

ISLAMIC AND AMERICAN CONSTITUTIONAL LAW:
BORROWING POSSIBILITIES OR A HISTORY OF BORROWING?

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INTRODUCTION

Islam is commonly viewed in the West as being incompatible with democracy. It is also viewed as an "Oriental" religion that has spawned violence and encouraged human rights violations. Because of the historical interaction between the West and Islam, the United States has recently been supporting efforts to export its democratic principles and human rights values to Muslim countries. In this context, the question of constitutional borrowing gains special significance.

To assess the possibilities of constitutional borrowing between Islamic countries and the United States, it is important to first discuss the historical relation between the two, as well as between Islamic concepts and early American thought on democracy. For this reason, some basic features of Islamic constitutionalism will be introduced and analyzed. Islamic concepts are rooted in the *Qur'an*, the most fundamental source of guidance for all Muslims, and related secondary sources. Examination of these sources reveals that most Orientalist writing on the nature of Islam during the eighteenth century was either distorted or false. Most importantly, for our purposes in this article, this examination will also provide the reader with a more adequate basis for comparing Islamic constitutionalism with American constitutionalism.

The resulting data will establish a solid basis for an answer to the question: "Can American democracy be exported to Muslim countries today?" This article answers this question by concluding that (i) democracy is critically needed in many Muslim countries, but that (ii)

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attempts to transplant Western secular systems of democracy to Muslim societies ignore these societies' fundamental spiritual nature, and that (iii) a more indigenous Islamic solution to the problem is more likely to succeed. The salient features of an Islamic solution to the perceived secular-spiritual conflict inherent in constitutional borrowing between Muslim and Western societies will be described in the body of this paper.

I. THE AMERICAN VIEW OF ISLAM

Islam is often viewed as an "Eastern" or "Oriental" religion, which is in its very essence incompatible with democracy and disrespectful of human rights.¹ Its recent visibility in the United States and Europe has not ameliorated this view in any significant way. American Muslim immigrants, for example, are viewed even today as alien to our system of democracy and human rights, and hence somewhat suspect.² This suspicion is deeply-rooted and has been manifest as early

¹ See, e.g., Judith Miller, *The Challenge of Radical Islam*, FOREIGN AFFAIRS, Spring 1993, at 43, 50-54 (quoting Bernard Lewis that Islam and liberal democracy do not make natural bedfellows and discussing human rights problems); JOHN ESPOSITO & JOHN VOLL, ISLAM AND DEMOCRACY 23 (1996) (stating that non-Muslims and some conservative Muslims have argued that it is impossible to have an "Islamic democracy"); Kathryn Webber, *The Economic Future of Afghan Women: The Interaction Between Islamic Law and Muslim Culture*, 18 U. PA. J. INT'L ECON. L. 1049, 1056-57 & n.27 (1997) (referring to the ongoing debate over the compatibility of Islam and international human rights agreements); *Dressing Down*, FIN. TIMES (London), Feb. 1, 1994, at 19 (announcing a debate at the Oxford Union on whether Islam and democracy are compatible); Ken Adelman, WASH. TIMES, Apr. 3, 1996, at A15 ("That Islam remains incompatible with liberty limits the spread of democracy in the post-communist world."). For more on "Orientalism," see EDWARD SAID, ORIENTALISM 59-61, *passim* (1979).

² See generally COUNCIL ON AM-ISLAMIC REL. RES. CENTER, THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES 1998, at 10, 11, 24 (1988). The negative perception of Islam in the West has been demonstrated in newspaper reporting:

After decades of scaring ourselves witless about reds-under-the-bed, it now turns out that we were worrying about the wrong men in beards. It's not the boring drones of Marxist-Leninism who threaten our world, but the mullahs-under-the-mattress, the supposed wild-eyed religious fanatics with bombs under their arms that we should have been terrified of all along as we live in an age of Islamaphobia.

Gavin Esler, *Stereotypes of Terror That Are Fundamentally Flawed*, SCOTSMAN, Aug. 31, 1993, at 11; see also Larry B. Stammer & Carla Hall, *Terror in Oklahoma City*, L.A. TIMES, Apr. 22, 1995, at A22 (reporting that in the aftermath of the Oklahoma City bombing American Muslims were stereotyped as terrorists and became targets of hostility). This attitude, while disproportionately directed against Muslims, is not and has not been unique to Muslims. French visitors to the United States in the eighteenth century at times received similar treatment. For example, eighteenth century author Abbe Constatin Francois de Chasseboul Volney's presence in the United States sparked much controversy. Volney was accused in 1797 of being a French spy sent to obtain information to prepare for the re-occupation of Louisiana. See 4 E. MILLICENT SOWERBY, CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON 213 (1953); Letter from John Adams to Thomas Jefferson (Jan. 23, 1825), in 16 THE WRITINGS OF THOMAS JEFFERSON 102-03 (Albert Ellery Bergh ed., 1903) [hereinafter BERGH] (commenting on the lack of freedom of inquiry and speech in the United States and explicitly mentioning that translating the works of Volney and Dapin could get an individual in trouble). Volney is also singled out by the drafters of the Alien and Sedition Act of 1798. Jefferson sought to attack the proposed law before it ap-

as the eighteenth century.³ During that period, several American novels featured either fictional Muslim spies in America or oppressed Muslim women confined to the seraglio.⁴

Many eighteenth century authors, from Voltaire to Prideaux and Volney, wrote important works about Islam that were eagerly read in the United States.⁵ Unfortunately, some authors were not quite concerned about historical accuracy.⁶ Furthermore, those individuals who contemplated religious views somewhat different from those of the mainstream were branded as “infidels.”⁷ Various books about Islam that appeared in the eighteenth century created an atmosphere of disdain, hostility and distrust of Muslims. Among these books was one entitled *The Nature of the Imposture, Fully Displayed in the Life of Mahomet*.⁸ The message of the book was that the combined use of false religion and military power could subdue people.⁹ Both the book and the message were used by Mathew Lyon, a staunch critic of the Federalists, to attack President Adams.¹⁰

peared on the books. In a letter to James Madison, Jefferson mentioned that the bill would have given Congress the power to deport suspected aliens: “this is understood to be meant for Volney and Collet.” Letter from Thomas Jefferson to James Madison (Apr. 26, 1798), in 18 BERGH, *supra*, at xviii.

³ See ROBERT J. ALLISON, *THE CRESCENT OBSCURED: THE UNITED STATES AND THE MUSLIM WORLD 1776-1815*, at xv-xvii, 20 (1995). A number of books on the Muslim world were published in the United States in the 1790s. See *id.* at xv-xvii, 20. These novels, histories, captivity narratives, and biographies on the Prophet Muhammad conveyed a picture of impoverishment wrought by despotic rulers, honest commerce perverted into piracy, and debased women. See *id.* In essence, to the Americans striving to forge a new country, these writings conveyed a cautionary lesson of what must be avoided.

⁴ See Timothy Worthington Marr, *Imagining Ismael: Studies of Islamic Orientalism in America from the Puritans to Melville 103* (1997) (unpublished Ph.D. dissertation, Yale University) (on file with the Yale University Library); see also ALLISON, *supra* note 3, at 61-85 (providing an Orientalist view of Muslim women).

⁵ See, e.g., HUMPHREY PRIDEAUX, *THE TRUE NATURE OF THE IMPOSTURE, FULLY DISPLAYED IN THE LIFE OF MAHOMET* (1697); ABBE CONSTANTIN FRANCOIS DE CHASSEBOUF VOLNEY, *THE RUINS, OR A SURVEY OF THE REVOLUTIONS OF EMPIRES* (1796) [hereinafter *THE RUINS*]; ABBE CONSTANTIN FRANCOIS DE CHASSEBOUF VOLNEY, *TRAVELS THROUGH EGYPT AND SYRIA IN THE YEARS 1783, 1784 & 1785* (1798) [hereinafter *TRAVELS*]; FRANCOIS MARIE AROUET DE VOLTAIRE, *MAHOMET, THE IMPOSTER: A TRAGEDY IN FIVE ACTS* (1777).

⁶ See ALLISON, *supra* note 3, at 59. Muslims were consistently depicted as submissive and accepting of religious and political despotism. See *id.* The claim that Islam is the source of political tyranny was often a central theme. Prideaux, for instance, depicted Prophet Muhammad as a religious heretic who had exploited religious indifference to create religious and ultimately political tyranny. See *id.* at 38.

⁷ See ABBE CONSTANTIN FRANCOIS DE CHASSEBOUF VOLNEY, *VOLNEY'S ANSWER TO DOCTOR PRIESTLY ON HIS PAMPHLET ENTITLED, "OBSERVATIONS UPON THE INCREASE OF INFIDELITY"* 4 (1797) [hereinafter *OBSERVATIONS*]. Priestly's pamphlet attacked Volney personally and his work *The Ruins*. In response, Volney wrote that Priestly was pleased to class his pamphlet among the writings of modern unbelievers, see *id.* at 4, and replied that no one had the right to ask him of his religious opinions, see *id.* at 8.

⁸ PRIDEAUX, *supra* note 5.

⁹ See *id.*, *passim* (especially 23, 25, 27, 32, 68-69, 89-90) (warning that the consequences of religious indifference would be religious slavery).

¹⁰ See ALLISON, *supra* note 3, at 41. Lyon was jailed for charging Adams with using the “sacred name of religion” as a “State engine to make mankind hate and persecute one another.”

Another book, entitled *Cato's Letters*, an English work which became highly influential in this country, pronounced the Prophet Muhammad a great impostor who deceived and destroyed his people with their own consent.¹¹ In support of their view, the authors cited the Turkish empire and other Muslim states which they claimed forbade printing and thus restricted free speech.¹² Other authors corroborated these views directly or indirectly.¹³ Even Volney, who was a great admirer of old civilizations, noted the state of apathy and indolence that had permeated many Muslim countries.¹⁴

Volney and many other writers were concerned about the reasons that contributed to the decline of Islamic civilization. They wanted later civilizations, especially the nascent American society, to avoid a similar fate. Their conclusions varied. Some blamed what they perceived to be the Islamic attitude of fatalism.¹⁵ Others blamed what they believed to be the discouragement of free thinking within Islamic civilizations.¹⁶ There was, however, general agreement that tyranny, fostered by religion, coupled with the acceptance by the Muslim people of such tyranny, were at the heart of the problem.¹⁷

Id. Lyon was convicted because of this and other statements he had made in Congress, and in letters to his constituents, stating that Adams was a "notorious and seditious person, and of a depraved mind, and wicked and diabolical disposition." *Id.*

¹¹ See 1 JOHN TRENCHARD & THOMAS GORDON, *CATO'S LETTERS, OR ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS*, vol. II, at 131 (Russell & Russell 3d ed. 1969) (1733).

¹² See 2 TRENCHARD & GORDON, *supra* note 11, vol. III, at 33 ("In Turkey, Printing is forbid [sic] . . . Nor is printing in other Arbitrary Countries of much use but to rivet their Chains."). "Arbitrary Countries" refers to authoritarian countries, many of which were Muslim. See *id.* at 301 (discussing the examples of the "Caliphs of Egypt," the "Monarchy of Persia," and the empire of Turkey); *id.*, vol. I, at 188 (discussing the "Muley . . . of Morocco," and the Turkish Court); see also ALLISON, *supra* note 3, at 47-48 (claiming that in the West, books and pamphlets allowed all issues to be discussed freely and expressed in print, while in Turkey, only one book had been printed in the eighteenth century) (citing JOHN FOSS, *A JOURNAL OF THE CAPTIVITY AND SUFFERINGS OF JOHN FOSS, SEVERAL YEARS A PRISONER AT ALGIERS: TOGETHER WITH SOME ACCOUNT OF THE TREATMENT OF CHRISTIAN SLAVES WHEN SICK: —AND OBSERVATIONS ON THE MANNERS AND CUSTOMS OF THE ALGERINES 75-76* (1798)).

¹³ See ALLISON, *supra* note 3, at 51-54 & n.26. For example, many American writers concluded that a wicked religion had fostered bad government, and a bad government had, in turn, thwarted social progress. See *id.* at 53-54. Jean Charles Leonard Simonde de Sismondi concluded that the poison that had destroyed the Muslim world came from within. See *id.* at 51.

¹⁴ See TRAVELS, *supra* note 5, at 7-8; see also ALLISON, *supra* note 3, at 48 (noting the fatalistic attitude of Muslim people as leading to "indolence").

¹⁵ See ALLISON, *supra* note 3, at 48 (arguing that Volney in particular believed that the "Islamic idea of predestination and the Muslim's willingness to accept everything and anything as the will of God" led to indolence). Allison argued that Turkish despotism had no reason to change, for its mere existence was viewed as reflecting God's will. See *id.* For a more recent discussion of the notion of Islamic "fatalism," see THOMAS W. LIPPMAN, *UNDERSTANDING ISLAM: AN INTRODUCTION TO THE MUSLIM WORLD 75-78* (2d. rev. ed. 1995).

¹⁶ See ALLISON, *supra* note 3, at 50-51 (discussing how religious intolerance had stifled free inquiry and prevented men from rising out of their misery in Egypt and Syria).

¹⁷ The perception of tyranny in Islamic countries generally available to Westerners is illustrated in *Cato's Letters*:

It is even Capital , and certain Death [in Turkey], only to reason freely

Subsequent discussion centered on how the American system of governance could avoid such a fate.¹⁸

Nevertheless, Islamic constitutional precedents played a part in the constitutional debates in the United States.¹⁹ For example, Alexander Hamilton argued for giving the federal government the right to impose taxes by referring to the example of the Ottoman empire. He noted that the sovereign of that empire had no right to impose a new tax.²⁰ As a consequence, the Ottoman sovereign permitted the governors of the provinces to impose these taxes, and then squeezed out of the governors the sums he required for his and the state's expenses.²¹ Hamilton concluded, "[w]ho can doubt that the happiness of the people in both countries would be promoted by competent authorities in the proper hands . . . ?"²²

In the debates of 1787, Anti-Federalists, using what they judged to be the example of the despotic Turkish government, argued against a strong central government, and demanded guarantees of individual liberties and religious freedom.²³ In particular, Daniel Webster, Patrick Henry and Patrick Dollard spoke of the evils of Turkish despotism.²⁴ Alexander Hamilton, on the other hand, saw deeper into the

upon their *Alcoran* A sure sign of Imposture [Islam, viewed as a false religion]! But by Imposture, Stupidity, and Janzaries [military or police force] his Throne is supported; and his vast but thin Dominions, know no inhabitants but barbarous, ignorant, and miserable Slaves.

2 TRENCHARD & GORDON, *supra* note 11, vol. III, at 32-33 (bracketed statements added by Editor); *see also* 1 TRENCHARD & GORDON, *supra* note 11, vol. II, at 131 (noting the acceptance of Muslims of Mahomet, an "enem[y] of Liberty, Truth, and Peace"); *id.* at 300-01 (discussing the tyranny of Egypt, Persia and Turkey); *id.*, vol. I, at 187-89 (discussing the submissiveness of Muslims to tyranny); ALLISON, *supra* note 3, at 51-53, 59 (discussing the Western use of Muslim culture as an illustrative example of the different consequences of religious and political beliefs); *supra* notes 6, 13-15 and accompanying text.

¹⁸ *See* Patrick Henry, *Virginia Convention, 16 June 1788*, in 2 DEBATE ON THE CONSTITUTION 696 (Bernard Bailyn ed., 1993) (examining the issue that there is no provision in the Constitution against maintaining a standing army during times of peace). *See generally* ALLISON, *supra* note 3, at 57-59 (citing the frequent reference to Muslim cultures during the constitutional debates of 1787-88).

¹⁹ *See* ALLISON, *supra* note 3, at 57, 59 (citing reference to Muslim cultures during the constitutional debates of 1787-88). Libertarians, such as Mathew Lyon and Thomas Paine, as well as conservatives, including John Adams and Alexander Hamilton, employed the popular view of Islam in their political arguments. *See id.* at 59. Anti-Federalist critics such as Patrick Dollard, during the South Carolina Convention of 22 May 1788, and Patrick Henry, in the Virginia Convention of 16 June 1788, used the image of Turkish despotism to attack the proposed government. *See id.* at 57-58.

²⁰ *See* THE FEDERALIST NO. 30, at 188 (Alexander Hamilton) (Jacob Cooke ed., 1961).

²¹ *See id.* (arguing for centralized authority to levy taxes by analogizing to the negative consequences illustrated by the Turkish empire).

²² *Id.*

²³ *See* ALLISON, *supra* note 3, at 57.

²⁴ *See* Patrick Dollard, *South Carolina Convention, 22 May 1788*, in 2 DEBATE ON THE CONSTITUTION, *supra* note 18, at 593-94; Patrick Henry, *Virginia Convention, 16 June 1788*, in 2 DEBATE ON THE CONSTITUTION, *supra* note 18, at 696; Daniel Webster, *A Citizen of America*, in 1 DEBATE ON THE CONSTITUTION, *supra* note 18, at 150-51 (arguing against a constitutional provision prohibiting a standing army during times of peace).

Turkish example, recognizing a complex power structure. He argued that, from one perspective, the Turkish sultan was in fact weak and had limited powers.²⁵ Hamilton then concluded that a strong central government would protect people from oppressive local governments.²⁶

Western commentators on Islam, as external observers, viewed Muslim regimes as embodiments of Islamic principles,²⁷ although, as a later section of this paper will show, nothing could have been further from the truth. This Western misperception of Muslim regimes made it more difficult for most Western authors to understand or present Islam as it was truly revealed in the *Qur'an*.²⁸ This problem has persisted in various degrees in this country for the last couple of centuries.

While Islam and Muslim countries were understood by the American population from the point of view of the "Other," some Founding Fathers made serious efforts to educate themselves about Islam and its civilizations. Despite these efforts, the Founding Fathers' attempts to avoid what they saw as the underlying reasons for the failure of democracy in Muslim countries were ultimately misdirected: Their misunderstanding of Muslim civilizations was based on inaccurate or incomplete information, which produced unreliable analysis.

In this article, I would like to revisit the issue of democracy in Muslim countries, and provide my own analysis for its failure. I shall then inquire as to whether our Founding Fathers, notwithstanding erroneous analysis, succeeded in avoiding the pitfalls that frustrated attempts to establish a stable Muslim *shuratic* (consultative) democracy. I shall also inquire as to whether the resulting American democratic system is so alien to Muslim thinking as to make its export to Muslim countries an impossibility, or whether the resulting system represents a truly viable solution for Muslim problems today.

²⁵ See FEDERALIST NO. 30, *supra* note 20, at 188 (noting that the sovereigns in the Turkish empire, although absolute masters of their subjects, had no right to impose taxes).

²⁶ See *id.* at 188-89 ("In America, from a like cause, the government of the Union has gradually dwindled into a state of decay, approaching nearly to annihilation.").

²⁷ Compare *supra* text accompanying notes 15-18, with *infra* Section V (discussing subsequent events which contributed to the demise of genuinely Islamic democratic principles in Muslim civilizations).

²⁸ See *infra* notes 37-44 and accompanying text. George Sale was careful to cast his discussion of the Prophet Muhammad in negative terms, in conformity with the attitude of the day. Sale took liberty, however, in praising the Prophet for his virtue as a leader, see SALE, *infra* note 38, at 51, and commended the Prophet's ability to disseminate knowledge of the "true God" to the "pagan Arabs." *Id.* As to particular Islamic principles, Sale discussed the treatment of women, acknowledging that the Prophet enjoined Muslims to treat women with respect and recognize their right to inherit from their parents, husbands and other relatives. See *id.* at 183. Sale also noted that Islam put an end to the pagan custom of female infanticide. See *id.* at 174.

II. THE VIEWS OF THE FOUNDING FATHERS

Many of the Founding Fathers were not as uninformed about Islam as are the rest of us, even today. Indeed, some made a special effort to read about Islam and related ancient civilizations.²⁹ Thomas Jefferson's library contained at least one copy of the *Qur'an* and was rich with books about ancient civilizations, including Islamic ones.³⁰ Jefferson appeared to consider his knowledge of these matters important for the development of the American model of political governance. In that approach, he was not alone.

Madison, for example, read about ancient confederacies before formulating his own proposal for a federal system in the United States.³¹ The resulting system, however, was decidedly American. It is, therefore, not surprising that T. J. Barlow reported to Jefferson from Paris that the "federality" of our system of government "is not at all understood in Europe even in theory. The best writers dont [sic] know what we mean by it."³²

It is sometimes easy to forget how exciting the period was in which our Founding Fathers lived. It was a period in which they felt that they could design a system of governance from which the rest of the world would benefit.³³ They took that responsibility seriously. So,

²⁹ See generally 1-5 SOWERBY, *supra* note 2 (relating that Jefferson's personal library, sold to the Library of Congress in 1812, contained a significant number of books on these subjects, including works by Volney, comparative religious works by Joseph Priestly, Petis de la Croix's *Histoire de Timur Bec*, Kosmopolitos' *The Revolt of Ali Bey*, Sir Paul Rycout's *The History of the Present State of the Ottoman Empire*, Thomas Broughton's *History of All Religions*, and Samuel von Pufendorf's *The Law of Nature and Nations*); see also THOMAS JEFFERSON'S LIBRARY: A CATALOG WITH THE ENTRIES IN HIS OWN ORDER 58 (James Gilreath & Douglas L. Wilson eds., 1989); DOUGLAS L. WILSON, JEFFERSON'S BOOKS (1996) (discussing Jefferson's library and book collections).

Alexander Hamilton and James Madison evaluated the governmental structures of the Ottoman Empire and Persia. See THE FEDERALIST NOS. 19, 30, reprinted in 4 THE PAPERS OF ALEXANDER HAMILTON, 384-90, 450-51 (Harold C. Syrett ed., 1962); *Constitutional Convention: Remarks on the Abolition of the States*, reprinted in 4 THE PAPERS OF ALEXANDER HAMILTON, *supra*, at 211.

³⁰ See FRANK L. DEWEY, THOMAS JEFFERSON LAWYER 14 (1986) (noting that records of the *Virginia Gazette* show that Jefferson purchased a copy of Sale's *Koran* while he was a student at the College of William & Mary in 1764-65). Most likely, Jefferson owned two copies of the *Qur'an*, as Jefferson lost all his papers and books in the February 21, 1770, fire which destroyed his Shadwell, Virginia home. See *id.* at 51. Yet a copy of the *Qur'an* was included in Jefferson's collection sold to the Library of Congress in 1812. See 2 SOWERBY, *supra* note 2, at 90.

³¹ See Letter from James Madison to Thomas Jefferson (Apr. 27, 1785), in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1790, at 367-71 (James Morton Smith ed., 1995) (requesting books on ancient and modern federal republics from Thomas Jefferson while Jefferson was in Paris).

³² Letter from Joel Barlow to Thomas Jefferson (Feb. 11, 1804), microformed on Thomas Jefferson Papers, Manuscript Division (Library of Congress).

³³ See Letter from Joel Barlow to Thomas Jefferson (Aug. 25, 1801), microformed on Thomas Jefferson Papers, Manuscript Division (Library of Congress) ("I now indulge myself in the hope that we are not to lose the fruits of former labors, but that we may be wise enough to improve the unspeakable advantages which we possess, and that other nations may have at least an opportunity of profiting by our example.").

while the general public was referring to Prophet Muhammad as an "infidel" and an "imposter," Jefferson was reading and corresponding with Volney, the author of controversial books on ancient Middle Eastern civilizations.³⁴ Jefferson even quietly translated parts of Volney's controversial book entitled *The Ruins*, which discusses Islamic civilizations, among others. Jefferson asked Volney to keep this fact confidential, a testimony to the political pressures of the time.³⁵

The Founding Fathers were interested in any precedent, regardless of geography, which could illuminate their work. Patrick Henry, for example, asked the Virginia ratifying convention, "Who has enslaved France, Spain, Germany, Turkey and other countries which groan under tyranny? They have been enslaved by the hands of their own people."³⁶ It was important for the Founding Fathers to lay down the foundation of a system of government which would not breed apathy or result in tyranny. To this end, the example set by the Muslim states was important, given the stature and long history of the Islamic civilization.

Not all that the Founding Fathers read about Islam was negative. Despite popular opinion, some concluded that they needed to have a better understanding of Islam in order to reach a correct analysis. For this reason, Jefferson and others read many books that the public found highly controversial. The first volume of Sale's *Koran*,³⁷ owned by Jefferson, consisted of the author's exposition and personal assessment of the Prophet Mohammad and the religion he professed.³⁸ In a gesture reflecting public opinion, Sale refers to the Prophet as an "infidel" and an "imposter."³⁹ The thrust of his discussion, however, is to provide a fair assessment of an individual and a religion which was grossly misunderstood in this country. In an introductory statement to the reader, Sale states:

I shall not here inquire into the reasons why the law of

³⁴ See generally Letters between Volney and Thomas Jefferson, *microformed on* Thomas Jefferson's Papers, Manuscript Division (Library of Congress). Many of these letters are reprinted in 1 GILBERT CHINARD, VOLNEY ET L'AMERIQUE: D'APRES DES DOCUMENTS INEDITS ET SA CORRESPONDANCE AVEC JEFFERSON 110 (1923).

³⁵ See Letter from Volney to Thomas Jefferson (Apr. 20, 1802), *microformed on* Thomas Jefferson's Papers, Manuscript Division (Library of Congress), *reprinted in* 1 CHINARD, *supra* note 34, at 111 ("When you shall be done with the manuscript you received from Mr. McClure, it is desired that it may be burnt."). A letter from Thomas Jefferson to Volney dated March 17, 1801 explains that a translation to the end of the 20th chapter of *The Ruins* was sent to Volney through McClure. See Letter from Thomas Jefferson to Volney (Mar. 17, 1801), *in* 1 CHINARD, *supra* note 34, at 110. Thomas Jefferson and Joel Barlow's edition appeared in Paris in 1802. See ALLISON, *supra* note 3, at 50.

³⁶ Patrick Henry, Virginia Convention, 16 June 1788, *in* 2 DEBATE ON THE CONSTITUTION, *supra* note 18, at 696.

³⁷ See DEWEY *supra* note 30, at 14.

³⁸ See generally GEORGE SALE, 1 THE KORAN: COMMONLY CALLED THE ALCORAN OF MOHAMMED (2d. ed. 1764).

³⁹ See *id.*

Mohammed has met with so unexampled a reception in the world, (for they are greatly deceived who imagine it to have been propagated by the sword alone) or by what means it came to be embraced by nations which never felt the force of Mohammedan arms, and even by those which stripped the Arabians of their conquests, and put an end to the sovereignty and very being of their Khalifs.⁴⁰

A few pages later Sale adds: "For how criminal soever Mohammed may have been in imposing a false religion on mankind, the praises due to his real virtues ought not to be denied him."⁴¹ Sale concludes that the Prophet's "original design of bringing pagan Arabs to the knowledge of the true God was certainly noble and highly to be commended."⁴²

Sale embarks on a long admiring description of the Prophet's personality and moral character, followed by long detailed chapters on Islamic history, theology, and law.⁴³ In the course of his discussion, he disposes of many of the negative myths about Islam.⁴⁴ He also compares Islamic law and Islam's historical track record with that of Christianity and Judaism, pointing out that Islam has done no worse than the other two religions.⁴⁵

Two points made in this manuscript are particularly salient in light of Jefferson's writings. First, Sale points out that Prophet Muhammad rejected the concept of the Trinity and the divinity of the Virgin Mary.⁴⁶ Jefferson had taken a similar position in his correspondence with William Short.⁴⁷ Second, Sale states that the Prophet declared that his "business was only to preach and admonish, that he had no authority to compel any person to embrace his religion."⁴⁸ This point is reiterated by the *Qur'an* itself, which is translated in the

⁴⁰ *Id.* at vii.

⁴¹ *Id.* at x.

⁴² *Id.* at 51.

⁴³ *See id.* at 54-55 (noting in particular the Prophet's piety, veracity, justice, liberty, clemency, humility, charm, excellent judgment, happy memory, cheerful temper and inoffensive behavior towards his friends).

⁴⁴ *See id.* at 63-64 (pointing out that, while it was commonly perceived that Islam spread by the sword, Prophet Mohammad propagated Islam not by compulsion but solely by persuasion; that the Prophet's followers had the right to defend themselves against infidels). Many authors, such as Prideaux, labeled Prophet Muhammad a tyrant. *See id.* at 65. Sale corrects this view by praising the Prophet's morals: "[H]e was a man of at least tolerable morals, and not such a monster of wickedness as he is usually represented." *Id.* at 54.

⁴⁵ *See id.* at x, 51, 64-65.

⁴⁶ *See id.* at 45-46.

⁴⁷ *See* Letter from Thomas Jefferson to William Short (Oct. 31, 1819), in 15 BERGH, *supra* note 2, at 221. Jefferson, incidentally, surpasses Muslim belief on this doctrinal point by rejecting the immaculate conception of Jesus. *See id.*

⁴⁸ 1 SALE, *supra* note 38, at 64.

second volume of Sale's *Koran*.⁴⁹ Again, Jefferson expressed a similar point of view in his writings about freedom of belief.⁵⁰

Another author who wrote on such matters was Joseph Priestly.⁵¹ Both Jefferson and Adams were not only familiar with Priestly's writings, but may have even encouraged him to write about ancient doctrines.⁵² In fact, Jefferson ordered a copy of Priestly's book, *The Doctrines of Heathen Philosophy Compared With Those of Revelation*, for John Adams.⁵³ Both Jefferson and Adams thought, however, that Priestly did not do justice to the topic.⁵⁴ This critique indicates a certain level of sophistication in the knowledge of the two Founding Fathers of ancient doctrines, a level we are still struggling to acquire in this country today.

Interestingly, in an earlier book, Priestly addressed the doctrine of the unity of God. He argued that the great advantage "Mohammedanism had over the corrupt [C]hristianity" of that time was that it "asserted the great doctrine of the unity of God, against the Trinitarians."⁵⁵ It therefore appears that, despite the fact that some individuals were quick to brand as "infidels" those who had somewhat different ideas about Christianity, some of the Founding Fathers did not relent in pursuing sources of information on the subject, and speaking out, despite the political fallout.⁵⁶ This experience no doubt

⁴⁹ 2 SALE, *supra* note 38, at 31 & n.2 (translating verse 2:256 of the *Qur'an*, which means "Let there be no compulsion in religion," as "Let there be no violence in religion," but explaining, in a related footnote, the idea of the prohibition against religious compulsion).

⁵⁰ See Thomas Jefferson, *Notes on Religion*, reprinted in 1 THE WRITINGS OF THOMAS JEFFERSON 266 (Paul Leicester Ford ed., 1904) ("Compulsion in religion is distinguished peculiarly from compulsion in every other thing. I may grow rich by art I am compelled to follow, I may recover health by medicines I am compelled to take agt. [sic] my own judgment, but I cannot be saved by a worship I disbelieve & [sic] abhor.").

⁵¹ See 2 SOWERBY, *supra* note 2, at 121-22.

⁵² See *id.* at 122 (relating that, in a letter to Henry Fry dated June 17, 1804, Jefferson wrote: "At my request Dr. Priestly wrote a comparative view of the moral doctrines of Jesus and of the antient [sic] philosophers, which he finished just before his death.").

⁵³ See *id.* at 122-23.

⁵⁴ See *id.* at 123 (relating that, in a letter to John Adams dated January 24, 1814, Jefferson wrote: "I think with you that Priestly, in his comparison of the doctrines of Philosophy and of revelation, did not do justice to the undertaking, but he felt himself pressed by the hand of death.").

⁵⁵ 2 JOSEPH PRIESTLY, *INSTITUTES OF NATURAL AND REVEALED RELIGION* 7 (1794). Priestly's concern was that Christianity could not spread to heathens, Muslims and Jews when it was viewed as being so corrupt. See *id.* For further information on this view, see 1 JOSEPH PRIESTLY, *HISTORY OF THE CORRUPTION OF CHRISTIANITY* (1797), a work which was considered to be a sequel to *Institutes*, see *supra*, and was often included in many of Thomas Jefferson's recommended reading lists.

⁵⁶ See THE PAPERS OF THOMAS JEFFERSON, SECOND SERIES: JEFFERSON'S EXTRACTS FROM THE GOSPELS 11 (Dickinson W. Adams ed., 1983) (describing religiously-based political criticism of Jefferson). Rather than embracing Jefferson's tolerance for divergent religious points of view, many of Jefferson's opponents during the election of 1800 labeled him an atheist, or considered him to be an infidel and therefore unworthy of serving in the highest office of the country. See *id.*; see also ALLISON, *supra* note 3, at 38-39 (stating that Prideaux warned that many influential people were critical of Christianity and attempted to convince skeptical people of the difference between Christianity and Islam and other beliefs; and that a decline in piety would lead

hardened Jefferson's resolve to guarantee freedom of religion for all.

In fact, Jefferson argued that society should be tolerant of the religious practices of others so long as they do not harm the public good.⁵⁷ He gives the example of killing calves or lambs.⁵⁸ This appears to be a reference to the Islamic annual custom in which a lamb is sacrificed to celebrate the event where Abraham's son was spared by God and a lamb was sacrificed in his stead.⁵⁹ If Jefferson was in fact making this reference, then it is possible that Jefferson was thinking of slave practices, since most Muslims in the American colonies at that time were slaves who were brought forcefully from Africa.⁶⁰ This raises a further question of the extent of contacts between Jefferson and other Founding Fathers, and their slaves, and how many of those were Muslim.

The question of whether the Founding Fathers had meaningful contact with Muslim slaves is not one of idle speculation, since it is established that many of the Muslim slaves were literate and hence assigned to house duties.⁶¹ Labor assignments in the house, as opposed to those in the field, would have allowed Muslim slaves to have increased contact with their "masters." Initial inquiry into relationships between colonial masters and slaves has already yielded information that Jefferson, in particular, had extensive contacts with two slaves: Jupiter and Sally Hemmings.⁶² We do not yet have adequate information as to their religious beliefs or the beliefs of other slaves in the Jefferson household.

Given this historical backdrop, we turn now to the task of presenting a more accurate and genuine understanding of Islam, its basic constitutional principles, and the dynamics of Muslim societies. This task is within reach because contemporary America is very different from, and significantly more free and diverse than, the America of the Founding Fathers. After all, in those early days, most Muslims in

to tyranny); Charles O. Lerche, Jr., *Jefferson and the Election of 1800: A Study in the Political Smear*, 7 WM. & MARY Q. 467, 475 (1948) ("Atheist" was used on Jefferson just as 'communist' . . . applied to Henry Wallace or to any other political figure who challenge[d] the basic assumptions of our society . . ."). Jefferson relentlessly pressed for religious freedom. See Thomas Jefferson, *Notes on Religion*, reprinted in 1 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 50, at 266 ("Neither Pagan nor Mahomedan nor Jew ought to be excluded from the civil rights of the Commonwealth because of his religion.") (quoting John Locke).

⁵⁷ See Thomas Jefferson, *Notes on Religion*, reprinted in 1 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 50, at 266.

⁵⁸ See *id.*

⁵⁹ See QUR'AN 37:102-108.

⁶⁰ See MICHAEL A GOMEZ, EXCHANGING OUR COUNTRY MARKS: THE TRANSFORMATION OF AFRICAN IDENTITIES IN THE COLONIAL AND ANTEBELLUM SOUTH 66 (1998) (stating that the number of Muslim slaves in America may have been in "the thousands, if not tens of thousands").

⁶¹ See *id.* at 85-86.

⁶² See JACK MCLAUGHLIN, JEFFERSON AND MONTICELLO 106-08 (1988); see also ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMMINGS: AN AMERICAN CONTROVERSY 172, 183 (1997).

America were slaves. As such, they were denied the right to speak freely.⁶³ By introducing Islam from the perspective of an "internal observer,"⁶⁴ it is finally possible to present Islam accurately and, thus, to properly refute the claim that Islam is inherently anti-democratic and disrespectful of human rights. This perspective also provides for a more accurate analysis of what went wrong with Muslim countries, and thus helps answer the question of whether American style democracy may be successfully exported to these countries.

III. INTRODUCTION TO ISLAM AND ITS BASIC CONSTITUTIONAL PRINCIPLES

A. *Basic Source and Principle: The Qur'an*

Muslims have one basic document that guides the spiritual, political, moral, and social aspects of their lives. This document is the *Qur'an*, which Muslims believe is the revealed word of God. The *Qur'an* contains a variety of elements, such as stories (often similar to Biblical ones), moral injunctions, and general as well as specific legal principles.⁶⁵ The constitutional principles are sparse but basic.⁶⁶ They make clear that a state must satisfy two basic conditions to meet Islamic standards. First, the political process must be based on "elections," or *bay'ah*.⁶⁷ Second, the elective and governing process must

⁶³ Not all Muslims in America at that time were slaves. See GOMEZ, *supra* note 60, at 67 (noting that "the Muslim presence in North America antedates the arrival of the English colonists. Spanish Florida's St. Augustine (and nearby Fort Mose) featured a significant black population The Muslim population, although unquantifiable, must have been significant.").

⁶⁴ Compare *supra* text accompanying notes 27-28 (discussing the perspectives of Western commentators on Islam as "external observers").

⁶⁵ The *Qur'an* contains stories about Jesus, Moses, Mary, Adam and many other biblical figures. It provides moral as well as legal guidance. For example, the *Qur'an* urges Muslims to preserve their family ties; take care of the widowed, orphaned, and poor; and to avoid gossip about others. It also speaks about specific penalties for specific crimes and, *inter alia*, establishes the laws of marriage and divorce. For more information on *Qur'anic* principles, see MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 29-31 (1991) and ABD AL-HAMID MUTAWALLI, MABADI' NIZAM AL-HUKM FI AL-ISLAM [PRINCIPLES OF THE SYSTEM OF GOVERNANCE IN ISLAM] 34-46 (al-Masari' Alexandria, 2d ed., 1974).

⁶⁶ See KAMALI, *supra* note 65, at 30, 33 ("The Qur'anic legislation on civil, economic, constitutional and international affairs is, on the whole, confined to an exposition of the general principles and objectives of the law."); MUTWALLI, *supra* note 65, at 34-35.

⁶⁷ See QUR'AN 60:12, 48:10, 18; see also Azizah Y. al-Hibri, *Islamic Constitutionalism and the Concept of Democracy*, 24 CASE W. RES. J. INT'L L. 1, 11-13 (1992) (discussing the origins of the term *bay'ah* and its significance as an "agreement" between a ruler and those who are ruled). *Bay'ah* is the act by which individual A informs individual B that A supports B's assumption of the leadership position in question, and gives to B his or her allegiance. This is usually, but not necessarily, expressed by a handshake, and is tantamount to casting one vote. It is possible, however, that a whole delegation cast a collective vote (equal to the sum of its individual members' votes) in one visit to the candidate. In the end, the winning candidate would be the one with the largest number of votes. For more on this process, see *infra* text accompanying notes 156-87, discussing the election of 'Uthman. Because 'Uthman received the largest number of votes from the population, the electoral committee (in this case, consisting of one person) nominated him

be based on "broad deliberation," or *shura*.⁶⁸ Clearly, very few, if any, Muslim countries truly satisfy these two criteria today. The reasons for their failure to do so will be discussed later.

Two fundamental features of *Qur'anic* philosophy underlie the broad formulation of the above-mentioned constitutional principles. The first is that of diversity. The *Qur'an* encourages ethnic and other types of diversity as blessings from God.⁶⁹ Consequently, ancient Muslim jurists recognized the fact that what may suit one culture may not be quite suitable for another. For this reason, they encouraged each country to introduce its own customs into its laws, provided that these customs did not contradict basic Islamic principles.⁷⁰ As a result, even today, the Islamic laws of Muslim countries differ significantly on various matters. Witness for example the difference in constitutional and family laws between Egypt and Morocco (both Muslim countries).⁷¹ By reserving room for custom, the Law Giver (God) emphasized the importance of cultural diversity and the ability of each society to make its own choices. These principles have far-reaching effects, especially in the area of federalism. Section IV will illustrate how respect for local custom and diversity led the Prophet to balance carefully the rights of the various tribes (predecessors of the modern states) against the powers of the Islamic federal system.

The second fundamental feature of the *Qur'anic* philosophy is that of gradualism.⁷² Again, the Law Giver recognized both the human ability to constantly evolve and improve and its need to do so over

as the next *khalifah*, and he was then immediately confirmed by an overwhelming popular majority. It appears, therefore, that the early Islamic electoral procedure, involving *bay'ah*, bears interesting resemblance to our electoral college system.

⁶⁸ See QUR'AN 42:38, 3:159; see also al-Hibri, *supra* note 67, at 21-24 (discussing the *Qur'anic* origins of the principle of requiring consultation in government); ABD AL-RAZAK AL-SANHURI, FIQH AL-KHILAFAH WA TATAWURUHA [KHILAFAH JURISPRUDENCE AND ITS DEVELOPMENT] 224-26 (al-Hay'ah al-Masriyah al-'Ammah li al-Kitab: Cairo, 1989); TOUFIC AL-SHAWI, FIQH AL-SHURA WA AL-ISTISHARAH 49-52 [THE JURISPRUDENCE OF CONSULTATION AND ADVISE] (Dar al-Wafa': Cairo, 1992).

⁶⁹ See QUR'AN 49:13.

⁷⁰ See al-Hibri, *supra* note 67, at 8; WIHBAH AL-ZUHAILI, 2 USUL AL-FIQH AL-ISLAMI [THE FOUNDATIONS OF ISLAMIC JURISPRUDENCE] 828-37 (Dar al-Fikr: Beirut, 1986); SUBHI MAHMASSANI, AL-AWDA' AL-TASHRI'YAH FI AL-DUWAL AL-'ARABIAH [LEGAL SYSTEMS IN THE ARAB WORLD] 438-39, 478-80 (Dar al-'Ilm li al-Malayin: Beirut, 3d ed., 1965).

⁷¹ Egypt is a republic; Morocco is a monarchy. Furthermore, their family laws differ significantly. For a detailed comparison of these two and other Muslim countries, see al-Hibri, *infra* note 86, at 10-25.

⁷² See al-Hibri, *supra* note 67, at 10 (discussing gradualism as being consistent with the concept of consensus building). Support for the principle of gradualism is also explained in the following terms:

The Qur'an was not revealed all at one time. Rather, it was revealed in accordance with the needs and capabilities of society . . . Graduality in the revelation of the Qur'an afforded the believers the opportunity to reflect over it . . . [.] facilitated continuous contact and [renewed] spiritual strength so that the hostility of unbelievers . . . did not weaken the hearts of the Muslims.

KAMALI, *supra* note 65, at 16; see also MAHMASSANI, *supra* note 70, at 92.

time.⁷³ For this reason, in an Arab society which at the time of revelation consumed a great deal of wine, the divine prohibition against consuming alcoholic beverages was imposed by the *Qur'an* gradually.⁷⁴ The same feature applied to the introduction of democracy. Given the pervasive authoritarian ideology in the world at that time (over fourteen hundred years ago), it was clear that human consciousness would need time to recognize the evils of authoritarianism and reject it in favor of democracy. The *Qur'an* provided the basic principles for a constitutional democracy without providing the details of a specific system. Muslims were to interpret these basic principles in light of their customs and the demands of their historical consciousness, as informed by the era in which they lived.⁷⁵ As a consequence, Muslim constitutional models would ideally start with basic democratic elements, remain flexible and continue to progress over time. Unfortunately, as will be pointed out later, despite all efforts, the force of authoritarianism in seventh century Arabia and the world at large was difficult to overcome. As a result, despotism replaced budding democratic models and thwarted their development.

B. Other sources

While the *Qur'an* remains the supreme source of law for Muslims, there are important secondary and tertiary sources as well. Another source of Islamic jurisprudence, secondary only to the *Qur'an*, is the example and words of the Prophet Muhammad, or his *sunnah*.⁷⁶ Where the *Qur'an* is silent, jurists have looked to this source for additional guidance. For example, the Prophet himself was the head of Madinah, the first Muslim city-state. He acquired this position through *bay'ah* and conducted his affairs through *shura*.⁷⁷ Thus, he set the perfect example for Muslims on how to understand and practice these two concepts. Unfortunately, very few subsequent leaders actually put these principles to practice.

The third source of Islamic jurisprudence is the "consensus" of

⁷³ See KAMALI, *supra* note 65, at 16-17.

⁷⁴ See QUR'AN 4:43; 5:90; see also al-Hibri, *supra* note 67, at 10 (discussing the variance in Muslim law concerning marriage).

⁷⁵ See al-Hibri, *supra* note 67, at 8 (acknowledging that change in laws over time is a basic principle of Islamic jurisprudence); KAMALI, *supra* note 65, at 283-86 (stating that rules formulated "in the light of prevailing custom" may be departed from if the custom on which they were founded changes over time); MAHMASSANI, *supra* note 70, at 92.

⁷⁶ For more discussion on *sunnah*, see al-Hibri, *supra* note 67, at 4-7 (stating that the *sunnah* is used to "supplement *Qur'anic* laws as well as to help interpret them"); see also KAMALI, *supra* note 65, at 44-48, 58-59 (discussing the history of the *sunnah* and comparing it to the *Qur'an*).

⁷⁷ See QUR'AN 60:12; 48:10 (mentioning *bay'ahs* of Muslim men and women); 2 IBN HISHAM, AL-SIRAH AL-NABAWIYAH [THE LIFE OF THE PROPHET] 431, 434 (al-Maktabah al-'Ilmiyah: Beirut, reprint, 9th century, n.d.); al-Hibri, *supra* note 67, at 11-12, 20-24 (explaining the terms *bay'ah* and *shura*); AL-SHAWI, *supra* note 68, at 50, 52-53 (noting that *shura* must be accompanied with freedom).

the Muslims, or *ijma*.⁷⁸ The Prophet stated, that if *all* Muslims agreed on a matter, then it cannot be wrong.⁷⁹ This principle further consolidated the democratic foundations of Islamic decision-making.

Finally, the fourth source is that of jurisprudence, or *ijtihad*.⁸⁰ The Prophet encouraged qualified Muslims to engage in *ijtihad* and stated that God would reward a serious *mujtahid* (one who engages in *ijtihad*), even if the wrong result is reached.⁸¹ Qualifications for *ijtihad* are solely scholarly and are neither gender-based nor a function of ethnicity, race or economic status.⁸² Furthermore, since God states in the *Qur'an* that we were all created from the same *nafs* (soul), it follows that no human being has an *a priori* advantage over any other, nor is the *mujtahid*, as human, immune to error.⁸³ These facts, combined with a deep aversion to arrogance in Islam, prompted classical scholars to offer their views in a humble manner which recognized the possibility of error.⁸⁴ For this reason, many scholars concluded their treatises or discussions with the statement "but God knows best."⁸⁵ Also, when Khalifah Abu Ja'far al-Mansur proposed, in the eighth century that the state officially adopt a particular school of Islamic jurisprudence, his proposal did not go far.⁸⁶ Jurists dreaded the spiritual liability which resulted from forcing their potentially erroneous views on others.

⁷⁸ See 1 AL-ZUHAILI, *supra* note 70, at 486-91; KAMALI, *supra* note 65, at 168-72; MAHMASSANI, *supra* note 70, at 149-50, 481. A successful *bay'ah*, see *supra* note 67, could be by *ijma*' or by majority vote.

⁷⁹ See KAMALI, *supra* note 65, at 178-80; IBN MAJAH, 2 SUNAN ¶ 3950, at 1303 (Dar al-Kutub al-'Ilmiyah: Beirut, n.d.); MAHMASSANI, *supra* note 70, at 149.

⁸⁰ See al-Hibri, *supra* note 67, at 6-7; 2 AL-ZUHAILI, *supra* note 70, at 1037-118; KAMALI, *supra* note 65, at 86-87, 366-68; MAHMASSANI, *supra* note 70, at 132-36, 141-44, 151-56.

⁸¹ See al-Hibri, *supra* note 67, at 6; ABU AL-HUSSEIN BIN MUSLIM, 12 SAHIH MUSLIM BI SHARH AL-NAWAWI [THE TRUE STATEMENTS OF THE PROPHET, WITH EXEGESIS BY AL-NAWAWI] 13-14 (Dar Ihya' at-Turath al-'Arabi: n. p., reprint, 8th century) [hereinafter SAHIH MUSLIM].

⁸² See 1 AL-ZUHAILI, *supra* note 70, at 496-98; KAMALI, *supra* note 65, at 374-77; MAHMASSANI, *supra* note 70, at 142-43 (stating that the qualifications for *ijtihad* are reason, maturity, justice, knowledge of Islamic studies, and, perhaps, an understanding of the goals of Islamic law).

⁸³ See QUR'AN 4:1, 39:6, 6:98.

⁸⁴ See ABU AL-BARAKAT AL-DARDIR, 1 AL-SHARH AL-SAGHIR [THE LITTLE INTERPRETATION] 6-7 (Dar al-Ma'arif: Cairo, reprint, 19th century) (calling himself a poor slave of God); 1 ABU HAMID AL-GHAZALI, IHYA' 'ULUM AL-DIN [REVIVING RELIGIOUS SCIENCES] 59, 75-76 (Matba'at Mustafa al-Babi al-Halabi: Cairo, 1939); SUBHI MAHMASSANI, MUQADDIMAH FI 'IHYA' 'ULUM AL-SHARI'AH [INTRODUCTION TO REVIVING SHARI'AH SCIENCES] 30 (Dar al-'Ilm li al-Malayin: Beirut, 1962); see also Azizah Y. al-Hibri, *Modesty*, in 3 OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD 126-27 (John L. Esposito ed., 1995); KAMALI, *supra* note 65, at 370-72 (discussing the procedure a *mujtahid* should follow if he resolves a matter in opposition to one of his previous decisions).

⁸⁵ 1 SAHIH MUSLIM, *supra* note 81, at 19, 21, 24, 26, 27 (in the margin authored by al-Nawawi); see also 1 AL-DARDIR, *supra* note 84, at 739; 2 AL-DARDIR, *supra* note 84, at 765; 3 AL-DARDIR, *supra* note 84, at 728; 1 AL-BUKHARI, SAHIH AL-BUKHARI BI HASHIYAT AL-SINDI [THE TRUE STATEMENTS OF THE PROPHET, WITH COMMENTARY BY AL-SINDI] 6, 7, 9 (Dar al-Ma'rifa: Beirut, reprint, 8th century).

⁸⁶ See MAHMASSANI, *supra* note 70, at 159; see also Azizah Y. al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 8-9 (1997).

Qur'anic philosophy makes room for gradual progress, as well as customary and cultural preferences.⁸⁷ Thus, a *mujtahid* today can readily conclude that a Muslim country may choose to be a republic and still be in compliance with *Qur'anic* requirements, so long as the vote for the president is genuinely free and the consultation among all branches of government is broad. Most importantly, the existence of a house of representatives would insure that the people's voice is heard in legislative matters, even if indirectly. Another *mujtahid*, however, may make similar arguments for a constitutional monarchy based on the British example. The interpretations of both *mujtahids* would reflect the state of their human and political consciousness, and usually that of their people, at that particular time and place. It is that consciousness that informs their understanding of the *Qur'an*. A more advanced consciousness may bring into the discussion other *Qur'anic* principles, such as those of equality and diversity, or focus more seriously on basic principles, such as *bay'ah*. It may thus lead to a more democratically advanced interpretation which transcends cultural customs that are finally recognized as contrary to the *Qur'anic* worldview.

C. *Is an Islamic State a Theocracy?*

Some Western thinkers concluded that the Islamic state is a theocracy from the fact that *ijtihad*, along with the *Qur'an* and *sunnah*, determine the fundamental features of government in a Muslim state.⁸⁸ This conclusion raises the following important question: "How can a theocracy be a democracy?" A theocracy is defined as "a form of government in which a God or a deity is recognized as the supreme civil ruler."⁸⁹ In a theocratic system, the laws of God are interpreted by the ecclesiastical authorities, or alternatively through "a system of government by priests claiming a divine commission."⁹⁰ Another definition of a theocracy specifies a "government by priests or men claiming to know the will of God."⁹¹

The Islamic political system does not fall under any of these defi-

⁸⁷ See *supra* text accompanying notes 72-74 (discussing gradualism).

⁸⁸ See LIPPMAN, *supra* note 15, at 70 (stating that there is no distinction in Islam between Church and State); Miller, *supra* note 1, at 50 (quoting Bernard Lewis stating that Islam is a theocracy); EPOSITO & VOLL, *supra* note 1, at 23-24 (noting that even some conservative Muslims argued that Islam is a theocracy, but they defined theocracy to mean something altogether different from that found in European exemplars); see also Stephen C. Hicks, *On the Citizen and the Legal Person*, 59 U. CIN. L. REV. 789, 843-44 (1991) (referring to the "theocracy of Islam"); Paul Johnson, *Our God Can Lick Your God*, N.Y. TIMES, May 9, 1993, § 7, at 7 (reviewing book by Mark Juergensmeyer, *Religious Nationalism Confronts the Secular State* (1993), which condemns Islamic theocracy); *The Rise of Islamic Politics*, CHRISTIAN SCI. MONITOR, Apr. 28, 1993, at 20 (discussing the rising religious passion and democratic desires in Arab countries).

⁸⁹ THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1471 (unabr. ed. 1983).

⁹⁰ See *id.*

⁹¹ WEBSTER'S DICTIONARY 1025 (encyclopedic ed. 1987).

nitions of a theocracy because Muslims have neither clergy nor ecclesiastical authorities. They only have *mujtahids*.⁹² As stated earlier, every Muslim who has the pre-requisite qualifications is entitled to be a *mujtahid*.⁹³ Not even a *mujtahid* can claim special knowledge of the will of God, let alone immunity from error.⁹⁴ Furthermore, any person can challenge the view of a *mujtahid* by simply offering a convincing critique.⁹⁵ This happened to the Khalifah 'Umar when he gave a speech in a mosque.⁹⁶ He proposed a change in marriage laws and an old, unknown woman in attendance stood up and challenged him.⁹⁷ She said, "You shall not deprive us [women] of what God gave us."⁹⁸ The Khalifah asked her to provide support for her statement. When she cited a *Qur'anic* verse, the Khalifah said: "The woman is right and the Khalifah is wrong."⁹⁹ He actually had no other choice but to defer to her, since his rule was based on *Qur'anic* laws, not on his political strength or military power.¹⁰⁰

Because *ijtihad* plays such an important part in Islamic societies, the Prophet declared education to be the duty of every Muslim, male and female.¹⁰¹ This led *mujtahids* to argue that education in Islam is nearly, if not completely, compulsory for all Muslims.¹⁰² Furthermore, if a person is unable to afford education, the family, neighborhood, or even the state, are charged with the financial responsibility for that person's education.¹⁰³ Consequently, all Muslims, male or female, white or black, rich or poor, have equal opportunities to engage in

⁹² See *supra* text accompanying note 81 (defining *mujtahid*).

⁹³ See *supra* text accompanying note 82 (noting the qualifications for *ijtihad*).

⁹⁴ See *supra* text accompanying note 83 (stating that all are created from the same soul).

⁹⁵ See al-Hibri, *supra* note 67, at 24 ("[I]t was always understood and agreed that it was the duty of every Muslim to right wrongs even if the perpetrator was the *khalifah*").

⁹⁶ See *id.* at 25 (telling the story of Khalifah 'Umar). *Khalifah* is the title of the Muslim head of state. *Khilafah* is the name of the office itself.

⁹⁷ See *id.* (suggesting a reduction in the amount of the groom's assets gifted to the bride).

⁹⁸ *Id.*

⁹⁹ 1 AL-GHAZALI, *supra* note 84, at 50; see also al-Hibri, *supra* note 67, at 25 (telling the story of Khalifah 'Umar); al-Hibri, *supra* note 86, at 40 (re-telling the story of Khalifah 'Umar).

¹⁰⁰ See al-Hibri, *supra* note 67, at 24 (noting the tradition that the *khalifah* and the state be subject to the rules of the *Qur'an* and *sunnah*).

¹⁰¹ See 1 AL-GHAZALI, *supra* note 84, at 15; al-Hibri, *supra* note 86, at 36 (noting that the Prophet stated that "[p]ursuit of knowledge is the duty of every Muslim."); 2 ABD AL-HALIM ABU SHUQQAH, TAHRIR AL-MAR'AH FI 'ASR AL-RISALAH [LIBERATING WOMAN IN THE ERA OF EARLY ISLAM] 41 (Dar al-Qalam: Kuwait, 1990).

¹⁰² See QUR'AN 2:159. Many modern scholars have concluded from this verse that education in Islam is compulsory or practically so. See, e.g., al-Hibri, *supra* note 86, at 37-38 (discussing the argument regarding which type of knowledge is required); MUHAMMAD AL-IBRASHI, AT-TARBIYAH AL-ISLAMIYAH WA FALSAFATUHA [ISLAMIC EDUCATION AND ITS PHILOSOPHY] 53-59 (Mustafa al-Babi al-Halabi Press: Cairo, 3d ed., 1975); 1 'ABD ALLAH 'ALWAN, TARBIYAT AL-AWLAD FI AL-ISLAM [THE UPBRINGING OF CHILDREN IN ISLAM] 262 (Dar as-Salam: Beirut, expanded 6th ed., 1983); AHMAD AL-AHWANI, AL-TARBIYAH FI AL-ISLAM [EDUCATION IN ISLAM] 101 (Dar al-Ma'arif: Beirut, 1980).

¹⁰³ See al-Hibri, *supra* note 86, at 37 ("Al-Qabisi, a prominent jurist, noted that, if parents are financially unable to educate their children, the community must pay to educate them instead."); AL-AHWANI, *supra* note 97, at 101.

ijtihad.

Therefore, in a Muslim state, any Muslim may contribute to the religious interpretation of the *Qur'anic* text. Furthermore, no one may oblige another to abide by his or her own understanding of the *Qur'an*.¹⁰⁴ Since humans are fallible, Muslim jurists recognize the importance of the diversity of opinion and freedom of conscience, even within the same religion.¹⁰⁵ In fact, they view this diversity as a sign of God's mercy, because it allows people to choose that jurisprudence which best suits their conditions.¹⁰⁶ For this reason, Muslim schools of thought proliferated, living side by side despite disagreement on important issues.¹⁰⁷ This Islamic respect for diversity of opinion foreshadows the American commitment to the "marketplace of ideas" principle.

Although selecting a school of thought to suit of one's conditions seems like forum shopping, it is not intended to be. A Muslim must make an honest and not an opportunistic choice in such matters.¹⁰⁸ For example, Imam al-Shafi'i, a major scholar and founder of the school bearing his name, revised his jurisprudence when he moved from Iraq to Egypt.¹⁰⁹ The explanation was simply that the new jurisprudence evolved in light of the new conditions.¹¹⁰ As a consequence of this example of jurisprudential revision, jurists generally recognize the principle that "laws change with the change in time and place."¹¹¹

¹⁰⁴ See *supra* notes 80-86 and accompanying text (discussing an individual's capacity to engage in *ijtihad*); see also al-Hibri, *supra* note 67, at 6 ("Islam guaranteed for each individual the freedom of choice in such matters.").

¹⁰⁵ See al-Hibri, *supra* note 86, at 6 (discussing the acceptance of differences in *ijtihad*); MAHMASSANI, *supra* note 84, at 30.

¹⁰⁶ See al-Hibri, *supra* note 86, at 6 (noting no fear of retribution from God); ABU ABDALLAH AL-SHAFI'I, RAHMAT AL-UMMAH FI IKHTILAF AL-A'IMMAH [MERCY TOWARDS THE MUSLIM COMMUNITY LIES IN THE DISAGREEMENT OF ITS IMAMS (RELIGIOUS LEADERS)] 25-26 (Mu'assasat al-Risalah: Beirut, reprint, 14th century, 1994); MAHMASSANI, *supra* note 70, at 481.

¹⁰⁷ See al-Hibri, *supra* note 86, at 6-7 ("Thus, hundreds of schools of *ijtihad* developed, each best suited to its own community and that community's culture."); AL-SHAFI'I, *supra* note 106, at 7-14; MAHMASSANI, *supra* note 70, at 99-132.

¹⁰⁸ See MAHMASSANI, *supra* note 70, at 179 (stating that the average person is free to abandon his adopted school of thought to follow another on a specific issue, so long as the change is based on reasoning and not on the desire to avoid a burdensome result); see also ABU ISHAQ AL-SHATIBI, 2 AL-MU'AFQAT [THE CONCORDANCES] 386-87 (Dar al-Ma'rifah: Beirut, reprint 14th century, n.d.) (stating that a person who follows exemptions by the various schools of thought should resolve every burdensome matter, and that one who follows subjective inclination has abandoned piety).

¹⁰⁹ See TAHA JABIR AL-ALWANI, USUL AL-FIQH AL-ISLAMI [SOURCE METHODOLOGY IN ISLAMIC JURISPRUDENCE] 33-36 (Yusuf Talal DeLorenzo trans., International Inst. of Islamic Thought: Herndon ed. 1990); MAHMASSANI, *supra* note 84, at 40; MUHAMMAD ABU ZAHRAH, AL-SHAFI'I 145-46 (Dar al-Fikr al-'Arabi: Egypt, 1948); 'ALA' AL-DEEN AL-SAMARQANDI, TARIQAT AL-KHILAF BAYN AL-ASLAF [THE METHOD OF DISAGREEMENT AMONG THE PREDECESSORS] 13 (Dar al-Kutub al-Ilmiyah: Beirut, reprint, 11th century, 1992).

¹¹⁰ See MAHMASSANI, *supra* note 84, at 40; ABU ZAHRAH, *supra* note 109, at 145-46; AL-SAMARQANDI, *supra* note 109, at 13.

¹¹¹ MAHMASSANI, *supra* note 70, at 478; see also al-Hibri, *supra* note 67, at 8 (discussing the principle that "laws may change with the passage of time or the change of place or circum-

In such a society of open religious choices, it cannot be said that, as in a bona fide theocracy, an ecclesiastical authority is interpreting the laws, even if certain scholars are revered by the population, or if, per chance, they occupy public office.

Furthermore, the head of a Muslim state has no divine claims or attributes.¹¹² He or she—there have been Muslim women heads of state¹¹³—is a representative of the people and is subject to the rule of law.¹¹⁴ The head of state serves at the pleasure of the people and may be removed at any time by the people for corruption, oppression or any other significant transgression.¹¹⁵ As late as the nineteenth century, the Egyptians resorted to this power when they removed the governor appointed by the Ottoman sultan.¹¹⁶ The governor was incensed when the people elected a replacement. He noted that he was appointed by the Ottoman sultan and was “not removable by the ‘peasants.’”¹¹⁷ The Egyptians responded by noting that their tradition was different and that they had always been able to remove an oppressive governor.¹¹⁸ Ultimately, the governor and the Ottomans understood the point, and the governor was replaced.¹¹⁹

While the Muslim state is not a “theocracy” as that term has been understood, it is nevertheless true that an Islamic state is subject to God’s laws because the constitution of a Muslim state is based on values and principles expressed in the *Qur’an*. That feature, however, is not sufficient to establish the claim that a Muslim state is a theocracy. This conclusion is supported by two reasons. First, since there is no such thing as compulsion in Islam, no nation may be coerced into ac-

stance”); 2 AL-ZUHAILI, *supra* note 70, at 1116-18.

¹¹² See al-Hibri, *supra* note 67, at 11 (“[T]here is generally no history of claims to rule by divine right, least of all by the prophets.”); AL-SANHURI, *supra* note 68, at 72. Note that the Umayyads advanced the theory of *jabr*, which argued that they came to power because of God’s will. They did not argue, however, that they represented God’s will on earth, nor did they appropriate the religious role of the *mujtahids*. For more on such views in Islamic societies, see HUSSEIN ‘ATWAN, AL-UMAWIYYUN WA AL-KHILAFAH [THE UMAYYADS AND THE KHALIFATE] 25-29 (Dar al-Jil: Beirut, 1986); see also MUTAWALLI, *supra* note 65, at 185.

¹¹³ Among famous Muslim queens are Queen Arwa of Yemen (11th century) and Shajarat al-Dur of Egypt (13th century). For more on Muslim queens, see FATIMAH MERNISSI, THE FORGOTTEN QUEENS OF ISLAM (1993).

¹¹⁴ See al-Hibri, *supra* note 67, at 11, 24 (discussing the two ways in which the will of the people is expressed); AL-SANHURI, *supra* note 68, at 72; HASSAN AL-ZEIN, AL-ISLAM WA AL-FIKR AL-MU’ASSER [ISLAM AND MODERN THOUGHT] 80, 82-83, 134-36 (Dar al-Fikr al-Hadith: Beirut, 1997).

¹¹⁵ See MAHMOUD AL-KHALIDI, MA’ALIM AL-KHILAFAH FI AL-FIKR AL-SIYASI AL-ISLAMII [FEATURES OF KHILAFAH IN ISLAMIC POLITICAL THOUGHT] 293-311 (Dar al-Jil: Beirut, 1984); ABU AL-HASSAN AL-MAWARDI, AL-AHKAM AL-SULTANIYAH [SULTANIC RULES] 19-20 (Dar al-Kutub al-‘Ilmiyah: Beirut, reprint, 11th century, 1985).

¹¹⁶ See MUHAMMAD AMARA, AL-ISLAM WA HUQUQ AL-INSAN [ISLAM AND HUMAN RIGHTS] 210-12 (Dar al-Shuruq: Beirut, 1939).

¹¹⁷ See *id.* at 211.

¹¹⁸ See *id.* at 212.

¹¹⁹ See *id.* at 211.

cepting a constitution which does not reflect its deep-seated beliefs.¹²⁰ Consequently, if the people end up choosing a constitution which reflects basic Islamic principles, then that choice represents the free will of the people.

So, given (a) a Muslim society's free choice of a constitution based on *Qur'anic* values,¹²¹ (b) that the *khalifah* in the Muslim state has no divine claims or attributes,¹²² (c) that the will of the people in that state continues to be expressed through *bay'ah*, *shura* and *ijma'*,¹²³ and (d) that there is no ecclesiastic structure in a Muslim state,¹²⁴ then the difference between a Muslim state and a secular one is reduced to the ultimate origins of their laws and not to whether the people's will is decisive. Thus, structurally, the two systems are the same, though substantively they may differ.

Second, if basing a nation's constitution on its collective religious values, without more, would result automatically in the determination that such a state is a theocracy, then the United States itself may be designated as a theocracy. After all, it has been repeatedly claimed that this country's laws are derived from its Judeo-Christian tradition.¹²⁵ Clearly, there is more to a theocracy than the source of one's values.

IV. THE CHARTER OF MADINAH: FURTHER CONSTITUTIONAL PRINCIPLES

While we have not yet uncovered evidence that the Founding Fathers were familiar with the Charter of Madinah, executed among and between the Prophet Muhammad and the various tribes, it is nevertheless instructive to study that charter as a way of introducing additional comparative constitutional concepts into the discussion.

The Charter represents an early seventh century example of "federalism."¹²⁶ At that time, the Prophet concluded agreements with various Muslim and non-Muslim tribes of the city as a way of forging a

¹²⁰ See 2 SALE, *supra* note 49, at 31 (translating verse from the *Qur'an* forbidding compulsion in Islam).

¹²¹ See *supra* notes 66-68, 78-81 and accompanying text.

¹²² See *supra* note 112 and accompanying text.

¹²³ See *supra* notes 66-67, 73 and accompanying text.

¹²⁴ See *supra* notes 91-92 and accompanying text.

¹²⁵ See, e.g., PAGE SMITH, A NEW AGE BEGINS 19-20, 27, 29, 44-45 (1976); see also Gary Leedes, *Taking the Bible Seriously*, 1987 AM. B. FOUND. RES. J. 311, 316-18.

¹²⁶ The Charter of Madinah was executed not between states, but between tribes. The Prophet headed the Madinah city-state, which corresponded to a federal umbrella under the terms of the Charter. For references to this Charter, I use two sources: An English translation, for the convenience of the reader, see AKRAM DIYA' AL-'UMARI, 1 MADINAN SOCIETY AT THE TIME OF THE PROPHET 107-10 (Huda Khatab trans., International Inst. of Islamic Thought: Herndon ed. 1991) [hereinafter MADINAN SOCIETY]; and, since the English version is at times wrong, the original Arabic text, see 1 AKRAM DIYA' AL-'UMARI, AL-SIRAH AL-NABAWIYAH AL-SAHHAH [THE CORRECT ACCOUNT OF THE LIFE OF THE PROPHET] (Maktabat al-'Ulum wa al-Hikam: al-Madinah al-Munawwarah, 1994) [hereinafter AL-SIRAH].

new "federal" community which would no longer be plagued by divisive tribal warfare.¹²⁷ The Charter of Madinah, which reflected the product of these agreements, declared all Muslim and Jewish tribes of Madinah (apparently, there were no Christians) to be one community.¹²⁸ At the same time, each tribe retained its identity, customs and internal relations.¹²⁹ The "federal" system of Madinah was responsible, however, for such matters as common defense and peacemaking, purposes similar to those in the Preamble to the American Constitution, which refers to insuring "domestic Tranquility, [and] provid[ing] for the common defence."¹³⁰ The Charter also contained its own partial bill of rights, which was supplemented by the *Qur'an* and *sunnah*. Among the rights that it protected were the right to freedom of religion, and the right not to be found guilty because of the deeds of an ally, a form of guilt by association which was widely practiced at the time.¹³¹ For this reason, due process protections are important in Islamic criminal justice.

A major right supplemented by the *Qur'an*, which was available to the Founding Fathers,¹³² is the right to privacy. The *Qur'an* enjoins Muslims not to enter a home without the permission of its occupant, and not to spy on others.¹³³ Significantly, the *Qur'an* protects some of the rights mentioned in the Fourth Amendment to the American

¹²⁷ For a reflection of the federal aspect of this agreement, see MADINAN SOCIETY, *supra* note 126, cls. 2, 25, at 107-09; AL-SIRAH, *supra* note 126, cls. 2, 25, at 282-84. Note that the Arabic text speaks of "people," not of "men."

¹²⁸ See MADINAN SOCIETY, *supra* note 126, cls. 2, 25-35, at 107-09; AL-SIRAH, *supra* note 126, cls. 2, 25-35, at 282-84.

¹²⁹ See MADINAN SOCIETY, *supra* note 126, cls. 3-11, 25-33, at 107-109; AL-SIRAH, *supra* note 126, cls. 3-11; 25-31, at 282-284. Note that the parenthetical statement in the English translation, guaranteeing Jews freedom of religion, was not a parenthetical statement in the Arabic original, but was part of the main text.

¹³⁰ U.S. CONST. preamble. Compare *id.*, with MADINAN SOCIETY, *supra* note 126, cls. 17, 36(a), 45(a), at 107-10, and AL-SIRAH, *supra* note 126, cls. 17, 36, 42, 45, at 283-84.

¹³¹ See MADINAN SOCIETY, *supra* note 126, cls. 41, 25 (providing for freedom of religion), and 37(b) (protecting against guilt by association), at 109-10; AL-SIRAH, *supra* note 126, cls. 41, 25 and 37(b), at 284. For commentary on the translated freedom of religion provision, see *supra* note 129.

¹³² See, e.g., *supra* note 30 (indicating that Jefferson owned a copy of the *Qur'an*).

¹³³ The *Qur'an* instructs in the area of privacy as follows:

O ye who believe! Enter not houses other than your own until you have asked permission and greeted those in them. That is best for you, perhaps you will remember. If you find no one in these houses, then do not enter until permission is given to you. And if you are told to go back, then go back. That is a purer course of action for you, and God knows what you are doing.

QUR'AN 24:27-28. Further instruction in this area provides:

O ye who believe, avoid suspicion (as much as possible): for suspicion in some cases is a sin: and spy not on each other, nor speak ill of each other behind each other's backs. Would any of you like to eat the flesh of his dead brother? Nay, you would abhor it And (so) fear God, for God is all-forgiving and merciful.

QUR'AN 49:12.

Constitution.¹³⁴

In a global era when religious intolerance was the rule, the Charter of Madinah stated that the Jews of the community, who were party to the Charter, were “one people” with the Muslims, though it provided “to each their own religion.”¹³⁵ More specifically, this meant that Jews who became party to the Charter were entitled to both succor and equality.¹³⁶ They also had the same standing as Muslims and were entitled to Muslim loyalty.¹³⁷ If wronged, the Charter provided that Jews must be helped.¹³⁸ Furthermore, both Muslim and Jewish signatories had a duty and a right to mutual assistance and consultation.¹³⁹ In exchange for these rights, the Charter makes it clear that the Jews must bear their portion of the communal defense expenses, as long as the city is at war.¹⁴⁰

The latter provision goes well beyond the statement made by George Washington, over a thousand years later, in a letter to a Hebrew congregation in Newport, Rhode Island, in which he stated:

For happily the government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.¹⁴¹

The Charter of Madinah repeatedly emphasized the principles of fairness and equity for Jews and Muslims.¹⁴² For example, no one could be punished for the wrong committed by another, even if the person was an ally.¹⁴³ All believers were required to oppose anyone

¹³⁴ In particular, “the right of the people to be secure in their persons, houses [and] effects[,]” is protected by the *Qur’an*. Compare QUR’AN, 2:188 (prohibiting taking even part of the property of others unjustly); and *id.* at 24:61 (prohibiting taking even food from houses other than one’s own, without permission), with U.S. CONST. amend. IV. For an illustration of how the privacy argument works under Islamic law, see Azizah al-Hibri, *Statement on The Lewinsky Scandal: An American Muslim Perspective* (last modified Feb. 27, 1999) <http://www.karamah.org/karamah/press/lewinaky_scandal.htm>.

¹³⁵ MADINAN SOCIETY, *supra* note 126, cl. 2, 25, at 107, 109; AL-SIRAH, *supra* note 126, cl. 2, 25, at 282, 284.

¹³⁶ See MADINAN SOCIETY, *supra* note 126, cl. 16, at 108; AL-SIRAH, *supra* note 126, cl. 16, at 283.

¹³⁷ See MADINAN SOCIETY, *supra* note 126, cls. 37(a) (2d and 3d subcl.), 46, at 110; AL-SIRAH, *supra* note 126, cls. 37, 46, at 284-85.

¹³⁸ See MADINAN SOCIETY, *supra* note 126, cl. 37(a), at 110; AL-SIRAH, *supra* note 126, cl. 37, at 284.

¹³⁹ See *supra* note 138.

¹⁴⁰ See *id.*

¹⁴¹ Letter from George Washington to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790), in 6 THE PAPERS OF GEORGE WASHINGTON 285 (Dorothy Twohig ed., 1996).

¹⁴² See MADINAN SOCIETY, *supra* note 126, cls. 3, 4, 6-11, 13, 17, 47, at 107-10; AL-SIRAH, *supra* note 126, cls. 3, 4, 6-11, 13, 17, 47, at 282-85.

¹⁴³ See MADINAN SOCIETY, *supra* note 126, cl. 37(b), at 110; AL-SIRAH, *supra* note 126, cl. 37(b),

who sought to spread injustice, sin, enmity, or corruption among them, even if the malefactor was an offspring of one of the believers.¹⁴⁴ A believer was not permitted to shelter an evil-doer.¹⁴⁵

Based on the above analysis, it is readily apparent that there are significant parallels between the concepts expressed in the Charter of Madinah, executed in the seventh century, and those of the American Constitution, drafted in the eighteenth century. Given this similarity, the research conducted by the Founding Fathers warrants further investigation to determine whether it uncovered, either directly or indirectly, the basic principles contained in the Charter.¹⁴⁶ Also, both the Charter and the Constitution deserve further analysis to uncover additional similarities. This analysis would, among other things, support the argument that American constitutional principles have a lot in common with Islamic principles. Such a conclusion would be helpful in evaluating the possibility of exporting American democracy to Muslim countries.

V. THE DEMISE OF DEMOCRACY IN MUSLIM SOCIETIES

The previous two sections expounded some basic democratic constitutional principles guaranteed by the *Qur'an* and *sunnah* (as the latter was partly exemplified by the Charter of Madinah). Nevertheless, a quick glance at past and present Muslim states will reveal that hardly any of them has truly satisfied the democratic standards articulated by Islam. What went wrong? This question is somewhat similar to that raised by the Founding Fathers and their contemporaries, who wanted to spare the new American republic a similar fate. As stated previously, some authors attributed the problem to a tyrannical Prophet.¹⁴⁷ The *bay'ah* and Charter of Madinah, however, refute this view of the Prophet Muhammad, as do other examples from his *sunnah*. Indeed, the Prophet was a modest, fair, and kind leader who continuously sought the advice of those around him, including

at 284.

¹⁴⁴ See MADINAN SOCIETY, *supra* note 126, cl. 13, at 108; AL-SIRAH, *supra* note 126, cl. 13, at 283.

¹⁴⁵ See MADINAN SOCIETY, *supra* note 126, cl. 22, at 109; AL-SIRAH, *supra* note 126, cl. 22, at 283.

¹⁴⁶ One way the Founding Fathers may have been indirectly familiar with the Charter is through the writings of European authors. This influence is often underestimated due to our lack of knowledge of the extent to which European intellectuals were familiar with Islam at the time. For example, according to Professor Mommsen, the year 1730 witnessed a surge in European literature supportive of the Prophet Muhammad. See KATHERINA MOMMSEN, GOETHE WA AL-'ALAM AL-'ARABI [GOETHE AND THE ARAB WORLD] 180-81 (A. Ali & A. Makkawi trans., al-Majlis al-Watani li al-Thaqafah wa al-Funun wa al-Adab: Kuwait, 1995). In particular, a book by the Dutch Henri Conte Boulainvillier, which praised the Prophet and his accomplishments, influenced Voltaire's thought and resulted in a reversal of his earlier hostile view. See *id.*

¹⁴⁷ See *supra* notes 6, 11, 17.

women.¹⁴⁸ In fact, a delegation of Arab women extended the *bay'ah* to him, thus establishing during his lifetime the right of Muslim women to participate in the political process.¹⁴⁹

In this section, I present a *de novo* analysis of the fundamental historical reasons for the failure of Islamic democratic institutions in Muslim countries. Primary among these reasons is a series of events that occurred soon after the death of the Prophet. An analysis of these events will show that democratic failure was not the result of the fatalism or apathy of Muslims as some eighteenth century writers concluded.¹⁵⁰ Rather, this failure resulted from serious challenges arising soon after the death of the Prophet for which neither the budding Muslim state nor its leadership was adequately prepared. These challenges were made even more insurmountable in light of the historical moment in which the whole region, and perhaps the world, was engulfed.

I now turn to the historical analysis of the failure. As it turned out, the democratic example presented by the society of Madinah was to endure only for a fleeting, shining moment in the history of the Arab Peninsula and Muslim communities beyond. Soon after the death of the Prophet, many Muslims began reverting to their former tribal ways.¹⁵¹ During that critical period, in which a great deal of upheaval followed, the Muslim leadership, primarily consisting of the Companions of the Prophet, was faced with impossible choices.¹⁵² In hindsight, one may now wonder whether the choices ultimately made

¹⁴⁸ See QUR'AN 60:12; see also al-Hibri, *supra* note 86, at 20 (citing ancient Arabic sources reporting that the Prophet used to mend his own clothes, cut meat, play with children, perform chores around the house and recounting that the Prophet also consulted women); 1 HASSAN IBRAHIM HASSAN, *TARIKH AL-ISLAM [HISTORY OF ISLAM]* 152-56 (Maktabat al-Nahdah al-Sharqiyah: Cairo, 7th ed., 1964); 1 ABU SHU'QQA, *supra* note 101, at 231 (citing the critical incident when Muslims were about to disobey the Prophet and in which, by following the advice given by his wife, Um Salamah, the Prophet successfully avoided the crisis).

¹⁴⁹ See QUR'AN 60:12; al-Hibri, *supra* note 67, at 12 (explaining the lack of limitations placed on citizens' participation in the political process).

¹⁵⁰ See *supra* note 14 and accompanying text.

¹⁵¹ See 1 HASSAN, *supra* note 148, at 342; 2 HASSAN, *supra* note 148, at 8-9. For detailed accounts of events subsequent to the death of the Prophet, see AL-TABARI, *infra*, at 257-306; 4 IBN HISHAM, *supra* note 77, at 656; see also AL-ZEIN, *supra* note 114, at 14, 28. The death of the Prophet was a shock to the community. Even his companion 'Umar Ibn al-Khattab refused to believe it. See 2 ABU JA'FAR AL-TABARI, *TARIKH AL-UMAM WA AL-MULUK [THE HISTORY OF NATIONS AND KINGS]* 232 (Dar al-Kutub al-'Ilmiyah: Beirut, n. d., reprint, 9th century, 1988). Then Abu Bakr al-Siddiq, who became the first *khalifah*, made his famous speech in which he said: "Oh People! Whoever amongst you worshiped Muhammad, [let them know that] Muhammad has died. Whoever amongst you worshiped God, [let them know that] God is alive eternally." *Id.*; 5 IBN KATHIR, *AL-BIDAYAH WA AL-NIHAYAH [THE BEGINNING AND THE END]* 243 (Maktabat al-Ma'arif: Beirut, 2d reprint, 14th century, 1974); see also 1 HASSAN, *supra* note 148, at 151.

¹⁵² The Companions of the Prophet were friends and supporters of the Prophet. According to some accounts, they numbered in the thousands and included a large number of women. For more on the women Companions, see MUHAMMAD SA'ID MUBAYYED, *MAWSU'AT AL-SAHABIYAT [ENCYCLOPEDIA OF LIFE OF THE FEMALE COMPANIONS]* (Maktabat al-Ghazali: Syria, 1990).

were the right ones. Nevertheless, I argue in this section that the demise of Islamic democracy was not a consequence of these choices. Rather, it was the direct result of the historical consciousness of the people and the world at that time, in the absence of a fully developed constitutional and legal apparatus for managing crises.

Having lost their Prophet, many Muslims reverted to traditional authoritarian forms of leadership. The *Qur'an* recognized this potential problem when it referred to those of weak faith.¹⁵³ The Prophet understood it as well.¹⁵⁴ Nevertheless, he sowed the seeds of democracy by taking, against all odds, the first few steps of what turned out to be a long historical journey for Muslims. By doing so, he irrevocably established democratic tradition as part of his *sunnah*, and provided yet one more example of the *Qur'anic* philosophy of gradualism.¹⁵⁵

Unfortunately, several events that occurred soon after the Prophet's death halted the development of his democratic tradition in favor of reverting to an authoritarian regime. Of these events, two in particular stand out in Muslim history: the murder of the third *khalifah*, 'Uthman, and the military battle between the grandson of the Prophet and Khalifah Yazid, of the Umayyad dynasty. Each event occurred in the seventh century.

The first of these events centered around a fundamental constitutional issue, the second around a legal/moral one. The first historical event resulted from the inability of the community to agree on an answer to the question: What constitutes an impeachable offense? The issue in the second instance was resolving the dilemma: Is it better to fight to uphold legitimacy (or one's principles) or to refrain in order to preserve harmony and peace within the community. Even today, these are difficult questions. An understanding of the historical background of these two events is important in order to recognize their significance.

The first event of import was occasioned by the people's *bay'ah* to

¹⁵³ The *Qur'an* admonishes against faithlessness as follows:

Muhammad is no more than a messenger; many were the messengers that passed away before him. If he died or were slain, will you then turn back on your heels? If anyone does turn back on his heels, he will not harm God in the least. And God will reward those who give thanks to Him.

QUR'AN, 3:144. This verse clearly illustrates the *Qur'anic* philosophy of gradualism. God did not expect Muslims to be immediately and totally transformed by the message of the *Qur'an*. Muslims did, however, start on the road to democracy in Madinah. The Madinan experience, though ancient, may be regarded as a model for building modern democracies in Muslim countries.

¹⁵⁴ See 4 AL-BUKHARI, *supra* note 85, at 198 (stating that the Prophet predicted that two groups of Muslims would fight each other for the same cause after his death); 5 IBN KATHIR, *supra* note 151, at 201. The Prophet also stated that there would be people who read the *Qur'an*, but for whom this reading would not reach beyond their vocal chords. See 4 AL-BUKHARI, *supra* note 85, at 198. Through such people, Islam would pass "as fast as an arrow." *Id.*

¹⁵⁵ See *supra* notes 72-73 and accompanying text.

'Uthman as their new *khalifah* after extensive *shura* among them.¹⁷⁴ 'Uthman, a pious and kind man, was a Companion of the Prophet, but he turned out to be a weak *khalifah*.¹⁵⁷ He remained *khalifah* for almost twelve years, until he was murdered at the age of eighty two.¹⁵⁸ As he grew older, he fell increasingly under the influence of some of his impious relatives.¹⁵⁹ He appointed them to high posts and, as a result, they accumulated wealth and power.¹⁶⁰ Muslims, in various regions, were unhappy with 'Uthman's appointments and nepotism.¹⁶¹ When their frustration finally turned into anger, Muslims departed from regions as far as Egypt, Basra, and Kufa (in Iraq) to march on Madinah in protest.¹⁶²

The Muslims of Madinah were quite concerned about these developments.¹⁶³ Their leaders were themselves displeased with 'Uthman's policies, but it does not appear that they found these policies to have risen to the level of impeachable offenses or that they warranted his resignation. After all, the dignity of the office of *khalifah* reflects on the dignity of the whole Muslim people and a *khalifah* could only be impeached for a limited number of reasons which were specified by Muslim jurists.¹⁶⁴ So, the Companions tried to give 'Uthman good advice and guidance.¹⁶⁵ Some also defended him against unfair accusations.¹⁶⁶ Still, others invited him to repent.¹⁶⁷ 'Uthman then declared his repentance publicly, promising to change

¹⁵⁶ See 2 AL-TABARI, *supra* note 151, at 582-83; 7 IBN KATHIR, *supra* note 151, at 146 (stating that even secluded women, children and travelers were consulted about the *bay'ah* for 'Uthman).

¹⁵⁷ See 1 HASSAN, *supra* note 148, at 253, 263, 265; 7 IBN KATHIR, *supra* note 151, at 145, 169.

¹⁵⁸ See 2 ABU AL-HASSAN AL-MAS'UDI, MURUJ AL-THAHAB WA MA'ADEN AL-JAWHAR [PASTURES OF GOLD AND MINERALS OF ESSENCE] 331 (Dar al-Andalus: Beirut, reprint, 10th century 1978); 1 HASSAN, *supra* note 148, at 265, 354.

¹⁵⁹ See 2 AL-MAS'UDI, *supra* note 158, at 334-36; 2 AL-TABARI, *supra* note 151, at 659-60, 668; 'ATWAN, *supra* note 112, at 25; 7 IBN KATHIR, *supra* note 151, at 169.

¹⁶⁰ See 2 AL-TABARI, *supra* note 151, at 652; 7 IBN KATHIR, *supra* note 151, at 171; see also AL-ASSADI, *infra* note 164, at 113-14; 3 AL-TABARI, *supra* note 151, at 8.

¹⁶¹ See 3 AL-TABARI, *supra* note 151, at 661; 2 AL-MAS'UDI, *supra* note 158, at 334-35; 7 IBN KATHIR, *supra* note 153, at 168, 171, 176, 201. For a list of all the charges, including nepotism, and 'Uthman's rebuttal, see 2 AL-TABARI, *supra* note 151, at 651.

¹⁶² See 2 AL-MAS'UDI, *supra* note 158, at 343-44; 2 AL-TABARI, *supra* note 151, at 652; 7 IBN KATHIR, *supra* note 151, at 168, 170, 173.

¹⁶³ See 2 AL-TABARI, *supra* note 151, at 663 (noting that the Madinans wrote a letter to 'Uthman asking him to repent); *id.* at 653 (relating that as the conflict intensified the Madinans stayed home).

¹⁶⁴ See AL-KHALIDI, *supra* note 115, at 293-381; SAIF AL-ASSADI, AL-FITNAH WA WAQ'AT AL-JAMAL [SEDITION AND THE BATTLE OF THE CAMEL] 19 (Ahmad Ra'ub 'Armoush ed., Dar al-Nafa'is: Beirut, 7th ed., 1993).

¹⁶⁵ See 7 IBN KATHIR, *supra* note 151, at 168 (stating that, in particular, 'Ali, the cousin of the Prophet and the front runner for the position of *khalifah* after 'Uthman, was asked by the people to advise 'Uthman); 2 AL-TABARI, *supra* note 151, at 653, 657, 664 (noting that 'Ali gave 'Uthman his straightforward advice and at the same time admonished the crowds for their behavior); 7 IBN KATHIR, *supra* note 151, at 171, 173.

¹⁶⁶ See 2 AL-TABARI, *supra* note 151, at 658; 7 IBN KATHIR, *supra* note 151, at 171.

¹⁶⁷ See *supra* note 163.

his objectionable policies.¹⁶⁸ As a result of these events, the crowds were mollified and decided to give 'Uthman another chance. The out-of-town crowds turned back to go home.¹⁶⁹

Unfortunately, it appears that Marwan, a relative of 'Uthman, decided to take matters into his own hands.¹⁷⁰ He forged a letter to the *wali* (governor) of Egypt in the name of the *khalifah*, ordering him to kill the leaders of the insurgents upon their arrival.¹⁷¹ The letter, however, fell into the hands of the departing crowds.¹⁷² Incited by the letter, the crowds turned back immediately towards Madinah and surrounded the residence of 'Uthman.¹⁷³ The *khalifah* denied writing the letter.¹⁷⁴ The denial served only to anger the crowds further by making the *khalifah* look either like a liar or an incompetent ruler.¹⁷⁵ The crowds gave 'Uthman three choices: deliver the deceitful Marwan to the crowd, resign, or be killed.¹⁷⁶

'Uthman refused to shirk his responsibilities by resigning.¹⁷⁷ It also appears that he was unwilling to flee or turn his relative Marwan over to the enraged crowds.¹⁷⁸ Seeing it as his only remaining option, 'Uthman prepared for his death.¹⁷⁹ Interestingly enough, although the Companions sent their sons to protect 'Uthman's residence, they did not take the threat to kill him seriously.¹⁸⁰ After all, 'Uthman was the *khalifah*, and the moral authority of the *khalifah* made such an act

¹⁶⁸ See 2 AL-TABARI, *supra* note 151, at 655, 658, 660; 7 IBN KATHIR, *supra* note 151, at 169, 171.

¹⁶⁹ See 2 AL-TABARI, *supra* note 151, at 655. But see 7 IBN KATHIR, *supra* note 151, at 174 (suggesting that the crowds had no genuine intention of returning to their homeland).

¹⁷⁰ See 2 AL-MAS'UDI, *supra* note 158, at 343; 2 AL-TABARI, *supra* note 151, at 666; 7 IBN KATHIR, *supra* note 151, at 186.

¹⁷¹ See 2 AL-TABARI, *supra* note 151, at 655-56; 7 IBN KATHIR, *supra* note 151, at 174-75, 186.

¹⁷² See 2 AL-TABARI, *supra* note 151, at 655-56; 7 IBN KATHIR, *supra* note 151, at 174, 186.

¹⁷³ See 2 AL-TABARI, *supra* note 151, at 662, 664, 666; 7 IBN KATHIR, *supra* note 151, at 174, 187.

¹⁷⁴ See 2 AL-TABARI, *supra* note 151, at 664, 666; 7 IBN KATHIR, *supra* note 151, at 175, 186.

¹⁷⁵ See 2 AL-TABARI, *supra* note 151, at 666-67; 7 IBN KATHIR, *supra* note 151, at 186.

¹⁷⁶ There are minor disagreements as to the actual choices 'Uthman had, but they all boiled down to the same thing: Leave or pay the consequences. Compare 2 AL-TABARI, *supra* note 151, at 664 (relating that the *Khalifah* was given the choice between resigning, punishment and death and that the *Khalifah* responded that he was too old and weak for punishment), with 7 IBN KATHIR, *supra* note 151, at 197 (stating the three choices), 174 (stating that the Egyptian crowds said, "if he leaves us [resigns], we will leave him"), 177, and 180 (stating that he was asked to resign or deliver Marwan to them).

¹⁷⁷ See 2 AL-TABARI, *supra* note 151, at 664, 666, 667, 675; 7 IBN KATHIR, *supra* note 151, at 180, 184.

¹⁷⁸ See 7 IBN KATHIR, *supra* note 151, at 180; 2 AL-TABARI, *supra* note 151, at 661-62 (noting that on one occasion a man from the crowd broke 'Uthman's cane while 'Uthman was delivering a speech in a mosque). The crowds also denied water to 'Uthman's household and prevented him from going to the mosque to pray. See *id.* at 672; see also 2 AL-MAS'UDI, *supra* note 158, at 344.

¹⁷⁹ See 2 AL-TABARI, *supra* note 151, at 674; 7 IBN KATHIR, *supra* note 151, at 198, 181.

¹⁸⁰ See 'AL-ASSADI, *supra* note 164, at 20; 7 IBN KATHIR, *supra* note 151, at 176, 181-82 (indicating that there were seven hundred Muslim leaders and supporters at 'Uthman's residence, among whom were sons of the Companions, but 'Uthman sent them away); see also 'AL-ASSADI, *supra* note 164, at 68-69 (stating that many refused to leave); cf. 2 AL-MAS'UDI, *supra* note 158, at 344-45 (stating that when Ali had heard that the crowds may kill 'Uthman he sent his own children with arms and other fighters to protect him).

unthinkable. The moral authority of 'Uthman, however, was eroding rapidly¹⁸¹ because he had not instituted the changes he had promised, and he had written other regions asking for military support.¹⁸² The crowds were getting out of control,¹⁸³ and when he tried to address them at the mosque, they stoned him.¹⁸⁴

After surrounding 'Uthman's residence for over forty days, the angry crowds finally realized that the *khalifah* was not going to change his ways, resign, or deliver Marwan.¹⁸⁵ Feeling betrayed by the *khalifah* and fearing defeat and retribution by the approaching armies, mobs decided to storm 'Uthman's house.¹⁸⁶ Some of the angry mobs burned down 'Uthman's front door and attacked his protectors, while others in the crowds climbed the wall and murdered 'Uthman as he read the *Qur'an*.¹⁸⁷ The repercussions of this bloody act continue to be felt in the Muslim world to this day.¹⁸⁸

The story of Khalifah 'Uthman has many lessons. For our purposes, we focus on the following facts. While Muslim leaders wanted to abide by the rule of law, the larger Muslim community, which at the time extended from Egypt to Syria and Iraq, contained significant elements that had not fully internalized this new concept. Had the leadership concluded that 'Uthman's offense was impeachable, they would have been able to remove him. In fact, politically, such an action would have benefitted several potential successors. But these individuals were not concerned with personal political interest. Their main concern was the proper and just application of *Qur'anic* law. By contrast, the angry crowds, recognizing that the *khalifah* was an old and physically weak man, opted for the pre-Islamic use of force instead of the Islamic rules of law.

'Uthman's weak personality permitted authoritarian tribal tendencies, previously submerged, to reappear. One may conclude from this event that the error committed by the early Muslim leadership was not that of being too cautious in impeaching 'Uthman. Rather,

¹⁸¹ See *supra* notes 156-62, 170-75 and accompanying text.

¹⁸² See 2 AL-TABARI, *supra* note 151, at 662, 664; see also *id.* at 667 (stating that 'Uthman told the crowds that, while the option was available to him, he had chosen not to send for military support in order to avoid bloodshed); 7 IBN KATHIR, *supra* note 151, at 173 (stating that the crowds discovered that 'Uthman had not changed his ways), 188 (indicating that the armies were coming, though not indicating that the *Khalifah* had requested them).

¹⁸³ See *supra* note 173-76.

¹⁸⁴ See 2 AL-TABARI, *supra* note 151, at 654, 660; 7 IBN KATHIR, *supra* note 151, at 176.

¹⁸⁵ See 2 AL-MAS'UDI, *supra* note 158, at 346 (noting that 'Uthman was under siege for 49 days); 2 AL-TABARI, *supra* note 151, at 655 (noting that 'Uthman was under siege for 40 days).

¹⁸⁶ See 2 AL-TABARI, *supra* note 151, at 669, 674, 676; 7 IBN KATHIR, *supra* note 151, at 188; see also 2 AL-MAS'UDI, *supra* note 158, at 345.

¹⁸⁷ Many in the crowds raided *Beit al-Mal*, the Islamic state Treasury. Revelation of this act led many to conclude that the motivation for rebellion was not entirely honorable. See 2 AL-TABARI, *supra* note 151, at 669; 7 IBN KATHIR, *supra* note 151, at 183-185, 188-89.

¹⁸⁸ This paper will discuss some of these repercussions, but it is important to note that this event and the second event discussed herein remain "live" issues in the Muslim community, despite the passing of fourteen hundred years.

the error was that the leadership underestimated the consequences of 'Uthman's weak personality at that early stage in Islamic constitutional development. Had the Muslim leadership properly assessed the situation, they may have been able to remedy it in time. This is especially true in hindsight. As history reveals, 'Uthman's policies allowed his relatives, the Umayyads, to accumulate significant wealth and power during his rule, seize the office of the *khilafah* illegitimately, and ultimately transform a traditionally democratic office into a monarchical one.¹⁸⁹

The second event that halted the evolution of democratic processes in Muslim states followed from the first. The murder of Khilafah 'Uthman brought chaos and bloodshed to the community at large.¹⁹⁰ As a result, a deep aversion to internecine fighting developed.¹⁹¹ It thus became highly important to reestablish unity and harmony in the Muslim community.¹⁹² It was under these conditions that the Umayyads ultimately seized power. They accumulated power by force and deceit.¹⁹³ Yet, even the Umayyads recognized the importance of religion to the Muslim psyche. Thus, they retained the symbols of an Islamic democratic system while emptying them of all content.¹⁹⁴ By co-opting these institutions, the Umayyads were able to confuse their subjects and diffuse much popular anger. Most significantly, the Umayyads transformed the political succession system into a hereditary system, coerced the *bay'ah* of Muslims, and weakened the concept of *shura*.¹⁹⁵ Many Muslims, though disgusted by this turn of

¹⁸⁹ See 3 AL-TABARI, *supra* note 151, at 8; AL-ASSADI, *supra* note 164, at 113-14 (stating that the Umayyads financed 'Aisha's trip to Basra in an attempt to undermine 'Ali); see also ABU HANIFAH AL-DAYNOURI, AL-AKHBAR AL-TIWAL [THE LONG STORIES] 121-22 (Dar al-Fikr al-Hadith: Beirut, reprint, 9th century, 1988) (noting that the Umayyads bought the allegiance of some allies); 2 AL-MAS'UDI, *supra* note 158, at 343 (relating that the Umayyads planned this course of action long before the murder of 'Uthman).

¹⁹⁰ See AL-ASSADI, *supra* note 164, at 155-79 (describing the Battle of the Camel and its ensuing chaos, which particularly shocked all Muslims). In this battle directly resulting from 'Uthman's murder, despite all attempts to avoid a confrontation, Muslims fought each other for the first time and thousands were killed. See *id.*; 3 AL-TABARI, *supra* note 151, at 54-55, 58; 8 IBN KATHIR, *supra* note 151, at 243.

¹⁹¹ See AL-DAYNOURI, *supra* note 189, at 126-27, 151; 3 AL-TABARI, *supra* note 151, at 5, 35, 78; 7 IBN KATHIR, *supra* note 151, at 253-54, 258.

¹⁹² See 3 AL-TABARI, *supra* note 151, at 78, 158; 8 IBN KATHIR, *supra* note 151, at 148; see also 2 AL-DAYNOURI, *supra* note 189, at 126, 165-66.

¹⁹³ See 3 AL-TABARI, *supra* note 151, at 101, 153, 165, 269-74; 'ATWAN, *supra* note 112, at 83-94; 7 IBN KATHIR, *supra* note 151, at 273, 276-278, 242-43; see also AL-DAYNOURI, *supra* note 189, at 148, 152-53, 173; 1 HASSAN, *supra* note 148, at 278.

¹⁹⁴ For examples of symbols of the Islamic democratic system, see *supra* notes 112-15 and accompanying text (explaining that a Muslim head of state has no claim to divinity); *supra* note 189 and accompanying text (explaining the transformation of Muslim states from deliberative into monarchical regimes); *infra* note 195 and accompanying text (explaining that the processes of *bay'ah* and *shura* were weakened); see also AL-ZEIN, *supra* note 114, at 14; 1 HASSAN, *supra* note 148, at 278.

¹⁹⁵ See 3 AL-TABARI, *supra* note 151, at 260, 269-70; 'ATWAN, *supra* note 112, at 51-52, 84-86; AL-ZEIN, *supra* note 114, at 172; 1 HASSAN, *supra* note 148, at 437; 2 HASSAN, *supra* note 148, at 7-8; 7 IBN KATHIR, *supra* note 151, at 146-47.

events, decided to live with the status quo rather than initiate another cycle of bloodshed and instability.¹⁹⁶

There was one notable exception. Before his death, the first Umayyad *khalifah* arranged the *bay'ah* from leading Muslims to his son Yazid.¹⁹⁷ Four important leaders, including al-Hussein, the grandson of the Prophet, refused to give it.¹⁹⁸ Upon becoming the *khalifah*, Yazid attempted to coerce al-Hussein into giving him his *bay'ah*.¹⁹⁹ At the same time, supporters from Kufa encouraged al-Hussein to challenge Yazid's claim to the *khalifah*.²⁰⁰ When al-Hussein sent a messenger to Kufa to assess the situation, Yazid decided to end any potential threat from al-Hussein.²⁰¹ He appointed a new *wali* for Kufa, and ordered him to kill or exile al-Hussein's messenger.²⁰² The *wali* did so, and he also threatened the people of Kufa with the use of force.²⁰³ Intimidated by the power of the Umayyads, the support of the people of Kufa for al-Hussein waned²⁰⁴ until he found himself left with approximately seventy fighters.²⁰⁵ Al-Hussein tried repeatedly to reach a peaceful resolution with the *wali*, without being coerced into giving his *bay'ah*.²⁰⁶ The *wali*, however, was in no mood to compromise.²⁰⁷

¹⁹⁶ See 3 AL-TABARI, *supra* note 151, at 5, 14, 164-65; 8 IBN KATHIR, *supra* note 151, at 148, 166; see also AL-DAYNOURI, *supra* note 189, at 166.

¹⁹⁷ See 3 AL-MAS'UDI, *supra* note 158, at 27-29; 3 AL-TABARI, *supra* note 151, at 260; AL-ZEIN, *supra* note 114, at 73; 2 HASSAN, *supra* note 148, at 437; 'ATWAN, *supra* note 112, at 52.

¹⁹⁸ See 3 AL-TABARI, *supra* note 151, at 260, 269-70; 8 IBN KATHIR, *supra* note 151, at 151; see also AL-DAYNOURI, *supra* note 189, at 173 (stating that al-Hussein refused to give a secret *bay'ah* to Yazid, preferring to wait until he met and consulted with the rest of the people).

¹⁹⁹ See AL-DAYNOURI, *supra* note 189, at 172-73; 3 AL-TABARI, *supra* note 151, at 269-70.

²⁰⁰ See AL-DAYNOURI, *supra* note 189, at 174, 183, 190 (stating that 18,000 Kufis gave *bay'ah* to al-Hussein); 3 AL-TABARI, *supra* note 151, at 275, 286, 301 (relating that a letter from al-Hussein's emissary informed al-Hussein that 12,000 people from Kufa gave *bay'ah* to him); 8 IBN KATHIR, *supra* note 151, at 170 (stating that the Kufis promised 100,000 supporters for al-Hussein), 151-52, 158, 161, 165 (stating that eighteen hundred Kufis gave *bay'ah* to al-Hussein); see also AL-DAYNOURI, *supra* note 189, at 184-85; 3 AL-TABARI, *supra* note 151, at 295 (stating that al-Hussein was repeatedly warned of the hypocrisy of the Iraqis).

²⁰¹ See AL-DAYNOURI, *supra* note 189, at 176; 3 AL-TABARI, *supra* note 151, at 274-75; 8 IBN KATHIR, *supra* note 151, at 152.

²⁰² See AL-DAYNOURI, *supra* note 189, at 176; 8 IBN KATHIR, *supra* note 151, at 152.

²⁰³ See AL-DAYNOURI, *supra* note 189, at 176-77, 182; 3 AL-TABARI, *supra* note 151, at 281, 287; 8 IBN KATHIR, *supra* note 151, at 155-56, 158.

²⁰⁴ See AL-DAYNOURI, *supra* note 189, at 181, 186; 3 AL-TABARI, *supra* note 151, at 288, 315; 8 IBN KATHIR, *supra* note 151, at 154-55, 169.

²⁰⁵ See AL-DAYNOURI, *supra* note 189, at 191; 3 AL-TABARI, *supra* note 151, at 298 (stating that al-Hussein had 45 knights and about 100 foot soldiers); 8 IBN KATHIR, *supra* note 151, at 171 (stating that al-Hussein had about 100 supporters), 169 (describing how there were at least 4,000 fighters in the army of Yazid, and how the support of al-Hussein by the people of Kufa waned).

²⁰⁶ See 3 AL-TABARI, *supra* note 151, at 298, 312, 313 (stating that the *wali* of Kufa, appointed by Yazid, ordered that al-Hussein be killed if he refused to give the *bay'ah*); see also 8 IBN KATHIR, *supra* note 151, at 170 (noting that al-Hussein proposed several alternatives to avoid a battle but was prevented by Yazid's military chieftains from returning to Madinah), 179, 180-81; AL-DAYNOURI, *supra* note 189, at 190-91 (stating that Yazid's army denied al-Hussein and his people access to water). But see AL-DAYNOURI, *supra* note 189, at 194 (stating that Yazid was saddened by the death of al-Hussein).

He wanted to eliminate al-Hussein while he still could, given that al-Hussein's support was still strong in Hijaz,²⁰⁸ and most Muslims viewed him as more eligible for the *khilafah* than Yazid.²⁰⁹

Yazid's forces massacred al-Hussein, his fighters, and all the male members of that branch of the Prophet's family, except for two children.²¹⁰ The women were taken to Damascus, the seat of Yazid's government.²¹¹ In an act of overwhelming courage, Zainab, the granddaughter of the Prophet, confronted Yazid in his palace and condemned his rule of force as unjust and oppressive.²¹² Zainab's defiant act, and the resistance of al-Hussein and others who understood the full significance of the unfolding events, prove that Muslims did not lose their democratic institutions because of an "Islamic attitude of fatalism."²¹³ Indeed, had the Muslims adopted a fatalistic attitude, many lives would have been spared. The loss of democracy was simply the result of a confrontation between the rule of law and the rule of force. Fourteen hundred years ago, the odds, or what may be termed "historical consciousness," overwhelmingly favored the rule of force.

After the massacre of al-Hussein's family, the rule of Islamic deliberative democracy was once and for all replaced by an absolute monarchy, which transmitted power through heredity. The monarchy continued to act and rule in the name of Islam in order to confuse the population and discredit any opposition. It also found jurists who developed jurisprudence supporting its interests.²¹⁴ Yet, the *Qur'an* states that kings bring disgrace and degradation to any town they enter, and the *Qur'anic* twin requirements of *ba'yah* and *shura* are inconsistent with a hereditary system of political succession.²¹⁵ The loss, therefore, of legitimacy of Muslim regimes in the eyes of the people can be traced to the installment of a hereditary, monarchical system to supplant the *ba'yah* and *shura* system of determining leadership.

For many centuries afterwards, prominent *mujtahids* who wit-

²⁰⁷ See AL-DAYNOURI, *supra* note 189, at 189-90; 3 AL-TABARI, *supra* note 151, at 298; 8 IBN KATHIR, *supra* note 151, at 170.

²⁰⁸ Hijaz refers to the Western part of today's Saudi Arabia. It includes Makkah and Madinah.

²⁰⁹ See AL-DAYNOURI, *supra* note 189, at 174; 3 AL-TABARI, *supra* note 151, at 295; 8 IBN KATHIR, *supra* note 151, at 151.

²¹⁰ See AL-DAYNOURI, *supra* note 189, at 193 (stating that two children were spared). *But see* 3 AL-TABARI, *supra* note 151, at 298 (stating that only one sick adolescent male was saved).

²¹¹ See AL-DAYNOURI, *supra* note 189, at 193-94; 3 AL-TABARI, *supra* note 151, at 339; 8 IBN KATHIR, *supra* note 151, at 194, 196.

²¹² 3 AL-TABARI, *supra* note 151, at 339-40 (describing how Zainab called Yazid an oppressive ruler and asked him if the granddaughters of the Prophet were prisoners of war); 8 IBN KATHIR, *supra* note 151, at 195-96.

²¹³ See *supra* note 15 and accompanying text.

²¹⁴ See 1 AL-GHAZALI, *supra* note 84, at 48, 64, 67; 2 AL-GHAZALI, *supra* note 84, at 351; AL-ZEIN, *supra* note 114, at 41-44.

²¹⁵ See QUR'AN, 27:34 (quoting the Queen of Sheba saying, "Whenever Kings enter a town, they plunder it and humiliate its noblest people.").

nessed these and subsequent power struggles recused themselves from political life and diverted their attention to other matters, such as the educational, social and spiritual welfare of the community.²¹⁶ Many well-known jurists were punished when they challenged, or even refused to cooperate with, the system.²¹⁷ The general population fared no better. The rights to privacy, free speech and due process were curtailed. Women lost the rights they previously enjoyed during the Prophet's life, such as the right to receive an education, engage in business and freely consent to their own marriages.²¹⁸ In time, *ijtihād* withered, and states began choosing their official schools of thought,²¹⁹ and "personal status codes."²²⁰ These laws denied men and women rights to which they were entitled during the Prophet's life.²²¹

Thus, the "lack of encouragement for free thinking" was thus not an "Islamic" trait.²²² Rather, it was a policy adopted by power-hungry, irreverent tyrants who usurped the *khilafah* from the people. As far as the tyrants were concerned, knowledge in the hands of the people enlightened them as to their human rights and would have enabled them to measure the extent of their oppression. As such, religious and, later, secular knowledge would have been, and remains, a danger to the regimes of such tyrants. Today, Muslims continue to desire both democratic government and freedom of expression. Given the repressive policies of many governments that rule Muslim citizens, the important questions are: (1) How can a people replace its repressive government with a democratic one without the use of force?; and (2) How can a people governed by the use of force transform its collective consciousness, as well as its political system, towards respecting the rule of law, without provoking and having to endure a long period of national instability?

I argue optimistically that today's methods of conflict resolution and restorative justice may help provide answers to these questions. I suggest that both the Companions and al-Hussein attempted to use these methods during the "Uthman" and "Yazid" crises but failed be-

²¹⁶ See 1 AL-GHAZALI, *supra* note 84, at 73; 2 AL-GHAZALI, *supra* note 84, at 140-44.

²¹⁷ See 1 AL-GHAZALI, *supra* note 84, at 33-34; AL-ZEIN, *supra* note 112, at 45-46; IBN KHALDOUN, AL-MUQQADIMAH [THE INTRODUCTION] 209 (Kitab al-Qalam: Beirut, reprint, 14th century, 1978); IBRAHIM AL-WAZIR, 'ALA MASHARIF AL-QARN AL-KHAMIS 'ASHAR AL-HIJRI [AT THE TURN OF THE FIFTEENTH CENTURY HIJRAH] 42 (Dar al-Shuruq: Beirut, 1989). *But see* 2 AL-GHAZALI, *supra* note 114, at 337-51 (providing instances where people who spoke out to the ruler directly were not punished).

²¹⁸ For more information on the curtailment of the rights previously enjoyed by women, see al-Hibri, *supra* note 86, at 14-21, 41-42.

²¹⁹ See *id.* at 14.

²²⁰ See *id.* at 18 (discussing the concept of *ta'ah*, which reduces the status of women under the law).

²²¹ Both men and women were denied the right to a true *bay'ah* and *shura*, but the denial of women's rights was more comprehensive. For more on this subject, see al-Hibri, *supra* note 86, *passim*, and 1 ABU SHUQQAH, *supra* note 101, at 7-38.

²²² See *supra* note 16 and accompanying text (discussing the general curtailment of rights enjoyed by men and women).

cause of the historical consciousness prevalent at the time, which overwhelmingly favored the use of force.²²³

Given the preceding analysis, it can readily be concluded that the Founding Fathers did not quite understand what really went wrong within Islamic civilizations. Nevertheless, the ancillary question of whether the Founding Fathers succeeded in avoiding the same pitfalls may still be posed. While I cannot be sure that the Founding Fathers succeeded in their task, I believe that they did lay a solid foundation in the American Constitution, but that many of the safeguards were developed over time, during historical eras that were more favorable towards the rule of law. Even with this strong foundation, we continue today to struggle with at least one of the two questions that perplexed and divided Muslims fourteen hundred years ago: First, what offenses are impeachable? Second, is it better to fight to uphold legitimacy (or one's principles), or to refrain in order to preserve harmony and peace within the community? Clearly, Abraham Lincoln and his contemporaries struggled with this dilemma before embarking on the Civil War.

In fact, a comparative study between al-Hussein's battle with Yazid and the American Civil War would be instructive in shedding some light on the second question. In conducting this study, it may be worthwhile to focus on answers provided by American historians to questions, such as: Could the Civil War have been avoided? Were there serious attempts to resolve the conflict peacefully? If so, why did these attempts fail? For the purpose of assessing the possibility of Muslim borrowing from the United States, we may also want to pose follow-up questions, such as: How did this country succeed in establishing and preserving its constitutional/legal structures, despite challenges that included a revolution and a civil war? Also, this article has suggested one initial answer to explain the demise of Islamic constitutionalism, namely, the historical consciousness that predominated at the time. There are many more answers to contemplate, especially in light of later developments in Muslim countries.

Since the time the Founding Fathers conducted their inquiries about Muslim countries, a great deal has taken place there. The Ottoman Empire collapsed, and so did many other regimes in the area. The region experienced the authoritarian rule of Western colonialism and has since experienced Western cultural, political and technological hegemony. These are important developments which require further study. In particular, it would be instructive to investigate whether these recent experiences would, regardless of any similarity between Western and Islamic democracy, tend to facilitate or complicate constitutional borrowings from the West. The answers to these questions may lie not only in constitutional law but also in studies of

²²³ See, e.g., *supra* text accompanying notes 184-88 (recounting that angry crowds stoned and ultimately killed Khalifah 'Uthman), and 206 (recounting the massacre of al-Hussein).

culture, politics, and mass psychology.

FINAL REMARKS

The first part of this article established the existence of many similarities between the thought of Jefferson and other Founding Fathers and some basic Islamic ideas. It established that Jefferson, for example, was familiar with Islam. In fact, he owned a *Qur'an* with a substantive historical introduction. Additionally, Jefferson read and later translated part of *The Ruins*, a book authored by the controversial French writer Volney, for whom Jefferson had a great deal of admiration. Volney's work reviewed older civilizations and studied the reasons for their demise. A discussion of the Turkish system and its excesses was thus important. Apparently, Jefferson was intent on developing a legal system that avoided the mistakes of prior civilizations. But he also learned from these civilizations and attempted to replicate their successes. At present, the extent to which Islamic concepts informed Jefferson's thoughts is unknown. The impact of Islam on Jefferson's thought could have come from two sources: Europe, or Muslim slaves in the United States.

Scholarly works are now being written about the extensive borrowing, legal and otherwise, by Europe from Islamic civilizations.²²⁴ Jefferson, for example, read the works of the German author Baron Samuel Puffendorf, sometimes citing matters of Islamic law.²²⁵ Thus, the extent to which Puffendorf's thinking may have been influenced, directly or indirectly, by Islamic thought deserves further research. Recent studies focused on American Muslim slaves, some of whom were literate religious figures.²²⁶ These slaves were used for service inside the house instead of in the field.²²⁷ Laboring inside of colonial houses would certainly have given learned Muslim slaves a greater opportunity to interact with their "masters." The issue of whether Jefferson could have been exposed to Islamic philosophy through such an experience is still under study. We already know, however, that

²²⁴ See John Maqdisi, *The Islamic Origins of the Common Law*, N.C. L. REV. (forthcoming, 1999); see also MOMMSEN, *supra* note 146.

²²⁵ See Frank L. Dewey, *Thomas Jefferson's Notes on Divorce*, 39 WM. & MARY Q. 212, 214, 221 (1982) ("Among the Turks is a kind of marriage called Kabin, where parties agree on a fixt [sic] time of separation, securing to the woman a sum of money on dismission" (quoting *Law of Nature and Nations* 6. I. 20 note (5)). Jefferson cited Pufendorf more than twenty times and *The Law of Nature and Nations* is the work most frequently mentioned in Jefferson's notes. See *id.* at 214.

²²⁶ See RICHARD BRENT TURNER, ISLAM IN THE AFRICAN-AMERICAN EXPERIENCE 25-32 (1997) (profiling the lives of Job Ben Solomon, Yarrow Mamout, and Abd al-Rahman Ibrahim); see also GOMEZ, *supra* note 60, at 71-85 (discussing other well-recognized American Muslims); SYLVANIA A. DIOUF, SERVANTS OF ALLAH: AFRICAN MUSLIMS ENSLAVED IN THE AMERICAS 50, 56-66 (1998) (profiling the lives of Omar ibn Said, Angelo Solimann (also known as Mamadi), Baron Roger and Ed Thorpe).

²²⁷ See *supra* note 64-65 and accompanying text.

Jefferson spoke of the right of religious groups to sacrifice sheep, a specifically Islamic practice.²²⁸ Also, Jefferson's view of God is highly consistent with the Islamic one. In fact, at times he was attacked by his contemporaries as an "infidel," a serious charge in any era. Were Jefferson's religious and constitutional views influenced by his readings on Islam? No conclusions have been formulated on this matter yet, but this research is ongoing.

Nevertheless, whether Jefferson's views were affected at all by Islamic thought through the writings of European thinkers, his own readings of a translated *Qur'an*, or discussions with Muslim slaves, the fact remains that fundamental similarities exist between the American and Islamic constitutionalist systems. This is clear from our analysis not only of the *Qur'anic* principles, but also from analysis of the *sunnah* of the Prophet as expressed in the Charter of Madinah.

The second part of the article focused on two major events that contributed to the demise of Islamic democracy. This focus was designed to refute the analyses offered by eighteenth century European writers, which blamed the absence of democratic institutions on "apathy," or the attitude of "fatalism" among Muslims.²²⁹

Together, the two parts of this article open the door for a fair assessment, based not only on knowledge of true Islamic principles, but also of the contributions of Islamic thought to world civilization in general and early American thought in particular. From this vantage point, the inference may properly be drawn that the Founding Fathers engaged in some borrowing, positive as well as negative, from Islamic civilizations.

One more question remains. May we conclude from the great deal of similarity between American and Islamic democracies that exporting our democratic ideas to Muslim countries will succeed? Pending further study of the ramifications of recent historical events in the region, one may answer with a qualified "yes." Importation of American constitutionalist ideas cannot succeed, however, without the same painstaking process of critical examination and adaptation in which our Founding Fathers engaged. Each Muslim country has an extensive cultural, religious and political history that deserves to be recognized and accommodated in devising a democratic system suitable for its own people.

Several things would help that process. First, a curtailment of the United States' support for tyrannical governments in Muslim countries would aid in the process of incorporating Western democratic structures into their political systems. Many of these regimes protect American economic interests in exchange for that support. The United State must decide, however, whether it would like to protect its economic interests abroad at all costs, or whether it would like to

²²⁸ See *supra* note 58 and accompanying text.

²²⁹ See *supra* notes 11-18 and accompanying text.

implement our human values internationally. In short, the issue here is whether we can allow ourselves, given our constitutional and moral beliefs as a nation, to use other people solely as means as opposed to ends in themselves. We have already answered this question domestically by recognizing the liberty of enslaved Africans, by enacting civil rights legislation, and by attempting to encourage diversity. Our policies, however, as opposed to our pronouncements, indicate that we have not fully resolved this issue on the global front.

Second, American Muslim jurists could also assist in expediting the process of critical examination and adaptation of democratic institutions by critiquing human rights violations abroad, acting as interpreters of the United States Constitution to other Muslims, and discussing such issues as freedom of belief, speech and elections in Islam. American Muslim jurists must particularly focus on the constitutional separation of Church and State, and adapt this concept to the sentiments of Muslim societies. If explained as a guarantee of freedom of belief for all, the concept would then of course be consistent with the Charter of Madinah. If understood as an anti-religion provision, however, a highly spiritual population will most likely reject the concept.²³⁰

Furthermore, it might be helpful to American Muslim jurists to investigate other borrowing links between Western and Islamic thought to facilitate acceptance of certain notions now viewed as exclusively Western. In this regard, further investigation of T. B. Irving's claim that Islamic thought led Europe, and later the United States, to the idea of the separation of Church and State would be warranted.²³¹

²³⁰ Of course, American jurists themselves continue to debate these two interpretations even today. See, e.g., J. H. GARVEY & FREDRICK SCHAUER, *THE FIRST AMENDMENT: A READER*, 512-633 (2d ed., 1996); G. STONE, ET AL., *CONSTITUTIONAL LAW* 1455-1463 (2d ed., 1991).

²³¹ See T. B. Irving, *The Process of Arab Thought in Spain*, IV *STUDIES IN ISLAM*, no. 2, Apr. 1967, at 65.