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## Islam Symposium: An Introduction

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## FOREWORD

# ISLAM SYMPOSIUM: AN INTRODUCTION

ROBERT A. KAHN\*

### I. ISLAM, CONSTITUTIONAL LIBERTIES, AND THE CURRENT POLITICAL CLIMATE

In early 2009, the University of St. Thomas Law Journal decided to hold a symposium on “Islamic Law and Constitutional Liberty.” One motivation for the symposium was the hostile reception given to the Archbishop of Canterbury’s speech calling for the British legal system to take a more positive attitude toward Islamic Law.<sup>1</sup> Another motivation arose in Ontario, where opponents of Sharia law outlawed its application in family law-based arbitration following a lengthy campaign.<sup>2</sup> In addition to these developments—which bore directly on Islamic law—came a rising tide of European laws aimed at Muslim clothing, especially the headscarf and burqa.<sup>3</sup>

To address the growing assertion that Islam is somehow incompatible with liberal democratic norms, the symposium directed its attention to the challenges, opportunities, and tensions that might exist between Islamic law

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1. See generally Doctor Rowan Williams, Archbishop of Canterbury, Archbishop’s Lecture - Civil and Religious Law in England: A Religious Perspective (Feb. 7, 2008) (transcript available at <http://www.archbishopofcanterbury.org/1575#>). For criticism of the Archbishop’s position, see *Williams Under Fire in Sharia Row*, BBC NEWS (Feb. 8, 2008), [http://news.bbc.co.uk/2/hi/uk\\_news/politics/7233335.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/7233335.stm) (recording reaction of a spokesperson for the then Prime Minister Gordon Brown that “British laws should be based on British values.”). See also John Witte, Jr. & Joel A. Nichols, *The Frontiers of Marital Pluralism: An Afterword*, in MARRIAGE AND DIVORCE IN A MULTI-CULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION (Joel A. Nichols ed., forthcoming 2011).

2. For an overview, see Faisal Kutty, *The Myth and Reality of “Shari’a Courts” in Canada: A Delayed Opportunity for the Indigenization of Islamic Legal Rulings*, 7 U. ST. THOMAS L.J. 559, 562–76 (2010) (describing background and development of the controversy).

3. The French have recently passed a law banning the wearing of the burqa in public places. See *French Burqa Ban Clears Last Legal Obstacle*, CNN (Oct. 7, 2010), <http://edition.cnn.com/2010/WORLD/europe/10/07/france.burqa.ban/index.html?iref=allsearch>. Similar laws either have passed or are under consideration in Belgium, Quebec, and Switzerland. For a brief overview, see Robert A. Kahn, *Are Muslims the New Catholics? Europe’s Headscarf Laws in Comparative Historical Perspective*, 21 DUKE J. COMP. & INT’L L. (forthcoming 2011).

and liberal democracy.<sup>4</sup> Now, as Noah Feldman points out, one can justly argue that there ought to be no “tension” at all, and that private law religious claims—whether Muslim, Jewish, or Catholic—can in no way threaten liberty, precisely because they are private.<sup>5</sup> He is also right to warn that using the word “tension” carries the risk of unintentionally fanning the flames of growing anti-Muslim sentiment on both sides of the Atlantic.<sup>6</sup>

That said, there is merit to understanding the causes of the recent upsurge of anti-Islamic and anti-Muslim rhetoric in countries with Muslim minorities. A good deal of this rhetoric turns on asserted “tensions” between Islamic law and liberal democracy.<sup>7</sup> Indeed, as Feldman points out, during the 19th century many Americans questioned the compatibility of Catholicism and American democracy.<sup>8</sup> Examining similar doubts about Islam is the first step toward winning over those opponents whose minds can be changed.<sup>9</sup> At a minimum, such an examination will let Muslims and their supporters know what they are up against.<sup>10</sup>

Second, the use of the word “tension” reflects the historical reality that, in the United States, broad declarations in favor of religious toleration

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4. The organizing materials for the symposium posed two questions. First, what were the “challenges and opportunities” facing Muslim-majority nations seeking to integrate Islamic law and constitutional rights? Second, what were the “tensions” that might exist between adherence to Islamic law and the norms of liberal democracies in nations with growing Muslim minorities? University of St. Thomas Law Journal, Organizing Materials, Apr. 12, 2010.

5. Noah Feldman, *Islamic Constitutionalism in Context: A Typology and a Warning*, 7 U. ST. THOMAS L.J. 436, 440–41 (2010).

6. *Id.* at 440. As examples of the recent surge in anti-Islamic and anti-Muslim “paranoia” in the United States, Feldman mentions the uproar over the construction of an Islamic community center in lower Manhattan, and the amendment passed by Oklahoma voters in the 2010 midterm elections to ban the Sharia. *Id.* at 436–40.

7. John Feffer, writing in Mother Jones, speaks of a new “Islamofascism” school of thought, which holds that “the fundamentalists are simply the new ‘totalitarians,’ as hidebound, fanatical, and incapable of change as the communists.” John Feffer, *The Lies of Islamophobia*, MOTHER JONES (Nov. 8, 2010), <http://motherjones.com/politics/2010/11/american-islamophobia?page=1>.

8. Feldman, *supra* note 5, at 439. While Feldman points out that doubts about Catholics today are absurd, *id.* at 449, this modern view emerged slowly. As late as 1960, there was a concern that “although Catholics were legally allowed toleration of the practices of their faith, there was . . . a cultural conflict or ill-fit between Catholics and ‘the dominant Protestant traditions’ over the religious contents welcome within the ‘traditional Anglo-American culture.’” Thomas W. Jodziewicz, *In the Matter of Catholic Historiography: A Proposal*, 14 CATH. SOC. SCI. REV. 271, 285 (2009) (quoting Thomas T. McAvoy, *American Catholics: Tradition and Controversy*, 35 THOUGHT 583, 588 (1960)). One could make the same point about Islam—formal equality is relatively easy to obtain, genuine acceptance more difficult.

9. This may be why Imam Feisal Abdul Rauf lists reducing “Western nations’ fear of ‘Islamic States’” as one of the motivations behind his project to establish a Sharia-Compliance Index. Imam Feisal Abdul Rauf, *Justification & Theory of Sharia Law: How the American Declaration of Independence, Bill of Rights and Constitution Are Consistent with Islamic Jurisprudence*, 7 U. ST. THOMAS L.J. 452, 456 (2010).

10. Furthermore, as a community dedicated to “integrating faith and reason in the search for truth,” the University of St. Thomas School of Law seeks to discuss controversial issues with persons of opposing viewpoints.

alternated with acts of religious bigotry. During the controversy over the Florida pastor who wanted to burn the Qur'an, Secretary of State Hilary Clinton referred to a speech from 1790 at Newport, Rhode Island, in which George Washington stated that the United States would give "bigotry no sanction" and "persecution no assistance."<sup>11</sup> Yet five years earlier, officials from New York City insisted that a Catholic church be built outside the city limits and the church, St. Peter's Roman Catholic Church, was subject to anti-Catholic demonstrations in 1806.<sup>12</sup> Clearly, even in the United States, full-fledged religious toleration has always been a work in progress.

A final reason to speak of "tensions" comes from the papers presented at the conference. Each presenter, in his or her own way, questioned the claim that Islamic and liberal democratic values are incompatible. The result is an incredibly rich discussion of Islamic law, liberal values, courts, democracy, and constitution-making among other topics. The summary of this discussion that follows can, by necessity, only scratch the surface.

## II. ISLAMIC LAW IN MUSLIM-MINORITY COUNTRIES

The first group of symposium contributors focused on the role of Islamic law in countries where Muslims are a minority. In a set of moving remarks, U.S. Representative Keith Ellison, the first Muslim elected to the U.S. Congress, noted that conflicts that appear to pit Muslims as opponents of liberal values—as, for example, when Muslim cabdrivers in the Twin Cities refused to transport passengers carrying alcohol—sometimes have more prosaic roots.<sup>13</sup> (According to Ellison, the cab drivers were more concerned about the conditions of their employment, including having bathroom breaks.)<sup>14</sup> For Ellison, the watchword is flexibility—on the one hand, "religious accommodation is part of the American constitutional framework"; on the other, "Islamic law is nowhere near as rigid as some people might represent it to be."<sup>15</sup>

Meanwhile, John Bowen highlighted some of the practical difficulties that emerge in implementing Islamic law in a Muslim-minority country.<sup>16</sup> In a masterful discussion of Islamic divorce law as applied by the Islamic Sharia Council in London and by an English court in a recent case, he moved the discussion from whether Britain should "recognize" Sharia law

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11. Paul Owen et al., *Qur'an Burning Day to Go Ahead Despite Death Threats*, GUARDIAN, Sept. 8, 2010 (quoting Letter of George Washington to the Jews of Newport (1790)).

12. Paul Vitello, *In Fierce Opposition to a Muslim Center, Echoes of an Old Fight*, N.Y. TIMES, Oct. 7, 2010, at A19.

13. U.S. Representative Keith Ellison, Opening Address at the University of St. Thomas Law Journal Symposium: Islamic Law and Constitutional Liberty (Apr. 12, 2010), in 7 U. ST. THOMAS L.J. 403, 409 (2010).

14. *Id.*

15. *Id.*

16. John R. Bowen, *How Could English Courts Recognize Shariah?*, 7 U. ST. THOMAS L.J. 411 (2010).

to how, as a practical matter, the courts and councils should apply Sharia law.<sup>17</sup> Based on his research, Bowen concludes that seeking “a universal set of rules that constitute ‘[S]haria law’” will likely fail.<sup>18</sup> According to Bowen, the better approach “is to draw from English legal resources and common sense the categories and imperatives that respond to the legal matter at hand.”<sup>19</sup>

Sometimes practical approaches can resolve what appears to be a political impasse. In a perceptive analysis of the campaign against Muslims’ use of Sharia law in proceedings brought under the Ontario arbitration laws,<sup>20</sup> law professor and Canadian attorney Faisal Kutty spoke of a lost opportunity to advance the evolution of Islamic law in Canada by “indigenizing Islamic legal rulings.”<sup>21</sup> This would involve the community (*ummah*) taking part in an “internal struggle with its customs, practices, and principles.”<sup>22</sup> As an example of what is possible with a bottom-up, context-sensitive approach to Islamic law, Kutty mentions the Fiqh Council of North America, which adopts legal rulings that are “culturally, politically, and socially relevant to the North American or Western contexts.”<sup>23</sup>

### III. GENERAL APPROACHES TO THE COMPATIBILITY OF ISLAMIC LAW AND CONSTITUTIONAL LIBERTIES

Two of the contributors raised the compatibility question at a more general level. In a work with groundbreaking potential, Imam Feisal Abdul Rauf proposes creating an index that would measure the extent to which a given country complies with the Sharia.<sup>24</sup> The index would serve several goals, including moving “away from a demographic—or institution—based definition of an Islamic state,” to one that focuses on outcomes, clarifying for Muslims the relationship between religion and political power and, as noted above, reducing the fear of Islamic states in the West.<sup>25</sup>

The project, while still in its initial phase, may yield surprising results. One is the weakening of the traditional boundary between majority-Muslim countries (*Dar al-Islam*) and countries in which Muslims make up a minority (*Dar al-Harb*).<sup>26</sup> Here Abdul Rauf notes the large number of Muslims in

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17. *Id.* at 411, 413, 435.

18. *Id.* at 435.

19. *Id.*

20. Kutty, *supra* note 2.

21. *Id.* at 560.

22. *Id.*

23. *Id.* at 595.

24. Abdul Rauf, *supra* note 9. While Abdul Rauf submitted a paper, he was unfortunately unable to attend the conference itself.

25. *Id.* at 454.

26. *Id.* at 468.

Western Europe and North America,<sup>27</sup> as well as the intellectual freedom afforded by most Western countries.<sup>28</sup>

Abdul Rauf points to a special compatibility between the United States and Islam. Part of this relates to the historical circumstance that, during the Enlightenment, “America did not go as far as Europe in eliminating religion and religious thought from its societal worldview.”<sup>29</sup> Another reason relates to the nature of the Declaration of Independence, which, in the tradition of Muslim rights discourse, bases rights on a series of historical wrongs—in the case of the Declaration, wrongs committed by the British government.<sup>30</sup> This reason ties in with what Abdul Rauf calls a “verb-based” conception of human rights, which rests on a series of duties—literally “a list of do’s and don’ts”—standing in contrast to most “noun-based” Western conceptions, which view rights as “entitlements.”<sup>31</sup>

Liaquat Ali Khan addressed the question of the distinctiveness of Islamic law from a slightly different angle.<sup>32</sup> In a detailed, thought-provoking article, Khan divides law into two categories—*fanā* (transient) and *baqā* (eternal).<sup>33</sup> *Fanā* consists of positive law—including jurisprudence (*fiqh*), custom (*urf*), legislation and regulations (*qanun*), and international law (*siyar*)—and is by its very nature “open to modifications and deletions.”<sup>34</sup> *Baqā*—what Khan calls the “Basic Code”—is God’s law. It includes the Qur’an and the Sunnah, and cannot be altered.<sup>35</sup> Moreover, because *Baqā* is divine law, it is not subject to text-skepticism, i.e., where judges “extract diametrically opposing rules from the same words.”<sup>36</sup>

A key element for Khan is the “submission principle,” under which the *fanā* “must all submit to God’s law as revealed in the Basic Code.”<sup>37</sup> This leads Khan to distinguish between supremacy clauses, like the one in the U.S. Constitution,<sup>38</sup> that “uphold[ ] the supernormativity of a human constitution,” and compatibility clauses, like the one in Pakistan’s Constitution (mandating that “existing laws . . . be brought in conformity with the In-

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27. *Id.* at 469.

28. *Id.* at 469–71 (“Rethinking Islam depends upon the freedom to think[,] . . . and thus, for now at least, must be done in the West.”) (citing MOHAMMED ARKOUN, *RETHINKING ISLAM: COMMON QUESTIONS, UNCOMMON ANSWERS IX* (Robert D. Lee ed., trans., 1994)).

29. *Id.* at 473 n.53.

30. Abdul Rauf identifies two dozen specific wrongs the Declaration of Independence attributes to the British. *Id.* at 496, 497.

31. *Id.* at 487.

32. See L. Ali Khan, *Fanā and Baqā Infinities of Islam: Approaches to Islamic Law and Behavior*, 7 U. ST. THOMAS L.J. 511 (2010).

33. *Id.* at 512.

34. *Id.* at 514.

35. *Id.*

36. *Id.* at 531.

37. *Id.* at 541.

38. U.S. CONST. art. VI.

junctions of Islam as laid down in the Holy Qur'an and Sunnah")<sup>39</sup> that submit themselves "to the supernormativity of the Basic Code."<sup>40</sup>

As a consequence of this difference, the U.S. Constitution is subject to "text-skepticism" in a way an Islamic Constitution grounded in the Basic Code should not be.<sup>41</sup> Moreover, the basis of obedience to an Islamic Constitution differs from a secular constitution in that the former is legitimated by fears of eternal punishment.<sup>42</sup> Accordingly, the Qur'an repudiated the attitude that it is okay to sin so long as one does not get caught, because "God is 'aware of all that you do.'"<sup>43</sup>

#### IV. ISLAMIC LAW IN MUSLIM-MAJORITY COUNTRIES

The final group of participants focused on how the tension between Islamic law and constitutional liberty is managed in majority-Muslim states. In his keynote address, Noah Feldman provided a useful framework for looking at how Islamism<sup>44</sup> plays out in majority-Muslim states. First, one can view Islamism at the level of politics.<sup>45</sup> Here Feldman notes the ability of Islamist political parties to garner votes—at least as long as they are shut out of political power.<sup>46</sup>

The second way Islamism can influence a majority-Muslim state concerns philosophy.<sup>47</sup> Just as in the West, the Muslim world frames issues of constitutional philosophy as a series of never-ending debates.<sup>48</sup> The main issues of the debate over Islamism concern statements that the Sharia is the source of law, clauses that invalidate laws that violate Islamic law (repugnancy clauses), and the use of Islamic norms in family law.<sup>49</sup>

The final category Feldman proposes is the legal-institutional plane, which includes positive law and the institutions that administer it.<sup>50</sup> The challenges of an individual lawsuit arise in this plane. Here, in a manner similar to Bowen's description of Islamic divorce law in England, the individual lawyer must navigate a sea of institutional details to do the best for the client.<sup>51</sup>

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39. PAKISTAN CONST. art. 227(1).

40. Ali Khan, *supra* note 32, at 543.

41. *Id.* at 532.

42. *Id.* at 552.

43. *Id.* at 555 (quoting Qur'an 6:3).

44. Feldman defines Islamism as a movement incorporating the slogan "Islam is the answer." Feldman, *supra* note 5, at 441–42.

45. *Id.* at 441.

46. By contrast, once Islamist parties come into office, they tend to lose votes—either because they no longer gain protest votes or because, once in office, they are subject to the same temptations to corruption as any other party. *Id.* at 442, 448.

47. *Id.* at 443.

48. *Id.* at 446.

49. *Id.* at 444–45.

50. *Id.* at 446.

51. *Id.* at 447.

These three categories are interrelated.<sup>52</sup> Looking toward the future, Feldman rejects the claim that Islam and democracy are incompatible, and suggests that Islamism might succeed in creating new institutions to bring about Sharia-based constitutional governance.<sup>53</sup> While such institutions could just as easily collapse,<sup>54</sup> the most likely outcome is a “muddling through,”<sup>55</sup> in which new Islamic institutions hover on the “periphery” of society.<sup>56</sup> Whether such “muddling through” is positive turns on whether the legal-institutional plane functions smoothly enough for citizens to believe the state reflects their values.<sup>57</sup>

The remaining panelists look at the prospects for Islamic law in specific majority-Muslim countries. In a thoughtful description of the implementation of Islamic law in the Aceh province of Indonesia, Asma Uddin raises the broad question of “whether Sharia can ever be translated into positive law without implicating religious freedom.”<sup>58</sup>

Her article describes laws in Indonesia as a whole, and Aceh in particular, that restrict basic human rights.<sup>59</sup> Uddin attributes the state of affairs in Aceh in part to a change in its political structure—in earlier times, support for Sharia law came from the priestly class, which used it largely to check the power of the Sultan.<sup>60</sup> More recently, however, “Sharia implementation gives the ruler both religious and political authority, thus removing checks on power and inevitably leading to the type of authoritarianism evident in many parts of the Muslim world.”<sup>61</sup> Uddin concludes that the Sharia implementation in Aceh has failed to promote public order or increase religiosity.<sup>62</sup> If this is true, then Aceh may be a place where the Islamist movement should fail because, in Feldman’s terms, it failed to “deliver distinctive, effective institutions that actually improve people’s lives.”<sup>63</sup>

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52. *See id.* at 449 (“Philosophical ideas are promoted by actual human beings who are then connected to actual institutions.”).

53. *Id.* at 449–50.

54. *Id.* at 450.

55. *Id.*

56. *Id.*

57. *Id.* at 451.

58. Asma Uddin, *Religious Freedom Implications of Sharia Implementation in Aceh, Indonesia*, 7 U. ST. THOMAS L.J. 603, 604 (2010).

59. *Id.* at 611–14 (describing Indonesia’s wide bans on blasphemy and proselytizing), 633 (describing provincial bans on intoxication, gambling, being alone with a non-relative of the opposite gender, fornication, homosexuality, adultery, and false accusations of adultery).

60. *Id.* at 643 (citing NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* 29, 33 (2008)).

61. *Id.* at 644.

62. *Id.* at 647–48.

63. Feldman, *supra* note 5, at 450. Part of the problem is also that the Aceh Sharia code led to the politicization of Islam by favoring one interpretation above all others. Uddin, *supra* note 58, at 2. So, for Uddin, the difficulty with Aceh comes from a particular institutionalization of Islamic law, rather than from Islamic law itself (or from Muslims). This distinction is often lost on nativist American anti-Muslim bigots, such as Rex Duncan, an Oklahoma legislator and one of the main

On the other hand, Clark Lombardi, in an exhaustive study of Pakistani Judge A. R. Cornelius, raises the intriguing possibility that Islamization, in some circumstances at least, “can actually help *strengthen* the thickly liberal rule of law.”<sup>64</sup> Born into an Indian family of Christian academics, Cornelius converted to Catholicism, and, taking Pakistani citizenship, served on the Pakistani Supreme Court during the 1950s and 1960s.<sup>65</sup> He was perplexed at the reluctance of the Pakistani elite to latch on to arguments against state power based on the British common law.<sup>66</sup> Over time, he came to two realizations: (1) Pakistanis, post-Independence, were not necessarily attached to the common law; and (2) in Britain itself, the legitimacy of the common law depended on the extent to which it was seen to have a divine pedigree.<sup>67</sup> Meanwhile, developments in the Arab world (most notably the revised Egyptian Civil Code drafted according to modernist Islamic principles),<sup>68</sup> suggested the possibility of a liberal Islamic code, which judges could interpret even if they lacked classical Islamic training.<sup>69</sup>

Applying his new found insights to Pakistan of the mid-1960s, Cornelius called for lawyers to lend their prestige to an Islamization process that would still allow a role for lawyers as interpreters of the law.<sup>70</sup> This, believed Cornelius, was the only way “a stable legal order could emerge.”<sup>71</sup> As Lombardi points out, Cornelius could take harsh positions—such as questioning the feasibility of banning honor killings,<sup>72</sup> or comparing amputation and other traditional Islamic punishments to their British counterparts.<sup>73</sup> Islamization for Cornelius, however, was the only way to re-establish “a judicially supervised, liberal democracy” in Pakistan and, as such, was worth the risk of what Lombardi calls “non-trivial concessions to illiberal popular beliefs about God’s command.”<sup>74</sup>

Turning his attention to more recent Pakistani history, Lombardi argues convincingly that even though Islamization is often seen as a top-down process put into place by General Zia-al-Haq in the 1970s, the judiciary

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authors of the Oklahoma Sharia ban, who warned that Muslims were threatening the “liberties and freedom [of] our children.” James C. McKinley Jr., *Oklahoma Surprise: Islam as an Election Issue*, N.Y. TIMES, Nov. 15, 2010, at A12, available at <http://www.nytimes.com/2010/11/15/us/15oklahoma.html?pagewanted=all>.

64. Clark Lombardi, *Can Islamizing a Legal System Ever Help Promote Liberal Democracy?: A View from Pakistan*, 7 U. ST. THOMAS L.J. 649, 650 (2010).

65. *Id.* at 651–52, 655, 689.

66. *See id.* at 667.

67. *Id.* at 665–67. This is quite similar to Ali Khan’s notion of a “compatibility clause” under which all positive law must conform to the Basic Code of divine law. *See* Ali Khan, *supra* note 32, at 543. Interestingly, Khan uses Pakistan as his example of such a clause. *Id.*

68. Lombardi, *supra* note 64, at 29–36.

69. *Id.* at 672–73.

70. *Id.* at 674.

71. *Id.*

72. *Id.* at 676.

73. *Id.* at 679.

74. *Id.* at 680.

played a major role in Islamizing Pakistan’s laws, doing so in a way that challenged Zia-al-Haq himself.<sup>75</sup> Based on his study, Lombardi suggests that countries like the United States, rather than supporting “liberal secularism,” should instead encourage lawyers in majority-Muslim countries to promote a liberal interpretation of Islam.<sup>76</sup>

As we have seen, one of the methods to ensure the Islamic nature of a state is through “repugnancy clauses.”<sup>77</sup> Haider Ala Hamoudi asks why Iraq’s repugnancy clause (Article 2 of its Constitution), itself the subject of considerable debate during the passage of the Iraqi constitution, has yet to be used.<sup>78</sup> After dismissing a number of conventional explanations—such as a general lack of constitutional activity in Iraq—he concludes that the Shi’i Najaf-based religious hierarchy has determined that it does not need the repugnancy clause to enforce religious norms in the region it dominates, and that any attempt to use the clause will lead to a backlash by Sunnis and secular Iraqis.<sup>79</sup>

Indeed, Iraq’s repugnancy clause is better understood as an assertion of Islamic identity. To show this, Hamoudi gives the example of the Iraqi Kurds who, while much more secular than the rest of Iraq, adopted a similar provision in their constitution.<sup>80</sup> The provision was meant to deflect Iraqi-Arab criticism of other parts of the constitution by showing that the Kurds shared Iraq’s Muslim identity.<sup>81</sup>

The Kurdish example shows how Feldman’s plane of constitutional philosophy can, at times, be quite divorced from his legal institutional plane.<sup>82</sup> It also shows that sometimes a majority-Muslim state can adopt an “Islamic” constitutional provision for largely symbolic reasons. Finally, Hamoudi’s larger analysis of Iraq carries a lesson for students of constitution making, who must always distinguish between the constitution in the book and the constitution in action.<sup>83</sup>

The final contributor, Russell Powell, raises the question of whether Turkey’s Justice and Development Party (AKP) can translate its “Islamist” rhetoric into something compatible with Turkey’s long-standing tradition of

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75. *Id.* at 688 (citing MARTIN LAU, *THE ROLE OF ISLAM IN THE LEGAL SYSTEM OF PAKISTAN* 1 (2006)).

76. *Id.* at 691.

77. Ali Khan, *supra* note 32, at 542–43 (describing Pakistan’s repugnancy clause); Feldman, *supra* note 5, at 445; Haider Ala Hamoudi, *Ornamental Repugnancy: Identitarian Islam and the Iraqi Constitution*, 7 U. ST. THOMAS L.J. 692, 692 (2010).

78. Hamoudi, *supra* note 77, at 692–93.

79. *Id.* at 702–05 (describing reasons for juristic restraint).

80. *Id.* at 711–12.

81. *Id.*

82. *See* Feldman, *supra* note 5, at 443.

83. In a wonderful analogy, Hamoudi compares scholarship on Iraq’s repugnancy clause to a hypothetical observer to the United States who debated—even after the legal issue was made clear in *McCulloch v. Maryland*, 17 U.S. 316 (1819)—whether the Constitution granted Congress the power to authorize a national bank. Hamoudi, *supra* note 77, at 695.

Kemalist secularism.<sup>84</sup> Powell largely answers this question in the affirmative with the help of analyses by leading observers of the Turkish scene.<sup>85</sup> These observers divide into two groups. The modernists argue that the AKP, by focusing on issues of religious freedom and group rights, have led to a more vibrant political culture in Turkey.<sup>86</sup> The post-modernists question whether Kemalist secularism is, in fact, the most authentic expression of Turkish identity.<sup>87</sup>

Particularly noteworthy is the idea that parties like the AKP challenge Turkey's secularist elite without directly calling for a religious state.<sup>88</sup> This allows the AKP to present itself as a representative of conservative, yet democratic values.<sup>89</sup> Equally significant is the Islamist parties' success in gaining support of "wealthier mercantile families" through their opposition to corruption<sup>90</sup>—precisely what Feldman would suggest might happen in a non-competitive political environment.<sup>91</sup> But in Turkey, presumably, the Islamic parties have made headway under conditions of relative political freedom. Finally, Powell raises the intriguing possibility that Turkey may be transitioning from an era of aggressive secularism, marked by "government control and the erasure of religion from public life" to passive secularism, characterized by "free exercise and anti-establishment principles."<sup>92</sup>

## V. CONCLUSION

Taken together, the ten essays in this volume pay tribute both to the diversity of Islam and the diverse ways scholars have theorized the relationship between Muslims, Islam, Islamic Law, liberal values, constitutionalism, and democracy. The authors differ in the approaches they take, the countries they study, and the conclusions they reach. Yet they share a common commitment, as stated by Noah Feldman, to take as their starting point the understanding that Islamic law and constitutional liberty are compatible.<sup>93</sup> As such, this volume sends a message to those in American public life who have, in recent months, called this starting point into question.

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84. Russell Powell, *The Study of Secularism and Religion in the Constitution and Contemporary Politics of Turkey: The Rise of Interdisciplinarity and the Decline of Methodology?*, 7 U. ST. THOMAS L.J. 714, 714 (2010).

85. *Id.* at 725.

86. *Id.* at 726.

87. *Id.*

88. *Id.* at 723.

89. *Id.* at 714.

90. *Id.* at 722–23.

91. Feldman, *supra* note 5, at 441, 448.

92. Powell, *supra* note 84, at 724.

93. Feldman, *supra* note 5, at 451.