

# On the American Constitution from the Perspective of the Qur'an and the Madinah Covenant

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## **Abstract**

This paper explores the insights provided by an analysis of the compatibility of democracy and constitutionalism with Islamic law. Such a discussion would benefit from an assessment of aspects of the United States Constitution in light of the Qur'an and the Madinah Covenant. The issues explored include the permissibility of man-made constitutions in Islamic law, the goals of such constitutions, the relative roles of positive law and discovery, the separation of powers, the specification of principles as opposed to mechanisms of government, succession, treason, slavery, racism, amendment, separation of state and religion, human rights, private property, and unenumerated rights.

The interminable discussions over the compatibility of democracy with Islamic nomocracy (called the Shari`ah, an Arabic word meaning "path") have included profound discussions of constitutionalism.<sup>1</sup> This paper exploits the premise that discussing the compatibility of democracy and constitutionalism with Islamic law would benefit by assessing certain aspects of the American Constitution in light of the Qur'an<sup>2</sup> and the Madinah Covenant, which has been called "the first written constitution."<sup>3</sup> The Madinah Covenant strongly influenced subsequent Muslim political practice, and we may search it for insights on constitutional issues.

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This paper is by no means an exhaustive comparison of the American Constitution with the Qur'an and the Madinah Covenant. Rather, it explores the kinds of insights that a comparison between these two documents may suggest. Accordingly, the constitutional topics selected are those in which the author or the commentators on earlier drafts perceived an assessment within the Islamic sources.<sup>4</sup> This paper should be taken as an invitation for future studies with more systematic comparisons. In addition to rational inference from the text of the Qur'an and of the Madinah Covenant, I shall draw on the views of the Prophet's Companions as recorded in the leading Hadith books. Analogously, the views of the Founding Fathers of the American Republic on constitutional matters are articulated in *The Federalist Papers*.<sup>5</sup>

We shall begin by reviewing the Madinah Covenant, and then evaluate the Constitution's goals as expressed in the preamble. After that, we shall explore a variety of topics in the main body of the text that lend themselves to the examination proposed here. In particular, these are the roles of the branches of government according to the separation of powers, the role of elections in determining the next head of state, the penalty for treason, the existence of the slave trade and racism, the republican form of government, the provisions for amending the Constitution, religious tests, and the Bill of Rights. Finally, we consider the Madisonian arguments on how the Constitution may be considered a model for avoiding *fitnah*.

## The Madinah Covenant

That Muslims attach great significance to their organization as a political community can be seen in the fact that their calendar is dated neither from the birth nor the death of the Prophet, but from the establishment of the first Muslim polity in the city-state of Madinah in 622. Before Madinah was founded, the Arabs had no state to "establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty ..." The custom at that time was that those who were too weak to protect themselves became clients of a protector (*wali*). Muhammad, himself an orphan, was brought up under the protection of his uncle Abu Talib.

After his uncle's death in 619, Muhammad received an invitation from Yathrib's feuding Arab tribes to govern there. Once in Yathrib, he entered into a covenant with all of its residents, whether they had accepted Islam or not. Even the Jews living on the city's outskirts subscribed to it.

Henceforth, the city was known as Madinah (the City), short for Madinat an-Nabi (the City of the Prophet). Let us consider the provisions of this seminal document.<sup>6</sup>

After invoking the name of God, the compact opens with an assertion of the community's unity:

In the name of God, the Compassionate, the Merciful. This is a covenant given by Muhammad to the believers and Muslims of Quraysh [i.e., the immigrants from Makkah], Yathrib, and those who followed them, joined them, and fought with them. They constitute one Ummah [community], to the exclusion of all other men.<sup>7</sup>

This is reminiscent of the opening clause of the American Constitution's preamble, in that it suggests the formation of a more perfect union of Madinah's clans, akin to the more perfect union of the states sought by the American Constitution. Further, it calls for a union based not on common origin, but on a commitment to a common cause. That the constituent groups' ties are not dissolved, but rather are integrated into the greater network, is underscored by the specific naming of the constituent groups in identical wording.<sup>8</sup>

One is tempted to assume that the common cause in the case of the Madinah Covenant is a much broader one than in the case of the American Constitution. After all, the former is based on a common religion and the latter only on a common political commitment (i.e., to the Constitution itself). The next few sentences, which speak in terms of "believers," seem to support this supposition.<sup>9</sup> However, the text immediately broadens the union's scope by asserting the inclusion of Madinah's Jews:

Any Jew who follows us is entitled to our assistance and the same rights as any one of us, without injustice or partisanship. This *Pax Islamica* is one and indivisible. No believer shall enter into a separate peace without all other believers whenever there is fighting in the cause of God, but will do so only on the basis of equality and justice to all others.<sup>10</sup>

In order to understand this passage, one must understand that in Islamic terminology, those Jews who believe in God and the Last Day are, by definition, believers. The Qur'anic word for a believer (*mu'min*) is used in the Covenant's text to refer to the Jews,<sup>11</sup> who are therefore included in the *Pax Islamica* (as al-Faruqi has translated the text). The text details this union's implications for military expeditions and networks of alliances, acknowledges the belligerence of the Quraysh, and

declares Muhammad to be the final court of appeal.<sup>12</sup> These passages establish the Madinah city-state as a sovereign entity with the right to declare war, negotiate treaties, and adjudicate internal disputes.

The Covenant then posits a defense of the rights of the innocent in the constituent communities, the rights of the constituent communities in a kind of federalism of religious communities, and a requirement of joint defense.<sup>13</sup> Apart from reiteration and further elaboration of the principles detailed above, the rest of the Covenant contains three additional points: All parties are required to defend Yathrib if it is attacked; any party may demand a cessation of hostilities (unless the war is against Islam *per se*); and the “covenant shall constitute no protection for the unjust or the criminal. Whoever goes out to fight, as well as whoever stays at home, shall be safe and secure in this city unless he has perpetrated an injustice or committed a crime.”<sup>14</sup>

The Covenant’s departure from the tribal institutions of protection that it replaced is remarkable. Although the general submergence of family-based protection into a broader civil institution was not new, the hard-wired religious pluralism was an innovation. This seems to anticipate the First Amendment’s “free exercise of religion” clause. On the other hand, there is no resonance at all with the disestablishment clause. Notwithstanding its total commitment to the freedom of religion,<sup>15</sup> the Madinah Covenant is unabashedly a Muslim document and unapologetically removes the defense of Islam from the non-Muslims’ right to veto the continuation of a war against an aggressor.

## Implications and Goals

Now that we have some familiarity with the Madinah Covenant, we can consider its implications for the basic notion of a man-made constitution. Muhammad’s willingness to found the Madinah city-state on a written covenant implies the permissibility of founding a nation on a written constitution. Further, the fact that he held the constituent groups’ consent to the Covenant necessary for its implementation implies the permissibility of the Constitution’s requirement of ratification.

Earlier, we noted the harmony between the Constitution’s goal of a union of states, as mentioned in its preamble, and the Covenant’s objective of a union of clans. The other goals listed in the preamble also appear to be appropriate for Islamic constitutionalism. Certainly the Covenant’s repetitive references to justice (and the demands for justice found

throughout the Qur'an) commend the establishment of justice.<sup>16</sup> Establishing a final court of appeals in the person of the Prophet attests to the goal of "domestic tranquility." Providing for the common defense is indisputably an objective, as the demand for all parties to defend the city-state demonstrates. Promoting the general welfare may be inferred, but the Covenant seems to go further, for various clauses require paying attention to the particular welfare of the community's members. This leaves only the goal of securing "the blessings of liberty," which will be addressed later.

Despite the harmony of goals, there is one particular element in the Constitution that is at odds with Islamic jurisprudence: The Qur'an demands that judgment be meted out according to what God has revealed (e.g., 5:45). The whole body of Islamic jurisprudence is based on the understanding that "law" is that which God has decreed and which humanity must learn, either directly through revelation or through scholarship, rather than something that humanity may invent. Accordingly, the Shari'ah (the divine law) was the subject of legal scholarship throughout the classical period of Islamic civilization (622-1492). It was not developed by an elected legislature, but by a "completely free and unorganized republic of scholars."<sup>17</sup> While nothing in Islam prohibits the election of a legislature *per se*, the Shari'ah's very nature as divinely mandated would imply that the mission of any such legislature ought to be restricted to setting rules in the discretionary areas between the *halal* (permitted) and the *haram* (prohibited). That is, a legislature may set speed limits and the like, but cannot declare anything *haram* to be *halal* and vice versa.<sup>18</sup>

### The Role of the Legislature

One may argue that Islamic law may accommodate a role for the legislature by making the scholars' research official, according to divine law. In that case, legislation would seek to fulfill the Qur'anic command to engage in *shura* (mutual consultation): "That which is with God is better and more lasting: (It is) for those ... who (conduct) their affairs by mutual consultation ..." (42:36-38). Since scholars may disagree in their inferences, an elected legislature could adopt particular interpretations, guided not by popular whim, but rather by the popularity of particular interpretations. The danger in such an undertaking is that it may stifle the diversity of legal interpretations historically found in Islamic law, as

indicated by the recognition of multiple *madhahib* (among the Sunni) or multiple *mujtahidun* (among the Shi`ah).

These notions may be reconciled by restricting legislative authority to those cases in which domestic tranquility requires choosing one of the options offered by the various schools. Islamic jurists of the classical era were unanimous in their agreement that rulers could not impose one school – even their own – over the others. Rather, they preferred to let people choose the school to which they would adhere. Thus, a contract among Muslims might state that it would be adjudicated according to Hanafi law as opposed to Maliki law, as modern American contracts state that they will be adjudicated according to Delaware law as opposed to Maryland law.

The importance of this preference for individual discretion over a standardized legal system can be understood best when one thinks of the implications of a legislature adopting a law for religious minorities. As in the Madinah city-state, a Jewish minority in a Muslim state could be ruled by its own laws, provided that they did not come into conflict with the Muslim residents. Thus, Christian minorities in Muslim society have always had access to wine (which they need for their sacrament), despite the fact that Islamic law prohibits it. Any body that interpreted and applied laws according to the popular will might transgress against such protected minority rights.

While it might be argued that a popular body that sees itself as a mere interpreter of divine law should not engage in such activity, it is in the nature of elected bodies to sacrifice principle for popularity.<sup>19</sup> Thus, while the Constitution grants all persons the right of *habeas corpus* and the right to confront their accusers, the United States Congress nonetheless passed the Counter-terrorism and Effective Death Penalty Act of 1996, which allows immigrants suspected of terrorism to be held without charge, without knowledge of any evidence against them, and with no right to confront their accusers. Immigrants lack the political clout to counter the charges of “softness on terrorism” that legislators would have confronted if they had failed to pass the legislation.

Muslims might think that the Constitution lacked an adequate safeguard against this excess of democracy. We may be concerned that such a weakness facilitates a legislative violation of the command:

O you who believe, stand out firmly for justice as witnesses to Allah, even as against yourselves or your parents or your kin and whether it be

[against] rich or poor, for Allah can best protect both. Follow not the lusts [of your hearts] lest you swerve. And if you distort [justice] or decline to do justice, verily Allah is well-acquainted with all that you do. (4:135)

## The Role of the Chief Executive

The American president is head of state and commander-in-chief of the armed forces. In Madinah, the Prophet combined these offices with the position of sole justice of the Supreme Court. Shall we conclude that the American Constitution gives too little authority to the chief executive? The answer depends upon whether the Prophet expected his political successors to have all of the responsibilities that he did as Prophet. This has been a hotly debated question in Muslim jurisprudence, for it is an article of faith that Muhammad was the last Prophet. Those men who led the temporal society after him should not be expected to fill the shoes of a man directly guided by God. The Prophet seems to have supported this point when he said that “the learned are the heirs of the Prophets ...”<sup>20</sup> Muslim jurists have taken this to support their own role as distinct from that of the rulers.

Some scholars, notably those influenced by Plato’s concept of the philosopher-king, have taken a different view: The ummah’s supreme leader must himself be a scholar. In other words, no separation of powers is envisioned. The Qur’an provides no prescription here, as it contains no details on the structure of Muslim governance but merely commands the believers to “obey ... those charged with authority among you” (4:59). It does not specify how this authority is to be distributed.

The Madinah Covenant also is silent on this issue. The governors appointed by the Prophet were expected to serve as final courts of appeal. This fact suggests that permitting the head of state to serve as chief justice is acceptable, especially since the general rule of Islamic law is that whatever is not prohibited is permitted. However, this does not mean that it is mandatory. It is a purely subjective opinion on my part, but I would like to think that the Qur’an’s emphasis on mutual consultation implies an appreciation of the merits of checks and balances and, therefore, that a separation between the executive and the judiciary is meritorious.

The Prophet’s silence on the separation of powers was not problematic in Muslim history. Muslims readily accepted that the chief justice was a separate person from the head of state, although they generally

gave the head of state the right to overrule the chief justice. (Even in the United States, the president can grant clemency to a criminal whom the court has condemned [Article II, section 2]. However, the president cannot condemn someone whom the court has acquitted.)

Neither the Qur'an nor the Madinah Covenant deals with the question of succession. After the Prophet's death, Muslims split over this issue, and the resulting divide led to the two main branches of Islamic scholarship: the Sunni (about 90 percent of all Muslims) and the Shi'ah (about 10 percent of all Muslims). Sunni scholars have concluded that the Prophet intentionally left the field wide open so that the community could develop its own mechanisms for selecting its leaders. Thus the first four leaders (viz., the Four Rightly Guided Caliphs) after the Prophet were selected by a variety of methods.

Most interesting to our present study was the selection of Abu Bakr, the first caliph, for he was chosen by a mechanism quite analogous to the Electoral College. The community's leaders met to discuss how to deal with the crisis of leadership caused by the Prophet's death. After negotiating among themselves as to the best candidates, they settled on Abu Bakr, the Prophet's close friend (and the first person outside the Prophet's family to embrace Islam). Although the electors were not elected as the Electoral College's members are, they were the community's undisputed leaders. A unanimous decision was reached by those leaders present at this meeting. However, not all of the community leaders were present. The absence of the Prophet's cousin Ali and those who might have pushed for his election caused a rift in the community that later developed into the Sunni-Shi'ah split. At the time, however, Ali accepted Abu Bakr's election. Thus, based upon the Sunni account, Abu Bakr's election as the first caliph demonstrates the acceptability of the Electoral College as a method of electing the head of state.<sup>21</sup>

Apart from the ambiguities concerning a chief justice separate from the chief executive, there can be no doubt about the acceptability of a separate judicial branch in Islam. The Qur'an specifically refers to judges, and, like the American Constitution, puts no constraint on them other than good behavior (2:188). Thus, Muslim jurists generally have held that judges should be appointed for life in order to assure their independence from the executive branch. The constitutional method of the chief executive appointing judges is also consistent with Islamic law, for Muhammad appointed judges. In addition, requiring the Congress to ratify the appointment is consistent with the Islamic practice of *shura* mandated by the Qur'an (see 3:159).



## Treason, the Slave Trade, and Other Concerns

The definition of treason is an interesting issue. Discussions of Islamic law by non-Muslims (and, all too often, by Muslims as well) suffer from confusion between the concepts of apostasy and treason. The majority view is that the death penalty applies only to treason during wartime, including providing aid and comfort to the enemy, rather than mere conversion. According to the Constitution [Article III, section 3], treason consists only “in levying war against [the United States], or in adhering to their enemies, giving them aid and comfort.” That Muhammad shared this view can be seen in the fact that he never executed apostates except when they made war or propaganda against the Muslims.

The Constitution’s silence on the slave trade is paralleled by an ambiguity on slavery in Muslim law. According to George Mason, the National Archives and Records Administration explains the Constitution’s failure to end this trade as the result of “a bargain” between delegates from South Carolina and Georgia and those from New England:

In exchange for the New Englanders’ support for continuing slave importation for 20 years, the southerners accepted a clause that required only a simple majority vote on navigation laws, a crippling blow to southern economic interests.<sup>22</sup>

Muslim law did not ban slavery completely, but it strongly urges the freeing of slaves by requiring it as a means of atonement in cases ranging from manslaughter (4:92) to a futile oath (5:89) or an ill-considered divorce (58:3), and demanding that slaves be allowed to purchase their freedom on the condition that “you know any good in them” (24:33). The ransom of slaves is one form of preferred charity (2:177). Furthermore, the Prophet (who never owned slaves)<sup>23</sup> forbade abusing slaves and required their captors to feed them the same food that they ate and to dress them in the same quality of clothing. Therefore, while the Prophet would sympathize with the political forces that made compromising on slavery necessary, he would be disappointed that the Constitution did not contain protections for the slaves’ dignity and rights and some mechanisms by which they could obtain their freedom.

More troubling to Muslims is the Constitution’s inherent racism. The various forms of discrimination enforced by the states until the passage of the Fourteenth Amendment (if not the civil rights acts of the 1960s) would be intolerable under Islamic law. For that matter, despite Islamic law’s tol-

erance of slavery, the association of a slave status with a particular racial group is unacceptable. Slavery was a status conferred upon prisoners of war for their acts of war against the community, not a status inherent in one's racial or ethnic origins. The Prophet is reported to have said: "There is no excellence that an Arab possesses over a non-Arab, nor a non-Arab over an Arab. Nor is there (an excellence) of a white man over a black man, or a black man over a white man, except by *taqwa*."<sup>24</sup>

The Constitution guarantees each state a republican form of government (Article IV, section 4). This entire essay may be viewed as a commentary on the Islamic perspective on a republican form of government; namely, that it is acceptable insofar as it allows for popular self-government within constitutional constraints, provided that those constraints are the outer limits of the divine law. The larger question of whether the forms of government adopted by the subsidiary political entities should model that of the larger political entity to which they belong is easily answered in the affirmative. It is reported that Muhammad would question the governors of the provinces to which he sent them as to how they would rule, and that he would indicate his approval if they answered by the Qur'an, the Sunnah, and their own judgment, in that order.

There was no provision for amending the Madinah Covenant. But to conclude that the possibility of amendment is impermissible in principle, however, would be hasty. Caliph Umar had no problem with amending the procedures by which the Prophet had distributed lands in conquered territories after he conquered Iraq. He did this only after consulting with the subsidiary leaders. One must assume that he would have done this only if he believed that the Prophet would have approved of changing such a fundamental procedure to accommodate changing conditions. Only the Qur'an itself, being the eternal word of God, is beyond amendment. Any man-made document, being contractual, could contain procedures for its own amendment.

Some analysts view the American Constitution not as a strictly contractual document, but as a human attempt to formulate a political structure that might respect uninvented divine or "natural" laws. The Madinah Covenant was also, in effect, such a document, notwithstanding the prophetic office of its principle founding father (25:7). Since applying revealed principles is not a trivial matter, the process of amending the Constitution is a fitting recognition of human fallibility. While any suggestion that the Qur'an should be subject to amendment would constitute a challenge to its divine authorship, such concerns are misplaced if applied to the Madinah Covenant or the American Constitution.

The Constitution's prohibition of any religious test is an interesting matter. Muhammad posed no religious tests in the Madinah Covenant. Subsequent Muslim scholars have required only that the head of state (because of his symbolic status as head of a Muslim state) be a Muslim. Thus, Jews and Christians have held high positions in Muslim governments (including that of the grand vizier, who sometimes was the true head of the government, just as sometimes the prime minister is the true head of government today). The Constitution's requirement that only someone born on American soil may be president is even more restrictive, since the president is both head of state and head of government, and since anyone can change his or her religion, but no one can alter his or her place of birth.<sup>25</sup> The American restriction is one of geography, while the Islamic restriction is one of declared commitment to the source of the law.

## The Bill of Rights

The Bill of Rights also merits discussion, for there is no doubt that many of the Founding Fathers considered it a necessary part of any constitution. What is the Islamic assessment of the freedoms guaranteed by the Bill of Rights?

Earlier, we mentioned the inclusion of the free exercise of religion in the Madinah Covenant. Muslims generally have viewed the other half of this freedom, its disestablishment from the state, as neither necessary nor desirable. The Prophet also favored the freedom of speech and encouraged his people to speak out. But Muslims never extended this concept to include lewd expression, because public lewdness is expressly identified as punishable by the Qur'an (e.g., 4:15-16). Of course American standards of public lewdness today are much more liberal than in Muhammad's day. For example, the Qur'an specifies flogging anyone who commits adultery in front of four witnesses. If any state today punished anyone for committing adultery in public, the Supreme Court would undoubtedly determine it to be a case of cruel and unusual punishment. This was not the case when the Constitution was written, however, and as late as c. 1848 a "Published Senate Document on Flogging in the Navy" lists the punishment for "being naked on the spar deck" as nine lashes.<sup>26</sup> It was not until the 1850s that Congress banned the practice.

Some Muslim countries make blasphemy a punishable offense (e.g., Iran<sup>27</sup> and Pakistan<sup>28</sup>), although it is not an offense under the American Constitution. Political speech, however, (except for treason, as described

above) is protected. Thus, when an otherwise historically insignificant woman challenged one of Caliph `Umar's decrees, not only did he accept her right to dispute with him, but he also accepted her correction.<sup>29</sup> Despite all of this, some interpret the Qur'an's clear denunciation of *fitnah* (defined as trial, persecution, oppression, temptation, enticement, intrigue, sedition, dissension, or civil strife<sup>30</sup>) to mean that dissent from a previously adopted position constitutes a punishable crime. Obviously, this depends on one's interpretation of *fitnah*. If, like Yusuf Ali (on whose translation of the Qur'an we have been relying), we understand it to mean oppression, then it is the intolerance of dissent that constitutes a capital crime. The Prophet is reputed to have said that diversity in his community is a blessing. The Qur'an also quotes Prophet Shu`ayb as warning his people to tolerate his own dissent by reminding them of the fate that met those earlier peoples who had not tolerated their dissenting prophets: "O my people, let not my dissent (from you) cause you to sin, lest you suffer a fate similar to that of the people of Noah, of Hud, or of Salih. Nor are the people of Lut [Lot] far off from you" (11:89).

As for the Second Amendment, an armed populace defended Madinah. Thus, the issue of quartering soldiers (Third Amendment) did not arise. However, the strict Islamic protection of privacy (see discussion below) would presumably require a ban on quartering soldiers in private homes during peacetime. Advocates of gun control would no doubt argue that in modern times, defense is best effected by a professional army and that as such, the presumption does not apply to a settled community that faces no danger of foreign attack. Opponents could point to Switzerland, where a citizen army exists today despite the fact that the country has not been attacked for over a century. In short, a debate over whether Muslims should support the Second Amendment or not would mirror the debate over the merits of the amendment itself.

The issue of due process (Fourth, Fifth, Sixth, Seventh, and Eighth amendments) was dealt with earlier. Except for the Khwarij, Muslims have always supported due process but have differed over the particular processes enshrined in the Constitution. Are juries a protection against corruption or an unwelcome injection of non-experts into a process that calls for experts? On the other hand, the right to subpoena witnesses seems clearly in accord with the Qur'an's calls for witnesses not to withhold evidence.<sup>31</sup> The injustice of a delayed trial is self-evident.

The question of what constitutes cruel and unusual punishment is a controversial subject. Most modern western non-Muslims deem the death

penalty, as well as the Qur'anic punishments for theft, fornication, and perjury, to be cruel and unusual by modern standards. While imposing the death penalty for adultery is not found in the Qur'an, cutting off the hand for theft or lashing for fornication and perjury are. Modern sensibilities find such punishments unpalatable (although Sir Thomas More defended bodily mutilation as more civilized than imprisonment).<sup>32</sup> The usual argument made in favor of these punishments, that since they are effective deterrents they would rarely be imposed, only complicates the issue. If they are so effective that they are imposed only rarely, that makes them all the more unusual (unlike incarceration, which is so ineffective that almost 1 percent of the American male adult population is now in prison<sup>33</sup>). As for the death penalty, the Qur'an limits its application to cases of murder and *hirabah* (war against society [5:32-33]).

The constitutional prohibition on seizing private property without just compensation is covered by the Qur'anic prohibition of theft. If that is not clear enough, the Prophet emphasized it in his Farewell Pilgrimage address: "Nothing shall be legitimate to a Muslim which belongs to a fellow Muslim, unless it was given freely and willingly. Do not, therefore, do injustice to your own selves."<sup>34</sup>

This leaves the Ninth and Tenth amendments. In the interest of economy, I shall somewhat oversimplify the issue by focusing on unenumerated rights. The Ninth Amendment's explicit mention of unenumerated rights and the Tenth Amendment's implicit reference to them reflect the fear of many of the Founding Fathers that enumerating certain rights might give the false impression that the Constitution recognizes only those rights. As we have seen, the Islamic concept that anything not prohibited is permitted demonstrates that there are unenumerated rights. While a discussion of what those rights may be would take us into the realm of extra-Qur'anic sources of Islamic law, it is interesting to note that one aspect of the Ninth and Tenth amendments that is consistent with the concept of Shari'ah is the implicit acknowledgement that rights are merely recognized – and not granted – by the Constitution, however partially or imperfectly. Since Muslims believe that all rights come from God, this is an almost Islamic element of the Bill of Rights.<sup>35</sup>

The only unenumerated right recognized by the Supreme Court in American constitutional history is the right of privacy, which was initially recognized in a case on contraception and mentioned in the dispute over abortion. This right has been challenged by, among others, Judge Robert Bork.<sup>36</sup> However, the right of privacy is very well established in Islamic

law. In fact, the right to privacy was established much earlier in the history of Islamic law than in the history of American law. The Qur'an guarantees the right of privacy within one's own home (24:27), and Islamic law established the principle early on that people who drank wine in private could not be prosecuted if the evidence was obtained by violating the right of privacy. "The texts prohibiting spying and searching out people's faults apply equally to the government and to individuals."<sup>37</sup>

Unsurprisingly, the Islamic view on contraception is consistent with prevailing American law. Abortion has become controversial in the modern era. Apparently under the influence of the debate among Christians, some Muslims now claim that the Qur'anic prohibition of infanticide (19:151 and 81:8) implies<sup>38</sup> a prohibition of abortion. However, the Qur'an implies and a hadith explicitly states<sup>39</sup> that God does not give the fetus a soul until the fourth month of pregnancy. Combine this fact with the view of some classical Muslim scholars that the mother's life takes precedence over the life of a fetus, and the classical position appears to be remarkably consistent with Justice Blackmun's majority position in *Roe v. Wade*: Privacy concerns prevail during the first trimester, while the state's interest in regulation becomes tenable in the later stages of pregnancy.<sup>40</sup>

## Conclusion

Our assessment of the American Constitution in light of the Qur'an and the Madinah Covenant has been largely favorable, although with some qualifications. The real issue, from the standpoint of Islamic law, is that any human constitution must be subordinate to divine law, and that human legislation should never be allowed to contradict the divine law, although it may be required to interpret and, perhaps, even to supplement it. Whenever the Qur'an is silent on a particular issue, such as the forms and structures of popular government, the American Constitution is a viable model for an Islamic government, whether or not it is the best such model.

While the Constitution seems to give more power to the general public to enact legislation than does the traditional Muslim practice of developing legislation by legal scholarship rooted in revelation, it does not necessarily follow that the Constitution would be unacceptable to Muslims. On the contrary, if Americans were Muslims, they could choose to operate under the Constitution in order to enact laws consistent with Islamic law and even to amend the Constitution, if necessary, to bring it into line with Islamic principles. No doubt Muslims would disagree as to what amendments would be

necessary. As Muhammad is no longer with us to arbitrate such disputes, they would have to rely on sound scholarship to resolve such questions.<sup>41</sup>

Some Muslims maintain that the Constitution's very essence is opposed to the Qur'an, because it was founded on the premise of human freedom, which denies humanity's essence as God's servant.<sup>42</sup> My understanding of the Founding Fathers' intention is that the Constitution's purpose is to secure people's freedom from other people, not from God. The signers of the Declaration of Independence, at least, appealed to, rather than resented, the "laws of Nature and Nature's God."

Any belief that human legislation can rid humanity of the laws of Nature and Nature's God is one that, I believe, the Prophet would reject as a self-defeating form of wishful thinking. In this respect, we find that the American Constitution is a human endeavor to avoid *fitnah*, as defined above. Indeed, James Madison's eloquent description of violent factionalism as *fitnah* could easily be addressed to the state of the Muslim world today (and indeed throughout too much of its history):

Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence, of known facts will not permit us to deny that they are in some degree true.<sup>43</sup>

Madison argues that just as we do not trust individuals to be the judges of their own case in disputes over such matters as religion and politics for fear of bias or corruption, the different factions of legislators are only "advocates and parties to the causes which they determine."<sup>44</sup> Madison's rejection of the claim that "enlightened" statesmen are above such difficulties applies as well to "pious" statesmen:

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.<sup>45</sup>

Since we cannot remove the causes of *fitnah*, Madison argues that the federal republican system will control its effects.

Madison's arguments, in their strongest form, are that a federal republican system with a separation of powers and a difficult-to-change constitution offer the best protection from *fitnah* toward the majority by the minority or vice versa. From the Muslim point of view, such a constitutional mechanism offers hope for an Islamic renaissance when implemented from within the framework of an Islamic worldview held by a majority of the voting population. This study thus suggests why the concept of an Islamic republic is so powerful to Muslims.

## Notes

1. See, for example, Azizah Y. al-Hibri "Islamic Constitutionalism and the Concept of Democracy," *Case W. Res. J. Int'l Law* 24 (1992) 1-27.
2. All quotes from the Qur'an cite are from Abdullah Yusuf Ali, *The Holy Qur'an: Text Translation and Commentary* (Elmhurst, NY: Tahrike Tarsile Qur'an, Inc., 1987).
3. Muhammad Hamidullah, *The First Written Constitution in the World: An Important Document of the Time of the Holy Prophet* (Lahore: Muhammad Ashraf, 1975). Whether Dr. Hamidullah is correct or not is debatable. Earlier candidates for this title (e.g., the Code of Hammurabi or the Ten Commandments) are basic laws rather than constitutions. On the other hand, the Madinah Covenant short of the American Constitution as a document intended to generate a detailed system for the generation of a body of laws. I believe that the distinction of the Madinah Covenant is that it was a constituting document in the same manner as the Mayflower Compact was, which some have argued was a precursor to the formation of the American Constitution. While it may be grandiose to call either of those documents constitutions, I think it is fair to say that the participants in both of them, by their willingness to found their respective polities on such man-made agreements, showed their acceptance of the general principle of founding a nation on a written constitution. Thus, I dare to speculate on Muhammad's views on the American Constitution.
4. The author is particularly grateful to the Joshua Stein (who originally suggested this paper), N. Mahmood Ahmad, and an anonymous AJISS reviewer.
5. *The Federalist Papers* (1/3/2001). Online at: <http://memory.loc.gov/const/fed/fedpapers.html>. Accessed 8/6/03.
6. The translation that follows is that of Isma'il al-Faruqi, from his translation of Muhammad Haykal's *The Life of Muhammad* (North American Trust Publications, 1976), 180-83.
7. Ibid.



8. "As was their custom, the Muhâjirûn [i.e., immigrants] from [the tribe of] Quraysh are bound together and shall ransom their prisoners in kindness and justice as believers do. Following their own custom, Banû `Awf are bound together as they have been before. Every clan of them shall ransom its prisoners with the kindness and justice common among believers. ... [The text here repeats the same prescription concerning every clan and house of Madinah's Arab tribes.] The believers shall leave none of their members in destitution without giving him in kindness what he needs by way of ransom or bloodwit [i.e., compensation for wrongful death]." Ibid., 180.
9. "No believer shall take as an ally a freedman of another Muslim without the permission of his previous master. All pious believers shall rise as one man against whosoever rebels or seeks to commit injustice, aggression, sin, or spread mutual enmity between the believers, even though he may be of their sons. No believer shall slay a believer in retaliation for an unbeliever; neither shall he assist an unbeliever against a believer. Just as God's bond is one and indivisible, all believers shall stand behind the commitment of the least of them. All believers are bonded one to another to the exclusion of other men." Ibid., 180-81.
10. Ibid., 181.
11. "The Jews are a community of Believers (*Mu'min*) along with the Muslims." Hamidullah, *First Written Constitution*.
12. "In every military expedition we undertake our members shall be accompanied by others committed to the same objective. All believers shall avenge the blood of one another whenever any one of them falls fighting in the cause of God. The pious believers follow the best and most upright guidance. No unbeliever shall be allowed to place under his protection against the interest of a believer any wealth or person of the Quraysh. Whoever is convicted of killing a believer deliberately, but without righteous cause, shall be liable to the relatives of the killed. Until the latter are satisfied, the killer shall be subject to retaliation by each and every believer. The killer shall have no rights whatsoever until the right of the believers is satisfied. Whoever has entered in to this covenant and believed in God and in the Last Day shall never protect or give shelter to a convict or criminal; whoever does so shall be cursed by God and upon him shall the divine wrath fall on the Day of Judgment. Neither repentance nor ransom shall be acceptable from him. No object of contention among you may not be referred to God and to Muhammad – may God's peace and blessings be upon him – for judgment." Haykal, *Life of Muhammad*, 181.
13. "As the Jews fight on the side of the believers, they shall spend of their wealth on a par with the believers. The Jews of Banû Aws are an ummah alongside the believers. The Jews have their religion and the Muslims theirs. Both enjoy the security of their own populous and clients, except the unjust and criminal among them. The unjust or criminal destroys only himself and his family. The Jews of [here the document lists the various Jewish clans] to

all[,] the same rights and privileges apply as to the Jews of Banû Aws. The clients of the tribe of Tha`libah enjoy the same rights and duties as the members of the tribe themselves. Likewise the clients of the Jews, as the Jews themselves. None of the foregoing shall go to war except with the permission of Muhammad ... though none may be prevented from taking revenge for a wound inflicted upon him. Whoever murders anyone will have murdered himself and the members of his family, unless it be the case of a man suffering a wrong, for God will accept his action. The Jews shall bear their public expenses and so will the Muslims. Each shall assist the other against any violator of this covenant. Their relationship shall be one of mutual advice and consultation, and mutual assistance and charity rather than harm and aggression. However, no man is liable for a crime committed by his ally. Assistance is due to a party suffering an injustice, not to one perpetrating it. Since the Jews fight on the side of the believers, they shall spend their wealth on a par with them. Yathrib shall constitute a sanctuary for the parties of this covenant. Their neighbors shall treat them as themselves as long as they perpetrate no crime and commit no harm." Ibid., 181-82.

14. Ibid., 183.
15. It is important to remember that some of the clients to whom the Madinah Covenant granted equal rights and privileges would have been polytheists.
16. The references are too numerous to cite. An exemplary instance is: "O you who believe! Stand out firmly for justice as witnesses to God even as against yourselves or your parents or your kin and whether it be (against) rich or poor: for God can best protect both. Follow not the lusts (of your hearts) lest you swerve and if you distort (justice) or decline to do justice verily God is well-acquainted with all that you do" (4:135).
17. S. D. Goitein, *Jews and Arabs: Their Contacts through the Ages* (New York: Schocken Books, 1964).
18. "But say not for any false thing that your tongues may put forth: 'This is lawful and this is forbidden' so as to ascribe false things to God. For those who ascribe false things to God will never prosper" (16:116).
19. While one might wonder whether Muhammad might think Muslims above that kind of pandering, one need only look to the Qur'an's description of the psychological type it calls the *munafiq*, a word usually translated as "hypocrite." Only God knows whom the hypocrites are: "When you look at them their exteriors please you; and when they speak you listen to their words. They are as (worthless as hollow) pieces of timber propped up (unable to stand on their own). They think that every cry is against them. They are the enemies; so beware of them. The curse of God be on them! How are they deluded (away from the Truth)!" (63:4).
20. *Sunan Abu Dawud*, no. 3634 (n.p.: n.d.).
21. Shi'i scholars not only reject the election of Abu Bakr in lieu of `Ali, but assert that the Prophet selected a successor. They point to several Prophetic

traditions that they claim prove that he intended that `Ali should succeed him. Thus they reject the entire electoral process. One must add that this critique would only apply to the period during which one of the Imams (e.g., Ali or one of his eleven successors) was present. Modern-day Iran, a Shi`ah country, allows for the popular election of its president in the absence of the Hidden Imam.

22. National Archives and Records Administration, "A More Perfect Union: The Creation of the U.S. Constitution: An Introduction," (8/13/2003). Online at: [www.archives.gov/exhibit\\_hall/charters\\_of\\_freedom/constitution/constitution\\_history.html](http://www.archives.gov/exhibit_hall/charters_of_freedom/constitution/constitution_history.html). Accessed 8/13/03.
23. Occasionally someone would make a gift of a slave to the Prophet. He raised one such young man as his adopted son and married a woman given to him. The latter gave birth to his only son, who died in infancy.
24. Amaam `Abd al-`Aziz ibn Baz, *Naqd al-Qawmiyat al-`Arabiyah*, trans. Abu Ramsayah, ed. al-Manhaj ([www.al-manhaj.com/Page1.cfm?ArticleID=53](http://www.al-manhaj.com/Page1.cfm?ArticleID=53)), quoting *Sahih Ahmad*, 5:411 (n.p.: n.d.). See also the popular but unauthenticated variation in R. Marston Speight, *God Is One: The Way of Islam* (New York: Friends Press, 1989), 50.
25. It is noteworthy that questions were raised regarding George Romney's eligibility to run for President in 1968, as he was born to American citizens in an American embassy or consulate in Mexico. Due to his early withdrawal from the race for unrelated reasons, the constitutional issue remains unsettled. The author of this essay has a more than academic interest in this question, for he was born on free waters on an American ship to an American father.
26. Naval Historical Foundation, "Naval Historical Foundation Lashed with Flogging Question," (2/17/01). Online at: [www.mil.org/navyhist/what%27s~2/question.htm](http://www.mil.org/navyhist/what%27s~2/question.htm). Accessed 9/3/01.
27. Robin Wright, *In the Name of God: The Khomeini Decade* (New York: Simon and Schuster 1989), 198.
28. Amnesty International, "Pakistan: The Death Penalty," (1/9/96). Online at: [www.web.amnesty.org/ai.nsf/index/ASA330101996](http://www.web.amnesty.org/ai.nsf/index/ASA330101996). Accessed 9/3/01.
29. See, e.g., Hassan al-Turabi, "On the Position of Women in Islamic Society," (7/11/2003). Online at: [www.islamfortoday.com/turabi01.htm](http://www.islamfortoday.com/turabi01.htm). Accessed 8/12/03.
30. "Tumult and oppression are worse than slaughter" (2:217).
31. "O you who believe! Stand out firmly for Allah as witnesses to fair dealing and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety. And fear Allah, for Allah is well-acquainted with all that you do" (5:8).
32. Thomas More, *Utopia* (Dover Publications: 1997), 1.
33. Page M. Harrison and Allen J. Beck, "Prisoners in 2002," *Bureau of Justice Statistics Bulletin NCJ-200248* (7/23/2003), 1.
34. Haykal, *Life of Muhammad*, 487.

35. The association of natural law with divine law in the minds of the Founding Fathers is explicit in the Declaration of Independence, which lays out the moral basis for establishing the Constitution. The signers of this document declared their intention that Americans would “assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature’s God entitle them....”
36. Bork argues that the Court found the right of privacy not to be a separate right under the Ninth Amendment, but in “the shadow” of other enumerated rights. He sides with the legal positivists, who deny natural or divine law completely.
37. Yusuf al-Qaradawi, *The Lawful and the Prohibited in Islam* (Indianapolis: American Trust Publications, 1980).
38. The Qur’an states that the period of total dependency of a child on its mother is 30 months (46:15) including 24 months of nursing (2:233 and 31:14). The 6 months of total dependency without nursing would be the last 2 trimesters of pregnancy. The first trimester is not counted, as it is before ensoulment, an act that is separate from conception (32:8-9).
39. Muhammad Muhsin Khan, *Sahih Bukhari*, 4:430 (Madinah: Crescent Publications, n.d.), 290-91.
40. “This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. ... On the basis of elements such as these, appellant and some *amici* argue that the woman’s right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. ... At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. ... The Court has refused to recognize an unlimited right of this kind in the past.”
41. “The superiority of the scholar over the worshipper is like that of the full moon on a clear night over the rest of the stars. Indeed the scholars are the inheritors of the Prophets, and the Prophets do not leave behind them the gold coin nor the silver coin as inheritance; rather, they leave only knowledge behind as inheritance. So whosoever acquires it, acquires a huge fortune.” Abu Dawud, *Sunan*, “Book of Knowledge”(n.p.: n.d.), 3:316, #3641.
42. See, for example, Imam Jamil al-Amin, *Revolution by the Book: The Rap Is Live* (Beltsville, MD: Writers Inc., Intl., 1993).
43. James Madison, “The Union as a Safeguard against Domestic Faction and Insurrection,” Federalist #10 (11/23/1787). Online at: [http://memory.loc.gov/const/fed/fed\\_10.html](http://memory.loc.gov/const/fed/fed_10.html). Accessed 8/12/03.
44. Ibid.
45. Ibid.