to, say, Sri Lanka, where the vast majority of Tamils live in one region of the island;[28] or, better yet, Cyprus, where the territorial divide between the Greeks and the Turks is clearly demarcated.[29] Territory-based power-sharing mechanisms—or any other kind of joint governance structures that are based on the allocation of powers or goods by a regional key—may not be an efficient means for analyzing, let alone reducing, tensions along secular/religious lines.

Third, the assumption that whole peoples share unified interests is questionable at best. Akin to early writings about the post-colonial world that tended to view post-colonial countries as a homogeneous block, populist academic and media accounts in the West tend to portray the spread of religious fundamentalism in the developing world as a near-monolithic, ever-accelerating, and all-encompassing phenomenon.[30] In contrast to the Western portrayal of religion as private and relatively benign, "politicized" religions are depicted as being a threat to reason and a hindrance to progress.[31] The Islamic world in particular has been the target of much of this critique, described by leading public intellectuals as a monolithic entity committed to a fundamentalist, anti-Western agenda.[32] The post-9/11 popular media followed suit by portraying

28. 1 POLITICS AND RELIGION, *supra* note 6, at 274-75.

29. *See* U.S. Dep't of State, Background Note: Cyprus (Jan. 2008), http://www.state.gov/r/pa/ei/bgn/5376.htm.

30. For an oft-cited illustration, see generally SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1998).

31. *See, e.g.*, TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 27-29 (1993).

32. *See, e.g.*, HUNTINGTON, *supra* note 30, at 109-19; BERNARD LEWIS, WHAT WENT WRONG? THE CLASH BETWEEN ISLAM AND MODERNITY IN THE MIDDLE EAST 156-60 (2003). For an alternative, more nuanced approach, see NOAH FELDMAN, AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY 228-31 (2003); CARRIE ROSEFSKY-WICKHAM, MOBILIZING ISLAM: RELIGION, ACTIVISM, AND POLITICAL CHANGE IN EGYPT 1-2 (2002).

Islamic societies as united by their religious zeal and antiliberal sentiment. In practice, however, the picture in most predominantly religious polities—Islamic, Jewish, Roman Catholic, or Hinduist—is much more complex and nuanced, reflecting deep divisions and strife along secular/religious lines, as well as widely divergent beliefs, interpretations, and degrees of practice within religious communities.

In fact, most countries that have experienced a revival of religious fundamentalism over the past few decades have long been caught between identities, worldviews, and commitments that are at once secular *and* religious, universalist *and* particularist. In virtually all of these countries, the very nature of the sociopolitical order has been highly contested; civic ideology, an often relatively cosmopolitan lifestyle, and diverse policy preferences are all often striving to establish or maintain their hegemony vis-à-vis embedded symbols of tradition, religiosity, and exceptionalism.[33]

Principles of theocratic governance may pose a threat to the cultural and policy preferences of secular-nationalist elites in these countries. After all, theocratic governance has seldom appealed to members of the often cosmopolitan urban intelligentsia and the managerial class and state bureaucrats may see it as an impediment to progress and modernization.[34] Theocratic governance is also often at odds with principles of modern economy and may threaten the interests of major economic sectors and stakeholders.[35] And it would be an understatement to say that theocratic governments are not the type of regimes that find favor with supranational trade and monetary bodies such as the International Monetary Fund, the World Bank, or the World Trade Organization. Additionally, with few exceptions, theocracy has been, and remains, abhorred by the military—perceived as a symbol of secular nationalism in many developing polities.

Fourth, and perhaps most importantly, is the uneasy union of constitutionalism and theocratic governance. Unlike the cases of

33. *See* 1 POLITICS AND RELIGION, *supra* note 6, at 319-21 (describing the clash between modernization and fundamentalism generally).

34. *See* Leslie C. Griffin, *Fundamentalism from the Perspective of Liberal Tolerance*, 24 CARDOZO L. REV. 1631, 1633-35 (2003) (contrasting the anti-modernization views of religious fundamentalists with those of a typical Rawlsian liberal democrat).

35. *See* 2 POLITICS AND RELIGION, *supra* note 1, at 879.

race, gender, ethnicity, or language, there seems to be an embedded tension between fundamentals of theocratic governance and principles of modern constitutionalism. Principles of theocratic governance often stem from and adhere to alternative sources of authority and legitimacy. The rule of God, not the rule of law, is the ultimate tenet here.[36] In other words, the holistic nature of theocratic governance is not prima facie conducive to constitutional compromise, power-sharing pacts, separation of powers, checks and balances, relative judicial independence, and other essentials of modern constitutionalism. What is more, principles of divine authority and theocratic governance are often at odds with international human rights regimes and principles, perhaps most tellingly in the contexts of religious freedoms, gender equality, or reproductive liberty.[37]

These conflicting pressures and interests have led to intense constitutional maneuvering in predominantly religious polities. All of these countries face the sources of friction inherent in a constitutional theocracy—a potentially explosive combination by its very nature, and one that poses new challenges to conventional constitutional ideas about secularism, religious freedom, and the relationship between religion and the state. How can a polity therefore reconcile the principles of accountability, separation of powers, and the notion of "we the people" as the ultimate source of sovereignty when the fundamental notion of divine authority and holy texts make up the supreme governing norm of the state? Who should be vested with the ultimate authority to interpret the divine text, and on what grounds? What ought to be done when principles of modern constitutionalism and human rights collide with religious injunctions and support for theocratic governance? And, more generally, how can a polity advance principles of twenty-first century government or run a modern economy when it treats ancient texts and pious authorities as a main source of legislation?

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36. *See id.* at 877.

37. *See id.* at 879 (describing the typical friction between religious fundamentalist regimes and international human rights principles). For a discussion of the incompatibility of fundamentalist religious belief and women's rights, see Clara Connolly & Pragna Patel, *Women Who Walk on Water: Working Across "Race" in Women Against Fundamentalism*, *in* THE POLITICS OF CULTURE IN THE SHADOW OF CAPITAL 375 (Lisa Lowe & David Lloyd eds., 1997).

In short, the theocratic challenge is inherently more difficult to overcome through constitution drafting than, say, divisions along ethnic or linguistic lines. This undermines the applicability of traditional power-sharing, "consociational" constitutional models commonly proposed as a way of mitigating tensions in troubled multi-ethnic polities.[38] Conflict settings where internal strife is high and state capacity is low merely exacerbate these difficulties.

An unfortunate "textbook" example of such difficulties is the Palestinian National Authority, where the struggle between the nationalist Fatah movement and the religious Hamas-led government has brought the polity to the brink of civil war.[39] These tensions were reflected in both the 1997 Basic Law[40] and the 2003 Draft Constitution[41] that was included as part of the "Roadmap to Peace,"[42] proposed by the United States, the United Nations, Russia, and the European Union. In the latter document, often referred to as the "Third Draft of the Constitution of the State of Palestine," Islam was adopted as the official state religion, though it also explicitly stated that Christian or other "monotheistic religions" would be accorded full respect and acknowledgment.[43] Specifically, Article 7 adopted "[t]he principles of Islamic Shari'a" as "a major source for legislation,"[44] avoiding a more forceful conceptualization

38. For a description of the consociational model, as well as problems associated with this model, see Donald L. Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 WM. & MARY L. REV. 1213 (2008).

39. For an extensive analysis of pertinent secular/religious tensions in Palestine, see generally LOREN D. LYBARGER, IDENTITY AND RELIGION IN PALESTINE: THE STRUGGLE BETWEEN ISLAMISM AND SECULARISM IN THE OCCUPIED TERRITORIES (2007).

40. Palestine Basic Law (May. 29, 2002), *available at* http://www.mideastweb.org/basiclaw.htm (last visited Feb. 21, 2008).

41. CONST. OF THE STATE OF PALESTINE [Third Draft] [2003], *available at* http://www.jmcc.org/documents/palestineconstitution-eng.pdf.

42. *See* Press Statement, Office of the Spokesman, U.S. Dep't of State, A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (Apr. 30, 2003), *available at* http://www.state.gov/r/pa/prs/ps/2003/20062.htm.

43. CONST. OF THE STATE OF PALESTINE [Third Draft] art. 5 [2003], *available at* http://www.jmcc.org/documents/palestineconstitution-eng.pdf. *See generally* Nathan Brown, *Constituting Palestine: The Effort To Write a Basic Law for the Palestinian Authority*, 54 MIDDLE E. J. 25 (2000); NATHAN BROWN, CARNEGIE ENDOWMENT FOR INT'L PEACE, PAPER NO. 59, EVALUATING PALESTINIAN REFORM (June 2005), *available at* http://www.carnegieendowment.org/files/CP59.brown.FINAL.pdf.

44. CONST. OF THE STATE OF PALESTINE [Third Draft] art. 7 [2003], *available at* http://www.jmcc.org/documents/palestineconstitution-eng.pdf.

of the role of Islamic law in Palestinian society. Then came the surprise landslide victory by Hamas in the January 2006 parliamentary elections.[45] Shortly thereafter, the Palestinian Legislative Council (PLC) approved the establishment of a constitutional court—a move undertaken by Fatah in its last days as a majority in the PLC in an attempt to constrain Hamas when it took over Parliament.[46] A new nine-judge court was to be convened with judges appointed by President Mahmoud Abbas of the Fatah, which would have the power to rule illegal those laws judged to violate the Basic Law.[47] Theoretically at least, Abbas effectively would have been in a position to veto laws passed by Hamas legislators. In its first legislative move in Parliament, however, Hamas—led by the then newly elected, but now ousted Prime Minister Ismail Haniyeh, and by Hamas leader-in-exile Khaled Mash'al—voted to invalidate all legislation passed by the outgoing Fatah following the 2006 election, including the creation of the constitutional court.[48]

An unstable coalition government was established in March 2006,[49] but tensions continued, at times violently. In early 2007, the strain between Hamas and Fatah escalated into a violent struggle, claiming the lives of over ninety Palestinians in Gaza and the West Bank.[50] A truce was then reached in the holy city of Mecca in February 2007.[51] According to the agreement on the distribution of cabinet positions, nine posts were to go to Hamas,[52] including the more "ideologically sensitive" portfolios of education, justice, and the

45. Hamas took 74 out of the 132 seats in the Palestinian Legislative Council, while Fatah won only 45; independent candidates won the remaining seats. *See* Greg Myre, *Despite Victory by Hamas, Control of Palestinian Security Forces Remains Uncertain*, N.Y. TIMES, Jan. 30, 2006, at A6.

46. Steven Erlanger, *U.S. and Israelis Are Said To Talk of Hamas Ouster*, N.Y. TIMES, Feb. 13, 2006, at A1.

47. *Id.*

48. Greg Myre, *Hamas Legislators Strip Palestinian President of Wider Powers*, N.Y. TIMES, Mar. 6, 2006, at A7.

49. *See* Laura King, *Hamas Undoes New Powers Given to Palestinian President; Fatah Lawmakers Walk Out of Parliament in Protest*, L.A. TIMES, Mar. 7, 2006, at A3.

50. Greg Myre, *Fighting Eases on First Day of a Cease-Fire by Gaza Factions*, N.Y. TIMES, Jan. 31, 2007, at A3.

51. Hassan M. Fattah, *Accord Is Signed by Palestinians To Stop Feuding*, N.Y. TIMES, Feb. 9, 2007, at A1.

52. Joel Greenberg, *Fatah and Hamas OK Power-Sharing Deal; Mecca Agreement Aims To End Sanctions and Factional Fighting*, CHI. TRIB., Feb. 9, 2007, at C11.

Wakf portfolio overseeing collectively-owned land and real estate held in trust for Muslim religious or charitable purposes.[53] Six "practical" ministries were given to Fatah, including agriculture, transportation, health, and public works.[54] Three key ministries —foreign affairs, finance, and interior, which controls security— would be held by independents.[55]

This agreement was derailed, however, when a violent Hamas-led takeover of the Gaza Strip took place in June 2007.[56] President Mahmoud Abbas reacted by dismissing the coalition Hamas-Fatah government and by appointing a moderate Fatah politician to head the new Palestinian Authority government.[57] As this example illustrates, there is not a dull constitutional moment west of the Jordan River, or indeed wherever a deep rift between secular-nationalist worldviews and religious-fundamentalist aspirations cuts across a demos not otherwise divided along ethnic, territorial, or linguistic lines.

II. THE EMERGENCE OF CONSTITUTIONAL THEOCRACY

The limited relevance of traditional power-sharing, consociational models for addressing the secular/religious divide suggests that we ought to look elsewhere for explanatory guidance. At the uneasy intersection of two present-day trends—the tremendous increase of popular support for principles of theocratic governance and the global spread of constitutionalism—a new legal order has emerged: *constitutional theocracy*. In contrast to a "pure" theocracy, power in constitutional theocracies resides in lay political figures operating within the bounds of a constitution, rather than from within the religious leadership itself. Basic principles such as the separation of powers are constitutionally enshrined.[58] The constitution also

53. Zeina Ashrawi, *The Palestinian National Unity Government* (Palestine Ctr. Info. Brief No. 149, Mar. 14, 2007), *available at* http://www.thejerusalemfund.org/images/information brief.php?ID=175.

54. *Id.*

55. *Id.*

56. Steven Erlanger, *Hamas Seizes Broad Control in Gaza Strip*, N.Y. TIMES, June 14, 2007, at A1.

57. Harvey Morris, *Abbas Bypasses Hamas in New Palestinian Government*, FIN. TIMES (London), June 18, 2007, at 6.

58. *See, e.g.*, Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three*

typically establishes a constitutional court that is mandated to carry out some form of active judicial review.[59]

At the same time, constitutional theocracies defy the Franco-American doctrine of strict structural and substantive separation of religion and state. Akin to models of "establishment" or "state religion," constitutional theocracies both formally endorse and actively support a single religion or faith denomination.[60] Moreover, that state religion is enshrined as the principal source that informs all legislation and methods of judicial interpretation. Unlike the handful of European countries with a state church, the designated state religion in constitutional theocracies is often viewed as constituting the foundation of the modern state; as such, it is an integral part, or even the metaphorical pillar, of the polity's national meta-narrative. In this way, religion often determines the polity's boundaries of collective identity as well as the scope and nature of some or all of the rights and duties assigned to its residents.

Constitutional theocracies, however, do more than simply grant exclusive recognition and support to a given state religion: Laws must conform to principles of religious doctrine and no statute may be enacted that is repugnant to these principles. In most instances, a well-developed nexus of religious bodies, tribunals, and authorities operates in lieu of, or in tandem with, a civil court system. The opinions and jurisprudence of these authorities and tribunals carry notable symbolic weight and play a significant role in public life. Importantly, however, the entirety of this nexus of laws and institutions is subject to judicial review by a *constitutional* court or tribunal. This tribunal consists of judges who are often well-versed in both general and religious law, and can speak knowledgeably on pertinent matters of law to jurists at Yale Law School as well as at the al-Azhar center of Islamic learning in Cairo.[61]

Middle Eastern Tales, 82 TEX. L. REV. 1819, 1822 (2004) (describing separation of the Egyptian Supreme Constitutional Court (SCC) from other branches of government).

59. *See id.* (describing the Egyptian example and noting that the SCC has "broad judicial authority to review the constitutionality of laws and regulations, settle jurisdictional conflicts between courts, and reconcile conflicting judgments issued by lower courts").

60. *See id.* at 1823 (describing the Egyptian example and examining Article 2 of the Egyptian Constitution, which reads, "'Islam is the religion of the state....' The result of this amendment effectively transferred Egypt into a 'constitutional theocracy.'").

61. The al-Azhar Center is an institution representing the Egyptian religious establishment and widely recognized throughout the Islamic world as a major theological

The "ideal" model of a constitutional theocracy can be summarized by outlining four main elements: (1) adherence to some or all core elements of modern constitutionalism, including the formal distinction between political authority and religious authority, and the existence of some form of active judicial review; (2) the presence of a single religion or religious denomination that is formally endorsed by the state as the "state religion"; (3) the constitutional enshrining of the religion, its texts, directives, and interpretations as *a* or *the* main source of legislation and judicial interpretation of laws—essentially, laws may not infringe upon injunctions of the state-endorsed religion; and (4) a nexus of religious bodies and tribunals that not only carry symbolic weight, but that are also granted official jurisdictional status and operate in lieu of, or in an uneasy tandem with, a civil court system. All in all, hundreds of millions of people, perhaps as many as a billion people, now live in polities that either fall squarely within the definition of a constitutional theocracy or that feature many of the substantive characteristics and tensions of such a legal order.[62]

III. FIVE MODELS OF RELIGION AND STATE RELATIONS

The separation of church and state was seen by Enlightenment thinkers as a means of confining dangerous and irrational religious passions to the private sphere.[63] In the modern West, the longstanding French policy of *laïcité* is arguably the clearest manifestation of the desire to restrict clerical and religious influence over the state.[64] By enacting its 2004 ban of Muslim headscarves in public schools, the French Parliament illustrated France's "suspicion of religion and its attempt to avert the growth and influence of an incipient Muslim fundamentalism in that nation."[65] But although the strict

center.

62. In addition, hundreds of millions live in countries with a designated state religion. A further two billion people live in countries such as India, Indonesia, Turkey, or Ireland where no particular religion is granted formal status, but where religious affiliation is a pillar of collective identity. The de facto, as opposed to de jure, boundaries of religion and state in these countries are blurred at best, and are continually contested in both the political and the judicial sphere.

63. *See* Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1402 (2003).

64. *See* REX AHDAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE 73 (2005).

65. *Id.*; *see also* Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes*

separation approach is the one most familiar to scholars of constitutional law and politics in the United States, expanding our horizons comparatively reveals at least five other constitutional-institutional models for delineating the relationship between religion and state; these models are of crucial importance for our analysis of the phenomenon of constitutional theocracy. I briefly discuss each in turn.

The first model involves states that have separated religion from state in what may be called *separationist reformism*. The Mustafa Kemal Atatürk-led secularization of predominantly religious Turkey is perhaps the most well-known example of separationist reformism in the twentieth century. Following the demise of the Ottoman Empire, the Kemalist secular-nationalist elite decided to abandon Islamic culture and laws, in favor of secularism and modernism.[66] Accordingly, both the 1961 and the 1982 constitutions established an official state policy of *laïcism*.[67]

In Thailand, the immensely popular Theravada Buddhism has had to make way for a civic ideology centering on the Thai monarchy and advanced by a tripartite coalition of the military, state bureaucracy, and business elites, which has dominated Thai politics since the early twentieth century.[68] Similar in its effects was the Soviet regime's policy that forced Armenia to abandon its formal ties with the Armenian Apostolic Church, which had been recognized as Armenia's state religion from the fourth century until the early twentieth century.[69] In Ethiopia, the introduction of strict anti-religious laws followed a military junta's ferocious overthrow of Emperor Haile Selassie,[70] descendant of King Solomon and Queen Sheba, who was a sacred figure for the Rastafarian movement in Jamaica.[71] Selassie was also, and most importantly, negotiator of

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of Citizenship and Governance in Diverse Societies, 50 MCGILL L.J. 49, 59-61 (2005).

66. *See* 2 POLITICS AND RELIGION, *supra* note 1, at 895.

67. *See* 1982 TÜRKIYE CUMHURIYETI ANAYASASI [TURK. CONST.] art. 2; 1961 TÜRKIYE CUMHURIYETI ANAYASASI [TURK. CONST.] art. 2.

68. *See* TAMARA LOOS, SUBJECT SIAM: FAMILY, LAW, AND COLONIAL MODERNITY IN THAILAND 22-24 (2006).

69. Paul Froese, *After Atheism: An Analysis of Religious Monopolies in the Post-Communist World*, 65 SOC. RELIGION 57, 58 (2004).

70. *See* BAHRU ZEWDE, A HISTORY OF MODERN ETHIOPIA 1855-1991, at 236-48 (2d ed. 2001).

71. *See id.* at 1.

autocephaly and a longtime patron of the Ethiopian Orthodox Church.[72] In a notably more civilized fashion, Portugal (1976),[73] Spain (1978),[74] and Italy (1984)[75] all adopted new constitutions or constitutional amendments that disestablished Catholicism as their state religion.

In contrast to the disaggregation of state and religion, a second pertinent constitutional model is a *weak form of religious establishment*—for example, establishment through the formal, mainly ceremonial, designation of a certain religion as "state religion."[76] Several European countries illustrate this model. An evident case in point is the designation of the Evangelical Lutheran Church as a "state church" in Norway, Denmark, Finland, and Iceland—arguably some of Europe's most liberal and progressive polities.[77] Norway's head of state, for example, is also the leader of the state church.[78] Article 2 of the Norwegian Constitution guarantees freedom of religion, but also states that Evangelical Lutheranism is the official state religion.[79] Article 12 requires more than half of the members of the Norwegian Council of State to be members of the state church.[80] Similarly, Greece and Cyprus formally designate the Greek Orthodox Church as the state church.[81] In England, the monarch is "Supreme Governor" of the Church of England and

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72. LEONARD E. BARRETT, SR., THE RASTAFARIANS 206-09 (1988) (discussing Selassie's relationship with the Ethiopian Orthodox Church).

73. *See* 1 POLITICS AND RELIGION, *supra* note 6, at 287.

74. *See* 2 POLITICS AND RELIGION, *supra* note 1, at 847.

75. *See* Agreement To Amend the 1929 Lateran Concordat, Italy-Vatican, Feb. 18, 1984, 24 I.L.M. 1589, 1591 (1985).

76. A diluted version of this model is at work in Germany, where the institutional apparati of the Evangelical, Catholic, and Jewish religious communities are designated as public corporations and therefore qualify for state support pursuant to the German church tax. 1 POLITICS AND RELIGION, *supra* note 6, at 343.

77. U.S. Dep't of State, Background Note: Norway (Oct. 2007), http://www.state.gov/r/pa/ei/bgn/3421.htm; U.S. Dep't of State, Background Note: Denmark (Oct. 2007), http://www.state.gov/r/pa/ei/bgn/3167.htm; U.S. Dep't of State, Background Note: Finland (Oct. 2007), http://www.state.gov/r/pa/ei/bgn/3238.htm; U.S. Dep't of State, Background Note: Iceland (Jan. 2008), http://www.state.gov/r/pa/ei/bgn/3396.htm.

78. NORGES RIGES GRUNDLOV [CONST. OF THE KINGDOM OF NOR.] art. 2.

79. *Id.*

80. *Id.* at art. 12.

81. U.S. Dep't of State, Background Note: Greece (Nov. 2007), http://www.state.gov/r/pa/ei/bgn/3395.htm; U.S. Dep't of State, Background Note: Cyprus (Jan. 2008), http://www.state.gov/r/pa/ei/bgn/5376.htm.

"Defender of the Faith."[82] The Crown has a role in senior ecclesiastical matters and, by the same token, the church is involved in the coronation of a new monarch, and senior bishops are represented in the House of Lords.[83]

A third response to the tension between secularism and religiosity is the *selective accommodation of religion in certain areas of the law*. Here, the general law is secular, yet a degree of jurisdictional autonomy is granted to religious minorities, primarily in matters of personal status and education. Countries such as Israel, Kenya, India, and South Africa grant recognized religious and customary communities the jurisdictional autonomy to pursue their own traditions in several areas of law, most notably family law. For example, each religious community in Israel has autonomous religious courts that hold jurisdiction over its respective members' marriage and divorce affairs.[84] Kenya has enacted a set of statutes to recognize the diversity of personal laws pertaining to different groups of citizens.[85] India has long been entangled in a bitter debate concerning the scope and status of Muslim and Hindu religious personal laws, versus the individual rights and liberties protected by the Indian Constitution.[86]

An increasingly prevalent yet seldom discussed fourth model is essentially a mirror image of these "religious jurisdictional enclaves"—what we might call *secular jurisdictional enclaves*. Here, most of the law is religious; however, certain areas of the law, such as economic law, are "carved out" and insulated from influence by religious law. Virtually all Islamic countries maintain criminal and economic codes that are based on French civil law, British common law, or other sources of law introduced by, or otherwise borrowed

82. *See* The Monarchy Today, Queen and Church, http://www.royalinsight.gov.uk/output/Page4708.asp (last visited Feb. 20, 2008).

83. *See id.*

84. *See* ESTHER M. SNYDER, ISRAEL: A LEGAL RESEARCH GUIDE 23 (2000).

85. For an overview, see Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 VAND. J. TRANSNAT'L L. 135, 179-84 (2007).

86. *See* VRINDA NARIAN, GENDER AND COMMUNITY: MUSLIM WOMEN'S RIGHTS IN INDIA 36-37 (2001); AYELET SHAHCAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 78-85 (2001).

from, European nations, alongside a variable status for *fiqh* (Islamic law and jurisprudence).[87]

An interesting case in point here is Saudi Arabia, arguably the country whose legal system comes the closest to being fully based on *fiqh*.[88] *Shari'a* law is bad for business, however. Whereas Saudi courts apply *Shari'a* in all matters of civil, criminal, or personal status, Article 232 of a 1965 Royal Decree provides for the establishment of a commission for the settlement of all commercial disputes.[89] Although judges of the ordinary courts are usually appointed by the Ministry of Justice from among graduates of recognized *Shari'a* law colleges, members of the commission for the settlement of disputes are appointed by the Ministry of Trade.[90] In other words, Saudi Arabia has effectively exempted the entire finance, banking, and corporate capital sectors from application of *Shari'a* rules. Foreign investors have not protested the move.

Following the same rationale, Saudi Arabia has recently embarked upon a comprehensive modernization of its judicial system.[91] Among the overhaul's main tenets is the creation of specialized courts in criminal, commercial, labor, and family issues instead of a general judge-made *Shari'a*-based interpretation in these matters.[92] Additionally, "[t]he judiciary council that used to act as the highest court and was controlled by some of the most reactionary clerics in the kingdom, has been relegated to administration."[93] A new ten-member Supreme Court will be filled mostly with royal appointees, not merely with religious clerics, thereby allowing the kingdom to extend its pragmatic, flexible application of *Shari'a* to various aspects of public life.[94]

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87. *See* Stephen Schwartz, Shari'a *in Saudia Arabia, Today and Tomorrow*, *in* RADICAL ISLAM'S RULES: THE WORLDWIDE SPREAD OF EXTREME SHARI'A LAW 20 (Paul Marshall ed., 2005) [hereinafter RADICAL ISLAM'S RULES].

88. *See generally id.*

89. Legal System of the Kingdom of Saudi Arabia, http://www.gulf-law.com/saudi_judicial.html (last visited Feb. 21, 2008).

90. *Id.*

91. *See, e.g.*, *Law of God Versus Law of Man*, ECONOMIST, Oct. 13, 2007, at 50, 50-51.

92. *Id.* at 51.

93. *Id.*

94. *Id.*

Another example is the city of Dubai, which was recently ranked the United Arab Emirates's number one tourist destination.[95] A suite in the Burj Al Arab, one of the world's finest hotels, costs up to $11,000 per night.[96] Upon its completion, Burj Dubai is soon to become the tallest free-standing structure in the world.[97] Dubailand, twice as big as Disney World, is the world's largest amusement park.[98] The United Arab Emirates, of which Dubai is a part, has the seventh highest GDP per capita of any country in the world.[99] As in Saudi Arabia, although the *Shari'a* is the main source of law, economic law is civil and is therefore not subject to religious injunctions.[100]

In a similar vein, Islam has been the state religion in the Maldives since the twelfth century.[101] Adherence to Islam is required for citizenship.[102] Furthermore, there is no secular legal system; rather, the local version of *Shari'a* law, as it is interpreted by state authorities and the Majlis, is the law of the land.[103] Yet the Maldives continue to boast some of the world's finest hotels, catering to jet-set tourists attracted to the Maldives's world class coral reefs. A special presidential decree exempts the thriving tourist industry, which accounts for over 20 percent of the country's GDP, from several non-tourist-friendly religious imperatives.[104]

Another approach to balancing the tensions inherent in constitutional theocracy is a *mixed system of religious law and general legal principles*. It is well known that Afghanistan has long been torn

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95. German Business Council, The United Arab Emirates at a Glance, http://www.gbc-dubai.com/info.htm (last visited Feb. 21, 2008).

96. Denny Lee, *The Latest Splash? Baths and Pools*, N.Y. TIMES, June 25, 2006, at TR9.

97. Leslie Wayne, *A Flight Plan for the Long Haul*, N.Y. TIMES, July 6, 2007, at C1 (noting that the building will stand 810 meters tall).

98. Lorne Mauly, *SPORTS ABROAD; Not a Mirage, but Certainly a Sight*, N.Y. TIMES, May 9, 2006, at D1.

99. CIA World Factbook, Rank Order, GDP-per capita, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html (last visited Feb. 21, 2008).

100. CIA World Factbook, United Arab Emirates, https://www.cia.gov/library/publications/the-world-factbook/geos/ae.html (last visited Feb. 21, 2008).

101. U.S. Dep't of State, Background Note: Maldives (Jan. 2008), http://www.state.gov/r/pa/ei/bgn/5476.htm.

102. U.S. Dep't of State, Maldives, International Religious Freedom Report 2004, http://www.state.gov/g/drl/rls/irf/2004/35517.htm.

103. *Id.*

104. *Id.*

between conflicting values of tradition and modernism.[105] From 1994 to 2001, the country was ruled by the radical Islamist Taliban,[106] but the U.S.-led military campaign removed the Taliban from power and installed a more moderate regime representing an array of groups hitherto in opposition: moderate religious leaders and the country's elites and intellectuals in exile.[107] The new constitution of Afghanistan came into effect in January 2004,[108] and it states that Afghanistan is an Islamic Republic;[109] that the "sacred religion of Islam is the religion of the Islamic Republic of Afghanistan;"[110] and that "[n]o law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan."[111] Courts are allowed to use Hanafi jurisprudence—one of Sunni Islam's more liberal interpretive schools—in situations of constitutional lacunae.[112] At the same time, the constitution also enshrines the right to private property[113] and resurrects a woman's right to vote,[114] as well as to run for and serve in office.[115] The 2004 constitution also establishes a Supreme Court composed of nine judges appointed by the president for a term

105. *See generally* Hannibal Travis, *Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq*, 3 NW. J. INT'L HUM. RTS. 4 (2005) (recounting the clashes between Afghanistan's political modernizers and traditionalists from the 1920s through the most recent constitution drafting in 2003).

106. Elizabeth Rubin, *In the Land of the Taliban*, N.Y. TIMES MAG., Oct. 22, 2006, at 88-89.

107. *See, e.g.*, Barry Bearak, *A City of Exiles Dreams of Power Regained*, N.Y. TIMES, Oct. 11, 2001, at A1 (describing the convergence in Peshawar of "exiled commanders, politicians, [and] mullahs" competing for a place in the post-Taliban government); Dan Fesperman, *Karzai Survives To Lead Afghans; Tribal Chief Dodges U.S. Bomb, Taliban To Head Government*, BALT. SUN, Dec. 6, 2001, at A1 (profiling Western-oriented "opposition leader in exile" Hamid Karzai, Afghanistan's first post-Taliban president); *Main Players in the Future Administration of Afghanistan*, INDEPENDENT (London), Dec. 4, 2001, at 6 (cataloguing six key figures in the post-Taliban Afghan government).

108. Carlotta Gall, *Afghan Council Gives Approval to Constitution*, N.Y. TIMES, Jan. 5, 2004, at A1.

109. AFG. CONST. ch. I, art. 1, *available at* http://www.afghan-web.com/politics/current_constitution.html (last visited Feb. 20, 2008).

110. *Id.* ch. I, art. 2.

111. *Id.* ch. I, art. 3.

112. *Id.* ch. VII, art. 130.

113. *Id.* ch. II, art. 40.

114. *See id.* ch. II, art. 22.

115. *See id.*

of ten years.[116] All members of the Court "[s]hall have higher education in legal studies or Islamic jurisprudence."[117]

A second example of a mixed system is the legal system of the Comoros, which rests on two tenets: Islamic law and an inherited Napoleonic French legal code.[118] Islam has increasingly dominated the political sphere and the May 2006 elections were won by Ahmed Abdallah Mohamed Sambi, a Sunni Muslim cleric nicknamed the "Ayatollah" for his time spent studying Islam in Iran.[119] But the French civil code prevails in most areas of commercial life.[120] The Constitutional Court, the ultimate arbiter of constitutional questions,[121] consists of seven judges who are all well-versed in both the French civil law tradition and the Shafi'i school,[122] which stresses reasoning by analogy.[123]

Akin to the constitutions of over two dozen predominantly Muslim polities, Article 2 of Yemen's constitution, adopted in 1994, declares that Islam is the religion of the state.[124] Article 3 further provides

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116. *Id.* ch. VII, arts. 116-17. The Afghan Supreme Court is called the Stera Mahkama.

117. *Id.* ch. VII, art. 118.

118. Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Country Reports on Human Rights Practices, 2006 (Mar. 6, 2007), http://www.state.gov/g/drl/rls/hrrpt/2006/78727.htm.

119. *See World Briefing: Africa: Comoros: Muslim Cleric Wins Presidential Election*, N.Y. TIMES, May 16, 2007, at A8.

120. Comoros is a signatory to the Treaty on the Harmonization of Business Law in Africa, which binds signatories to apply a civil code framework in areas of business law. *See* Traile Relatif a l'Harmonisation en Afrique du Droit des Affaires, 4 Journal Officiel [JO] OHADA 1 (Nov. 1, 1997), *available at* http://www.ohada.com/traite.php?categorie=10; Salvatore Mancuso, *Trends on the Harmonization of Contract Law in Africa*, 13 ANN. SURV. INT'L & COMP. L. 157, 165-66 (2007). Additionally, Comoros law provides that in terms of national monetary policy, its national civil law trumps locally administered Islamic law. *See* INT'L MONETARY FUND, COUNTRY REP. NO. 04/233, UNION OF THE COMOROS: SELECTED ISSUES AND STATISTICAL APPENDIX 22 (2004), http://www.imf.org/external/pubs/ft/scr/2004/cr04233.pdf; *see also* COMOROS CONST. art. 3 (providing that international treaties take precedence over local island law).

121. *See* COMOROS CONST. art. 31.

122. *See id.* arts. 32-33. The constitution requires that Constitutional Court members "have high moral standards and great integrity as well as a recognised competence in the legal, administrative, economic or social domains." *Id.* art. 33, *translation available at* http://www.parliament.go.th/parcy/sapa_db/cons_doc/constitutions/data/Comoros/Comoros.doc (last visited Feb. 21, 2008).

123. *See* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 198 (1981). *Shafi'i* is another of the four Sunni schools of law. *Id.*

124. YEMEN CONST. pt. I, ch. I, art. 2 (1994), *available at* http://www.al-bab.com/yemen/gov/con94.htm (last visited Feb. 21, 2008).

that *Shari'a* is the source of all legislation.[125] Non-Muslims are forbidden from running for or holding elected office.[126] The same constitution, however, calls for an independent judiciary,[127] and establishes a separate commercial court system[128] and a Supreme Court,[129] which draws upon a combination of *Shari'a* interpretations and principles of modern constitutional law.[130] Consequently, unique constitutional amalgamations of religious and modern principles emerge, such as Article 31 of the constitution, stating: "Women are the sisters of men. They have rights and duties, which are guaranteed and assigned by Shari'ah *and* stipulated by law."[131] Another amalgam occurs in Article 46, according to which, "Criminal liability is personal. No crime or punishment shall be undertaken without a provision in the Shari'ah *or* the law."[132]

The Islamic Republic of Iran is commonly considered to be a fundamentalist theocracy, with governing principles and practices that bear very little resemblance to prevailing principles of western constitutionalism. In practice, however, its system of government features many elements of a constitutional democracy.[133] The preamble of the 1979 Islamic Republic Constitution enshrines the *Shari'a* as the supreme law—superior even to the Constitution itself.[134] Articles 2 and 3 declare that authority for sovereignty and legislation has a divine provenance (from the *Shari'a*) and that the leadership of the clergy is a principle of faith.[135] According to Article

125. *Id.* pt. I, ch. I, art. 3.

126. *Id.* pt. III, ch. II, art. 106.

127. *Id.* pt. III, ch. III, art. 147.

128. *See* U.S. Dep't of State, Background Note: Yemen (Dec. 2007), http://www.state.gov/r/pa/ei/bgn/35836.htm.

129. YEMEN CONST. pt. III, ch. III, art. 151 (1994), *available at* http://www.al-bab.com/yemen/gov/con94.htm (last visited Feb. 21, 2008).

130. *See* U.S. INST. OF PEACE, STATE AND NON-STATE JUSTICE IN YEMEN 2 (2006), http://www.usip.org/ruleoflaw/projects/zwaini_paper.pdf (describing Yemen's mix of *Shari'a*, tribal, constitutional, and international law, which comprises the state law to be applied by its courts).

131. YEMEN CONST. pt. I, ch. III, art. 31 (emphasis added).

132. *Id.* pt. II, art. 46 (emphasis added).

133. *See generally* ASGHAR SCHIRAZI, THE CONSTITUTION OF IRAN: POLITICS AND THE STATE IN THE ISLAMIC REPUBLIC (1997); Mehran Tamadonfar, *Islam, Law, and Political Control in Contemporary Iran*, 20 J. SCI. STUD. RELIGION 205 (2001).

134. *See* QANUNI ASSASSI JUMHURI'I ISLA'MAI IRAN [The Constitution of the Islamic Republic of Iran] pmbl. [1980].

135. *Id.* arts. 2-3.

6, the administration of the state is to be conducted by the wider population: the general public participates in the election of the President, the Majlis representatives (members of parliament), and municipality councils.[136] Article 8 further entrenches principles of popular participation in deciding political, economic, and social issues.[137] Most notably, Iran has seen the emergence of the Guardian Council—a de facto constitutional court armed with mandatory constitutional preview powers and composed of six mullahs appointed by the Supreme Leader and six jurists proposed by the head of the judicial system of Iran and voted in by the Majlis.[138] The Supreme Leader has the power to dismiss the religious members of the Guardian Council, but not its jurist members.[139] More stunning still is Khomeini's strategic initiative in 1988 to amend the Iranian Constitution in order to institutionalize the regime's Discernment Expediency Council (*majma-e tashkhis maslahat nezam*) to serve as the final arbiter between the Consultative Assembly (Majlis) and the Guardian Council (*shoray-e negahban*).[140] This new body—as of October 2005 the ultimate judicial body in Iran[141]—aids the government in asserting its pragmatist approach to public policymaking (based on the concept of "national necessity") over the Guardian Council's more doctrinal, rigid interpretive approach to pertinent religious directives.[142] In summary, even in the least likely settings, constitutional framers have been able to hedge or mitigate the tension between modern day needs and principles of theocratic governance through innovative constitutional design and reconstruction.

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136. *Id.* art. 6.

137. *See id.* art. 8.

138. CIA World Factbook, Iran, https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html (last visited Feb. 21, 2008).

139. QANUNI ASSASSI JUMHURI'I ISLA'MAI IRAN [The Constitution of the Islamic Republic of Iran] art. 91 [1980].

140. *See* U.S. Dep't of State, Background Note: Iran (June 2007), http://www.state.gov/r/pa/ei/bgn/5314.htm.

141. *See id.*

142. *See* Ray Takeyh & Nikolas K. Gvosdev, *Pragmatism in the Midst of Iranian Turmoil*, WASH. Q., Autumn 2004, at 33, 38-39.

IV. CONSTITUTIONAL COURTS AS SECULARIZING AGENTS

The growing popular support for principles of theocratic governance poses a major threat to the cultural propensities and policy preferences of secular, cosmopolitan, moderate elites in these countries. A common strategy for addressing some of the difficulties presented in the ongoing friction between traditional religious outlooks and principles of modern constitutionalism is the construction of constitutional courts armed with judicial review powers.[143] This strategy has little effect in failed state settings, but in other pertinent settings, it may have some bite.

It is well-established in the literature that constitutionalization and the establishment of judicial review may increase the international reputation and credibility of regimes.[144] But this is only part of the picture. In countries struggling with the complex issue of constitutional theocracy, constitutional courts may also be viewed as the guardians of secularism, modernism, and universalism against the increasing popularity of theocratic principles. In order to govern effectively, politicians and ruling elites in predominantly religious polities must confront the challenge of constitutional theocracy while simultaneously maintaining popular support for their regimes. Indeed, an increasingly common strategy by those who wield political power—and represent the groups and policy preferences that object to principles of theocratic governance—is the transfer of fundamental collective identity questions of "religion and state" from the political sphere to the courts. Consequently, constitutional courts have been assigned the sensitive task of dealing with contentious political "hot potatoes." The result has been an unprecedented judicialization of foundational collective

143. *See supra* Part III.

144. *See, e.g.*, Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 LAW & SOC. INQUIRY 883 (2003); Douglass C. North & Barry Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989); Barry Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 J. INST. & THEORETICAL ECON. 286 (1993). For the importance of judicial review mechanisms generally, see William W. Van Alstyne, *Quintessential Elements of Meaningful Constitutions in Post-Conflict States*, 49 WM. & MARY L. REV. 1497 (2008). *But see* Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473 (2008).

identity, particularly issues relating to religion and state, and the subsequent emergence of constitutional courts as important secularizing agents in these countries.

Why is it that constitutional courts are so appealing to secularist, modernist, cosmopolitan, and other antireligious social forces in polities facing deep divisions along secular/religious lines? First, there is a "blame deflection" logic at work. From the politicians' points of view, delegating contentious political questions to the courts may be an effective means of shifting responsibility, and thereby reducing the risks to themselves and to the institutional apparatus within which they operate. The calculus of this "blame deflection" strategy is highly intuitive. If a delegation of power to the courts will increase the credit and/or reduce the blame attributed to the politician as a result of the policy decision of a delegated body, then a delegation of this sort can benefit the politician.[145] At the very least, the transfer of contested political issues to the courts offers a convenient retreat for politicians who have been unwilling or unable to settle contentious public disputes in the political sphere.[146] It may also offer refuge for politicians seeking to avoid difficult or "no win" decisions and/or avoid the collapse of deadlocked or fragile governing coalitions.[147] In other words, transferring these contested issues to the courts allows secularist leaders to talk the talk of commitment to religious values without walking the actual walk of that commitment.

Second, the constitutionalization of religion subjects certain aspects of religious affairs to state monitoring. With state funding comes statutory regulation. Akin to the legalization of otherwise unregulated and unauthorized norms and practices, the constitutionalization of religion may help prevent the evolution of an "underworld" of religious authority and institutions. The "legalization" point has another related aspect to it. Historically, religious law operated primarily as private law. Its traditional location was in non-centralized religious institutions in which the judgment of

145. Stefan Voigt & Eli Salzberger, *Choosing Not To Choose: When Politicians Choose To Delegate Powers*, 55 KYKLOS 289, 294 (2002).

146. *Id.* at 294-95.

147. *See* Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 38-45 (1993) (detailing instances of legislative deferral to the courts in American political history).

individual jurists was autonomous and final, and certainly not subject to appeal.[148] Cases were voluntarily brought to religious tribunals by private parties, not by a public prosecuting authority, and there was no state enforcement mechanism.[149] The whole enterprise was run as an informal, yet socially and morally binding, arbitration system. For example, as Martin Shapiro has noted, non-appellate "kadi justice" in Islamic jurisprudence reflects the absence of central political authority.[150] By contrast, the formal constitutionalization of religion brings religious law to the fore of the public law domain, where the state with its central political authority, regulatory hierarchies, and appellate procedures has always been a key stakeholder.

Delegation and legitimation, however, are not all that attracts certain polity members to the lure of the constitutional court. Rather, the very logic of modern constitutional law—with its state-driven legitimacy and authority, procedural rules of engagement, methods and styles of reasoning, and often measured approaches to politically charged questions—seems intrinsically appealing to a moderate approach to issues of religion and state. Constitutional courts' very conception of the rule of (state) law, with its deep-rooted orientation toward European legal tradition and what Max Weber characterized as formal and rational reasoning,[151] necessarily weakens the potential accommodation of alternative hierarchies of traditional or religious interpretation. The emergence of proportionality as the prevalent interpretive method in comparative constitutional jurisprudence also makes constitutional courts appealing to relatively moderate or secular elites.[152] By its very nature, proportionality favors middle-of-the-road, balanced, judicious and pragmatic solutions to contested issues. Extreme or radical positions are not likely to fare well under proportionality.

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148. *See* SHAPIRO, *supra* note 123, at 204-12 (citing the case of Islamic law).

149. *Id.*

150. *Id.* at 195-96.

151. *See* MAX WEBER ON LAW IN ECONOMY AND SOCIETY 65-97 (Max Rheinstein ed., 1st ed. 1954).

152. On proportionality as the new Esperanto or *lingua franca* of comparative constitutional jurisprudence, see, e.g., DAVID BEATTY, THE ULTIMATE RULE OF LAW 159-88 (2004).

A constitutional court's reluctance to grant support to radical religious views may also derive from its interest in retaining its status as the one and only legitimate interpreter of laws vis-à-vis the perceived menace of alternative interpretation systems—namely, traditional religious authorities, which are well-established within the circles of the traditional supporters of theocratic governance and have been steadily gaining support among new crowds. The deep structural reluctance of constitutional courts to recognize the legitimacy of alternative, primarily religious, interpretation systems is one of the main reasons for their near universal appeal to the urban intelligentsia, the "managerial class," and proponents of civic nationalism.[153]

There are also more prosaic reasons why proponents of threatened secularist worldviews and policy preferences may turn to the courts. Most constitutional court judges have had a general legal education and are familiar with Western law's basic principles and methods of reasoning.[154] More often than not, the judge's educational background, cultural propensities, and social milieu are closer to those of the urban intelligentsia and top state bureaucrats than to any other social group. Constitutional courts are established and funded by the state and their judges are appointed by state authorities, often with the approval of political leaders. Consequently, the judge's record of adjudication is well known at the time of his or her appointment. And, as the recent history of comparative constitutional politics shows us, the recurrence of unsolicited judicial intervention in the political sphere in general—and unwelcome judgments concerning contentious political issues in particular—have brought about significant political backlashes, targeted at clipping the wings of over-active courts.[155] Among the more common power-constraining strategies are the

153. *See* RAN HIRSCHL, TOWARDS JURISTOCRACY 38-49 (2004) (describing the reasons for which political and economic elites often support the constitutionalization of society in order to check democratic preferences).

154. *See, e.g.*, AJMAL MIAN, A JUDGE SPEAKS OUT (2004); Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to* Shari'a *Threaten Human Rights?: How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379, 430-34 (2006) (discussing the contrasting interpretive theories of jurists trained in secular law and the educational focus on respecting precedent).

155. *See* Frank B. Cross, *Thoughts on Goldilocks and Judicial Independence*, 64 OHIO ST. L.J. 195, 199-202 (2003) (discussing the Iranian experience).

following: executive overrides of controversial rulings; political tinkering with judicial appointment and tenure procedures to ensure the appointment of compliant judges and/or to block the appointment of undesirable judges; court-packing attempts by those who hold political power; disciplinary sanctions; impeachment or removal of objectionable or over-active judges; the introduction of jurisdictional constraints; or clipping jurisdictional boundaries and powers of judicial review.[156] All of these factors make it unlikely that constitutional court judges in a given polity can continue to hold views that are consistently at odds with the views of the secular-nationalist political elites.

And when judges do not comply, the political reaction may be fierce. In late 1997, for example, a serious rift developed between Pakistani Prime Minister Nawaz Sharif and the Chief Justice of the Supreme Court, Sajjad Ali Shah, over the appointment of new judges to the court.[157] The constitutional crisis came to a dramatic end when the chief justice was suspended from office by rebel members of the Supreme Court.[158] A crisis of a similar nature occurred in January 2000, when Pervez Musharraf insisted that all members of the Supreme Court pledge allegiance to the military administration.[159] The judges who refused to take the oath were expelled from the Court.[160] In a similar fashion, in March 2007, Musharraf ordered Chief Justice Iftikhar Chaudhry to resign, presumably for being over-independent and therefore "unreliable" from the government's point of view.[161] Protests by Pakistani

156. *See, e.g., id.* at 205-08 (discussing U.S. methods of restraining the judiciary). For a general survey of the various formal and informal political checks on the judiciary in the United States, see TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999), as well as GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 9-36 (1991). *See also* Gerald Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992). For a discussion and worldwide examples of "judicialized mega-politics," see Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 743-51 (2006).

157. *See* Hirschl, *supra* note 156, at 749.

158. *Pakistan's Top Court Gets New Leader; After Political, Judicial Battles Comes Healing*, TORONTO STAR, Dec. 4, 1997, at A23.

159. *See* Pamela Constable, *Pakistani Ruler's Reform Agenda Mired in Politics*, WASH. POST, Feb. 10, 2000, at A17.

160. *Id.*

161. *See* Griff Witte, *Ousted Chief Justice Speaks Out in Pakistan; Protesting Lawyers Hail Judge as Hero, Call on President Musharraf To Resign*, WASH. POST, Mar. 28, 2007, at A12.

lawyers and opposition groups led to fierce clashes with police.[162] Ultimately, Chaudhry was reinstated by the Pakistani Supreme Court in July 2007,[163] a ruling Musharraf had to accept as his bid for continuing grasp on power now depended upon the support of secularist Benazir Bhutto, whose followers instigated the pro-Chaudhry demonstrations.[164] However, as is well known, in November 2007 Musharraf declared a state of emergency in Pakistan, suspended the constitution, dismissed Chief Justice Chaudhry for the second time in eight months, and appointed several loyalist judges to the Pakistan Supreme Court.[165] The entire maneuver was driven, in no small part, by Musharraf's concern that the Court might declare Musharraf ineligible to serve as President of Pakistan as long as he continues to head the Pakistani armed forces.[166]

Following two and a half years of conservative jurisprudence in religious matters by the newly established Afghan Supreme Court, President Hamid Karzai opted for a shake-up of the Court's composition. In 2006, he appointed several new, more moderate members to the Court.[167] In addition, the reappointment of the conservative Chief Justice Faisal Ahmad Shinwari–a conservative Islamic cleric with questionable educational credentials–did not pass parliamentary vote.[168] Karzai then chose his legal counsel, Abdul Salam Azimi–a former university professor who was educated in the United States–to succeed Shinwari.[169] The new, distinctly more moderate Court was sworn in August 2006.

Consider also Egypt, with its history of political interference with the judicial sphere. The most blatant example is the 1969 "massacre

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162. *Id.*

163. Shahan Mufti, *Is Democracy "Reborn" in Pakistan?*, CHRISTIAN SCI. MONITOR, July 23, 2007, at 6.

164. *See* Declan Walsh, *Bhutto Ready To Share Power if Musharraf Drops Military Role*, GUARDIAN (London), July 30, 2007, at 15.

165. *See* Shahan Mufti & Mark Sappenfield, *Emergency Rule in Pakistan: Musharraf's Last Grab for Power?*, CHRISTIAN SCI. MONITOR, Nov. 5, 2007, at 1.

166. *See id.*

167. Pamela Constable, *Afghans' Uneasy Peace With Democracy; In Discord Over Convert's Trial, Muslims Say They Identify with Islamic Law First*, WASH. POST., Apr. 22, 2006, at A15.

168. *See* Carlotta Gall, *Parliament in Kabul Rejects Pick for Top Court*, N.Y. TIMES, May 28, 2006, at A14.

169. *See* KENNETH KATZMAN, CONG. RESEARCH SERV., AFGHANISTAN: GOVERNMENT FORMATION AND PERFORMANCE 6 (2007), http://www.fas.org/sgp/crs/row/RS21922.pdf.

of the judiciary," where more than 200 senior judicial personnel were dismissed by a presidential decree for being overly independent.[170] Along the same lines, disciplinary hearings were held against Egypt's Supreme Constitutional Court Judges Hisham al-Bastawisi and Mahmoud Makki for openly accusing the government of electoral fraud in the November 2005 elections.[171] In March 2007, President Hosni Mubarak introduced a set of constitutional amendments that effectively gave more power to the president, banned the establishment of religious parties (a blatant anti-Muslim Brotherhood move), and loosened controls on security forces in its "war on terror."[172] Among the reforms introduced was the removal of judicial scrutiny of electoral lists, ballots, and procedures.[173]

A careful examination of the constitutional jurisprudence of apex courts in Egypt, Israel, Malaysia, Nigeria, Pakistan, and Turkey—six polities that have been facing the challenge of constitutional theocracy for decades—demonstrates how courts have become key secularizing agents for elites despite intense scrutiny from the more religious segments of the public.[174] Moreover, each example country illustrates the remarkably creative interpretive techniques adopted by judges confronted with concrete legal disputes that reflect and encapsulate the greater issues emerging from constitutional theocracy.

Egypt, Israel, Malaysia, Nigeria, Pakistan, and Turkey have all experienced a growth in the influence of religious political movements, with a commensurate increase in the levels of popular support that they receive. At the same time, these countries differ

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170. *See* Mahmoud M. Hamad, *The Politics of Judicial Selection in Egypt*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER 260, 266-67 (Kate Malleson & Peter H. Russell eds., 2006).

171. *See Egypt: Investigate Election Fraud, Not Judges*, HUM. RTS. WATCH, Apr. 24, 2006, http://hrw.org/english/docs/2006/04/25/egypt13269.htm.

172. *See* Liz Sly, *Egypt's Democrats Feeling Betrayed*, CHI. TRIB., Mar. 28, 2007, at C10.

173. NATHAN J. BROWN, MICHELE DUNNE & AMR HAMZAWY, CARNEGIE ENDOWMENT FOR INT'L PEACE, EGYPT'S CONTROVERSIAL CONSTITUTIONAL AMENDMENTS: A TEXTUAL ANALYSIS 2-3 (2007), http://www.carnegieendowment.org/files/egypt_constitution_webcommentary01.pdf.

174. A detailed analysis of pertinent jurisprudence will appear in RAN HIRSCHL, SACRED JUDGMENTS: THE DILEMMA OF CONSTITUTIONAL THEOCRACY (forthcoming 2009). I begin this analysis in Hirschl, *supra* note 58.

in their formal recognition of, and commitment to, religious values. In Pakistan, the law underwent full Islamization in 1973 and again in 1985.[175] Article 227(1) of the Constitution of Pakistan stipulates that "[a]ll existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions."[176] In theory, this means that legislation must be in full compliance with principles of the *Shari'a*. Similarly, Article 2 of the Egyptian Constitution, as amended in 1980, states that principles of Muslim jurisprudence (the *Shari'a*) are the primary source of legislation in Egypt,[177] while Israel defines itself as a "Jewish and democratic state."[178] Malaysia is a federal country that endorses Islam as its official religion, and political Islam has been continuously gaining political support and clout at the state level.[179] Nigeria is a secular federal country that grants some legislative autonomy to its states, thereby allowing the states to adopt religiously-influenced laws.[180] Finally, modern Turkey characterizes itself as secular, adhering to the Western model of strict separation of state and religion.[181] Accordingly, there are considerable differences in the interpretive approaches and practical solutions adopted by the six countries' respective high courts in dealing with the core questions of religion and state. Despite these dissimilarities, however, there are some striking parallels in the way that the constitutional courts in these, and some other similarly situated countries, have all positioned themselves as important secularizing forces within their respective societies.

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175. Jeffrey A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 VA. J. INT'L L. 759, 764-65 (2004).

176. PAK. CONST. pt. IX, § 227(1).

177. EGYPT CONST. pt. 1, art. 2.

178. Basic Law: Human Dignity and Liberty, *available at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (last visited Feb. 21, 2008) (defining Israel as a "Jewish and democratic state" in the first Basic Law).

179. *See generally* Peter G. Riddell, *Islamization and Partial* Shari'a *in Malaysia*, *in* RADICAL ISLAM'S RULES, *supra* note 87.

180. *See* Paul Marshall, *Nigeria:* Shari'a *in a Fragmented Country*, *in* RADICAL ISLAM'S RULES, *supra* note 87.

181. Hirschl, *supra* note 58, at 1820 (internal citations omitted).

Egypt's Supreme Constitutional Court has played a central role in dealing with the core question of the status of *Shari'a* rules—arguably one of the most controversial and fundamental collective identity issues troubling the Egyptian polity.[182] Constrained by Article 2 of the Constitution, Egypt's Supreme Constitutional Court has developed its own moderate interpretation of religious rules and norms.[183] Similarly, the Supreme Court of Pakistan has been able to advance a holistic view of the constitution that emphasizes the interdependence and harmony of its various sections. In response to the possible conclusiveness of § 227(1), the Court developed its "harmonization doctrine," according to which no specific provision of the constitution, and that includes § 227(1), stands above any or all other provisions. The constitution as a whole must be interpreted in a harmonious fashion so that specific provisions are read as an integral part of the entire constitution, not as standing above it. In addition, the Court retained its overarching jurisdictional authority, including its appellate capacity over the newly established Shariat Appellate Bench at the Supreme Court.[184] This has proved itself time and again to be a safety net for secular interests vis-à-vis the formal Islamization of law.

The Israeli Supreme Court responded to the increased tension between Israel's dual commitment to universal (democratic) and parochial (Jewish) values by subjecting the jurisprudence of religious courts to the general principles of administrative and constitutional law.[185] Over the last two decades, the Court pursued a distinctly liberalizing agenda in core matters of religion and state.[186] At the same time, it has also protected the "Jewishness" pillar of the state's collective identity against alternative national narratives, as illustrated in the Court's controversial 2006 ruling in the Family Unification Case.[187]

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182. *Id.* at 1832.

183. *See, e.g.*, Lombardi & Brown, *supra* note 154, at 415-25.

184. *See, e.g.*, Redding, *supra* note 175, at 770.

185. *See* Ran Hirschl & Ayelet Shachar, *Constitutional Transformation, Gender Equality, and Religious/National Conflict in Israel*, *in* THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 205, 205-29 (Beverly Baines & Ruth Rubio-Marin eds., 2005).

186. Hirschl, *supra* note 58, at 1857.

187. HCJ 7052/03 Adalah v. Minister of Interior [2006] 2 TakEi 1754. Here, in a divided 6-5, 263-page decision, the Court upheld the new Citizenship and Entry into Israel Law, which imposes age restrictions on both the granting of Israeli citizenship and residency

In Malaysia and Nigeria, their pertinent differences in formal accommodation of religion notwithstanding, national high courts have drawn upon federal/provincial jurisdictional boundaries to override legislative manifestations of popular religious drift at the provincial/state level.[188]

Finally, the Turkish Constitutional Court (TCC) has played a key role in preserving the strictly secular nature of Turkey's political system amid the growing popularity of theocratic governance principles.[189] This has been done, inter alia, by continually outlawing anti-secularist political forces and parties. For example, the TCC dissolved two major Islamic parties, the Welfare (Refah) Party and the Virtue (Fazilet) Party, in 1998 and 2001, respectively.[190] In May 2007, the TCC went on to annul the parliamentary vote that designated the pro-Islamic AK Party nominee—foreign affairs minister Abdullah Gül—as president.[191] A less frequently acknowledged yet equally telling example is the TCC's jurisprudence restricting the female dress code in the public education system.

A detailed analysis of the comparative "religion and state" jurisprudence of these six courts illustrates the key role that constitutional courts play in protecting and preserving the secular nature of their respective polities against the growing support for theocratic governance. Although they operate within different constitutional traditions, frameworks, and constraints, these courts have been able to advance secular or secularizing responses to fundamental religion and state questions. In so doing, they have

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permits to Arab residents of the Occupied Territories who marry Israeli citizens. *See* Adalah: Legal Advocacy, http://www.adalah.org/eng/legaladvocacypolitical.php#7052 (last visited Feb. 21, 2008). Because the practice of marrying Palestinians is far more common among Israel's Arab minority, the law effectively targets Arab citizens, but maintains the "demographic balance" in favor of Israel's Jewish population. The Justices divided between those in the majority who favored the first tenet in Israel's self-definition as a Jewish and democratic state, and those in dissent (including then-Chief Justice Aharon Barak) who gave priority to the second. *Id.*

188. *See generally* Paul Marshall, *Nigeria:* Shari'a *in a Fragmented Country, in* RADICAL ISLAM'S RULES, *supra* note 87, at 113; Andrew Ubaka Iwobi, *Tiptoeing Through a Constitutional Minefield: The Great* Sharia *Controversy in Nigeria*, 48 J. AFR. L. 111 (2004).

189. *See* Hirschl, *supra* note 58, at 1851.

190. *Id. See generally* Dicle Kogacioglu, *Progress, Unity, and Democracy: Dissolving Political Parties in Turkey*, 38 LAW &. SOC. REV. 433 (2004).

191. Sabrina Tavernise, *Turkish Court Blocks Candidate with Islamic Base*, N.Y. TIMES, May 2, 2007, at A1.

been able to impose effective limitations on the accommodation of religious values in public life.[192]

CONCLUSION

This brief Article points to three main lessons. First, the theocratic challenge has become a significant factor in world politics as well as constitutional law. It stretches well beyond current media hot spots like Iran, Iraq, and Afghanistan. Any attempt to examine the complexities of constitution drafting in post-conflict settings without paying close attention to the ever more relevant secular/universal versus religious/particularist divide is bound to come up short.

Second, the canonical literature concerning constitutionalism as an effective means for mitigating tensions in multi-ethnic or multi-linguistic states does not adequately address the theocratic challenge. It rests on four main presumptions: territorial concentration and demarcation; social and demographic cohesiveness among members of a given group; unified interests, worldviews, and policy preferences among group members; and an underlying vision of constitutionalism as a viable forum of compromise. Although these assumptions provide a plausible set of working hypotheses with respect to dividing factors such as nationality, ethnicity, or language, they are less relevant in capturing the realities of the secular/religious divide. Of particular significance here are the inherent tensions between principles of modern constitutionalism and the rule of law on the one hand and fundamentals of theocratic governance on the other.

Third, the emergence of a new legal order—constitutional theocracy, which is now shared in one form or another by dozens of countries in the developing world—provides important insights into the sociopolitical role of constitutionalism in predominantly religious settings. Regimes throughout the new world of constitutional theocracies have been struggling with these foundational quandaries, forced to navigate between cosmopolitanism and parochialism, modern and traditional meta-narratives, constitutional principles and religious injunctions, contemporary governance

192. Hirschl, *supra* note 58, at 1855.

and ancient texts, judicial and pious interpretation. More often than not, the clash between these conflicting visions results in fierce struggles over the nature of the body politic and its organizing principles.

An uneasy alliance emerges, comprising political leaders, state bureaucrats, economic stakeholders and the managerial class, intellectuals, jurists, and the military. Each of these groups necessarily brings to the table their own worldviews, interests, and communities of reference. Consequently, they seek to tame the spread of religious fundamentalism and diffuse attempts to establish a full-fledged theocracy. Constitutional courts find themselves at the forefront of this struggle, as they attempt to address constitutional theocracy and translate its uneasy bundle of contradictory aims and commitments into practical guidelines for public life.

The bottom line is this: constitutional theocracies are a Galapagos-like paradise for scholars of constitutional design in today's world. They reflect sociopolitical order under constant duress. Striking tensions are often seen between the rule of law and the rule of God, cosmopolitanism and parochialism, economic interests and public will, modern government and religious authorities, new constitutions and ancient texts, judicial and pious interpretation. A unique hybrid of seemingly conflicting worldviews, values, and interests, constitutional theocracies thus offer an ideal setting—a "living laboratory" as it were—for studying constitutional law as a form of politics by other means.