CONSTITUTIONAL THEOCRACY

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CHAPTER ONE

The Rise of Constitutional Theocracy

The Holy One, blessed be He, waits for the nations of the world in the hope that they will repent, and be brought beneath His wings.

NUMBERS RABBAH (JEWISH MIDRASH, CIRCA SECOND CENTURY C.E.)

RELIGION and the belief in God have made a major comeback. Over the last few decades principles of theocratic governance have gained enormous public support worldwide. From the fundamentalist turn in predominantly Islamic polities to the spread of Catholicism and Pentecostalism in the global South and to the rise of the Christian Right in the United States, it is hard to overstate the significance of the religious revival in late twentieth- and early twenty-first-century politics. Parties that advance religion-infused agendas have gained a tremendous popular following in polities as diverse as India, Israel, Malaysia, and Turkey. Christianity, meanwhile, has been growing exponentially in the so-called developing world. The Roman Catholic population in Africa alone more than doubled between the mid-1970s and the mid-1990s, and in Asia it increased by 90 percent during that period. Religion-based morality continues to hover over much of the Catholic “old world,” from Latin America to the Philippines. The Orthodox Church has enjoyed a big resurgence in parts of Eastern Europe just as Russia has been struggling to control the spread of Islam in the northern Caucasus. The changing demographics of French society have given rise to serious challenges, raucous at times, to France’s assertive secularism. And one only needs to reach for the television remote control to appreciate the prevalence of Evangelical, born-again Christianity in the United States, with its scores of pastors, churches, and televised salvation ceremonies. All of this happens, lest we forget, as newspaper
headlines report on religion-based insurgency from Iraq and Afghanistan to Pakistan, Yemen, Somalia, and Indonesia on a near-daily basis; on how Hezbollah (the “party of God”) has effectively erected its own governing apparatus within Lebanon; on how the struggle between the nationalist Fatah movement and the religious Hamas movement has effectively split the Palestinian people; and on struggles between clerics and reformists in Iran. In short, the reports of God’s death, to paraphrase Mark Twain’s remark, have been greatly exaggerated.

At the same time, the world has witnessed the rapid spread of constitutionalism and judicial review. Constitutional supremacy, a concept that has long been a major pillar of the American political order, is now shared, in one form or another, by over 150 countries and several supranational entities across the globe. Most of these countries can boast the recent adoption of a constitution or a constitutional revision that contains a bill of rights and enshrines some form of active judicial review. Consequently, constitutional courts and judges have emerged as prominent translators of constitutional provisions into guidelines for public life. The international migration of constitutional concepts and structures has grown exponentially. At the uneasy intersection of these two sweeping trends—the tremendous increase of popular support for principles of theocratic governance and the global spread of constitutionalism—a new legal and political order has emerged: constitutional theocracy.

What is constitutional theocracy? In a pure theocracy (e.g., the Islamic state envisioned by the Prophet Muhammad in the early seventh century or its emulation in Mahdist Sudan of the late nineteenth century) the supreme religious leader is also the highest political leader. Law proclaimed by the ruler is also considered a divine revelation and hence the law of God. In a closely related ecclesiocracy (e.g., the Vatican) an ensconced institutional religious leadership is at the helm; the religious leaders assume a leading role in the state but do not claim to be instruments of divine revelation. In contrast, formal separation exists in constitutional theocracy between political leadership and religious authority. Power in constitutional theocracies resides in political figures operating within the bounds of a constitution rather than from within the religious leadership itself. Basic principles such as the separation of powers are constitutionally enshrined. The constitution also typically establishes a constitutional court that is mandated to carry out some form of active judicial review.

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

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

The ideal model of a constitutional theocracy can be summarized by outlining four main cumulative elements: (1) adherence to some or all core elements of modern constitutionalism, including the formal distinction between political authority and religious authority and the existence of some form of active judicial review; (2) the presence of a single religion or religious denomination that is formally endorsed by the state, akin to a “state religion”; (3) the constitutional enshrining of the religion and its texts, directives, and interpretations as a or the main source of legislation and judicial interpretation of laws—essentially, laws may not infringe on injunctions of the state-endorsed religion; and (4) a nexus of religious bodies and tribunals that often not only carry tremendous symbolic weight but are also granted official jurisdictional status on either a regional or a substantive basis and operate in lieu of, or in uneasy tandem with, a civil court system. Most important, their jurisdictional autonomy notwithstanding, some key aspects of religious tribunals’ jurisprudence are subject to constitutional review by higher courts, often state created and staffed.

In all, hundreds of millions of people, perhaps as many as a billion, now live in polities or subnational units that either fall squarely within the definition of a constitutional theocracy or that feature many of the substantive characteristics and tensions of this legal order. From the early 1970s to
2000 alone, at least two dozen predominantly Muslim countries, from Egypt to Pakistan, declared Shari’a (Islamic law) “a” or “the” source of legislation. The more recent new constitutions of Afghanistan (2004) and Iraq (2005) reflect precisely that type of dual commitment to principles of Shari’a and to principles of human rights, constitutional law, and popular sovereignty. Although virtually none of these polities’ constitutions was adopted in an authentic bottom-up, “we-the-people” fashion—in fact, quite the opposite is true in most cases—Islamization does reflect a set of values that a large portion of the population in these countries seems to support. In several other countries precepts of Islam have been incorporated into the constitution, penal code, and personal-status laws of subnational units, most notably in twelve Nigerian states, Pakistan’s North-West Frontier Province, and Indonesia’s Aceh, to varying degrees in two Malaysian states, and to an increasing extent in Russia’s Chechnya and Dagestan. Much like the considerable variations within the so-called liberal democratic world, wide variation exists within the constitutional theocratic world in how central religion is in public life. Granted, Malaysia and Tunisia are a world apart from Iran or the Vatican in how lax or rigid the actual translation of religious principles into public life is. But in virtually all these countries religion not only plays a key collective-identity role but is also granted a formal constitutional status, serves as a source of legislation, whether symbolically or practically, and, more important, enjoys jurisdictional autonomy in matters extending from education and personal-status law to essential omnipresence in every aspect of life, law, and politics.

The prevalence of variations on constitutional theocracy in the predominantly Islamic world points to an interesting constitutional trajectory—perhaps anomalous from a Western hegemonic perspective—in such settings. Whereas much of the Western world has undergone a gradual political and constitutional confinement of religion since early modern times, the Islamic world of the last forty years seems to have taken the opposite route. Throughout most of the twentieth century nationalism and socialism were the two pillars of political discourse in North Africa, the Middle East, and Southeast Asia. With few exceptions, polities in these regions emerged from colonialism with surprisingly little reliance on religion or religious authorities. The secularist nationalism of Mahatma Gandhi and the leftist revolutionary independence movement in Algeria are two prominent examples. But religion has made a major comeback over the last few decades and is now a de facto and often a de jure pillar of collective identity, national metanarrative, and constitutional law in many predominantly Muslim countries in Asia, Africa, and the Middle East.

A further two billion people, perhaps as many as three billion, live in countries such as India, Indonesia, and Turkey where no particular religion is granted formal status, but where religious affiliation is a pillar of collective identity. The struggle to establish uniform personal-status law in formally secular but markedly religious India has been a perennial bone of contention in Indian constitutional law and politics. In half a dozen Indian states, to pick another example, strict restrictions on conversion from Hinduism have been introduced into law by the Hindu nationalist Bharatiya Janata Party (BJP). The fundamental mismatch between Turkey’s constitutionally enshrined secularism and the manifested religious inclinations of most Turks has given rise to a frenzy of political and constitutional maneuvering in that country. In countries such as Israel, Sri Lanka, or parts of the former Yugoslavia religious affiliation is closely entangled with definitions of ethnicity, nationality, and citizenship. To that count one may add polities where, despite formal separation of church and state, long-standing politically systemized Catholic Church preeminence and religion-centric morality continue to loom large over the constitutional arena. The de facto, as opposed to de jure, boundaries of religion and state in these countries can be described as being blurred at best and are continually contested in both the political and the judicial spheres.

Regimes in these and other countries throughout the new world of constitutional theocracies have been struggling with questions of a profoundly foundational nature and have been forced to navigate between cosmopolitanism and parochialism, modern and traditional metanarratives, constitutional principles and religious injunctions, contemporary governance and ancient texts, and judicial and pious interpretation. More often than not, the clash between these conflicting visions results in fierce struggles over the nature of the body politic and its organizing principles. These tensions are evident in virtually every aspect of public life, from court hearings to university lectures, from crowded soccer stadiums to secluded board meetings, and from casual conversations in markets and street eateries to maneuvers in the upper echelons of politics.

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

Like early writings about the postcolonial world that tended to view postcolonial countries as a homogeneous bloc, populist academic and media accounts in the West tend to portray the spread of religious fundamentalism in the developing world as a near-monolithic, ever-accelerating, and all-encompassing phenomenon. The frequent formulation of this supposed dichotomy is that the West is largely secular and modernist, whereas the non-West is largely religious and traditionalist. According to this “civilizational” approach, a distinction between religion and state is deeply rooted in Christendom but does not exist in other major religions, certainly not in Islam. Moreover, in contrast to the Western portrayal of religion as private and relatively benign, “ politicized” religions are depicted as a threat to reason and a hindrance to progress. The Islamic world, in particular, has been the target of much of this critique. Whereas the West is characterized as driven by a constant quest for modernism and progressiveness, Islam and Muslims have increasingly been depicted as insular and anti- cosmopolitan. The post-9/11 popular media followed suit by portraying Islamic societies as united by their religious zeal and antibilateral sentiment.

The reality, however, is more complex and nuanced, for the secular/ religious divide is a continuum, not a binary, dichotomous classification. Europe has been the birthplace of secularism and the separation of church and state, but at the same time it has maintained, and is reluctant to forgo, its ultimate Christian predominance. And just as American society has multiple traditions and defining characteristics and thus may not be easily labeled either “modern” or “parochial,” most polities where principles of theocratic governance have gained public support may not be easily defined as fundamentalist, reactionary, or ultrareligious. Egypt, to pick one example, has witnessed tremendous growth in popular support for the Muslim Brotherhood. The prospects of further Islamization are real; even under extreme duress—the regime is doing everything it can, often at the expense of civil liberties and democracy, to contain the theocratic threat—political Islam was able to garner one-fifth of the votes in the 2007 parliamentary elections. But this is the same Egypt that attracts millions of tourists every year to some of the world’s cultural and natural wonders, as well as millions more to party at the beaches of Sharm el-Sheikh, and that produced Anwar al-Sadat, initiator of the historic peace accord with Israel, Naguib Mahfouz, winner of the Nobel Prize in Literature, and Boutros Boutros-Ghali, former secretary general of the United Nations, among other world-class luminaries. Cairo is one of the most culturally vibrant cities in the Middle East. In 1980 Egypt’s constitution was amended to introduce Shari’a as the (instead of “a”) source of legislation. But this is also the Egypt that on December 31, 1999, hosted the world’s largest outdoor concert to celebrate the new millennium, as well as five thousand years of Egyptian civilization—an audiovisual megaspectacle by French electronic music icon Jean Michel Jarre performed at the Grand Pyramids of Giza. Although the literary scene is regulated by government-appointed religious clerics, The Yacoubian Building by Alaa Al Aswany freely depicts homosexuality, corruption, and illegal abortion in Cairo and has become the best-selling Arabic novel in recent history.

These intriguing amalgams are widespread in religion-laden politics. The Justice and Development Party (Adalet ve Kalkınma Partisi, AKP), a moderately religious party, is now governing Turkey, a country whose constitution is arguably one of the most militantly secularist constitutions on offer. Iran—commonly perceived as a strict, fundamentalist Islamic republic—is the country where the first major antimonarchist constitutional revolution in the Middle East, dating back to 1906, took place. In 1993 the Iranian Majlis (parliament) approved the Free Zones Act, which established Kish Island, Qeshm Island, and the Port of Chabahar as the Free Zones of Iran: free-trade zones in Iran, each of which offers various perks to the international investor, such as full exemption from “Islamic banking” hurdles, tourist attractions, guaranteed repatriation of capital and accumulated profit in case of nationalization, and other benefits that are, by any stretch of the imagination, not fully compatible with a straightforward reading of Shari’a. In a much-heralded move in 2005, neighboring Kuwait adopted a law that for the first time in its history allows women to vote and to run for parliament. The new law also added, in a generic fashion, that both women voters and candidates must comply with Shari’a law norms. In 2009, four women, two of whom are vocal advocates of women’s rights, were elected to the Kuwaiti parliament. Conservatives argued that women who serve in office must dress in accordance with Muslim religious law, with their heads covered. The struggle over women’s dress code in parliament even found its way to Kuwait’s Constitutional Court (I discuss this case in some detail in Chapter 4). The court had to determine the meaning of the requirement that women voters and elected representatives comply with Shari’a norms. More generally, it had to rule whether Kuwait is
governed by religious law, or whether Islam is merely the state religion. (The Constitution of Kuwait [1962] establishes that Islam is “the religion of the state,” and that Shari’a is “a main source of legislation.”)

Such existential tensions, of course, are not confined to the Islamic world. Israel is arguably one of the world’s capitals of embedded, near-oxymoronic contradictions of that nature. The very title of the utopian novel *Altneuland* (The Old New Land, 1902) by Theodor Herzl, the founder of political Zionism, captures some of these existential paradoxes. Israel defines itself as a Jewish and democratic state. Much has been written about this duality, how logically plausible it may be, given the fact that non-Jews make up approximately one-fifth of Israel’s citizenry, and how these two foundational tenets may be translated into a fairly coherent set of guidelines for public life. The Supreme Court of Israel has developed rich jurisprudence (which I discuss in some detail in Chapter 4) on formative questions such as “Who is a Jew?” for conversion purposes, the scope of naturalization rights for non-Jewish spouses of Israeli citizens, or the jurisdictional boundaries of rabbinical courts. But everyday-life episodes of the close entanglement of state and religion in Israel seem to tell the story of these complexities better than any grand philosophical accounts. In 2004 Professor Avram Hershko and Aaron Ciechanover of the Technion in Haifa, Israel, won the Nobel Prize in Chemistry for their discovery of ubiquitin-mediated protein degradation. This was the first-ever Nobel Prize awarded to a scientist working in an Israeli university and a foundational event for Israel’s scientific community, no doubt. (Israelis had won Nobel Prizes in Literature and Peace; Daniel Kahneman, an Israeli, had won the Nobel Prize in Economic Sciences while he was working at Princeton.) The Swedish Royal Academy happened to announce Hershko and Ciechanover’s prize on a Jewish holiday. Instead of holding a major press conference at the Technion, as one would expect, given the moment’s grandeur, Technion authorities had to host the press conference with the two laureates at Hershko’s private home. It was later revealed that the Technion’s rabbi would not allow the university to hold a press conference on the university’s premises during the Jewish holiday because by law all public institutions must remain closed on such days. Not even a historic Nobel Prize could change that divine call.

Meanwhile, several notable scholars and prominent politicians have argued that the preamble of a new European constitution should contain a reference to Europe’s “Judeo-Christian tradition” so as to avoid an artificial “Christian deficit” that would in turn hinder efforts to create an authentically European political community.10 In Catholic Europe, the continued prevalence of religious morality sends Poland and Ireland to frequent rendezvous with the European Court of Human Rights (ECtHR). One had only to listen to the reaction of Prime Minister Silvio Berlusconi of Italy to the ruling of the ECtHR in November 2009 (discussed in some detail in Chapter 5) that called for ubiquitous crucifixes to be removed from Italian classrooms—he described it as a “nonsensical attempt to deny Europe’s Christian roots” and thus “unacceptable for us Italians”—to understand how Swiss voters’ 2009 endorsement of a constitutional amendment that bans the construction of new minarets in that country is anything but an idiosyncratic manifestation of embedded Christian dominance in Europe. And lest we forget, steps from where Berlusconi was speaking in Rome stands the Vatican, the world’s undisputed bastion of Catholicism. It has recently reformed its legal system so that as of January 1, 2009, Italian laws no longer apply automatically to the Vatican state (the Holy See). Instead, pertinent Italian laws will be examined by Vatican clerics to determine their compatibility with canon law and Catholic moral principles. This transformation alters the Lateran Pacts of 1929 that made Italian laws automatically applicable in the Vatican state. A senior Vatican canon lawyer, Monsignor José María Serrano Ruiz, has gone on record as saying that Italian laws are too many and too unstable and too often conflict with the moral teachings of the Catholic Church.11

Another telling illustration of mixed commitments heralds from South East Asia. A person’s wish to convert from one religion to another is considered a private matter in most secular states. However, in Malaysia, things are not that simple. Malaysia is a multiethnic yet formally Islamic state that grants ethnic Malays (all of whom are Muslims) preferential treatment and protects the juridical autonomy of Shari’a courts in an expansive list of personal-status matters pertaining to Muslims, including the politically sensitive issue of conversion to and from Islam. At the same time, religious freedoms for members of all other denominations are constitutionally guaranteed, as interreligious harmony has long been the country’s official stance. This framework is inherently prone to existential constitutional clashes between the state religion and the rights of non-Muslims. A unique jurisprudential landscape has inevitably formed. In 2007, for example, Malaysia’s Federal Court held in the *Lina Joy* case that a Muslim-born woman who claimed to have converted to Christianity cannot convert from Islam to another religion at her own will but must ask the Syariah (Bahasa Malaysia or Malay for Shari’a) courts to contemplate her request and possibly risk a designation as an apostate. Confused? In Chapter 4 I discuss the war currently being waged between Malaysia’s Federal Court in charge of enforcing the constitution and its rights provisions and the Syariah courts, which, by law, adjudicate all matters pertaining to
personal status, inheritance, apostasy, child custody, and conversion to and from Islam.

The same year that \textit{Lina Joy} was decided a Catholic newspaper in Malaysia used the word “Allah” to refer to God in its Malay-language edition. A controversy arose regarding who may use the word “Allah”—whether it is an exclusively Muslim word as some Muslim leaders in Malaysia suggest or a neutral term referring to One God that may be used by all regardless of their religion as the newspaper argued. A law to ban the use of the term in reference to God by non-Muslims was enacted in the 1980s, but had seldom been enforced prior to 2007. On December 31, 2009 (quite symbolically), the high court in Kuala Lumpur ruled that the ban on non-Muslims using the word “Allah” to refer to God was unconstitutional as it infringed on freedom of expression and freedom of religion principles. The court went on to state that the word “Allah” is the correct word for “God” in various Malay translations of the Bible, and that it has been used for centuries by Christians and Muslims alike in Arabic-speaking countries. This ruling was viewed by radical Islamists as a legitimization of deceitful attempts to convert Muslims to Christianity. Riots and church burning ensued. The government appealed the high-court ruling, and the implementation of the decision has been suspended until the appeal is heard.

Although core predicaments and jurisprudential clashes of that sort may be captivating, they do not capture all the complexities in such settings. The secular/theocratic rift itself is often not only about worldviews, modernism versus tradition, or sources of authority but also about distribution of material resources, access to government funding, and employment opportunities. To begin with, the potential of desecularized laws is in many respects bad for business. Religious directives are generally not very conducive to a modern market economy. Islam’s prohibition of interest or usury is only one illustration. Some religious directives are simply old, obsolete, or irrelevant in today’s high-tech markets. Others are based on individual or small-scale economic premises that are not suitable for a multitrillion-dollar, interconnected, globalized economy. Still others advance restrained or collectivist normative stands that are not in line with prevalent notions of megacapitalism, individualism, and conspicuous consumerism.

Because most religion-based economics are not in accord with modern economic theory, international markets, monetary bodies, and financial institutions—the World Trade Organization, the World Bank, and the International Monetary Fund, for example—are not keen on them. The tourism industry, perhaps with the exception of a few chain hotels in Rome, Jerusalem, or Mecca, resents it. (If one looks at the other side’s perspective, it is little wonder that the targets of so many incidents of sectarian violence have been fancy hotels and resorts, from Sharm El-Sheikh to Mumbai and from Bali to Islamabad to Mombasa.) More generally, strict religious law is not helpful, to put it mildly, in supporting a country’s international economic reputation. It would be reasonable to assume, for example, that despite the formal constitutional entrenchment of Shari’a precepts, most upper-class Qataris are not very enthusiastic about turning their heavenly paradise—Qatar is one of the most affluent places on earth—into a distinctly more religious polity that would require them to give up much of its impressive economic and international success. In Dubai, a member of the United Arab Emirates (UAE), Islam is a marker of collective identity, but ultra-conservative Islamic morality is not exactly the mantra Dubai’s politicians or its investors and high-end commercial managers (for example, of Burj Khalifa, the tallest free-standing structure in the world, or Dubailand, the world’s largest amusement park, twice as big as Disney World) wish to recite. Abu Dhabi (capital of the UAE) and Bahrain are two of the glossy locations of the Formula One world racing tour, with all the ultracommercialization that comes with it. Fly Emirates, as the commercial slogan goes. And, despite all the differences, the image of a predominantly religious polity clearly does not aid Turkey’s bid to join the European Union.

But the political economy of the secular/religious divide stretches well beyond the apparent incompatibility of a conservative reading of religious precepts with principles of modern economy. As Ernest Gellner famously observed, the ruling classes in what he called agglomerate states often control state institutions and use artifacts like high culture or modernism to undermine social structure, distancing themselves from nonmembers of the national elite. This logic sheds light on some of the interests at play in the secularist/religious divide. A plausible but often-overlooked reason that secularists or moderates resent theocratic government is the potential redistributive implications of such a regime. In countries such as Israel, Malaysia, Turkey, and Egypt the clash between secularists and religionists has an important center-versus-periphery economic-distribution dimension to it. In terms of demographic indicators, support for religious parties in these countries is often closely associated with the relative have-nots and is distinctly more prevalent among occupiers of the sidelines, economic and cultural. Secularism and cosmopolitanism, on the other hand, are often associated with the metaphorical center. It often comprises old elites, the urban intelligentsia, and the managerial class and is characteristic of the relative have, members of the upper socioeconomic echelons. Granted, support for religion-infused political agendas has not been confined to lower socioeconomic groups. In several instances religious parties, perhaps by virtue of their participation in the formal political process, are led by pragmatic
moderate leaders, not by fundamentalist zealots. Turkey’s AKP and the similarly named Justice and Development Party in Morocco (Parti de la Justice et du Développement, PJD) illustrate this trend. Still, in virtually all pertinent settings religious parties draw many more followers from denizens of the political, economic, and cultural periphery than from occupants of the political, economic, and cultural core.

In short, principles of theocratic governance may pose a threat to the cultural propensities and policy preferences of secular-nationalist elites and the often-pragmatist bureaucracy and state apparatus, as well as of powerful economic stakeholders in these countries. Theocratic governance has seldom appealed to members of the often-cosmopolitan urban intelligentsia and the managerial class. At the same time, theocratic governance is also often at odds with principles of modern economics and may threaten the interests of major economic sectors and stakeholders. The contrast between the “Muezzin’s call” and the “Dow Jones bell” is a telling metaphor in that respect. Pragmatic state bureaucrats may see theocratic governance as an impediment to progress and modernization. It would be an understatement to say that theocratic governments are not the type of regimes that find favor with supranational trade and monetary bodies. With few exceptions, theocracy has been and remains detested by the military—a symbol of modern nationalism in many developing polities. The powerful Turkish, Pakistani, and Algerian militaries are only three of many examples that come to mind here. The global spread of international human rights norms and watchdog organizations further pressures regimes to implement modernizing reforms and to limit the spread of distinctly antimilitarist aspects of theocratic governance. Finally, the prospect of theocratic government has potentially far-reaching power-shifting implications, both symbolic and material.

From this an uneasy alliance of anti- and theocratic forces emerges that seeks to tame the spread of religious fundamentalism and defuse attempts to establish a full-fledged theocracy. It comprises secularist or moderately religious political leaders and parties; statist bureaucrats; powerful economic stakeholders, corporations, and the managerial classes; judges and jurists; and, at times, the nationalist military. Each of these groups brings to the table its own worldviews, interests, and communities of reference, and at times there is an embedded distrust between two or more of them—for example, between state bureaucrats and free marketeers, or between supporters of political liberalization and the military (think Turkey or Pakistan). But the threat of theocratic governance drives these groups to leave their animosity toward each other for better days and to collaborate tacitly so as to keep their eyes on the religious ball, so to speak. At the same time, as support for religious parties and policies increases, religious talk of some kind—and it had better come across as genuine—becomes ever more essential to maintaining some of these elites’ popular legitimacy and political hegemony.

These conflicting pressures, opinions, and interests have led to intense constitutional maneuvering and interpretive innovation in polities that face deep rifts along secular/religious lines. Therefore, constitutional theocracy has emerged, to some extent as a genuine attempt at aspirational constitutionalism committed to a set of pious principles with a strong ideological outlook, but at the same time also driven, at least in part, by strategic, instrumentalist, irreverent constitutionalism aimed at containing the spread of theocratic government and bringing religious institutions under state control. Granting religion formal constitutional status is not only a legitimacy-enhancing move that appeases popular pressures; it also neutralizes religion’s revolutionary sting, co-opts its leaders, ensures state input in the translation of religious precepts into guidelines for public life, helps mutate sacred law and manipulate religious discourse to serve powerful interests, and, above all, brings an alternative, even rival order of authority under state control and supervision.

A range of constitutional strategies have been developed by those who wield political power—and represent the groups and policy preferences that defy principles of theocratic governance—to hedge or mitigate the impact of religiosity on politics and public policy. This is done in different ways in different places because of variance in different countries’ constitutional legacy, political culture, and power struggles. But taken as a whole, these forms of constitutional ingenuity allow non- or anti-theocratic elites and leaders to talk the talk of commitment to religious values without walking much of the actual walk of that commitment. As a result, constitutional law and courts in virtually all such polities have become bastions of relative secularism, pragmatism, and moderation, thereby emerging as effective shields against the spread of religiosity and increased popular support for principles of theocratic governance. In other words, akin to constitutional democracy, where the former element establishes a core set of entrenched limitations on the scope, nature, and range of possible outcomes of the latter element, constitutionalism in predominantly religious settings plays a key role in curbing the spread and impact of theocratic governance, with its alternative worldviews, texts, and hierarchies of authority. Just as in constitutional democracy the “constitutional” keeps in check the “democracy” aspect, so does the “constitutional” in constitutional theocracy limit the spread of theocratic governance in settings prone to such expansion.

Formal establishment of religion may be portrayed as surrender to religion, but in reality it helps limit the potentially radical impact of religion
by bringing it under state control. The constitutionalization of religion and the consequent subjection of religious authority to state scrutiny turn legal and political considerations into key determinants in the evolution of religious law. This process makes the state (and its courts) a key player in picking religion’s official interpretive authorities and jurists and gives the state a stake in the interpretive game. The pacifying co-optation impulse may explain why, quite counterintuitively, countries facing increasing support for principles of theocratic governance may elect to become constitutional theocracies.

Constitutional law and courts may be a rational secularist endeavor in other respects. Restrictive constitutional provisions have been used to delegitimize and exclude unwelcome religion-based political association. Even if the jurisdiction of constitutional courts is formally religious in some sense, it will inevitably reflect a less militant view of religious identity. In addition, the very logic of constitutionalism, with its very reasoned set of core tenets and prevalent modes of interpretation, makes it an attractive enterprise to those who wish to contain religiosity and assert state or civil society authority over religious texts, worldviews, and interpretive hierarchies. Effective political control over, as well as better access to, the constitutional arena also makes it attractive to secularists, modernists, and statists who seek to keep religious authority in check. Consequently, constitutional law and courts have become the natural companions of these groups and their political representatives in their struggle against the spread of principles of extreme theocratic governance.

Strikingly, current comparative constitutional law scholarship seldom addresses constitutional theocracies. Several works begin to investigate the vast terrain explored in this book. Nathan Brown’s illuminating, politically astute studies of constitutions in the Middle East see constitutional institutions in the region as archetypal of those in authoritarian settings. The focus is on the “Arab world” (understood in the area-studies sense of the term) and the lack of democratic tradition in it. If constitutional courts are established and supported by a regime in the region, this is done mainly to enhance state capacity and regime control. Religion and secularism do not play a key role in this matrix. Olivier Roy’s and Gilles Kepel’s seminal works focus on the main tenets and embedded problems of global jihad, and political Islam more generally, with little attention to constitutional structures or constitutional politics, let alone jurisprudence or the role of courts. Noah Feldman’s widely recognized work skillfully debunks the notion of the “clash of civilizations” by pointing to important conceptual and historical overlaps, not just contradictions, between democracy and Islam. But in comparative constitutional law and politics the silence is deafening. Despite the growing scholarly interest in, and burgeoning literature on, comparative constitutional law and the international migration of constitutional ideas, we still know little about constitutional law and politics in countries where the potentially explosive combination of modern constitutionalism and the fundamentals of theocratic governance come together. Like early maps of the world where tracts of emptiness cover much of the non-Western world, the jurisprudential landscape of constitutional theocracies, as well as constitutional and judicial politics in such politics more generally, remains a terra incognita of sorts, almost completely uncharted, let alone theorized.

Aspects of the constitutional law of religion closer to home are frequently addressed by scholars in the West. Debates over the accommodation of religious diversity in Europe are plentiful. Virtually every French, Dutch, or German politician or intellectual sports a learned opinion on this and related predicaments. The debates are outnumbered only by the numerous scholarly and journalistic accounts of the place of religion in the U.S. Constitution and American public life; dozens of books and hundreds of academic articles are published every year on the First Amendment’s Free Exercise Clause and Establishment Clause. However, notwithstanding the increasing prevalence of constitutionalism and principles of theocratic governance in the nonsecular world, very few works have explored the intersection among constitutional law, religion, and politics in the new world of constitutional theocracies, with their competing commitments, conflicting worldviews, and rival visions of the “good sociopolitical order.” Rich, theoretically sophisticated, innovative works on the ethics, morality, and practice of religious law—most notably canon law, Jewish law, and Islamic law—are plenty. The study of Islamic jurisprudence and legal theory, in particular, has enjoyed a tremendous renaissance in North America over the last two decades. However, with very few exceptions, relevant studies tend to focus either on the theological or internal aspects of religious law, thus catering mainly to specialty scholars of religion (doctrinal studies of Jewish or Islamic law are good examples of this insular tendency), or on constitutional politics in a single country or region, thus reaching only specific country- or area-studies scholars.

In addition to the traditional disciplinary boundaries that often characterize academic discourse, this lacuna is also due in part to the fact that populist academic and media accounts in the West tend to portray the spread of religious fundamentalism in the developing world as a near-monolithic, one-dimensional, and all-encompassing phenomenon, as I stated earlier. In practice, however, the picture in most predominantly religious polities—be they Islamic, Jewish, Roman Catholic, or Hindu—is much more
complex and nuanced, reflecting deep divisions and strife along secular/religious lines, as well as widely divergent beliefs, interpretations, and degrees of practice within religious communities. In fact, most countries that have experienced a revival of religious fundamentalism have long been caught between identities, worldviews, and commitments that are at once secular-nationalist and religious, universalist and particularist. In virtually all these countries the very nature of the sociopolitical order has been highly contested. Civic-nationalist ideology, principles of modern economics, relatively cosmopolitan lifestyles, and diverse worldviews and policy preferences all strive to establish or maintain their hegemony vis-à-vis embedded symbols of tradition, religiosity, and exceptionalism.

In short, constitutional theocracies and, by extension, the emerging global encounter of constitutionalism and religion more generally are a Galapagos-like paradise for scholars of comparative constitutional law and politics. They reflect a sociopolitical order under constant duress. We often see striking tensions between the rule of law and the rule of God, cosmopolitanism and parochialism, economic interests and public will, modern government and religious authorities, new constitutions and ancient texts, and judicial and pious interpretation. A unique hybrid of apparently conflicting worldviews, values, and interests, constitutional theocracies thus offer an ideal setting—a living laboratory, as it were—for studying constitutional law as a form of politics by other means.

In this book I combine insights from legal theory, economics, theology, and political sociology with a genuinely comparative analysis of religion-and-state jurisprudence from dozens of countries worldwide to explore the evolving role of constitutional law and courts in a nonsecularist world. Emphasis is put on the largely unexplored universe of constitutional design and jurisprudence in the increasingly large number of polities caught between the popular resurgence of religion and overarching principles of modern constitutionalism—two of the most powerful ideas of our time, an odd couple of sorts, diametrically opposed in many respects, but at the same time sharing strikingly similar characteristics, each with its own sacred texts, interpretive practices, and communities of reference. The numerous examples explored herein know no borders; they stretch from antiquity to the present day, from the banal and familiar to the exotic and spectacular, from the tiniest sects to the most established religions, from remote archipelagos to the most powerful nations, and from new courts and constitutions to the oldest constitutional orders known.

The discussion focuses on several core questions. How are we to explain the recent resurgence of constitutional enshrinement of religion in so many countries in the developing world, in stark contrast to its confinement to the private sphere and the demise of the theological-political form of governance in much of the West? Why are constitutional courts so appealing to antireligious social forces in polities that face deep divisions along secular/religious lines? What has been the role of constitutional law and courts in co-opting and mutating the interpretation of religious precepts—theoretically derived from sacred sources—to reflect the interests of influential political and economic stakeholders and the modern state? What are the unique characteristics of the emerging theocratic-infused constitutional jurisprudence, and how is the expansion of religious law tempered through it? What are the differences and similarities between the role of constitutional law and courts in theocratic and nontheocratic settings? Are there nonpious (e.g., political and economic) origins to doctrinal change, jurisdictional wars, and intra- and interfaithe clashes within and between the religious and the constitutional domains? And how are we to explain the conceptual and sociolegal parallels between constitutional and religious interpretive approaches?

I address these questions through five different lenses. In Chapter 2 I place the rise of constitutional theocracy in the context of other models—from the distant past to the present day; Christian, Muslim, Hindu, and Jewish; and from east, west, north, and south—for arranging religion and state relations. I point to some serious shortcomings of canonical constitutional theory in accounting for the jurisprudential and sociopolitical realities of the secular/theocratic rift in a nonliberal context. Constitutional theocracy is only one of several main templates for addressing religion-and-state relations, but there is a strong echo of religion in each and all of these models. In fact, all constitutions, from France to Iran and anywhere in between, address the issue of religion head-on. Some constitutions despise it, others embrace or even defer to it, and still others are agnostic but are willing to accommodate certain aspects of it, but not a single constitution abstains from, overlooks, or remains otherwise silent with respect to religion. With the exception of the concrete organizing principles and prerogatives of the polity's governing institutions, the only substantive domain addressed by all modern constitutions is religion. What could be a more telling illustration of religion's omnipresence in today's world or a stronger testament to constitutionalism's existential fear of religion?

In Chapter 3 I explore the secularist appeal of constitutional law and courts. I identify six broad rationales—from the most abstract epistemological platform to the most concrete political level—that make these institutions attractive to secularist, modernist, cosmopolitan, and other antireligious social forces in polities that face deep divisions along secular/religious lines: (1) co-optation; (2) jurisdictional advantages; (3) strategic
delegation; (4) the very nature and characteristics of constitutional law, its epistemology, and its interpretive logic; (5) constitutional delegitimation of radical religious association; and (6) political control of constitutional courts and judges. Drawing on all these rationales, the state, even in the most theocratic settings let alone in more lax ones, invests tremendous energy in bringing religion under constitutional check.

In Chapter 4 I examine in considerable detail how constitutional courts in seven countries featuring widespread popular support for political religion (Egypt, Kuwait, Pakistan, Malaysia, Nigeria, Israel, and Turkey)—each court within the different constitutional framework and political context in which it operates—advance secular or secularizing solutions to problems of state and religion. To that end, courts in these countries have developed extraordinary interpretive ingenuity, the richness of which makes the vibrant interpretive debates in the United States look rather meager. To press forward with their religion-taming agenda, courts in these countries have been engaged in zealous jurisdictional wars unseen in any liberal constitutional setting. I also show how and why, under certain politically charged circumstances, constitutional courts in these and similarly situated polities may side with religion law and authorities against their own secularist, religion-subjugating tilt.

In Chapter 5 I show how constitutional law and courts in several non-theocratic settings—from the battle over religious attire in Europe to the struggle over reproductive freedoms in Colombia and Mexico, the status of customary law in South Africa, and the erection of boundaries to multicultural accommodation in Canada—essentially display the same secularist sentiment as their counterparts in predominantly religious settings. Courts in these polities, each operating in a different political context and preoccupied with a distinct state-and-religion challenge of their own, have nonetheless positioned themselves at the secularist end of the acceptable continuum in each of their respective polities. Even some of the most accommodating polities—think of South Africa’s “rainbow nation” or Canada’s “mosaic” conception of citizenship—are open to diversity-as-inclusion claims but resist nonstate-law-as-competition claims that seek to establish “islands of jurisdiction” lying outside the governance of the state and its official agents. Constitutional courts worldwide share a secularist tilt relative to the context within which they operate.

In Chapter 6 I suggest that although constitutional law and religion law seem fundamentally different from each other, they ultimately have much more in common than meets the eye. The conceptual affinity between “originalist” and “living-tree” interpretive approaches in the two domains is only one example, but there are several other core commonalities, conceptual and political, between constitutionalism and religion, and the concrete interests, some quite profane, that drive their respective institutions, epistemic communities, and interpretive practices. These may help us understand why and how these two domains mutate, collaborate, or fight each other to address ideational platforms, economic interests, or political aspirations.

I conclude by stressing the significance of the lessons learned from this comparative inquiry into the intersection of religion, state, and constitutionalism for the study of constitutional law and politics in a nonsecularist world. Ultimately, I argue that however challenging the quandaries and disharmonies of constitutional theocracy may be, they pale compared with the tectonic political pressures created by the increasing popular support for principles of theocratic governance and the corresponding need for some religious talk, or even policies, to maintain political legitimacy and appease religious pressures, when stacked against the bundle of powerful anti-religious interests and stakeholders. More than anything else, I argue, constitutional theocracy is a political phenomenon, not a theological or juridical one. It may seem an oxymoron, even potentially explosive compound, but from an antitheocratic point of view it is ultimately a rational solution to the mounting pressures of political religion with its alternative cultural, political, and distributive agenda. The constitutional incorporation of religious directives, I suggest, is not done for the pure love of religion. It is a response and at times even preemptive move aimed at appropriating religion to counter fundamentalist threats. As support for theocratic governance continues to grow, religious establishment becomes an increasingly attractive, lesser-evil solution for secularists, statists, modernists, and other religion-taming interests that strive to protect or advance their agendas in a nonsecularist world.

At the most abstract level, the rise of constitutional theocracy provides insights into the political construction of constitutional law and courts and the key role of these institutions in taming the spread and limiting the impact of theocratic politics in predominantly religious settings. The rise of constitutional theocracy, much like the process of separation of church and state before it, is merely another stage, a politically driven synthesis that is already becoming the new thesis throughout much of the developing world in the ongoing tug-of-war between two of the most powerful belief systems of our time. Turning to constitutional law and courts to bring religiosity under check, or defuse its potentially radical edge is a rational choice of action by secularists and moderates. Despite occasional and inevitable setbacks, it is a prudent, judicious gamble.

At a more concrete level, however, I suggest that the key to understanding why constitutionalism may be effective in taming the impact of religious
thought lies in the similarity, not the difference, between constitutionalism and religion. Although constitutionalism and religion are often portrayed as diametrically opposed or at least unrelated domains, they are in fact two analogous symbolic, but also workaday, systems—each with its own constitutive texts, sets of beliefs, high priests, and earthly interests—that vie to establish, maintain, or enhance their hegemony, worldviews, and preferences vis-à-vis each other. Precisely because constitutionalism is a religion-like domain, a civic faith with its high priests, constitutive texts, and interpretive institutions, fostered by the modern state and the international community, it is distinctly better positioned than blunter, ostensibly more forceful means to defuse, mutate, co-opt, or mitigate principles of theocratic governance. As a de facto civic religion, the constitutional scripture may be an effective counterpoint to a religious scripture.

But before I turn to address these big ideas, two preliminary queries ought to be dealt with: What is the place of constitutional theocracy in the broader matrix of religion-and-state relations worldwide? And what exactly is the theocratic challenge to conventional constitutional theory? Let the erudite journey begin.

As every amateur historian acknowledges, religion and politics were closely allied, indeed, often inseparable and unified, throughout much of pre-eighteenth-century human history. The gradual transition from an abstract, omnipresent, and near-communal perception of divine powers to the separate but often-symbiotic existence of the political and the religious appears to have started about 3,500 years ago with the initial emergence of embryonic forms of what may be termed state power. That ancient cultures are often perceived as, well, ancient, medieval Europe, where “it was virtually impossible not to believe in God,” is perhaps the most vivid illustration of the close entanglement of religion and politics in the pre-modern world. Religion was embedded in the political and social fabric of the community and was integral to, and inseparable from, everything else. The prevalence of theological politics in medieval Europe was reflected in virtually all aspects of life of the time, from economics and jurisprudence to architecture, culture, and the arts. The spread of monasticism in the early Middle Ages, the rise of Byzantium (Eastern Roman Empire) in the sixth to eighth centuries, the crusades of the eleventh to the thirteenth centuries, and the themes of Raphael's, Botticelli's, and Michelangelo's paintings during the High Renaissance of the early sixteenth century are popular illustrations of the centrality of religion and its governing institutions in premodern Europe's political and public life. Occasional attempts to establish pure theocracies took place in various parts of Europe. Two
examples are the Savonarola reign in Florence (1494–1498), and the Anabaptist Kingdom of Münster (1534–1535).

The sixteenth century also brought to the fore the doctrine of royal absolutism, the “divine right of kings,” according to which a monarch was the ultimate authority in both political and spiritual matters and was subject to no earthly authority but derived his right to rule directly from the will of God. The king was thus not perceived as subject to the will of his people, the aristocracy, or any other estate of the realm, including the church. This doctrine implied that any attempt to depose the king or to restrict his powers ran contrary to the will of God and could constitute treason. The doctrine reached its zenith in the seventeenth century during the reign of King James I in England and King Louis XIV of France. Meanwhile, religion wars in late medieval Europe, most notably the French Wars of Religion in the second half of the sixteenth century (ending with the Edict of Nantes, 1592) over claims for accommodation and access to wealth and power between Catholics and Huguenots, are said to have cost the lives of hundreds of thousands of people, perhaps as many as two million.

The idea of closely tied but parallel political and religious leadership existed in several early civilizations as well. In most ancient cultures in the Near and Middle East, for example, Egypt, Canaan, and Mesopotamia, the predominant religious model was polytheism, which centered on the cult of regional patron deities. By contrast, the ancient Israelite kings, for example, were not deified and seldom assumed any priestly functions. There are close ties but also a clear distinction between the Israelite kings as state rulers and the pastors (cohanim) and prophets (nevi'im) as religious authorities. Philosopher judges (shoftim) turned political leaders were raised up at critical moments to fight Israel’s battles and judge the people. Separation of the political and the religious also characterized the postbiblical period in ancient Israelite history (the Persian period circa 538 B.C.E. to circa 332 B.C.E., and later for the first 160 years of the Hellenistic period, circa 331 B.C.E. to circa 169 B.C.E., with the rise of the Hasmonean dynasty). Upon the return of Israelites from exile in Babylon (following the fall of Babylon and the Koresh Declaration, circa 536 B.C.E.), for example, the leadership was shared between Zerubbabel as the civic authority and Joshua as the high priest. This distinction between religious and political leadership became fuzzier later on, but was re-established after the end of the Second Temple Period in 70 C.E. Likewise, in the Jewish ke-bi-lu (community) in medieval and early modern Europe, religious shepherding and political guidance were theoretically separate but remained closely entwined. Jewish statelessness helped maintain the distinction be-

between intracommunity spiritual guidance and more earthly affairs negotiated with or dictated by the gentile authorities. Except for a few episodes of false prophecy—for example, the seventeenth-century rise and fall of Shabbetai Tzvi, who professed himself to be the long-awaited Jewish Messiah, only to convert to Islam when God refused to collaborate—separation of religious leadership and political leadership has long characterized the Jewish tradition.4

The premodern Islamic world had its own experiments with relations of state and religion. The Constitution of Medina—commonly considered to have established the first Islamic state—was drafted by the Prophet Muhammad circa 622 C.E. It formed an alliance among several local tribes (pagan at the time) and Muslim emigrants from Mecca. The community defined in the Constitution of Medina—the ummah (nation)—had a distinctly religious outlook. It sought to replace tribal identities as the main binding tie among people with a new-created nation where faith served as the foundational binding concept. At the same time, the Constitution of Medina, while certainly not envisioning any distinction between the religious and the political or featuring any remote resemblance to modern constitutions, did address earthly issues such as taxation and day-to-day governance. It specified the rights and duties of citizens, as well as the relationship between Muslim and non-Muslim communities, most notably Jews. Importantly, it also distinguished between the polity’s wars, which were binding on non-Muslim members of the polity, and wars of the Muslims, from which non-Muslims were exempt. Still, the Constitution of Medina was an exercise in theological politics, where the distinction between divine and political authority was vague at best. Innovation, historical contingencies, and struggles within caliphate dynasties from the late 7th century to the demise of the Ottoman Empire, brought about considerable variation in the relations between theocratic and political government.

In the modern era the short-lived Law of the Tunisian State (1861–1864) is considered the first written constitution in the Muslim world.3 It combined some Islamic elements with reference to nonreligious sources of sovereignty alongside principles for fiscal and administrative organization of the state. At the other end of the continuum, the Mahdiyah (1884–1898) was a short-lived theocratic state in most of the territory of today’s Sudan. Driven by the political and military aspirations of Muhammad Ahmad, known as the “Mahdi,” the Mahdiyah was a hierarchical state, run like a military operation. It was entangled in an ongoing war with the Anglo-Egyptian army led initially by Charles “Chinoise” Gordon and after Gordon’s death in Khartoum by Lord Herbert Kitchener. In 1898 Kitchener defeated the Khalifa, the Mahdi’s successor, and reestablished British
rule over the Sudan.) The Mahdi modified Islam’s five pillars to support the dogma that loyalty to him was essential to true belief. The Mahdi also added the declaration “and Muhammad Ahmad is the Mahdi of God and the representative of His Prophet” to the recitation of the creed, the Shahada. Moreover, service in the jihad replaced the hajj (pilgrimage to Mecca) as a duty incumbent on the faithful. Zakat (almsgiving) became the tax paid to the state. The Mahdi justified these and other innovations and reforms as responses to instructions conveyed to him by God in visions. Interestingly, the tension between religion and other forces, most notably nationalism, played itself out even in this theocratic setting. Alongside strong Islamism, the Mahdiyyah has become known as the first genuine Sudanese nationalist government. The Mahdi maintained that his movement was not a religious order that could be accepted or rejected at will but a universal regime that challenged mankind to join or be destroyed.

Arguably the most noteworthy pioneering experiment with constitutionalism in the Muslim world took place in Iran in the early twentieth century. The Islamic Republic of Iran is commonly considered a fundamentalist theocracy, with governing principles and practices that bear very little resemblance to prevailing principles of Western constitutionalism. However, its system of government features many elements of modern constitutionalism. In fact, Iran has a long legacy of constitutionalism. Toward the end of the nineteenth century the established feudal-like nobility, religious authorities, and the emerging educated elites began to demand a curb on royal authority and the establishment of the rule of law. In late 1905 a mutiny erupted, led by a coalition of Tehran merchants and supported by the clergy. It ultimately forced the corrupt, extravagant, and at times dysfunctional late reign of the Qajar dynasty to agree to constitutional limits on its power. In August 1906 Mozaffareddin Shah agreed to allow the establishment of a parliament, the Majlis. In the fall of that year the first elections were held. The First Majlis was established in October 1906 and immediately declared itself a constitutional assembly. Because the shah’s political clout and influence were on the wane, a new constitution was introduced on December 31, 1906, modeled primarily on European constitutions, mainly the Belgian Constitution. The shah was from then on “under the rule of law,” and the crown became a divine gift given to the shah by the people.

The 1906 Imperial Constitution, as it has come to be known, had been in effect for over seven decades when the 1979 Islamic revolution erupted. Much of the institutional nexus it established has been a part of Iranian political life for over a century now. It stipulated that sovereignty came from the people, symbolized in the person of the monarch. It stated that an elected parliament should ensure that this power was represented through the deputies and should be implemented through the laws enacted by them. It also established a bicameral legislature and set up detailed electoral rules and procedures. Articles 1 and 2 of the supplementary fundamental laws of 1907 established Islam as the official religion of Iran and specified that all laws of the nation must be approved by a committee of Shi’a clerics. That the Pahlavi dynasty ignored this directive in the later part of the twentieth century was one of the reasons for the Islamic revolution of 1979, which, among other things, replaced the 1906 constitution with a new one.

Meanwhile, in Europe the Protestant Reformation of the sixteenth and early seventeenth centuries, with its emphasis on breaking down the invidious political structures of the Catholic Church, is often thought of as the birth point of the secular age. However, the big transformation of state-and-religion relations did not occur before the late seventeenth and early eighteenth centuries. In the late seventeenth century Spinoza and other rationalists started to raise persuasive arguments against theology-induced politics. Because of a confluence of more concrete political, economic, societal, and technological factors—all are widely documented by historians of Western civilization—republican ideas and modern nationalism started to gain momentum in Europe and among European settlers in the New World. Consequently, the unified theological-political pact of the Middle Ages began to implode. The theory of divine right was abandoned in England during the Glorious Revolution of 1688–1689, alongside the imposition of certain constitutional limitations on the monarch’s power and authority.

The eighteenth century saw the emergence of a doctrine of separation of church and state, advocated by Enlightenment thinkers as a means of confining dangerous and irrational religious passions to the private sphere. Whereas the public sphere was portrayed as the realm of reason, the private sphere began to be regarded as the realm of faith, superstition, and other such nonverifiable beliefs. In creating its characteristic division between secular public space and religious private space, European secularism sought to shuffle religious ritual and discipline into the private realm. This distinction, however reductionist and otherwise problematic, has come to be identified as the secularist state’s defining marker. With the American and French revolutions of the late eighteenth century, the form of the absolute monarchy with feudal privileges for the aristocracy and for the Catholic clergy in Europe underwent a radical change based on Enlightenment principles of secularist nationalism, citizenship, inalienable rights, and the strict separation of church and state. Throughout the twentieth
century the ideal of separation of religion and state became prevalent in what is termed the West. However, in practice, as Charles Taylor notes, secularism never completely banished religion. The religious has never been lost in Western culture, let alone in other cultures; it has only become one of many stories striving for acceptance.9

Extant Models of State and Religion Relations

A taxonomy of contemporary approaches to govern religion and state relations suggests at least nine archetypical models may be identified, ranging from atheism or strict separation to weak establishment, and from models of jurisdictional enclaves to strong establishment, or parallel governance of constitutionalism and religion. I briefly discuss each in turn.

At the antireligious end of the continuum of state-and-religion models we find the position of Communist regimes. At least at the declaratory level, such regimes hold an atheist position that associates religion in both the public and the private spheres with backwardness, colonialism, and false consciousness. The Communist-atheist vision thus advocates, at least at a principled level, a concentrated effort by the state to eliminate religion. The establishment of the People’s Republic of China in 1949, for example, was accompanied by a campaign to eradicate religion from Chinese life and culture. China’s attitude toward religion was relaxed considerably in the late 1970s with the 1978 constitution’s formal guarantee of freedom of religion. In Ethiopia the Ethiopian Orthodox Church was disestablished as the state church in 1974, and its patriarch was executed by the Marxist Derg military junta in 1979. The introduction of strict antireligious laws followed a military junta’s forcible overthrow of Emperor Haile Selassie, believed by some to be descendant of King Solomon and the queen of Sheba, who was a sacred figure for the Rastafarian movement in Jamaica and negotiated the autocracy of the Ethiopian Orthodox Church. A move in the opposite direction may be seen in the Russian state of the post-Communist era, which, unlike the days of the Soviet Union, is no longer antireligious, has become passively secularist, and even has affirmative relations with the Orthodox Church.9

With regard to the formal place of religion in the modern West, the long-standing French policy of laïcité is arguably the clearest manifestation of the desire to restrict clerical and religious influence over the state and to establish a uniform, religion-free citizenship and nationhood.10 It establishes a form of assertive, even militant secularism that goes beyond neutrality toward religion or even a declared areligiosity to advance an explicitly secular civic religion that resents manifestations of religion in all avenues of public life (but not in the relatively narrowly defined private sphere) and views secularism as a core element of the modern nation and its members’ collective identity. This form of secularism tied to the polity’s collective identity is accompanied by an explicitly assimilationist approach to citizenship and national identity. With the changing demographics of French society, a multicultural challenge to France’s secularism has emerged, but the resistance to diversity as inclusion prevails and has led, in France’s case, to blunt antireligious statements by government officials (including former President Jacques Chirac), as well as to national legislation that uncompromisingly bans the display in public schools of any “conspicuous religious symbols” (including the Islamic headscarf).11

Turkey, which I discuss in detail in Chapter 4, provides another example of such assertive, even militant, secularism. The secularization of predominantly religious Turkey, led by Mustafa Kemal Atatürk, is perhaps the best-known example of separationist reformism in the twentieth century. After the demise of the Ottoman Empire the Kemalist secular-nationalist elite rejected Islamic culture and laws in favor of secularism and modernism. Accordingly, the words “the religion of the Turkish State is Islam” were removed from the constitution in 1928. In 1937 the words “republican, popular, atheist, secular, and reformist” were inserted into the constitution to better reflect modern Turkey’s adherence to a strict separation of state and religion. Both the 1961 and the 1982 constitutions established an official state policy of laicism. This official policy has become a linchpin of modern Turkish identity but has been challenged by the moderately religious AKP-led government, as illustrated by the constitutional amendment of February 2008 that effectively lifted the ban on wearing the Islamic headscarf in the public education system. However, in June 2008 the Turkish Constitutional Court declared that amendment unconstitutional and restored the strictly secularist nature of the Turkish Constitution.

In most other countries where formal separation of church and state exists, a third, less assertive, secularism-as-neutrality mode emerged that emphasizes the state’s impartial, neutral stance toward religious creeds rather than active advancement of secularism per se. Although religion has always been a core element of American society and culture, the First Amendment to the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The Establishment Clause prohibits the state from adopting, preferring, or endorsing a religion, as well as from preferring religion over nonreligion (the nonestablishment principle); the Free Exercise Clause enjoins the state from interfering with the religious freedom of its citizens.
(the principle of freedom of religious expression). There is an inherent tension between a command not to establish religion and a command not to inhibit its practice. However, both clauses advance neutrality toward religion by preventing the government from singling out specific religious sects for special benefits or burdens unless the action is necessary to promote a compelling interest.

At the same time, comparative polls often suggest that Americans are among the most likely people in the West to refer to God, depend on divine authority for decision-making guidance, or otherwise draw on religious morality or principles in their everyday lives. "In God We Trust" is on all American currency; each Supreme Court session begins with the invocation "God save the United States and this Honorable Court"; and a copy of the Gideon Bible is in virtually every hotel room in America. Given such disharmony, to borrow Gary Jacobsohn's phrase, it is hardly surprising that over its many years of existence the U.S. Supreme Court has issued hundreds of landmark rulings on the scope and nature of each of the two clauses, as well as on their intersection with each other and with other constitutional provisions.

In several other "immigrant-society" democracies, most notably Canada and postapartheid South Africa, a fourth, softer version of the formal separation accompanied by a true commitment to multiculturalism and diversity (a mosaic or accommodationist rather than a melting pot or assimilationist approach) has emerged, whereby state and religion are separated, but the conception of citizenship is not tied to strict secularism or neutrality. The true sense of citizenship, and indeed of liberalism more generally, is perceived here as respect for the common aspects of statehood and nationality while celebrating the difference in citizens' cultural, linguistic, and religious traditions. In that regard, Section 2 of the Canadian Charter of Rights and Freedoms protects freedom of religion; Sections 16–23 of the Charter establish the constitutional status of (French/English) bilingualism in Canada; and Section 27 of the Charter complements these principles by enshrining multiculturalism and diversity as one of the linchpins of Canadian national and constitutional identity. In short, there are important variations within the dominant separationist model deployed throughout the liberal democratic world.

In other parts of the world important variations of the separationist model, and even divergence from and rejection of it, have emerged. Although the separation approach in its several versions is the one most familiar to scholars of constitutional law and politics in the United States, expanding our horizons comparatively reveals several other constitutional-institutional models for delineating the relationship between religion and state; these models are of considerable importance to an analysis of the phenomenon of constitutional theocracy.

A fifth pertinent constitutional model is the weak form of religious establishment—for example, establishment through the formal, mainly ceremonial, designation of a certain religion as the "state religion." Several European countries illustrate this model. A case in point is the designation of the Evangelical Lutheran Church as the "state church" in Norway, Denmark, Finland, and Iceland—arguably some of Europe's most liberal and progressive polities. Norway's head of state, for example, is also the leader of the church. Article 2 of the Norwegian Constitution guarantees freedom of religion but also states that Evangelical Lutheranism is the official state religion. Article 12 requires that more than half the members of the Norwegian Council of State be members of the state church. Similarly, Greece and Cyprus formally designate the Greek Orthodox Church as their state church. In England the monarch is the "supreme governor" of the Church of England and "defender of the faith." The Crown has a role in senior ecclesiastical matters, and, by the same token, the church is involved in the coronation of a new monarch, and senior bishops are represented in the House of Lords. A diluted version of this model operates in Germany, where the institutional apparatuses of the Evangelical, Catholic, and Jewish religious communities are designated as public corporations and therefore qualify for state support from the German church tax.

A sixth model, more a de facto scenario than a de jure model, involves countries where formal separation of church and state, as well as religious freedoms more generally, is constitutionally guaranteed, but where longstanding patterns of politically systemized church hegemony and religion-centric morality continue to loom large over the constitutional arena. Ireland provides a good example. Although the special status of Catholicism was removed from the Irish Constitution in 1973, Article 41 of the constitution "recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law." Until 1995 the constitution essentially banned divorce and remarriage and in effect subjected Irish Catholics to concurrent jurisdiction of the church and the state in such matters. Article 44, which continues to be in effect today, reads: "The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion." The specter of Catholic morality, despite formal separation of church and state, does not end there. The Eighth Amendment (1983)—the "Pro-Life Amendment" passed by referendum—asserts that the fetus has an explicit right to life equal to that of the pregnant
woman and that the Irish state guarantees to vindicate that right. Exceptions are made in cases where there is a threat to the life of the mother, and it may not be used to limit the right to travel to other countries to procure an abortion.  

Other predominantly Catholic countries in Europe, most notably Malta and Poland, and to a considerably lesser degree Slovakia, continue to grapple with similar tensions. Portugal (1976), Spain (1978), and Italy (1984) all adopted new constitutions or constitutional amendments that disestablished Catholicism as their state religion. In at least the former two cases the church had been historically entangled with right-wing authoritarianism—close ties that the transition to democracy sought to dismantle. As a result, Roman Catholic morality lost some (but not all) of its grip over public morality even though it continues to be prevalent in the private sphere. The gradual convergence toward judicial review, constitutional rights and liberties, gender-equality standards, and growing social acceptance of homosexuality, stacked against a history of church dominance and legalized religion-centered morality, has also characterized the constitutional jurisprudence of predominantly Catholic countries in the global South. Courts in the Philippines, Chile, and Ecuador, to pick three examples, have been quite adamant in their refusal to liberalize various aspects of women’s reproductive freedoms. In other countries—Colombia, Mexico, and Argentina, for example—constitutional courts have been notably more receptive to challenges to systemized religion-centric morality. But any way one looks at it, although religion and state are formally separated in Ireland, as well as in other countries with a similar history of church dominance, they continue to be tied together in some non-trivial ways.

A seventh constitutional response to the tension between secularism and religiosity is the selective accommodation of religion in certain areas of the law. Here the general law is secular, but a degree of jurisdictional autonomy is granted to religious communities, primarily in matters of personal status and education. Countries such as Kenya, India, and Israel grant recognized religious or customary communities the jurisdictional autonomy to pursue their own traditions in several areas of law, most notably family law. Kenya, for example, has enacted a set of statutes to recognize the diversity of personal laws pertaining to different groups of citizens. India has long been entangled in a bitter debate concerning the scope and status of Muslim and Hindu religious personal laws versus the individual rights and liberties protected by the Indian Constitution. Each recognized religious community in Israel, including the Jewish community, has autonomous religious courts that hold jurisdiction over its respective members’ marriage and divorce affairs. Religious affiliation, conversion, and the provision of religious ser-

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vices are controlled by statutory religious bodies, whose decisions must comply with general principles of administrative and constitutional law. Core features of this arrangement originated from the Ottoman millet system of semiautonomous jurisdictional enclaves of religious minorities. In other settings, they resemble elements of the colonial policy of “indirect rule.” Ethiopia, Indonesia, Lebanon, Nigeria, the Gambia, Senegal, Ghana, the Philippines, Singapore, Sri Lanka, and Tanzania all follow one form or another of that model with respect to their respective religious-minority populations.

Paradoxically, the status of religious minorities under this model may, in some instances, be better than under the no-establishment arrangement. Whereas Muslim tribunals in Israel or India, for example, are officially recognized and enjoy a certain jurisdictional autonomy, Muslim communities do not enjoy such statutory recognition and jurisdictional autonomy in, say, the United States. In practice, however, religion, ethnicity, and nationality in many of the polities that adhere to this model tend to be closely entangled. Although jurisdictional autonomy in certain areas of law is granted to minority religious groups, foundational national metanarratives, and often the law itself, reflect preferential treatment of members of the majority religious/ethnic group. The political and legal systems of Israel (with respect to Jews), Malaysia (with respect to Muslims), or Sri Lanka (with respect to Buddhists) all feature elements of such religion-based preferential treatment. And although the status of Hindu (Hinduism) in Indian culture, law, and politics is less overt or formal, it too reflects a notion of religion-based “first-class citizens.” In such settings symbiotic relations evolve whereby religion thrives in tandem with nationality. The state has an embedded interest in preserving or promoting a viable “state religion” to the extent that this religion provides meaning to the national metanarratives that constitute the nation as such.

There are other, less formal illustrations of this logic in action. In Ukraine the political affiliation and regional dominance of each of the separate branches of the Ukrainian Orthodox Church correlate neatly with the pro-Russian versus pro-Western political rift in Ukrainian society. In Serbia, another politically turbulent post-Communist country, the ties between Serbian nationalism and the Serbian Orthodox Church are so close that Serbian Orthodox churches in Kosovo have been viewed by the Serbian government as fortresses of Serbian nationality in that seceding territory. As a reaction to the 2008 Kosovo declaration of independence, the Serbian government’s minister of religion, Radomir Naumov, decided to pay the salaries of the Serbian Orthodox clergy in Kosovo to signal the strategic significance of the Serbian Orthodox Church to Serbian nationalism and sovereignty.
The close ties between church and nation in Ukraine and Serbia lead us to question the thesis that religion's vitality depends on the capacity of organized religion to serve as a critic of and counterweight to secular political authority. José Casanova, for example, credits the sustained religiosity of Catholic Poland to the church's energetic opposition to the Communist state. In contrast, he argues that because the Catholic Church in Spain collaborated and was associated with the Franco regime, its stature therefore plummeted considerably when that regime was dissolved. Granted, this thesis has some bite in places such as Egypt or Turkey, where religious parties indeed fulfill the role of an effective alternative to the statist establishment. But in other countries, and Serbia is certainly not an exception, close ties between nationalism and religious affiliation are mutually beneficial and reinforcing for both sides.

The model of religious jurisdictional enclaves may be based on substantive or subject-matter jurisdictional boundaries or on more conventional spatial/regional boundaries (e.g., federalism). Two vivid illustrations of the latter version are Nigeria and Indonesia. The Constitution of Nigeria (1999) establishes that country as a secular state with constitutionally enshrined freedom of religion. At the same time, the constitution allows subnational units to grant additional jurisdiction to their local courts. Twelve predominantly Muslim northern states have used this provision to expand the substantive jurisdictional boundaries of their Sharia's tribunals. As we will see in Chapter 4, secularist interests have employed principles of federalism and constitutional supremacy, alongside self-restraint by high religious tribunals, to mitigate the impact of Islamization in these twelve Nigerian states.

Indonesia has one of the largest Muslim populations in the world; approximately 90 percent of its roughly 250 million citizens identify as Muslims. One of the five core principles (pancasila) established by the Indonesian Constitution (1945, reaffirmed 1959) is that "the state shall be based on the belief in the one and only God." However, the constitution does not establish Islam as the sole state religion; Christianity, Buddhism, Hinduism, and, as of 1998, Confucianism also enjoy equal status as state-recognized religions. In addition, freedom of religion is guaranteed by Chapter 10 of the constitution. In 2001, following the rise of intense secessionist impulses in the state of Aceh, the historical stronghold of Islam in Southeast Asia, the federal government agreed to grant Aceh special autonomy. Federal laws 44/1999 and 18/2001 provided the legal basis for Aceh to apply certain aspects of Shari'a without contested aspects of Islamic criminal law and procedure. Federal authorities, meanwhile, have used the procedure of presidential decrees—essentially executive orders by Jakarta—to limit the codification and implementation of certain controversial aspects of Shari'a law in Aceh.

Another increasingly prevalent but seldom-discussed model is essentially a mirror image of these religious jurisdictional enclaves—what we might call secular jurisdictional enclaves. Here most of the law is religious; however, certain areas of the law, such as economic law, are "carved out" and insulated from influence by religious law. An interesting case in point is Saudi Arabia, arguably one of the countries whose legal system comes closest to being fully based on fiqh (Islamic jurisprudence). Article 1 of the Saudi Basic Law (1993) reads: "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution." Article 23 establishes the state's duty to advance Islam: "The state protects Islam; it implements its Shari'a; it orders people to do right and shun evil; it fulfills the duty regarding God's call." Shari'a law is often less than attractive for business, however, and the Saudi royal family came to the rescue. Chapter 4 of the Basic Law (titled "Economic Principles") protects private property, guarantees against confiscation of assets, and suggests that "economic and social development is to be achieved according to a just and scientific plan." Moreover, whereas Saudi courts apply Shari'a in all matters of civil, criminal, or personal status, Article 232 of a 1965 royal decree provides for the establishment of a commission for the settlement of all commercial disputes. Although judges of the ordinary courts are usually appointed by the Ministry of Justice from graduates of recognized Shari'a law colleges, members of the commission for the settlement of commercial disputes are appointed by the Ministry of Trade. In other words, Saudi Arabia has effectively exempted the entire finance, banking, and corporate capital sectors from application of Shari'a rules. A modern, business-friendly foreign-investment law was adopted in 2000, and taxes on foreign firms were drastically slashed in 2003. Foreign investors have not protested the move.

Softer examples of this model are common in the Islamic world. Article 1 of Qatar's new constitution (2003) states that "Qatar is an independent Arab state; Islam is the State's religion and the Islamic Shari'a is the main source of its legislations." But this has not proved a major obstacle to Qatar's emergence as a regional economic superpower. Although it has long been endowed with oil and natural gas resources that are among the richest worldwide, it was not until 1995, under the leadership of Emir Hamad bin Khalifa al-Thani, that Qatar began to experience a notable cultural and economic liberalization, including the endorsement of women's right to vote, a modern constitution, and the launch of Al Jazeera, a leading English and Arabic news source that operates a website and a
widely watched satellite television news channel. Qatar's new investment law (Law No. 13, 2000) creates a business-friendly investing environment. It is little wonder that, according to recent statistics by the International Monetary Fund, Qatar is the country with the highest per capita gross domestic product (GDP) worldwide, alongside Luxembourg. It has also become an emerging hot spot for international events, including the Doha Development Round of trade negotiations of the World Trade Organization, the 2006 Asian Games, the 2010 Athletics World Indoor Championship, and a failed but competitive bid to host the 2016 Summer Olympic Games.

Similarly, Islam has been the state religion in the Maldives since the twelfth century. Section 2 of the most recent constitution (2008) reads: "The Maldives is a sovereign, independent, democratic Republic based on the principles of Islam." Section 10 reads: "The religion of the State of the Maldives is Islam. Islam shall be the basis of all the laws of the Maldives. No law contrary to any tenet of Islam shall be enacted in the Maldives." Adherence to Islam is required for citizenship; as Section 9 of the 2008 constitution states, "A non-Muslim may not become a citizen of the Maldives." Furthermore, there is no secular legal system; rather, the local version of Shari’a law, as it is interpreted by state authorities and the Majlis, is the law of the land. But the Maldives continues to boast some of the world’s finest hotels, catering to jet-set tourists attracted to the country’s world-class coral reefs. Over half a million tourists visit the country every year. A special presidential decree exempts the thriving tourist industry, which accounts for over 20 percent of the country’s GDP, from several non-tourist-friendly religious imperatives. Therefore, although most of Malé’s (the Maldives’ capital city) hotels are alcohol free, drinking is common in luxurious beach resorts (although most still prohibit the sale of alcohol to Maldivian nationals). And while in Malé locals are bathing fully clothed, the swimsuits in most beach resorts leave little to one’s imagination.

Another example of the model of secular jurisdictional enclaves—a close relative of constitutional theocracy—is provided by the legal system of the Comoros, which rests on two tenets: Islamic law and an inherited Napoleonic French legal code. Islam has increasingly dominated the political sphere, and the May 2006 elections were won by Ahmed Abdallah Mohamed Sambi, a Sunni Muslim cleric nicknamed the "Ayatollah" for his time spent studying Islam in Iran. The Constitutional Court, the ultimate arbiter of constitutional questions, consists of seven judges who are all well versed in both the French civil law tradition and the Shafi’i school. But the French civil code prevails in most areas of commercial life. In fact, the Comoros is a signatory to the Treaty on the Harmonization of Business Law in Africa, which binds signatories to apply a civil code frame-

work in areas of business law. Furthermore, Article 3 of the constitution provides that international treaties take precedence over local island law.

The jurisdictional-enclaves model is not limited to economic law. In several countries it has been extended, to a varying degree, to other important aspects of the law such as civil procedure, labor law, laws regulating the legal profession itself, and to a lesser extent the contested domain of family and personal-status law. Once officially taken out of the exclusive purview of sacred law, the jurisdictional authority of ordinary courts (whose decisions are subject to scrutiny by the constitutional courts) is expanded to adjudicate these areas of the law at the expense of religious tribunals.

Finally, an increasingly common approach to governing relations of religion and state is a mixed system of religious law and general legal principles. Like a few exemplars of the jurisdictional-enclaves model, several manifestations of this model of religion and state relations come close, perhaps even the closest, to the ideal type of constitutional theocracy. It is well known that Afghanistan has long been torn between conflicting values of tradition and modernism. From 1994 to 2001 the country was ruled by the radical Islamist Taliban, but the U.S.-led military campaign removed the Taliban from power and installed a more moderate regime representing an array of groups hitherto in opposition: moderate religious leaders and the country’s elites and intellectuals in exile. The new Constitution of Afghanistan came into effect in January 2004. It states that Afghanistan is an Islamic republic (Article 1); that the “sacred religion of Islam is the religion of the Islamic Republic of Afghanistan” (Article 2); and that “[n]o law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan” (Article 3). Courts are allowed to use Hanafi jurisprudence in situations of constitutional lacunae (Article 130). At the same time, the constitution also enshrines the right to private property (Article 40) and resurrects a woman’s right to vote, as well as to run for and serve in office (Article 22). The 2004 constitution also establishes a Supreme Court (Sera Mahkama) composed of nine judges appointed by the president for a term of ten years (Articles 116–117). All members of the court “[s]hall have higher education in legal studies or Islamic jurisprudence” (Article 118).

The newly adopted Iraqi Constitution of 2005 offers another variant of this amalgam. Article 2.1 states that “Islam is the official religion of the state and a basic source of legislation.” No law can be passed that contradicts settled Islamic (legal) rules. At the same time, Article 2.1(b) states that “[n]o law can be passed that contradicts the principles of democracy,” and Article 5 declares: “The law is sovereign and the people are the sources of power and its legitimacy.” The Federal Supreme Court, states Article 92,
"shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives." Influenced by the circumstances of its adoption, the Iraqi Constitution also emulates Western constitutional catalogues of rights by protecting a host of rights and liberties, such as religious freedoms (Articles 2, 3, 4, and 42); formal equality, including antidiscrimination on the basis of religion (Articles 14 and 16); privacy (Article 17); and personal freedom and dignity (Article 37). More important still is that the constitution incorporates into Iraqi law (via Article 44) provisions of international human rights treaties to which Iraq is a signatory, so long as they do not conflict with other elements of the constitution. The commitment to rights and liberties is also affirmed by a declarative umbrella section (Article 2.1(c)), which reads: "No law can be passed that contradicts the rights and basic freedoms outlined in this constitution." To pass comprehensive constitutional scrutiny, then, a law has to conform to the common tenets of Islam, democracy, individual rights and liberties, and international human rights—a difficult task, to put it mildly, even for distinctly more stable policies.

Or consider the Yemenite amalgam of constitutionalism and religiosity. Article 2 of the Constitution of Yemen (adopted in 1994) declares that Islam is the religion of the state. Article 3 provides that Shari'a is the source of all legislation. Non-Muslims are forbidden to run for or hold elected office. The same constitution calls for an independent judiciary and establishes a separate commercial court system and a Supreme Court, where a combination of Shari'a interpretations and principles of modern constitutional law is applied. Unique constitutional amalgamations of religious and modern principles emerge, such as Article 31 of the constitution, which states, "Women are the sisters of men. They have rights and duties, which are guaranteed and assigned by Shari'a and stipulated by law," and Article 46, according to which "Criminal liability is personal. No crime or punishment shall be undertaken without a proviso in the Shari'a or the law."

The preamble of the 1979 Constitution of the Islamic Republic of Iran enshrines Shari'a as the supreme law—superior even to the constitution itself. Articles 2 and 3 declare that authority for sovereignty and legislation has a divine provenance (from Shari'a) and that the leadership of the clergy is a principle of faith. According to Article 6, the administration of the state is to be conducted by the wider population: the general public participates in the election of the president, the Majlis representatives (members of parliament), and municipality councils. Article 8 further entrenches principles of popular participation in deciding political, economic, and social issues. Most notably, Iran has seen the emergence of the Guardian Council, a de facto constitutional court armed with mandatory constitutional preview powers and composed of six mullahs appointed by velayat faqih (the supreme leader) and six jurists proposed by the head of the judicial system of Iran and voted on by the Majlis. The supreme leader has the power to dismiss the religious members of the Guardian Council, but not its jurist members (Article 91). Featuring a combination of religious supremacy, pragmatist institutional innovations (e.g., Ayatollah Khomeini's 1989 introduction of the Regime's Discernment Expediency Council [Majma-e-Tashkhis Maslahat Nezam] to serve as the final arbiter between the generally more progressive Consultative Assembly and the distinctly more conservative Guardian Council), and carried-over legacies of the 1906 Imperial Constitution, primarily with respect to the popular source of sovereignty, an elected parliament, and some separation-of-powers principles, Iran's constitutional order is a living exemplar of a strong form of constitutional theocracy.

Despite fundamental differences, a pattern of controlled religious establishment through constitutionalism has taken place in many other predominantly Islamic polities over the last forty years. Three prime examples, despite considerable dissimilarities among them, are Sudan, Pakistan, and Egypt, all of which underwent the constitutionalization of Shari'a during that era. Sudan has a long history of ambivalence with respect to law and religion. Unlike the conventional image of the country, at least one-fifth of Sudan's population is non-Muslim, subscribing to either Christianity or traditional animist religions. Its legal system is an amalgam of British colonial heritage and legal influence, the socialist state-building years led by President Gaafar an-Nimeiri, and Islamic law introduced by Nimeiri in the early 1980s and further expanded by Omar al-Bashir's authoritarian leadership (1989–present). Although Nimeiri was the only Arab leader who maintained close relations with Anwar el-Sadat after the Camp David Accords and attended Sadat's funeral, in 1981, pressured by his Islamic opponents and still president of Sudan, he began a dramatic shift toward Islamist political governance. He allied himself with the Muslim Brotherhood and in 1983 imposed Shari'a law throughout the country, thereby alienating the non-Muslim (predominantly Christian or animist) south. In violation of the Addis Ababa Agreement he dissolved the southern Sudanese government, thereby prompting a renewal of the civil war. Many aspects of Sudan's less-than-dazzling image are no doubt accurate, but even in this bleak corner of the world of new constitutionalism some interesting constitutional provisions exist. Article 1 of the 1998 constitution, for example, states: "The State of Sudan is a country of racial
and cultural harmony and religious tolerance. Islam is the religion of the majority of the population and Christianity and traditional religions have a large following.” Article 2 states: “Sudan is a Federal Republic governed at its highest level of authority in accordance with a federal system of government based on the Constitution and at the local level it is governed by local councils acting in accordance with the law.” The 1998 constitution also includes an extensive bill of rights (Articles 21-29) with guarantees that, at least on paper, meet the criteria of any modern constitutional state. At the same time, Article 7 states that “[d]efense of the motherland is an honor and Jihad is a duty”; Article 35 holds that it is the duty of every Sudanese citizen “to defend the country and respond to the Jihad call and national service.”

Two distinctly softer, albeit equally fascinating, exemplars of the drift toward constitutional theocracy are Pakistan and Egypt. Pakistan has a long-standing tradition of constitutionalism and a British-influenced tradition of legal education and practice. It has been one of the West’s closest allies in the fight against radical Islamism in the Middle East and central Asia. Pakistan is also a military superpower and one of the few members of the world’s nuclear club. At the same time, Islam has been a major political force in Pakistan at least since the early 1970s, and many would say since the country gained its independence in 1947. The province of Baluchistan has become one of the main frontiers of the “war on terror.” Pakistan’s North-West Frontier Province (including the Swat valley region) has been governed by the religious-fundamentalist Muttahida Majlis-e-Amal party since 2003. These conflicting trends reflect a complex, if not completely blurred, collective identity, torn between modernity and tradition, universalism and religiosity, that has been rapidly translated at both the institutional and jurisprudential levels of Pakistan’s constitutional landscape.

In 1973 Pakistani legislators departed from the country’s rich British common-law tradition by enabling the Pakistani judiciary to use Islam as an authoritative source in constitutional interpretation. From 1978 to 1980 President Zia-ul-Haq established a system of Shari’i-based high courts at the provincial level, as well as the Shari’at Appellate Bench at the Supreme Court; each of these would be responsible for ensuring the appropriate implementation of Shari’a law. In 1985 President Zia went on to introduce a set of amendments to the constitution that effectively stipulated that “[a]ll existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur’an and Sunna, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.” In theory, this means that legislation must be in full compliance with principles of Shari’i. How the Supreme Court of Pakistan has skillfully managed to contain the jurisdictional expansion of Shari’a courts and avoid elevating Islamization into a fundamental norm of the entire Pakistani constitutional order through the development of the “harmonization doctrine” is a fascinating story that I tell in some detail in Chapter 4.

Egypt presents a further telling example of the softer approach, having established a system of judicial review in 1979. The criminal penal code is largely nonreligious, as are numerous economic, property, and investment rules. In 1971 President Sadat passed a new constitution that, on the one hand, preserved Egypt’s socialist legacy and, on the other, stated that Shari’a was a primary source of legislation in Egypt. In 1980 Article 2 of the Egyptian Constitution was amended to establish principles of Islamic jurisprudence (Shari’a) as the (not a) primary source of legislation in Egypt. It now reads: “Islam is the religion of the State, Arabic is its official language, and the principles of Islamic Shari’a are the principal source of legislation.” Alongside this amendment, Islamism in Egypt has enjoyed an astounding growth in popularity over the last three decades. Under the guidance of the Muslim Brotherhood, Egyptian Islamism has consistently opposed the modernist-nationalist agenda advocated by the government, the historically powerful National Democratic Party, the pro-statist military, and, above all, Egypt’s moderate, economically well-off elites. Of course, with this expansion the familiar challenges of constitutional theocracy emerged. For nearly thirty years now the Egyptian political and constitutional order and, consequently, Egypt’s courts have been grappling with the contested status and role of Shari’a as a potentially determinative source of authority in an otherwise strong state with a historically powerful executive branch.

In sum, there is much more diversity in the religion-and-state universe than often meets the popular Western eye. The dichotomous view of separation in the West versus entanglement of religion and state elsewhere is rather unrefined. A taxonomy of contemporary approaches to governing relations of religion and state suggests, as discussed above, several archetypal models: (1) atheism and proactive elimination of religion; (2) an assertive form of secularism or separationist reformism, often established as a modernist reaction to backwardness and religious dominance; (3) separation as state neutrality toward religion, often accompanied by an assimilationist approach to religious or cultural difference; (4) separation with a de facto accommodationist approach to diversity and religious difference; (5) formal separation with de facto preeminence of a given religion and its moral preaching; (6) a weak form of religious establishment, where there is a formal, mainly ceremonial designation of a certain religion as the
"state religion" but few or no implications in public life; (7) selective accommodation of religion in certain areas of the law, often with "religious jurisdictional enclaves" in matters of personal status; (8) the model of secular jurisdictional enclaves, where most of the law is religious, but certain areas of the law, such as economic law, are carved out and insulated from influence by religious law; and finally, (9) mixed system of religious law and general legal principles, where the entire legal and constitutional system is based on a dual commitment to religious fundamentals and constitutional principles, or a bipolar system of constitutional and sacred texts and authority. The last two models of relations of religion and state come the closest to the ideal type of constitutional theocracy. However, various degrees of reaction to, accommodation of, deference to, and control over religion are evident in virtually all these models. In fact, there are very few, if any, constitutional orders in today's world, their various outlooks notwithstanding, that are completely separable from religion, conceived as either a friend, a foe, or a bit of both.

The Theocratic Challenge to Conventional Constitutional Theory

The apparently oxymoronic nature of a constitution that features significant theocratic substance does not necessarily mean that such a form of constitutionalism is partial, incomplete, or illegitimate. (A few friends pointed to other compound creations, such as "vegetarian meatballs," "nuit blanche," or Altmeuland—German for "old new land," the title of Theodor Herzl's utopian novel—to support this point). To begin with, an array of possible interpretations and schools of thought, from the strictest to the most liberal, exists within virtually all major religious traditions. While certain ultraconservative interpretations of religious precepts defy universal values such as tolerance or equality, liberal interpretations of the same precepts suggest that some Venn-diagram-like common ground between religion and democracy or liberalism may be found.21 As scholars of Islamic jurisprudence have noted, some interpretations of Islam are certainly not conducive to principles of modern constitutionalism, while others are consistent with these principles and perhaps even positively support them.22 Reform Judaism, to cite another example, is notably easier than Orthodox (let alone Haredi or ultra-Orthodox) Judaism to reconcile with modern ideals of gender equality or freedom of thought. Some might even contest the very idea of a religious state as deriving from genuine reading of pertinent religious teachings.21

Like most other constitutional orders, theocratic constitutionalism includes reference to high morality and limits the sorts of policy choices the government can make. As Andrew March lucidly explains, the Islamic conception of religious morality is that "a political order is legitimate to the extent that it approximates an ideal legal order as expressed in the idea of Shari'a, just as for a political liberal a political order is legitimate to the extent it approximates the terms of social cooperation as would be endorsed by parties contracting in ideal circumstances."24 Thus state, law, and religious morality are inseparable; a religion-less political order that seeks to replace divine guidance and God's injunctions with man-made rule of law is viewed by classical Islam as illegitimate and unacceptable.25 Where the substantive ideational core of a theocratic political order may be nonliberal, this in itself does not make a constitutional order based on it flawed, just nonliberal. Other core aspects of constitutionalism, aspirational and practical, may very well be adhered to by constitutional theocracy. Granted much depends on our understanding of constitutionalism as a hardware-like concept that may accommodate and reflect various contents as opposed to a software-like understanding of it as a bundle of substantive aspirational commitments. Either way, constitutional theocracy is not an illegitimate order. As discussed above, virtually all constitutional theocracies adhere to many software-like (let alone hardware-like) aspects of constitutionalism.

What is more, although constitutional theocracy may be deemed organically incoherent or committed to different sets of values, this in itself is certainly not an unheard-of scenario in the world of modern constitutionalism. Most constitutions, liberal, theocratic, or otherwise, include provisions and statements that may be interpreted as standing at odds with other provisions in the same constitution. One of my favorite examples of this is the Canadian Charter of Rights and Freedoms—arguably one of the most frequently cited constitutional bills of rights currently in existence—which protects formal equality in Section 15(1) and substantive equality and affirmative action in Section 15(2). The same document also commits to bilingualism (English and French) and at the same time to multiculturalism. It also begins with this preamble: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law." Thus an apparently incoherent mix of constitutional sources and provisions is not something over which constitutional theocracy has exclusive monopoly.

It is true that like any other intolerant perception of the good, a constitutional theocracy is not a natural companion of liberalism or liberal constitutionalism. But it is not inherently at odds with a plain and simple definition of
constitutional democracy. The demos in most constitutional theocracies has some nontrivial say in the choice of government (e.g., by periodic elections), which is not the case in a pure theocracy. Even in countries where the democratic process fails to meet Western standards, popular legitimacy is not something constitutional theocratic regimes take lightly. The powers of the government are constrained by a constitution in which certain basic rules, norms, rights, entitlements, and limitations are granted entrenched status and are therefore not easily amenable to change. True, constitutional theocracy is incompatible with a radical notion of democracy that sees any limitation on the demos’s will—for example, through constitutionally entrenched rules or sources of authority other than the people themselves—as violating the ultimate essence of democracy. By that standard, however, no constitutional democracy is indeed purely democratic.

More subtle is the tension between a constitutional theocracy and the view of constitutional protection of certain civil liberties as an integral element of democratic (not merely liberal) constitutionalism. To begin with, most liberal constitutions limit the scope and application of the rights they protect to full members of the polity. Not everyone in such polities enjoys the right to have rights. Whereas some provisions apply to “everyone” or “every individual,” others apply selectively to citizens and to a variable degree to permanent lawful aliens, but not to other classes of people. Prevalent birthright citizenship principles, such as jus soli or jus sanguinis, have long been applied in most liberal democracies, thereby excluding millions of people from initial access to the collective good.

The existence of de facto two-tier conceptions of citizenship that differentiate between full members and “second-class” citizens is certainly not a practice foreign to the history and, in some cases, the present-day policies of certain Western societies. Black Americans and German-born Turks, not to mention “nonwhite” South Africans, are obvious examples of such historically disenfranchised groups. The exclusion or limitation of certain rights in some theocratic constitutions is therefore not a unique practice, unheard of in other, supposedly liberal settings.

But perhaps more significantly, the obvious tension between theocracy and religious pluralism or religious neutrality (e.g., free expression and disestablishment of religion) is not the same as religion-based differential access to core political rights and access to public goods. This problem is illuminated vividly when a polity uses religious ascriptions to establish an “ethnocracy” (or its more mellow version, “ethnic democracy”) where the entire political system and the hegemonic religious or ethnic group’s foundational national metanarratives are developed and organized so as to benefit members of that group to the detriment of others, and where few or no members of minority ethnic groups are granted proportional access to wealth, power, and opportunities.

Malaysia, for example, defines itself as an Islamic state despite the fact that over one-third of its population consists of members of other denominations and ethnic origins, mainly Chinese and Indian. Ethnic Malays are Muslim and are granted constitutionally entrenched preferential treatment over members of other ethnic groups. Muslims (and non-Muslims who marry a Muslim) are obliged to follow the decisions of Syariah (Behasa Melayu or Malay for “Shari’a”) courts in matters concerning their religion, most notably marriage, inheritance, apostasy, child custody, and conversion. Israel, likewise, defines itself as a Jewish and democratic state. Its citizenship and immigration policy gives preferential treatment to Jews. Its anthem features explicitly Jewish or Zionist themes, despite the fact that approximately 20 percent of its citizenry consists of non-Jews. So while neither Malaysia nor Israel is a pure constitutional theocracy, the formal constitutional status of a foundational ethno-religious criterion that determines which members of the polity enjoy privileged access to desired public goods illustrates the tension between religion-based ascriptive traits and fundamental democratic governing principles of participation and representation.

More complex still are the challenges that theocracy poses to less idealist notions of constitutionalism. Arguably one of the most admirable functionalist or result-oriented perspectives on constitutions sees them as establishing an institutional framework for democratic deliberation and, by extension, as an effective mechanism for nation building. Unlike Bruce Ackerman’s idealist notion of constitution making that is shaped by and reflects the authentic “we the people” will, a pragmatic vision of constitution making sees it as constituting the demos and providing a framework for its establishment and evolution. It is little wonder that this latter view of constitutionalism has been popular among advocates of a European Union (EU) constitution. Unlike social contract, Rawlsian, or even public choice theories of constitutionalism, an instrumentalist, problem-solving view of constitutionalism has emerged, one which advocates a negotiated, voluntarily accepted or externally imposed constitutional pact as a means for resolving existential tensions in multiethnic settings. A voluminous body of literature on constitutional design and engineering in its more practical guise has evolved. Its canonical tenor suggests that when constitutionalization is seen as a pragmatic, second-order measure—as opposed to instances of constitutionalization involving a more principled, first-order, ideational outlook—it may help institutionalize attempts to mitigate tensions in ethnically divided polities through the adoption of federalism, secured representation, and other trust-building and power-
sharing mechanisms. The literature on constitutional design of this kind, often referred to as "consociationalism," emphasizes the significance of joint-governance institutions, mutual veto points, power-sharing mechanisms, and the like. In its more strategic, "integrationist" guise this brand of scholarship advocates the adoption of institutions that would make the political process more attractive to recalcitrant stakeholders, encourage moderation, and defuse the causes of strife by providing incentives to vote across group lines. Surprisingly, however, although there are many examples of discussions of the mitigating potential of constitutional power-sharing mechanisms to ease rifts along national, ethnic, or linguistic lines, scholars of comparative constitutional design have given little attention to the increasing divisions along secular/religious lines per se (i.e., not in association with ethnic divisions). From an analytical standpoint, the secular/religious divide differs in at least four respects from these more obvious and more commonly addressed markers of identity.

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

Second, the territorial boundaries of the secular/religious divide are often blurred. Although residents of certain regions within a given country may be more prone to hold theocratic views than residents of other regions, this divide is not neatly demarcated along territorial lines, as is often the case with ethnic or linguistic boundaries. Proponents of theocratic governance may reside in rural towns or in blue-collar neighborhoods on the outskirts of large urban centers, but they may also reside within a few bus stops from bastions of modernism such as art galleries, universities, posh hotels, shopping malls, and government buildings. Thus the secular/religious divide manifests itself in a wide range of situations in everyday life, from the sidewalk to the market and from schools to workplaces. This

is in stark contrast to, say, Sri Lanka, where the vast majority of Tamils live in one region of the island; or, better yet, Cyprus, where the territorial divide between the Greeks and the Turks is clearly demarcated. Territory-based power-sharing mechanisms or any other kind of joint-governance structures that are based on the allocation of powers or goods according to region may not be an efficient means for analyzing, let alone reducing, tensions along secular/religious lines.

Third, accounts of religion and state tend to assume firm identities and fixed group affiliations, although in reality this is not always the case. To begin with, people have multiple identities beyond their faith-based affiliation. Feminist philosopher Judith Butler notes: "I identify, for example, as a Lesbian and as Jewish. But I have additional identities: I am a peculiar philosopher, a short person, and a woman who is getting old. Lesbian and Jewish clearly does not define everything that I am." More important, membership in a group is in some instances voluntary and self-professed, whereas in others it is determined by laws external to the group, and in still other cases it is imposed by intragroup practices and traditions. Religious labels such as "Jewish," "Christian," or "Muslim" do not tell us much because there are a variety of schools, from very moderate to ultraconservative, within each of these categories. At certain times one school may enjoy greater support or become more dominant than others, but as the political kaleidoscope shifts, other voices within each religious community become more prevalent, and different aspects of that religion are emphasized. Thus identity and group affiliation are not primordial. They are to a large extent politically constructed by a dynamic interplay between intragroup politics and the political context within which that group operates. And religiosity as a marker of identity may be brought to the fore or relegated to lesser status as coalitions shift, elites transform, and interests change. The Zionist movement, for example, drew on aspects of Orthodox Judaism to support its cause in the years before and after the establishment of Israel. But as Orthodox Judaism fulfilled its historic role and new challenges of membership in the global community emerged, Orthodox Judaism became more of a burden than an asset for many Israelis. This holds true in smaller-scale, nontheocratic settings as well. In their recent study of the shifting dimensions of ethnicity in the Romanian-Transylvanian city of Cluj-Napoca, Rogers Brubaker and his coauthors show how groups use ethnic or nationalist symbols to announce their presence and promote their interests. When such markers of identity exhaust their effectiveness they are gradually replaced with others.

One might add the numerous intrafaith struggles and interpretive debates that question the validity of such labels as "Jewish," "Christian," or
"Muslim" identity. At least since the immediately pre-Jesus Judea and the days of King Herod the Great, when the Hellenic world faded away and the Roman Empire emerged, intrareligion splits and intense rivalry, theological, political, economic, and otherwise, have come to dominate much of the history of religion. The split between the Western and Eastern churches in the eleventh century, the emergence of the Anglican Church, and the Reformation and the Counter-Reformation are only a few obvious examples. Today the Christian world is divided into several established churches and dozens of smaller sects, some distinctly more conservative than others. Even within established churches—the current rift within the Anglican Church is only one illustration—internal interpretive and political divides are fierce and plentiful.

The Jewish world of the Second Temple was divided into Sadducees, Pharisees, and Essenes (I explore the theological and political differences among these sects in Chapter 6). Today Orthodox Judaism remains hegemonic (although not unchallenged) in Israel, whereas Reform and Conservative branches of Judaism are distinctly more popular in the Diaspora. The Muslim world is divided into two major branches—Sunni and Shi’a—but also draws on several traditional interpretive schools within Islamic law and features a wide variety of sects and subdivisions, from radical Wahhabism to spiritual Sufism. In fact, even relatively stable labels describing modernist communities of faith—"constitutionalists," for example—are increasingly contested ones; the age-old debate between "textual" and "living" interpretive schools or the current deliberation in the United States concerning the constitutional legitimacy of reference to foreign jurisprudence are two immediate examples. Therefore, group identities not only are dynamic and fluid but also are contested from within, because intragroup struggles may emerge over who should speak for the group and on what basis. These problems, one would expect, intensify with formal state recognition of some or all aspects of religion, as intragroup contestation emerges over who officially serves as the community’s voice, who represents its “authentic” precepts and traditions, or who “owns” the community’s constitutive metanarratives.

Fourth, as I have already argued, the assumption that whole peoples share unified interests is, at best, highly questionable. The spread of religious fundamentalism in the developing world is sometimes wrongfully depicted as a phenomenon that is near monolithic, all-encompassing, or free of fierce internal opposition. More religiosity in the public sphere or in the political domain serves the interests of some at the expense of others. It poses a clear and present danger to the cultural propensities, worldviews, and policy preferences of many, ranging from most of the urban intelligentsia and the majority of the managerial classes to the strong statist bureaucracy and powerful industries and economic stakeholders. The secular-religious divide and the struggle over the nation’s aspirational commitments more generally are not free of large-scale distributive-justice aspects and material interests because, more often than not, support for religious parties emanates from occupiers of the polity’s periphery, real or imagined. Furthermore, principles of theocratic governance often stem from alternative sources of authority and legitimacy that constitutionalism may regard as exogenous and even threatening to overarching state authority. Moreover, the holistic nature of theocratic governance is not prima facie conducive to constitutional compromise, power-sharing pacts, separation of powers, checks and balances, relative judicial independence, and other essentials of modern constitutionalism. These conflicting pressures and interests have led to intense constitutional maneuvering in predominantly religious polities. I explore the religion-taming nature of this maneuvering in the following chapters.

Conclusion

This chapter points to five main lessons. First, approximately half of the world’s population, perhaps more, now lives in polities where religion not only has remained public but also has been playing a key role in political and constitutional life. Of these, approximately a billion people live in polities, national or subnational, that feature key elements of what I have termed constitutional theocracy.

Second, despite the general agreement that the world has witnessed a convergence on principles of constitutional supremacy and international human rights alongside increasing popular support for principles of theocratic governance, we still know precious little about constitutional law and practices in countries that are facing the dilemma of constitutional theocracy. As I hope to show in the following chapters, any attempt to explore the scope and nature of constitutional democracy in the early twenty-first century must include serious contemplation of the scope and nature of a different and increasingly common model—constitutional theocracy. The theocratic challenge has become a significant factor in world politics, as well as constitutional law. It stretches well beyond current media hot spots like Iran, Iraq, and Afghanistan, and any attempt to examine the complexities of constitution drafting in postconflict settings without paying close attention to the ever more relevant divide between the secular and universal and the religious and particularist is bound to come up short.
Third, constitutional theocracy shakes up the traditional affinity between liberalism, democracy, and constitutionalism. It questions canonical literature that considers constitutionalism an effective means for mitigating tensions in multiethnic or multilingual states and does not adequately address the theocratic challenge. That literature rests on five main presumptions: territorial concentration and demarcation; social and demographic cohesiveness among members of a given group; fixed identities; unified interests, worldviews, and policy preferences among group members; and an underlying vision of constitutionalism as a viable forum of compromise. Although these assumptions may provide a plausible set of working hypotheses with respect to dividing factors such as nationality, ethnicity, or language, they are less relevant in capturing the realities of the secular/religious divide. Of particular significance here are the apparently inherent tensions between principles of modern constitutionalism and the rule of law, on the one hand, and fundamentals of theocratic governance, on the other.

Fourth, although there were several notable premodern and early modern exercises in separating the theological from the political, the major transformation in the relationship between these two realms did not occur until the late eighteenth century, and in many settings much later. What is striking, however, is that unlike the conventional linear, “developmental,” or “evolutionist” story, at least half of the world’s population now lives in polities that, despite having been through a secularization process for decades, have recently undergone a postsecularist or an antisecularist transformation, with the inevitable cultural, political, and legal clashes this trend brings to the fore. As we have seen, there are several prototypical models for managing religion and state affairs, ranging from strict separation to weak establishment and from models of jurisdictional enclaves to parallel governance.

Obviously, there is considerable variance within, let alone among, these prototypical or ideal models; each comes in different shapes, forms, and sizes, with local nuances and idiosyncrasies abounding. This variance is often rooted in distinctive political legacies, differences in constitutional structures and aspirations, and dissimilarities in historical inheritances and formative experiences, as well as nontrivial differences in value systems and foundational national metanarratives. These differences often feed and shape the specific ways in which the tension between religion and constitutional governance manifests itself. Gary Jacobsohn explains, for example, how different national constitutional understandings of religious freedom are consequences of constitutional efforts to disestablish a previously established religion (India), maintain an established religion (Israel), or prevent any religion from becoming established (United States).