

## Religion and New Constitutions: Recent Trends of Harmony and Divergence

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### I. INTRODUCTION

One of the most remarkable global political trends of the past century is the spread of constitutionalism.<sup>1</sup> With few exceptions, every country in the world has its fundamental premise and structure encapsulated in a written document purporting to guarantee the legitimacy of its rulers to its people and its sovereignty to other international actors. The thirst for constitution-making unites the East and West, the First and the Third Worlds, the former colonizers and the formerly colonized. Any governmental entity interested in drafting a new constitution faces no shortage of examples to draw upon.

A potentially vexing and contentious issue for the drafters of new constitutions is the role of religion.<sup>2</sup> More specifically, to what degree, if any, should the new constitution reflect and incorporate the religious beliefs of a majority of the population? Should a foundational document in a country with a clear majority faith but an element of religious diversity, however small, appeal as broadly as possible or primarily to its core constituency? The traditional answer provided in liberal constitutionalism is that of official governmental neutrality toward religion alongside special protection for the exercise of religion by private individuals and their faith groups.<sup>3</sup> This approach is incarnated in constitutional texts by a variety of provisions, with guarantees of non-establishment of religion, free exercise of religion, and equal protection of religion serving as popular choices.<sup>4</sup>

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1. Davis S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163, 1167 (2011) (“[I]t has become nearly universal practice for countries to adopt formal written constitutions.”). “Constitutionalism is the idea . . . that the government can and should be legally limited in its powers, and its authority or legitimacy depends on its observing these limitations.” *Constitutionalism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sep. 11, 2012), <http://plato.stanford.edu/entries/constitutionalism> (on file with the *McGeorge Law Review*).

2. See, e.g., Benjamin Berger, *Understanding Law and Religion as Culture: Making Room for Meaning in the Public Sphere*, 15 CONST. F. 15, 16 (2006) (“Law has struggled mightily, but it has never been able to resolve its tensions with religion. . . . [L]aw and religion have been locked in a durable tension.”).

3. See, e.g., Stephen Macedo, *Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism*, 26 POL. THEORY 56, 57 (1998) (“So a vital task of constitutional law is to strike reasonable balances between private freedom and public power: to draw lines demarcating the proper spheres of conscience and religious association, on the one side, and political authority, on the other.”).

4. See Michael Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 311–14 (1986) (discussing, in the context of the United States Constitution, the convergence of non-establishment, free exercise, and equality principles). The popularity of these choices will be discussed in Section III *infra*.

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In the context of religion, however, the traditional approach of liberal constitutionalism arguably faces a rival trend in what Larry Catá Backer calls “theocratic constitutionalism.”<sup>5</sup> Backer writes:

[A] number of groups have accepted the legitimacy of transnational constitutionalism as a disciplining force but have rejected the notion that such restraints can be the product of a secular global consensus. Among the most potent of these groups have been religious transnational constitutionalists who have argued that one or another of the current crop of universalist religions ought to serve as the foundation of normative disciplining of constitution making.<sup>6</sup>

Theocratic constitutionalism may be reflected in constitution-making through the inclusion of provisions that explicitly align the nation-state with a particular faith, that offer legal or financial benefits to one or a small number of favored faiths, that adopt religious law as binding for certain types of disputes, or that provide roles for religious leaders in governance.<sup>7</sup> Despite recent scholarly attention given to the constitutions of Iraq and Afghanistan,<sup>8</sup> the influence of theocratic constitutionalism is not a phenomenon solely tied to predominantly Muslim countries: other faiths are reflected as well, such as the influence of Buddhism in the constitution of Bhutan and Christianity in the preamble to the constitution of the Cayman Islands.<sup>9</sup> The degree to which various countries incorporate religious elements into constitutions can vary dramatically, from non-binding ceremonial references in preambular recitations at one extreme to the

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5. Larry Catá Backer, *Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering*, 16 IND. J. OF GLOBAL LEGAL STUD. 85, 85 (2009); see also Ran Hirschl, *The Theocratic Challenge to Constitution Drafting in Post-Conflict States*, 49 WM. & MARY L. REV. 1179, 1188 (2008) (“At the uneasy intersection of two present-day trends—the tremendous increase of popular support for principles of theocratic governance and the global spread of constitutionalism—a new legal order has emerged: *constitutional theocracy*.”).

6. Backer, *supra* note 5, at 91.

7. See *id.* at 92 (“States engage with religion, as a formal matter, in different manners. Some states conflate legal and religious systems together. Some states sponsor or establish a religion. Others incorporate religious law as the law of the state. . . .”).

8. See, e.g., Haider Ala Hamoudi, *Notes in Defense of the Iraq Constitution*, 33 U. PA. J. INT’L L. 1117 (2012); Intisar A. Rabb, “*We the Jurists*”: *Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. L. 527 (2008); Ashley S. Deeks & Matthew D. Burton, *Iraq’s Constitution: A Drafting History*, 40 CORNELL INT’L L. J. 1 (2007); John McGarry & Brendan O’Leary, *Iraq’s Constitution of 2005: Liberal Consociation as Political Prescription*, 5 INT’L J. CONST. L. 670 (2007); Nusrat Choudhury, *Constrained Spaces for Islamic Feminism: Women’s Rights and the 2004 Constitution of Afghanistan*, 19 YALE J. L. & FEM. 155 (2007); J. Alexander Their, *The Making of a Constitution in Afghanistan*, 51 N.Y. L. SCH. L. REV. 557 (2007); Jason L. Reimer, *Finding Their Own Voice—The Afghanistan Constitution: Influencing the Creation of a Theocratic Democracy*, Comment, 25 PENN ST. INT’L L. REV. 343 (2006).

9. CONSTITUTION OF THE KINGDOM OF BHUTAN July 18, 2008; THE CAYMAN ISLANDS (CONSTITUTION) ORDER 1972, July, 26, 1972; see also IRAQI CONSTITUTION Oct. 15, 2005 (establishing Islam as the official state religion); THE CONSTITUTION OF AFGHANISTAN Jan. 3, 2004 (noting the people’s belief in Islam in its preamble).

denial of political office and even citizenship to members of the non-established faith at the other.<sup>10</sup> Although its particular effects may be lesser or greater, as a philosophical approach to constitution making, theocratic constitutionalism offers the possibility of basing a nation's fundamental values on precepts tied to faith, revelation, and authority as opposed to the traditional liberal values of liberty and equality.<sup>11</sup>

The notion that certain countries incorporate religious elements into their constitutions is not, by itself, particularly novel or noteworthy. What *is* worth exploring, however, is the extent to which theocratic constitutionalism has become a legitimate and visible rival to the traditional liberal constitutionalism drafting process. Constitutionalism has been enormously successful on a global scale, but what *kind* of constitutionalism? Has decolonization and a reported resurgence in religious fundamentalism led to a widespread invocation of theocratic constitutionalism, or do the tenets of liberal constitutionalism in the area of religion still hold sway?<sup>12</sup> As Backer phrases it, “[i]s there now arising a theocratic constitutionalism in opposition to and competing with conventional constitutionalism for a place as one set, or the supreme set, of organizing principles for states?”<sup>13</sup>

One approach to answering this question is anecdotal, involving a deep analysis of a small sample of recently enacted constitutions and drawing inferences from their contents. This is largely the approach taken by Backer.<sup>14</sup> However, a more systematic approach may bear fruit as well. In an impressive article that tracked and categorized the elements of every constitution from 1946 to 2006, David Law and Mila Versteeg made an important point: “although it has become nearly universal practice for countries to adopt formal written constitutions, very little is known empirically about either the evolution of this

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10. Compare CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008 (“INVOKING the name of God and recognizing our diverse forms of religions and spirituality”) with THE CONSTITUTION OF AFGHANISTAN Jan. 3, 2004 (stating that the President must be Muslim); see also CONSTITUTION OF THE REPUBLIC OF MALDIVES 2008 Article 9(d) (forbidding citizenship to non-Muslims) and Articles 73, 109, 130, & 149 (forbidding non-Muslims from, respectively, the legislature, the Presidency, the Cabinet, and the judiciary).

11. See Backer, *supra* note 5, at 121 (“Theocratic constitutionalism is grounded in notions similar to those that underlie transnational secular constitutionalism—that there is a set of universal values under the authority of which government is both constructed and limited.”). Backer goes on to discuss the universal values provided by religion. *Id.* at 121–35.

12. Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales 1* (Univ. Tor. Public Law and Legal Theory Working Paper No. 04–08, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=557601](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=557601) (on file with the *McGeorge Law Review*).

13. Backer, *supra* note 5, at 92. The competing trends could arguably be seen as examples of Samuel Huntington's controversial “clash of civilizations” thesis. See SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMARKING OF WORLD ORDER* 28 (1996) (arguing that the most pivotal conflicts in post Cold War society will be between people of different cultures, not people of different social classes).

14. See Larry Catá Backer, *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century*, 27 *MISS. C. L. REV.* 11, 13–14 (2007) (discussing the new constitutions of Afghanistan and Iraq).

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practice or the content of the constitutions themselves.”<sup>15</sup> The best approach for discerning overall patterns and broad trends is one that includes both qualitative and quantitative elements.

This Article applies an empirical approach in an attempt to answer the question of whether liberal constitutionalism, theocratic constitutionalism, or some combination has become the dominant theory reflected in modern constitution making in the area of religion. Specifically, this Article analyzes every constitution enacted since the year 2000, sorting the provisions of each one into six categories that broadly fall within one of these two approaches. Part II of this Article explains the methodology of how constitutions were selected and the categories created. Part III applies this methodology and analyzes the results, while Part IV discusses the particular limitations of this project. Part V summarizes the results of the analysis and offers broad conclusions.

## II. METHODOLOGY

The research and analysis conducted for this Article took place as follows.

First, each new constitution enacted by a nation-state since (and inclusive of) the year 2000 was examined. The choice of the year 2000 as a starting point to evaluate new constitutions is to some degree an arbitrary one, as would be the choice of any other year near that point in time. The date range chosen yielded over three-dozen examples, which is a sample size that appears sufficient to support broad inferences regarding global trends. Constitutions were included in the data set if they purported to be constitutions and set forth the basic law and structure of a country, even if those constitutions were not legally entrenched in the sense that legislation inconsistent with them would necessarily be invalid.

One vexing aspect of determining whether particular constitutions fit into this data set was distinguishing between genuinely new constitutions and constitutions that were simply amended or revised and re-enacted. Because constitutions may be modified to varying degrees and in different ways, the determination of whether a constitution is a new constitution is, to some extent, a matter of judgment. This author has relied on press releases, newspaper accounts, and official nomenclature in deciding whether questionable candidates should be included. In four cases (Egypt, Libya, South Sudan, and Syria), constitutions that have not yet received final approval have been included on the rationale that they provide the most recent indication of trends in this area. The author hopes that mistakes, omissions, or the inclusion or non-exclusion of debatable examples will be few enough that the final analysis will not be significantly skewed.

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15. Law & Versteeg, *supra* note 1, at 1167; *see also id.* at 1168 (“It is unfortunate . . . that empirical questions about the content and evolution of the world’s constitutions have rarely been addressed by legal scholars.”).

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The constitutions themselves were obtained from a variety of sources, with particular recourse made to *Constitution Finder*,<sup>16</sup> a repository maintained by members of the University of Richmond School of Law community,<sup>17</sup> *Constitutionmaking.org* maintained by the Comparative Constitutions Project,<sup>18</sup> *World Constitutions Illustrated* on HeinOnline, Wikisource,<sup>19</sup> and a variety of governmental and private websites. For constitutions not written in English or French, the author has relied on unofficial translations in some cases.

Second, references to religion in each constitution were separated into the following six categories: Preamble, Ceremonial Deism, Established Religion, Religious Freedom, Equal Protection of Religion, and anti-Establishment Clause.<sup>20</sup> Placement of a single provision into multiple categories was not uncommon. A description of each category and its placement on the spectrum between liberal and theocratic constitutionalism is provided in the Analysis section below. As with the determination of what constituted a new constitution, an exercise of judgment was sometimes necessary in determining the placement of particularly unusual or ambiguous provisions.

Finally, the author created and organized a table by country and types of religious references present in its constitution, allowing for a basic quantitative evaluation of trends in the inclusion or exclusion of specific constitutional provisions relating to religion.<sup>21</sup> This evaluation was then used as the empirical starting point for further analysis of the question of whether liberal or theocratic constitutionalism had attained predominant status, with more in-depth discussion of particular examples used as case studies.

### III. RESULTS

Table 1, below, contains a list of every constitution that fit the criteria for this survey along with an indication of whether it contained provisions fitting into the designated categories.

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16. *United States*, CONSTITUTION FINDER, <http://confinder.richmond.edu/index.html> (on file with the *McGeorge Law Review*).

17. *Circumscription*, CONSTITUTION FINDER, <http://confinder.richmond.edu/circumscription.html> (on file with the *McGeorge Review*).

18. *About Us*, CONSTITUTION MAKING, <http://constitutionmaking.org/about.html> (on file with the *McGeorge Law Review*).

19. WIKISOURCE, [http://wikisource.org/wiki/Main\\_Page](http://wikisource.org/wiki/Main_Page) (on file with the *McGeorge Law Review*).

20. Three additional categories labeled Religious Education, Religious Limitations, and Miscellaneous were used during the sorting phase, but discarded during the writing of this Article because they were insufficiently defined and cumulative of the other categories.

21. The author recognizes that this method of evaluation is not necessarily statistically rigorous. However, it is hoped that what this analysis lacks in sophistication, it will gain in simplicity and clarity. As the great Saki said, "a little inaccuracy sometimes saves tons of explanation." Hector Hugh Munro, *Clovis on the Alleged Romance of Business*, in *THE COMPLETE STORIES OF SAKI* 397 (Woodsworth ed., 1993).

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TABLE 1: LIST OF COUNTRIES & RELIGIOUS PROVISIONS. P=PREAMBLE, CD=CEREMONIAL DEISM, ER=ESTABLISHED RELIGION, RF=RELIGIOUS FREEDOM, EC=(ANTI-) ESTABLISHMENT CLAUSE, EPR=EQUAL PROTECTION OF RELIGION

Country	P	CD	ER	RF	EC	EPR
Afghanistan	X	X	X (Islam)	X		
Angola				X	X	X
Bhutan	X	X	X (Buddhism)	X	X	X
Bolivia	X			X	X	X
British Virgin Islands	X	X		X		X
Burundi				X	X ("Secular")	X
Cayman Islands	X			X		X
Central African Republic				X	X ("Secular")	X
Comoros	X	X				
Congo (Democratic Republic of)	X			X	X ("Secular")	X
Congo (Republic of)				X	X ("Secular")	X
Cote d'Ivoire				X	X ("Secular")	X
Dominican Republic	X			X		X
East Timor	X	X		X	X	X
Ecuador	X			X	X ("Secular")	X
Egypt (Provisional)		X	X (Islam)	X		X
Gibraltar		X		X		X ("creed")
Guinea				X	X ("Secular")	X
Hungary	X	X		X	X	X
Iraq	X	X	X (Islam)	X		X
Kenya	X	X		X	X	X
Kosovo				X	X	X
Kyrgyzstan				X	X	X ("belief")
Libya (Interim)	X	X	X (Islam)	X		X
Madagascar	X			X	X	X
Maldives		X	X (Islam)			
Montenegro				X	X	
Morocco	X	X	X (Islam)	X		
Mozambique				X	X	X
Myanmar			X (Multiple)	X		X
Nepal		X		X	X ("Secular")	X
Niger		X		X	X	X
Qatar		X	X (Islam)	X		X
Rwanda		X		X	X ("Secular")	X
Senegal				X	X ("Secular")	X
Serbia				X	X	X
South Sudan (Transitional)	X	X		X	X	X
Swaziland	X	X		X		X
Syria (Draft)		X	X (Islam)	X		X
Thailand			X (Buddhism)	X		X
TOTAL	18	20	11	38	24	35

*McGeorge Law Review / Vol. 44**A. Preamble*

The legal effect of language contained in preambles to constitutions varies from country to country. In a recent study of judicial interpretation of preambles, Liav Orgad noted:

In many states, the preamble has been increasingly used to ‘constitutionalize’ unenumerated rights. An international survey of the function of preambles shows a growing trend toward it having a more binding force, either independently, as a substantive source of rights, combined with other constitutional provisions, or as a guide for constitutional interpretation. The courts rely more and more on preambles as sources of law. While in some states this development is not new and dates back several decades, in others it is a recent development. From a global perspective, the U.S. Preamble, which does not enjoy binding legal status, remains the exception rather than the rule.<sup>22</sup>

Orgad goes on to conclude that the legal effect of preambles falls broadly into three approaches: “ceremonial-symbolic” in which the preamble is given no binding force, “interpretive” in which preambular language is considered when the construction of ambiguous statutory provisions is required, and “substantive,” where the preamble is seen as an independent source of legal rights or limitations.<sup>23</sup>

The insertion of religious language in preambles to new constitutions was quite common, as eighteen of the forty constitutions studied for this project included such language. Within this set of constitutions containing religious language in their preamble, the exact nature of the language used could differ dramatically. In Ecuador, for example, the Preamble includes a relatively short and open-ended statement stating that the constitution was made “INVOKING the name of God and recognizing our diverse forms of religion and spirituality....”<sup>24</sup> In contrast, the Constitution of Afghanistan includes this passage:

In the name of God, the Most Beneficent, the Most Merciful[.] Praise be to Allah, the Cherisher and Sustainer of Worlds; and Praise and Peace be upon Mohammad, His last Messenger and his disciples and followers. . .

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22. Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT’L J. CONST. L. 714 (2010).

23. *See id.*

24. CONSTITUTION OF ECUADOR, Oct. 20, 2008 pmbl.

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We the people of Afghanistan: Believing firmly in Almighty God, relying on His divine will and adhering to the Holy religion of Islam. . . .<sup>25</sup>

It seems reasonable to assume that preambles with strong, sustained, and denominationally-focused references to religion are more likely to receive substantive legal consideration in domestic courts than those that merely contain passing references to a deity.<sup>26</sup> However, whether passages like those above will be given ceremonial, interpretive, or substantive legal effect will, of course, depend upon the judiciary of each country. The uncertain legal effect of religious references in preambles is similar in nature to that of largely symbolic religious references in the body of constitutions.

#### B. Ceremonial Deisms

“Ceremonial deism” is the label given to non-coercive, largely symbolic and ritualistic references to religion in legislation or government activity in the United States.<sup>27</sup> Extending the idea to the constitutional context, ceremonial deisms are provisions or scattered references that invoke a divine being or religious concept for non-substantive effect.<sup>28</sup> For example, under the Constitution of Bhutan, each session of Parliament concludes with the Tashimon-lam,<sup>29</sup> “prayers for fulfillment of good wishes and aspirations.”<sup>30</sup> The Kenyan Constitution contains the full text of the national anthem, which begins “O God of all creation[,] Bless this our land and nation.”<sup>31</sup> Most of the ceremonial deisms found in this study stemmed from oath requirements, such as “So help me God”<sup>32</sup> and “I Swear by Almighty God.”<sup>33</sup> Oath requirements with religious phrases could, if applied stringently, have coercive effects on atheists and members of minority religions or religious faiths that are opposed to the concept

25. CONSTITUTION OF AFGHANISTAN Jan. 3, 2004, pmb1.

26. However, even such passing references may give rise to sustained debate as to their meaning. *See, e.g.*, Jonathon W. Penney & Robert J. Danay, *The Embarrassing Preamble? Understanding the “Supremacy of God” and the Charter*, 39 U. B.C. L. REV. 287, 288 (2006) (summarizing paucity of judicial attention given to the phrase “Supremacy of God” in the preamble to the Canadian Charter of Rights and Freedoms and arguing that it should be given significant interpretive effect).

27. *See generally*, Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism* 96 COLUM. L. R. 2083, 2094–96 (1996) (referring to practices like prayer at the presidential inauguration and the role of the Bible in judicial oaths as belonging to a certain category of ceremonial deism).

28. *Id.*

29. CONSTITUTION OF THE KINGDOM OF BHUTAN July 18, 2008, art.10.6.

30. *Id.* at 65 (Glossary to Official English Translation).

31. CONSTITUTION OF KENYA Aug. 27, 2010, art. 9(2) (referencing Second Schedule, National Symbols, Part (b)).

32. *See, e.g.*, CONSTITUTION OF SWAZILAND July 26, 2005, Second Schedule.

33. *See, e.g.*, CONSTITUTION OF THE STATE OF QATAR June 8, 2005, arts.10, 74, 92, 119.



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of oaths. For the most part, however, these oaths apply only to persons assuming high office and presumably will have little practical effect.<sup>34</sup>

Taken on their own, ceremonial deisms are far from an establishment of religion.<sup>35</sup> Their presence and cumulative effect, could, nonetheless, lead a court to find that state neutrality toward religion is not required in particular contexts. Steven Epstein, writing in reference to the United States' Establishment Clause, discusses what he refers to as the "any more than" argument:

[T]he argument typically goes, if practices such as the Pledge of Allegiance to a nation "under God," legislative prayer, the invocation to God prior to court proceedings, and the Christmas holiday are permissible notwithstanding the Establishment Clause, then surely the practice at hand (be it a nativity scene, commencement invocation, or some other governmental practice)—which does not advance religion "any more than" these accepted practices—must also pass muster under the Establishment Clause.<sup>36</sup>

Applying this logic to ceremonial deisms contained in a *constitution* (as opposed to a statute or executive practice), courts could conceivably find that symbolic references serve as a limiting principle to broader anti-establishment clauses or that they even affirmatively align the country with a religious viewpoint.<sup>37</sup>

Of the new constitutions examined for this study, twenty contained ceremonial deisms. This set of twenty was not identical with the set that contained religious references in their preambles, though there was substantial overlap with twelve countries' constitutions containing both preambular religious references and ceremonial deisms. This also means that twenty-six of the forty new constitutions examined in this study make some symbolic reference to religious concepts. The next section of this Article examines constitutional provisions that establish religion in a far more substantive sense.

### C. *Established Religion*

This section examines constitutional provisions that establish religion in a far more substantive sense than ceremonial deisms. The concept of an established

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34. Compare Epstein, *supra* note 27, at 2147 (condemning requirement of religious oaths for trial jurors and witnesses); *id.* at 2094–2096.

35. See Rex Adhar & Ian Leigh, *Is Establishment Consistent with Religious Freedom?*, 49 MCGILL L.J. 635, 642 (2004) ("Religious establishment may end at the point of symbolic acknowledgment, with no further translation of religious doctrine into public policy and institutions.").

36. Epstein, *supra* note 27, at 2086.

37. *But cf.* Richard H. Jones, "In God We Trust" and the Establishment Clause, 31 J. CHURCH AND STATE 381, 405 (1989) ("[S]ymbolism by its very nature cannot be neutral between religions. There are no generic religious symbols or ceremonies common to all religions.").

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religion is by no means self-defining, and there is widespread disagreement over exactly when a religion is considered established.<sup>38</sup> As M.H. Ogilvie explains, “‘Establishment’ is not and never has been a legal term of art. There is no comprehensive body of case law purporting to define it, nor have many legal writers attempted to do so. . . . The concept, then, is vague, imprecise, and ever-changing.”<sup>39</sup> Instead of attempting to craft a catchall definition, it appears to be fruitful to conceive of establishment as involving three distinct aspects, each of which is a continuum.<sup>40</sup> First, there is the distinction “between ‘earthed’ or ‘low’ establishment” (where a particular religion has a “daily on-the-ground presence . . . in community life”) and “high” establishment, which refers to a religion’s political or “constitutional status.”<sup>41</sup> Second, there is the distinction between “formal” establishment (reflected in statutory or constitutional guarantees) and “de facto” establishment (reflected in raw political influence and, potentially, legislation that implicitly favors that religion).<sup>42</sup> Finally, there is the distinction between “weak” and “strong” establishments. The former consists of the government supporting (through monetary grants or favorable legislation) a particular religion, whereas the latter consists of restraints on the non-established religions.<sup>43</sup>

This Article examines establishment only in the “high” and “formal” sense, as “low” or “de facto” establishment falls outside the scope of a study of constitutional provisions. Both “weak” preferences for a particular religion and “strong” burdens on non-established religions have been considered as establishments for this project as have clear statements aligning the country with a particular faith or faiths regardless of whether those statements are implemented with tangible consequences.<sup>44</sup>

According to these criteria, eleven of the forty new constitutions studied could be considered to have established religions. Eight establish solely Islam, two establish solely Buddhism, and one gives primary establishment to Buddhism while also establishing Christianity, Islam, Hinduism, and Animism.

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38. M.H. Ogilvie, *What is a Church by Law Established?* 28 Osgoode Hall L.J. 179, 195–96 (1990).

39. *Id.*

40. See Ahdar & Leigh, *supra* note 35, at 641–45 (discussing the differences between low and high establishment, formal and defacto establishment, and weak and strong establishment).

41. *Id.* at 641.

42. *Id.* at 643.

43. See *id.* at 644–45 (describing the various perks that a religious organization might be privy to in a weak system and using the Taleban’s Ministry for Suppression of Vice and Promotion of Virtue as an example in a strong system).

44. In other words, as an exercise in comparative law, this project is formalist rather than functionalist in nature. See generally Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228–30 (1998) (noting that several ways to analyze different constitutions include functionalism, expressivism, and *bricolage* and explaining these three approaches in detail); Frederick Schauer, *Constitutional Invocations*, 65 FORDHAM L. REV. 1295, 1298 (1996) (explaining the formalist approach to constitutional analysis).

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The degree of establishment varies amongst the constitutions studied and it is worth examining a few of them in more detail to illustrate this point.

The Myanmar Constitution represents a case of multiple establishments listed above. It articulates the establishments as follows:

The Union recognizes [the] special position of Buddhism as the faith professed by the great majority of the citizens of the Union. . . .The Union also recognizes Christianity, Islam, Hinduism and Animism as the religions existing in the Union at the day of the coming into operation of this Constitution. . . .The Union may assist and protect the religions it recognizes to its utmost.<sup>45</sup>

Thus, we see the concept of “recognition” tied to permission for the government to “assist” and “protect” those religions.<sup>46</sup> This would appear to embrace special privileges for favored religions while not necessarily burdening disfavored religions.<sup>47</sup>

The 2011 Interim Constitution of Libya, authored by the Transitional National Council, provides a very recent example of Backer’s point that “[s]ome states conflate legal and religious systems together.”<sup>48</sup> The first Article of that Constitution states: “Islam is the Religion of the State and the principal source of legislation is Islamic Jurisprudence (Shari’a).”<sup>49</sup> The Libyan Constitution, in its current form, contains no further guidance on how Islam or Islamic jurisprudence will be incarnated into governing structures.<sup>50</sup>

Contrast that to the pervasive role of Islam given in almost every major aspect of the Constitution of the Maldives:

- The legislative assembly “shall not pass any law that contravenes any tenet of Islam.”<sup>51</sup>
- Every citizen is given the affirmative obligation “to preserve and protect the State religion of Islam. . . .”<sup>52</sup>

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45. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR May 29, 2008, arts. 361–63.

46. *Id.*

47. *Id.* An interesting aspect of some of these constitutions, one that will be discussed more in subsequent sections, is that the same constitutions that establish religions often simultaneously purport to be secular and/or guarantee religious freedom.

48. Backer, *supra* note 5, at 92; CONSTITUTIONAL DECLARATION OF LIBYA Feb. 7, 2011, art. 1. The Libyan Congress has not ratified the constitution. *Id.*

49. CONSTITUTIONAL DECLARATION OF LIBYA Feb. 7, 2011, art. 1.

50. *See generally id.* (lacking any further discussion on the interaction between Islam and the Libyan government). Intisar Rabb has written an interesting article differentiating between types of constitutionalization of Islamic law. *See* Intisar Rabb, “*We the Jurists*”: *Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. LAW 527, 531 (2008).

51. CONSTITUTION OF THE REPUBLIC OF MALDIVES Aug. 7, 2008, arts. 70(c), 10(b).

52. *Id.* art. 67(g).

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- All rights and freedoms provided for in the Constitution may not operate “in a manner that is . . . contrary to any tenet of Islam. . . .”<sup>53</sup>
- The President or Vice-President may be removed from office for “direct violation of a tenet of Islam[.]”<sup>54</sup>
- Judges must consider Shari’ah law in any case where “the Constitution or the law is silent. . . .”<sup>55</sup>
- No non-Muslim may become a citizen of the Maldives.<sup>56</sup>
- No person may be elected to the legislative assembly, the presidency, cabinet, or the judiciary unless that person is both Muslim and “a follower of a Sunni school of Islam[.]”<sup>57</sup>
- Education “shall strive to inculcate obedience to Islam [and] instil [sic] love for Islam. . . .”<sup>58</sup>

The Constitution of the Maldives thus appears to be a perfect demonstration of theocratic constitutionalism.<sup>59</sup> If religious references in preambles, ceremonial deisms, and established religions are placed into the broad category of constitutions trending towards theocratic constitutionalism, this study would indicate that twenty-eight of the forty constitutions studied would fit into that approach to a greater or lesser degree. However, as we shall see in the next sections, it is a mistake to see theocratic constitutionalism as necessarily operating to the exclusion of liberal constitutionalism. In fact, the two approaches are often incarnated side-by-side in the same constitutional text.

#### D. Religious Freedom

There is no doubt that freedom of religion has become one of the most widespread rights to be recognized in constitutional documents: out of the constitutions in force as of 2006, 97% contained such a provision.<sup>60</sup> Like most of the concepts discussed in this Article, “freedom of religion” is not self-explanatory, and its meaning is likely to depend on context and judicial

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53. *Id.* art. 16(a).

54. *Id.* art. 100(a)(1).

55. *Id.* art. 142.

56. *Id.* art. 9(d).

57. *Id.* arts. 73(a)(3), 109(b), 130(a)(3), 149(b)(1).

58. *Id.* art. 36(c).

59. *See supra* notes 52–58.

60. Law & Versteeg, *supra* note 1, at 1200.

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interpretation.<sup>61</sup> Perhaps in its most common interpretation, freedom of religion protects against coercion: “Coercion either prevents the exercise of a particular religion or forces compliance with a religious observance or an activity that is perceived by some as having religious significance.”<sup>62</sup>

It should come as no surprise that the new constitutions studied for the present Article are very similar in this respect to the larger number examined in Law and Versteeg’s study: thirty-eight of the forty (95%) contain freedom of religion guarantees.<sup>63</sup> The only exceptions were the Constitution of the Maldives<sup>64</sup> and the Constitution of Comoros (which does not contain a bill of rights).<sup>65</sup> As a crucial aspect of liberal constitutionalism, freedom of religion has become almost omnipresent, at least in a formal sense.

*E. Equal Protection of Religion*

A similar result is obtained when examining the presence of equality guarantees that specifically reference religion. Thirty-five of the forty constitutions studied for this project contain such provisions, usually as part of a longer list of characteristics that are protected from discrimination. The only exceptions were Afghanistan, Morocco, and the Maldives (each with Islam as an established religion),<sup>66</sup> Comoros,<sup>67</sup> and Montenegro (which broadly guarantees “equal protection of . . . rights and liberties” without mentioning religion specifically).<sup>68</sup> As with freedom of religion, equality guarantees appear to be part of what Law and Versteeg recognize as “the emergence of a core set of constitutional rights that are generic to the vast majority of national constitutions.”<sup>69</sup>

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61. See, e.g., Denise J. Doyle, *Religious Freedom in Canada*, 26 J. CHURCH & STATE 413, 413 (1984) (“Religious freedom, like religion itself, is not fixed or static, but is a developing concept.”).

62. *Id.* at 433.

63. See Law & Versteeg, *supra* note 1, at 1200 (finding that 97% of constitutions in force since 2006 contain provisions regarding religious freedom).

64. See *supra* Part IV.C.

65. LA CONSTITUTION COMORIENNE Dec. 23, 2001 (Comoros), available at <http://www.wipo.int/wipolex/en/details.jsp?id=8667> (on file with the *McGeorge Law Review*).

66. THE CONSTITUTION OF AFGHANISTAN Jan. 3, 2004; CONSTITUTION OF THE REPUBLIC OF MALDIVES Aug. 7, 2008; THE CONSTITUTION OF MOROCCO Sept 13, 1996.

67. LA CONSTITUTION COMORIENNE Dec. 23, 2001 (Comoros), available at <http://www.wipo.int/wipolex/en/details.jsp?id=8667> (on file with the *McGeorge Law Review*).

68. CONSTITUTION OF MONTENEGRO Oct. 19, 2007, art. 19.

69. Law & Versteeg, *supra* note 1, at 1170.

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### F. Establishment Clause<sup>70</sup>

Along with guaranteeing individual religious freedom and religious equality, one of the hallmarks of liberal constitutionalism in the area of religion is a commitment to having a state that is officially secular.<sup>71</sup> As Benjamin Berger puts it:

The term ‘secular’ or the declaration that we live in a ‘secular state’ is proposed as the main conceptual means by which Western Liberal societies deal with the expression of religious conscience. Secularism is understood as a societal tool that has the ability to reconcile competing claims to ultimate authority, to confine the influence of religion on state power, and to limit actions based on personal conscience.<sup>72</sup>

When applied as a restriction or requirement on government activity, the term “secular” is by no means self-defining. It is often interpreted as requiring state neutrality towards religion, but the concept of neutrality generates additional ambiguity and debate.<sup>73</sup> Douglas Laycock, for example, distinguishes between “formal” neutrality, which forbids only explicit religious classifications in law-making<sup>74</sup> from “substantive” neutrality, which “require[s] government to minimize the extent to which it either encourages or discourages religious belief

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70. The term “establishment clause” can be a misnomer and may be worth clarifying. In the U.S., the term “establishment clause” will be taken to mean a provision *separating* government and religion. *See, e.g.,* *McCreary Count v. ACLU*, 545 U.S. 844, 860 (2005) (plurality) (“When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality....”). In non-U.S. or conceptual contexts, it could be taken to mean a provision that does the exact opposite by affirmatively linking government and religion. *But cf.* Kurt T. Lash, *Five Models of Church Autonomy: An Historical Look at Religious Liberty Under the United States Constitution* in *CHURCH AUTONOMY: A COMPARATIVE SURVEY* 304 (Gerhard Robbers, ed., 2001) (describing “Religious Establishment” as a type of church-government relationship wherein “government regulates on the basis of religious truth. Churches are not autonomous but are subject to state regulation directed towards the end of encouraging true, and discouraging false religion.”). I have often affixed the preface “anti-” or “non-” before “establishment clause” to help avoid this ambiguity. *See, e.g.,* Claudia E. Haupt, *Transnational Nonestablishment*, 80 *GEO. WASH. L. REV.* 991, 994 (2012) (defining “nonestablishment”); David M. Estes, *Justice Sotomayor and Establishment Clause Jurisprudence: Which Antiestablishment Standard Will Justice Sotomayor Endorse?*, 11 *RUTGERS J. L. & RELIGION* 525, 526 (2010) (discussing the “antiestablishment principle”).

71. *See, e.g.,* Benjamin Berger, *The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State*, 17 *CANADIAN J. LAW & SOC’Y* 39, 49 (2002).

72. *Id.*

73. *See, e.g.,* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 *DEPAUL L. REV.* 993, 994 (1990) (“Those who think neutrality is meaningless have a point. We can agree on the principle of neutrality without having agreed on anything at all. From benevolent neutrality to separate but equal, people with a vast range of views on church and state have all claimed to be neutral.”); Michael Paulsen, *supra* note 4, at 333 (“A statement such as ‘the state should be neutral’ is completely vacuous; it says nothing about that with respect to which the state is supposed to be neutral.”).

74. Laycock, *supra* note 73, at 999.

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or disbelief, practice or nonpractice, observance or nonobservance.”<sup>75</sup> The concept of non-establishment is more controversial than that of freedom of religion and equal protection of religion, with non-coercive support for religion being seen as acceptable in some eyes<sup>76</sup> despite being arguably barred by the non-establishment principle.<sup>77</sup>

Despite disagreement over how it should be applied in practice, the non-establishment principle has shown recent popularity in constitution-making, as twenty-four of the forty new constitutions studied for this project include provisions incorporating it. Ten of those simply state that the country is “secular,”<sup>78</sup> and thus invite further political and judicial exploration of how that broad term should be applied in practice. Another popular choice is the simple and straightforward one demonstrated by the Transitional Constitution of South Sudan: “Religion and State shall be separate.”<sup>79</sup> The Constitution of Madagascar contains a more specific and detailed provision:

The State affirms its neutrality with regard to different religions. The secular characteristic of the Republic rests on the principle of separation of the activities of the State from that of religious institutions and their representatives. The State and religious institutions are completely forbidden to commingle their respective domains. The State may neither subsidize nor finance religious institutions. No Department Head or Member of the Legislature may take part in the direction of a religious institution, under penalty of being disqualified by the High Constitutional Court or of being stripped of his office or his responsibilities.<sup>80</sup>

As an aspect of liberal constitutionalism, non-establishment guarantees are less prevalent in new constitutions than freedom of religion or equal protection of religion guarantees.<sup>81</sup> However, when viewed solely in comparison to the number of new constitutions establishing religion, it appears that more than twice as

75. *Id.* at 1001.

76. See, e.g., Donald L. Beschle, *Does the Establishment Clause Matter? Non-Establishment Principles in the United States and Canada*, 4 U. Pa. J. Const. L. 451, 451 (2002) (comparing “accommodationist” versus “separationist” views of the Establishment Clause).

77. But cf. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 297 (1987) (“The principal kind of evil against which the establishment clause protects is institutional, not individual. Governmental action violating the clause generally involves some form of support for religion. But the religion so benefited is not injured, and in any event is unlikely to complain about such support; and nonadherents to the religion may be hard pressed to show any concrete injury which they personally have suffered.”).

78. See *supra* Table 1.

79. TRANSITIONAL CONSTITUTION OF THE REPUBLIC OF SOUTH SUDAN July 11, 2011, art. 8(1); see also CONSTITUTION OF MONTENEGRO Oct. 19, 2007, art. 14 (“Religious communities shall be separated from the state.”).

80. PROJET DE CONSTITUTION, art. 4 (Madag.) (translated from French to English by the author).

81. See *supra* Table 1.

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many constitutions separate religion and government than explicitly link them together.<sup>82</sup> Fears of theocratic constitutionalism sweeping the globe are thus misplaced,<sup>83</sup> even if theocratic constitutionalism may be perceived as a viable alternative to liberal constitutionalism.

#### G. Analysis

For the purposes of this study, theocratic constitutionalism is the process of linking religion to the authority of governing bodies through constitutional provisions. Three types of provisions were categorized as falling under the umbrella of theocratic constitutionalism: preambular references, ceremonial deisms, and explicit establishments of religion. Of the forty constitutions examined, twenty-eight (70%) contained provisions falling into one or more of these categories. The actual legal effect of preambles and ceremonial deisms depends very much on the interpretation and weight that the judiciary affords to them; they may view them as either purely symbolic or, *in contrast*, as hooks upon which elaborate doctrinal constructions can be hung. The presence of provisions explicitly establishing one or more religions, which occurred in about one fourth of the constitutions studied, are likely to have far greater effect on members of non-favored religions. This is a phenomenon that may be feared by advocates of religious liberty and liberal constitutionalism, as it points to a continuance or a resurgence of religious fundamentalism at the cost of individual rights. The fact that a sizable majority of these provisions establish Islam might lead some to reinterpret theocratic constitutionalism as a euphemism for Islamic constitutionalism.

Liberal constitutionalism, as it relates to religion, was understood for this project as to embody elements of respect for religious conscience, equality and autonomy of religious institutions and their followers, and state neutrality towards religion. Three specific types of constitutional provisions were categorized under this broad approach: freedom of religion, equal protection of religion, and non-establishment. Freedom of religion was almost unanimously adopted by the constitutions examined, as was equal protection of religion. Although not as prevalent as the other two categories placed under the umbrella of liberal constitutionalism, the principle of non-establishment was reflected in well over half of the constitutions studied. Taken together, every constitution studied reflected at least one element of liberal constitutionalism except for two:

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82. It is interesting to compare the percentage of new constitutions incorporating anti-establishment clauses (59%) and established religions (26%) in this study with the percentage of all constitutions in force as of 2006 in Law & Versteeg's study: 34% and 22%, respectively. Law & Versteeg, *supra* note 1, at 1163, 1201–02. Note that there is a period of overlap between the time frames of the two studies. *Id.*

83. Hirschl, *supra* note 5, at 1183 (“[P]opulist 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.”).



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Comoros, which has no bill of rights at all,<sup>84</sup> and the Maldives, which was the clearest example of a country embracing theocratic constitutionalism.<sup>85</sup> Twenty-three of the forty (58%) new constitutions examined included provisions reflecting all three categories.

If liberal constitutionalism and theocratic constitutionalism are conceptualized as competing ideologies for nations to incorporate during constitution making, is there a clear winner and loser between the two? Any attempt to take a binary approach in answering that question would have to grapple with the reality that almost all of the new constitutions have elements of theocratic constitutionalism *and* liberal constitutionalism.<sup>86</sup> Instead of conceptualizing the two ideologies as mutually exclusive, the drafters of most of the new constitutions studied for this project have chosen to view them as complementary. This convergence between theocratic and liberal constitutionalism is not necessarily sound from either a conceptual or practical viewpoint. For example, how can a constitution logically establish one religion while simultaneously guaranteeing religious equality, or proclaim that the state is secular while simultaneously incorporating religious references in oaths for public office? Nonetheless, there is substantial overlap: of the eleven countries with established religions, ten contain some element of liberal constitutionalism. Of the twenty-four countries with non-establishment clauses, twelve contain an element of theocratic constitutionalism. Whether for good or ill, most framers of recent constitutions perceive religion and rights as at least partially compatible rather than contradictory.

## IV. LIMITATIONS

Conclusions about constitutionalism reached solely after a study of formal textual provisions have obvious limitations.

First, the content of those provisions may have little actual relation to legal and political reality. As Backer notes, “[t]here may well be significant differences between constitutions in theory and in practice. Constitutions can be a sham.”<sup>87</sup> Even if not a “sham” per se, the broad and often ambiguous phrases used to indicate the proper relationship between religion and the state are susceptible to various interpretations that leave extensive power in the hands of judges and politicians. In a related fashion, the “on-the-ground” reality will depend not only on how the government acts, but on how religious institutions

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84. LA CONSTITUTION COMORIENNE Dec. 23, 2001 (Comoros), available at <http://www.wipo.int/wipolex/en/details.jsp?id=8667> (on file with the *McGeorge Law Review*).

85. CONSTITUTION OF THE REPUBLIC OF MALDIVES Aug. 7, 2008.

86. See *supra* Table 1.

87. Backer, *supra* note 5, at 94 n.39. See also Law & Versteeg, *supra* note 1, at 1169 (“Sometimes, constitutions neither constrain nor even describe the actual operation of the state.”).

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conceive of their role.<sup>88</sup> “No religion is monolithic, and religion is far too varied and complex to allow for any simplistic generalizations about how faith and politics will interact.”<sup>89</sup> However, to whatever degree constitutions reflect the values and aspirations of their makers, they provide insight on what those makers thought worthy of including in their country’s foundational document.<sup>90</sup> An examination of formal constitutional texts, such as the one performed in this study, is the first step in determining whether rhetoric matches reality. And more, it is impossible to determine whether reality matches rhetoric in constitutionalism unless an examination of formal texts are a part of the study.<sup>91</sup>

Second, this study has treated the constitution of each country as if it were of equal importance to that of any other country. The reality, of course, is far more complex than that, as the foundational law that governs millions in Iraq,<sup>92</sup> for example, holds ramifications different than that of the law governing the 54,000 residents of the Cayman Islands.<sup>93</sup> Existing constitutions often serve as templates for future drafters in other countries to adopt as their own, and therefore the choices made by regional powers or allied nations may prove more influential to the long-term trend of constitutionalism than the choices made by isolated outliers.

## V. CONCLUSION

The purpose of this Article was to examine the role of religion in recent constitutional drafting. As a lens for analysis, the competing ideologies of liberal and theocratic constitutionalism were chosen. Three common categories of constitutional provisions relating to religion were articulated for each ideology. Every constitution enacted since the year 2000 was read and its provisions relating to religion were then sorted into one of those categories for further analysis. Analysis indicated that liberal constitutionalism and theocratic constitutionalism should not necessarily be conceived of as mutually-exclusive ideologies that are either wholly embraced or wholly discarded by modern constitution makers. Instead, elements of both approaches could be found in the majority of new constitutions.

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88. See Adhar & Leigh, *supra* note 35, at 640–41 (explaining the different definitions of establishment).

89. David Blaikle and Diana Ginn, *Religious Discourse in the Public Square*, 16 CONST. F. 37, 42 (2006).

90. Law & Versteeg, *supra* note 1, at 1170.

91. *Id.* at 1169 (“To recognize that some constitutions are shams merely begs a host of further questions, none of which can be tackled without a systematic understanding of what the world’s constitutions actually say.”).

92. *The World Factbook: Iraq*, CIA (July 2013), <https://www.cia.gov/library/publications/the-world-factbook/geos/cj.html> (on file with the *McGeorge Law Review*).

93. *The World Factbook: Cayman Islands*, CIA (July 2013), <https://www.cia.gov/library/publications/the-world-factbook/geos/cj.html> (on file with the *McGeorge Law Review*).

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Some have viewed the rise of theocratic constitutionalism in the following light:

In a sense, with these challenges the great universalist constitutional projects of Anglo-European society come full circle. Having spent the greater part of the last four centuries unmaking quasi-governmental systems of religious law, the West is now confronted with globalizing political systems grounded in religion as fully formed politico-legal systems.<sup>94</sup>

Those of us committed to the secular nature of liberal constitutionalism may be justifiably concerned when theocratic constitutionalism is seen as a legitimate alternative in the eyes of some new constitution makers. However, this concern should be tempered with the knowledge that the liberal constitutional project has certainly not been a complete failure: all but the most zealous and hardened theocracies guarantee, at least formally, the rights of freedom of religion and equal protection of religion.<sup>95</sup> Whether this seemingly paradoxical attempt to merge liberal and theocratic constitutionalism together has any hope of success is a question that only time and the judges faced with the unenviable task reconciling the two approaches can hope to answer.<sup>96</sup>

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94. Backer, *supra* note 14.

95. *See supra* Table 1.

96. Hirschl, *supra* note 5, at 1200 (“A common strategy for addressing some of the difficulties presented in the ongoing friction between traditional religious outlooks and principles of modern constitutionalism is the construction of constitutional courts armed with judicial review powers.”). Hirschl’s article discusses this issue in more detail through an analysis of the highest courts of six “constitutional theocracies” operating under older constitutions. *Id.* at 1206.