

Framing Religious Constitutionalism

*Article by Russell Powell**

Scholarship considering Christian, Islamic, or other forms of religious constitutionalism has tended to focus on harmonizing constitutional texts with traditional religious jurisprudence in some way. However, only considering constitutions with explicit references to religion makes comparison with constitutions in religiously diverse societies challenging, even though comparisons might be apt and fruitful. This paper proposes a taxonomy for understanding the range of approaches attempting to bridge scholarship considering religious nationalism with research related to religious constitutionalism in various cultural contexts.

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* The author is Professor of Law and the Fr. John Topel Endowed Scholar at Seattle University School of Law and would like to thank Professors Ronald Krotoszynski, Shaheen Sardar Ali, Nathan Brown, and Haider Hamoudi for their helpful comments on early versions of this work. Thanks also to my excellent Research Assistants, Ahmed Dhafer, Owen Leupold, and Decker O'Donnell.

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I. INTRODUCTION

Universities and research institutions throughout the world have hosted numerous conferences and panels considering aspects of “religious constitutionalism” over the past several years.¹ Most have focused on systems

¹ Related conferences would include those on Islamic Constitutionalism held by the University of Warwick in 2019 and the Max Planck Institute in 2024, Religion, Illiberal Constitutionalism, and Fundamental Rights at the European University Institute in 2023, Constitutionalism in the Middle East at the University of Chicago in 2004, a variety of AALS Annual Conference Section panels over the the past 25 years, and several of the annual conferences for the International Consortium for Law and Religion Studies.

that include explicit requirements to harmonize a given constitution with traditional religious jurisprudence in some way. There is a tension between the performative aspects of these requirements and good-faith attempts by judges at their implementation. However, only considering constitutions with explicit references to religion makes comparison with constitutions in religiously diverse societies challenging, even though comparisons might be apt and fruitful.

“Religious constitutionalism” is the legal and political framework in which the principles and practices of a particular religion influence or are integrated into the constitutional structure of a state.² It recognizes relationships between religious doctrines and constitutional law, shaping the governance, legal interpretations, and public policies of a country. It may be understood as a system in which religious norms and values are embedded within the constitutional text or influence its interpretation, even in the absence of explicitly religious constitutional language. Religious authorities may or may not have a role in the legislative or judicial processes, but religious commitments and preferences held by political leaders and jurists inevitably impact understandings of constitutions. This framework varies widely depending on the specific religion and the degree to which it is integrated into the state's constitutional and legal systems, but religious constitutionalism is ubiquitous and empirically demonstrable.³ This paper aims to create a taxonomy for understanding the range of approaches.

² The definition in this section is proposed by the author.

³ See, e.g., RUSSELL POWELL, *SHARI'A IN THE SECULAR STATE: EVOLVING MEANINGS OF ISLAMIC JURISPRUDENCE IN TURKEY* (Routledge 2016) (explaining one of the conclusions being that religious sentiment and even some norms are observable in legal structures and public opinion even under aggressively secular constitutional rules that have existed in Türkiye; Russell Powell, *Religious Approaches to Constitutionalism: Empirical Scholarship and Exceptionalism*, 38 ARAB L.Q. 430, 438 (Nov. 13, 2024) (contrasting religious incoporporation and rejection in Turkey and Ireland from the early 20th century through the early 21st century.).

This article focuses on movements toward religious constitutionalism in presumably secular states in a variety of contexts. Previous works have explored recent United States Supreme Court jurisprudence and its shifts away from well-established principles of First Amendment Free Exercise and Establishment Clause precedent,⁴ as well as religious aspects of constitutionalism in some predominantly Muslim and Christian countries.⁵ These projects have shown that the role of religion in constitutional systems is dynamic. This project attempts to bridge scholarship on religious nationalism with research related to religious constitutionalism in various cultural contexts. It will provide a framework for distinguishing forms of religious constitutionalism, with a later emphasis on predominantly Muslim countries that demonstrate a wider variety of approaches. The categories range from aspirational secularism, to ostensible neutrality, to religious incorporation, to theocracy (all described *infra* in Section II).

Constitutional structures intended to explicitly incorporate religious norms or values are not necessary for religious constitutionalism. Framers of the U.S., Turkish, and Indonesian constitutions did not necessarily believe that their law was in tension with religious values. In fact, their constitutions, which do not explicitly incorporate religious tradition, were almost certainly presumed to be consistent with their respective faith traditions. Similar moves have been made in Hungary, India, Poland, and Italy. As has been asserted in earlier work and is built upon here, this may be considered a form of religious constitutionalism.⁶ Additionally, much has been written about attempts to harmonize law and constitutions with Islamic tradition in Egypt and

⁴ Russell Powell, *Religious Originalism*, 69 WAYNE L. REV. 311, 312 (2024).

⁵ See Powell, *supra* note 3.

⁶ See Powell, *supra* note 3.

Pakistan.⁷ Although there have been interesting innovations in both, neither has become a model for explicit “Islamic constitutionalism.”⁸ Consideration of systems that have attempted to make similar moves more recently has been even less encouraging.⁹ If we accept that there is some form of religious constitutionalism in all legal systems (as virtually all nations now have some form of constitution), it will be helpful to identify the range of approaches.

Section II builds a taxonomy for religious constitutionalism, identifying four categories that will be defined in detail. Section III considers how a number of non-Muslim nations might fit within these categories. Section IV focuses on predominantly Muslim jurisdictions. These countries are broken out for a number of rhetorical reasons. First, the analysis confirms that a large number of these states are explicitly secular in ways that might surprise some readers. Second, this group includes a number of nations that attempt to incorporate religious norms in their constitutions and law, which has given rise to some common approaches, which have been studied by a wide range of scholars. Finally, the impetus to incorporate religious norms into law through

⁷ See, e.g., CLARK LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT* (Brill 2006) (focusing on Egypt, makes important arguments for the compatibility of Islamic jurisprudence and state law, identifying three approaches for deriving Islamic legal norms: traditional fiqh, utilitarian neo-ijtihad, and comparative neo-taqlid); Fazlur Rehman, *Islam and the Constitutional Problem of Pakistan*, 32 *STUDIA ISLAMICA* 275, 284-85 (1970).

⁸ Shaheen Sardar Ali, *Equal Before Allah, Unequal Before Man? Negotiating Gender Hierarchies in Islam and International Law* (1998) (negotiating gender hierarchies in Islam and international law) University of Hull Doctoral Thesis (1998) (considering the overlapping legal and theological issues in Islam, with particular consideration of Pakistan); Nathan Brown & Mara Revkin, *Islamic Law and Constitutions*, in *THE OXFORD HANDBOOK OF ISLAMIC LAW* (Anver Emon & Rume Ahmed eds., 2015) A thoughtful consideration of the relationship between Islamic jurisprudence and modern constitutions in predominantly Muslim states, with especially good analysis related to Egypt.

⁹ See generally Intisar A. Rabb, *We the Jurists: Islamic Constitutionalism in Iraq*, 10 *U. PA. J. CONST. L.* 527 (2008).

constitutions is universal, and claims that some religions (such as Islam) are somehow exceptional in their focus on religion in law are erroneous.¹⁰ The Appendix then roughly groups nations into the proposed framework for considering religious constitutionalism, with a reference to the most recent Rule of Law Index number for each.¹¹

The proposed taxonomy has significant implications for future research and could serve as a starting point for studies regarding the depth of constitutionalism, particularly with regard to protections for individual rights. It may also provide context for studies of religious entanglement in law. Perhaps the most interesting and relevant finding is that movements toward authoritarianism have tended to result in greater religious influence and incorporation.

II. BUILDING A TAXONOMY

A taxonomy of religious constitutionalism begins with a definition of constitutionalism, more generally. This section will proffer a broad definition and then consider how it might relate to religion in particular national contexts. It will then turn to the wide range of approaches in a variety of constitutional contexts and suggest four categories. There will be an emphasis on predominantly Muslim countries, as they have the greatest variety of approaches to religion.

Constitutionalism is a doctrine that asserts that the authority of a government is defined and limited by a body of laws (in jurisdictions that do not have a formal written “constitution”) or a constitution.¹² This principle aims to prevent arbitrary rule by ensuring that governmental power is exercised according to established

¹⁰ See Powell, *supra* note 3.

¹¹ The Rule of Law Index is a score defined and calculated by the World Justice Project in an annual empirical review of nearly all countries.

¹² Moses Adagbabiri, *Constitutionalism and Democracy: A Critical Perspective*, 5 INT’L J. OF HUMANITIES & SOC. SCI. 108, 108-09 (2015).

legal frameworks and procedures.¹³ Constitutionalism encompasses various mechanisms, such as the separation of powers among the legislative, executive, and judicial branches, the protection of individual rights, and the establishment of checks and balances to prevent any single entity from gaining unchecked power.¹⁴ By embedding these principles within a constitution, constitutionalism seeks to create a stable and accountable government that operates within the bounds of “law,” with the goal of safeguarding the rights and freedoms of individuals.

The most typical constitutional approach to religion is some sort of secularism, though there are numerous exceptions.¹⁵ There are a variety of definitions of secularism and a variety of ways in which those principles are incorporated within constitutional and legal texts. Charles Taylor’s focus on neutrality with regard to religion is extremely helpful for understanding U.S. First Amendment religion clause cases in the late 20th century,¹⁶ but it does not address the more aggressive approaches to secularism in France, Mexico, or Türkiye (at least until 10-15 years ago). Ahmet Kuru’s categories of hard (French *laïcité*)¹⁷ secularism versus soft (U.S. establishment prohibition)¹⁸ provide a useful distinction.¹⁹ Although there are a number of authoritarian states with strongly secular constitutional language, those systems

¹³ CHARLES HOWARD MCIWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 21–22 (1947).

¹⁴ *See generally* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967).

¹⁵ *See generally* PIPPA NORRIS & RONALD INGLEHART, SACRED AND SECULAR: RELIGION IN POLITICS WORLDWIDE (2004).

¹⁶ *See generally* CHARLES TAYLOR, A SECULAR AGE, (2007).

¹⁷ AHMET T. KURU, SECULARISM AND STATE POLICIES TOWARD RELIGION: THE UNITED STATES, FRANCE, AND TURKEY (Cambridge Univ. Press 2009).

¹⁸ *Id.*

¹⁹ *Id.*

are arguably not truly “constitutional” in their aspirations or in practice.²⁰

The taxonomy proposed for systems that might be described as constitutional includes what may be called aspirational secularism, then ostensible neutrality, then religious incorporation, and then theocratic constitutionalism. However, this section will first briefly address the phenomenon of unwritten and informal constitutions.

A. Constitutional Text versus Constitutionalism

Most modern constitutions have some connection to the 18th century written documents adopted by the United States and then France.²¹ However, not all constitutional systems have a single governing text. Some that do still do not consider those documents to constitute “constitutions” in the French and American traditions. Saudi Arabia, for example, has a Basic Law of Governance that is “constitutional” in structure and character, but it is intentionally not referred to as a formal constitution.²² Israel has 14 quasi-constitutional Basic Laws that cover a range of considerations (such as human dignity and liberty) typically included in more-traditional constitutions.²³

A more nuanced understanding of “constitutions” does not even require a fixed text or body of texts. For example, the constitution of the United Kingdom is a unique, uncoded system composed of various written and unwritten sources, including statutes, common law,

²⁰ Tad Stahnke & Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, 36 GEO. J. INT’L L. 947 (2005).

²¹ Charles Borgeaud, *The Origin and Development of Written Constitutions*, 7 POL. SCI. Q. 613, 613–14 (1892).

²² Abdulaziz H. Al-Fahad, *Ornamental Constitutionalism: The Saudi Basic Law of Governance*, 30 YALE J. INT’L L. 375, 376 (2005) (“[T]he Saudi Constitution, or Basic Law of Governance.”).

²³ Basic Law: Human Dignity and Liberty [BL] [CONSTITUTION] (Isr.).

conventions, and authoritative works.²⁴ Central to this constitution is the principle of parliamentary sovereignty, which grants Parliament the ultimate legal authority to create or repeal any law. International laws and treaties are also treated as binding on the state and may be considered to have a constitutional character. This system provides flexibility, but it adds a layer of complexity and potential ambiguity that might be avoided by turning to a single founding document. Comparative research explains how the lack of explicit constitutional language does not prevent courts from developing sophisticated frameworks for protecting individual rights.²⁵

This paper considers all of these approaches to be constitutions for the purpose of developing a method of comparing religious constitutionalism across different legal systems. One could certainly argue that the rich history of constitutional development in the U.K. has created a legal culture of constitutionalism that is more robust than that of many countries with comprehensive written constitutions.

B. Aspirational Secularism

Aspirational secularism might be broadly understood as explicit and meaningful constitutional secularism, though it could be argued that even in these cases, there are implicit religious biases. A distinguishing

²⁴ See generally Eric Barendt, *Is There a United Kingdom Constitution?*, 17 OXFORD J. L. STUD. 137 (1997) (discussing the lack of the United Kingdom's constitution and how political matters are determined).

²⁵ See e.g., RONALD KROTOSZYNSKI, *FREE SPEECH AS CIVIC STRUCTURE* (Oxford Univ. Press 2024) This excellent theoretical and empirical work considers how legal systems are able to develop robust doctrine protecting free speech with reference to constitutional text or in its absence. Professor Krotoszynski contrasts the United State, South Africa, the United Kingdom, Australia, and Israel. Australia and Israel, in particular, have no constitutional text guaranteeing free speech, and yet expressive rights are protected by judges as a core component of democracy. Thus, Krotoshynski concludes that judges and legal culture are ultimately more critical for protecting individual rights than constitutional text.

characteristic of aspirational secularism is some degree of tension with or separation from religion. In the case of France, Mexico, China, and the USSR (until its fall in 1991), religion is, or was—in the case of the Soviet Union—subject to regulation and control in order to limit the coercion of citizens and entanglement with government. Although the U.S. Constitution takes a different approach, case law in the latter part of the 20th century emphasized some of these principles. Although some constitutions reference and favor specific religions, most use language of neutrality or secularism to at least create the impression that all religious groups are treated in a similar manner. Both the United States and the French Constitutions emphasize a form of secularism. In the French context, the emphasis rests on the principle that citizens ought not be unduly pressured in matters of religion, and it allows significant state intervention to limit potentially coercive religious behavior or speech.²⁶ The U.S. Constitution focuses instead on protecting individual religious liberty (free exercise) and prohibiting the establishment of religion by the government (in stark contrast to the Church of England).²⁷ Although the notion of a formal separation between church and state in U.S. constitutional law is tied to the history of drafting and early understandings of some founders, it is not found in the text.²⁸

Even in constitutions that attempt to be completely neutral as to religion or secular, there is nearly always a bias in favor of the dominant religion. The constitutions of China, North Korea, and the former Soviet Union contain explicit guarantees of individual freedoms and arguably antagonized all religions;²⁹ however, those “constitutions” often fail to meet the aims of constitutionalism. Notably, even Germany in the 1930’s technically adhered to the

²⁶ 1958 CONST. 1 (Fr.).

²⁷ U.S. CONST. amend. I.

²⁸ *Id.*

²⁹ XIANFA [CONSTITUTION] art. 36 (1982) (China); CONSTITUTION art. 68 (1972) (N. Kor.); KONSTITUTSIIA ROSSIĬSKOĬ FEDERATSII [CONSTITUTION] art. 28 (Russ.) (1993).

Weimar Constitution,³⁰ but it would hardly be characterized as achieving constitutionalism in that period. Even in those examples, there may be evidence that these ostensibly secular or religiously neutral regimes favored dominant religious identities over others³¹ (for example, Orthodoxy in the Soviet Union, Confucianism in China, or Lutheranism in interwar Germany).

The earliest secular constitutional republics like France and the U.S. (as well as systems using them as a model such as Türkiye), clearly have an at least implicit bias in favor of majority religious communities.³² This is evident in disparate treatment of the public display of religious imagery in France, where some Catholic symbols have been allowed while Islamic ones have been banned.³³ It is fairly apparent in major First Amendment Supreme Court cases in the U.S. that Christian claims of free exercise tend to be more durable than claims by religious minorities (Muslims or adherents of Native American religions, for example).³⁴ Türkiye similarly favors Sunni Muslim religious practice and institutions, despite constitutional and legal secular policies that have existed since the founding of the Turkish Republic.³⁵ This form of religious constitutionalism is explicit and meaningful secularism with implicit religious preference—which is a

³⁰ James J. Sheehan & Charles C. Bayley, *The Weimar Constitution*, BRITANNICA (Sep. 21, 2025), <https://www.britannica.com/place/Germany/The-Weimar-constitution>.

³¹ See, e.g., Hans Tiefel, *The German Lutheran Church and the Rise of National Socialism*, 41 CHURCH HIST. 326 (1972).

³² See generally Joseph R. Duncan, *Privilege, Invisibility, and Religion: A Critique of the Privilege that Christianity Has Enjoyed in the United States*, 54 ALA. L. REV. 617 (2002).

³³ *France: Hijab Bans in French Sport Expose Discriminatory Double Standards Ahead of Olympic and Paralympic Games*, AMNESTY INTERNATIONAL (July 16, 2024), <https://www.amnesty.org/en/latest/news/2024/07/france-hijab-bans-olympic-and-paralympic/>.

³⁴ Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 231 (2012).

³⁵ See generally DERYA BAYIR, *MINORITIES AND NATIONALISM IN TURKISH LAW* (Routledge 2016).

common characteristic of aspirational secularism. It might even be possible for a state with some sort of symbolic official religion to actually fit within aspirational secularism if formal separation meaningfully prevented entanglement with the official religion.

This understanding of secularism in an Islamic context is supported by the empirical research in *Shari'a in the Secular State*.³⁶ Prior to amendments over the past twelve years, the Turkish Constitution was considered aggressively secular among North Atlantic Treaty Organization (NATO) countries along with France.³⁷ The signature defining issue was the ban on headcoverings for women in schools and government offices after the 1980 coup and its resulting new constitution.³⁸ The norm of modesty in Islam, which many understand as requiring headcovering for women, was frustrated by this ban.³⁹ In 2007, about half the female law students in a professor's class in Istanbul complained that they were required to remove their headcovering (worn as an act of religious obligation and devotion) whenever they stepped onto campus.⁴⁰ Other students were grateful for the ban, so that they would not feel social pressure to abide by religious norms they did not believe in. The ban on headcoverings was relaxed in 2013,⁴¹ and religious language and norms have become more accepted in Turkish politics and law, paralleling the continued rule of Recep Tayyip Erdoğan as the chief executive since 2003

³⁶ See RUSSELL POWELL, *SHARI'A IN THE SECULAR STATE* (Routledge 2016).

³⁷ See, e.g., Elisabeth Ozdalga, *Secularism*, in THE ROUTLEDGE HANDBOOK OF MODERN TURKEY (Routledge 2012).

³⁸ Bans on religious dress actually began much earlier with Law No. 671 on Hats enacted by the Turkish Grand National Assembly in 1925, less than one month after the declaration of the Turkish Republic on October 29, 1925.

³⁹ See e.g., Nilüfer Göle, *THE FORBIDDEN MODERN* 83- 113 (Univ. of Michigan Press 2003).

⁴⁰ The author taught a course on Comparative Constitutionalism to Turkish and American students at Bahçeşehir Üniversitesi in 2007.

⁴¹ Arsu & Bilefsky, *Turkey Lifts Longtime Ban on Head Scarves in State Offices*, N.Y. TIMES (Oct. 8, 2013).

(first as Prime Minister and then as President after major structural amendments to the constitution).

In the period prior to about 2010, India, Hungary, and Poland might also be considered examples of aspirational secularism. India's constitution, as described in Section III.B.1. below, was intended to require that the state remain mostly neutral with regard to religion⁴² (though extended rule by the Bharatiya Janata Party (BJP) may have shifted this emphasis to favor Hinduism). Hungary's 1949 Constitution, in force until 2012, was based on the Soviet model, which was strongly secular and arguably anti-religious.⁴³ After the collapse of the Warsaw Pact, there was significant liberalization within that constitutional framework. Only in the 2011 Constitution supported by Viktor Orbán was there a textual shift to favor Christianity.⁴⁴ Poland followed a similar path, replacing its Soviet-based constitution in 1997.⁴⁵ Although there was a reference to Catholicism, the text preserved pluralism and broad religious freedom—though social and political shifts since that time have likely negatively impacted those freedoms.

The constitutions of the Balkan and former-Soviet states described in Sections IV.A.1 and 2 may all likely be considered aspirationally secular. However, as many of these examples exist in the context of authoritarian rule, not all of these systems likely represent authentic constitutionalism. For example, Turkmenistan is likely to have the weakest substantive and procedural constitutional protections in this group.⁴⁶ Kazakhstan

⁴² INDIA CONST. art. 25 cl. 1.

⁴³ Andras Jobbagy, *Religious Policy and Dissent in Socialist Hungary: The Case of the Bokor Movement*, 58 J. CHURCH & STATE 508 (2016). The Case of the Bokor-Movement (2014) (M.A. Thesis, Central European University, on file with Central European University); Asim Jusic, *Constitutional Changes and the Incremental Reductions of Collective Religious Freedom in Hungary*, 10 VIENNA J. INT'L CONST. L. 199 (2016).

⁴⁴ *Id.*

⁴⁵ DIETER NOHLEN & PHILLIP STOVER, ELECTIONS IN EUROPE: A DATA HANDBOOK 1491 (2010).

⁴⁶ Annette Bohr, *Turkmenistan* (in NATIONS IN TRANSIT, pub. Freedom House 2013).

likely has the strongest claim to constitutionalism among these former Soviet states, at least to the extent that its Rule of Law Index has improved substantially.⁴⁷ In this group, only Kosovo has a higher rating.

The Sub-Saharan African states described in Section IV.A.3. are somewhat more diverse, but they have a similar challenge. Despite having textually secular constitutions, most do not have robust constitutionalism, at least to the extent that it would be reflected in the Rule of Law Index.⁴⁸ Only Sierra Leone likely falls within this category.⁴⁹ That said, all of the Balkan, former-Soviet, and Sub-Saharan African examples described here do at least have forms of textual secularism, which could potentially support robust constitutionalism in the absence of authoritarian threats to human rights and the rule of law.

C. *Ostensible Neutrality*

Ostensible neutrality might be understood as effective state or official religion with a veneer of fair treatment for minority religions (which may be more or less robust). This might be explicit, as in the case of the United Kingdom or Denmark, both of which have official religions that receive some degree of advantage from the state. Even so, both of these examples provide significant protection for individual rights and high Rule of Law ratings.⁵⁰

Perhaps the more interesting group of states in this category are those that fairly clearly had aspirational secularism with no official religion but have moved

⁴⁷ *Kazakhstan*, WORLD JUST. PROJECT (2024), <https://worldjusticeproject.org/rule-of-law-index/country/Kazakhstan>.

⁴⁸ *See generally*, WORLD JUST. PROJECT (2024); and Appendix *infra*,

⁴⁹ *See Sierra Leone*, WORLD JUST. PROJECT (2024), <https://worldjusticeproject.org/rule-of-law-index/country/2024/Sierra%20Leone/>.

⁵⁰ *United Kingdom*, WORLD JUST. PROJECT (2024), <https://worldjusticeproject.org/rule-of-law-index/country/2020/United%20Kingdom/>; *Denmark*, WORLD JUST. PROJECT (2024), <https://worldjusticeproject.org/rule-of-law-index/country/Denmark>.

toward an effective official religion that receives clear and fairly consistent advantages. The United States and India both may fall into this category. The rise of Christian nationalism in the U.S. and Hindu nationalism in India has had identifiable impacts on legal secularism in each country.⁵¹ For example, the move toward allowing state funding for sectarian education (especially Christian and Jewish religious schools) demonstrates the United States' preference for Judeo-Christian religions.⁵² India has made similar moves toward favoring its majority religion.⁵³ A similar transition can be observed in predominantly Muslim countries, particularly Türkiye and Indonesia.

Türkiye may actually provide the most helpful example, as it shifted from extremely aggressive constitutional secularism that asserted control over religious institutions and prevented public religious expressions of the majority Sunni community.⁵⁴ The clearest turning point was the electoral success of the Justice and Development Party (Adalet ve Kalkınma Partisi or AKP), which has held control of parliament since 2002, with Recep Tayyip Erdoğan serving as the chief executive since 2003 (first as Prime Minister and then as President from 2014 on, after a constitutional

⁵¹ See, e.g., Powell, *supra* note 3; CHERIAN GEORGE, HATE SPIN: THE MANUFACTURE OF RELIGIOUS OFFENSE AND ITS THREAT TO DEMOCRACY (2016).

⁵² See, e.g., Carson v. Makin, 596 U.S. 767, 778 (2022) (protecting Christian claimants access to state tuition assistance for Christian schools); Kennedy v. Bremerton, 597 U.S. 507 (2022) (protecting a Christian claim to public prayer at the end of public high school football games); Loffman v. California Dep't of Educ., 2:23-cv-01832-JLS-MRW (9th Cir. Oct. 28, 2024) (protecting state education funding for Jewish schools providing special education services).

⁵³ Perhaps the clearest example is the right of return statutes that explicitly excludes Muslims. See, e.g., Sheikh Saaliq, *India's new citizenship law excludes Muslims. Here's what to know*, THE LOS ANGELES TIMES (Mar. 16, 2024), <https://www.latimes.com/world-nation/story/2024-03-16/indias-new-citizenship-law-excludes-muslims-heres-what-to-know>.

⁵⁴ See, e.g., *Turkey Covers Up*, THE ECONOMIST (Jan. 26, 2017), <https://www.economist.com/international/2017/01/26/turkey-covers-up>.

shift to a presidential system).⁵⁵ Over this period, religion has played an increasing role in politics and law. Some of these moves, such as the rejection of bans on headcoverings, have arguably expanded rights to the free exercise of religion and strengthened constitutionalism. However, since the Gezi Protests of 2011 and even more so after the attempted coup of 2016, Erdoğan has used law and the constitution to extend and strengthen his rule.⁵⁶ Türkiye is similar to India in this regard. In both cases, the eventual test of whether the countries have moved from constitutionalism to authoritarianism will be when and how the countries transition to new leadership. Some have argued that with the reelection of Donald Trump, the United States is making a similar move toward authoritarianism that may threaten future democratic transfers of power.⁵⁷

Indonesia, like Türkiye, is a majority Muslim country, though it does have significant non-Muslim minorities, unlike Türkiye.⁵⁸ As described earlier, Indonesia's constitution explicitly embraces a form of secularism and yet also acknowledges a single "God," making it amenable to monotheistic faiths. This pluralistic approach to faith without reifying an official religion is unique. This pluralism does give regional governments authority to incorporate religious tradition into law; for example, the Province of Aceh in North

⁵⁵ *Turkish Secularism is Withering*, WASH. INST. FOR NEAR E. POL'Y (Aug. 26, 2007), <https://www.washingtoninstitute.org/policy-analysis/turkish-secularism-withering>.

⁵⁶ See Paul Kirby, *Turkey Coup Attempt: Who's the Target of Erdogan's Purge?*, BBC (Jul. 20, 2016), <https://www.bbc.com/news/world-europe-36835340>.

⁵⁷ Laura Barron-Lopez & Jason Stanley, *How Trump's Reelection Signals a Broader Acceptance of Authoritarian Leadership*, PBS NEWSHOUR (Nov. 27, 2024), <https://www.pbs.org/newshour/show/how-trumps-reelection-signals-a-broader-acceptance-of-authoritarian-leadership>.

⁵⁸ K. Caileigh Sterling, *5 Facts About Muslims and Christians in Indonesia*, PEW RSCH. CTR. (Mar. 28, 2024), <https://www.pewresearch.org/short-reads/2024/03/28/5-facts-about-muslims-and-christians-in-indonesia/>.

Sumatra aspires to conform to Shari'ah rules.⁵⁹ However, it is the only province to do so. Although Indonesia had strong authoritarian characteristics from its independence in 1945, after Suharto fell from power in 1998, democratic transitions of power along with economic growth contributed to improvements in protecting human rights and the rule of law.⁶⁰

D. Religious Incorporation

Religious incorporation is the explicit incorporation of religious standards within constitutional text or high court jurisprudence. In the 20th century, a handful of predominantly Christian countries have experimented with modest religious incorporation—Ireland in its 1937 Constitution, for example.⁶¹ That said, the mere identification of an official religion does not automatically result in religious incorporation without a broad commitment to incorporating religious norms into law, particularly in systems that explicitly commit to protecting the rights of minorities and dissenters.

The constitutions of Hungary, Poland, and Italy (analyzed in greater detail later) also have explicit commitments to particular religions. Their participation in the European Union likely provides some guardrails to protect individual liberties and procedural protections; however, in the case of Hungary, it is possible that its shift toward authoritarianism is moving it away from

⁵⁹ 2021 Report on International Religious Freedom: Indonesia (2023), U.S. DEPT OF STATE, <https://www.state.gov/reports/2021-report-on-international-religious-freedom/indonesia/>.

⁶⁰ *World Report 2024: Indonesia* (2024), HUM. RTS. WATCH, <https://www.hrw.org/world-report/2024/country-chapters/indonesia>.

⁶¹ See Fifth Amendment of the Constitution Act, 1972 (Act No. 5/1972) (Ir.), <https://www.irishstatutebook.ie/eli/1972/ca/5/enacted/en/print.html> (removing a clause highlighting the importance of the Catholic Church to the great majority of citizens).

authentic constitutionalism.⁶² Democratic processes appear to have moderated this same shift in Poland.⁶³ The same might be true for Italy, though parliamentary instability may have prevented shifts toward greater authoritarianism even with party leadership desirous of such moves.⁶⁴ Although all three might be considered to be ostensibly neutral, the tendency to include religious norms in law more likely constitutes religious incorporation.

Another example of this approach is found in constitutions in a number of predominantly Muslim countries such as Egypt (along with several other Arab nations) and Pakistan. There is significant literature considering how these traditions may form an Islamic constitutionalism.⁶⁵ At various times, these approaches might have been considered forms of constitutionalism with meaningful commitments to rule of law, such as Egypt and Tunisia in the wake of reforms of the Arab Spring, or Pakistan in the early years of the Benazir Bhutto government. Currently, the most stable examples would likely be Kuwait and the United Arab Emirates. Both declare Islam to be the official religion, with specific

⁶² See Robert Benson, *Hungary's Democratic Backsliding Threatens the Trans-Atlantic Security Order*, CTR. FOR AM. PROGRESS 20 (Jan. 22, 2024), <https://www.americanprogress.org/article/hungarys-democratic-backsliding-threatens-the-trans-atlantic-security-order/>.

⁶³ See Jocelyn Hayes, *Poland's Democratic Paradox: The Remarkable Path Toward (and Away?) from Democratic Erosion*, DEMOCRATIC EROSION SYMPOSIUM (Apr. 25, 2024), <https://democratic-erosion.org/2024/04/25/polands-democratic-paradox-the-remarkable-path-toward-and-away-from-democratic-erosion/>.

⁶⁴ See, e.g., Cain Burdeau, *In Meloni's authoritarianism, some Italians see echoes of Mussolini*, COURTHOUSE NEWS SERV. (Aug. 9, 2025), <https://www.courthousenews.com/in-melonis-authoritarianism-some-italians-see-echoes-of-mussolini/>.

⁶⁵ See, e.g., Clark Lombardi, *Constitutional Provisions Making Sharia "A" or "THE" Chief Source of Legislation: Where Did they Come from? What Do they Mean? Do they Matter?*, 28 AM. U. INT'L L. REV. 733 (2013); SHAHEEN SARDAR ALI, MODERN CHALLENGES TO ISLAMIC LAW (Cambridge 2016); Martin Lau, *Print, Publish, Punish: The Qur'an and the Law from Colonial India to Contemporary Pakistan*, 38 ARAB L.Q. 371 (2024).

applications by law, along with strong familial executives in the form of dynastic emirs. Nonetheless, both have reasonably robust textual protections for individual liberties and reasonably high Rule of Law Indices,⁶⁶ likely placing them within broader traditions of constitutionalism.

E. Theocratic Constitutionalism

This category may be largely theoretical as none of these systems likely qualify as examples of robust constitutionalism. Nevertheless, they all have some sort of formal written constitution, though perhaps in the form of a “basic” or “fundamental” law. Theocratic constitutionalism would include religiously focused constitutions that actually provide the sorts of protections that might qualify the legal system as constitutionalism, but this may not be possible. The clearest contemporary examples would likely be Saudi Arabia and Iran. Both have written constitutions that claim to provide for human rights and some procedural legal protections.⁶⁷ Iran has democratic structures for choosing its majles and president, but the Supreme Leader (currently Ayatollah Ali Hosseini Khamenei) and the clergy (ulema) are able to exercise a high degree of authoritarian rule.⁶⁸ This is even more true for the monarchy in Saudi Arabia.⁶⁹ Mauritania

⁶⁶ *Kuwait*, WORLD JUST. PROJECT (2024), <https://worldjusticeproject.org/rule-of-law-index/country/2023/Kuwait/>; *United Arab Emirates*, WORLD JUST. PROJECT (2024), <https://worldjusticeproject.org/rule-of-law-index/country/United%20Arab%20Emirates>.

⁶⁷ See CONSTITUTION (1992) (Saudi Arabia); CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN (1979) (Iran).

⁶⁸ Mehdi Khalaji, *The Regent of Allah: Ali Khamenei's Political Evolution in Iran*, WASH. INST. FOR NEAR E. POL'Y (July 14, 2023), <https://www.washingtoninstitute.org/policy-analysis/regent-allah-ali-khameneis-political-evolution-iran>.

⁶⁹ *Saudi Arabia*, FREEDOM HOUSE (2021), <https://freedomhouse.org/country/saudi-arabia/freedom-world/2021>.

might also be considered at least verging on theocracy.⁷⁰ Like Iran, it has constitutionally created organs to guarantee compliance with Shari'a beyond the judicial mechanisms of repugnancy or conformity found in many constitutions, such as Egypt or Pakistan.

The 2004 Constitution of Afghanistan, promulgated under the former Taliban government, would have constituted a form of theocratic constitutionalism. Notably, the new Taliban government has refused to reinstate even parts of that or previous constitutions, as they are considered violations of Shari'a.⁷¹ The only other clear example of theocratic constitutionalism might be Vatican City, which does have the Fundamental Law of Vatican City State, in which the Pope has absolute sovereignty within the context of Canon Law.⁷² So, although there are theocratic forms of government with formal constitutions, there are no contemporary examples that provide the sort of rights protection and rule of law that would amount to robust constitutionalism.

III. NON-MUSLIM EXAMPLES OF RELIGIOUS CONSTITUTIONALISM

This section considers the range of religious constitutionalism, noting examples for each: aspirational secularism, ostensible neutrality, religious incorporation, and theocratic constitutionalism. This analysis proposes groupings, but their boundaries are fuzzy at the edges, and legal systems are not static.

⁷⁰ See e.g., Katie Harmon, *The Forgotten Islamic Republic: Mauritania's Importance in the World*, INTL. RELATIONS REV. (Oct. 4, 2022), <https://www.irreview.org/articles/the-forgotten-islamic-republic-mauritanias-importance-in-the-world>

⁷¹ *Taliban to 'Temporarily' Adopt Monarchy Constitution, With Caveats*, INT'L BUS. TIMES (Sep. 28, 2021), <https://www.ibtimes.com/taliban-temporarily-adopt-monarchy-constitution-caveats-3305864>.

⁷² LEGGE FONDAMENTALE DELLO STATO DELLA CITTA DEL VATICANO [CONSTITUTION] (May 13, 2023), art. 1 (Vatican) ("The Supreme Pontiff, Sovereign of Vatican City State, has the fullness of legislative, executive and judicial powers.").

A. Those with Aspirational Secularism

The tradition of modern secular constitutions began with the US Constitution and the French Declaration of the Rights of Man and the Citizen, both fully adopted in 1789.⁷³ The French version was largely attributed to the Marquis de Lafayette, who supported the US Revolution and was influenced by Thomas Jefferson and other American thinkers.⁷⁴

No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order.⁷⁵

This formulation, in a sense, maps the US free exercise and establishment clauses, but there is a stronger emphasis on the power of the state to regulate religious behavior that interferes with the “established Law and Order.” The tradition paved the way for most modern constitutions. This Section will briefly describe the role of religion in French constitutional law today and then consider Mexico and Japan, which have similar commitments in different cultural contexts.

Analogous to the non-establishment principle of the US First Amendment, the French principle of *laïcité* (secularism) plays a central role, attempting to ensure formal separation between church and state. This principle, enshrined in the constitutional texts and the 1905 law on the Separation of the Churches and the State, prohibits the government from recognizing or

⁷³ The 1789 Declaration of the Rights of Man and the Citizen of France became the most influential model of assertive state secularism.

⁷⁴ *Marquis de Lafayette*, BRITANNICA (updated Dec. 21, 2024), <https://www.britannica.com/biography/Marquis-de-Lafayette>.

⁷⁵ DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN (1789) (Fr.), art. 10 (“No one may be disturbed on account of his opinions even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order.”)

funding any religion, thereby maintaining a neutral stance towards all religious traditions.⁷⁶ As a balance, the French Constitution guarantees freedom of religion, allowing individuals to practice their faith freely as long as it does not disrupt public order.⁷⁷ This framework is intended to promote equality and prevent religious influence on state affairs or the coercion of citizens. In that regard, it goes beyond the requirements of the US First Amendment, as it would prohibit some aspects of free exercise.

Following the French model, the Mexican principle of secularism (*laicidad*) ensures the separation of church and state, as established by the constitutional reforms of 1992.⁷⁸ These reforms guarantee freedom of religion while maintaining that the state does not endorse or fund any religion.⁷⁹ The Mexican Constitution (like the French and American) explicitly protects individual rights to religious freedom, but those freedoms may be less extensive than free exercise in the US, reflecting deep historical concerns regarding the coercive power of religious institutions (in this case, the Catholic Church, as in France) to influence politics and individual choice. Like France, Mexico has a long history of anti-clericalism. Its 1917 Constitution went so far as outlawing teachings by the Church, banning religious orders, seizing church property, and

⁷⁶ *What is French Laicite?*, THE ECONOMIST (Nov. 23, 2020), <https://www.economist.com/the-economist-explains/2020/11/23/what-is-french-laicite>.

⁷⁷ See CONSTITUTION OF THE FIFTH REPUBLIC OF FRANCE (1958), art. 1, as amended (“France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs [...].”).

⁷⁸ See generally Maria Concepcion Medina Gonzalez, *Mexican Law of Religion at 28 Years of the Constitutional Reform on Religious Matters*, 3 LATIN AM. PERSP. L. AND RELIGION 117, 120 (2020).

⁷⁹ CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, CP, art. 24, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

persecuting priests.⁸⁰ Strong secular and anticlerical language is more explicit in the Mexican Constitution than the French (which has used statutes for specific prohibitions against coercion and entanglement).

The 1946 Constitution of Japan was technically proposed as an amendment to the earlier Meiji Constitution as part of the post-WWII settlement process. The principle of separation of church and state is firmly established, as outlined in Article 20 of the Constitution, which reads as follows:

Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority. No person shall be compelled to take part in any religious act, celebration, rite or practice. The State and its organs shall refrain from religious education or any other religious activity.⁸¹

Interestingly, it emphasizes a prohibition against compulsion and state support that is more in line with the French and Mexican constitutions than the US model, which is ironic given the role of the US military in facilitating the amendment process.⁸²

⁸⁰ See CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, CP, art. 24, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014. (“Every person has the right to have freedom of ethical convictions, of conscience and of religion, and to have or to adopt, as the case may be, the one of her preference. Such freedom includes the right to participate, individually or collectively, in both public and private ceremonies, worship or religious acts of the respective cult, as long as they are not a felony or a misdemeanor punished by law. No person is allowed to use these public acts of religious expression with political ends, for campaigning or as means of political propaganda.”)

⁸¹ THE CONSTITUTION OF JAPAN, art. 20.

⁸² See Frank Ravitch, *The Shinto Cases: Religion, Culture, or Both—The Japanese Supreme Court and Establishment of Religion Jurisprudence*, 2013 BYU L. REV. 505 (2014).

No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority.⁸³

The result has been that state Shintoism, which played a significant role in public life, law, and politics under previous governments, lost its privileged status. That said, it remains the dominant tradition (along with Buddhism) and continues to be disproportionately influential.⁸⁴

B. Those with Ostensible Neutrality

The focus here is on India and the United States as examples of systems that may have recently moved into this category. Also included within this category are nations with official religions or that otherwise provide some advantage to the dominant faith, while also attempting to provide religious freedom for all communities with robust, and otherwise secular protections.⁸⁵

1. India

India may be considered to have a form of religious constitutionalism as a consequence of its unique approach to balancing secularism with religious diversity, within the context of Hindu nationalist political control. India is the most populous democracy and has wrestled with challenges related to ethnic, caste, and religious

⁸³ THE CONSTITUTION OF JAPAN, art. 89.

⁸⁴ See, e.g., *Kakunaga v. Sekiguchi*, Saiko Saibansho [S.Ct.] (July 13, 1977) (Gyo-Tsu) 69 vol. 31, no. 4 Minshu 533 (Japan) (demonstrating one of a series of cases upholding Shintoism as culture rather than religion in arguably state-funded events).

⁸⁵ One might consider Denmark, Finland, Iceland, Norway, and the United Kingdom (among others) to be in this category. See Appendix.

diversity.⁸⁶ The Indian Constitution guarantees freedom of religion, allowing individuals to profess, practice, and propagate their faith.⁸⁷ However, it also incorporates religious personal laws for different communities, governing matters such as marriage, divorce, and inheritance.⁸⁸ These personal laws reflect the religious customs and traditions of major religious groups, including Hindus, Muslims, Christians, and others. Although historically intended to acknowledge pluralism in an extremely large and diverse country, religiously-tied personal status legislation may lean toward religious incorporation. The explicit secular commitments in the constitution arguably lean more toward ostensible neutrality.

Additionally, the Constitution provides for the regulation of religious institutions and practices to ensure public order, morality, and health (which is secular and antireligious as in the French and Soviet constitutions).⁸⁹ This blend of secular principles with religious accommodations illustrates how Indian law integrates religious values within its constitutional framework, aiming to respect and protect the country's diversity. However, given that the BJP and Hindu nationalist leaders are often viewed as privileging Hinduism and its institutions over other religions, the approach to religious constitutionalism might be considered at least culturally Hindu.⁹⁰

⁸⁶ See generally Neha Saghal et al, *Religion in India: Tolerance and Segregation*, PEW RESEARCH CENTER (June 29, 2021), <https://www.pewresearch.org/religion/2021/06/29/religion-in-india-tolerance-and-segregation/>.

⁸⁷ India Const. art. 25 cl. 1 (“Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.”).

⁸⁸ India Const. art. 26 cl. b. (explaining that every religion shall have the right “to manage its own affairs in matters of religion”).

⁸⁹ See, e.g., India Const. art. 25 cl. 1.

⁹⁰ Milan Vaishnav, *The BJP in Power: Indian Democracy and Religious Nationalism*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Apr. 4, 2019), <https://carnegieendowment.org/research/2019/04/the-bjp-in-power-indian-democracy-and-religious-nationalism?lang=en>.

Hindu nationalism has influenced Indian law in significant ways, particularly under the leadership of the BJP. This impact is evident in several areas. For example, the Citizenship Amendment Act (CAA) of 2019 provides a pathway to Indian citizenship for non-Muslim refugees from Pakistan, Bangladesh, and Afghanistan, which arguably discriminates against Muslims and undermines India's broader constitutional commitment to secularism.⁹¹ Religious conversion has also become a contentious legal issue. Several states governed by the BJP have enacted or strengthened anti-conversion laws, which are intended to prevent forced or fraudulent religious conversions.⁹² However, these laws focus on conversion from Hinduism.⁹³ The sacrality of cows in Hindu tradition has prompted the expansion of laws protecting them.⁹⁴ Alleged violation of these laws has resulted in violence against those accused of cow slaughter, particularly Muslims and Dalits.⁹⁵ Hindu nationalism has also impacted education policy. For example, there have been efforts to revise textbooks to emphasize Hindu cultural and historical narratives.⁹⁶ This has sparked debates over historical accuracy and the marginalization of other religious and cultural

⁹¹ The Citizenship Amendment Act, 2019 §2 (India).

⁹² Rashad Khan, *The Political Ideology Behind Anti-Conversion Laws In India*, THE DIPLOMAT (June 20, 2023), <https://thediplomat.com/2023/06/the-political-ideology-behind-anti-conversion-laws-in-india/>.

⁹³ U.S. Dep't of State, 2021 Report on International Religious Freedom: India (2021), <https://www.state.gov/reports/2021-report-on-international-religious-freedom/india/>.

⁹⁴ *The Hindu Right's Pro-Cow Policies Are Terrible for India's Cows*, THE ECONOMIST (Feb. 3, 2024), <https://www.economist.com/asia/2024/01/28/the-hindu-rights-pro-cow-policies-are-terrible-for-indias-cows>.

⁹⁵ *Deaths Raise Fresh Fears Over Cow Vigilantism in India*, BBC (May 8, 2023), <https://www.bbc.com/news/world-asia-india-65229522>.

⁹⁶ Sanya Mansoor, *India's School Textbooks are the Latest Battleground for Hindu Nationalism*, TIME MAGAZINE (Apr. 7, 2023), <https://time.com/6269349/india-textbook-changes-controversy-hindu-nationalism/>.

perspectives.⁹⁷ Finally, judicial appointments and decisions have been subject to allegations of bias favoring Hindu jurists and communities.⁹⁸ These changes reflect a broader trend of integrating Hindu nationalist ideals into the legal and political framework of India, raising concerns about the erosion of secularism and the protection of minority rights.

2. *Shifts in US Religion Jurisprudence*

There is no disputing that the current US Supreme Court has shifted in its First Amendment religion jurisprudence over the past two decades. Decriers complain and champions proclaim that this move emboldens explicitly Christian nationalist advocates and strengthens their claims that the US Constitution endorses a particular religious worldview, which some assert ought to shape legal doctrine.⁹⁹

a. *Shifts in First Amendment Religion Doctrine*

US constitutional religion jurisprudence has shifted from the strong establishment and free exercise principles of *Lemon v. Kurtzman*¹⁰⁰ and *Employment Division v.*

⁹⁷ Christophe Jaffrelot and Pradyumna Jairam, *BJP Has Been Effective in Transmitting Its Version of Indian History to Next Generation of Learners*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Nov. 16, 2019), <https://carnegieendowment.org/posts/2019/11/bjp-has-been-effective-in-transmitting-its-version-of-indian-history-to-next-generation-of-learners?lang=en>.

⁹⁸ See Mihir R., *A Profile of the Supreme Court: Gender, Regional, and Religious Diversity*, SUPREME COURT OBSERVER (Aug. 28, 2021), <https://www.scobserver.in/journal/a-profile-of-the-supreme-court-gender-regional-and-religious-diversity/>; See also Soutik Biswas, *Supreme Court Collegium: the Growing Row Over Picking Judges in India*, BBC (Jan. 24, 2023), <https://www.bbc.com/news/world-asia-india-64372672>.

⁹⁹ See, e.g., Elizabeth Dias & Lisa Lerer, *Alito's 'Godliness' Comment Echoes a Broader Christian Movement*, N.Y. TIMES (June 11, 2024), <https://www.nytimes.com/2024/06/11/us/samuel-alito-christianity-law-democracy.html>.

¹⁰⁰ *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *abrogated by*, *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022).

Smith.¹⁰¹ The so-called *Lemon* test has three prongs: the governmental action must have a “secular”(non-religious) purpose, it must not have the primary effect of either “advancing” or “inhibiting” religion, and it must not result in an “excessive entanglement” of the government with religion.¹⁰² If the governmental action fails any of these prongs, it is unconstitutional.¹⁰³ *Smith* held that generally applicable laws that are neutral and not motivated by religious animus do not violate the First Amendment's Free Exercise Clause, which means that the government can restrict acts performed for religious reasons as long as the law is not specifically directed at religion.¹⁰⁴ However, it is not clear how this standard might be treated by the current court.

Lemon has been effectively overturned, though the court was not clear about when that occurred. Two potential turning points are *Kennedy v. Bremerton School District*, which did not explicitly overturn *Lemon*, or *Groff v. DeJoy*, in which Justice Alito described the *Lemon* test as “now abrogated.”¹⁰⁵ *Employment Division v. Smith* has long been a target for conservative justices, and in 2021, in *Fulton v. City of Philadelphia*, Justice Alito, joined by Justices Clarence Thomas and Neil Gorsuch, expressed intent to overrule *Smith*.¹⁰⁶ In *Kennedy*, the court prioritized free exercise, claiming that the requirement for strict scrutiny in *Smith* had been met. Given changes in the membership of the court, *Smith* is likely to go the way of *Lemon*—with establishment clause mechanisms intended to prevent government entanglement being weakened by the court’s expansion of the scope of free exercise principles. The shift from *Lemon* to a focus on historical practices and understandings potentially opens the door to greater judicial discretion and subjectivity in determining the boundaries of the establishment clause.

¹⁰¹ *Emp. Div. v. Smith*, 494 U.S. 872 (1990).

¹⁰² *Lemon*, 403 U.S. at 612–13.

¹⁰³ *Id.*

¹⁰⁴ *Smith*, 494 U.S. at 885–90.

¹⁰⁵ *Groff v. DeJoy*, 600 U.S. 447, 460 (2023).

¹⁰⁶ *Fulton v. City of Phila.*, 593 U.S. 522, 545 (2021)(Alito, J., concurring)(noting that “this severe holding is ripe for examination”).

i. Tensions Between Establishment and Free Exercise

In recent terms, both *Everson v. Board of Education of the Township of Ewing*¹⁰⁷ and *Kennedy v. Bremerton School District*¹⁰⁸ have severely constrained earlier meanings of the Establishment Clause. Statutory accommodations of religion are typically constitutional because they tend to expand religious freedom.¹⁰⁹ The religion clause cases granted certiorari in early 2024 are likely to further erode establishment clause rules.

As noted in *Religious Originalism*,¹¹⁰ *Carson v. Makin* likely paved the way for requiring states to publicly fund religious charter schools if they fund secular charters. The proposed Oklahoma Catholic charter school has been challenged, and the Supreme Court chose to hear the case in Spring 2024.¹¹¹ The court could have used the voucher related reasoning in *Carson* and apply it to charter schools. However, the recusal of Justice Barrett resulted in a four-to-four stalemate leaving the Oklahoma State Supreme court holding prohibiting the religious charter in place.¹¹² Should a similar case come to the Supreme Court, I expect that Justice Barrett would find a religious charter school constitutional. In the meantime, universal vouchers already allow public funding of private religious education in many jurisdictions, but requiring public funding of religious charter schools will incentivize private religious schools—in districts with charters but not vouchers—to apply for charter status.

¹⁰⁷ *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947).

¹⁰⁸ *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 514 (2022).

¹⁰⁹ *Id.* at n.5.

¹¹⁰ Powell, *supra* note 4, at 340-41.

¹¹¹ See Troy Closson, *Supreme Court to Hear Oklahoma Religious Charter School Case*, N.Y. TIMES (Jan. 24, 2025), <https://www.nytimes.com/2025/01/24/us/supreme-court-oklahoma-religious-charter-school.html> (on file with author).

¹¹² See *Oklahoma Statewide Charter Sch. Bd. v. Drummond*, 605 U.S. 165, 166 (2025).

*ii. Free Speech and Free Exercise Trumping
Antidiscrimination Measures*

Since the 1980s and even more over the past ten to twenty years, the Court has tended to favor free exercise claims when they may conflict with establishment claims. For example, in *303 Creative LLC v. Elenis*,¹¹³ the owner of a graphic design firm expanded her business to include wedding websites (which she had not offered previously). Even though she had never been asked to provide services to gay couples, she objected to the Colorado Anti-Discrimination Act (CADA) as forcing her to provide services that violate her conscience on religious grounds.¹¹⁴ CADA prohibits businesses that are open to the public from discriminating on the basis of numerous characteristics, including sexual orientation.¹¹⁵ Notwithstanding significant problems with ripeness and standing challenges, the Supreme Court held that Colorado could not force the plaintiff to create websites with content that would violate her conscience.¹¹⁶ Although the pleadings, publicity, and amicus briefs¹¹⁷ made it clear that the 303 Creative's owner was objecting on the grounds that providing wedding services to gay couples violated her religious conscience, the opinion rests nearly entirely on free speech grounds.¹¹⁸ The Sotomayor dissent chastises the majority for granting a business open to the public a constitutional right to refuse to serve members of a protected class,¹¹⁹ because the state's compelling interest in preventing discrimination in public accommodations justifies incidental impact on commercial

¹¹³ *Groff v. DeJoy*, 600 U.S. 447 (2023).

¹¹⁴ *303 Creative*, 600 U.S. at 580-81.

¹¹⁵ COLO. REV. STAT. ANN. § 24-34-601 (West, 2025).

¹¹⁶ *303 Creative*, 600 U.S. at 602-03 (2023).

¹¹⁷ *See, e.g.*, Brief for Arizona et al. as Amici Curiae Supporting Petitioners at 1–2, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), No. 21-476; Brief for Catholic League for Religious and Civil Rights as Amicus Curiae Supporting Petitioners at 28, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), No. 21-476.

¹¹⁸ *Id.* at 602-03.

¹¹⁹ *Id.* at 603-04 (Sotomayor, J. dissenting).

speech.¹²⁰ So, although the holding relies on free speech, it is arguably reifying religious exercise to thwart anti-discrimination law,¹²¹ creating a system of speech-based exemptions to the anti-discrimination provisions of public accommodations laws.¹²²

iii. Implications

So, both emerging free speech (in *303 Creative*) and religion clause (in *Kennedy*) doctrine have the effect of neutering establishment clause precedent and directing potentially massive public funding to sectarian schools. Optimistically, perhaps the only impact of these moves will be to serve as a bulwark for individual liberties, but they may create opportunities for religious institutions (especially Christian ones) to grow in influence with the benefit of state support, undergirding open calls for Christian nationalism that could ultimately compromise the rights of non-Christians and dissenters.

b. How is this Religious Constitutionalism?

The United States is a complicated example. Are these shifts away from secularism as separation and nonestablishment significant enough to indicate that the country has moved away from its historical commitment to aspirational secularism in favor of a more-explicit commitment to support religion (especially Christianity and Judaism)? At this point, there are few remaining constraints on government funding for sectarian education, at least indirectly. The challenged funding of the first state religious charter school in Oklahoma will be an important test case. Given the outspoken role of self-identified Christian nationalists in the 2024 election and the proposals of the Heritage Foundation's Project 2025, it would seem that that is the direction US politics is

¹²⁰ *Id.* at 608.

¹²¹ See NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 115, 155-16 (Harvard Univ. Press 2017).

¹²² See briefs, *supra* note 117.

moving. Although the Supreme Court may provide some boundaries at the extreme, their recent decisions seem to indicate at least tacit support for some of these moves. Unchecked, this could lead to explicit religious incorporation in the future, but it at least indicates a shift away from aspirational secularism (which some scholars and jurists would argue was never a goal).

C. Religious Incorporation

Although the boundary may be admittedly fuzzy, religious incorporation moves toward more explicit religious norms in law, entwinement between religion and the state, and discernibly weakened protections for religious minorities. This Section uses Hungary, Poland, and Italy as examples.

1. Hungary

Hungarian law can be seen as a form of religious constitutionalism due to its incorporation of Christian values and principles into its legal framework. The Hungarian Constitution, known as the Fundamental Law, explicitly references Christianity as a key component of the nation's identity and heritage.¹²³ This is evident in the preamble, which acknowledges the role of Christianity in preserving the nation and emphasizes the importance of family, faith, and national unity.¹²⁴ Additionally, certain laws and policies reflect Christian moral teachings, such as those related to marriage, family, and the protection of life.¹²⁵ This intertwining of religious values with legal principles illustrates how Hungary's legal system aligns with the concept of religious constitutionalism, where religious beliefs

¹²³ MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, preamble (Hung.).

¹²⁴ *Id.*

¹²⁵ See e.g., MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, art. L (Hung.), MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, art. II (Hung.).

significantly influence the formulation and interpretation of laws.¹²⁶

For example, the Fundamental Law explicitly acknowledges the role of Christianity in preserving the nation. The preamble states, “We recognize the role of Christianity in preserving nationhood,” and emphasizes the importance of family and national unity.¹²⁷ Hungarian family law, in particular, is influenced by Christian values. For instance, the Fundamental Law defines marriage as a union between a man and a woman, reflecting a traditional Christian view of marriage.¹²⁸ The Hungarian regulation of abortion is similarly influenced by traditional Christian (and specifically Catholic) teachings on the sanctity of life. The Fundamental Law states that “the life of the fetus shall be protected from the moment of conception,” which aligns with the anti-abortion stance of many Christian denominations.¹²⁹

This identification with traditional Catholicism is also reflected in statutes and rules in similar ways. Religious education is provided in schools, and parents can choose to have their children receive religious instruction, which is often based on Catholic or broader Christian teachings.¹³⁰ Similarly, the 2011 Church Act established a tiered system for recognizing religious organizations, with certain Christian denominations

¹²⁶ See generally Samuel Moyn, *The Secret History of Constitutional Dignity*, 39 YALE HUM. RTS. & DEV. L.J. 41 (2014).

¹²⁷ MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, preamble (Hung.).

¹²⁸ MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, art. L (Hung.) (“Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation.”).

¹²⁹ MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, art. II (Hung.) (“Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.”).

¹³⁰ On Public Education, 1993 (Act LXXIX of 1993) (Hung.).

receiving preferential treatment.¹³¹ This law has been criticized for discriminating against minority religions and favoring established Christian churches, most notably the Catholic Church.¹³²

2. Poland

Polish law might also be considered a form of religious constitutionalism due to its deep integration of Christian values, particularly those of the Roman Catholic Church, into its legal and constitutional framework. The Polish Constitution acknowledges the nation's Christian heritage and includes references to God in its preamble, highlighting the importance of religious values in the nation's identity.¹³³ Additionally, the concordat with the Holy See formalizes the relationship between the Polish state and the Roman Catholic Church, granting the Church significant influence over various aspects of public life, including education and moral issues.¹³⁴ Laws related to marriage, family, and education often reflect Catholic teachings, and public schools offer religious instruction.¹³⁵

Perhaps more than in Hungary, the Catholic Church plays a role in shaping Polish legislation, often influencing laws and policies through its moral and social teachings. Despite the formal separation of church and

¹³¹ On the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities, 2011 (Act CCVI/2011) (Hungary). 2012. évi CCVI. (Act CCVI of 2011) (Hung.).

¹³² Case of Magyar Kereszteny Mennonita Egyhaz and Others v. Hungary [Eur. Ct. H.R.] (2014) (Hung.).

¹³³ THE CONSTITUTION OF THE REPUBLIC OF POLAND, preamble ("We, the Polish Nation - all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources...").

¹³⁴ Concordat of 1993, Pol.-Vatican (July 28, 1993), 90 A.A.S. 310.

¹³⁵ Ewa A. Golebiowska and Silviya Gancheva, *Religious Regulation in Poland*, OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (Jan. 25, 2019), <https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-670>.

state, the Church's influence is pervasive in areas such as education, family law, and public morality. For instance, the Church's stance on abortion has heavily influenced Poland's restrictive abortion laws, which align with Catholic teachings on the sanctity of life.¹³⁶ Similarly, the concordat between Poland and the Vatican described above grants the Church privileges in areas like religious education and the operation of religious institutions.¹³⁷ The Church also exerts influence through its close ties with political parties, particularly the ruling Law and Justice (PiS) party, which often aligns its policies with Catholic teaching.¹³⁸ This relationship allows the Church to shape public discourse and legislative priorities, reinforcing its influence in Polish law and politics.

3. Italy

As a consequence of its historical and ongoing relationship with the Roman Catholic Church, Italy may also be considered a form of religious constitutionalism. The Italian Constitution, while establishing the state as secular, acknowledges the significant role of the Catholic Church through the Lateran Pacts, which were incorporated into the Constitution in 1948.¹³⁹ These agreements grant the Church certain privileges, such as the ability to provide religious education in public schools

¹³⁶ Vanessa Gera, *Poland Has a Strict Abortion Law – and Many Abortions. Lawmakers Are Now Tackling the Legislation*, AP NEWS (Apr. 11, 2024), <https://apnews.com/article/poland-abortion-law-tusk-b70785a371f16d781906463dbb7ab688>.

¹³⁷ See generally, Concordat of 1993, Pol.-Vatican (July 28, 1993), 90 A.A.S. 310.

¹³⁸ Joanna Kozłowska & Michal Dyjuk, *In Poland, Church and State Draw Nearer, and Some Catholic Faithful Rebel*, AP NEWS (Oct. 9, 2023), <https://apnews.com/article/poland-election-catholicism-catholic-church-religion-ba0f1167d3b75de9c52f4f2d827462b6>.

¹³⁹ COSTITUZIONE [COST.], art. 7, (It.) (“The State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are regulated by the Lateran pacts. Amendments to such Pacts which are accepted by both parties shall not require the procedure of constitutional amendments.”).

and influence on moral and social issues.¹⁴⁰ Additionally, the presence of religious symbols, like crucifixes in public buildings and schools, reflects the integration of Catholic values into public life.¹⁴¹ Despite Italy's commitment to religious freedom and pluralism, the Catholic Church's influence remains evident in various aspects of legislation and public policy, illustrating a blend of secular governance with religious principles.

There are a number of examples of religious influence in Italian law. As with many predominantly Catholic countries, Italy's abortion laws reflect Catholic values, with a particularly strong emphasis on the sanctity of life. While abortion is legal, it is subject to strict regulations, including mandatory counseling and a waiting period.¹⁴² Relatedly, Italian law allows healthcare professionals to refuse to perform abortions on the grounds of conscientious objection, reflecting the influence of Catholic moral teachings.¹⁴³ Unsurprisingly, Italian family law defines marriage as a union between a man and a woman, aligning with traditional Catholic teachings.¹⁴⁴ Additionally, the legal framework supports family values, with policies aimed at promoting childbirth and supporting families.¹⁴⁵ This complex entanglement with religious institutions and teaching supports the argument that Italy employs a form of religious constitutionalism consistent with Religious Incorporation.

D. Those with Theocratic Constitutionalism

This category likely includes only a handful of countries, like Vatican City (and perhaps Tibet as a

¹⁴⁰ Lateran Treaty, June 7, 1929, It.-Vatican, 0 VLS 161.

¹⁴¹ See *Court Rules Against Crucifixes in Italian Public Schools*, N.Y. TIMES (Nov. 3, 2009), <https://www.nytimes.com/2009/11/04/world/europe/04briefs-Crucifix.html>.

¹⁴² Art. 1, L. n. 194/1978 (It.).

¹⁴³ Art. 9, L. n. 194/1978 (It.).

¹⁴⁴ *Same-Sex Marriage Around the World*, PEW RSCH. CTR. (Jun. 28, 2024), <https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world/>.

¹⁴⁵ Legge 30 dicembre 2023, n.213, G.U. Dec. 30, 2023, n.303 (It.).

government in exile if it were to be considered an independent nation). Vatican City is unique given its close geographical and historical connections to Italy. Although it provides some liberty and process protections in line with Italian norms, the power of the Curia and the Pope himself does not allow for the sort of democratic input, accountability, and balance of powers expected within authentic constitutionalism.¹⁴⁶ As described earlier, this may only be a hypothetical category if the requirements of theocracy practically prohibit effective constitutionalism.

IV. SIMILAR TREATMENT IN MUSLIM CONTEXTS

Most constitutions, including those in predominantly Muslim countries, have explicit protections both for the free exercise of religion and from discrimination by the government, at least in certain circumstances. Sometimes antidiscrimination protection is very broad, but it is often provided to explicit categories in constitutional text, usually applying to sex, religion, race, or all three forms of discrimination.¹⁴⁷ Explicit incorporation is heavily studied, but, notably, large numbers of predominantly Muslim countries have extremely secular constitutions and legal systems, in some cases demonstrating hostility to the dominant religion. In a sense, this was true in Türkiye until about 15 years ago¹⁴⁸ and remains the case in a number of countries with constitutions modeled on European and North American precedents. However, this sort of antagonism to religion is typically aimed at the control of

¹⁴⁶ *The Vatican's Government*, THE VATICAN (May 22, 2018), <https://vatican.com/The-Vaticans-government/> (outlining the Pope's authority over matters of state).

¹⁴⁷ Note that the US Constitution developed categories subject to Equal Protection in caselaw.

¹⁴⁸ THE CONSTITUTION OF THE REPUBLIC OF TURKEY, art. 2 ("The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble.").

all religions rather than the marginalization of politically weaker communities. Even so, the dominant religion in such systems is typically still preferred over minority faiths and is the reference frame for considering religion.

A. Aspirational Secularism in Muslim Majority Countries

Considering the list of aspirationally secular constitutional systems in Muslim-majority countries, there are some clear patterns¹⁴⁹. Three groupings emerge: countries in the Balkans, former Soviet states, and select states in Africa. Two examples that used to be in this category are Türkiye and Indonesia, which will be discussed in greater detail below. The following countries all have a textual commitment to secularism and the protection of freedom of religion, but have some key differences.

1. Balkan States Committed to Religious Freedom and Neutrality: Albania, Bosnia Herzegovina, Kosovo

The Balkan nations of Albania, Bosnia and Herzegovina, and Kosovo share several similarities in their approach to the role and treatment of religion, reflecting a commitment to religious freedom and neutrality. All of these regions were included in the Ottoman Empire and transitioned to socialism in the 20th century (Albania as a member of the Warsaw Pact and the others as part of the formally nonaligned Yugoslavia).¹⁵⁰ In Albania, the constitution explicitly provides for freedom of conscience and religion, stating that there is no official religion and that the state is

¹⁴⁹ Note that these are all post-WW2 constitutions and tend to have more specificity than 19th century models.

¹⁵⁰ *Ottoman Empire Timeline*, BRITANNICA, <https://www.britannica.com/summary/Ottoman-Empire-Timeline>.

neutral in matters of belief.¹⁵¹ It recognizes the equality and independence of religious groups and prohibits discrimination based on religion.¹⁵² This framework is intended to ensure that all religious communities are treated equally under the law, fostering an environment of religious pluralism and tolerance.

Similarly, Bosnia and Herzegovina provides for freedom of religious thought and practice, prohibits religious discrimination, and allows registered religious organizations to operate freely.¹⁵³ This collaborative model ensures that religious groups can engage in various social, educational, and charitable activities without state interference, provided they do so without discrimination.

Kosovo's constitution also guarantees freedom of religion, conscience, and belief, ensuring that all individuals are free to practice their religion without fear of discrimination or persecution.¹⁵⁴ The state is secular and neutral in religious matters, and it recognizes the independence of religious communities.¹⁵⁵ This legal framework is designed to protect the rights of all religious groups and promote intercommunal harmony, an elusive goal in most modern Balkan nations.

¹⁵¹ CONSTITUTION OF ALBANIA, art. 24 (“1. Freedom of conscience and of religion is guaranteed. 2. Everyone is free to choose or to change his religion or beliefs, as well as to express them individually or collectively, in public or private life, through cult, education, practices or the performance of rituals. 3. No one may be compelled or prohibited to take part in a religious community or its practices or to make his beliefs or faith public.”)

¹⁵² CONSTITUTION OF ALBANIA, art. 18(2) (“No one may be unjustly discriminated against for reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic condition, education, social status, or parentage.”).

¹⁵³ CONSTITUTION OF BOSNIA AND HERZEGOVINA, art. II(3)(g) (explaining that all persons shall enjoy human rights including “Freedom of thought, conscience, and religion”).

¹⁵⁴ CONSTITUTION OF THE REPUBLIC OF KOSOVO, art. 38 (“Freedom of belief, conscience and religion includes the right to accept and manifest religion, the right to express personal beliefs and the right to accept or refuse membership in a religious community or group.”).

¹⁵⁵ CONSTITUTION OF THE REPUBLIC OF KOSOVO, art. 8 (“The Republic of Kosovo is a secular state and is neutral in matters of religious beliefs.”).

In all three countries, the constitutions reflect a commitment to maintaining a secular state while respecting and protecting the rights of religious communities, which is not the most common approach among predominantly Muslim societies. This approach aims to ensure the freedom of religious practice but also promotes equality and non-discrimination, creating a legal environment where diverse religious beliefs can ideally coexist peacefully. The emphasis on neutrality and cooperation between the state and religious groups is a common thread that underscores the importance of religious freedom and tolerance in these nations.

*2. Inheritors of the Soviet Vision of Secularism:
Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan,
Turkmenistan, Uzbekistan*

The constitutions of Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan share several similarities in their approach to the role and treatment of religion, reflecting a common commitment to secularism and the protection of religious freedom. They are all nations created out of the dissolution of the Soviet Union in 1991,¹⁵⁶ and thus share a number of common approaches to these issues. Most notably, the regulation of religion in these countries has the additional goal of maintaining public order and security, which they share in common with France and Mexico. The following descriptions reflect constitutional text and may be aspirational, particularly as several of these countries tend toward authoritarianism. As a result, the constitutional aspirations may not reflect legal reality, particularly for religious minorities or those who actively challenge the state. That said, these nations inherited a Soviet vision of secularism that has influenced constitutional and legal frameworks.¹⁵⁷

¹⁵⁶ *Collapse of the Soviet Union*, BRITANNICA (Aug. 11, 2025), <https://www.britannica.com/event/the-collapse-of-the-Soviet-Union>.

¹⁵⁷ *Id.*

In Azerbaijan, the constitution stipulates the separation of religion and state, with the aim of treating all religions equally and ensuring that individuals have the right to express and practice their religious beliefs freely, provided these do not violate public order or morality (which could be a significant restraint).¹⁵⁸ This framework is designed to prevent state interference in religious activities while also combating religious extremism and radicalism (a central concern for predominantly Muslim former-Soviet republics).

Kazakhstan's constitution similarly guarantees freedom of religion and the separation of religion from the state.¹⁵⁹ It emphasizes the equality of all religions and prohibits any form of religious discrimination.¹⁶⁰ The state ostensibly ensures that religious organizations can operate freely, provided that they conform to legal requirements and do not engage in activities that threaten public security or order.¹⁶¹ This approach aims to foster solidarity and to deter radicalization. Kazakhstan differs from other post-Soviet nations in this group in that

¹⁵⁸ SUPREME LAW OF THE REPUBLIC OF AZERBAIJAN [CONSTITUTION], art. 18 & art. 48 ("In the Republic of Azerbaijan religion is separated from the State. All religions are equal before the law." & "The free conduct of religious rites if it does not violate public order or public morality is authorized.").

¹⁵⁹ CONSTITUTION OF THE REPUBLIC OF KAZAKHSTAN, art. 1 ("The Republic of Kazakhstan proclaims itself democratic, secular, legal and social state whose highest values are an individual, his life, rights and freedoms.").

¹⁶⁰ CONSTITUTION OF THE REPUBLIC OF KAZAKHSTAN, art. 14 ("No one shall be subject to any discrimination for reasons of origin, social, property status, occupation, sex, race, nationality, language, attitude towards religion, convictions, place of residence or any other circumstances.").

¹⁶¹ *See* CONSTITUTION OF THE REPUBLIC OF KAZAKHSTAN, art. 5(3) ("Formation and functioning of public associations pursuing the goals or actions directed toward violent change of the constitutional system, violation of the integrity of the Republic, undermining the security of the state, inciting social, racial, national, religious, class and tribal enmity, as well as formation of unauthorized paramilitary units shall be prohibited.").

it has a very large ethnic Russian population¹⁶² and is subject to more direct Russian involvement in decision-making, particularly with regard to petrochemical exports and space launch facilities.¹⁶³

In Kyrgyzstan, the constitution similarly enshrines the principle of secularism, guaranteeing freedom of religion and belief.¹⁶⁴ It prohibits any form of religious persecution and provides that religious organizations function independently of the state.¹⁶⁵ The legal framework is designed to protect the rights of all religious groups and promote religious tolerance and diversity.

Tajikistan's constitution provides for the separation of religion and state and guarantees freedom of religious practice.¹⁶⁶ It emphasizes the equality of all citizens regardless of their religious beliefs and prohibits any form of religious discrimination.¹⁶⁷ The state regulates religious activities to ensure they do not undermine

¹⁶² *Central Intelligence Agency*, THE WORLD FACTBOOK: KAZAKHSTAN, (Dec. 12, 2024), <https://www.cia.gov/the-world-factbook/countries/kazakhstan/>.

¹⁶³ Sydney Freeberg et. al, *Putin's Pipeline: How the Kremlin Outmaneuvered Western Oil Companies to Wrest Control of Vast Flows of Kazakhstan's Crude*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Nov. 22, 2024), <https://www.icij.org/investigations/caspian-cabals/kazakhstan-caspian-oil-pipeline-russia-chevron/>; see Alistair Coleman, *Russian Space Launch Death Stirs Kazakh Resentment*, BBC (Jun. 15, 2017), <https://www.bbc.com/news/blogs-news-from-elsewhere-40285760>.

¹⁶⁴ CONSTITUTION OF THE KYRGYZ REPUBLIC, art. 32 ("Everyone shall be guaranteed freedom of conscience and belief.").

¹⁶⁵ CONSTITUTION OF THE KYRGYZ REPUBLIC, art. 31 ("No one may be forced to express his/her opinion or deny it.").

¹⁶⁶ CONSTITUTION OF THE REPUBLIC OF TAJIKISTAN, art. 26 ("Everyone has the right to independently determine his (her) relationship toward religion, to profess any religion individually or together with others, or to profess none, and to participate in the performance of religious cults, rituals, and ceremonies.").

¹⁶⁷ CONSTITUTION OF THE REPUBLIC OF TAJIKISTAN, art. 17 ("All are equal before the law and court. The State guarantees the rights and freedoms of everyone regardless of his nationality, race, gender, language, religious beliefs, political persuasion, education, [and] social and property status.").

national security or public safety.¹⁶⁸ This regulatory approach aims to balance religious freedom with the need to maintain social stability.

Turkmenistan's constitution similarly guarantees the freedom of religion and the separation of religion from the state.¹⁶⁹ It ensures that all religious groups are treated equally and that individuals can freely practice their religion.¹⁷⁰ The state monitors religious activities to prevent extremism and ensure that religious practices do not disrupt public order.¹⁷¹ This oversight is ostensibly intended to protect both religious freedom and public safety.¹⁷² Of this group of nations, Turkmenistan is unquestionably the most authoritarian; the framing of individual liberties in its constitution may reflect the performative role those sorts of protections played in the previous Soviet Constitution.¹⁷³

Uzbekistan's constitution also enshrines the principles of secularism and religious freedom.¹⁷⁴ It guarantees the equality of all religions and prohibits any form of religious discrimination.¹⁷⁵ The state regulates religious organizations to ensure they operate within the legal framework and do not engage in activities that

¹⁶⁸ See U.S. Dep't of State, *2023 Report on International Religious Freedom: Tajikistan* (2023), <https://www.state.gov/reports/2023-report-on-international-religious-freedom/tajikistan>.

¹⁶⁹ CONSTITUTION OF TURKMENISTAN, art. 18 ("The state shall guarantee freedom of religion and belief, and equality before the law.").

¹⁷⁰ *Id.*

¹⁷¹ See U.S. DEPT OF STATE, *2023 Report on International Religious Freedom: Turkmenistan* (2023), <https://www.state.gov/reports/2023-report-on-international-religious-freedom/turkmenistan/>.

¹⁷² See generally *id.*

¹⁷³ *Turkmenistan*, HUM. RTS. WATCH, <https://www.hrw.org/europe/central-asia/turkmenistan>.

¹⁷⁴ CONSTITUTION OF THE REPUBLIC OF UZBEKISTAN, art. 35 ("Freedom of conscience shall be guaranteed to all. Everyone shall have the right to profess or not to profess any religion. A compulsory imposition of religion shall be impermissible.").

¹⁷⁵ CONSTITUTION OF THE REPUBLIC OF UZBEKISTAN, art. 75 ("Religious organizations and associations shall be separated from the state and equal before law. The state shall not interfere in the activity of religious associations.").

threaten public security.¹⁷⁶ This regulatory approach is designed to promote national unity and prevent religious extremism. This emphasis on religious coercion is similar to the approach of French *laïcité* or Turkish *laiklik* as approaches to secularism. Perhaps more than any of the other listed former-Soviet republics, Uzbek leaders have been deeply concerned about the influence of external groups like the Muslim Brotherhood and the Taliban since independence in 1991.¹⁷⁷ So, although these nations embraced Islamic identity, at least in part to garner legitimacy, they have always been concerned about religious challenges to government authority and stability, particularly from external sources¹⁷⁸

The constitutional systems of these six countries have textual, historical, and sociological similarities. They all reflect a shared stated commitment to secularism, religious freedom, and the equal treatment of all religions. They emphasize the separation of religion from the state, the protection of individual religious rights, and the regulation of religious activities to maintain public order and security. This common approach aims to foster a peaceful and tolerant society where diverse religious beliefs can coexist harmoniously. How robust or meaningful these protections are in practice is a separate question.

¹⁷⁶ See U.S. Dep't of State, *2023 Report on International Religious Freedom: Uzbekistan* (2023), <https://www.state.gov/reports/2023-report-on-international-religious-freedom/uzbekistan/>.

¹⁷⁷ See Bruce Pannier, *Countering a "Great Jihad" in Central Asia*, FOREIGN POL'Y RESEARCH INST. (Nov. 19, 2024), <https://www.fpri.org/article/2024/11/countering-a-great-jihad-in-central-asia/> ("In the last half of the 1990s, the Central Asian states, except Turkmenistan, viewed the Taliban as the greatest threat to their security. The ultra-Orthodox Taliban's ability to gather support and sweep through Afghanistan was especially alarming to the Central Asian leaders. When the Soviet Union collapsed in late 1991, among the first acts of the governments in the newly independent Central Asian states was to lift restrictions on religious practice and remind the world that Islam was the religion of the region. This public reembrace of Islam reinforced their claim to independence from their former colonial master Russia.")

¹⁷⁸ *Id.*

3. *Post-World War II Constitutions in Sub-Saharan Africa: Burkina Faso, Chad, Eritrea, Mali, Niger, Nigeria, Senegal, Sierra Leone*¹⁷⁹

The constitutions of Burkina Faso, Chad, Eritrea, Mali, Niger, Nigeria, Senegal, and Sierra Leone exhibit several similarities in their approach to the role and treatment of religion, reflecting a shared commitment to secularism and the protection of religious freedom. All eight countries emerged from colonial rule, which provides some commonality as sub-Saharan African nations,¹⁸⁰ though the approaches of the English, French, and Italians did vary significantly. That said, the constitutional systems emerged in a post-World War II culture that looked to France, the United States, and similar democratic and largely secular legal systems.¹⁸¹

In Burkina Faso, the constitution declares the country a secular state, ensuring that individuals have the right to choose and practice their religion freely, provided they respect public order and morality.¹⁸² This framework aims to prevent state interference in religious matters while ideally promoting religious tolerance and human flourishing.

¹⁷⁹ Guinea would have fit within this category, but its constitution was dissolved after a coup in 2021. See Boubacar Diallo and Krista Larson, *Soldiers Detain Guinea's President, Dissolve Government*, AP NEWS (Sep. 5, 2021), <https://apnews.com/article/africa-guinea-army-government-dissolved-214f607402a533c581bbd7ef91d5bb0f>.

¹⁸⁰ Amy McKenna, *List of African Countries' Independence Dates*, BRITANNICA, <https://www.britannica.com/topic/list-of-African-Countries-Independence-Dates>.

¹⁸¹ See generally CHARLES M. FOMBAD, *THE EVOLUTION OF MODERN AFRICAN CONSTITUTIONS: A RETROSPECTIVE PERSPECTIVE* (in SEPARATION OF POWERS IN AFRICAN CONSTITUTIONALISM, ed. Charles M. Fombad) (2016).

¹⁸² CONSTITUTION OF BURKINA FASO, art. 7 (“The freedom of belief, of non-belief, of conscience, of religious opinion, [of] philosophy, of exercise of belief, the freedom of assembly, the free practice of custom as well as the freedom of procession and of demonstration, are guaranteed by this Constitution, under reserve of respect for the law, for public order, for good morals and for the human person.”).

Chad's constitution similarly guarantees freedom of religion and the separation of religion from the state.¹⁸³ It emphasizes the equality of all religions and prohibits any form of religious discrimination.¹⁸⁴ The state ensures that religious organizations can operate freely, provided they adhere to the law and do not engage in activities that threaten national unity or secularism.¹⁸⁵

In Eritrea, the constitution provides for the freedom of religion and belief, ensuring that individuals can practice their religion without fear of discrimination or persecution.¹⁸⁶ The state is secular, recognizing the independence of religious communities.¹⁸⁷ This legal framework is intended to further the principles of democracy, social justice, and the rule of law,¹⁸⁸ which are challenging goals given that the country is roughly split between Muslim and Christian communities.¹⁸⁹

Mali's constitution provides for the separation of religion and state and guarantees the free exercise of religion.¹⁹⁰ It emphasizes equal protection and prohibits any form of religious discrimination.¹⁹¹ The state regulates religious activities in order to support national

¹⁸³ CONSTITUTION OF THE REPUBLIC OF CHAD, art. 1 ("The separation of the religions and of the State is affirmed.").

¹⁸⁴ CONSTITUTION OF THE REPUBLIC OF CHAD, art. 14 ("The State assures to all equality before the law without distinction of origin, of race, of sex, of religion, of political opinion or of social position.").

¹⁸⁵ See CONSTITUTION OF THE REPUBLIC OF CHAD, art. 4-5 (allowing all parties to vote but prohibiting any attempt to harm the national unity or secularity of the state).

¹⁸⁶ CONSTITUTION OF ERITREA, art. 19(4) ("Every person shall have the freedom to practice any religion and to manifest such practice.").

¹⁸⁷ See, CONSTITUTION OF ERITREA, art. 1 ("Eritrea is a sovereign and independent State founded on the principles of democracy, social justice and the rule of law.").

¹⁸⁸ *Id.*

¹⁸⁹ U.S. DEP'T OF STATE, *2022 Report on International Religious Freedom: Eritrea* (2022).

¹⁹⁰ CONSTITUTION OF THE REPUBLIC OF MALI, art. 4 ("Every person has the right to freedom of thought, conscience, religion, worship [culte], opinion, expression and creation with respect to the law.").

¹⁹¹ CONSTITUTION OF THE REPUBLIC OF MALI, art. 2. ("Every Malian is born and remain free and equal in rights and duties. All discrimination founded on social origin, color, language, race, sex, religion and political opinion shall be prohibited.").

unity and prevent coercion.¹⁹² This regulatory approach aims to balance religious freedom with the need to maintain social stability. The 1992 Constitution goes so far as to guarantee a constitutional right to asylum on the basis of religious persecution.¹⁹³

Niger's constitution also guarantees the freedom of religion and the separation of religion from the state.¹⁹⁴ However, the state monitors religious activities to deter extremism and ensure that religious groups do not disrupt public order.¹⁹⁵ This oversight is intended to protect both religious freedom and public safety.¹⁹⁶

Nigeria's constitution enshrines the principles of secularism and religious freedom.¹⁹⁷ It guarantees the equality of all religions and prohibits any form of religious discrimination.¹⁹⁸ The state regulates religious organizations in an effort to preserve public order and individual autonomy.¹⁹⁹ Of the nations considered in this section, Nigeria is arguably the most complex. It has the largest population of any country in Africa, and it wrestles with tensions between the majority Muslim population and its sizable Christian minority.²⁰⁰ Many of the attempts to provide for legal fairness have focused on

¹⁹² See U.S. DEP'T OF STATE, *2023 Report on International Religious Freedom: Mali* (2023).

¹⁹³ CONSTITUTION OF THE REPUBLIC OF MALI, art 12 [b]. ("Every person persecuted by reason of his political or religious convictions, (or) by his ethnicity, may benefit from the right of asylum in the Republic of Mali.")

¹⁹⁴ CONSTITUTION OF NIGER, art. 8 ("[Niger] respects and protects all beliefs. No religion, no belief can arrogate the political power or interfere in the affairs of State.").

¹⁹⁵ See U.S. DEP'T OF STATE, *2023 Report on International Religious Freedom: Niger* (2023).

¹⁹⁶ *Id.*

¹⁹⁷ CONSTITUTION OF NIGERIA (1999), § 38(1) ("Every person shall be entitled to freedom of thought, conscience and religion[...]").

¹⁹⁸ *Id.*

¹⁹⁹ See U.S. DEP'T OF STATE, *2023 Report on International Religious Freedom: Nigeria* (2023).

²⁰⁰ *Id.*

structural fixes allowing for regional distinctions.²⁰¹ It may be that those regional approaches allow for an erosion of the constitutional framework, which could justify considering Nigeria to fit within ostensible neutrality as an edge case. However, the move toward regionalism is considered a viable solution to decreasing sectarian tensions.²⁰²

Senegal's constitution also guarantees freedom of religion, conscience, and belief, with the goal of ensuring that all individuals are free to practice their religion without fear of discrimination or persecution.²⁰³ The state is explicitly secular, and it recognizes the independence of religious communities.²⁰⁴ The explicit requirements for autonomy might be understood as a reaction to French colonial control of religion and Islamic institutions.²⁰⁵

Sierra Leone's constitution reflects a commitment to maintaining a secular state while respecting and protecting the rights of religious communities.²⁰⁶ It ensures the freedom of religious practice and prohibits

²⁰¹ See Bolutife Oluwadele, *Thoughts on the proposed regional government in Nigeria*, THE PREMIUM TIMES (Nov. 27, 2024), <https://www.premiumtimesng.com/matchesresults/757196-thoughts-on-the-proposed-regional-government-in-nigeria-by-bolutife-oluwadele.html?tztc=1>

²⁰² *Id.*

²⁰³ CONSTITUTION OF THE REPUBLIC OF SENEGAL, art. 1 (“The Republic of Senegal is secular, democratic, and social. It assures the equality before the law of all the citizens, without distinction of origin, of race, of sex [and] of religion. It respects all beliefs [croyances].”).

²⁰⁴ CONSTITUTION OF THE REPUBLIC OF SENEGAL, art. 24 (“The institutions and the religious communities have the right to develop themselves without hindrance [entrave]. They are disengaged from the protection [tutelle] of the State. They regulate and administer their affairs in an autonomous manner.”).

²⁰⁵ See Andrew F. Clark, *Imperialism, Independence, and Islam in Senegal and Mali*, 46 AFRICA TODAY 149, 153 (1999).

²⁰⁶ CONSTITUTION OF SIERRA LEONE, art. 24 (“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience and for the purpose of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom either alone or in community with others and both in public and in private to manifest and propagate his religion or belief in worship, teaching, practice and observance.”).

discrimination based on religion.²⁰⁷ The state promotes religious tolerance and cooperation among different religious groups in order to encourage national unity and minimize religious strife.

The constitutions of these eight countries reflect a shared commitment to secularism, religious freedom, and the equal treatment of all religions. They emphasize the separation of religion from the state, the protection of individual religious rights, and the regulation of religious activities to maintain public order and security. This common approach aims to foster a peaceful and tolerant society where diverse religious beliefs can coexist. This is a significant hurdle for countries with more-diverse populations like Nigeria and Eritrea, but the constitutional language in these countries tends to reflect secular norms found in Western Europe and North America, distinguishing them from systems in most predominantly Arab countries. However, constitutional text does not guarantee constitutionalism. Many of these countries struggle with political violence and instability. Although Senegal continues to wrestle with internal tensions and its colonial past, it ensured a democratic transition of power in 2024 and has the highest Rule of Law rating among this group.²⁰⁸

B. Those with Ostensible Neutrality

This category is relatively small for Muslim-majority countries. The clearest examples are Türkiye and Indonesia, both of which have shifted from prior, more explicit commitments to secularism. As a technical matter of constitutional text, both Syria and Sudan might fall within this category as well. However, given the ongoing instability in both countries, they are not particularly useful examples to explore.

²⁰⁷ *Id.*

²⁰⁸ *Senegal*, WORLD JUST. PROJECT (2024), <https://worldjusticeproject.org/rule-of-law-index/country/Senegal>.

1. *Türkiye*

Although the Turkish Constitution is avowedly “secular,”²⁰⁹ it does acknowledge Islam as the predominant religion and recognizes the role of religious institutions. It further provides for the direct governmental oversight of religion, “The Department of Religious Affairs, which is within the general administration, shall exercise its duties prescribed in its particular law, in accordance with the principles of secularism, removed from all political views and ideas, and aiming at national solidarity and integrity.”²¹⁰

There are three major nondiscrimination provisions in the Turkish Constitution: Article 10, which is an equal protection provision applying to language, race, color, sex, political opinion, philosophical belief, religion, or sect.²¹¹ Article 15 is a variation of free exercise, providing protection from compulsion or punishment on the basis of conscience or religion even in times of exigent

²⁰⁹ THE CONSTITUTION OF THE REPUBLIC OF TURKEY, art. 2 (“The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble.”).

²¹⁰ THE CONSTITUTION OF THE REPUBLIC OF TURKEY, art. 136 (“The Presidency of Religious Affairs, which is within the general administration, shall exercise its duties prescribed in its particular law, in accordance with the principles of secularism, removed from all political views and ideas, and aiming at national solidarity and integrity.”).

²¹¹ THE CONSTITUTION OF THE REPUBLIC OF TURKEY, art. 10 (stating that everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds) (Paragraph added on May 7, 2004; Act No. 5170); Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. (Sentence added on September 12, 2010; Act No. 5982) Measures taken for this purpose shall not be interpreted as contrary to the principle of equality.

circumstances,²¹² while Article 24 is the more traditional general provision for freedom of religion and conscience.²¹³

2. *Indonesia*

Although its constitution is often presumed to be “secular,” religion plays a significant role in Indonesian legal theory and practice. The preamble of Indonesia’s Constitution of 1945 expresses the five core values of the state’s ideology (Pancasila): “the belief in one God Almighty, humanity that is just and civilized, the unity of

²¹² CONSTITUTION OF THE REPUBLIC OF TURKEY Apr. 16, 2017, art. 15 (Turk.) (As amended on April 16, 2017; Act No. 6771) In times of war, mobilization, a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated. (As amended on May 7, 2004; Act No. 5170) “Even under the circumstances indicated in the first paragraph, the individual’s right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling.”

²¹³ CONSTITUTION OF THE REPUBLIC OF TURKEY Apr. 16, 2017, art. 24 (Turk.) (“Everyone has the freedom of conscience, religious belief and conviction. Acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14. No one shall be compelled to worship, or to participate in religious rites and ceremonies, or to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions. Religious and moral education and instruction shall be conducted under state supervision and control. Instruction in religious culture and morals shall be one of the compulsory lessons in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual’s own desire, and in the case of minors, to the request of their legal representatives. No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economical, political, and legal order of the State on religious tenets.”)

Indonesia, democracy guided by the wisdom of representative deliberation, and social justice for all Indonesians.”²¹⁴ Even so, the text does provide in Article 29.1 that “The State shall be based upon the belief in the One and Only God.”²¹⁵

There is no constitutional attempt to enforce Shari’a principles and, in fact, “an effort to include a provision imposing on the state an ‘obligation to carry out the Shari’a for the adherents of Islam’ in the Indonesian constitution was rejected . . . on the ground that it would threaten national unity in a multi-religious polity.”²¹⁶ The government has maintained its positivist legal system by “limit[ing] formal recognition of Islamic law to specified areas of family law and finance, codifying the relevant principles and enforcing them through Islamic courts,”²¹⁷ essentially absorbing those elements. The 1989 Religious Courts Act strengthened the role and influence of Islamic courts.²¹⁸ Prior to the act, decisions of Islamic courts had to be ratified by civil courts in order to be enforced: “The 1989 Act redressed the subordinate status of the Islamic courts by making their decisions enforceable in their own right.”²¹⁹ The state, “by taking control over the recruitment, training and employment of those bureaucrats and judges responsible for enforcing Islamic law, has been able to ensure that these actors give predominance to state law in their policy and decision-making, rather than giving effect to their own understandings of Islamic doctrine.”²²⁰

Both Türkiye and Indonesia identify as legally secular, but Indonesia acknowledges a formal role for

²¹⁴ Mark Cammack, *Islam, Nationalism, and the State in Suharto’s Indonesia*, 17 Wis. Int’l L. J. 23, 48 n.115 (1999).

²¹⁵ THE 1945 CONSTITUTION OF INDONESIA Aug. 18, 1945, art. 29.1 (Indon.).

²¹⁶ Cammack, *supra* note 214, at 48 n. 117.

²¹⁷ Simon Butt, *Islam, the State and the Constitutional Court in Indonesia*, 19 PACIFIC RIM LAW & POL’Y J. 279, 279-300 (2010).

²¹⁸ Religious Judicature Act No. 7 of 1989 (Indon.).

²¹⁹ Cammack, *supra* note 214, at 51.

²²⁰ Butt, *supra* note 217, at 285.

Islamic jurisprudence that is not accorded such a role in Türkiye.

Chapter XI. Religion

Article 29

1. The State shall be based upon the belief in the One and Only God.
2. The State guarantees all persons the freedom of worship, each according to his/her own religion or belief.²²¹

This article emphasizes the nation's foundation in monotheism, reflecting Indonesia's commitment to religious principles, especially those found in Islam and Christianity. Interestingly, to the extent that it is not an explicitly Islamic formulation, it implies that “the One and Only God” is the same across various traditions, making it a unique constitutional formulation. The article guarantees the religious freedom to worship according to a person's beliefs.

Article 29 underscores the state's role in ensuring religious freedom and protecting the rights of individuals to worship without interference. On its face, this could be construed as narrower than the free exercise provision of the U.S. Constitution, but it has not been interpreted in that way. By embedding these principles in its constitution, Indonesia aims to foster a society that respects diverse religious practices and upholds the spiritual values of its people.

C. Religious Incorporation and Theocratic Constitutionalism

As noted earlier, there is an extensive literature on religious incorporation in constitutions of a number of predominantly Muslim countries, with the most common examples focusing on Pakistan and Egypt. Seven countries have so-called “repugnancy clauses” such as the one found in Article 227 of the Constitution of the Islamic

²²¹ CONSTITUTION OF INDONESIA, ch. XI art. 29 (Indon.).

Republic of Pakistan;²²² however, such clauses serve a variety of roles, and are given meaning according to local legal and historical contexts.²²³ Algeria has a less-restrictive provision indicating that government institutions “shall not indulge in [...] practices contrary to Islamic morals and the values of the November Revolution.”²²⁴ Egypt preemptively appropriated the constitutional strategy of establishing that principles of shari’a are “a source of legislation,” by incorporating the language into Article 2 of the 1971 Constitution.²²⁵ The Egyptian government further amended Article 2, changing the phrase to “the principles of the Islamic shari’a are the chief source of legislation.”²²⁶ This approach was adopted by many predominantly Muslim nations.²²⁷ This standard of permissive or mandatory enforcement of the shari’a tradition makes these examples of religious incorporation in Islamic contexts. As noted earlier, Saudi Arabia and Iran might be considered examples of theocratic constitutionalism were they presumed to have meaningful constitutionalism. Taliban Afghanistan and the former Islamic State of Iraq and al-Sham might also be considered to have adopted forms of theocracy, but they do not plausibly hold to constitutionalism.

²²² All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.—Constitution of the Islamic Republic of Pakistan.

²²³ See e.g. Haider Ala Hamoudi, *Ornamental Repugnancy: Identitarian Islam and Iraqi Constitution*, 7 U. OF ST. THOMAS L.J. 693 (2010).

²²⁴ ALGERIAN CONSTITUTION, art. 10.

²²⁵ See Saïd Amir Arjomand, *Islamic Constitutionalism*, 3 ANN. REV. L. & SOC. SCI. 115, 123 (2007).

²²⁶ See NATHAN BROWN, *THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF* 82-84 (Cambridge Univ. Press 1997).

²²⁷ See generally Clark B. Lombardi, *Constitutional Provisions Making Sharia “a” or “the” Chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?* 28 AM. U. INT’L L. REV. 733 (2013).

V. CONCLUSION

The taxonomy outlined in this article provides a means of easily classifying the degree to which religion has been integrated into a given legal system. It is important to note that no legal system is entirely devoid of religious influence—a fact that the taxonomy takes into account. The first group, aspirational secularism, encompasses systems that, as its name suggests, seek to create a government where no religion is favored by or integrated into the legal system. Similarly, ostensible neutrality claims protection for minority religions but in reality implements an effective state religion. Religious incorporation both explicitly states an official religion and incorporates the religion and its values into the law. Finally, theocratic constitutionalism is the explicit and pervasive focus of religion in a legal system; however, such a system is largely theoretical because it is unlikely such a system could qualify as robust constitutionalism.

The proposed taxonomy is admittedly fuzzy at the boundaries; however, the shift toward authoritarianism and majority religious overlap with government in Hungary, India, Poland, Türkiye, and even the United States seems to justify some distinction to note the increased influence of religion within those legal systems and observable shifts over the past twenty to thirty years. This article does not argue that these shifts necessarily change commitments to rule of law principles and practices, which is why the appendix notes the Rule of Law Index rating for every country listed. That said, empirical study of the relationship between rising populism, authoritarianism, and religious entanglement with law will be essential for understanding how legislators and lawyers might address challenges to the rule of law as they arise.

The proposed taxonomy has significant implications for future research. It could serve as a starting point for studies regarding the depth of constitutionalism, particularly with regard to protections

for individual rights.²²⁸ It may also provide context for studies of religious entanglement in law. Perhaps the most interesting and relevant finding is that movements toward authoritarianism (in India, Italy, Hungary, Poland, Russia, Turkey, and the United States, for example) have tended to result in greater religious influence and incorporation. If countries like Austria, Belgium, France, or Germany make similar shifts toward authoritarianism, it could be helpful to track and compare with the examples highlighted in this study.

²²⁸ See *e.g.*, Krotoszynski, *supra* note 25.

APPENDIX
CATEGORIES OF OF RELIGIOUS
CONSTITUTIONALISM

Country **Dominant Religion**²²⁹ **RoL**²³⁰

ASPIRATIONAL SECULARISM

Albania	Islam	.48
Australia	Christianity	.80
Austria	Christianity	.79
Azerbaijan	Islam	NA
Belgium	Christianity	.78
Belize	Christianity	.50
Benin	Christianity	.48
Bolivia	Christianity	.37
Bosnia-Herzegovina	Islam	.52
Botswana	Christianity	.59
Brazil	Christianity	.50
Burkina Faso	Islam	.46
Burundi	Christianity	NA
Cameroon	Christianity	.36
Canada	Christianity	.80
Central African Republic	Christianity	NA
Chad	Islam	NA
Chile	Christianity	.66
China	Buddhism/Confucianism	.47
Colombia	Christianity	.48
Croatia	Christianity	.61
Cuba	Christianity	NA

²²⁹ Note that in many cases only specific sects or denominations qualify as the dominant religion (e.g., Sunni Islam, Mahayanna Buddhism, or Russian Orthodoxy). Identification is in most cases the largest religious tradition by population. Two traditions are listed where the population is nearly split or where multiple traditions contribute to national identity. This is somewhat problematic in explicitly communist countries officially committed to atheism (such as China, North Korea and Vietnam). Even in those cases, religious traditions associated with nationality have been used or incorporated into the narrative of the country.

²³⁰ Rule of Law Index 2024, World Justice Project

Cyprus	Christianity	.67
Czech Republic	Christianity	.74
Congo, Dem. Rep.	Christianity	.34
Dominica	Christianity	.58
Ecuador	Christianity	.46
El Salvador	Christianity	.43
Eritrea	Islam & Christianity	NA
Estonia	Unaffiliated & Christianity	.82
France	Christianity	.72
Gabon	Christianity	.40
Gambia	Islam	.49
Germany	Christianity	.83
Ghana	Christianity	.55
Guyana	Christianity	.50
Ireland	Christianity	.82
Ivory Coast	Christianity & Islam	.45
Jamaica	Christianity	.57
Japan	Buddhism & Shintoism	.79
Kazakhstan	Islam	.54
Kenya	Christianity	.45
Kyrgyzstan	Islam	.45
Kosovo	Islam	.56
Latvia	Christianity	.73
Lesotho	Christianity	NA
Luxembourg	Christianity	.83
Madagascar	Christianity	.43
Malawi	Christianity	.52
Mali	Islam	.39
Mauritius	Hinduism	.60
Mexico	Christianity	.41
Montenegro	Christianity	.57
Mozambique	Christianity	.39
Namibia	Christianity	.61
Nepal	Hinduism	.52
Netherlands	Christianity	.83
New Zealand	Christianity	.83
Niger	Islam	.43
Nigeria	Islam & Christianity	.40
North Korea	Atheism	NA
Philippines	Christianity	.46
Portugal	Christianity	.68

Congo, Rep.	Christianity	.40
Rwanda	Christianity	.63
Senegal	Islam	.55
Sierra Leone	Islam	.43
Singapore	Buddhism	.78
Slovakia	Christianity	.66
Slovenia	Christianity	.69
South Africa	Christianity	.56
South Korea	Unaffiliated & Christianity	.74
South Sudan	Christianity	NA
Suriname	Christianity	.49
Sweden	Christianity	.86
Switzerland	Christianity	NA
Tajikistan	Islam	NA
Tanzania	Christianity	.47
Thailand	Buddhism	.50
Trinidad and Tobago	Christianity	.51
Turkmenistan	Islam	NA
Ukraine	Christianity	.49
Uruguay	Christianity	.72
Uzbekistan	Islam	.49
Venezuela	Christianity	.26
Vietnam	Vietnamese Folk Religion	.50
Zimbabwe	Christianity	.40

OSTENSIBLE NEUTRALITY

Angola	Christianity	.43
Argentina	Christianity	.55
Belarus	Christianity	.45
Bulgaria	Christianity	.56
Myanmar	Buddhism	.34
Cape Verde	Christianity	NA
Costa Rica	Christianity	.68
Denmark	Christianity	.90
Equatorial Guinea	Christianity	NA
Ethiopia	Christianity	.37
Finland	Christianity	.87
Georgia	Christianity	.60
Greece	Christianity	.60
Guatemala	Christianity	.44

Haiti	Christianity	.33
Honduras	Christianity	.42
Iceland	Christianity	NA
India	Hinduism	.50
Indonesia	Islam	.53
Laos	Buddhism	NA
Liberia	Christianity	.44
Lebanon	Christianity	.44
Lithuania	Christianity	.77
Moldova	Christianity	.54
Mongolia	Buddhism	.53
Nicaragua	Christianity	.34
Norway	Christianity	.89
Panama	Christianity	.52
Papua New Guinea	Christianity	NA
Paraguay	Christianity	.46
Peru	Christianity	.48
Rep. of Macedonia	Christianity	.53
Romania	Christianity	.62
Russia	Christianity	.43
Samoa	Christianity	NA
Serbia	Christianity	.47
Spain	Christianity	.71
Sri Lanka	Buddhism	.51
Sudan	Islam	.35
Swaziland	Christianity	NA
Syria	Islam	NA
Togo	Christianity	.45
Tonga	Christianity	NA
Türkiye	Islam	.42
Uganda	Christianity	.39
United Kingdom	Christianity	.78
United States	Christianity	.78

RELIGIOUS INCORPORATION

Algeria	Islam	.49
Armenia	Christianity	NA
Bahrain	Islam	NA
Bangladesh	Islam	.39
Bhutan	Buddhism	NA

Brunei	Islam	NA
Cambodia	Buddhism	.31
Djibouti	Islam	NA
Dominican Republic	Christianity	.49
Egypt	Islam	.35
Hungary	Christianity	.51
Iraq	Islam	NA
Israel	Judaism	NA
Italy	Christianity	.66
Jordan	Islam	.55
Kuwait	Islam	.58
Libya	Islam	NA
Liechtenstein	Christianity	NA
Malaysia	Islam	.57
Maldives	Islam	NA
Malta	Christianity	.67
Monaco	Christianity	NA
Morocco	Islam	.48
Oman	Islam	NA
Pakistan	Islam	.38
Palestine	Islam	NA
Poland	Christianity	.66
Qatar	Islam	NA
Somalia	Islam	NA
Tunisia	Islam	.50
United Arab Emirates	Islam	.64
Western Sahara	Islam	NA
Yemen	Islam	NA
Zambia	Christianity	.45

THEOCRATIC CONSTITUTIONALISM²³¹

Iran	Islam	.39
Mauritania	Islam	.36
Saudi Arabia	Islam	NA
Vatican City	Catholicism	NA

²³¹ Afghanistan can reasonably be considered a theocratic state, but at the time of this research it did not have a formal constitution. Note that the former Taliban government did. *See*, AFGHANISTAN CONSTITUTION 2004, https://www.constituteproject.org/constitution/Afghanistan_2004.