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GOD(S) OVER CONSTITUTIONS: INTERNATIONAL AND RELIGIOUS TRANSNATIONAL CONSTITUTIONALISM IN THE 21ST CENTURY

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I. INTRODUCTION

After the Second World War, the Americans, as leaders of a coalition of victoricus nations, played a pivotal role in the making of new constitutions for Germany and Japan.[2] These constitutions were different, in important respects, from both the first set of democratic constitutions produced in the 18th century in the United States[3] and France,[4] and from the imperial constitutions of the 19th century German[5] and Japanese[6] Empires. Both post-War constitutions were notable for a firm adherence to the ideal of constitutional legitimacy grounded on the foundation of the rule of law in two senses. First, both constitutions embraced firm limits on arbitrary use of power, that is, of the use of the state power when not grounded in law (something like the pre-War German notion of the *Rechtsstaat*),[7] rejecting the monarchial, socialist and "Rousseau" styles of

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2. For the German post-war constitution, *see* Grundgesetz, *Basic Law for the Federal Republic of Germany* (1949), *available at* http://www.iuscomp.org/gla/index.html. For the Japanese post-war constitution *see* Japanese Constitution (1946), *available at* http://web-japan.org/factsheet/pdf/constitu.pdf.

3. For the U.S. Constitution, *see* the site maintained by the National Archives, *available at* http://www.archives.gov/national-archives-experience/charters/constitution.html.

4. The French Constitution of October 4, 1958 can be accessed from the official site maintained by the Assemblée National, *available at* http://www.assemblee-nationale.fr/english/8ab.asp.

5. For a contemporary critical discussion, *see*, HERMANN FERNAU, THE COMING DEMOCRACY (Immanuel Kant, trans., E.P. Dutton & Co., 1917).

6. For a discussion, *see*, JUNJI BANNO, THE ESTABLISHMENT OF THE JAPANESE CONSTITUTIONAL SYSTEM (1995).

7. Vivian Curran has written well about the formalism of pre-war *Rechtsstaat* notions in which the formal legality of the process of state action was the focus of legitimacy and the substance of those actions relegated to an uncontrolled expression of the will of the people through their legitimately elected representatives. *See* Vivian Grosswald Curran, *Fear of Formalism: Indications From the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L L.J. 101 (2002). *See also* Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 HASTINGS L.J. 1 (1998). For a description of an understanding of the *Rechtsstaat* principle in Meiji Japan, *see* Nobushige Ukai, *The Individual and the Rule of Law Under the New Japanese Constitution*, 51 NW. U.L. REV. 733, 735-737 (1956).

Kaiserreichstaat.[8] Second, both constitutions embraced an ideal of constitutional law as morally and ethically bounded (something like the post-War German notion of the *Sozialstaat*).[9] Under both post-War German and Japanese constitutions, a core role of constitutional rule of law ideals vested the state with a critical role as guardian of set of foundational communally embraced moral and ethical norms that were to be protected and furthered through the use of state power grounded in law.[10] No law could be enacted or action legitimately taken contrary to this set of moral and ethical norms. Taken together, substance and process elements of constitutional elaboration marked the boundaries between "genuine constitutionalism" and the imposition of other forms of governance.[11]

But these moral and ethical substantive boundaries of post war constitutionalism were not derived solely from the peculiar will of the citizens of the constituting state. Rather, at least the critical set of foundational norms was to be derives, or at least limited, by a set of universal norms. These norms were to be transnational, that is beyond the state[12]—they were to

8. *See* Charles J. Friedrich, *Rebuilding the German Constitution, I*, 43 AM. POL. SCI. REV. 461, 463-464 (1949).

9. German academics after 1945 emphasized the restrictions on positive constitutional law under a variety of theories understood as natural law, unalterable by legislative will or voidable by constitutional action, in contra-distinction to legislative or constitutional pronouncements as positive acts of sovereign (and now limited) will. As a consequence, the constitution itself, and the positive expression of sovereign will it represents, might itself be restricted by higher law. These principles of higher law might be expressed in the Constitution but might not be altered by them. Together, these would constitute the substantive or social element of state constitutionalism. *See* Gottfried Dietze, *Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany,* 42 VA. L. REV. 1, 2 (1956). Dr. Dietze quoted from what would become an extremely influential 1950 opinion of the Bavarian Constitutional Court that summarized these ideals:

> The fact that a constitutional norm forms part of the constitution does not necessarily mean that a void constitutional norm is, by definition, impossible. *There are fundamental constitutional principles, which are of so elementary a nature and so much the expression of a law that precedes the constitution, that the maker of the constitution himself is bound by them.* Other constitutional norms, which do not have this rank, can be void because they conflict with them."

2 VERWALTUNGS-RECHTSRECHUNG No. 65, *quoted in* Gottfried Dietze, *Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany,* 42 VA. L. REV. 1, 16 (1956) (emphasis added). What, as is stressed in this article, is extraordinary in that statement, is that this notion, within a constructed system of transnational constitution, did not need recourse to a system of religion to support the supra constitutional features of these "natural law" principles, at least until the construction of theocratic constitutionalism with the Afghani and Iraqi constitutions. *See* discussion *infra* at Sections III and IV.

10. *See*, Grundgesetz, art. 20, discussed in this respect in Arthur Lenhof, *The German (Bonn) Constitution With Comparative Glances at the French and Italian Constitutions*, 24 TUL. L. REV. 1 (1949) ("The guarantee goes not only to the republican form but extends to the basic rights, the concept of *Rechtsstaat*, and the universal, direct, free equal right to vote in secret elections, as well as to the autonomy of the local territorial units.") *Id.* at 29.

11. For an early application, *see* Charles J. Friedrich, *Rebuilding the German Constitution I*, 43 AM. POL. SCI. REV. 461 (1949) ("The makers of the Weimar constitution had only a weak appreciation of the two most vital features of genuine constitutionalism: the protection of the individual against the government(state). . . , and the need for some effective scheme of dividing governmental power.") *Id.* at 463.

12. For a discussion of the meaning of transnational in the context of this article, *see* Larry Catá Backer, *Principles of Transnational Law: The Foundations of an Emerging Field*, LAW AT THE END OF THE DAY, March 9, 2007, *available at* http://lcbackerblog.blogspot.com.

reflect the understandings of appropriate behavior by governments developed among the community of nations, now constituted itself in a global system around the institutions of the United Nations.[13] And this institutional systems would be led by the great global powers—the United States, the United Kingdom, France, the Soviet Union and China—that emerged victorious form the Second World War. The rest would follow.

This form of new constitution making, of instilling substantive principles and values in a constitution, in light of the developing system of secular international human rights, became the basis for a rising system of global constitutional legitimacy. This system was based on the creation of norms for the limits of governmental power in the constitution of states, based on developing international principles of conduct,[14] elaborated in the increasingly prominent organs of global discourse, including the United Nations,[15] and emerging systems of regional human rights systems.[16] Conformity to these rising norms by emerging state constitutions was viewed as the basis for gaining legitimacy and principled convergence of political systems around key governance norms in a pluralist world.[17] States increasingly looked to international standards of legitimate state organization in drafting their constitutions.[18]

But things change. After its successful campaigns in Afghanistan and Iraq, the Americans, as leaders of a coalition of nations, also played a pivotal role in the making of new constitutions for Afghanistan and Iraq. These constitutions were different, in important respects, from the constitutions it helped craft a half a century earlier for Germany and Japan. Both of these post-conflict constitutions are notable for a firm adherence to the ideal of constitutional legitimacy grounded in the rule of law as both process (state rule through law) and substance (state organization framed by fundamental substantive principles and values. But unlike the German and Japanese constitutions of the mid twentieth century, these constitutions

13. The institutionalized international community has become self aware and self-referencing in this respect. *See*, ICJ, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (second phase)*, ICJ Reports, ¶ 33 (1970).

14. *See* Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001).

15. *See* Charter of the United Nations, *available at* http://www.un.org.

16. *See* Jo M. Passqualucci, *The Harmonization of Human Rights Laws: Guaranteeing the Plurality of Individual Rights, in* HARMONIZING LAW IN AN ERA OF GLOBALIZATION: CONVERGENCE, DIVERGENCE AND RESISTANCE 35-54 (2007).

17. *See*, Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307 (2001).

18. This was particularly true in places like Latin America in the 1990s. "[S]everal countries of the region have amended their Constitutions to grant to human rights matters, in particular, a special hierarchy with respect to ordinary laws. The current Constitution of Argentina (since the amendments of 1994) attributes constitutional hierarchy to international treaties on human rights that are ratified by those countries." Hector Fix-Fierro & Sergio Lopez Ayllon, *The Impact of Globalization on the Reform of the State and the Law in Latin America*, 19 HOUS. J. INT'L L. 785, 799 (1997).

embraced a set of singular transcendent norms—those of Islam. "In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam."[19] This system is a national reflection of an ancient universal system of governance developed within a global community of believers, whose moral and ethical norms, it is argued, should limit the power of states over their subjects, whether or not members of the community of believers.

By the 21st century, political communities organized as states no longer constitute their governance apparatus in isolation, especially with respect to the protection of the rights of their citizens and residents.[20] State constitutions no longer represent unique expressions of the "souls" of nations expressed through law.[21] The notion, common to 18th and 19th century constitutions, that the government could not enlarge or otherwise modify its power by reference to external sources, including treaties and international law,[22] has given way in the late 20th century to a different regime of transnational constitutionalism, at least among a significant number of states whose constitutions post date the end of the Second World War. Since the mid 20th century, a number of global systems of fundamental and limiting norms have been competing for authority to serve as the sole source of legitimate framework for constituting states through law.

This paper examines two of the most prominent. The first consists of the community of states organized as a single, autonomous and universal political system.[23] Now constituted as an international system of states the core of which is the United Nations system,[24] this universal system has produced an elaborate set of behavior norms that effectively limit legitimate

19. Afghanistan Const., ch.1, art. 3.

20. *See, e.g.*, MERVYN FROST , CONSTITUTING HUMAN RIGHTS: GLOBAL CIVIL SOCIETY AND THE SOCIETY OF DEMOCRATIC STATES (2002).

21. On the 19th century German political theory from which this arises, *see* FRIEDRICH KARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (1814) (Trans. Abraham Hayward (1975)). *See also* SCHMITT, CARL, LEGALITY AND LEGITIMACY (1932) (Trans. Jeffrey Seitzer (2004 from first (1932) and 2nd (1958) German eds.)). *See generally* Michaels, Ralf, *Globalizing Savigny The State in Savigny and the Challenge of Europeanization and Globalization* (Durham, NC: Duke Research Paper Series, Research Paper No. 74 (September 2005)).

22. *See, e.g.*, Mayor of New Orleans v. United States, 35 U.S. 662, 736 (1836).

23. On the "family of nations" as an organizing concept in the development of international law, as a construction of Western oriented global governance, *see*, MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2001).

24. On the elaboration of the modern system of international law based on the development of a legal structure through consensus negotiation among the community of states, all of which states together are meant to discipline misbehaving states, *see*, United Nations, International Law Commission, Introduction: *Origin and Background of the Development and Codification of International Law, available at* http://www.un.org/law/ilc/index.htm. With respect to transnational constitutional law principles, developed in the wake of the defeat of the German and Japanese Empires, the Americans, through an institutionalized international community, sought to create a new legal order grounded in international law. The European Union, through its court of justice, has developed a jurisprudence based on a set of similar notions of mutual support among the EU's Member States grounded in the governance framework of the Community Treaties. *See, Commission v. Luxembourg and Belgium (Milk products)* Case 90, 91/63, [1964] ECR 625 ("In fact the Treaty is not limited to creating reciprocal obligations between the different natural ad legal persons to whom it is applicable, but establishes a new legal order which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognizance of and penalizing any breach of it.") *Id.*

provisions of national constitutions.[25] The second includes religion[26]—understood as self-referencing closed systems[27] of organized, universalist, institutionalized, structures of law, ethics and morals—as binding sources of constitutional norms, as autonomous and complete legal systems.[28] All major religions have produced rules of civil governance and one now seeks to provide, more or less successfully, frameworks for constituting states through constitutional law.[29]

Both systems of trans-border constitutional legitimacy produce complex frameworks of behavior rules (systems of morals and ethics). Each competes with the other for dominion over the construction of governments. States are meant to choose from amongst these and, having chosen a system of substantive constitutional values, thereafter internalize those international constitutional norms within their national legal orders.[30] The heart of this exploration is thus on "constitutionalism" as an aspect of legal universalism.[31]

Consequently, the emphasis will be on the nexus of constitutionalism, globalism and religion in the construction and limitations of constitutions imposed from outside any single state. The essay suggests the secular and institutional sources of substantive supra-national (that is transnational) constitutionalism developed after 1945, and the way in which religion has sought to ape the forms of secular transnational constitutionalism but in the service of a different set of supra national substantive values. And specifically I will describe the current great contest for a universal basis of global institutionalization of theology, morals and ethics within global constitutionalism between secular and religious universalism.

The essay starts with a brief exercise in contextualization, fleshing out a view of the framework within which elites think about constitutions in modern global legal orders. I start with a review of traditional constitutionalism, that is, with a review of the relationship between state and constitution at the beginning of the 20th century. I then suggest the ways that

25. *See* discussion, infra, at Section III.

26. The issue of religion is a complicated one. The issue of religion in the "public sphere" at least in the United States, is even more complicated. *See*, Larry Catá Backer, *Religion as Object and the Grammar of Law*, 81 MARQ. L. REV. 229 (1998).

27. I deliberately draw from but do not specifically focus, for this purpose, on autopoiesis. *See* essays in AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY (Gunther Teubner ed., 1988). I am particularly sensitive to, but do not here in detail explore, the notions of constitutional and international law as a set of networks that "integrate parts into a whole." NIKLAS LUHMANN, THE DIFFERENTIATION OF SOCIETY 37 (1982).

28. *See*, HAROLD BERMAN, THE INTERACTION OF LAW AND RELIGION (1974); Larry Catá Backer, *There Can be Only One: Law, Religion, Grammar and The Organization of Society in the United States*, *in* LAW AND RELIGION: A CRITICAL READER 425-463 (Stephen M. Feldman, ed., 2000).

29. *See* discussion, infra at section III.

30. "Constitutionalism is the end product of social, economic, cultural, and political progress; it can become a tradition only if it forms part of the shared history of a people." H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65, 80 (Greenberg, et al., eds., 1993).

31. *See* Oliver Gerstenberg, *What International Law Should (Not) Become. A Comment On Koskenniemi*, 16 EUR. J. INT'L L. 125 (2005).

consensus on the character of constitutions changed after the Second World War. That period marked the institutionalization of a universalist approach to constitutionalism—the idea that all constitutions ought to conform to a specific framework, one with a certain tolerance for national idiosyncrasies, but demanding a conformity to certain fundamental notions of appropriate relationships between state apparatus and citizen.[32]

The section of this essay that follows examines the rise of an alternative universalist transnational constitutionalism—theocratic constitutionalism—to challenge the orthodoxy of the secular post-WWII supra-constitutionalist project. It starts with a look at the big bang of modern universalist theocratic constitutionalism—the Iranian 1979 constitution and its progeny, the American inspired constitutions of Afghanistan and Iraq. The essay fleshes out the great innovation of theocratic constitutionalism, an innovation that distinguishes this from medieval theocratic models: *the use legality (process constitutionalism) in the service of and to legitimate alternative universal systems of substantive limits to constitutional choices.*

The essay ends by suggesting morals and consequences.[33] The rise of theocratic universalist constitutionalism deepens the relationship between national constitutions and global norm systems. Sovereignty, at least sovereignty as reflected in the constitution of a state, is no longer the sole province of the people of that nation. At the same time, differences among constitutional orders have now moved up from the state to the international level. Comparative law ought now to be concerned not solely with distinctions among states, but also with distinctions among global systems realized in national legal orders. Constitutional law now has, to an increasing extent, become the object of international rather than national systems. Lastly, the rise of alternative universalist constitutional systems may have significant effects on the domestic constitutionalism of the United States. For those who view theocratic constitutionalism as a positive development with internal consequences, that development may suggest the means for interpreting the American constitution in very different ways.

II. Traditional Orthodoxies of Constitutionalism

At the end of the 20th century, members of the elite global constitutional law academic community could, with confidence, look out on a world order in which the idea of a single transcendent system of supra-national, that is of transnational, constitutionalism had emerged as the great norm of all legitimate national constitutionalism.[34] This supra-national constitutionalism posited limits on national constitution making grounded in an

32. *See*, Peter Fitzpatrick, *"What Are the Gods to Us Now?": Secular Theology and the Modernity of Law*, 8 Theoretical Inquiries in Law 161-190 (2006).

33. *See* discussion infra at Section IV, *Drawing Morals and Consequences—A First Attempt.*

34. For a discussion of the movement toward transnational constitutionalism and its further progression, *see, e.g.*, Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory, in* Transnational Governance and Constitutionalism 3-28 (Christian Joerges, Inger-Johane Sand and Gunther Teubner, eds., 2004).

evolving set of foundational universal norms *derived* from the understandings of basic right and wrong developed by consensus among the community of nations.[35] The focus was on secular universal principles of human rights.[36]

These rules of this global system could be enforced by a global bar and judiciary loyal to this harmonized set of norms. While the effectiveness of enforcement could be debated, it was clear that no state could unilaterally opt out of the system, whatever it own views of the relationship between its internal constitutional system and that of the global legal order.[37] The international community of nations, through its institutional organs, seeks to build a binding legal framework within which national constitutions are subordinated to international normative frameworks. The emerging international system of *jus cogens*, for example, is meant to be applied to even the most unilateralist constitutional system.[38]

But the reality of the early 21st century is quite different. The jurisprudential basis of global constitutionalism is in flux,[39] and authority over norm setting is contested.[40] The foundations of a universal constitutionalism[41] are both contested and in flux. These contestations and fluctuations

35. "Today, that tradition is most visibly articulated in the debate - especially vocal in Germany - about the constitutionalization of international law under the UN Charter." Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT'L L. 113, 117 (2005). For an interesting perspective on the law of nations in the United States, and the production of a respect for international law applicable within and without the U.S., *see*, Mark Weston Janis, *Americans And The Quest For An Ethical International Law*, 109 W. VA. L. REV. 571 (2007).

36. Consider as representative Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211 (1998).

37. An excellent example is provided by the numerous cases constituting the attempts by the United States of Mexico to force the United States of America to abide by certain treaty provisions relating to Mexican national accused of crimes in the United States, irrespective of the rules of the American constitutional order. *See* Mexico v. U.S., 2004 I.C.J. 1 (March 31); Medellín v. Dretke, 125 S.Ct. 2088 (2005).

38. *See, e.g., Our Global Neighborhood: The Report of the Commission on Global Governance* 48, 60 (New York: Oxford University Press, 1995) ("As at the national level, so in the global neighborhood, the democratic principle must be ascendant. . . . Here, as the role of international institutions in global governance grows, the need to ensure that they are democratic also increases."). *Id.* An excellent example was a recent opinion of the OAS Court of Human Rights in an action by the United States of Mexico against the United States of America with respect to its treatment of undocumented Mexican nations within the United States. *See* Juridical Condition and Rights of the Undocumented Migrants, Inter-Am. C.H.R. Advisory Opinion, Report No. 18/03, OEA/Ser.A., doc. 18 (2003).

39. *See, e.g.*, DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER (1995); DAVID HELD, ANTHONY MCGREW, DAVID GOLDBLATT AND JONATHAN PERRATON, GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE 450 (1999); Samuel S. Kim, *In Search of Global Constitutionalism, in* THE CONSTITUTIONAL FOUNDATIONS OF WORLD PEACE 55-81 (Richard Falk, Robert Johansen, and Samuel Kim, eds., 1993).

40. By authority I mean the recognized binding character of understandings and norms flowing from a certain institutional actor or process. In this case, of one vested in the community of states acting formally through the organs of the United Nations or other regional supra national organizations, or organically through the elaboration of customary international law of a foundational character. On one reading of the current difficulty, *see* Enrique de Rávagó Bustamante, *The Compulsory Character of International Law*, 11 INT'L LEGAL THEORY 69 (2005).

41. By foundations of constitutionalism I mean the normative structure from which the legitimacy of constitutions can be determined in accordance with generally accepted universal standards embraced by the community of nations. For a discussion of some of these themes, *see* the essays in

are a reflection of fundamental and perhaps irreconcilable differences[42] smothered under the drive to institutionalize authoritatively late 20th century universalist secular international law-based constitutionalism. Thus, at the beginning of the 21st century, and just at the moment of its seeming triumph as THE global standard of constitution-making, at least within important elite communities with authority to speak on these matters,[43] the system of secular, political, international norms-bounded constitutionalism—that great political triumph of the Allied Powers after WWII—is being challenged from a variety of different directions.

These contestations and fluctuations pit a number of communities against each other and against the global universalist constitutionalism based on "family of nations" consensus on behavior norms. First, national unilateralist political communities, like the United States and the People's Republic of China, adhere to traditional normative frameworks rejecting binding supra-national systems limiting national constitutionalism.[44]

Second, older and to some extent marginalized universalist constitutional systems seek rehabilitation and authority within the global system.[45] Foremost among them are the old Marxist-Leninist universal governance principles,[46] colonialism and empire,[47] and subordination systems based on racial, ethnic or other characteristics.[48] Each of these systems seeks to provide a normative basis for the substance of state ordering through constitutions or other mechanisms. But the normative bases of each is substantially different from that in ascendancy today, forged by the Americans in their constitutional experiments in Germany and Japan.

CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES (Michel Rosenfeld ed., 1994).

42. Those judgments of irreconcilability are nicely argued in SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER (1997). But they are also evident in writings from the more or less respectable versions of subaltern position. *See, e.g.*, Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003); Diane Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOCIAL AND LEGAL STUDIES 337 (1996). And even works of a more revolutionary nature. *See, e.g.*, FRANTZ FANON, THE WRETCHED OF THE EARTH (Constance Farrington trans., Grove Weidenfeld 1963) (1961).

43. *See, e.g.*, PIERRE BOURDIEU, LA NOBLESSE D'ÉTAT (1989).

44. The theoretical basis of this system are discussed infra at Section II. A.

45. While important, these systems are not the subject of this essay. For a traditional understanding of one of these competing systems from the perspective of its opponents, *see* the essays in INTERNATIONAL COMMUNISM (David Footman ed., Southern Illinois University Press, 1960).

46. For a discussion, *see, e.g.*, Larry Catá Backer, *Cuban Corporate Governance at the Crossroads: Cuban Marxism, Private Economic Collectives, and Free Market Globalism*, 14 J. OF TRANSNAT'L L. & CONTEMP. PROBS. 337 (2004).

47. For a discussion from a critical perspective, *see, e.g.*, Tayyab Mahmud, *Geography And International Law: Towards A Postcolonial Mapping*, 5 SANTA CLARA J. INT'L L. 525 (2007).

48. As one commentator has noted: "The extreme racism, the failure of the Rule of Law to take root within Japan itself, the sheer weight of numbers of nefarious adventurers, Japan's own slide into a brutally repressive regime, the lack of a strong humanitarian movement, and the fact that the Japanese Empire was acquired and controlled against a background of almost non-stop war all combined to make Japanese imperialism a synonym for repression." DONALD CALMAN, THE NATURE AND ORIGINS OF JAPANESE IMPERIALISM: A REINTERPRETATION OF THE GREAT CRISIS OF 1873 211 (1992). For a taste of this form of universalism from a Western perspective, *see* OSWALD SPENGLER, THE HOUR OF DECISION (1942). Racial imperialism is not confined to European powers. The Japanese expansion was based in part on notions of racial/cultural superiority.

Third, sub-national communities continue to reject universalism on the basis of declared sub-national exceptionalism claims (going to the uniqueness of their communities).[49] Alternatively, these sub-national communities base their claims on the idea that they are part of larger transnational communities including ideological, racial & ethnic, and religious communities with their own universalist claims.

Fourth, this confrontation and challenge comes not only from outside, but is generated from within as well. Successful experiments abroad may be attempted domestically. This may be part of a system of translation of norms or of adoption of similar normative frameworks. Thus, as suggested in the last section of this article,[50] the implications for American constitutional law as internally constructed (by its polity and its Supreme Court) may be great as well, as domestic elites seek to reconstruct American constitutional law on universalist theocratic foundations. Indeed, most important are the challenges by transcendent, universalist, autonomous, *religious communities* and their efforts to displace secular universalist normative frameworks with transcendent religious frameworks no less universal.

In a sense, with these challenges the great universalist constitutional projects of Anglo-European society come full circle. Having spent the greater part of the last four centuries unmaking quasi-governmental systems of religious law, the West is now confronted with globalizing political systems grounded in religion as fully formed politico-legal systems. This section starts with a brief description of the constitutionalist framework prior to the Second World War. That framework is characterized by the triumph of the national state as the supreme repository of law making power. This system focused on legality (process) not substance, except to the extent it reflects the will of the sovereign.

This section then examines the movement from a national supremacist constitutionalism model to the present system of global constitutionalism. Global constitutionalism describes the great post-WWII Western project of contextualizing constitution making within limits derived from international law, norms or standards. It represents a shift in focus from process to substance and legality, especially around the limitations of government power against individuals. It also represents a shift of authority over substance from the constituting state to the international community of nations. The object is both the creation of a universal normative framework for constitutional values and a harmonization of constitutions pursuant to great principles of democracy and human rights; evolution of this hierarchy of a 'higher' higher law of the constitution.

49. *See, e.g.*, Larry Catá Backer, *Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union*, 12 EMORY INT'L L. REV. 1331 (1998).

50. *See* section IV, *Drawing Morals and Consequences—A First Attempt, infra*.

A. *Traditional Constitutionalism Before WWII: Constitutionalism in 1900*

The bedrock presumption of traditional late post-Westphalian constitutionalism was that nation-states stood at the apex of global legal orders.[51] The foundation of state power was popular will (however manifested). That manifestation could arise from a number of sources: (1) the people;[52] (2) their representatives;[53] (3) the monarch;[54] (4) or a dictatorship of the proletariat.[55]

As the unique expression of a unique national will, governments and its constitutions were *not* constrained by *law*. Two types of limitation on constituted government were suggested, one focusing on the realities of power and the other on the limitations of self-interest within moral and cultural constraints. Thus, for example, it was thought that "[t]he external limit to the real power of a sovereign consists in the possibility or certainty that his subjects, or a large number of them, will disobey or resist his laws."[56] An older English tradition, leading to the decapitation of an English monarch, suggested the limits as an abuse by the sovereign of authority under law.[57] On the other hand:

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51. *See, e.g.*, WESTEL W. WILLOUGHBY, THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW 307-309 (1924).

52. Eighteenth century constitutions from the United States and France, so called first generation constitutions, stressed popular sovereignty and the constitutive act of will of the people in establishing a legitimate apparatus of state. The tradition of popular sovereignty, and the legitimating power of the collective to constitute an apparatus for the state, has become a foundation for legitimate assertions of constitutive power. On the theoretics of popular sovereignty from a then contemporary perspective, *see* THE FEDERALIST PAPERS (Alexander Hamilton, James Madison, John Jay) (1789).

53. Thus, for example, the Weimar Constitution and the constitutions of several central European states vested national legislatures with the constitutive power of the people, to be exercised as legislation or constitutional law making at their option. The road from Weimar to National Socialist dictatorship has served as a cautionary tale for this form of governance since 1945. On the Weimar constitution, *see* Arthur T. Von Mehren, *Constitutionalism in Germany—The First Decision of the New Constitutional Court*, 1 AM. J. COMP. L. 70 (1952) (explaining as a weakness of Weimar constitutionalism the absence of strong judicial review mechanisms of basic rights, which were "further weakened by constitutional provisions making them subject to exception by ordinary legislation . . . and noting further a power in the executive to set aside fundamental rights in an emergency.") *Id.* at 73. The representatives of the people need not be elected. The German Imperial Constitution was grounded in an alliance entered into among various rulers of what would become parts of the German Empire, the President of the resulting Confederation was to be the King of Prussia holding the title German Emperor. *See* German Imperial Constitution (Verfassung der Deutches Reiches (1871)) at tit. IV, art. 11.

54. Non-democratic constitutions are characterized by grants of constitutive authority from the power holder. In the case of the German and Japanese Imperial constitutions, that grant came from the imperial household or the person of the Emperor/Empress. For a discussion, *see* Y. Yamada, Note: *The New Japanese Constitution*, 4 INT'L & COMP. L.Q. 197 (1955) ("Sovereignty resides with the nation nowadays, whereas in the past it resided with the Emperor himself.") *Id.* at 199.

55. The Constitutionalism of the Chinese Communist Party stresses this form of democratic centralism. Larry Catá Backer, *The Rule of Law, The Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (the "Three Represents"), Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16 J. OF TRANSNAT'L L. & CONTEMP. PROBS. 29 (2006).

56. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 30 (8th ed. 1915).

57. *See* Larry Catá Backer, *Reifying Law: Understanding Law Beyond the State*, 25 PENN ST. INT'L L. REV. (forthcoming 2007).

> The internal limit to the exercise of sovereignty arises from the nature of the sovereign power itself. Even a despot exercises his powers in accordance with his character, which is itself molded by the circumstances under which he lives, including under that head the moral feelings of the time and the society to which he belongs.[58]

As a consequence, the foundational issue of constitutional orders was authenticity of that expression of the national will by whatever means institutionalized. Legitimacy was the foundation of constitutional orders. Constitutions constituted government.[59] Law constituted the relations among the people outside the state apparatus,[60] and higher law constituted the relations between the people and the state.[61] Law and government were not necessarily identical.[62]

Traditionally, state-centered constitutionalism concentrates on issues of fraud and illegitimacy. Lawful use of authority is the key element of legitimacy. Constitutional techniques are deployed to police against arbitrariness or the use of arbitrary state power. These techniques formed the core of traditional *Rechtsstaat*.[63] Yet the substance of legality is less important than its authenticity as an expression of the polity through legitimate channels for the expression of power. Thus *Rechtsstaat* notions find expression in both democratic and totalitarian societies—for the Americans with the rise of process theory,[64] with the NAZI regime with the theoretics of Carl Schmitt in 1930s Germany,[65] and with the construction of a Japanese militarist despotism.[66]

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58. DICEY, *supra* note 56, at 32.

59. *See, e.g.*, THE FEDERALIST NO. 1 (Alexander Hamilton) (1789) ("It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made.") *Id.*

60. *See, e.g.*, PAOLO GROSSI, MITOLOGÍAS JURÍDICAS DA MODERNIDADE (2004).

61. EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955).

62. For a discussion of the theory, *see* Larry Catá Backer Symposium: Law and the State in the Transnational Legal Order: *Reifying Law: Understanding Law Beyond the State*, 25 PENN ST. INT'L L. REV. – (forthcoming 2007).

63. "The *Rechtsstaat* principle contemplates government according to law and allows a remedy to be obtained in an impartial administrative court for governmental violations of the law. However, the right to obtain such relief must be granted by the legislature, either in the form of a general grant or by specifically enumerating the types of violation for which a remedy may be obtained." Nobushige Ukai, *The Individual and the Rule of Law Under the New Japanese Constitution*, 51 NW. U. L. REV. 733, 735-736 (1956).

64. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

65. CARL SCHMITT, LEGALITY AND LEGITIMACY (Jeffrey Seitzer trans., Duke University Press 2004) (1958).

66. *See* Sakae Wagatsuma, *Guarantee of Fundamental Human Rights Under the Japanese Constitution*, 26 WASH. L. REV. 145, 154 (1951) ("Under the new Constitution, therefore, there is no longer the likelihood, as there was under the old Constitution of the fundamental freedoms and equalities being unreasonably restricted by law, however much the political trend of the National Diet may change.") *Id.*

Thus the key to traditional constitutionalism is a distinction between substance and process. While legitimacy requires protection, substantive values are inherently political and constituted outside the framework of a national constitution. The expression of substantive values or judgments, no matter how vile by the standards of others, would have to be lawful as long as it was the product of lawfully derived rules. Substantive expression is essentially extra-constitutional. The stakeholders, who constituted the state for whose behalf the apparatus of state functions, are the only persons who could limit that expression. Any such substantive limitation could be drawn in the constitution itself, or otherwise through lawful action by the polity in accordance with the process guarantees of the constitution. But it can also be limited to those standards not accepted by the popular will and written (or otherwise provided) in the Constitutional framework of any particular state. Principles of international law might guide the behavior of states among themselves, and the behavior norms might provide a touchstone for judging the validity of the expression of domestic political will (and the place of a state within the community of nations as civilized or not),[67] but it could not override that expression of will as memorialized in a constitution.[68]

It was a sense of dissatisfaction with the limits of this sort of constitutionalism that led to an attempt to re-conceive constitutionalism after 1945. If the Germans could create a rule of law legitimizing extraordinary cruelty and destruction, made authoritative and institutionalized in a most professional manner through their state apparatus, if the Japanese could use their constitutional structure as a vehicle for barbarous militarism, then constitutionalism itself would have to be reworked. And that was a task that the Allied victors in general, and especially the Americans as heirs to a visionary constitutionalism of their own, thought was fundamental to preventing future warmongering among the defeated states they occupied,[69] or the wholesale stripping of rights through constitutionally lawful methods.[70] It is to that project that great minds, and global elites, threw themselves after 1945.

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67. *See* WILLOUGHBY, *supra* note 51, at 29-39.

68. Thus, at the time of the reconstitution of the Japanese constitution within the framework of transnational constitutionalism, the war renunciation cause appeared remarkable—in accordance with traditional approaches to constitutionalism. "One of the strangest arguments advanced at that time was that the nation would find security within the United Nations with the Security Council taking over Japan's defense and perhaps permitting Japan appropriate measures of self defense. A strange argument indeed—look to an external force for permission to do that which is within the power of a sovereign nation!" P. Allen Dionisopoulos, *The No War Clause in the Japanese Constitution,* 31 IND. L. J. 437, 440 (1956). *Cf,* The Antelope, 23 U.S. 66 (1825); The Amistad, 40 U.S. 518 (1841).

69. Thus, for example, with reference to the Japanese constitutional renunciation of war, General Douglas MacArthur wrote "The renunciation of war is a unique feature of the new Constitution. Born out of the bitter experience of war and defeat, this provision bears the impress of the modern conception that mankind constitutes a unity." Douglas MacArthur, Report 1945, quoted in Dionisopoulos, *supra* note 68, at 441. *See, e.g.*, Harold S. Quigley, *Japan's Constitutions: 1890 and 1947,* 41 AM. POL. SCI. REV. 864 (1947) (on the Japanese post-War constitutional provisions renouncing war).

70. *See, e.g.*, Robert G. Neumann, *New Constitution in Germany,* 42 AM. POL. SCI. REV. 448 (1948) (value of new Basic Law in fostering democracy in post war Germany).

Though the paper uses 1945 as its starting point, the date is clearly arbitrary, though suitable for the purposes of the arguments made here. Still, it is worth noting certain important caveats. First, for some the exercise is a reminder, sometimes uncomfortable, of a longer-term effort of Western states to extend and secure their dominance of global politics and political culture. From that perspective, the arguments made here might be suspect as a foundational matter. Transnational constitutionalism merely emphasizes the character of the exercise as a product of Western States seeking to universalize their ideas of constitutionalism in terms of: (i) arbitrary use of power (process aspects—rule of law), and (ii) substantive limits of power (substantive rule of law: human rights).[71] This may make constitutionalism of limited value in the developed world where assimilation and uniformity may work against or exclude a certain necessary diversity.[72] For others, the origins and history of this project in transnational constitutionalism might make less difference than content and value of the ideas they project. Second, 1945 is an arbitrary cut off or starting date. The roots go back over a century in different countries in different historical, political, cultural and social contexts. We may remember that "Napoleon I, another military occupant, was a great reformer and succeeded in having European countries he conquered adopt ideas and institutions resulting from the French Revolution."[73] Latin America saw efforts to secularize national constitutions in the late 19th and early 20th centuries. Africa saw British efforts, usually misplaced and meant to harmonize in accordance with British notions of universal approaches to governance, the constitutionalization and rationalization of indigenous codes. Even the Westphalian system contains the seeds of constitutional law universalism, though that was not a road taken after the 17th century in Europe for the most part.

But the focus is on events after 1945 for several reasons. First, the period after 1945 saw, for the first time, conscious efforts by a global community to systematize and institutionalize a system of behavior norms limiting constitutional expression of any given polity. Second, this period also witnesses the first attempts to place that systemization/institutionalization within a vertical hierarchy of 'higher law' in which the constitutions of states did not come out on top. Third, the norms themselves for the first time acquire a more developed autonomy and independence from the control of any state or groups of states (however that control was usually expressed internally. Fourth, this period also witnessed for the first time an

71. *See* M. Koskenniemi, *Legal Universalism: Between Morality and Power in a World of States*, *in* LAW, JUSTICE, AND POWER, BETWEEN REASON AND WILL 46 (S. Chen ed., 2004). *But see* Wagatsuma, *supra* note 66 ("The recent war was begun, it may be said, in utter disregard of the real will of the people . . . . At least we may safely say the positive guarantee of fundamental human rights is the minimum requirement for the regeneration of Japan as a peace loving, cultural nation free form the tendency to wage an aggressive war once more."). *Id.* at 145.

72. *See* JAMES TULLY, STRANGE MULTIPLICITY-CONSTITUTIONALISM IN AN AGE OF DIVERSITY 58 (1995).

73. Alfred C. Oppler, *The Reform of Japan's Legal and Judicial System Under Allied Occupation*, 24 WASH. L. REV. 290 (1949).

attempt to draw a conscious link between state constitutions and independent (international) norms.

B. Building Universalist Constitutionalism After the Second World War

The end of the Second World War suggested to American elites the opportunity to effect large changes in governance systems.[74] The focus of the Allied Powers after the end of the war was on the construction of a system of states that would make war less likely or at least more costly.[75] They wished to institutionalize these protections through the U.N. system as well as through a variety of supra-national multi-state arrangements.[76] The goal of the Allied Powers was to tie all states together in a community of nations in which would be placed the power to set the limits of state constitutionalism. The institutional focus of that embrace was to be the United Nations system.[77]

For nation-states, that embrace of a framework of constitutionalism based on the power of a community of states to set the limits of state constitutionalism required a reorientation of constitutionalism away from a single minded focus on process to one that would provide a greater concentration on the legitimacy of the substantive content of constitutions There were two major objectives of this new universalist transnational constitutionalism. First, constitutionalism was to be made into a force for limiting recourse the resort even to otherwise lawful power. Power over the constitution of the state was to be shared between the people of a nation-state, and the people of the community of states. Constitutions were to become a means for limiting the range of expression of popular will, especially with respect to its spillover effects on individuals (for example slavery or the extermination of minorities) or other states (militarism). Those limitations were now to be placed in the hands of the international community rather than left in those of the political community of any single nation-state.

Second, constitutionalism was to focus on harmonizing those universal substantive restraints so that all states within the community of nations would act alike, or adhere to the same set of codes of behavior. Effectively, the architects of the new universalist constitutionalism sought to democratize and institutionalize the "civilized nations" framework of 19th century international law[78] within the bounds of national constitutionalism.

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74. "The world is today witnessing another important stage in constitutional history. In Europe, Asia and South America, adjustments to a new order have necessitated basic changes in fundamental law." Harrop A. Freeman, *New Constitutions of Europe, Asia, and South America,* 34 CORNELL L.Q. 1 (1948).

75. *See* Dionisopoulos, *supra* note 68 ("The victorious powers wanted to mold Japan into a democracy by imposing Western democratic institutions on the Japanese and to create a 'peace loving' nation by destroying all vestiges of the war machine.") *Id.* at 441.

76. "If the objectives of the Potsdam Declaration were to be achieved, the victorious powers had to be willing to police the defeated nation; the policing power depended on domestic politics and international relations." *Id.* at 438.

77. *Cf.* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2001).

78. *See* description in WILLOUGHBY, *supra* note 51, at 307-309.

And the focus of that effort was to be on human rights.[79] In this effort, the Allies were to be wildly, though not uncritically, successful.[80]

The great initial models of this new universalist constitutionalism were the German[81] and Japanese[82] post-war constitutions. These constitutions were the product of Allied thinking.[83] And the American academic elite was an eager participant as well,[84] a role they sought to reprise after the fall of "communism" in Eastern Europe.[85] (need to put aside racial/ethnic overlay, especially with respect to the construction of the Japanese Constitution). But they were also meant to apply the experience of American constitutionalism in a new form to sole governance problems very different from that confronting the founders in 1789. As a consequence, the resulting constitutions were to be quite different in scope and character.[86]

The Allied powers, and especially the United States and its legal establishment, were a powerful influence in what was seen as part of a larger global project. American perspectives in the formation of international constitutionalism began its first full flowering with the projects to reconstitute Japanese and German legal political institutions along a more structurally limited (that is constitutionally bounded) way.[87] The reconstitution of

79. For a discussion on the effect of this perspective in the construction of the Japanese post War constitution, *see* Sakae Wagatsuma, *Guarantee of Fundamental Human Rights Under the Japanese Constitution,* 26 WASH. L. REV. 145 (1951); Y. Yamada, *The New Japanese Constitution,* 4 INT'L & COMP. L. Q. 197, 200 (1955) ("In light of past history, the present constitution recognizes what it calls fundamental human rights and declares that they shall be conferred upon the people of this and future generations as eternal and inviolate rights."). For its importance in the construction of the German Bund after 1945, *see* Charles J. Friedrich, *Rebuilding the German Constitution II,* 43 AM. POL. SCI. REV. 704, 707-708 (1949).

80. For a criticism from a contemporary African constitutional development perspective, *see* Ruth Gordon, *Growing Constitutions,* 1 J. CONST. L. 528 (1999).

81. Basic Law for the Federal Republic of Germany (Grundgesetz) (1949), *available at* http://www.iuscomp.org/gla/statutes/GG.html.

82. The Constitution of Japan (1946), *available at* http://web-japan.org/factsheet/const/index.html.

83. *See, e.g.*, Harold S. Quigley, *Japan's Constitutions: 1890 and 1947,* 41 AM. POL. SCI. REV. 864 (1947) (Japanese post-War Constitutional provisions were product of Occidental thinking though it might reflect values inherent in Japanese culture); P. Allen Dionisopoulos, *The No War Clause in the Japanese Constitution,* 31 IND. L. J. 437, 441 (1956) ("external supervision (the Occupation Forces) was necessary to guarantee acceptance of Japanese democratic organization and renunciation of war"). *Id.* On the Allied efforts to forge a German "constitution" in the 1940s, *see* Charles J. Friedrich, *Rebuilding the German Constitution I,* 43 AM. POL. SCI. REV. 461, 469-471, 476-480 (1949).

84. All sectors of American political life participated in the enterprise. For the view from the Socialist camp. *See, e.g.*, Saffell, John, *Japan's Post-War Socialist Party*, 42 AM. POL. SCI. REV. 5 (1948).

85. Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, And Legal Change In The Post-Communist World And Beyond,* 20 U. PA. J. INT'L ECON. L. 179, 179-180 (1999) ("Asked to provide advice to a Central or Eastern European nation drafting its first post socialist constitution, a prominent American legal academic promptly produces an elaborate manuscript headed 'Constitution of the Republic of _____.' The document is a form-book charter of economic liberties, liberal rights, democratic governance, and limited governmental powers that awaits only a few strokes of the pen to insert the recipient country's name."). *Id.*

86. "Even in those countries where Americans have had a sizeable hand in formulating the documents, the constitutions are more leftist and advanced than the parent model." Harrop A. Freeman, *New Constitutions of Europe, Asia, and South America,* 34 CORNELL L.Q. 1, 28 (1948).

87. *Id.* at 5 ("The new constitutions of Japan and Bavaria, Hesse and Wuertenberg-Baden in the American zone in Germany are of particular interest because they may represent present American constitutional thinking.").

Japan and Germany also would set the stage for later constitutional interventions of two types. The first would include American interventionism in the reconstitution of post Soviet states in the 1990s.[88] The second would involve the naturalization of post War constitutionalist discourse in the reconstitution of post-colonial states, from Argentina in the 1980s[89] to South Africa and other Sub Saharan states in the 1990s,[90] to Islamic fundamentalist states at the beginning of the 21st century.[91]

The thrust of post War constitutionalism, as applied to Germany and Japan, was meant to create substantive limits on the exercise of the political will of the German and Japanese people by imposing strict structural limits on the availability of state power to affect certain ends. There were two principal objectives. The first was cultural—the Allied Powers meant to help restructure Japanese and German political culture, stripping the former of its militarism and the later of its disrespect for human life, and deepening in both a respect for democratic values and institutions.[92] This was thought to involve a large-scale reconstitution of the *Kulturstaat* principles of the defeated states.[93] The second was instrumental—to use the formal mechanics of government creation to impose strict sets of substantive and procedural limits on the power of the state apparatus either to be used against its own people or to be used against others.[94] Quoting from the *United States Initial Post Surrender Policy for Japan,* John Maki described how the Policy for the occupation was directed to the achievement of only two basic objectives:

88. *See* Rett R. Ludwikowski, *Supreme Law Or Basic Law? The Decline Of The Concept Of Constitutional Supremacy*, 9 CARDOZO J. INT'L & COMP. L. 253 (2001).

89. *See, e.g.*, Alejandro M. Garro, *Judicial Review Of Constitutionality In Argentina: Background Notes And Constitutional Provisions,* 45 DUQ. L. REV. 409 (2007); Illeana Gomez, Comment, *Declaring Unconstitutional a Constitutional Amendment: The Argentine Judiciary Forges Ahead*, 31 U. MIAMI INTER-AM. L. REV. 93, 95-101 (2000).

90. *See, e.g.*, Devika Hovell and George Williams, *A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa,* 29 MELB. U. L. REV. 95 (2005).

91. This aspect is taken up *infra* at text and notes at Section III, "*In the name of God, the Merciful, the Compassionate: The Rise of Theocratic Constitutionalism.*"

92. *See* JOHN M. MAKI, GOVERNMENT AND POLITICS IN JAPAN: THE ROAD TO DEMOCRACY 43-60 (1962).

93. "The occupation of Japan . . . is developing along quite unusual lines. Above and beyond those military considerations which normally govern the dispositions victors make of enemy territory, there are present in the Allied control of Japan broad programs for social, political and economic reform, some phases of which are only faintly related to the elimination of militarism or the reduction of military potential." Thomas J. Blakemore, *Post-War Developments in Japanese Law*, 1947 WIS. L. REV. 632 (1947).

94. Thus, in discussing the early jurisprudence of the German Federal Constitutional Court, Arthur von Mehren noted the importance of a judicial construction of the German Basic Law from which it extracted to fundamental principles with overriding effect—"the principles of democracy and federalism." Arthur T. von Mehren, *Constitutionalism in Germany—The First Decision of the New Constitutional Court*, 1 AM. J. COMP. L. 70, 86 (1952). With respect to the Japanese Constitution, the only other and by far more constructive alternative was to replace the old charter by a new fundamental law, which was to establish the guiding principles or the over-all program on which a democratic system of government could be built and from which modern legislation could be developed. Alfred C. Oppler, *The Reform of Japan's Legal and Judicial System Under Allied Occupation*, 24 WASH. L. REV. 290, 297 (1949).

> "(a) To ensure that Japan will not again become a menace to the United States or to the peace and security of the world. (b) To bring about the eventual establishment of a peaceful and responsible government which will respect the rights of other states and will support the objectives of the United States as reflected in the3 ideals and principles of the Charter of the United Nations."[95]

For Germany, on the other hand, constitutionalism was to be built from the bottom up, in an effort to reverse the centralization of power that had marked German national development since 1871.[96] Echoing what would later form part of the basis underlying the creation of the European Coal and Steel Community (and eventually the European Union), the 1945 directive (amended in 1947) of the Joint Chiefs of Staff for Germany declared that the Allies had no intention of imposing its own form of government on Germany. But it sought the establishment of a constitutionalist state in Germany grounded on basic principles of mandatory constitutional ordering to which Germany, like other sates, must be subject.

> It seeks the establishment in Germany of a political organization which is derived from the people and subject to their control, which operates in accordance with democratic electoral procedures, and which is dedicated to uphold both the basic civil and human rights of the individual. It is opposed to an excessively centralized government which through a concentration of power may threaten both the existence of democracy in Germany and the security of Germany's neighbors and the rest of the world.[97]

Constitutionalism was thus born out of a desire to strip sovereign polities of their discretion in exercising sovereign power by positing—as a newly constituted set of doctrines of constitutionalism—a set of substantive and process values which no state could contravene in its self constitution or in the implementation or exercise of its constitutional order.[98] Constitutionalism was to become an exercise in transnationalism, in which all states

95. JOHN M. MAKI, GOVERNMENT AND POLITICS IN JAPAN: THE ROAD TO DEMOCRACY 44 (1962).

96. *See* Charles J. Friedrich, *Rebuilding the German Constitution I,* 43 AM. POL. SCI. REV. 461, 465-469 (1949).

97. Directive Regarding the Military Government of Germany, July 11, 1947, Dept. of State Pub. 2913, quoted in Charles J. Friedrich, *Rebuilding the German Constitution I,* 43 AM. POL. SCI. REV. 461, 466 (1949).

98. *See supra,* note 8 for the German conception of the limiting power of Sozialstaat ideals on Rechtsstaat constitutionalism. Sakae Wagatsuma noted, for an American academic audience, that with respect to the new fundamental rights guaranteed under the Japanese postwar constitution, what "is of utmost importance, however, is that these rights of freedom under the new Constitution are not guaranteed as the 'rights which cannot be restricted except in accordance with law' but as the 'rights which are inviolable even in accordance with law.'" Sakae Wagatsuma, *Guarantee of Fundamental Rights Under the Japanese Constitution,* 26 WASH. L. REV. 145, 154 (1951) ("One may easily perceive that in this

were to have responsibilities to the community of nations in their internal constitution. And this was done for the best of all reasons—to avoid a repetition of the excesses of the Second World War, as calculated by the Allied Powers.

The makers of the German and Japanese post War constitutions drew generally from three sources of substantive (moral/ethical) nominative limits on constitutionally legitimate state power:[99] The first was to be found in the communal traditions of the state itself (expression of their highest communal aspirational views of themselves: as civilized, advanced, democratic, and the like).[100] The second was to be found in the aggregate of the moral/ethical behavior rules which find expression in the legal orders of all civilized states.[101] And the third was to be found in the formal legal

provision [art. 97 of the new Constitution] the ideology which regards fundamental rights not as the rights merely guaranteed by state laws but as natural rights inherent in mankind manifests itself clearly"). *Id.*

99. *See, e.g.*, Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000).

100. Post War writers in the West emphasized the constitutional and social traditions of Japan and Germany lending themselves to a democratic social and political order. Thus, for example, Kurt Steiner, the Chief, Civil Affairs and Civil Liberties Branch, Legislation and Judicial Division, Legal Section, GHQ, SCAP, Tokyo, Japan, wrote in 1950 of the revolutionary character of the Japanese attitudes to family (and thus also to social) organization. He concluded that "the reform of the Civil Code was in line with tendencies active in Japanese society for some decades." Kurt Steiner, *Postwar Changes in the Japanese Civil Code*, 25 WASH. L. REV. 286, 312 (1950) ("while it has been pointed out that legislative changes alone do not bring about new social conditions, there is no doubt that reform, in doing away with all legal sanctions against non conformity, will considerably hasten the adjustment of the farers and fishermen to the freer urban concept."). *Id.* at 312. Harold Quigley noted, again with respect to Japan, that the "new constitution embodies in law a political fact many centuries old. The Emperor is authorized to perform certain 'acts of state,' but is specifically forbidden to exercise 'powers related to government.'" Harold S. Quigley, *Japan's Constitutions: 1890 and 1947*, 41 AM. POL. SCI. REV. 865, 869 (1947) ("The new constitution is, however, a projection of lines of development that were apparent before the Manchurian crisis occurred. That fact is an augury of its survival."). *Id.* at 874.

101. Thus, Thomas Blakemore noted at the time that "in its definition of governmental institutions and their powers, this Constitution is clear and incorporates the experience of many nations." Thomas L. Blakemore, *Postwar Developments in Japanese Law,* 1947 WIS. L. REV. 632, 640. Charles Friedrich described German constitutionalism as "partly German, partly French, partly English, and partly American." Charles J. Friedrich, *Rebuilding the German Constitution I,* 43 AM. POL. SCI. REV. 461, 462 (1949). The roots of these ideas can be found in the earliest notions of 20th century international law, which posited a set of behavior codes grounded in agreement by the Great Powers. The mechanism of supra national behavior control rested on agreement among the Great Powers and was enforced by the ability of these Powers to act militarily against states that disregarded the rules. *See* Pollock, *The Sources of International Law,* 2 COLUM. L. REV. 511, 512 (1902). This suggested an attempt to impose on Constitutional law the rules of the international community as reflecting behavior (substantive law) ideals that could not be avoided in the construction of domestic systems. These notions were bound up in early formulations of international law that conflated supra-national characteristics with internal legal substantive sensibilities. "The principles of international law are the principles which are in force between all independent nations." The S.S. Lotus, Permanent Court of International Justice Ser. A No. 10 (1927). I note, but will not address here, the argument, grounded in post colonial theory and discourse, that the substance of these standards attempt to universalize Western notions of governance and institutional moral/ethical behavior *and* that this (alone or in conjunction with other factors) makes them suspect or less valuable. *See e.g.*, EDWARD SAID, ORIENTALISM (1978). Yet, even that position is itself highly contestable.

instruments among the community of states that set forth the basic rules of behavior among states.[102]

The Preamble to the Post War Japanese Constitution sets these themes out nicely:

> "We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want.
> We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations."[103]

Yet, even a couple of generations out, the Japanese still feel the foreignness of the imposition of this system, which they are still attempting to claim as their own.[104]

The German constitution is also self consciously aware of its role as both the foundation of a "rule of law" state and of the expression of the normative content of that "rule of law" governance system in unalterable principles of a "social state." The Grundgesetz focuses on restraining government in its power over individuals and minority or subordinated —that

102. This element was recognized in the development of the German Basic Law. *See* Arthur Lenhof, *The German (Bonn) Constitution With Comparative Glances at the French and Italian Constitutions*, 24 TUL. L. REV.1, 34-35 (1949) (explaining how the German, French and Italian constitutions express "the subordination of the nation under a higher authority, a "more perfect" organization, a control by international law and order, binding upon the individual nations.") *Id.* at 34. The pre War foundations of this last strand of transnational constitutionalism was recognized as derived from the constitutional traditions of both Anglo-American and German republican constitutionalism. *See* Lawrence Preuss, Editorial Comment: *International Law in the Constitution of the Länder in the American Zone in Germany*, 41 AM. J. INT'L L. 888 (1947). He noted the long tradition of rules of the family of civilized states as binding the community of nations belong to that "family." He explained that judicial practice "assumed, as did Lord Alverstone in the *West Rand* case, that whatever had received the common consent of civilized countries must have received the consent of their own, and that it could hardly be supposed that a *Kulturstaat* would repudiate a rule widely and generally accepted by others. Thus the obligatory character of international law was reconciled with the logical exigencies of positivist theory." *Id.* at 893 (citing West Rand Gold Mining, Ltd. v. The King, 2 K.B. 391, 406-407 (1905).

103. Japan Const, *available at* http://web-japan.org/factsheet/const/pre.html. At the time of its creation Harold Quigley noted that "Whereas the constitutions of Prussia and other German states of the early 1880s were the models used by Meiji statesmen, American, British, and internationalist principles are dominant in the present constitution." Harold S. Quigley, *Japan's Constitutions: 1890 and 1947*, 41 AM. POL. SCI. REV. 865, 867 (1947).

104. *See* Masaru Tamamoto, *Reflections on Japan's Postwar State*, 124 DAEDALUS 1 (1994).

power the monopoly of power over individuals begins to shift from nation-states to the community of nations. Consider Article 1 of the Grundgesetz:

> "(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law."[105]

The supra constitutional character of these provisions is confirmed within the text of the Grundgesetz itself, which forbids constitutional modification of the principles of basic rights, and the democratic and federal character of the state, except perhaps by an act rejecting the Basic Law in its entirety and substituting for it another.[106] These notions were most recently explored and confirmed in the German Maastricht case.[107] The German Federal Constitutional Court clearly articulated the nature, scope and limitations of political constitution, and the nature of their relationship to generalized principles of universalized human standards of conduct. That action by the court itself evidenced an embrace of Sozialstaat (substantive principles based) limits on otherwise legally sufficient bases of government action.[108]

In both cases, the Japanese and German constitutions were meant to exceed that of their predecessors, and perhaps even solve problems that continued to plague the constitutional systems of the Allied powers. The emphasis on human rights in the black letter of German and Japanese constitutions, was grounded on the sense that while these were unnecessary in the constitutional traditions of the United States and the U.K., because they were culturally deeply engrained in these political and social systems, the same was not true of less well culturally developed states—like Germany and Japan.[109] With some hindsight irony, some of these provisions

105. GRUNDGESETZ [GG] [Constitution] art. 1 (F.R.G.).

106. *See* GG art. 79. At the time of its enactment it was viewed by American academics as a bit of a constitutional oddity, and one not worth spending much time on. *See*, e.g., Charles J. Friedrich, *Rebuilding the German Constitution II,* 43 AM. POL. SCI. REV. 704, 719 (1949).

107. *See* Brunner v. European Union Treaty (German Maastricht case) 89 BVerfGE 155; 20 EuGRZ 429; [1993] NJW 3047; English translation available at: 1 CMLR 57; (1994) 33 ILM 388. The irony of that case, of course, was its emphasis on the lack of legitimacy of supra national institutions (in this case those of the European Union) with respect to the universal values of state organization.

108. "For generations, German jurists accepted whatever law was made by the lawmaker. Its interpretation became a mere 'art' or 'technique.' The men exercising it were supporting what was nothing but a dubious legality, until under the Hitler regime that legality was finally found to be fraudulent." Gottfried Dietze, *Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany,* 42 VA. L. REV. 1, 2 (1956).

109. Consider in this respect Thomas Blakemore's understanding of the development of civil liberties in Japan. Thomas L. Blakemore, *Postwar Developments in Japanese Law,* 1947 WIS. L. REV. 632, 649-52. Quoting from Hozumi Nobushige's work on the Japanese Civil Code, the understanding at the time was that:

were viewed as silly because they sought to elevate hortatory provisions to law in a way uncharacteristic of Anglo-American constitutionalism.

> The American observer, used to the classic draftsmanship of his own constitution, may be repelled by the verbosity and pamphleteering character of some of the German provisions. . . . A country like England, where the tradition of personal freedom is deeply engrained, may easily do without a single document embodying the supreme law of the land. But where liberty is not so secure, a strong constitution can give added strength to the friends of democracy and help confound its enemies.[110]

One of the most interesting aspects of this mentality is the academic loathing of political parties. The expectation, apparently, in the 1940s was that Japanese political parties might be of a better character than those of their American or European counterparts.[111] The German efforts were subject to the same criticism.[112]

Within a generation of their introduction, the principles underlying Japanese and German constitution making became systematized and generalized within the field of transnational constitutionalism. And increasingly, from the 1970s on, came to be centered outside the nation state and within a progressively more completely developed set of transnational and international institutions. Thus constitutional normative common law began to be expressed, for example, through positivist rules of global institutions—the U.N. in particular, as the great source of the communal civilizer

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> The notion of right did not originally exist in Japan before the introduction of Western Jurisprudence. Many Western writers assume that right is coeval with law, and law and right are only two terms expressing the same notion from different points of view. Some even go so far as to affirm that right is anterior to law, and that letter only exists for the assurance or protection of the former. In Japan, however, the idea of right did not exist so long as her laws belonged to the Chinese Family. There was indeed the notion of *duty* or *obligation* buy neither the notion of right nor the word for it existed in either Japanese or Chinese.

HOZUMI NOBUSHIGE, THE NEW JAPANESE CIVIL CODE AS MATERIAL FOR THE STUDY OF COMPARATIVE JURISPRUDENCE (1912).

110. *See* Robert G. Neumann, *New Constitutions in Germany*, 42 AM. POL. SCI. REV. 448, 467-468 (1948) (viewing these pas the black-letter expression of political party propaganda) *Id.* at 449-51, 454-456. He sarcastically suggesting that perhaps "the framers built themselves a prison of *Weltanschauung* from which they could no longer escape." *Id.* at 451. But of course, that is precisely what they did.

111. "Can the cesspools of corruption called political parties be cleaned up and forced to serve the national interest in preference to the narrow interests f the individual bosses?" Justin Williams, *The Japanese Diet Under the New Constitution,* 42 AM. POL. SCI. REV. 927, 939 (1948). The question might well have been asked of those of their American masters at the time. The weakness of the political party organization in Japan in the immediate postwar period is discussed in John Saffell, *Japan's Postwar Socialist Party,* 42 AM. POL. SCI. REV. 957-69 (1948); Harry Emerson Wildes, *Underground Politics in Post-War Japan,* 42 AM. POL. SCI. REV. 1149-1162 (1948) (on the construction of political machines); Justin Williams, *Party Politics in the New Japanese Diet*, 42 AM. POL. SCI. REV. 1163-1180 (1948) (on lobbying).

112. *See* Robert G. Neumann, *New Constitutions in Germany*, 42 AM. POL. SCI. REV. 448, 450-451 (1948).

of states through international law now limiting constitutions.[113] Other entities also began to become great players in this area. The European Court of Justice had a great impact through the elaboration of systems of general principles of Community Law derived from out of the constitutional traditions of the Member States of the European Union along with the pronouncements and principles of international law derived form regional human rights institutions and international organizations.[114] These regional human rights institutions, for example the European Court of Human Rights,[115] the Inter-American Court[116] and others, have also developed a set of substantive principles limiting the scope and elaboration of constitutional governance with effects on the substantive content of national constitutional law provisions.[117] Recently the criminal law of human rights has been internationalized as well through the Rome Statute of the International Criminal Court.[118] The internationalization of substantive and process rights, available to all individuals, irrespective of the peculiar nature of the constitutional order of the states in which their citizenship rights derive, still forms a critical project of so called international law.[119]

Thus, by the third quarter of the 20th century a pattern of global understanding, the customary practices of a majority of states within their constitutional orders, and the principles developed within the international and transnational organizations reflecting the will of the community of

113. *See* BOUTROS BOUTROS-GHALI, AN AGENDA FOR DEMOCRATIZATION (1996). *See also* Anne Peters, *Global Constitutionalism Revisited,* 11 INT'L LEGAL THEORY 39 (2005). Professor Peters notes that "international law used t be blind for constitutional principles within states. In contrast the idea of constitutionalism implies that state sovereignty is gradually being complemented (if not substituted) by other guiding principles, notably the 'global common interest' and/or 'rule of law' and/or 'human security.'" *Id.* at 49. On an argument for the international regulation of occupation through which new constitutionalism may be expressed, *see* Jean L. Cohen, *The Role Of International Law In Post-Conflict Constitution-Making: Toward A Jus Post Bellum For "Interim Occupations"*, 51 N.Y.L. SCH. L. REV. 497 (2006-2007). On the same for genocide crimes *see* NEAL REIMER, PROTECTION AGAINST GENOCIDE: MISSION IMPOSSIBLE? 141-160 (Neal Riemer, ed., 2000) ("Nations have a crucial role to play in the protection against genocide, and they should be encouraged to play this valuable role. However, protecting against illegitimate intervention and securing the development of global constitutionalism call for primary use of global (UN) and regional organizations."). *Id.* at 155.

114. Indeed, academics now speak of the development of a common legal culture to supplement the legal orders of the Member States. *See, e.g., the essays in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (J. H. H. Weiler & Marlene Wind, eds., 2003).

115. The European Court of Human Rights provides a wealth of materials on its web site, *available at* http://www.echr.coe.int/echr/.

116. For a discussion, *see, e.g.*, THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS (David J. Harris & Stephen Livingstone, eds., 1998); John F. Stack, Jr., *Human Rights in the Inter-American System: The Struggle for Emerging Legitimacy?, in* LAW ABOVE NATIONS: SUPRANATIONAL COURTS AND THE LEGALIZATION OF POLITICS 99 (Mary L. Volcansek, ed., 1997).

117. For a discussion in the context of German constitutional law, *see* Frank Hoffmeister, *Germany: Status of European Convention of Human Rights on Domestic Law*, 4 ICON INT'L J. CONST. L. 722 (2006).

118. *See, e.g.*, Joshua Bardavid, *The Failure Of The State-Centric Model Of International Law And The International Criminal Court*, 15 N.Y. INT'L L. REV. 9 (2002); Leila Nadya Sadat, S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381 (2000).

119. *See, e.g.*, Robin West, *Human Capabilities and Human Authorities,* 4 GREEN BAG 2nd 207, 213 (2001); Rett R. Ludwikowski, *Constitutionalization Of Human Rights In Post-Soviet States And Latin America: A Comparative Analysis*, 33 GA. J. INT'L & COMP. L. 1, 109 (2004).

states, became the basis of a system of structural control of constitutionalism. This understanding was backed by the moral and military power of the Allied Powers of the Second World War, now exerted within the institutional context of a growing web of transnational and international organizations, and clothed in the forms of international formal and customary law. The effect was revolutionary. The traditional notions of sovereignty were destabilized. No longer was it entirely respectable for a state to claim that it could organize itself in any way in chose and deal internally with its relationship to its people without constraint, when the adoption of a constitutional form was only skin deep.[120]

The synthesis of a Post-War system of norms applicable to all nation state constitutions, if they were to be recognized as legitimate by the international community of nations, constituted an expansion and constitutionalization of sources of a set of norms of human behavior, and of the necessary constraints in the development of systems of institutions with effects on people. From the time of the establishment of the United Nations it dovetailed with expansion of role and legitimacy of international law and governance.[121] And ultimately, it served as a mechanism for the control of state behavior either internally against its own citizens (the Nazi problem) or externally against other states (the Japanese militarism problem).

The mechanism paralleled a customary or common law system, though it could also claim a consistency with sources in civil law systems,[122] and could derive legitimacy form its relationship to the forms (if not the content necessarily) of customary international law.[123] The rules formation for principles of transnational constitutionalism appeared to mirror those of

120. *See* Isaac I. Dore, *Constitutionalism and the Postcolonial State in Africa: A Rawlsian Approach*, 41 ST. LOUIS U. L.J. 1301, 1303-1305 (1997).

121. *See, e.g.*, ARTHUR N. HOLCOMBE, HUMAN RIGHTS IN THE MODERN WORLD 120-140 (1948).

122. Thus, for example, there is an echo in transnational constitutionalism to the natural law underpinnings of civil law. One of the more influential comparative law texts notes that the French "Code Civil is based on the tenet of natural law that there are autonomous principles of nature, quite independent of religious belief, from which one can infer a system of legal rules which, if given intelligible form according to a plan, can act as the basis for an orderly, reasonable and moral life in society." KONRAD ZWEIGERT AND HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 88 (Tony Weir, trans., 3rd ed., 1988). *See also* note 8, supra.

123. On customary international law, *see, e.g.*, Steven R. Ratner, *Is International Law Impartial?*, 11 LEGAL THEORY 39, 57 (2005). This is not to suggest that customary international law is either stable or accepted by the international community. The concept is both fluid and subject to intense attack in many quarters. An interesting angle on the value of customary international law, from the perspective of the creation of a norm system of transnational constitutionalism is bound up in the relationship between "critical mass" and notions of legitimacy and authority.

> "However, in the same way that a social norm may be transformed into a legal norm, a social movement may end up defining itself in legal terms. In fact, some have argued that law is, and should be, a critical player in the creation and sustenance of social movements, while others maintain that "social movements and juridical law are fundamentally in tension." I need not join that debate here. For my purpose, it is sufficient to note that whether they ultimately constitute themselves legally or not, the emergence of social movements is subject to the same logic of critical mass as are social behavior and social norms."

Adeno Addis, *The Concept Of Critical Mass In Legal Discourse*, 29 CARDOZO L. REV. 97, 146-147 (2007).

customary international law. It evidences characteristics of a sort of common law or organic law of constitutional restraint, applicable to all states, in which all states have a role/stake in its construction, and is meant to produce constitutional convergence at least with respect to frameworks/objectives.

Transnational constitutionalism as a mechanism of control of national popular will work because it effectively restrains expression of that will by recourse to a higher authority—that of all people constituted in the family of nations—in the form of a developed set of principles of political organization.[124] Thus, the source of the limiting rules was located outside the control of any individual state, but within the control of the community of nations. Likewise, the limiting framework was external to any individual state constitutional system. It was secular.[125] It could be changed but only by the consensus of the community of nations. As Jonathan Miller noted in connection with Argentine constitutionalism: "In a sense, international human rights law provides the legitimacy that might once have found in natural law, and much of the discussion at the Convention places international human rights law on a pedestal very similar to that of natural law."[126]

The system tends towards self-enforcement *within* states through communication between states by reference to international normative standards. It began to depend on the growth of a transnational judicial elite and the construction of a transnational jurisprudence of constitutional norms.[127] It is also aided as more and more of the issues of constitutional states are juridified.[128] Thus, a transnational level, constitutionalism serves

124. Though subject to any number of iterations, it has become a reductionist commonplace to describe the form of transnational constitutionalism as comprising the two principle objectives of the Allies after the Second World War: no government apparatus may be vested with limitless power and political organization requires a recognition and protection of a set of individual rights. *See* Issa G. Shivji, *State and Constitutionalism: A New Democratic Perspective, in* STATE AND CONSTITUTIONALISM: AN AFRICAN DEBATE ON DEMOCRACY 27, 28 (Issa G. Shivji, ed., 1991).

125. Law as a universal concept of order could free itself from a religious foundation either through an invocation of natural law, as it had authoritatively done in the West since at least the 18th century, or as Roberto Unger, suggested, by invoking a theology of transcendence, a belief in group pluralism, tied to the idea of the liberal secular state. *See* ROBERTO M. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 66-76, 83-86, 176-81 (1976).

126. Jonathan M. Miller, *A Typology Of Legal Transplants: Using Sociology, Legal History And Argentine Examples To Explain The Transplant Process*, 51 AM. J. COMP. L. 839, 863 (2003). *See generally*, THE GLOBALIZATION OF HUMAN RIGHTS (Jean-Marc Coicaud, Michael W. Doyle, & Anne-Marie Gardner eds., 2003).

127. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT'L L. 1 (2003); J. Patrick Kelly, *The Changing Process of International Law and the Role of the World Court*, 11 MICH. J. INT'L L. 129 (1989).

128. Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721 (2006). Early in the history of the German Basic Law of 1949, Arthur von Mehren wrote of the German Federal Constitutional Court as "the central institution in the experiment with constitutionalism initiated by the Basic Law—it is 'the final step in building a state based upon the rule of law (*Rechtsstaat*).'" Arthur T. von Mehren, *Constitutionalism in Germany—The First Decision of the New Constitutional Court*, 1 AM. J. COMP. L. 70, 78 (1952) (quoting, in part, the remarks of a Herr von Merkatz in the debate on the Law of the Constitutional Court).

as a meta-system with its own mechanics of elaboration, interpretation, legitimacy and authority.[129] The system represents the great expression of the collective genius of humanity—the great flowering of the humanism that started in the Renaissance in Europe and acquired its current form during the European Enlightenment with its focus on (1) secularism, (2) positivism, and (3) scientism (reason or rationality).[130]

Yet, for all that theoretical cohesion, the system of transnational constitutionalism was uneven in its application. From its beginnings in 1945 there were questions of effectiveness: "Whether this advance proves to be real rather than apparent will depend upon the sincerity of the German people and the effectiveness of the international control by which they are held to their own professions."[131] Some states rejected the full implications of the system (the United States and the People's Republic of China among them).[132] Other states never enjoyed the freedom to set their own norms (especially in the decolonizing world) so that the circumstances that contributed to successful transplantation in Japan and Germany had the opposite effect.[133] Many states continue to resist internationalization of law, at least at the margins. The great debates over the value and effectiveness of reservations to treaties—especially on constitutional grounds (upholding the supremacy of internal law) or shar'ia grounds (upholding the supremacy of religious over natural, secular or communal law) provide two example.[134] In some respects, then, the system described appeared more aspirational than real until the 1980s, and remains very much contigent into the 21st century.

Still, from the 1980s, the system began to appear to have some success in limiting state power. This power was reflected in both the discrediting of the military regimes of Latin America and the marginalization and ultimate dismantling of a constitutionally formally legitimate system of apartheid in

129. In this sense the system is effectively autonomous and transnational in character. *See* Larry Catá Backer, *Principles of Transnational Law: The Foundations of an Emerging Field*, LAW AT THE END OF THE DAY, March 9, 2007, *available at* http://lcbackerblog.blogspot.com.

130. *See* GERALD R. CRAGG, THE CHURCH AND THE AGE OF REASON 1648-1789 235-239 (1970).

131. Lawrence Preuss, Editorial Comment: *International Law in the Constitution of the Länder in the American Zone in Germany*, 41 AM. J. INT'L L. 888, 899 (1947).

132. Americans, for example, continue to treat their constitutional state as requiring an inward looking historicist approach, even as American political elites constructed and supported outward looking constitutionalism abroad. *See, e.g.*, Thomas B. McAffee, *Restoring The Lost World Of Classical Legal Thought: The Presumption In Favor Of Liberty Over Law And The Court Over The Constitution,* 75 U. CIN. L. REV. 1499 (2007).

133. Thus, for example, Ruth Gordon argues that constitutionalism in Sub-Saharan Africa was doomed to trouble "in part because the postcolonial order was usually built on foreign paradigms that had little or no foundation in the myriad of cultures of the peoples they were to govern. Postcolonial institutions were prescribed on top of still-existing coercive anti-democratic structures of the colonial era." Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528, 532 (1999) (postcolonial constitutions "appear to have been doomed to fail from the outset."). *Id.* at 533).

134. *See* discussion in United Nations, International Law Commission, *Report of the International Law Commission Fifty-ninth session* (7 May-5 June and 9 July-10 August 2007) General Assembly Official Records Sixty-second session Supplement No. 10 (A/62/10). *Id.* at 84-86 (on reservations grounded in local constitution); *Id.* at 86-87 (on the so-called shari'a reservation).

South Africa. They also influenced post Soviet constitutionalism in Eastern Europe.[135] These changes gave rise to the first flowering in so-called third generation constitutions, exemplified by those of Argentina, and South Africa. These constitutions are characterized by a strong adherence to principles of substantive and process rule of law ordering in the construction of state institutions. They are also self consciously focused on the mechanisms of transnational constitutionalism for the elaboration of national constitutional interpretation. Thus, for example, the South African Constitution elevates certain international agreements within the South African Constitutional order and requires or permits its Constitutional court to consider decisions and interpretations of other constitutional systems in interpreting the South African Constitution.[136] And the Argentine Constitution provides that its provisions are subject to certain international agreements, conventions and systems of supra national governance.[137] Though neither system has been free of criticism, at least at a formal level each evidences the ways in which constitutionalism has sought to become bounded within networks of normative constrains expressed in law sourced outside the state.

Within these systems *religion* has a very precise role. Within post War transnational constitutionalist systems religion was meant to be understood as just another right to protect. As against the universalizing framework of transnational constitutionalism, with its focus on human rights, democracy, participation and non-discrimination, religion was viewed as important but parochial.[138] Religion divides and does not compromise. It tolerates but cannot accept equality among those of different faiths. And it used religion to emphasize its fundamental character of supra religious.[139] Within the hierarchy of norms, the religious was treated as subordinate to universal

135. *See, e.g.*, Rett R. Ludwikowski, *Constitutionalization Of Human Rights In Post-Soviet States And Latin America: A Comparative Analysis*, 33 GA. J. INT'L & COMP. L. 1 (2004).

136. *See* THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996, *available at* http://www.concourt.gov.za/site/theconstitution/thetext.htm (*see* especially Arts 39 and Preamble). The South African courts have nicely elaborated and applied this system. Among the most well developed examples of this jurisprudence is the case in which the South African court considered the constitutionality of the death penalty. State v. T. Makwanyane and M. Mchunu, Case No. CCT/3/94 (1995); *available at* http://law.gsu.edu/ccunningham/fall03/DeathPenalty-SouthAfrica-Makwanyane.htm.

137. *See* Jonathan M. Miller, *A Typology Of Legal Transplants: Using Sociology, Legal History And Argentine Examples To Explain The Transplant Process*, 51 AM. J. COMP. L. 839 (2003); Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281 (1999).

138. *See, e.g.*, LOUIS HENKIN ET AL., HUMAN RIGHTS 68-72 (1999) (suggesting a connection between human rights as articulated after the Second World War, state organization and development as currently conceived).

139. Even where the primacy of a former official religion is acknowledged, the primacy of the state with respect to its interactions with religion in general is acknowledge. Thus, for example, the Constitution of Peru provides "el Estado reconoce a la Iglesia Católica como elemento importante en la formación histórica, cultural y moral del Perú, y le presta su colaboración. El Estado respeta otras confesiones y puede establecer formas de colaboración con ellas." CONSTITUTION OF PERÚ (1993 as amended), art. 50, *available at* http://pdba.georgetown.edu/Constitutions/Peru/per93reforms05.html ("the state acknowledges the Catholic Church as an important element in the historical formation, culture and norms of Peru, and lends it its support. The State respects other religious confessions and may establish formal collaborations with them.").

secular and political norms. Yet religion, and institutionalized religion, did not acquiesce, either in the West or in the non-Christian world. Still, institutions communicate.[140] And the forms of institutional expression might converge. Secular transnational constitutionalism clearly evidenced success on the ground. Would it be possible to mimic the pattern but substitute a different set of normative frameworks? It appears that the answer is increasingly—yes. It is to that question, and to the role of religion in the formation of an answer that the article turns to next.

III. "IN THE NAME OF GOD, THE MERCIFUL, THE COMPASSIONATE": THE RISE OF THEOCRATIC CONSTITUTIONALISM

> In accordance with the sacred verse of the Qur'an ("This your community is a single community, and I am your Lord, so worship Me" [21:92]), all Muslims form a single nation, and the government of the Islamic Republic of Iran has the duty of formulating its general policies with a view to cultivating the friendship and unity of all Muslim peoples, and it must constantly strive to bring about the political, economic, and cultural unity of the Islamic world.[141]

The template established in the construction of the German and Japanese post War constitutions has proven to be quite influential. And, indeed, by the third quarter of the 20th century, a lively field of transnational constitutionalism had developed to study and comment on the increasingly well understood patterns of governance and rule of law systems engendered by the post War transnational constitutional order.[142] The focus of this constitutionalism was transnational and secular. It was grounded on

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An interesting example in the West concerned the long campaign by the Vatican to have included in the proposed Constitutional Treaty for the European Union at least a reference to the religious foundations of Europe. "The Holy *See* believes the draft of the European Constitution has two flaws: It recognizes neither the continent's Christian heritage nor the proper role of churches." Holy *See* Believes EU Constitution is Flawed, Zenit.org (Nov. 20, 2003) *available at* http://www.goacom.org/overseas-digest/Religion/Pope%20JPII/vat&eu03.htm.

140. *Cf.* Drury Stevenson, *To Whom is the Law Addressed?*, 21 YALE L. & POL'Y REV. 105, 144-145 (2003) ("Society is understood as a self-regulating system of communication . . . specialized cycles of communication have developed out of the general cycle of communication. Some have become so thoroughly independent that they have to be regarded as second-order social autopoietic systems. They have constituted autonomous units of communication which, in turn, are self-reproductive. They produce their own elements, structures, processes, and boundaries. They construct their own environment, and define their own identity. . . Social subsystems are operatively closed, but cognitively open to the environment. The legal system in its present form can be viewed as a second-order autopoietic social system," referencing GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM 69-70 (1993). *Id.* at 106. And reference to a particular religion remains unlikely in the more recent modifications to the treaty structure of the European Union. *See* Treaty of Lisbon (proposed). *See* Presidency of the European Union, Portugal 2007, *European leaders approve Treaty of Lisbon*, Oct. 19, 2007, *available at* http://www.eu2007.pt/UE/vEN/Noticias_Documentos/20071019soc.htm.

141. THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN art. 11; *available at* http://www.iranchamber.com/government/laws/constitution.php.

142. For American academic forays in this newly constituted field, *see, e.g.*, VICKI C. JACKSON, MARK V. TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (1999); MICHEL ROSENFELD, ANDRAS SAJO,

the rules of behavior derived from the understandings and sensibilities of the community of states. In this sense it was self-referencing and meta sovereign—the system essentially moved ultimate discretion up from any individual state to the community of states.

Still, the pattern of constitutionalism—its grounding in larger social principles in the constitution of states, and its deployment of process of structure in the constitution of social and procedural rule of law governments, was not inherently tied to the normative structure on which the Allied Powers, and thereafter the United Nations relied. Any number of other transnational sources could be invoked for the construction of "rule of law" constitutional systems. Among the more powerful of these, and the most successful since the end of the Second World War, has been theocratic transnational constitutionalism. "However hazy, a Middle Eastern pattern exists, which, for particular historical reasons connected with colonialism and the fragmentation of the area, needs some attention: the craving of people for a unity built on a real or imagined Arab or Islamic commonwealth."[143]

For the purposes of this article, modern origins trace back to very recent history—the Iranian revolution and adoption of the Iranian Constitution of 1979.[144] This assumption, of course, is subject to a number of important caveats. First, 1979 is arbitrary. The roots of modern theocratic constitutionalism, at least in the dar al Islam, go back at least as far as the Pan-Arab nationalism of the 19th century and Persian resistance to Westernization prior to WWI. Second, constitutionalism has some roots in traditional modern form within the dar al Islam. Traditional constitutionalism existed in models of varying influence from Egypt to Saudi Arabia to Morocco.[145] The Ottoman model was also influential, especially after 1923 and the reconstitution of Turkey as a modern secular republic.[146] Third, *theocracy comes in a wide variety of flavors.* Though the article focuses on Islam as the most dynamic and successful current form (at least successful in translating its forms into modern discursive forms). But other universalizing faiths might also provide other foundations: Christianity, Hinduism, Buddhism, etc. But for the moment, Islamic theocratic constitutionalism presents the most developed form of this branch of transnational constitutional development, and for that reason is worth careful study.

SUSANNE BAER, NORMAN DORSEN, COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS (2003).

143. Chibli Mallat, *On The Specificity Of Middle Eastern Constitutionalism*, 38 CASE W. RES. J. INT'L L. 13, 16 (2006).

144. THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN, *available at* http://www.iran-chamber.com/government/laws/constitution.php.

145. Indeed, the Pakistani Constitution of 1973 had already constitutionalized Islam within the framework of a state formally constituting a rule of law democratic government apparatus. *See* Anne Elizabeth Meyer, *Islam and the State,* 12 CARDOZO L. REV. 1015 (1991).

146. On the difficulties of pluralism in the construction of the modern Turkish state, *see* Ihsan Yilmaz, *Secular Law and the Emergence of Unofficial Turkish Islamic Law*, 56 MIDDLE E.J. 113-131 (2002).

Islamic theocracy provides the most developed form of post War constitutionalism applied using a different normative foundation.[147] Again, this must be understood in terms of the construction looking for first systematization and institutionalizations of universal system limiting constitutional powers of state. What makes the Iranian Constitution of 1979 special for my purposes is the way it modernizes the language and institutional context of theocratic state governance. It adapts overarching transcendental system of norms to modern language of *Process Constitutionalism.*[148] Together they produce a *Sozialstaad* very different from that envisioned either by the Americans after 1945 or Western Constitutionalism as developed thereafter.

Like modern constitutions grounded in principles of transnational constitutionalism, the Iranian constitution appears to protect against arbitrary use of state power. The Constitution gives the power to enact legislation to the representatives of the people.[149] The Iranian Constitution also provides for a system of institutionalized and nominally democratically based legislation adopted in accordance with constitutional requirements.[150] Like modern constitutions it also imposes limits on power the people can give the state Substance Constitutionalism.[151]

Yet, *unlike* constitutions adopted under Post-WWII framework, the Iranian Constitution embraces the substantive (moral/ethical) restraints of Shi'a Islam.[152] "This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the

147. As Nigerian Justice Wali suggested: "Islamic Law is not the same as customary Law as it does not belong to any particular tribe. It is a complete system of universal Law, more certain and permanent and more universal than the English Common Law." 1 SCNJ 73 (1999), quoted in Abdulmumini Adebayo Oba, *The Sharia Court of Appeal in Northern Nigeria: The Continuing Crisis of Jurisdiction,* 52 AM. J. OF COMP. L. 859, 881 (2004).

148. In this context the very modern and very American process school provides an insight in the current language of rule of law process constitutionalism:

> The legal process school focuses primary attention on who is, or ought, to make a given legal decision, and how that decision is, or ought, to be made. . . . The question what is or ought to be the substantive law governing citizen behavior in a given area is no longer the sole, or even the dominant, object of legal analysis. Rather, legal process analysis illuminates how substantive norms governing primary conduct shape, and are in turn shaped by, organizational structure and procedural rules.

Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 691 (1989) (reviewing PAUL M. BATOR ET AL., HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed, 1988)). *See also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 38-41 (1980).

149. *See* THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN art. 57 (powers of government are vested in the legislature, judiciary and executive) and art. 58 (legislative functions to be exercised through the Islamic Consultative Assembly).

150. The legislative power is then elaborated at *Id.* arts. 62-99.

151. The substantive limitations on state power are elaborated at Chapter III of the Constitution, arts. 19-31. These mimic the standard description of basic rights in Post-War constitutions. But, rather than grounded in transnational constitutionalist principles, these rights are grounded "in conformity with Islamic criteria." *Id.* at art. 20 (equal protection of the laws); 21 (rights of women); 24 (press freedom except when "detrimental to the fundamental principles of Islam"); 27 (public gatherings, same as art. 24); 28 (right to choose occupation, "if not contrary to Islam and the public interest").

152. *See e.g.*, THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN art. 12:

> The official religion of Iran is Islam and the Twelver Ja'fari school [in usual al-Din and fiqh], and this principle will remain eternally immutable. Other Islamic schools, including the

fuqaha' of the Guardian Council are judges in this matter."[153] And, the constitutional systems set up an institutional framework for religious oversight of political activity.[154] Thus, for example, the work of the Consultative Assembly is overseen by a Guardian Council,[155] "with a view to safeguard the Islamic ordinances and the Constitution, [and] in order to examine the compatibility of the legislation passed by the Islamic Consultative Assembly with Islam."[156] Indeed, the representative legislature "does not hold any legal status if there is no Guardian Council in existence."[157] This is constitutionalism of a very different order. It rejects conformity to international norms, or an obligation to bend behavior to the standards of the international community on the implementation and acceptance of certain norms—principally involving human rights, subordination and the construction of democratic governance institutions. It serves a different community, that of the faithful. The rest of the world is irrelevant, except to the extent of their power to intervene in internal Iranian affairs.

There are several key features that distinguish the 1979 Iranian Constitution from other constitutional efforts. The fundamental difference is the source of substantive constitutional norms. Like the dominant transnational constitutionalist system, Iranian constitutionalism is based on a system of universal substantive norms. But while the emerging system of transnational constitutionalism is grounded in global secular, internationalist human rights norms based on common values among the family of nations, Iranian constitutionalism is founded on Shi'a Islam.[158] As a consequence, the system of checks and balances common to secular transnational constitutionalist systems is substantially different. While the former constructs its state apparatus as self-referencing and internally complete—all elements of governance are incorporated as a formal part of the state apparatus, within Iranian constitutionalism the state apparatus is distinct from and subordinate to the apparatus of religious governance.

Hanafi, Shafi'i, Maliki, Hanbali, and Zaydi, are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites. These schools enjoy official status in matters pertaining to religious education, affairs of personal status (marriage, divorce, inheritance, and wills) and related litigation in courts of law. In regions of the country where Muslims following any one of these schools of fiqh constitute the majority, local regulations, within the bounds of the jurisdiction of local councils, are to be in accordance with the respective school of fiqh, without infringing upon the rights of the followers of other schools.

See also arts. 1(sovereignty of Qur'onic justice); 2 (belief in "Divine revelation and its fundamental role in setting forth the law"); and 4 (need to base all laws and regulations on Islam). The critical provision is art. 5 that vests ultimate authority on a religious leader.

153. THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN art. 4.

154. Said Saffari, *The Legitimation of the Clergy's Right to Rule in the Iranian Constitution of 1979,* 20(1) BRIT. J. OF MID. E. STUD. 64-82 (1993).

155. THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN at art. 91.

156. *Id.*

157. *Id.* at art. 93.

158. Thus for example, in the section of the Constitution elaborating the rights of national sovereignty, the Constitution starts with the declaration that "absolute sovereignty over the world and man belongs to God. . . . The people are to exercise this divine right in the manner specified in the following articles." THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN art. 56.

While there are substantial areas of overlap, the two systems are distinct. And the apparatus of religious governance is hierarchically supreme within the sphere of traditional state governance.[159] Third, the governed—the people of Iran—have no power to interrogate and alter the formulation of the basic substantive norms on which political governance is founded. That basic norm structure derives from a divine source and is unalterable, except by that source. The people are permitted only one response to these norms—obedience.[160] But of course, the people, at least within Islam, do have a significant and complex role in the elaboration and application of that system both as applied to the constitution of the state and in its role as legal code governing every aspect of life.[161]

Still, despite those differences, the Iranian theocratic Constitution resembles modern constitutions, and adheres to the current pattern of modern constitutionalism in certain respects. First, the forms of "rule of law" constitutionalism are observed. The government constituted is in some great sense democratic.[162] There is a significant element of separation of powers in the construction of the state apparatus.[163] Second, the substantive elements of modern constitutionalism are also observed.[164] Human rights are enshrined in the constitution and protected.[165] The power to petition the government is preserved.[166] Third, the power of the state and its governance organs are strictly limited. In this sense the Iranian constitution follows emerging models of transnational constitutionalism. The difference—and a critical one to be sure—is the source of the norms

159. *See* Said Saffari, *The Legitimation of the Clergy's Right to Rule in the Iranian Constitution of 1979*, 20(1) BRIT. J. OF MID. E. STUD. 64-82 (1993).

160. Republican principles are still consonant with this system—it is just that the interrogation of basic norms sourced in Islam are now outside the bounds of political discourse, and with respect to those, the citizen must yield to the "priest." Said Saffari has nicely described the origins of an institutionalized elaboration of priestly government in Shi'a Islam, and its relation to the construction of a political state. Said draws out the foundationally distinct quality of universal theocratic constitutionalism and its relationship to government: "[T]he Islamic government is based on an ideology different from that of a democratic republic. What . . . is indeed appropriate for a democratic republic . . . fails to meet the requirements of Islam." Said Saffari, *The Legitimation of the Clergy's Right to Rule in the Iranian Constitution of 1979*, 20(1) BRIT. J. OF MID. E. STUD. 64, 73 (1993) (on the religious basis of priestly government in Shi'a Islam). *Id.* at 65. *See generally* Larry Catá Backer, *Religion as Object and the Grammar of Law*, 81 MARQ. L. REV. 229 (1998).

161. The concept and operation of the 'ummah is well known within Islam. While its actual invocation and effect are highly contested, and fluid, it does provide at least in theory a vehicle through which the people can, as a whole, directly intervene in the elaboration and application of the unalterable divine command. In reality, of course, the 'ummah system is tempered by an ancient and complex system of elaboration by scholars and others, the size and power of whose following, may also be invested with a certain legitimacy and authority. *See* generally, Christopher Stewart, *From "Mother of the World" to the "Third World" and Back Again: The Harmonization Cycle Between Islam and the Global Economy in* HARMONIZING LAW IN AN ERA OF GLOBALIZATION: CONVERGENCE, DIVERGENCE, RESISTANCE 279-308 (2007).

162. *See* THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN, arts. 6-8, though subject to the ultimate limitations of the supreme religious leader. *See Id.* art. 5.

163. *See Id.* arts. 56-63, though, again, in accordance with the limitations of Islam generally as exercised through the religious leader pursuant to Article 5 and Articles 90-99.

164. *See Id.* arts. 19-55.

165. *See Id.* arts. 19-42.

166. *See Id.* arts 26-27 (though they are ambiguous in the extent of the protections offered).

constituting those boundaries of governance and the mechanisms for engaging with those norms.[167]

The standard response of the secularizing international community was to explain away the developments in Iran in one of two ways. The first suggested that Iranian theocratic constitutionalism was a form of retrograde traditionalism to be overcome by steady progress (the "we will talk it to death" strategy).[168] The second was to play definition games. The Iranian theocracy could not be considered constitutionalism at all, and thus marginalized and delegitimated, it could be ignored.[169] And a variation of this approach was to suggest the possibilities for convergence within a protean Islamic legal structure.[170] The third was to view this form of religiously based constitutionalism as "sui generis"—explained away by the special circumstances of the 1979 revolution against the Shah,[171] or by the special characteristics of Shi'a Islam.[172] This latter explanation was particularly odd in light of Sunni constitutionalism in other parts of the Middle East.[173] And indeed, only some commentators in the West embraced the notion that "[t]he Iranian set-up, whose toned-down parallels can be found in Pakistan and Egypt, offers the most concrete Islamic challenge to classical

167. *See* Jason Lawrence Reimer, *Comment: Finding Their Own Voice?: The Afghanistan Constitution: Influencing the Creation of a Theocratic Democracy,* 25 PENN ST. INT'L L. REV. 343 (2006) ("During a meeting of the United Nations Human Rights Committee in 1982 investigating reports of state-sponsored murder and torture, the leader of the Iranian delegation was questioned about Iran's view on the United Nations Universal Declaration of Human Rights. Sayed Hadi Khosrow- Shahi, the leader of the delegation, replied that Iran believed in the 'supremacy of Islamic laws, which are universal' and when a law, such as the Universal Declaration of Human Rights, comes in conflict with Islamic laws, Iran would 'choose the divine laws.'"). *Id.* at 360.

168. *See, e.g.*, Edna Boyle-Lewicki, *Need World's Collide: The Hudad Crimes of Islamic Law and International Human Rights,* 13 N.Y. INT'L L. REV. 43 (2000); Neil Shevlin, *Velayat-E-Faqih in the Constitution of Iran: The Implementation of Theocracy*, 1 U. PA. J. CONST. L. 358 (1998).

169. *See, e.g.*, ABBAS MILANI, MICHAEL MCFAUL, & LARRY DIAMOND, BEYOND INCREMENTALISM: A NEW STRATEGY FOR DEALING WITH IRAN 23 (2005); Donna Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT'L. L. J. 349 (1996) ("Iran's new constitution has turned the notion of constitutionalism on its head, allowing it to serve as a warrant for, rather than a safeguard against, tyranny."). *Id.* at 390.

170. *See* Louise Halper, *Law, Authority and Gender in Post Revolutionary Iran*, 54 BUFF. L. REV. 1137 (2007); Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash With a Construct?*, 15 MICH. J. INT'L LAW 307 (1994); Anne Elizabeth Meyer, *Islam and the State,* 12 CARDOZO L. REV. 1015 (1991).

171. *See, e.g.*, ROBIN WRIGHT, THE LAST GREAT REVOLUTION: TURMOIL AND TRANSFORMATION IN IRAN (2000).

172. SHAUL BAKHASH, THE REIGN OF THE AYATOLLAHS: IRAN AND THE ISLAMIC REVOLUTION (Rev. Ed., 1990). He suggests that:

> Many members considered article 6, which treated sovereignty as stemming from the popular will, to be in conflict with the vice-regency of the faqih. The constitution, however, left these two concepts of sovereignty standing side by side in uneasy or—given a different perspective —creative symbiosis. The 1906 constitution, at an earlier time and in similar fashion, had declared sovereignty to be a divine gift bestowed by the people on the monarch. The 1979 constitution was a reminder that seventy years after the Constitutional Revolution, Iranians were still uncertain whether it was the people or God and the clerics who ruled.

Id. at 88.

173. For a discussion of Saudi constitutionalism, for example, *see* Abdulaziz H. Al-Fahad, *Ornamental Constitutionalism: The Saudi Basic Law of Governance*, 30 YALE J. INT'L L. 375, 375 (2005). On a comparison between Iranian and Saudi Islamic constitutionalism, *see* Chibi Mallat, *On the Specificity of Middle Eastern Constitutionalism,* 38 CASE W. RES. J. INT'L L. 13, 33-41 (2006).

constitutionalism in the Middle East by allowing the judiciary—the Islamic jurists of the Shi'i tradition—a key role as ultimate interpreter of the constitution."[174]

For all that, the Iranian experience can be considered the heart and real starting point for the legitimization of an increasingly important framework for drawing constitutions within Muslim majority states. This framework mimicked the form of transnational secular constitutionalism, substituting for its organic and consensus based system of drawing foundational constitutional substantive norms, a system grounded in the word of a particular Deity whose ordinances had been institutionalized within one or another institution of organized religion. Thus, for example, it might be possible to suggest a connection between the principles of Iranian constitutionalism and the constitutional developments of states such as Nigeria, Indonesia, Pakistan, and Somalia, among others.[175] As importantly, perhaps, the Iranian model may have been influential in transnational efforts to internationalize a theocratic foundation of religious constitutionalism based on Islam. Following the pattern for the construction of a legitimate framework for supra-national substantive restraints on secular constitutionalism grounded in contemporary global international organizations, the Islamic Conference of Foreign Ministers adopted a *Cairo Declaration on Human Rights in Islam.*[176] The Cairo Declaration sought to elaborate a normative framework for substantive transnational constitutionalism grounded in Islam, rather than in the system of state centered customary law of the Post-War international system. Its internationalist and substantive agenda were unhidden.[177]

Ironically, and perhaps perversely, the greatest evidence of its status as a viable alternative to international humanistic universalism was perhaps bound up in the adoption of theocratic constitutions for American administered Afghanistan and Iraq. Both of these constitutions were, from a certain American perspective, the product of a situation similar in vital

174. Chibli Mallat, *On The Specificity Of Middle Eastern Constitutionalism*, 38 CASE W. RES. J. INT'L L. 13, 34 (2006).

175. *See* Tad Stahnke & Robert C. Blitt, U.S. Comm'n On Int'l Religious Freedom, *The Religion-State Relationship And The Right To Freedom Of Religion Or Belief: A Comparative Textual Analysis Of The Constitutions Of Predominantly Muslim Countries,* Mar. 8, 2005, *available at* http://www.uscirf.gov/countries/global/comparative_constitutions/03082005/Study0305.pdf.

176. *See* The Cairo Declaration on Human Rights in Islam, adopted and issued at the 19th Islamic Conference of Foreign Ministers in Cairo, Aug. 5, 1990, *available at* http://www.religlaw.org/interdocs/docs/cairohrislam1990.htm.

177. The Cairo Declarations is overtly patterned on the old community of civilized states approach to international law and behavior norms of early 20th century secular international law. But the discursive trope is now utilized to privilege Islam as the source of universal substantive values which must be embraced by the uncivilized non-Muslim world. This mimicry produced the declaration of the Islamic Ummah's civilizing role in the world "to guide humanity confused by competing trends and ideologies and provide solutions to the chronic problems of this materialistic civilization." Cairo Declaration, supra, Preamble. The provisions, themselves, recast traditional human rights protections as subject to the normative framework of Islam. Catalogued, they serve as a secondary elaboration of the primary principles of religion, which can shape and limit the applicability of each. In this, Islam serves the privileged role that in contemporary supa-national systems is reserved to the normative structure embraced by the community of nations.

respects to that facing American occupying forces in Japan in 1945. And it was from a memory, now hazy, of those experiences, that the Americans might have sought to draw. On the one hand, Americans were quick to argue that the situation in conquered Iraq and Afghanistan were different than that the Allies faced in conquered Japan and Germany.[178] What Americans remembered was that "the democratic process is practicable within the framework of a military occupation. . . . The relationship between the occupant and the occupied seemed eventually to be forgotten over the feeling of an international fellowship among jurists who have in common the ardent concern for the improvement of a law."[179]

Yet, unlike the situation in the 1940s in Germany and Japan—which reinforced the American inspired system of institutional internationalism grounded in the higher substantive law of a community of nations within a United Nations systems—this time the Americans appear to have contributed to the rejection of the very system they helped create in favor of fostering a different framework of transnational constitutionalism—one based on universal religious substantive values. As such, Americans are not merely returning to the traditional notion that conceptualizes constitutional law as confined to the peculiar social constitution of the state in which it is adopted. Instead, they appear to have changed the foundation of internationalism from secular consensus among the community of nations, to the universalism of religion. And this was done in the name of fostering national freedom to choose and thus avoid constitutional impositions; the great American project of the Americans to create a global secular transnational constitutionalism is discredited by another generation of Americans with different goals and perspectives.[180]

Both the Iraqi and Afghani constitutions are products of direct interventions after a military conflict—like Germany and Japan. And also like these predecessor constitutions, the Iraqi and Afghani constitutions both

178. Thus Noah Feldman, one of the non-Muslim foreigners more deeply involved in the process could very carefully say,

> Gone are the days when American legal officers could write the constitution of Japan, translate it into Japanese, and extract the acquiescence of such a Japanese government as existed under the auspices of U.S. occupation and the reign of Supreme Allied Commander General Douglas MacArthur. Today we are more likely to *see* documents like Ayatollah Ali Sistani's fatwa of June 26, 2003. . . . As a result of the fatwa, the unelected constitutional team named by the Iraqi Governing Council produced not a constitution but a "Transitional Administrative Law" ("TAL") to function only until there could be elections and a new constitution could be drafted and ratified. Although I served as an adviser to the TAL process both in an independent capacity and, initially, for the Coalition Provisional Authority in Baghdad, I in fact did not directly draft the Iraqi constitution, whatever might be the perception on West Third Street. Old-fashioned imposed constitutionalism, it would seem, is dead.

Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 857-858 (2005). *Accord*, Kevin Reinhart & Gilbert S. Merritt, *Reconstruction and Constitution Building in Iraq*, 37 VAND. J. OF TRANSNAT'L L. 765 (2004) ("That is the society into which we stepped when we occupied Iraq and the idea that we can import democracy in the same sense that you might import a radio or a power plant, is simply a mistake."). *Id.* at 767.

179. Alfred C. Oppler, *The Reform of Japan's Legal and Judicial System Under Allied Occupation*, 24 WASH. L. REV. 290, 303 (1949).

180. Feldman, *supra* note 172, at 867-875.

were nurtured by American influence. Both were also the products of local action by the elites permitted to act for the occupied states by the occupying powers. In any case, American forces effectively controlled the territory of these states and had substantial effect on their respective post invasion governments,[181] at the time that representative assemblies were constituted in each state to construct new constitutional orders for each. And both reflected assumptions about the authority of occupiers and the extent of necessary constitutional modifications that suggest an American willingness to foster theocratic constitutionalism in the dar al Islam.[182]

American elites played key roles in the construction of these constitutions, and particularly American diplomatic and academic elites. Thus, for example, the offices of Zalmay Khalilzad, a naturalized U.S. citizen of Pashtun origins, who played a role as the American representative to Afghanistan and to Iraq at the times of the drafting of the constitutions of each.[183] Also critical were American academics who, following a tradition of American interventionism in constitutional matters stretching in modern times from the fall of the Soviet Empire (but going back critically to the work of the Americans in shaping the German and Japanese constitutions, the legacy of which served as the great battlefield of later generations of American interventionists, some of whom fought to enlarge the secular human rights international universalism of those constitutions and others who rejected it). But between 1945 and 2003 a great change appears to have occurred within acceptable academic constitutionalism in the United States. In place of the old American project of transnational constitutionalism, a new, more particularized and fragmentary constitutionalism appears to have arisen. Democracy now appears to solve all problems of self-constitution, whatever its peculiar forms. Traditional postwar transnational constitutionalism was termed "international" and reduced to a "European" construct.[184] This might appear to be an amazing claim in light of the origins of postwar constitutionalism. Nevertheless, notable among academics advancing this new theory of anti-universalist constitutional universalism, and serving as a great booster for the Iraqi constitution of 2005, was Noah

181. Professor Feldman explains:

> In the Iraqi case, Ambassador Bremer unwittingly strengthened the Islamists' position when, apparently in response to pressure from Senators Santorum and Brownback, he publicly stated in comments to reporters in the Iraqi town of Hillah that the Iraqi constitution would not be Islamic. This unfortunate statement had the effect of strengthening the hand of the Islamists precisely because it reeked of imposed constitutionalism. Moreover, the publication of the Afghan Constitution, which included the provision prohibiting laws that violated Islam, revealed to Iraqi Islamists that the United States was prepared to accept such a formulation, further strengthening their negotiating position.

Id. at 878-879.

182. "Beyond the basic impossibility of excluding state religion from the constitutions of these majority-Muslim countries, the model of imposition was also unable to overcome further powerful manifestations of the role of Islam in the constitutional texts." *Id.* at 878.

183. For a somewhat gushy account, *see*, for example, Jon Lee Anderson, *American Viceroy: Zalmay Khalilzad's Mission*, THE NEW YORKER, DEC. 19, 2005, *available at* http://www.newyorker.com/fact/content/articles/051219fa_fact2.

184. *See, e.g.*, Jed Rubenfeld, *The Two World Orders*, 27 THE WILSON QUARTERLY 28 (2003) (identifying international constitutionalism as a European construct). For a critique, *see* Anne Peters,

Feldman, a law professor at New York University and former constitutional adviser to the Coalition Provisional Authority in Baghdad.[185] Professor Feldman has also been involved in debates over the institutional role of religion in the United States.[186] It is possible that his participation in one affected his view on the other.

The Constitution of Afghanistan was adopted in 2004 after the convening of the traditional Loya Jirga.[187] The adoption was presided over by the person of last Afghan king, though substantially guided and effectively approved first by the Americans, whose support was critical to the authority (and perhaps even the formal, though not necessarily effective, legitimacy) of the Afghani state apparatus installed after the defeat of the Taliban led government.[188] This was followed by a popular vote that approved the document.[189] The Constitution of Iraq was adopted Oct. 15, 2005, replacing an American inspired interim constitution (known as the Law for Administration of the State).[190] The permanent Constitution was adopted after conclusion of unsuccessful three-way negotiations between the largest Iraqi ethnic and religious blocs—Sunni, Shi'a, and Kurds. The document, though substantially the product of the people approved as representatives of these three bloc by the American occupiers, effectively represented a three way deal between Kurds, Shi'a, (some) Sunni and the Americans.[191] The document was subsequently approved by popular vote and a government based on that document thereafter constituted with

Global Constitutionalism Revisited, 11 INT'L LEGAL THEORY 39, 42-43 (2005). Yet Rubenfeld is symptomatic of American discomfort with the system they created a generation ago and over which they increasingly have less influence as they seek a different path.

185. *See, e.g.*, NOAH FELDMAN, WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING (2004). For a different approach that appears to have not quite overcome the now dominant American view of constitutionalism in the Muslim world, or a dominant institutional religious law view in the dar al-Islam, *see* Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 THE AM. J. COMP. L. 789 (2004).

186. NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM AND WHAT WE SHOULD DO ABOUT IT (2005).

187. *See* Golnaz Esfandiari, *Afghanistan: Loya Jirga Approves Constitution, But Hard Part May Have Only Just Begun*, RADIO FREE EUROPE, Jan. 5, 2004, *available at* http://www.rferl.org/featuresarticle/ 2004/01/a2ad922a-ad1f-4194-8b43-bf5b47f5427e.html.

188. Early in the process of overthrowing the Taliban regime it was reported that "A number of people in the West have argued that only Zahir has the standing to unite the Afghan people, primarily as a symbol of a more peaceful past." Melinda Henneberger, *A Nation Challenged: The Afghan Opposition; Ex-King and Rebels to Hold Special Council*, N.Y. TIMES, Nov. 4, 2001, *available at* http://query.nytimes.com/gst/fullpage.html?res=9D0DE7DF133DF931A35753C1A9679C8B63&n=Top/Reference/Times%20Topics/People/Z/Zahir%20Shah,%20Mohammed.

189. *See* Steven Graham, *A New Constitution for Afghanistan*, CBS NEWS, Jan. 26, 2004, *available at* http://www.cbsnews.com/stories/2004/01/02/world/main591116.shtml.

190. *See Iraqis Agree on New Constitution*, BBC NEWS ONLINE, March 8, 2004, *available at* http://news.bbc.co.uk/1/hi/world/middle_east/3541875.stm (BBC's Middle East analyst, Roger Hardy, says the interim constitution is remarkably progressive by the standards of the Middle East, seeking to strike a balance between respect for Islam and regard for liberal democratic rights). *See* generally, Ashley S. Deeks, Matthew D. Burton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INT'L L.J. 1 (2007) (the authors were Legal Adviser and Deputy Legal Adviser, respectively, at the U.S. Embassy in Baghdad during Iraq's constitution drafting process).

191. The politics of the process of constitutional development are nicely summarized in Noah Feldman & Roman Martinez, *Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 75 FORDHAM L. REV. 883, 886-901 (2006). The Sunni position was at best equivocal. *See*

muted fanfare in the Western press.[192] However, the outcome of these negotiations, the legitimacy of the popular approval process and the authority and legitimacy of the constitution thus produced are highly contested.[193]

Like the Iranian constitution, both the Iraqi and Afghani constitutions speak the language of post WWII constitutionalism in its process and substance aspects. Both enshrine principles of process constitutionalism, that the rule of law is a fundamental part of governance (state rule through law).[194] Both also embrace substance constitutionalism also embraced: sensitive to human rights constraints.[195] Thus, for example, authoritative academic voices in the United States have emphasized the textual commitment of the Iraqi Constitution to the foundational principles of Islam, democracy, human rights and pluralism—read horizontally, against a backdrop of the leaders of a majority of the population with a more hierarchical reading of these principles.[196] The Iraqi constitution declares law supreme,[197] yet this supreme law is in turn supreme only when it does not contradict established provisions of Islam, principles of democracy, rights and freedoms stipulated in the Constitution or repudiates the guarantee of the Islamic identity of the majority of Iraqis.[198]

Both constitutions have been touted as great experiments in Islamic democracy. "Indeed, it is fair to say that the charter self-consciously aims to integrate Islamic values into the country's political life while retaining the separation of powers, checks and balances, and human rights guarantees that are the hallmark of secular and democratic constitutions around the world."[199] Academics in the West seek somehow to reconcile the human rights values inherent in the framework of transnational constitutionalism, with the rights framework of Islam.[200] Or to show that progressive courts under such a system can reconcile Islamic jurisprudence to the requirement of secular international human rights law in the interpretation

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Jonathan Finer & Omar Fekeiki, *Iraqis Finish Draft Charter That Sunnis Vow to Defeat*, The Washington Post, Aug. 29, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/08/28/AR2005082800268.html.

192. *See* Steven C. Welsh, *Iraq Constitutional Referendum*, CENTER FOR DEFENSE INFORMATION, Oct. 17, 2005, *available at* http://www.cdi.org/news/law/iraq-referendum-101705.cfm; Kirk Semple & Robert F. Worth, *Early Signs Show Iraqis' Approval of Constitution*, N.Y. TIMES, Oct. 17, 2005, *available at* http://www.nytimes.com/2005/10/17/international/middleeast/17iraq.ready.html.

193. *See, e.g.*, Herbert Docena, *Iraq's Neo Liberal Constitution*, FOREIGN POLICY IN FOCUS, Sept. 2, 2005, *available at* http://www.fpif.org/fpiftxt/492.

194. Thus the Iraqi constitution provides for separation of powers in the Western sense of a legislative, judicial and executive power. *See* Iraqi Constitution art. 47.

195. Thus the Iraqi constitution provides broad ranging provisions securing individual rights and liberties. *See* Iraqi Constitution arts. 14-46. Privacy rights, for example, are protected—as long as personal privacy "does not contradict the rights of others and public morals." *Id.* art. 17. Public morals, of course, is a matter regulated by the tenets of Islam. *See id*, art. 2.

196. *See* Feldman, *supra* note 185, at 886-887 (political position of major parties), 901-906 (Islam), 907-910 (human rights), 916-918 (judiciary).

197. Iraqi Constitution art. 5 ("The law is supreme. The people are the source of authorities and its legitimacy.").

198. *Id.* art. 2.

199. *See* Feldman, *supra* note 185, at 884.

200. *See, e.g.*, Mohamed Y. Mattar, *Unresolved Questions In The Bill Of Rights Of The New Iraqi Constitution: How Will The Clash Between Human Rights" And "Islamic Law" Be Reconciled In Future*

of Islamic Constitutions.[201] Yet there has been strong criticism as well for this exercise in the illogic of a presumption that secular transnational human rights based constitutions can somehow overcome the framework of a different normative framework built into the constitution itself, one grounded in religious institutions and beliefs.[202] Both share a common bond to what has been called the master narrative of Western understanding of post conflict constitutionalism that suggests a progression from barbarity to enlightenment (in native garb) for the peoples' of both places with the success of their respective contact with the superior military forces of the occupying powers.[203]

Legislative Enactments And Judicial Interpretations?, 30 FORDHAM INT'L L.J. 126 (2006). The solutions proposed remain grounded in secular, institutional and political frameworks:

> While the new Iraqi Constitution is to be considered a step forward, it leaves, perhaps intentionally, many questions unresolved, especially in defining the limits that Islamic Law may impose on the exercise of the various human rights enumerated in the Constitution. The answers to many of these questions depended on the legislative process that will commenced when the Constitution was approved by the people of Iraq. It will also depend upon the judicial interpretation of its various provisions, especially those that establish constitutional rights for the Iraqi people. Finally, it will depend upon the degree to which ordinary Iraqis are educated about these rights and if civil society holds the government accountable to upholding these rights. In all cases, the Iraqi people should be fully aware of their constitutional rights. Non-governmental organizations and other members of civil society have the vital duty of engaging in this educational initiative.

Id. at 157. It is not clear, as I am suggesting, that the focus ought to be on the institutions of the government or the political process. The Constitution vest critical authority in that sphere to the institutions and apparatus of religion.

201. *See* Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence To Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law With The Liberal Rule Of Law*, 21 AM. U. INT'L L. REV. 379 (2006) (But even the authors concede that the most secular friendly versions of Islamic jurisprudence do not define the field.). *Id.* at 394-413.

202. *See* LAW AT THE END OF THE DAY, *Of Political States and "Soft" Religion as the Basis for State Organization, available at* http://lcbackerblog.blogspot.com. As one set of commentators well described it:

> Human rights organizations, women's organizations, academics, and journalists have focused intently on the role of Islam in Iraq's constitution. Many commentators believe that it pervades the document, starting with the second Article, which makes Islam the official religion of the state, and running through provisions on Iraq's identity, the need for future laws to be consistent with the established provisions of Islam, personal status, and the existence of Sharia scholars on the Supreme Court. Others have argued that the religion-related provisions are too weak and ambiguous to have any substantial impact on their own. Still others, including those in the U.S. government, have argued that the constitution is progressive in the Middle East because it recognizes freedom of belief for all, and that it synthesizes Islam with the internationally recognized principles of democracy and human rights.

Ashley S. Deeks & Matthew D. Burton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INT'L L.J. 1, 5-6 (2007).

203. *See* Faiz Ahmed, *Afghanistan's Reconstruction, Five Years Later: Narratives of Progress, Marginalized Realities, and the Politics of Law in a Transitional Islamic Republic*, 10 GONZ. J. INT'L L. 269 (2007). Ahmed well (and mockingly) describes this narrative:

> before the American intervention, Afghanistan lay enveloped in medieval barbarism and the darkest of tyrannies. The moment of contact with Western civilization— initiated by the U.S. and British bombing campaign that began on October 7, 2001—was the enlivening moment that served as the necessary catalyst for progressive change. What follows is a story of upward bound, unfailing progress—beginning with the formation of a transitional government at Bonn in December of 2001, to the ratification of a new constitution and presidential elections in 2004, and most recently, country-wide parliamentary elections in September 2005. Freedom, human rights, and the rule of law, so the story goes on, are inevitable products of these auspicious political developments.

But their constitutions share more in common with the spirit of the Cairo Declaration and the Iranian Constitution than with the earlier products of American intervention after the Second World War and then after the fall of the Soviet Union. Whatever the suggestions to the contrary, and whatever the niceties of the parsing of the language of the text (in English), the legal orders established by the constitutions are subordinated to the overarching legal/moral/ethical system of Islam. These differences have significant effect on the foundations of constitutional ordering. The United States Constitution is an expression of the will of the people of the United States, self constituted as a union.[204] The Japanese Imperial Constitution was an expression of the will of the Imperial Household. The Iraqi Constitution is grounded in a different relationship between the polity and the state. The constituting framework of the Iraqi Constitution is declared "[i]n the name of God, the most merciful, the most compassionate,"[205] and which can be elaborated only by "[a]cknowledging God's right over us, and in fulfillment of the call of our homeland and citizens, and in response to the call of our religious and national leaderships and the determination of our great (religious) authorities and of our leaders and reformers. . . ."[206] Only on that basis might "[w]e the people of Iraq of all components and shades" take it upon "to draft, through the values and ideals of the heavenly messages and the findings of science and man's civilization, this lasting constitution."[207] The place of human rights guarantees within this framework is highly contested, at least in the West.[208]

The Afghani Constitution, in contrast, appears to speak more clearly the language of transnational constitutionalism.[209] It speaks to the constitutive acts of the people of Afghanistan, grounded in the international system of human rights, and a desire to regain "Afghanistan's deserving place in the international community."[210] These sentiments echo those in the

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Id. at 270-71.

204. Thus, the Preamble to the American Constitution provides for its creation by its constituting sovereigns, the people. *See* U.S. CONST. pmbl. Of course, their was no consensus on the meaning of this descriptor—did it mean the people constituted as states or the people of the several states aggregated into a single constituency?—until 1865, and even today, the issue causes some discomfort among the members of the Supreme Court. *See* Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

205. Iraqi Constitution, Draft Document, to Be Presented to Voters Saturday, Preamble, WASH. POST, Oct. 12, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/10/12/AR2005101201450.html.

206. *Id.*

207. *Id.*

208. *See* Mohamed Y. Mattar, *Unresolved Questions In The Bill Of Rights Of The New Iraqi Constitution: How Will The Clash Between Human Rights" And "Islamic Law" Be Reconciled In Future Legislative Enactments And Judicial Interpretations?*, 30 FORDHAM INT'L L.J. 126 (2006).

209. Constitution of Afghanistan 1382 [2004], *available at* http://www.junbish.org/constitution_of_afghanistan_yea.htm.

210. *Id.* at pmbl. Thus, the Preamble declares a number of now conventional objectives of the constitution including:

> "[O]bserving the United Nations Charter and respecting the Universal Declaration of Human Rights, For consolidating national unity, safeguarding independence, national sovereignty, and territorial integrity of the country, For establishing a government based on people's will and democracy, For creation of a civil society free of oppression, atrocity, discrimination, and violence and based on the rule of law, social justice, protection of human rights, and dignity, and

German and Japanese post War constitutions.[211] Yet it also presents a similar acknowledgment of the boundaries of self-constitution proclaiming a constitution "[i]n the name of God, the Merciful, the Compassionate."[212] The Preamble only then continues with an acknowledgement to the centrality of the people to the project of constituting the state, but then grounds that acknowledgment within the structural limitations and framework of Islam. "We the people of Afghanistan: With firm faith in God Almighty and relying on His lawful mercy, and Believing in the Sacred religion of Islam."[213] And, more honestly, perhaps, than in the Iraqi effort, the Afghani Constitution also acknowledged the constraints under which it was possible to create a constitution for the nation. It acknowledged that adoption could only be effected "in compliance with historical, cultural, and social requirements of the era."[214]

Like the German Constitution, the Afghani Constitution preserves against constitutional change, the core values of its legal order. In the case of Germany, those core values include democracy, human rights, and the federal character of the German State.[215] In the case of the Afghani state, the focus is on a different set of core values: "The provisions of adherence to the fundamentals of the sacred religion of Islam and the regime of the Islamic Republic cannot be amended."[216] Thus both the mimicry of transnational constitutional *forms* and its *application* to wholly different effect. The suggestion is not that it is a bad thing necessarily, only that it tends, by its practice, to diminish (and perhaps threaten) the universality of the principles of transnational secular constitutionalism through which it has derived its legitimacy.

But we are also reminded that "[w]hile references to Islam are customary and appropriate, attention should be devoted to clauses that give some specificity to Islam's official status. Islam must be enshrined in a way that it is expressed through normal democratic mechanisms, rather than supplanting them."[217] The effective difference of theologically based systems, contrasted with those founded on secularist principles of transnational constitutionalism become more apparent when one moves beyond the hortatory expressions of the Constitutions and looks to their concrete application within the body of each constitution. It is hard to read around

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ensuring the fundamental rights and freedoms of the people, For strengthening of political, social, economic, and defensive institutions of the country, For ensuring a prosperous life, and sound environment for all those residing in this land."

Id.

211. *See* discussion *supra* section II.B.

212. Constitution of Afghanistan 1382 [2004], *supra* note 209, at pmbl.

213. *Id.*

214. *Id.*

215. *See* Grundgesetz, *supra*, at art. 79. *See* also, Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) Oct. . 12, 1993, 89 Entscheidungen des Bundeseverfassungsgerichts (BVerfG) 155 (F.R.G.), *translated in* 1 CMLR 57 (1994); 33 ILM 388 (1994).

216. Constitution of Afghanistan 1382 [2004], *supra* note 209, at ch. 10 art. 1.

217. Khaled M. Abou El Fadl, et. al., *Democracy and Islam in the New Constitution of Afghanistan*, Conference Report of the Center for Asia Pacific Policy, 2003, *available at* http://www.rand.org/pubs/conf_proceedings/2005/CF186.pdf.

the provision of the Afghani constitution that proclaims: "In Afghanistan no law can be contrary to the beliefs and provisions of the sacred religion of Islam."[218] The Iraqi Constitution declares to similar affect that:

> First: Islam is the official religion of the State and it is a fundamental source of legislation:
> A. No law that contradicts the established provisions of Islam may be established.
> B. No law that contradicts the principles of democracy may be established.
> C. No law that contradicts the rights and basic freedoms stipulated in this constitution may be established.[219]

While some American commentators suggest that this is a soft form of the "hard" theocracy in Iran and therefore amenable to transnational constitutional norms,[220] others suggest that the text of these constitutions can be read to the same effect.[221]

And more, these constitutions subordinate non-Muslim peoples to the socio-moral-legal system of Islam. For the Muslim, in Iraq, there is a unity between law, religion, and society. The State privileges Islam and the Arab, both of which together serve as the foundation of State identity and governance: "Second: This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice such as Christians,

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218. Constitution of Afghanistan 1382 [2004], *supra* note 209, at ch. 1 art. 3.

219. *See* Constitution of Iraq, *infra* note 222, at art. 2.

220. *See* Noah Feldman & Roman Martinez, *A New Constitutional Order? Constitutional Politics And Text In The New Iraq: An Experiment In Islamic Democracy,* 75 FORDHAM L. REV. 883 (2006).

221. A recent comment makes an excellent point on this score:

> The Iranian constitution parallels the Iraqi Constitution with its two significant protectionist clauses, one protecting Islam and the other democratic principles. Article 4 in the Iranian constitution states that Islamic principles apply absolutely and generally to all articles of the Constitution, thus providing a concrete foundation for Islam. Article 6 in the Iranian Constitution protects democracy in providing that elections and public opinion will govern the administration of affairs. However, even though Article 6 provides a basis for democratic principles, in practice Article 4 assumes a significant portion of power and authority in Iran. Therefore, although Iraq does not permit Islam the same dominating presence as Iran in other sections of the Constitution, an expansive, broad interpretation of Iraq's Article 2 could allocate Islam as much authority as Iran's Article 4.

Forest Hansen, Note, *The Iraqi Constitution: Upholding Principles Of Democracy While Struggling To Curtail The Dangers Of An Islamic Theocracy*,12 ROGER WILLIAMS U. L. REV. 256, 279-280 (2006); *accord*, Jason Lawrence Reimer, Comment, *Finding Their Own Voice? The Afghanistan Constitution: Influencing The Creation Of A Theocratic Democracy*, 25 PENN ST. INT'L L. REV. 343 (2006) ("The Afghanistan Constitution reflects the nation's determination to value Islam over western values and democratic thought." Additionally, the comment concludes that the Afghanistan Constitution's blending of theocracy and democracy will lead to its ultimate failure."). *Id. But see*, Kristen A. Stilt, *Islamic Law And The Making And Remaking Of The Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 698 (2004) ("The Iraqi population's diverse political, religious, and ethnic affiliations suggest that agreement will come only through negotiation and compromise among many different views, making the prevalence of any one extreme view on the role of Islamic law in the new Iraq unlikely."). *Id.*

Yazedis, and Mandi Sabeans."[222] For the Christian, Yazedis and Mani Sabeans there is tolerance, but no social legal equality. Jews have been erased from the constitution, though not from the consciousness of Islam, whose core religious sources of theology, morals, ethics and law are laced with references to that religion and the people who continue to adhere to it.[223] These minorities are "possessed" by the majority, tolerated and protected, as long as they behave—and that is the entirety of the protections accorded them.[224] But ultimately, the expectation is assimilation through conversion.

The Afghani Constitution provides a similar framework of privileging Islam not only as state religion, but also of placing Islam at the apex of a hierarchical system of toleration. Thus, "[t]he religion of the state of the Islamic Republic of Afghanistan is the sacred religion of Islam."[225] By definition, Islam provides the behavioral template for appropriate behavior with which the state may not interfere. In contrast, other religions acquire a more modest degree of toleration. "Followers of other religions are free to exercise their faith and perform their religious rites within the limits of the provisions of law."[226] The practical effect has tended to privilege religion as the basis for social and political organization in a way that may be troubling in the West.[227]

The symbolism attached to the state reinforces this foundational choice. The Afghani flag, for example, is laced with symbols of Islamic hegemony.[228] So is the Afghani national anthem[229]—and not merely with vague references to a fungible deity, as exemplified by the American

222. Constitution of Iraq 2005, *available at* http://www.iraqigovernment.org/Content/Biography/English/constitution.html.

223. Quanuni Assassi Jumhuri'I Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980], arts. 13, 14. (For a description of the Islamic basis of the relationship with non-Muslims written into Constitutional law *see* Article 14.) Ironically, The Iranian Constitution recognizes only Zoroastrians, Jews and Christians. *Id.* at art 14. Toleration is explicit in Iran. Article 14 both provides for treatment of non-Muslims "in conformity with ethical norms and the principles of Islamic justice and equity, and to respect their human rights." On the other hand, such toleration ends where such minorities conspire or engage in activities "against Islam and the Islamic Republic of Iran." *Id.* Technically, any political activity on the part of non-Muslims not specifically approved could serve as a basis for the violation. *Id.*

224. There are lots of socio-cultural clues to these expressions of possession and subordination. It was common in the West to conceive of Jewish people in the possessive, as wards of some or another portion of the state apparatus, or as strangers. *See, e.g.*, Daniel H. Cole, *Symposium On The Constitution Of The Republic Of Poland - Part II,* 1998 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1, 9 (1998); *cf.* Thomas Aquinas, *De Regimine Judaeorum*, in AQUINAS: SELECTED POLITICAL WRITINGS 84 (A.P. D'Entrèves ed. & John G. Dawson trans., 1970). Certain leaders in the modern Middle East continue this tradition. Transcript, President Ahmadinejad Delivers Remarks at Columbia University, CQ Transcripts Wire, September 24, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/24/AR2007092401042.html ("We love all nations. We are friends with the Jewish people. There are many Jews in Iran, leaving peacefully, with security."). *Id.*

225. Constitution of Afghanistan 1382 [2004], *supra* note 209, at ch. 1 art. 2.

226. *Id.*

227. *See* Larry Catá Backer, *Constitution and Apostasy in Afghanistan*, LAW AT THE END OF THE DAY, March 28, 2006, *available at* http://lcbackerblog.blogspot.com/2006/03/constitution-and-apostasy-in.html.

228. Constitution of Afghanistan 1382 [2004], *supra* note 201, at ch. 1 art. 20 ("The national insignia of the state of Afghanistan is composed of Mehrab and pulpit in white color. In addition, in the

pledge of allegiance.[230] And the presidential oath of office emphasizes the religious character of the state.[231] But there are also significant effect on the construction of democratic organization and governance as well. For example, under the Afghani Constitution, the right to form political parties of any stripe is guaranteed,[232] as long as the "program and charter of the party are not contrary to the principles of sacred religion of Islam."[233] That a similar provision in the West might well constitute a violation of basic human and political rights merely underscores the magnitude of effect that a choice of foundational constitutional framework has had on the constitution of the character of democratic organization in Afghanistan.[234] And indeed, the constitution imposes on the state a positive obligation to further the inculcation of Islam, Islamic religion and values, on the population through education.[235] Islamic values also shape the state's responsibility to the family under the Afghani Constitution.[236] Yet the morality clauses of

upper-middle part of the insignia the sacred phrase of 'There is no God but Allah and Mohammad is his prophet, and Allah is Great' is placed, along with a rising sun."). *Id.*

229. *Id.* (providing that the "National Anthem of Afghanistan shall be in Pashtu and mention 'Allahu Akbar' and the names of the ethnic groups of Afghanistan.").

230. That symbols matter, and symbolic speech raises emotive issues touching on core notions of self identity were made clear in the recent litigation in the United States over the insertion of the words "under God" in the pledge of allegiance recited in the United States. The case is particularly interesting for the context in which the issue arose—a domestic battle by divorcing parents over the custody of their offspring served as the setting for the issue. It is not clear whether the issue was a means to an ends (punishing the spouse and securing custody) or an independent value issue. Yet, the context suggests the mundane aspects of life in which grave issues of core normative values can arise. *See* William Branigin and Charles Lane, *Supreme Court Dismisses Pledge Case on Technicality Justices Do Not Decide Constitutionality of Reference to God in Pledge of Allegiance,* THE WASH. POST, June 14, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A40279-2004Jun14.html.

231. *See* Constitution of Afghanistan 1382 [2004], *supra* note 201, at ch. 3 art 4 ("In the name Allah, the Merciful, the Compassionate In the name God Almighty, in the presence of you representatives of the nation of Afghanistan, I swear to obey and safeguard the provisions of the sacred religion of Islam. . . . "). Scholars have noted the way that theocratic constitutionalism privileges members of a plural polity through the imposition of religious tests of a variety of sorts—including the use of oaths. "The constitutions of a number of predominantly Muslim countries may restrict to Muslim citizens the right to serve in government positions, particularly to hold executive power. This is achieved by requiring a specific Islamic oath or by stipulating that only Muslims can hold a given position." Tad Stahnke, Robert C. Blitt, *The Religion-State Relationship And The Right To Freedom Of Religion Or Belief: A Comparative Textual Analysis Of The Constitutions Of Predominantly Muslim Countries* 36 GEO. J. INT'L L. 947, 974 (2005). The constitutional traditions of several Western states continue a similar practice—especially in Latin America. *See, e.g.*, Argentine Constitution Part I,. Ch. 1, Sec. 2 (The Federal Government supports the Roman Catholic Apostolic religion) *available at* http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html.

232. Constitution of Afghanistan 1382 [2004], *supra* note 201, at ch. 2, art 14.

233. *Id.*

234. *Id.* Interestingly, while a religious political party might be formed, as long as it is Islamic, no such party can be formed under the Afghani Constitution if it is based on an "Islamic School of thought. Formation and functioning of a party based on ethnicity, language, Islamic school of thought (mazhab-i fiqhi) and region is not permissible."). *Id.*

235. *See* Constitution of Afghanistan 1382 [2004], *supra* note 201, at ch. 2 art. 23 ("The state shall devise and implement a unified educational curriculum based on the provisions of the sacred religion of Islam, national culture, and in accordance with academic principles, and develops the curriculum of religious subjects on the basis of the Islamic sects existing in Afghanistan.").

236. *See* Constitution of Afghanistan 1382 [2004], *supra* note 201, at ch. 2 art. 32 ("The state adopts necessary measures to ensure . . . upbringing of children and the elimination of traditions contrary to the principles of sacred religion of Islam."). *Id.*

the Iraqi constitution is said to be a milder version of its Iranian and Saudi counterparts.[237]

Moreover, the Afghani Constitution reinforces the Islamic character of the legal order constituted through its structuring of the judiciary. The criteria for the selection of judges are meant to emphasize the Islamic character of the legal basis of the state.[238] While the Supreme Court may "review compliance with the Constitution of laws, legislative decrees, international treaties, and international conventions, and interpret them, in accordance with the law",[239] the court must apply Islamic law directly under certain circumstances.[240] Yet it must also be remembered that this superstructure of theocratic constitutionalism suits atop an ancient and complex system of formal and informal decision making, some of which is more intensely "Islamic" and others less so.[241] And, indeed, we are told, that Afghani traditional elites have been actively resisting the Westernization of their law at the subconstitutional level, in favor of the more traditional Iranian model, for some time.[242] The Iraqi Constitution paves a similar road but in a more subtle fashion. It is important more for what it does not provide than for its brief statement on the issues. The Iraqi Constitution vests the Federal Supreme Court with independence and provides

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237. As one commentator concludes:

> "The morality clause is interpreted differently in a country like Iran, which makes it the function of the state to impose certain rules of morality. Const. Iran art. 8. Article 8 of the Iranian Constitution states: In the Islamic Republic of Iran, al 'amr bilma'ruf wa al-nahy 'an al'munkar' [Enjoin the good and forbid the evil] is a universal and reciprocal duty that must be fulfilled by the people with respect to one another, by the government with respect to the people, and by the people with respect to the government." *Id.* Similarly, in Saudi Arabia, "[t]he state protects Islam; it implements its Shari'ah; it orders people to do right and shun evil; it fulfills the duty regarding God's call."

Mohamed Y. Mattar, *Unresolved Questions In The Bill Of Rights Of The New Iraqi Constitution: How Will The Clash Between Human Rights" And "Islamic Law" Be Reconciled In Future Legislative Enactments And Judicial Interpretations?*, 30 FORDHAM INT'L L.J. 126, 146 & n. 122 (2006) (*citing* Basic Law of Saudi Arabia, art. 23.).

238. *See* Constitution of Afghanistan 1382 [2004], *supra* note 201, at Ch. 7 art. 3 (specifying the qualifications of Afghani Supreme Court justices as requiring "a higher education in law or in Islamic jurisprudence"). Such judges "swear in the name of God Almighty to support justice and righteousness in accord with the provisions of the sacred religion of Islam and the provisions of this Constitution and other laws of Afghanistan." *Id.* at ch. 7 art . 4.

239. Constitution of Afghanistan 1382 [2004], *supra* note 201, at ch. 7 art. 6.

240. "When there is no provision in the Constitution or other laws regarding ruling on an issue, the courts' decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence." Constitution of Afghanistan 1382 [2004], *supra* note 201, at ch. 7 art. 15. Special provision is made for the application of Shi'a law under certain circumstances. *Id.* at ch. 7, art. 16.

241. For an excellent analysis *see* Christina Jones-Pauly and Neamat Nojumi, *Balancing Relations Between Society and State: Legal steps Toward National Reconciliation and Reconstruction in Afghanistan*, 52 AM. J. COMP. L. 825 (2004).

242. *See* Faiz Ahmed, *Afghanistan's Reconstruction, Five Years Later: Narratives of Progress, Marginalized Realities, and the Politics of Law in a Transitional Islamic Republic*, 10 GONZ. J. INT'L L. 269, 299 (2007) (suggesting the difficulty of elaborating at the sub-constitutional level the human rights protections described in the Afghani Constitution in light of the opposition of traditionalist Islamic law grounded elites).

that its members shall be made up of a "number of judges, and experts in Islamic jurisprudence and law experts" to be determined by law.[243]

This form of state construction is by no means unique to Islam. It parallels the ancient universalist strains in Western philosophy of law grounded in the union of law and the divine,[244] and echoes the notions of governance in the Christian West before the Enlightenment and the construction of the Westpahlian system.[245] Ironically, though, Islamic openness on this score, and the willingness of Iraqi elites' American overseers to tolerate it, has emboldened a certain segment of Western elites who have become more vocal about the same expectation in the West.[246] Indeed, this sort of basis of supra-constitutionalism has become a cornerstone of American policy as well, at least of the current Administration.

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243. Constitution of Iraq 2005, at art. 91. It has the jurisdiction to oversee the constitutionality of laws and regulations as well as to interpret the provisions of the Iraqi Constitution. *Id.* at art. 92. In that respect, and in conjunction with Art. 2, the Federal Supreme Court might be said to operate as a religious and secular court. A Higher Juridical Council is responsible for the management of the affairs of the judiciary. *Id.* at art. 90.

244. "One god, one state, one law—this well known formula states the doctrine of the Stoics in a clear and simple way. . . . All [people] are subject to the one God and the one law." CARL JOACHIM FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 28 (2nd ed., 1963). For elaboration in Roman law, *see Id.* at 30.

245. For a discussion of the philosophy of the law of state and religion before the Protestant Reformation, *see Id.* at 35-43.

246. Ann Coulter, a famous elite celebrity on American television in her time, for example, suggested to her Jewish interviewer that things would work better in the United States if it were a Christian nation, and that Jews would do well to come over since their conversion would "perfect" them.

> "Earlier this week, Coulter went on 'The Big Idea,' a talk show aired on CNBC, the cable channel devoted to business news. . . . Coulter was there to describe how she had — in our vulgar commercial argot –'branded' herself. At one point, Deutsch asked her what an ideal country would be like, and she replied that it would be one in which everyone was 'a Christian.' Deutsch, who happens to be Jewish, protested that Coulter was advocating his people's elimination. She responded that she simply hoped to *see* Jews 'perfected' through conversion to Christianity."

Tim Rutten, *Coulter's Anti-Semitic Comment Too Dangerous to Ignore*, The Los Angeles Times, Oct. 13, 2007 (Entertainment News, Regarding Media), *available at* http://www.latimes.com/entertainment/news/la-et-rutten13oct13,0,1859447.column?coll=la-home-center. Sadly, Ms, Coulter has not been keeping up with some of the more interesting expressions of Christian faith in its relations with Jews, at least as expressed by Catholics hierarchs. "The Holy Father has stated this permanent reality of the Jewish people in a remarkable theological formula, in his allocution to the Jewish community of West Germany at Mainz, on November 17th, 1980: "the people of God of the Old Covenant, which has never been revoked." *Commission For Religious Relations With The Jews, Notes On The Correct Way To Present The Jews And Judaism In Preaching And Catechesis In The Roman Catholic Church, available at* http://www.vatican.va/roman_curia/pontifical_councils/chrstuni/relations-jews-docs/rc_pc_chrstuni_doc_19820306_jews-judaism_en.html. Or perhaps she has rejected these teachings. It is hard to say. And certain strains of fundamentalist Protestantism, of course, view the issue in an entirely different light. *See, e.g.*, Southern Baptist Convention, Resolution On Jewish Evangelism (June 1996), *available at* http://www.sbc.net/resolutions/amResolution.asp?*ID*=655. Yet, whatever the source of Ms. Coulter's religious belief, she continues to be rewarded by those for whom she performs or who hold her in some regard. The point, however, is to highlight the parallelism between Islam and Christianity on this score in the socio-political sphere. In the circles in which Ms. Coulter thrives, those views, like those of people traveling in Osama bin Ladin's circles, are strongly held.

This policy was first articulated in President Bush's Second Inaugural address. President Bush suggested a substantial reworking of the international constitutionalist project begun by his predecessors of his grandfather's generation.

> "Freedom, by its nature, must be chosen, and defended by citizens, and sustained by the rule of law and the protection of minorities. And when the soul of a nation finally speaks, the institutions that arise may reflect customs and traditions very different from our own. America will not impose our own style of government on the unwilling. Our goal instead is to help others find their own voice, attain their own freedom, and make their own way."[247]

Effectively, the form of transnational constitutionalism was to be observed. But its content would not be driven by a secular system of international consensus as evidenced by the common traditions of the majority of states or other international expressions of norms in law or custom. Instead, core norms within transnational constitutionalism—and principally the adherence to democratic norms in state construction and government elaboration—would now serve to curtail the power of the community of states to limit sovereign expressions of state constitutions by local sovereigns democratically constituted.

> "But something happened between 1945 and the present that began to be revealed after September 11, 2001. The Second Iraq War finally brought the differences between classical internationalism and the Bush administration into sharp relief. In place of the structuralism of the United Nations systems, and the consolidation of political power outside the nation, the Second Inaugural Address reveals President Bush's revolutionary new project of internationalism – a state centered system founded on individual participation. In place of the post 1945 drive to transfer and consolidate power over political and social communities – that is, nations, ethnic and religious communities—within a remote and elite international community, the President suggests the consolidation of state centered political communities all operating under the same general set of framework norms – 'that every man and woman on this earth has rights, and dignity, and matchless value, because they bear the image of the Maker of Heaven and earth.'"[248]

247. George Bush, Second Inaugural Address, Washington, D.C., Jan. 20, 2005, *available at* http://www.whitehouse.gov/inaugural/.

248. Larry Catá Backer, *President Bush's Second Inaugural Address: A Revolutionary Manifesto For International Law in Chaotic Times*, LAW AT THE END OF THE DAY (April 1, 2006), *available at* http://lcbackerblog.blogspot.com/2006/04/president-bushs-second-inaugural.html.

Like Iranian constitutionalists, modern American transnational constitutionalism would adhere to the form of constitutionalism but turn it in fundamental ways to serve different, and perhaps incompatible, objectives. That the system in Iraq and Afghanistan can be clothed in the whispers of the language of pluralism and post-colonial rhetoric of freedom from the strictures of Western universalism adds a bit of ironic spice to the enterprise.

This formal adherence and functional rejection of transnational constitutionalism is clearly evident in the reconstitution of democracy as a value of state constitution. Under traditional transnational constitutionalism democracy served as a core value of state formation because it accorded with fundamental notions of fair governance and gave expression to the values of human dignity and equality. But it acquires its legitimacy and authority within constitutionalism because the community of nations, through their legal traditions and international expressions, have determined that this principle ought to have constitutional value—along with a number of other equally critical normative principles.But within Iranian theocratic constitutionalism, and its American variant (as written into the Iraqi and Afghani and Iraqi constitutions), democracy serves as a sword, justifying national interventions and peculiarities that can trump other values, including those that are held to be fundamental by the community of nations. Thus the forms are observed by the substance is altered and redirected.

This functional twisting is sourced in the rejection of a secular, consultative, organic and political source for fundamental values. The forms of supra national constitutionalism is observed. Like modern supra-national constitutionalism the Iraqi and Afghani constitutions *locate the source of the limits of political expression outside both the state and the sovereign power of the people.* But the functional effect is altogether different. Unlike modern supra-national constitutionalism both Iraqi and Afghani constitutions locate the source of extra constitutional restraint: beyond human reach, under the interpretive control of a body of intermediaries that are not necessarily part of the entire political community, nor directly accountable to that community. In the secular transnational constitutionalist context, the people must look to their constitutional traditions informed by the consensus of international law norms, in the development of which she may participate. In a universalist theocratic transnational constitutionalist context, the people must also look to their constitutional traditions informed by the precepts of religion, which they might affect but only as members of the religious community and to the extent permitted under the rules of that community.

This change has strong effect especially on the legitimacy and extent of protections accorded to the constellation of norms which under transnational constitutionalism are also the objects of structural limits on national constitutionalism. This is particularly telling with respect to international human rights norms and ideals. Under Iraqi and Afghani national constitutionalism, it is possible to view human rights as constituted as a

subordinate system of norms subject to application only in line with superior framework of religious norms. Moreover, human rights is treated as *object* of religious norms. But, it must be emphasized, that these constitutions are not elevating religion *in general.* Each elevates one particular institutionalized religious organization—its theology, ethics and morals as constituted in its religious codes and laws—to what had been an aspirational universalist ambition.[249] Thus, like its Iranian counterpart, and unlike American constitutionalism, one parochial religion is made universal through its constitution as the supreme source of authority for the elaboration of a constitutional rule of law state.

Ironically (there is much irony in this turn of American constitutionalism projected abroad), this is the same defect that the post colonialist discourse suggests is at the heart of the UN driven secular universalism of human rights constitutionalism. This suggests a fundamental incompatibility between the objectives of both transnational constitutional frameworks. Democracy becomes tyranny, equality becomes tolerance, and rights discourse becomes subordinated to one overarching right—the right of a dominant religion to set the political baseline for state activity. Interestingly enough, these views are quite compatible with the sort of American constitutional vision long espoused by certain living members of the American Supreme Court.[250]

A sense of where Iraqi and Afghani theocratic constitutionalism is going can be gleaned from the position of the Islamic democratic parties represented in the Iraqi constitution making process.[251] Islam is identified as a fundamental source of legislation. Feldman and Martinez characterize this as a victory of sorts for the new face of Universalist religiously based democratic society. Indeed, Feldman attempts to bridge the theoretical chasm between religious and human rights universalism within Islam like this:

> Some people think that because God is sovereign in Islam, the people can't be the ultimate decisionmakers in their governance. There might be a difficulty in resolving the political power of the people and the sovereignty of God. But at the theoretical level, I think it's possible to respond that

249. Iraq, for example, by the terms of its constitution, is subsumed as "part of the Islamic world." Constitution of Iraq 2005, at art. 3. In a sense that can be deemed to subordinate Iraqi sovereignty to the ethno religious system of that world in a way similar to that Member States of the European Union are subsumed within that system. *See, e.g.,* Van Gend en Loos v. Nederlandse Administratie der Belastingen, Case 26/62, [1962] ECR 1 ("the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights"). *Id.* Clearly the analogy is not perfect—the two systems, in character, history, scope and institutionalization, are quite distinct. Perhaps they are even incompatible. But the thrust of the participation in a greater system is not. And that is the point, both Islam and the European Union—one through Divine command, the other through the aggregate will of the participants thereto—each constitute a legal order which governs the rights, powers and obligations of its members.

250. *See, e.g.,* EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON v. Smith, 494 U.S. 872 (1990).

251. *See* Feldman & Martinez, *supra*, at 901-918.

> in Islam, although God is sovereign, God's laws are still interpreted by humans, and day-to-day governance happens by people, not by God. What's more, in democracy we believe there are some fundamental rights that transcend what the people might or might not think was right at a given point, like the right to life and liberty.

Others have suggested a similar framework, grounded in the notion of a functional convergence distinct formal systems: that of Isalm and that of secular universal human rights. Michael Schoiswohl argues, for example, that the consolidation of Islamic constitutional jurisprudence in Afghanistan through the Afghani Supreme Court "promotes an application of Islam that is not in contravention of its human rights guarantees."[252] This is hard to square with reality, but at least offers the possibility of a plausible response to criticism that Americans have become the greatest exporters of theocratic constitutionalism since the Iranian Revolution of 1979 and are at the forefront of those who would destroy the very system of secular, consensus based, organic, transnational constitutionalism that they helped create after the Second World War. But it still plainly reveals the conundrum of a democratic system in which the "countermajoritarian difficulty" of American constitutional law[253] is not only magnified but also extracted from the political system itself and constituted as a supreme extra governmental system of constitutional and normative control. As a check on this formal ceding of supra-constitutional authority to an extra-constitutional normative and governance system that may not include within its community all members of the polity, the proponents of these new constitutional

252. Michael Schoiswohl, *The New Afghanistan Constitutional and International Law: A Love-Hate Affair*, 4 INT'L J. OF CONST. L. 664, 671 (2006). He notes that any other interpretation under the Afghani Constitution would impermissibly privilege Islam within the non contradiction clause of Art. 2 with the human rights standards specified in art. 3 of the Afghani Constitution. Yet, even he is unsure of the plausibility of this formalist argument. However, a systematic interpretation in favor of constitutionalism cannot be taken for granted in practice. Rather it may be that in contentious cases, "the Supreme Court as well as local courts would adopt interpretations that disregard human rights standards prescribed by international law, even though there are ways to interpret those standards as being in line with Islamic principles." *Id.* He illustrates the difficulty with a look at obligations under the United Nations Convention on the Elimination of All Forms of Discrimination Against Women. *Id.* at 672-675.

253. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962); ALEXANDER BICKEL, THE MORALITY OF CONSENT (1975). But the so-called countermajoritarian difficulty is itself not without its own d'fficulties, grounded in the relationship between law and the institutions of government. I have elsewhere argued, for example, that

> Indeed, the so-called "countermajoritarian difficulty" that has enthralled several generations of American legal and academic elites (Bickel 1962), and that has served as the basis for a campaign to scare the electorate about the power of the judiciary (Bork 1990), reduces itself to a twentieth century version of the perhaps more elegantly proffered argument of Francis Bacon. Bickel and his disciples, like Francis Bacon, argue that lawyers and the courts ought to exercise their authority under the authority of the sovereign. For Bacon, that sovereign took the form of the King, for Bickel, that sovereign was the "people" through their elected representatives to which popular authority had been transferred.

Larry Catá Backer, *Constitutionalism in the Muslim World: A Conversation With Noah Feldman*, *in* 9 DEMOCRACY: CONSTITUTIONALISM AND EMERGING DEMOCRACIES 33, 34 (2004).

systems focus on the functional limits of formal privileging of religion. They suggest that politics will supply the practical antidote to and limits of the normative system privileged.

Then there is the practical process of figuring out institutions within the constitution that will mediate between Islamic and democratic values when they might appear to outside observers to be in contention with each other.[254] But it is not clear that as a formal practical matter, the sort of factionalism envisioned by these apologists is possible even if conceivable as a functional matter. If the universalism of the adherents of religious supremacy are formally constituted as supreme within the constitutional orders of Iraq and Afghanistan, then the American, Arab secularist and Kurdish ethnic protectionist inspired temporary overlay will not matter very much. Nor will a formal declaration of the applicability of universal human rights values, in conformity with Islam. In these systems, religious foundational values have been privileged and the secular system of human rights must necessarily be read within its parameters. The result follows from the basic pattern of transnational constitutionalism from which this system is derived. Just as religion and its value systems are an object of protection under secular transnational constitutionalism and its human rights value systems, human rights will be an object of protection under theocratic transnational constitutionalism and its specific religious system.

Unpacking the formal elements of Art. 2 of the 2005 Iraq Constitution are particularly helpful on this score. *Islam is the state religion.* While state religions, as such, may not infringe on the rights of minority religious groups, it does from a textual perspective, privilege one religion, and its theology, morals and ethics, over all others. This may make it impossible for any deviation for the majority peoples. *Islam is identified as a fundamental source of legislation.* This is a compromise provision from the ultimate expression of this position in Constitutional law: Islam is the only source of legislation.

These normative values are reinforced through the *Non-Contradiction Clauses* of Article 2: There are three non-contradiction clauses included in separate sub parts to Article 2. Together they provide that no law can be established that contradicts (1) the established principles of Islam, (2) the principles of democracy, or (3) the rights and basic freedoms stipulated in the constitution. Feldman and Martinez suggest that the three create an opposition sufficient to protect individual liberties against a more purely theocratic privileging of Islam.[255] However, the Islamists within Iraq could make a strong case for the opposite—that the three non contradiction clauses together are supreme, but that, given the focus on Islam, both the

254.

255. Feldman & Martinez *supra* at 904. "As a practical matter, these clauses raise the possibility that future interpretations of the Islamic noncontradiction clause would be influenced by the principle of democracy, whatever these may be defined to constitute. In any case, it cannot be maintained that the text of the constitution privilege Islam over basic rights or democratic principles, however uneasily they might sit beside each other under certain circumstances." *Id.*

democratic and rights non contradiction clauses must be read within the general parameters of Islamic morals, ethics and law. An Islamist reading of the sort suggested would not be peculiar, even within the understanding of Western judicial constitutional discourse. It could, for example, be said to parallel the reading in the much-celebrated German Southwest Case.[256]

So what would the non-American vetted Iraq Constitution look like? It might look like this: Islam is the source of all law. All law that contradicts Islam contradicts the Constitution. Authoritative Islamic law scholars must sit on the highest court, which merges secular and religious law. Individual, religious, democratic and human rights are respected within the context of the Islamic identity of the state. Group but not individual rights to conscience will be respected—a right to change religion will be permitted only to the extent permitted by the religious community from which the individual seeks to exit (best case) or permitted only in favor of conversion to Islam.

Within this constitutional framework, religion is no longer an object with which a political community must deal. Instead, religion serves as the foundation on which political communities are constituted. Religion thus serves as the 'higher law' that limits the constitutional expression of a polity: (1) exists outside the state; (2) beyond the control of any state or its apparatus, (3) it is eternal; (4) it is autonomous and complete in itself as a moral, ethical, theological and *legal system*; (5) comes with an institutional apparatus for its implementation and expression as behavior norms.[257]

Yet it must be emphasized that his basis of religious constitution is not merely an expression of parochial Islamic worldviews. Similar seeds, for example, lie in places like the Catholic catechism,[258] or in Hindu nationalist expressions.[259] And it is well known that elements of religion and religious practice, as well as a symbiosis between religion and the state is, in the West, as old as the execution of Socrates.

VI. DRAWING MORALS AND CONSEQUENCES: A FIRST ATTEMPT

The rise of this alternative form of infusing constitutions with morals and ethics will have potentially great consequences. At the macro level, it

256. For a discussion, *see* Arthur T. von Mehren, *Constitutionalism in Germany—The First Decision of the New Constitutional Court*, 1 AM. J. COMP. L. 70 (1952).

257. This, of course, is a thrust of the Cairo Declaration on Human Rights in Islam, supra, *available at* http://www.religlaw.org/interdocs/docs/cairohrislam1990.htm, which long redated the American efforts in Afghanistan and Iraq.

258. *See*, CATECHISM OF THE CATHOLIC CHURCH (Doubleday 1995), ¶¶ 1878-1948 (The Person and Society) and ¶¶ 2419-2442 (The Social Doctrine of the Church; Economic Activity and Social Justice; Justice and Solidarity Among Nations). This is a complex subject outside immediate scope of these remarks, but note ¶ 2242 ("The citizen is obliged in conscience not to follow the directives of civil authorities when they are contrary to the demands of the moral order, to the fundamental rights of persons or the teachings of the Gospel") and ¶ 2244 (suggesting that societies based on normative orders that do not recognize a divine moral order "arrogate to themselves an explicit or implicit totalitarian power over man and his destiny.").

259. *See, e.g.*, CHETAN BHATT, HINDI NATIONALISM:ORIGINS, IDEOLOGIES AND MODERN MYTHS 99-102, 179-209 (2001).

suggests that, in the future, at least two sources of normative constitutional foundations will be competing for influence in the construction of constitutions for political communities. It might follow that constitutional convergence becomes more difficult. Indeed, conflict over constitutional ideology may represent, in the 21st century, what conflicts over economic ideology represented for much of the 20th century.

As the example from the European Union suggests, that competition can produce attempts to rethink the substantive grounding of new constitutional orders. It might provide a basis for rethinking the substantive basis of old constitutional orders – for example the United States, even without the bother of constitutional amendment. There are leaders within the United States that have already advanced this idea: The United States, like Iraq, should recover its roots as a religious state with a plural but common grounding in Christianity,[260] which must form, as it once had, the basis of its law making.[261] The political branches in the United States have attempted, from time to time, to advance this notion.[262] It is possible to construct a jurisprudence of tolerance based on a religious hierarchy grounded in predominance in the general population.[263]

The greatest consequence on a macro level may well be the effect of competition on the great state centered project of constructing a universal set of norms for constitution making. The rise of competitor universalizing systems threatens the hegemony of the great secular project of behavior norm construction centered on public international law that had provided the basis for constitutionalism for over a generation. But this competition

260. Christianity, like Islam and Judaism, can claim a number of distinct sects, which shall significant elements of morals, ethics and theology.

261. *See, e.g.*, Davis v. Beason, 133 U.S. 333, 343 (1890).

262. There have been a variety of demonstrations of local political will to return to a more religiously oriented political framework within the United States. For example, the Missouri Legislature declared the Christian origins of the state. In the spirit of the Iraqi Constitution, Missouri legislators in Jefferson City considered a bill that would name Christianity the state's official "majority" religion. House Concurrent Resolution 13 has is pending in the state legislature. . . . The resolution would recognize "a Christian god," and it would not protect minority religions, but protect the majority's right to express their religious beliefs. The resolution also recognizes that, "a greater power exists," and only Christianity receives what the resolution calls, "justified recognition." H.R. 13, 93RD LEG., 2D REG, SESS. (Mo. 2006).

John Mills, *State Bill Proposes Christianity to be Missouri's Official Religion*, KMOV.com (March 4, 2006), *available at* http://www.kmov.com/topstories/stories/030206cckIrKmovreligionbill.7d361c3f.html. The Kentucky legislature made a number of similar declarations in support of the display of the Decalogue which was the subject of McCreary case. *See also* McCreary County v. ACLU, 125 S. Ct. 2722, 2753 (2005).

263. McCreary County v. ACLU, 125 S. Ct. 2722, 2748 (2005) (Scalia, J., dissenting). "Expanding on the hints he made in Mitchell, Justice Scalia here advances his notion that the Establishment Clause permits the state to favor one religion over another, as long as the formal requisites of neutrality are met (assuming that true neutrality is impossible) and offering members of non majority religions the solace of the Free Exercise Clause." Larry Catá Backer, *On the Cusp of Great Changes: American Religion Clause Jurisprudence in the First Decade of the 21st Century*, LAW AT THE END OF THE DAY (Nov. 25, 2006), *available at* http://lcbackerblog.blogspot.com/2006/11/on-cusp-of-great-changes-american.html.

pits traditional constitutionalism, international secular constitutionalism and the new theological universalist constitutionalism.[264]

At the micro level, the embrace of one transcendental system of constitutional values over others can have substantial consequences as well on rule of law constitutionalism in both its aspects. In its substantive aspects constitutional religious transcendentalism can redefine the scope of protection of religious minorities and those who otherwise reject the transcendence of the belief system grounding the constitution. As a source of constitutional normative foundation, this shift can as well affect the substantive right to religious expression within the polity – from a protection of religious rights in general[265] to the protection of religious rites.[266] These movements would mark a return to the sensibilities of a time when Reynolds[267] and Davis[268] were the foundations of the American judiciary's understanding of the relationship between religion and the apparatus of the state.[269] The future of American constitutional jurisprudence may well have been illuminated by the American approaches to the religious problem in Afghanistan and Iraq, and its transplantation back to the United States. Justice Scalia, may have outlined the language of that transplantation, for example, speaking in his dissent in McCreary County.[270]

In its process aspect, the embrace suggests a potential for transfers of governance authority. In essence, the countermajoritarian difficulty well known to modern constitutional law, will acquire a more complicating dimension. On one level, democratic theory must deal with the problem of

264. For a discussion of the competition between the first two within the United States, *see* Vicki Jackson, *Constitutions as 'Living Trees' Comparative Constitutional Law and Interpretive Metaphors*, 75 FORDHAM L. REV. 921 (2006).

265. Perhaps the Court might be emboldened to continue its reconstruction of U.S. Const. Amend. 1, to a provision that requires accommodation of majority religious practices, beliefs and norms, and a toleration of others, in the manner of the Iraqi Constitution. Justice Scalia, after all, has already made it clear that this, effectively, is the substantive framework driving his Establishment and Free Exercise analysis. *See, e.g.*, Employment Div. Dept. of Human Resources v. Smith, 494 U.S. 872, 874 (1990). For a discussion of the recent transformation of the American Religion Clauses, *see* Larry Catá Backer, *On the Cusp of Great Changes: American Religion Clause Jurisprudence in the First Decade of the 21st Century*, LAW AT THE END OF THE DAY (Nov. 25, 2006), *available at* http://lcbackerblog.blogspot.com/2006/11/on-cusp-of-great-changes-american.html.

266. As has become clear—the thrust of religious toleration under the theocratic constitutions of Iraq and Afghanistan protects the preservation of religious rites (as long as they might not offend Islam) but cannot serve as a basis for the protection of religious rights independent of the toleration framework permitted under Islam. *See* Afghani Const. Ch. 1, Art. 1; Iraqi Constitution Arts. 39, Art. 40 (protection of individual religious expression). And, of course, religious toleration then shifts—from constitutional discourse involving value judgments of the polity in the context of global expression of appropriate institutional behavior, to a religious discourse *within* Islam. The extent and expression of the rights of non-Muslims, within Iraq and Afghanistan are to be determined by the Muslim majority. But this is precisely Scalia's point in *Smith* as well. Thus, from an American perspective, an ironic congruence using two distinct jurisprudential frameworks.

267. *See* Reynolds v. United States, 98 U.S. 145, 164 (1878).

268. *See* Davis v. Beason, 133 U.S. 333, 342 (1890).

269. *See* Larry Catá Backer, *On the Cusp of Great Changes: American Religion Clause Jurisprudence in the First Decade of the 21st Century*, LAW AT THE END OF THE DAY (Nov. 25, 2006), *available at* http://lcbackerblog.blogspot.com/2006/11/on-cusp-of-great-changes-american.html.

270. McCreary County v. ACLU, 125 S. Ct. 2722 (2005).

unelected judges with power to interpret national constitutions. On another level, states must also deal with the effect of transferring norm making power from out of the state either to the internationals community (global human rights system) or to a priesthood or other body of people charged with interpreting Holy Writ or Divine pronouncement (priests, ministers, imams, etc.). Ironically, theocratic constitutionalism solves the countermajoritarian difficulty directly—by providing a Divine dispensation from popular control through a theology that vests a priestly caste with authority to act in matters of state and religion (inextricably intertwined).[271] Divine command effectively solved the problem of representation and legitimated the transfer of power to the priestly caste in Iran. It serves a similar purpose in Afghanistan and Iraq.[272] There is little reason to suppose that such a leap of faith cannot be undertaken among other institutionalized religious establishments, as each, invited to participate in the religious aspects of political affairs, provides a divinely inspired basis for the transfer of authority from the people to the priestly caste. And, indeed, the Anglo-American judicial system is already receptive to those patterns of justification of authority transfers.[273]

Whatever the results, democracy and republicanism might have be to reconceived under a system in which the highest expression of national political will – the constitution – is subject to a transcendent set of norms in the application and implementation of which some but not all of the polity may participate. The rise of theocratic transnational constitutionalism ought to remind the student of constitutionalism of the parochialism of even the most aspirationally lofty and apparently disconnected system of universals.

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271. As Chibli Mallat recently explained with respect to Islam: "As for the problem of Islamic law being prevented from change because it is God's law—as the political expression of the 'closing the gate of ijtihad', the issue has been for all societies, including those professing allegiance to Islam, a matter of 'the ultimate interpreter.' In this context present crises surrounding democracy tend to get befuddled. The problem is not so much the issue of whether man or God makes the law, but which of the many competing men, and more rarely women, are empowered to interpret it." Chibli Mallat, *On The Specificity Of Middle Eastern Constitutionalism*, 38 CASE W. RES. J. INT'L L. 13, 29 (2006). For the analogue in the secular law systems of the West, *see* Larry Catá Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges,* 12 WM & MARY BILL OF RTS J. 117 (2003).

272. Thus, it has been explained that "Khomeini's doctrine of *velāyat-e faqîh* contended that as deputes of the Hidden Imam (the twelth Imam who went into occultation in A.D. 873), the boundaries of authority of the *'ulamā'* during the Imam's *gheibat* (absence) included absolute rule over the believers. Khomeini argued that various *hadîths* had established the jurists as the *valî-ye amr* (guardian of affairs) who possessed the qualifications necessary to serve as deputies during the absence of the Hidden Imam."

Said Saffari, *The Legitimation of the Clergy's Right to Rule in the Iranian Constitution of 1979*, 20(1) BRIT. J. OF MIDDLE E. STUD. 64, 65 (1993).

273. *See* discussion in Larry Catá Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges,* 12 WM & MARY BILL OF RTS J. 117 (2003). Substitution priests for judges or adding priests into the judicial mix might not change the patterns of judging in the United States as much as might otherwise be assumed. As long as there is an authoritative justification (for the Americans within their constitutional structure—and I have suggested the movement in that direction) the patterns of institutional action would have to be only little modified to effect the change. That, perhaps, might also explain the ease with which American academics could slip into a system of judicial review subject to a priestly overview.

> None of these men thought of Europe in merely local terms, but generalized it into a representative of the universal. The principle of generalization may have changed: Roman civilization (and law), Christianity, the 'humanity' of the Enlightenment, science and capitalism in the nineteenth, modernity in the twentieth and globalization in the twenty-first century. It is hard to tell these ideas apart. They all claim the status of an Esperanto, transcending the time and place in which they are spoken.[274]

To this list of European universals can now be added Islam (and more generally, religion, including but not now limited to Christianity).[275] Each universalism is by definition proof of the falsity of other universalisms. Thus, the Iraqi and Afghani Constitutions present us with a reality in which at least three fundamental systems of constitutionalism are now competing for legitimacy, authority—and powerful adherents. They are, at their core, irreconcilable. "How differently the Americans see the world!"[276] The Americans have been instrumental in creating two of them—transnational secular constitutionalism grounded now in the United Nations system, and transnational theocratic constitutionalism, in which the state apparatus bows to one of any possible number of parochial (now universalist) religious constitutions. And yet the Americans, like the governing apparatus in the People's Republic of China continue to adhere to a more ancient form of national constitutionalism, grounded in the power of national sovereigns to assert unrestricted power in the constitution of their own political communities. The future of constitutionalism, whether national, secular or religious transnational form, is now dynamic indeed.

274. Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal,* 16 EUR. J. INT'L L. 113, 114 (2005).

275. This is a revolutionary addition from a European perspective. *See Id.* at 115 ("in 1880, Sir Travers Twiss noted that the Koran - unlike the Bible - prohibited equality between the House of Islam and the infidel states and that thus '*la civilisation turque sera toujours incompatible avec la notre*'"). Though it is hardly revolutionary when one applies the criteria for universality without the privilege of a parochial European (or American) context.

276. *Id.* at 117. This is true enough, but hardly in the way that Koskenniemi would have us believe. He views the United States through very European lenses—always sensitive to the behavior of empires. *Id.* at 117-118. But while the United States might push universal values, it has rarely if ever done so in the manner of European imperial universalism.