Religion and New Constitutions: Recent Trends of Harmony and Divergence

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I. INTRODUCTION

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

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

1. Davis S. Law & Mila Versteeg, The Evolution and Ideology of Global Constitutionalism, 99 CAL. L. REV. 1163, 1167 (2011) ("It has become nearly universal practice for countries to adopt formal written constitutions."). "Constitutionalism is the idea...that the government can and should be legally limited in its powers, and its authority or legitimacy depends on its observing these limitations." Constitutionalism, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sep. 11, 2012), http://plato.stanford.edu/entries/constitutionalism (on file with the McGeorge Law Review).
2. See, e.g., Benjamin Berger, Understanding Law and Religion as Culture: Making Room for Meaning in the Public Sphere, 15 CONN. L. REV. 15:16 (2006) ("Law has struggled mightily, but it has never been able to resolve its tensions with religion...[L]aw and religion have been locked in a durable tension.").
3. See, e.g., Stephen Macedo, Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism, 26 POL. THEORY 56, 57 (1998) ("So a vital task of constitutional law is to strike reasonable balances between private freedom and public power; to draw lines demarcating the proper spheres of conscience and religions association, on the one side, and political authority, on the other.").
4. See Michael Paulson, Religion, Equality, and the Constitutions: An Equal Protection Approach to Establishment Clause Adjudication, 61 NUGGET 311, 311–14 (1986) (discussing, in the context of the United States Constitution, the convergence of non-establishment, free exercise, and equality principles). The popularity of these choices will be discussed in Section III infra.
In the context of religion, however, the traditional approach of liberal constitutionalism arguably faces a rival trend in what Larry Catá Backer calls “theocentric constitutionalism.” Backer writes:

[A] number of groups have accepted the legitimacy of transnational constitutionalism as a disciplining force but have rejected the notion that such restraints can be the product of a secular global consensus. Among the most potent of these groups have been religious traditionalists who have argued that only one or another of the current crop of universalist religions ought to serve as the foundation of normative disciplining of constitution making.4

Theocentric constitutionalism may be reflected in constitution-making through the inclusion of provisions that explicitly align the nation-state with a particular faith, that offer legal or financial benefits to one or a small number of favored faiths, that adopt religious law as binding for certain types of disputes, or that provide roles for religious leaders in governance.5 Despite recent scholarly attention given to the constitutions of Iraq and Afghanistan,6 the influence of theocentric constitutionalism is not a phenomenon solely tied to predominantly Muslim countries: other faiths are reflected as well, such as the influence of Buddhism in the constitution of Bhutan and Christianity in the preamble to the constitution of the Cayman Islands.7 The degree to which various countries incorporate religious elements into constitutions can vary dramatically, from non-binding ceremonial references in preamble recitations at one extreme to the denial of political office and even citizenship to members of the non-established faith at the other.8 Although its particular effects may be lesser or greater, as a philosophical approach to constitution making, theocentric constitutionalism offers the possibility of basing a nation’s fundamental values on precepts tied to faith, revelation, and authority as opposed to the traditional liberal values of liberty and equality.9

The notion that certain countries incorporate religious elements into their constitutions is not by itself, particularly novel or noteworthy. What is worth exploring, however, is the extent to which theocentric constitutionalism has become a legitimate and visible rival to the traditional liberal constitutionalism drafting process. Constitutionalism has been enormously successful on a global scale, but what kind of constitutionalism? Has decolonization and a reported resurgence in religious fundamentalism led to a widespread invocation of theocentric constitutionalism, or do the tenets of liberal constitutionalism in the area of religion still hold sway?10 As Backer phrases it, “[t]here now arising a theocentric constitutionalism in opposition to and competing with conventional constitutionalism for a place as one set, or the supreme set, of organizing principles for states.”

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

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


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

11. See Backer, supra note 5, at 121 ("Theocentric constitutionalism is grounded in notions similar to those that underlie transnational secular constitutionalism—that there is a set of universal values under the authority of which government is both constrained and limited."); Backer goes on to discuss the universal principles provided by religion. Id. at 121-35.


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

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

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

II. METHODOLOGY

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

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

15. Law & Ventoura, supra note 3, at 1167; see also id. at 1168 (“It is unfortunate . . . that empirical questions about the content and evolution of the world’s constitutions have rarely been addressed by legal scholars.”).
**A. Preamble**

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

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

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

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

In contrast, the Constitution of Afghanistan includes this passage:

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

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23. See id.
24. CONSTITUTION OF ECUADOR, art. 20, 2008 edn.
2013 / Religion and New Constitutions

We the people of Afghanistan: Believing firmly in Almighty God, relying on His divine will and adhering to the Holy religion of Islam. 15

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

B. Ceremonial Deisms

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

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

[The] argument typically goes, if practices such as the Pledge of Allegiance to a nation "under God," legislative prayer, the invocation to God prior to court proceedings, and the Christmas holiday are permissible notwithstanding the Establishment Clause, then surely the practice at hand (be it a nativity scene, commencement invocation, or some other governmental practice)—which does not advance religion "any more than" these accepted practices—must also pass muster under the Establishment Clause. 34

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

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

C. Established Religion

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

26. However, even such passing references may give rise to sustained debate as to their meaning. See, e.g., Jonathan W. Penney & Robert J. Dayvey, The Embarassing Preamble: Understanding the "Supremacy of God" and the Charter, 39 U. B.C. L. REV. 287, 288 (2000) (summarizing patchy judicial attention given to the phrase "Supremacy of God" in the preamble to the Canadian Charter of Rights and Freedoms and arguing that it should be given significant interpretive effect). 27. See generally, Laurence B. Vignes, Revisiting the Constitutionality of Ceremonial Deism 96 COLUM. L. R. 2003, 2004-96 (2006) (referring to practices like prayer at the presidential inauguration and the role of the Bible in judicial oaths as belonging to a certain category of ceremonial deism).
28. Id.
29. CONSTITUTION OF THE KINGDOM OF BHUTAN July 18, 2008, art.106.
30. Id. at 65 (Glossary to Official English Translation).
31. CONSTITUTION OF RHODA AUG. 27, 2010, art. 9(2) (referring to a national symbol, Part (b)).
32. See, e.g., CONSTITUTION OF SIERRALEON July 26, 2005, Second Schedule.
33. See, e.g., CONSTITUTION OF THE STATE OF QATAR June 8, 2005, arts.50, 74, 92, 119.
34. Compare Epstein, supra note 27, at 2147 (condemning requirement of religious oaths for trial jurors and witnesses); id. at 2094-2096. 35. See Bars Adair & Ian Leigh, Is Establishment Consistent with Religious Freedom?, 49 MCGILL L.J. 635, 642 (2004) ("Religious establishment may end at the point of symbolic acknowledgment, with no further translation of religious doctrine into public policy and institutions.").
36. Epstein, supra note 27, at 2086.
37. Bart v. Richard H. Jones, "In God We Trust" and the Establishment Clause, 51 J. CHURCH & STATE 381, 409 (1999) ("'In God we trust' by its very nature cannot be neutral between religions. There are no generic religious symbols or ceremonies common to all religions.").
religion is by no means self-defining, and there is widespread disagreement over exactly when a religion is considered established. As M.H. Ogilvie explains, "Establishment" is not and never has been a legal term of art. There is no comprehensive body of case law purporting to define it, nor have many legal writers attempted to do so. The concept, then, is vague, imprecise, and ever-changing." Instead of attempting to craft a catchall definition, it appears to be fruitful to conceive of establishment as involving three distinct aspects, each of which is a continuum. First, there is the distinction between "evidenced" or "low" establishment (where a particular religion has a "daily on-the-ground presence ... in community life") and "high" establishment, which refers to a religion's political or "constitutional status." Second, there is the distinction between "formal" establishment (reflected in statutory or constitutional guarantees) and "de facto" establishment (reflecting in real political influence and, potentially, legislation that implicitly favors that religion). Finally, there is the distinction between "weak" and "strong" establishments. The former consists of the government supporting (through monetary grants or favorable legislation) a particular religion, whereas the latter consists of restraints on the non-established religions.

This Article examines establishment only in the "high" and "formal" sense, as "low" or "de facto" establishment falls outside the scope of a study of constitutional provisions. Both "weak" preferences for a particular religion and "strong" burdens on non-established religions have been considered as "establishments for this project as have clear statements aligning the country with a particular faith or faiths regardless of whether those statements are implemented with tangible consequences." According to these criteria, eleven of the forty new constitutions studied could be considered to have established religions. Eight establish solely Islam, two establish solely Buddhism, and one gives primary establishment to Buddhism while also establishing Christianity, Hinduism, and Animism.

39. Id.
40. See Abdur & Leigh, supra note 35, at 641-45 (discussing the differences between low and high establishment, formal and de facto establishment, and weak and strong establishment).
41. Id. at 641.
42. Id. at 643.
43. See id. at 644-45 (describing the various goals that a religious organization might be prey to in a weak system and using the Talmud's Ministry for Suppression of Vice and Promotion of Virtue as an example in a strong system).
44. In other words, as an exercise in comparative law, this project is formalist rather than functionalist in nature. See generally Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 Yale L.J. 1225, 1228-30 (1998) (noting that several ways to analyze different constitutions include functionalism, expressionism, and Milleniology and qualifying these three approaches in detail); Frederick Schneer, Constitutional Innovations, 65 Fordham L. Rev. 1293, 1298 (1996) (explaining the formalist approach to constitutional analysis).
46. Id.
47. Id. An interesting aspect of some of these constitutions, one that will be discussed more in subsequent sections, is that the same constitutions that establish religions often simultaneously purport to be secular and/or guarantee religious freedom.
48. Bacher, supra note 5, at 92, CONSTITUTIONAL DECLARATION OF LIBYA Feb. 7, 2011, art. 1. The Libyan Constitution has not ratified the constitution. Id.
50. See generally id. (discussing further discussion on the interaction between Islam and the Libyan government).
51. Hadi Rabb, "We the Jurists": Islamic Constitutionalism in Iraq, 10 U. PA. J. CONST. LAW 527, 531 (2013).
52. CONSTITUTION OF THE REPUBLIC OF MALDIVES Aug. 7, 2008, arts. 78(c), 101(b).
53. Id. at 67(c).

The degree of establishment varies amongst the constitutions studied and it is worth examining a few of them in more detail to illustrate this point. The Myanmar Constitution represents a case of multiple establishments listed above. It articulates the establishments as follows:

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

Thus, we see the concept of "recognition" tied to permission for the government to "assist" and "protect" those religions. This would appear to embrace special privileges for favored religions while not necessarily burdening disfavored religions.

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

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

- The legislative assembly "shall not pass any law that contravenes any tenet of Islam."
- Every citizen is given the affirmative obligation "to preserve and protect the State religion of Islam. . . ."

912 / 913
2013 / Religion and New Constitutions

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

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

D. Religious Freedom

There is no doubt that freedom of religion has become one of the most widespread rights to be recognized in constitutional documents: out of the constitutions in force as of 2006, 97% contained such a provision. 60 Like most of the concepts discussed in this Article, "freedom of religion" is not self-explanatory, and its meaning is likely to depend on context and judicial interpretation. 61 Perhaps in its most common interpretation, freedom of religion protects against coercion: "Coercion either prevents the exercise of a particular religion or forces compliance with a religious observance or an activity that is perceived by some as having religious significance." 62

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

E. Equal Protection of Religion

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

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53. Id. art. 16(6).
54. Id. art. 109(b)(1).
55. Id. art. 142.
56. Id. art. 9(d).
57. Id. arts. 73(a)(3), 109(b), 130(a)(3), 149(b)(1).
58. Id. art. 196(c).
59. See supra note 52–58.
60. Law & Versteeg, supra note 1, at 1200.

61. See, e.g., Denise J. Doyle, Religious Freedom in Canada, 26 J. CRIM & STATE 413, 413 (1984) ("Religious freedom, like religion itself, is not fixed or static, but in a developing concept.").
62. Id. at 433.
63. See Law & Versteeg, supra note 1, at 1200 (noting that 97% of constitutions in force since 2006 contain provisions regarding religious freedom).
64. See supra Part IV C.
69. Law & Versteeg, supra note 1, at 1170.
F. Establishment Clause

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

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

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

70. The term “establishment clause” can be a misnomer and may be worth clarifying. In the U.S., the term “establishment clause” will be taken to mean a provision separating government and religion. See, e.g., McCorvey Count v. ACLU, 545 U.S. 844, 860 (2005) (plurality) (“When the government acts with the amenable and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality...”). In non-U.S. or conceptual contexts, it could be taken to mean a provision that does the exact opposite by affirmatively linking government and religion. Bart v. Kori; T. Lath, Five Models of Church Autonomy: An Historical Look at Religious Liberty Under the United States Constitution in CHURCH AUTONOMY: A COMPARATIVE SURVEY 304 (Gerhard Rothens, ed., 2001) (describing “Religious Establishment” as a type of church-government relationship wherein “government regulates on the basis of religious truth. Churches are not autonomous but are subject to state regulation directed towards the end of encouraging true, and discouraging false religion.”); I have often affidated the prefix “anti-” or “non-” before “establishment clause” to help avoid this ambiguity. See, e.g., Chadha v. Hutson, Transnational Nonestablishment, 89 Geo. Wash. L. Rev. 961, 964 (2012) (defining “anti-establishment”); David M. Erens, Justice Sotomayor and Establishment Clause Jurisprudence: Which Antiestablishment Standard Will Justice Sotomayor Endorse?, 11 Rutgers J. L. & RELIGION 525, 525 (2010) (discussing the “anti-establishment principle”).


72. Id.

73. See, e.g., Douglas Laycock, Formal, Substantive, and Disapparelated Neutrality Toward Religion, 39 DePaul L. Rev. 993, 994 (1989) (“Those who think neutrality is meaningless have a point. We can agree on the principle of neutrality without having agreed on anything at all. From heteroneutral neutrality to separate equal, people with a vast range of views on church and state have all claimed to be neutral.”); Michael Paulson, supra note 4, at 333 (“A statement such as ‘the state should be neutral’ is completely vacuous; it says nothing about that with respect to which the state is supposed to be neutral.”).

74. Laycock, supra note 73, at 999.
many constitutions separate religion and government than explicitly link them together.62 Fears of theocratic constitutionalism sweeping the globe are thus misplaced,63 even if theocratic constitutionalism may be perceived as a viable alternative to liberal constitutionalism.

G. Analysis

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

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

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

63. Hirsh, supra note 5, at 1183 (“For academic and media accounts in the West to portray the spread of religious fundamentalism in the developing world as a near-monolithic, ever-accelerating, and all-encompassing phenomenon,”).
conceive of their role. 88 "No religion is monolithic, and religion is far too varied and complex to allow for any simplistic generalizations about how faith and politics will interact. 89 However, to whatever degree constitutions reflect the values and aspirations of their makers, they provide insight on how those makers thought worthy of including in their country’s foundational document. 90 An examination of formal constitutional texts, such as the one performed in this study, is the first step in determining whether rhetoric matches reality. And more, it is impossible to determine whether reality matches rhetoric in constitutionalism unless an examination of formal texts are a part of the study. 91

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

V. CONCLUSION

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

88. See Adhar & Leigh, supra note 33, at 640-41 (explaining the different definitions of establishment).
90. Law & Vestergaard, supra note 1, at 170.
91. Id. at 1169 (“To recognize that some constitutions are shams merely begs a host of further questions, none of which can be tackled without a systematic understanding of what the world’s constitutions actually say.”).