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Constitutionalism and the Republic

Understanding Iranian Constitutional Development from 1906 to 1989

A dissertation submitted in partial satisfaction of the
requirements for the degree of Doctor of Philosophy
in Political Science

by

Benjamin Radd

2015

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ABSTRACT OF THE DISSERTATION

Constitutionalism and the Republic

Understanding Iranian Constitutional Development from 1906 to 1989

by

Benjamin Radd

Doctor of Philosophy in Political Science

University of California, Los Angeles, 2015

Professor Leonard Binder, Co-Chair

Professor Steven Spiegel, Co-Chair

Iranian constitutionalism has been in existence since the early twentieth century, and has taken many forms. Despite these decades of experience, Iranian constitutional development has yet to reach maturity, as reflected by the domestic turmoil of its various form of governance. Nevertheless, the Iranian constitutional experiment serves as a valuable case study of constitutional development, especially with respect to Islamic societies. This dissertation derives three principles from Iran's constitutional history and development that provide a foundation for understanding greater constitutional development in the region: (1) constitutionalism is a process-driven, rather than event-driven, phenomenon; (2) constitutional development performs best in conjunction with a republican form of government; and (3) judicial agency, in the form of an empowered judicial branch, is critical to any lasting constitutional process.

The dissertation of Benjamin Radd is approved.

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2015

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Introduction

There are limits to power, as those who put their hopes in a constitution ultimately discover. ... Constitutions become the ultimate tyranny. They're organized power on such a scale as to be overwhelming. The constitution is social power mobilized and it has no conscience. It can crush the highest and lowest, removing all dignity and individuality. It has an unstable balance point and no limitations. I, however, have limitations. In my desire to provide an ultimate protection for my people, I forbid a constitution. — Paul Atreides in *Dune Messiah*.¹

Early on in Frank Herbert's *Dune* science fictions series, the newly-anointed and all-powerful Padishah Emperor Paul Atreides is faced with a challenge by an organization comprised of dissidents who refuse to submit to his rule unless several conditions are met. The specific nature of their demands aside, what this rebellious "Ixian Confederacy" really sought were limits on Paul's imperial authority — in the form of a constitution. Paul's response, which may be taken as a critique of constitutionalism, is provided above.

In this paper, I address the greater quandaries of modern constitutionalism as it has operated in the last two centuries. What can we expect constitutions to do? What should they look like? And how do we measure their progress and failure? These are broad questions, indeed, and I do not suggest that I am capable of addressing them in their entirety, on these pages or elsewhere. What I do propose

¹ Frank Herbert, *Dune Messiah*.

is a different approach — a re-imaging of how to consider constitutional development and measure its progress.

We live in a time where constitutions have become a standard, if not fashionable, accessory to all different types of regimes: democratic, republican, monarchical, oligarchic, and so on. In fact, all but a few states today have an official constitution, and the remaining holdouts are on their way there. However, that most of the world's governments have something called a "constitution" is, for the most part, the only trait they have in common. In some states, the constitution serves as a shield to protect the governed from their leaders. There are also constitutions-as-flags: systems where the constitution is a symbol of national or religious identity, and not much more. In others, the constitution operates as a fence to limit the ruler's authority, similar to what the Ixian Confederacy desired. And then we have constitutions-as-scepters, which exist in regimes where constitutionalism is used to establish or abet dominion and lordship over a given population. In one cultural and geographical region of the world, the Islamic Middle East, are found examples of each; and in one state in particular — Iran — is a laboratory of constitutional experimentation and development. That is where I begin my inquiry.

Iran functions under the designation of a *constitutional Islamic republic*. What do each of these descriptors mean? And are they accurate? Setting aside the issue of Iran's "Islamic-ness" (about which volumes can be written), to what degree, if any, is it either constitutional or republican in nature?

These questions matter for several reasons. First, in a broader sense, Iran's one hundred-plus years of constitutional experimentation provides a unique opportunity to study and understand how constitutionalism evolves in Islamic countries and whether it is efficacious. Second, we can use Iran's experience to make greater sense of what it means to be a "republic," constitutional or otherwise. The majority of the countries in the world call themselves republic without operating as one in the technical sense. And thirdly, with respect to Iran's condition in particular, examining these questions will shed light on why, after two major constitutional revolutions and decades of time to foster them, Iran's government remains in a state of constitutional dysfunction.

Through an analysis of Iranian constitutional development — including the pre-Islamic, Islamic, and Western legal-political theories that underlie it — I offer the following:

- Constitutionalism, as a Western (European-American) construct, has different meanings and applications in other parts of the world.
- Even within the same religious tradition, constitutional government can have starkly contrasting traits.
- The term "constitutional democracy" is often employed when what actually should be used is "constitutional republic."
- It is a mistake to view "constitutional theocracy" — or any other combination of constitutionalism and religion — as a fusion of two distinct political tracts; it is not a merger of equal theories. Rather, a state operates

as either a constitutional regime with theocratic attributes, or the inverse.

This is not always apparent, and typically takes form as a process-driven (rather than event-driven) phenomenon.

- For constitutional republicanism to succeed, the role of the judiciary is critical. Specifically, there must be a degree of judicial empowerment vis-a-vis the other branches of government. Absent a strong juristic authority with the power of judicial review, constitutional republicanism is unlikely to take shape or endure.

Iran's constitutional legacy is part failure and success. The failure comes from the inability of the various movements and revolutions to produce a lasting legal framework for governance; the success is that they managed to produce anything at all, given their broad political, social, and religious differences. There can be no doubt, however, that a constitutional process is underway in Iran, and that it began early last century. And that this process even exists is an accomplishment all of its own. It is a narrative that we can study and follow *in vivo*, and mine for all sorts of potential theories about and solutions to the implementation of an enduring constitutional order in Islamic — and perhaps also non-Islamic — societies. That is the objective of this paper: to demonstrate how the Iranian experience may be used to reframe the debate about constitutional government and its development.

There are several reasons why Iran makes for an ideal case study in constitutional (and republican) development, especially with respect to the Islamic Middle East:

- It's 1906-1911 constitutional revolution was the first in the region during the modern period.
- As one of the oldest civilizations and one with a long history or nationhood/statehood, we can better take account of the political evolution that led to constitutional republicanism. Quite simply, it has been around longer, so we can understand why it got to where it is today.
- It has a strong national identity that is separate from its religious (Islamic) identity. This distinction plays an important role in republican systems.
- Iran was never "colonized" in the same way that the neighboring Arab states were. Most of its political development, therefore, is organic and not the result of colonial legacies or vestiges. It is not, in other words, a state created by the Europeans.
- In the last one hundred years, Iran has experienced pure monarchy, constitutional revolution, constitutional monarchy, another revolution, and now a constitutional (Islamic) republic. Thus, it has run the gamut of systems seen in the region. With this experience, (which, regionally-

speaking, is unique to Iran) we can look to see why each system failed, or needed to be revamped.

- Both of its constitutions were modeled, in part, on Western documents. This makes it easier to compare.
- It has struggled with the role of religion and clergy in politics. To that end, it has tried different approaches, each meeting limited success.
- Part of the challenge in determining whether a constitution has “failed” or not requires that certain standards for constitutionalism exist against which we can measure failure or success. This is where the discussion about Islamic constitutionalism becomes most interesting — in part because there are competing explanations not just for what the standards of Islamic constitutionalism are, but also a fierce debate as to what the word “constitutional” even means. Iran’s early 20th-century experience with constitutionalism captures this debate better than any other in the region.
- Iran’s 1979 revolution, although unsuccessful as an export elsewhere in the region, has without a doubt succeeded in raising the discourse of constitutionalism and political Islam, even in secular constitutional republics like Turkey. The impact of 1979 has been felt everywhere, even if its ideology has been accepted nowhere.

This paper explores the development of Iranian constitutionalism according to three distinct time periods:

- **Constitutionalism during the Qajar dynasty (1890-1925).** This period begins with the Tobacco Protest and ends with the rise of Reza Pahlavi as the new shah. It includes the seminal events of the 1906-1911 Constitutional Revolution, which forms the backbone of the debate over Iranian constitutionalism for the balance of the paper. Key analyses in this section include: application of constitutionalism in the Shi'a context, and the contrast with Sunni systems; Ayatollah Shirazi and the ascendancy of the clerical class as a potent political force (during the Tobacco Protest); constitutional theories of Ayatollah Khorasani; the Nuri-Na'ini debates on the meaning of constitutionalism in Islamic systems; and the intervention of great powers and the disintegration of the constitutional movement, paving the way to the ascendancy of Reza Shah Pahlavi.
- **Constitutionalism during the Pahlavi dynasty (1925-1979).** Although there is very little formal constitutional development during this period (the content of Iran's constitution remains relatively static), what stands out nonetheless is the important transition from judicial quietism to judicial activism: with the passing of Grand Ayatollah Borujerdi, a new era of the Shi'ite jurist is born, led by Borujerdi's pupil, Ruhollah Khomeini. This transition and its consequences first appear in the form of protests against

Mohammad Reza Shah's White Revolution reforms in 1963, and continue through the next two decades until the 1979 revolution. It is also during this period that the most important modern contribution to Iranian constitutionalism is made: Khomeini's 1971-1972 lectures on Islamic government are recorded and disseminated, under the name "Islamic Government". This is the beginning of what I call neo-Shi'ism, and marks the introduction of Khomeini's innovative (and very controversial) theory of *velayat-e faqih*, or "the guardianship of the jurist."

- **Constitutionalism during the First Republic Period (1979-1989).** This marks the beginnings of Islamic constitutionalism in Iran. It begins with the constitutional debates during the summer of 1979 and goes through Khomeini's death ten years later. Key analyses in this section include: the Beheshti-Bazargan debates on constitutionalism and republicanism in Iran, which reflects the broader religious-secular battles; the various drafts of the constitution, which one succeeded, and why (including analysis of the constitutional assembly); the constitutional crises of the early 1980s and how Khomeini addressed them; and the stagnation and paralysis of constitutional development as Khomeini's death nears. It is also during this period that we first see the institutionalization of the jurists in the government.

Within these pages, I offer three overarching and guiding propositions.

Firstly, I propose that constitutionalism is not a phenomenon or seminal event confined to the frenetic time period immediately before and after a framing legal document is adopted; rather, it is a process that plays out over time. The framing document we refer to as a “constitution” is but the seed; what we should care most about is the ripening process, and whether it is even permitted to occur. The fruit this process bares is ultimately what matters. In this context, we find both non-constitutional and unconstitutional constitutions. What do these terms mean? Iran’s 1979 constitution — including its 1989 amendments — is, in my opinion, a *non-constitution* (and, as a result, leaves a system of governance that is non-republican). I distinguish *non-constitutional* from the more commonly used descriptor *unconstitutional* as follows: the latter violates the very legal boundaries it prescribes, whereas the former operates outside those boundaries completely. A constitution is unconstitutional if it breaks its own laws; it is non-constitutional if it plays by a completely different set of rules altogether.² Iran’s 1906 and 1979 constitutions fall into this latter category. These descriptions matter if we are to understand the process of constitutionalism and when and why it fails. Despite the non-constitutional nature of Iran's two major constitutions, they are both a part of a greater narrative of *constitution-making*. And during this constitutional-making process (with “process” being the key word), the success or failure of the entire exercise is measured by different standards. Where the process moves forward, and

² Nathan Brown, whose seminal theories on constitutionalism in the Middle East is discussed later in this paper, offers a different take on *constitution* and *non-constitution* than what I am proposing here.

where the law and the political institutions of the state are evolving, the constitutional movement can be considered at best successful, or at worst inconclusive — but not a failure. I conclude that one hundred years of Iranian constitutionalism has demonstrated that, perhaps, we should re-examine what we want to see from constitutional regimes: the ultimate objective should not be a perfect or divine charter, but to consider what follows and develops from that charter over time. As a rabbinic commentary on the Book of Exodus states, “the process is, itself, the goal.” And so it is with Iran and its constitutional development.

As I discuss in Part One of this paper, the awareness of a constitutional process is part of the equation. Concurrently, we must also consider what republicanism principles, if any, are included in the constitution itself. In almost every instance, and certainly with respect to Iran’s constitutional history, constitutions are enacted as a means of exercising a “check” on executive power; they are not necessarily about ceding authority to a segment of the population. This is where the term “democracy” is often conflated with, and used instead of, “republicanism.” Democracy in a constitutional order cannot exist without republicanism, so it is the latter that we should consider first and foremost. Too often during the euphoria and excitement of constitutional movements and revolutions, the essence of what it means to be a “republic” is overlooked or obfuscated (sometimes by design); the result is a deformed or aborted constitutional process.

The third proposition of constitutionalism, which is discussed in Part Two, is that of judicial empowerment. Simply put, the courts are the shepherds of constitutional development; they act to ensure that the process moves forward according to an established framework. And although they are typically the least democratic by design of all the branches of government, they are the most republican by definition: when afforded the power of judicial review, they are the only institution with the authority to shield the rule of law from tyranny and despotism. That is why judicial review power is so critical to the constitutional process. It can serve as the ultimate check on the executive branch, and in systems with weak democratic institutions, the judiciary will be the last man standing against the crown.

Taken cumulatively, these three propositions (constitutionalism-as-process, republicanism, and judicial empowerment) function as the engine of constitutional development; an absence or deficiency in any one of them will doom the entire project. Where this paper departs from the existing literature on constitutionalism is that, for each specific context, I consider and weigh all of the following *equally*: the origins of constitutional thought, the elements that define the constitution, and the development of the constitution through time (*i.e.* the process). The scholarship that is available pertaining to comparative constitutionalism is quite extensive, but the subset that focuses on constitutional development in religious societies is not. Ran Hirschl, Nathan Brown, Intisar Rabb, Chibli Mallat, Said Amir Arjomand, and Shaul Bakhash — all very accomplished academics — have

written at length about constitutionalism in the Islamic world (the latter three, in particular, have explored the unique traits of Iranian constitutionalism). Using their works as a foundation, I have expanded the analysis further and in different directions to consider those factors they have not — and to explore why and how constitutional movements are birthed, and why and how they fail. Iranian constitutional history provides an excellent tableau upon which this endeavor can begin.

PART ONE · Legal Dimensions of Iranian Constitutionalism

Since the adoption of the United States Constitution in 1787, and particularly in the last fifty years, constitutional movements have occurred globally at a remarkable and unprecedented pace. Today, only three of all the United Nations member-states govern without a document referred to as a “constitution.”³ By *constitutional movements*, I refer to the political and legal machinations, in various forms and comprised of varying segments of society, undertaken with the express objective of transforming the system of government into a constitutional one. For purposes of this discussion, a constitutional government is one where the central authority — be it a monarch, dictator, religious figure, assembly, or elected official — possesses powers of governance restrained by a body of fundamental law. The

³ The three countries with this distinction are the United Kingdom, Israel, and Nepal. The UK, it should be noted, is moving towards a constitutional model, and the Israeli Knesset has held several important sessions in favor of adopting a state constitution.

authority's power to rule, or govern, is therefore *conditional* to its obedience to the law.⁴

But which law? In systems of government with an official religious component, the push towards constitutionalism will inevitably pose a greater challenge due to the dual and opposing theories of secular and sacred law that modern constitutional movements tend to embody. The Iranian experiment at constitutionalism, which began in 1906 and was revisited in 1979, represents an ideal model through which we can view these challenges and the consequences they produce. The movement that began in 1977 and culminated in the Islamic Revolution — and constitution — of 1979 consisted of two distinct groups, each with its own theories on governance and Shia jurisprudence, and how politics and law should be combined to form a viable, Islamic state. One favored a constitutional democratic republic with specific theocratic qualities, the other, a pure theocratic autocracy. Both positions were ultimately reflected in the final version of the Constitution of the Islamic Republic adopted in December of 1979, yet their coexistence has been rather inauspicious, if not disastrous, both politically and as a matter of legal doctrine. The Iranian constitution's dual-personality characteristic reflects philosophies that were then, as they are today, incompatible with one another for purposes of a unified framework of governance. The result has

⁴This notion of “conditionality” and how it applies to constitutionalism is central to the discussion of constitutions in religious systems and, subsequently, this paper. In later sections I will expand on the notion of conditionality and its application to Islamic, and specifically Shia, legal tradition.

been three decades of an Islamic Constitutional Republic that, for the most part, has failed at being sufficiently constitutional or republican.

In this section, I examine the two different traditions and legal philosophies whose ideas were hastily grafted together in the 1979 constitution, why they were incompatible, and how both the ideas and incompatibilities have roots in the earlier 1906-1909 constitutional movement. I then demonstrate how this “unholy union” has manifested into a system of governance that is neither constitutional nor republican. In the following section, I examine the state of constitutionalism in Iran since the adoption of the 1979 constitution and assess whether the Islamic Republic has moved closer or further from being a constitutional republic. All of this will be discussed within the framework and context of *velayat-e faqih*, Ayatollah Khomeini’s controversial theory of the guardianship of the jurist and Islamic government. The objective is to better understand the role of constitutions in Shia systems of governance, whether republicanism can comfortably exist in a theocratic system like Iran’s, and how, in the presence of both constitutionalism and republicanism, one individual can transcend the boundaries of the jurist’s mandate and become a supra-constitutional authority contrary to any legal or theological precedent in Shi’ism.

I begin Part One (of Four) of this paper with a brief overview of modern constitutional theory and attempt to explain the Western consensus on what *constitutionalism* means, what makes a *constitution*, and the characteristics of a

republic. Next, I examine the two different approaches to constitutionalism that make up Iran's 1906-1909 and 1977-1979 movements, including the theories underlying each and their proponents. To conclude, I discuss where the two respective theories differ, how those differences were incorporated into the final version of the 1979 constitution, and conclude with how the 1979 document does not satisfy the elements of constitutional republicanism.

Chapter One: Constitutionalism and the Essence of a Republic

You have rights antecedent to all earthly governments; rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe.

— John Adams⁵

1. The American Experience

Any discussion of modern constitutionalism must acknowledge American constitutional development. Beginning with the Articles of Confederation (ratified in 1781) and followed soon thereafter by the extensively-revised and much-improved Constitution of 1787, the American framework for governance has come to embody constitutionalism in the modern world, and as the oldest continuing constitution in use today, it has served as a model of inspiration and for imitation. The reason for this is because the U.S. constitution has, through the success of its longevity, established three elements that almost all other successful constitutions since — and definitely those of the Western world — have incorporated: entrenchment, separation of powers, and safeguarding. So as to avoid turning this paper into an extended discourse on constitutional theory, I shall define these three elements briefly. But before I do, I must issue this disclaimer: in using the U.S. constitution as a reference and basis for comparison, I am not suggesting that it is the perfect embodiment of constitutionalism, nor do I imply that it serves or

⁵ John Adams, *The Works of John Adams*, 447-452. Regarding the virtues of a republican form of government.

should serve as a blueprint for Iran's constitution. Rather, it is my belief that the U.S. model is important in any discussion of constitutionalism — and is applicable to this discussion of Iranian constitutionalism in particular — because, as a purely framing document, it is considered successful in the broader application of governance. I attribute this success, in part, to three basic elements: (1) entrenchment, (2) separation of powers, and (3) safeguarding.

(1) Entrenchment. When we ask the question, “how easy is it to amend the constitution?”, we are raising the issue of entrenchment. Constitutions are either strongly or weakly entrenched. An ideal constitution would be a strongly entrenched one, where changes do not come about upon the capricious dictates and whims of the majority at the expense of the minority, or where government is not encouraged towards abuses of power, restriction of individual liberties, or other undesirable effects of authority. Conversely, we do not want a constitution that is too strongly entrenched, which would thereby retard the growth and progression that comes about through the evolution of civil society. An adequately entrenched constitution, we should agree, is one where amendments to the law cannot become part of the day-to-day process of the legislature or other branch of government, but remain a detached, deliberative, and somewhat onerous process. The U.S. constitution is an example of a strongly entrenched framework of fundamental law and governance — its framers sought a document that was amendable out of need rather than habit. That is why the amendment process is separated into two steps, proposal and ratification, with each serving different constituencies.

(2) Separation of powers. This element should be well known to most scholars, and generally describes a disbursement of central power through two or more bodies of government. In the United States, power is spread both vertically (between the federal government and the states) and horizontally (the familiar Montesquieuan division between the executive, legislative, and judicial branches).

(3) Safeguarding. This, I propose, is the most important element of constitutionalism, especially in religious-based systems, such as Iran's. If entrenchment asks the question, "how easy is it to amend the constitution?", safeguarding asks, "who speaks for the constitution?". By safeguarding, I refer to two aspects of "defending" the fundamental law. The first involves protecting the constitution from *without*, that is to say, shielding it from attacks originating outside the judicial organs of government. In the United States, these non-judicial actors include Congress, the states, and the executive branch.⁶ The second component of safeguarding entails protecting the constitution from *within*: decisions made by the jurists that (instantly or over time through the power of precedent) fundamentally alter the substance and spirit of the law.⁷ These "attacks" on the constitution are particularly dangerous because they emanate from the very same organ of government charged with protecting it, by an institution with no public accountability.

⁶ The "attacks" would take the form of congressional legislation, state legislation, or executive orders, respectively. Three noteworthy examples — one used by each — of non-judicial agencies undermining constitutionally-guaranteed liberties are Abraham Lincoln's suspension of *habeus corpus* during the Civil War, the Alien and Sedition Acts passed by Congress during John Adams' presidency, and the enactment of California's Proposition 8 regarding gay marriage.

⁷ That most celebrated of American legal opinions, *Marbury vs. Madison*, would serve as an excellent example of judicial decision permanently altering constitutional law and doctrine. For more insight, see "Marbury v. Madison," (*Timeline*).

2. A Global Consensus?

One of the greater obstacles towards establishing an “international standard” on constitutionalism rests with the fact that a constitutional system, by definition, need not be a democratic one. Iran, let us not forget, began its own experiment in 1906 as a limited constitutional *monarchy*, and remained so (albeit in name, only) through 1979. Yet Iran’s first constitution was in no way any “less constitutional” just because it circumscribed the power of a self-anointed king rather than a popularly elected president. The 1979 constitution of the Islamic Republic also outlines a structure of government that possesses anti-democratic characteristics, beginning with the office of the supreme leader. Yet it’s governing body of law is also referred to as a constitution. Therefore, what makes Iran’s two different constitutions under two different regime-types constitutional? A better question to ask: what makes *any* constitutional regime constitutional?

Earlier, I presented my impression of what makes a constitution: a framing document, which — at a minimum — reflects some aspects of entrenchment, separation of powers, and safeguarding.⁸ I admit that these requirements are quite sparse and not necessarily sufficient for a “true” constitutional system (if there is such a thing), but they are necessary. Other legal scholars have put forth more

⁸ I cannot take credit for designating these three characteristics as “elements of constitutionalism.” The galaxy of such elements, however, is vast, and I present these elements as my estimation of the *minimal* elements of constitutionalism. I maintain that any arrangement between the government and the governed that does not include entrenchment, separation of powers, and safeguarding as components of governance is essentially a different system of rule altogether.

comprehensive necessary-and-sufficient criteria. Among them, at the late Louis Henkin of Columbia Law School, one of the foremost experts on international law and constitutionalism, stipulates the following seven: allocating for popular sovereignty; constitution is to be supreme (over other laws) and prescriptive; commitment to political democracy and representative government; separation of powers (including an independent judiciary and civilian control of the military); government protection of individual rights; safeguarding; and respect for self-determination.⁹ We can note immediately Professor Henkin’s inclusion of popular sovereignty and the democratic trappings that typically accompany it. His is a more specific and exacting definition of constitutionalism in that regard. Also of interest is the requirement of a “supremacy clause” — the insistence that the constitution trumps all other laws. In the United States, this provision is found in Article VI and also tangentially in the Fourteenth Amendment.^{10 11} As I discussed above, certain elements of constitutionalism — and particularly these two offered by Professor Henkin — fit better in secular liberal constitutional systems than in religious ones. With respect to Iran, which is governed by a two-tier parallel

⁹ Louis Henkin, *Comparative Constitutionalism* (Publisher). Prior to his passing in 2010, Prof. Henkin served as chairman of the Center for the Study of Human Rights at Columbia University.

¹⁰ Article VI, Clause 2: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” The Fourteenth Amendment: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” The Privileges and Immunities Clause of the Fourteenth Amendment refers to those rights guaranteed by the Fifth Amendment (of the Bill of Rights); the former amendment is generally recognized as applying the latter to the states.

¹¹ United States Constitution, Amendment XIV, Section 1, Clause 2: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

arrangement of both secular laws as well as *shari'ah*, questions of sovereignty and legal supremacy are unavoidable, if not contentious. Indeed, both were significant and polarizing issues during the 1979 debate and drafting of the constitution. If God is the ultimate sovereign, than what is left for the people? And if the sacred law is to co-opt the constitution where they both conflict, of what value is a constitution at all if, at any point and for any provision, it can be overruled by an immutable law that is centuries old and open to interpretation by a select few? I shall discuss the debate surrounding both of these issues in section three. But they also raise a larger question, which should be addressed immediately: can a scriptural-based divinely inspired constitution be constitutional? Or, asked another way, is Iran's framework for governance constitutional only because the founders of the Islamic Republic chose to call its body of fundamental law a "constitution"?

To attempt an answer these questions, we must first appreciate a subtle but significant difference between *constitution* (or *constitutionalism*) and *constitutional*.¹² Much in the same way that a system of government may have democratic qualities but not be a democracy, that government's fundamental law may possess constitutional traits (a crude imitation of separation of powers doctrine, for instance, as exists in Iran today) but lack the required elements of constitutionalism. The framing document, therefore, may be called a "constitution" and be accurate in the most basic definition of the word — a legal code that

¹² Other terms associated with *constitution* and *constitutional* are *unconstitutional* and *non-constitutional*. A law or some sort of public conduct may be considered unconstitutional when it explicitly violates an existing provision in the constitution. Meanwhile, non-constitutional may be used to describe a general legal code or framework that does not comport with constitutionalism (or, as I would argue, does not satisfy the elements of constitutionalism).

enumerates key powers to a central government but with specific restrictions in place to limit those powers — but also concurrently be “non-constitutional.” In the realm of constitutional theory, this quasi-constitutional status is the grey area where faith-based constitutions often reside. To complicate matters even further, Islamic tradition — and Shi’ism, in particular — can assign an altogether different meaning to *constitutional* and *constitution*. This will be addressed in detail in sections two and three.

As I hope this discussion reveals, finding a universally applicable standard for constitutionalism can be quite vexing. Secular constitutions appear to meet one standard, religious constitutions may qualify those standards further, and, as I shall demonstrate later, within specific religions we have even greater variation. Perhaps the solution to this dilemma of understanding constitutionalism across the various spectrums of regimes is to place each constitution, or constitutional movement, in context. Constitutions don’t stand alone — as history has demonstrated, there is no single pure “constitutional government,” but rather constitutionalized versions of other forms of governance. This is where we would, in effect, “hyphenate” *constitutional* and look at its various manifestations: constitutional-monarchy, constitutional-autocracy, or in the case of both the Islamic Republic and the United States, constitutional-republic.¹³ It is regarding the nature of *republic* and *republicanism* I wish to turn to next.

¹³ Grammatically, the use of *constitutional* in these contexts would not need to be hyphenated (*i.e.*, we would write “constitutional republic” rather than “constitutional-republic”). I merely suggest hyphenation, and employ it hyphen here, for dramatic effect.

3. Whither the Republic?

Republicanism, as both a political ideology and philosophical theory, can be as difficult to define with precision as constitutionalism. Technically, any state whose leadership does not consist of a monarch or other hereditary-based figure can be called a republic. Most republican governments appoint their leader(s) through elections, but this is not a necessary condition of a republic. Even Plato's idealized vision of a republic had, as its guardian, an autocratic and unelected philosopher-king.¹⁴ In the United States, the decision by the Framers to embrace republicanism — in the wake of the failed attempt at a confederation — included an electoral component. But we must not mischaracterize their intentions: the goals they embraced were meant to push the new nation away from pure democracy, not to embrace it. In James Madison's *Federalist No. 10*, we can find the argument for modern republicanism, and the reasons for it are for more compelling — and are more reflective of Ayatollah Khomeini's own ideas of a republic — than anything else that came before it.

In his attempt to rally support for ratification of the constitution, Madison, in *Federalist No. 10*, addresses two key issues of the day, both a byproduct of liberty: factionalism and justice.¹⁵ Specifically, Madison outlines how the solution to

¹⁴ Plato, *The Republic* (Cambridge University Press), p. 175

¹⁵ One could easily argue that both of these are also of paramount concern in Islam. Khomeini often spoke of Islamic government as the ideal vehicle for promoting social justice and promoting unity (in the form of the *umma*).

controlling the former and encouraging the latter is to be found in a republican form of government, as the new constitution would prescribe, and not a “pure democracy.”¹⁶ In a republic, which he defines simply as “a government where the scheme of representation takes place,” the interests of the public are far less likely to be surrendered by the majority in power (in reference to a democracy), because all decisions that would in any way affect the rights and liberties of the people would be “passed ... through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations.”¹⁷ A democratic system, in contrast, provides “nothing to check inducements to sacrifice the weaker party, or an obnoxious individual,” resulting in regimes that have “been as short in their lives, as they have been violent in their deaths.”¹⁸ In Madison’s judgment, only the probity of a selective, qualified assembly of representatives can save the people from the consequences of their own self-love and individual pursuits, and the corruption of the mind and the disease of the polity that factionalism can produce.

As I discuss in detail in section two, Khomeini raised similar concerns when making the case for an Islamic government during his lectures in Najaf in 1969-1970. Under Khomeini’s model of government according to the mandate of the jurist (*velayat-e faqih*, more commonly referred to as “guardianship of the

¹⁶ James Madison, *Federalist No. 10*, p. 55.

¹⁷ *Ibid*, p. 56.

¹⁸ *Ibid*.

jurist”), leadership would not be vested in ordinary men via a democratic process, but through the divine vicegerency of the jurist (*faqih*) acting as the Hidden Imam’s deputy.¹⁹ According to Khomeini’s theory, only the jurists (*fuqaha*) possessed the sacred qualifications that made them fit to lead the community (*umma*).²⁰ Furthermore, as a student of philosophy, Khomeini embraced the Platonic model of the republic, which was first introduced to the Islamic world in the ninth century and reconciled with existing Islamic theory of the state by the tenth century philosopher, Farabi.²¹ The Farabi model of the republic envisions a “model city” comprised of the *umma*, with the routinizing charisma of a philosopher-king embodying the leadership.²² This leader would possess the divine mandate to rule exclusively and absolutely, though not hereditarily, thus remaining consistent with spirit of republicanism. This is vision is not inconsistent with Khomeini’s ideal Islamic government.

If, as I discussed earlier, religion can create complications for a constitutional system — and, accordingly, Islam’s relationship with constitutionalism — what can be said of Islam and republicanism? Republicanism was and remains, after all, a European (and now an American) export.²³ The Islamic scholar Bernard Lewis, just shortly after the creation of the Republic of Pakistan, phrased the question

¹⁹ Hamid Algar, *Islam and Revolution* (Mirzan Press).

²⁰ Roy Mottahadeh, *The Mantle of the Prophet* (Oneworld Publications Ltd).

²¹ Bernard Lewis, “The Concept of an Islamic Republic,” (*Die Welt des Islams*), 1955, p. 7.

²² Ibid.

²³ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press).

more directly: “how far is an Islamic state ... compatible with an ideal of government that is so palpably an importation from the Western world?”²⁴ This is where constitutionalism becomes most paramount. Beyond Farabi’s reverie of the ideal Islamic state, Islam ultimately found consonance with the theory of the republic (*jomhuriyat*) as a viable model for governance only after it was merged with the theory of constitutional government (*masbrutiyat-e masbruteh*). Nowhere is this process better illustrated than with Iran’s experiments at constitutionalism, and constitutional republicanism, in the 20th century.

²⁴ Lewis, 4.

Chapter Two: The Two Faces of Iranian Constitutionalism

Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them.

— Benjamin Hoadly²⁵

In the last one hundred and five years, Iran has experienced three distinct constitutional episodes: the first one began in 1905 and lasted through 1911; the second from 1977 through 1979 and the adoption of the new constitution; and the third from 1980 through 1989, when the constitution of the Islamic Republic was amended for the first (and only) time. In describing Iran’s experiments with constitutionalism, I find *episode* to be a more accurate term than *movements* when discussing them collectively, for two reasons. First, they were not all “movements towards a constitution” *per se*.²⁶ And second, they are episodic because all three weave together, often with overlapping characters and common ideological motives. The three episodes are part of the same narrative, which is quite fitting with Iranian tradition and its fondness for narratives.

The chronicle of events from 1905 through 1989, through close analysis, reveals the emergence of two distinct factions. Many historians and Iranian experts

²⁵ Jefferson Powell, *The original understanding of original intent*, (*Harvard L. Rev.*), 885-948. Quote by Benjamin Hoadly, Bishop of Bangor, from a sermon delivered in 1717.

²⁶ It would be awkward, for example, to describe the post-constitutional period of 1980 through 1989 as a “constitutional movement” — a constitution was already in place, and there was no movement to create a new one, unlike in 1906 and 1979, where the term “movement” would be the more accurate designation. Rather, the post-constitutional, post-revolutionary period during the 1980s represented a moment of re-evaluation and clarification of some of the constitution’s key components. This came following several major constitutional crises in the regime involving the Guardian Council and the *Majles*.

describe these two factions, especially in connection with the 1905-1911 episode, as polarities: one supporting constitutionalism, the other in opposition to it.²⁷ This simplification may be found all the way through the 1979 revolution, but it is assigned a different nomenclature: the anti-Shah groups are either conservative Islamists or liberal secularists. Today, the same groups are divided into the “pro-regime,” or clerical, camp and the “Green,” or reform, movement.²⁸ I submit that, although the labels may have changed, the underlying ideologies have not, and furthermore, that both groups began as and continue to remain constitutionalists. Where they differed then, and where they are in tension now, is not their respective *positions* on constitutionalism, but their *definition* of it.

In order to explain the distinction between the two factions and minimize confusion in the process, I shall refer to “anti-constitutional” group — the one ostensibly opposed to the first constitutional movement, and their ideological successors — as the Legalist faction, and I will explain why I chose that particular designation. The other group, comprised of those deemed supporters of the first constitutional movement, and their ideological progeny, I refer to as the Structuralist faction.

²⁷ For theories as to who and what these groups represented, see Ervand Abrahamian, *Iran Between Two Revolutions*; Shaul Bakhash, *Reign of the Ayatollahs*; and Said Amir Arjomand, *After Khomeini*.

²⁸ Abbas Milani, “The New Democrats”, (*The New Republic*), 17-18.

1. Constitutional Legalism

As a theory of governance, constitutionalism, like republicanism, possesses a certain regional bias.²⁹ What we know as “constitutionalism” — a body of fundamental law created by men to impose limits on their government, and provide for some semblance of rights — has no analog in Islam or Islamic societies.³⁰ Iranians at the turn of the 19th century only became aware of constitutionalism due to their contact with Europeans, particularly the Belgians.³¹ The “enlightened Iranians,” or *roshhanfekrha*, would return from their sojourns in Brussels or Paris with radical ideas of secular liberalism, socialism, democracy, and constitutionalism. However, there was and remains another type of constitutionalism, one espoused by more traditional, religious Iranians and rooted in Islamic jurisprudence and theology, and with no Western influence. The cornerstone of this alternate constitutionalism was a fundamental belief in the rule of law and legal doctrine, as first delineated by the Prophet and then later, according to Shi’a theology, by the Imams. The interpretation, application, and adjudication of this law, in the absence of the Twelfth Imam, became the exclusive domain of the jurists, or *fuqaha*.³² The followers of this legal-based (as opposed to

²⁹ Nicholas Onuf, *Republican Legacy in International Thought*

³⁰ For more on what is expected of “Islamic constitutionalism”, see Nathan Brown’s seminal work, *Constitutions in a Nonconstitutional World* (SUNY Press). Ran Hirschl, in *Constitutional Theocracy*, (Harvard University Press) offers an updated analysis of Brown’s theories on why Islamic constitutions exist.

³¹ The Belgian constitution, in fact, served as the model for the Iranian constitution of 1906.

³² This is different from the theory of *velayat-e faqih*, which holds that the jurist not only has the right and duty to interpret the law but to lord over it, and the people, as well.

politically oriented) theory of constitutionalism, which I refer to as constitutional legalism, are the Legalists.

The Legalists may be characterized by their four distinct approaches to constitutionalism. First, their definition of “constitution” (*masbruteh* in Persian), from the Arabic root *shart* (condition), implies a state of conditionality.³³ The political leader is granted authority to rule *for* the people, not *over* them, conditional to the sacred law (*shari’ah*). He is, therefore, limited by the *shari’ah*, which serves as the equivalent of a written constitution. There is no other law to which the ruler is bound. Second, the Legalists believe in the power of divine law over temporal institutions and man-made political structures for governance. To the Legalist, Islam has already created the ideal system of governance based on *shari’ah*, as defined by the *fuqaha*. The only other tool man needs to govern, in the Imam’s absence, is an executive power to enforce and administer the divine law, subject to the jurists’ adjudication of it. No other institutions are necessary. What about a legislative body? Why bother to create a body designed only to create new laws, the Legalist would answer, when the perfect and complete law already exists? The divine law obviates the need for (additional) political structures. This leads to the third component of Legalist theory: an elected assembly (legislature/parliament/congress) is superfluous, at best, and all a state needs to function are the jurists and an executive power to administer the bureaucracy and enforce the law. And finally, ultimate sovereignty resides with God, not with the people or their

³³ Michael Fischer, *Iran*, p.149; Amir Boozari, *Shi’i Jurisprudence and Constitution*, 233.

leaders (although certain segments of the leadership, acting as vicegerents, may give voice to the Divine Sovereign).

An example of the application of the Legalist doctrine may be found in the dispute over the creation of a new political institution. In 1927, Reza Shah established a the Ministry of Justice with the intent of producing and implementing a unified code of law, and to rid Iran of the anachronistic and localized religious codes that governed the country and varied from region to region.³⁴ This move angered the clerical establishment, for not only would they be disenfranchised by the shift in power towards the state, but especially because the idea of a unified code was antithetical to Islamic jurisprudence and centuries of Shia tradition.³⁵ To the Legalist *fuqaha*, the divine law, particularly when applied to matters of governance, was subject to their exclusive interpretation, not to be shared with or delegated to anyone else, let alone a secular authority of the likes of Reza Shah. They believed in the “jurisconsult’s right to describe the law in his own way.”³⁶ Reza Shah, in their estimation, went beyond the “constitution of Islam” and did not remain within the bounds of *shari’ah* — contrary to the principle that his authority could remain legitimate only on the condition that he abided by that constitution.

³⁴ Reza Shah perceived the existing legal system — administered by clerics, with particular laws for each jurisdiction — as an embarrassment vis-a-vis the Europeans and the Russians. The move to create the Ministry was consistent with his vision to modernize Iran in the European model.

³⁵ Mottahedeh, 225.

³⁶ Ibid.

The imprimatur of constitutional legalism can also be found in the 1979 constitution. Asghar Schirazi highlights six key elements in the document, four of which are direct reflections of constitutional Legalist theory: the tasks and goals of the state are to be consistent with Islamic principles; all legislation is conditional upon or to the *shari'ah*; the *fuqaha* are to fill all important leadership posts; and any political institutions created by the government should exist for the sole purpose of “ensur[ing] the Islamic character of the state.”³⁷

One aspect of Legalist doctrine worth closer examination pertains to the issue of sovereignty and how it is represented in the 1979 constitution. I raise this issue because there is no other single element in the constitution that carries as much tension: strict adherence to *velayat-e faqih* doctrine (itself, a child of Legalist philosophy) dictates that God is the ultimate sovereign, and his power may be delegated to the jurists during the Occultation of the Hidden Imam. This is supported by Article One of Chapter Five. In fact, during the drafting of the 1979 constitution, a leading cleric put forth the theory that “in Islam, sovereignty does not belong to the people,” that it is “not a general right,” but “rather, to be governed by God’s law and to be the subject of government is the general condition.”³⁸ Yet, the Islamic revolution was a movement borne by the people in the cities, towns, and villages, not by the clerics in the seminaries of Qom. It was, by all accounts, a

³⁷ Asghar Schirazi, *The Constitution of Iran: Politics and the State in the Islamic Republic* (IB Tauris), 8. Note particularly the use of the “Islamic character of the state,” in contrast with “the republican character” as used in the United States.

³⁸ Shaul Bakhash, *Reign of the Ayatollahs* (Basic Books), 79. Note here the use of the word “condition” as a substitute for “constitution.” The idea is that the people may self-govern on the condition that ultimate sovereignty remain with God and God’s law.

populist movement, with leaders from all aspects of Iranian society — liberal secularists, the pious, marxists, nationalists, and so forth.³⁹ There is an entire chapter of the constitution explicitly acknowledging the people’s role in the revolution and rewards them for it with the following clause: “No one can deprive man of this God-given right [to be in charge of his social destiny], nor subordinate it to the interests of a given individual or group. The people exercise this God-given right by the paths specified in the [Constitution].”⁴⁰ Chapter Five, where this clause is found, is even titled, “The Sovereignty of the People and the Powers Thereby Conferred.”⁴¹ Conversely, Article Two of Chapter Five states that the foundation of Islamic governance manifests in the “continual *ejtehad* by qualified jurists,” implying that it does not reside with the people.⁴² And then there is Article 56, which states that God has delegated his absolute right to rule (“over the world and all mankind”) not to the *fuqaha*, but to “men at large.”⁴³ The

³⁹ Ervand Abrahamian, *Khomeinism* (Univ. of California Press). Abrahamian’s fascinating work, *Khomeinism*, devotes an chapter to the sociological and ideological melting pot that was the early revolutionary movement, in addition to its non-clerical influences.

⁴⁰ *Constitution of the Islamic Republic of Iran*, Chapter V, Art. 56.

⁴¹ Interestingly, this is Asghar Schirazi’s interpretation of the original Persian. Hamid Algar translates this same title as “The Right of National Sovereignty and the Powers Deriving Therefrom.” The difference between them is not insignificant, and reflects each scholar’s own position on the sovereignty debate. Algar uses the term “national sovereignty,” which can be somewhat vague. Who represents the nation, and thus carries the mantle of sovereignty? Algar does not specify, either in the translation or in his own commentary. Furthermore, Algar translates that said powers are “derived” from the nation, but “derive” can have many different connotations — we can say that sovereignty is “sourced” from the nation, is an “extension” of it, or is a “progression” of it; each of these alternate meanings can describe a different direction of power (who possesses it and then conveys it to the other). Schirazi, meanwhile, refers to the “sovereignty of the people” — a far different implication — and states that the people “confer” power (in the form of sovereignty) to the various state authorities. Again, two wholly conflicting interpretations of the same clause in the constitution, one that could be used to support the Legalist position, the other to challenge it. This reflects the tension, even amongst scholars, over the origin and application of sovereignty.

⁴² This is consistent with the Usuli position, which gives weight to the *marja* (the highest clerical level in Shi’ism) and to the process of *taqlid* (emulation) over laypersons and individual interpretation or *ijtihad*.

⁴³ Schirazi, p. 15. “Accordingly,” Schirazi maintains, “this ‘God-given right’ is to be ‘exercised by the people,’ not by jurists.” Algar’s translation of the same clause makes no reference to “men at large,” or any variation of “man” in whatsoever.

constitution is rife with these inconsistencies regarding sovereignty, betraying the strong influence of Legalist thought shared by its framers (namely, Ayatollah Beheshti) during its drafting.

Episode One: The Architect of Constitutional Legalism: Sheikh Fazlollah Nuri

In each of Iran's three constitutional episodes, one individual emerged as the leader and distinct voice of Legalist ideology. In this section, I address the first two of these key figures, beginning with the earliest and most enduring, Sheikh Fazlollah Nuri, a prominent cleric in late 19th and early 20th century Qajar Iran. Nuri is typically portrayed as a member of the anti-constitutionalist faction during the 1905-1911 movement, having begun as an advocate for constitutional revolution and later turning against his allies and in support of the newly-throned Mohammad Ali Shah.⁴⁴ Nuri, however, was not opposed to a constitution for Iran — at any time during the movement. The confusion (or, rather, claimed certainty) regarding Nuri's stance on constitutionalism persists because he was opposed to a particular form of constitutionalism, not constitutionalism in general. The “problem with Nuri,” if we can characterize it as such, should not be over his position on a constitution for Iran, but his definition of it. It was Nuri who popularized the alternate meaning to constitutionalism in the Islamic context.

Like his contemporaries, Nuri preferred a constitutional government, but “constitutional” as applied literally from the Arabic *mashruta*, which itself comes from the root *shart*, or “condition.”⁴⁵ Nuri's constitution did not consist of a body of fundamental law, drafted by men, for the purpose of imposing limits on the

⁴⁴ For this act of sedition, and the more serious charge of “sowing corruption on earth” by taking sides with the monarchy during the constitutional revolution, Nuri was executed in 1907.

⁴⁵ Boozari, 233.

shah's power. Rather, his constitution was based on the current monarchical system, but to be "conditioned by the Qur'an and sunna practices of the Prophet."⁴⁶ This was constitutionalism not in the Western sense, but the Islamic one — a "shari'ah-based constitutionalism."⁴⁷ Therefore, the underlying movement should be, according to Nuri, a "religious constitutional revolution" (*enqelab-e mashrutiiyat-e mashru'a*).⁴⁸ This approach to "constitutionalism" was not Nuri's, alone. Mohammad Ali Shah — the Qajar ruler during the early stages of the constitutional revolution who would be deposed because of his position against it — defended his resistance to constitutionalism on the same religious grounds. This was not a coincidence, given that Nuri openly supported the Shah against the insurgent constitutionalists (a position that would later cost Nuri his life). The Shah argued that "as a good Muslim, he could accept the Islamic term *mashru'* (lawful) but not the alien concept *mashrut* (constitutional)."⁴⁹

Nuri's definitions — of both an ideal constitution and the movement to create one — are consistent with another of the characteristics of Legalism discussed earlier: the existing framework for law and governance, in the form of the *shari'ah*, is perfect and complete, rendering useless any additional legislation or, for that matter, a legislature altogether. In a text outlining his reasons for opposing the 1906 constitution, Nuri argued that the "legislative body" called for the document,

⁴⁶ Ibid, 149.

⁴⁷ Arjomand, *After Khomeini*, 17. In Persian, *mashruta-ye mashru'a*.

⁴⁸ Michael Fischer, *Iran: From religious dispute to revolution* (Univ. of Wisconsin Press), 149.

⁴⁹ Ervand Abrahamian, *Iran Between Two Revolutions*, 90-91.

or any such legislative institution in general, was “in opposition to the profession of the Prophethood and the completeness and perfection of [Islam].”⁵⁰ His distaste for and distrust of temporal legislatures was absolute, even if the “objective were to institute law (*qanun*) in accordance with the *shari’ah*,” as some had proposed, and he offered two reasons why: “First of all, this was not at all within the jurisdiction of that group and fell completely outside the limits of their responsibility... [S]econdly, it was a case of rational discretionary approval (*istihsan-e ‘aqli*), and as such prohibited (*haram*).”⁵¹

This is one component of Nuri’s three-part attack on constituent legislative institutions. He also warned of the classic threat facing any form of representative government: tyranny of the majority. What mechanism exists to prevent the majority from “legislat[ing] whatever appeals to and pleases their majority according to their insufficient intelligence and regardless of compatibility or incongruency with the Sacred Law”?⁵² His third critique appears to be based more on a technicality, but is critical as part a greater symbolic context that is dear to Shia tradition: the members of the new *majles* (parliamentary assembly) would call themselves “representatives,” a title (*vakil*) and position of representation (*vikaalat*) reserved exclusively for the Hidden Imam “or his General Deputies.”⁵³

⁵⁰ Boozari, 233.

⁵¹ Ibid, 330.

⁵² Ibid, 334. James Madison, when posed with the same question, responded with a republican form of government as the best means of protection, with a constitution designed to limit the legislature’s ability to oppress the minority (through the Bill of Rights).

⁵³ Ibid, 335.

Nuri went further and argued that the Belgian-inspired framework sought by the constitutionalists was *unconstitutional* from an Islamic constitutionalist perspective. Why have a constitution at all, he asked, if the purpose of a new constitution for Iran was to limit state encroachments on the exercise of religion and to “preserve the Islamic commandments?”⁵⁴ If that were truly the intent, how does one explain the constitutionalists’ position that the new law should be based upon the “equality” and “freedom” of the people, when these very principles are incompatible with Islam? He explained⁵⁵:

[E]ach of these pernicious principles is the destroyer of the fundamental foundation of the Divine Law.... The foundation of Islam is obedience, not freedom; and the basis of its commandments is the differentiation of collectives and the assemblage of the different elements, not equality.

A pro-Islamic constitution, therefore, cannot contain material elements that are inherently unorthodox to the faith. Nuri’s constitutionalism represents a difference of kind, not degree; it favors submission and obedience over unbridled individual liberty, and social stratification to civil equality. These perspectives, though many would find undesirable anti-democratic, are most certainly not anti-republican, nor are they inconsistent with the fundamental principles of constitutionalism discussed earlier.

⁵⁴ Ibid, 330.

⁵⁵ Ibid, 331.

Worth clarifying further, when Nuri writes of the “basis” of Islamic duty as being not only inconsistent with equality, but going so far as to obligate “the differentiation of collectives and the assemblage of the different elements,” he is, in fact, referring to the government’s right to discriminate. His concern is not with equality *per se*, but, its consequences — that “the misguided and misleading groups [of Jews, Christian, and Zoroastrians] be treated with similar respect as the Shi’ite sect.”⁵⁶ Attempts at legislating this “right” away — as the framers of the 1906 constitution aimed to do by mandating *equality* as a fundamental principle — would be inconsistent with Islamic law, and thereby unconstitutional. Instead, Nuri maintains, and “in obedience to Islam,” the framers should consider equal only those whom are designated as such under the Divine Law, and treat all other differently; any other model would invite “religious and worldly corruptions.”⁵⁷ As the prototypical constitutional Legalist, Nuri yet again raises his disdain for human, rather than divine, legislation. It is, quite simply and in this context in particular, an unconscionable abrogation of an Islamic commandment, a power reserved exclusively for the “Messengers.” If you want equality, he argues, become a Muslim; otherwise, as is God’s decree, “you will be debased and oppressed in the Islamic Land.”⁵⁸

⁵⁶ Ibid. In defense of Nuri’s position on the equality issue, a long-standing concern amongst many of the religious and clerical classes was that it was precisely the desire to place all groups on an equal plane that ultimately led, or will lead to, the subordination and subjugation of *a particular group*. To treat everyone fairly in Nuri’s time would have meant to elevate some at the expense of others. In other words, not everyone stands to benefit in this arrangement, although the intent may be for society to benefit as a whole.

⁵⁷ Ibid.

⁵⁸ Ibid. And herein we find Nuri’s solution to the issue of inequality amongst the disparate groups in Iranian society.

Nuri's opinions on an essential aspect of a constitutional republic — the separation of power between specific branches of government and their interrelationships — lead to several noteworthy observations, and are illustrative of the Legalist approach to governance. First, Nuri places little value in the concept of the legislature, thereby eliminating one-third of the classical Montesquieuan executive-legislative-judiciary arrangement that is found in many constitutional republics. Any constitutive deliberative body, especially one comprised of laypersons, whose sole function in government is to create or modify an otherwise infallible law is, to put it simply, unholy.

Second, Nuri criticizes the 1906 constitution's absence of any check on legislative power.⁵⁹ He notes that even though “they have written in the Constitution that its articles must comply with the Sacred Law...they have also stipulated that all articles of the Constitution are changeable,” including that which requires comportment with the Sacred Law.⁶⁰ This alludes to his concern, discussed earlier, about an unrestrained majority running roughshod over the other, more “important” organs of government. Indeed, as I shall explain in the sections to follow, the Legalists are unique amongst other ideological groups during the constitutionalist episodes in their obsessive and paranoid fears of becoming the permanent minority — and in the process, marginalized and politically eviscerated — should a non-Islamic constitutional model become the governing framework.

⁵⁹ This check would ultimately arrive as part of the 1907 supplemental laws, in the form of a five-man council of *mujtabids*.

⁶⁰ Ibid.

Third, despite his concerns over the lack of legislative accountability, Nuri is relatively cavalier about the inherent dangers of the executive branch. Given that the constitutional revolution he was a part of began as a result of widespread dissatisfaction with the existing Qajar leadership, Nuri's ideas about governance do not suggest an answer to questions of executive accountability. How, under his constitutional model, can the ruler be held accountable or prevented from deviating from the Divine Law? Nuri's concern with that "other" constitutionalism reflects his view that it will tolerate, if not accommodate, legislation with un-Islamic attributes. Yet he does not address the fact that the Qajar monarchy at the time of the revolution had, itself, shifted away from those very same Islamic principles.⁶¹ Perhaps Nuri is more at ease with the devil he knows.

Fourth, Nuri's positions on "freedom" demand clarification. His concern is less over the comings and goings of the citizenry and has more to do with First Amendment-equivalent freedoms of speech, press, and assembly. He envisions European-style constitutionalism providing a forum for the blasphemization of Islam, and Shi'ism in particular, while concurrently guaranteeing immunity against any punishment for it. This, Nuri argues, will only lead to repeat of the biblical parable of Moses and the golden calf at the foot of Mount Sinai.⁶² Is the likelihood of such spiritual degeneration and social disorder commensurate with the fleeting, European-bred desires for "freedom" and "equality," Nuri seems to ask?

⁶¹ Ahmad Kasravi, *History of the Iranian Constitutional Revolution* (Mazda Publishers).

⁶² Boozari, 333.

Lastly, Nuri puts forth the interesting argument that there are three unique characteristics to Iran that render it incompatible with a non-Islamic constitutionalist system of governance — traits that as “a result of which the establishment of Parliament cannot but create unbearable confusion and anarchy.”⁶³ The existence of many religious groups, of an even greater number of tribes, and an army too small to control them all and enforce the law leave Iran with the wrong demographic blueprint for constitutionalism. “Foreign countries,” Nuri maintains, “do not share these characteristics,” thus making them more amenable to a constitutional system.⁶⁴

Episode Two: Populist Constitutionalism for an Islamic Republic: Ayatollah Khomeini

If Nuri is the architect of constitutional Legalsim, then Ayatollah Khomeini surely represents its edifice. Unlike his predecessor, whose ideas about constitutionalism were propagated during a condensed period of his life, Khomeini had decades to explore the ideal system of governance, with the benefit of a failed earlier attempt at constitutionalism as his guide.⁶⁵ The result — a series of lectures Khomeini gave in Najaf in 1969-1970 and published in 1971 — was the most

⁶³ Ibid, 339.

⁶⁴ Ibid.

⁶⁵ Ervand Abrahamian's *Khomeinism* offers an interesting perspective on the evolution of Khomeini's political theories, and is best read in light of Hamid Algar's translation of Khomeini's original speeches, as published in *Islam and Revolution*.

important Legalist text ever produced: “Islamic Government: The Guardianship of the Jurist” (*Hokumat-e Elsami*).

Khomeini’s work, in the context of Legalism, can be divided into three parts. The first explores the 1905-1911 constitutional movement. Khomeini draws a distinction between Western and non-Western models of constitutionalism. “Agents” of the former model, he argues, spread the notion that Islamic law was innately insufficient to address most jurisprudential concerns, thus precluding the latter as an option:⁶⁶

It is sometimes insinuated that the injunctions of Islam are defective, and said that the laws of judicial procedure, for example, are not all that they should be. In keeping with this insinuation and propaganda, agents of Britain were instructed by their masters to take advantage of the idea of constitutionalism in order to deceive the people and conceal the true nature of their political crimes.... True, they added some of the ordinances of Islam in order to deceive the people, but the basis of the law that was now thrust upon the people was alien and borrowed [from the Belgian, French, and British legal codes].

One aspect of Legalist doctrine worth discussing here, given Khomeini’s comments in the passage above, is the approach towards judicial procedure. The Ayatollah’s complaint is that Western jurists and legal scholars find Islam’s pronouncements in this regard to be insufficient, if not ignored altogether. This belief is actually quite accurate if we are to base it on Khomeini’s own opinions on

⁶⁶ Ayatollah Khomeini, *Islamic Government*, 31.

the matter. In fact, what Khomeini appears to be criticizing is not Western notions of the right to due process (rights guaranteed in the United States by the Fifth and Fourteenth Amendments to the Constitution), but that fact that Western systems afford such rights at all.

Throughout *Islamic Government*, Khomeini insists that the “constitutionalism” of the 1905-1911 movement sought to remove Islamic laws and replace them with inferior Western ones. As suggested in an earlier passage, it is not an organic Islamic product but a viral secular ideology hatched through conspiracy, seeking to drain its host of its divine attributes. A cabal of foreign agents, usually led by “the imperialist government of Britain,” infected Iranian society with the intent to “take the laws of Islam out of force and operation by introducing Western laws.”⁶⁷ Freedom, equality, representative government — each a byproduct of Western constitutionalism — are as anathema to Khomeini as they were heretical to Nuri. The legacy of the 1906 constitution, and the effects of which continued to impact Iranians at the time of Khomeini’s writing in 1969-1970, is summed up by the Ayatollah: “That is our situation then — created for us by the foreigners through their propaganda and their agents. They have removed from operation all the judicial processes and political laws of Islam and replaced them with European importations, thus diminishing the role of the scope of Islam and ousting it from Islamic society.”⁶⁸

⁶⁷ Ibid, 32.

⁶⁸ Ibid, 35.

In a second part, Khomeini addresses the role of the executive branch in an Islamic government. The Legalists favor a strong executive, in the model of the Prophet, to carry out the intent of the law as mandated by Islam. In fact, Khomeini suggests, the divine laws and the authority to execute them were created in unison; any government without the latter is “clearly deficient.”⁶⁹ Legalist Shi’ism emphasizes the rule of law above all else, with the executive power representing the “rule” in that equation:⁷⁰

A body of laws alone is not sufficient for a society to be reformed. In order for law to ensure the reform and happiness of man, there must be an executive power and an executor.... By their very nature, in fact, law and social institutions require the existence of an executor. It has always and everywhere been the case that legislation alone has little benefit: legislation by itself cannot assure the well-being of man.

Furthermore, Khomeini is specific about the executive’s scope of authority: “[H]is task is not legislation, but the implementation of the divine laws that the Prophet had promulgated.”⁷¹ This statement reaffirms both the Legalist view that new legislation in general is not needed, and that there are no allowances for “executive orders.” The executive only exists to serve the needs of the law, and to carry out the essential bureaucratic functions of a modern state.⁷² In this context, it

⁶⁹ Ibid, 36-37.

⁷⁰ Ibid, 40-41.

⁷¹ Ibid, 37.

⁷² Ibid, 40. “[The Most Noble Messenger] did not content himself with the promulgation of law”. Indeed, Khomeini was quite aware of the need for a state bureaucracy, without which “chaos and anarchy will prevail, and social, intellectual, and moral corruption will arise.”

is not a co-equal branch of government alongside the judiciary, but is subordinate to it. Here, we see another major sign of the Legalist doctrine's non-constitutional characteristics, along with the rejection of a legislative branch.⁷³ However, Khomeini insists that his is not a position against the tenets of government, despite his strong support for some of its institutions and repudiation of others conventionally considered to be equally as important. Rather, his issue (or "disagreement," as he phrases it) pertains to "which person should assume responsibility for government and head of state."⁷⁴

A third section of *Islamic Government* addresses the constitutional question, namely, is constitutional government the best form for an Islamic system. Here, Khomeini is revisiting Nuri's opinions on the same issue. However, unlike Nuri's disquisition on constitutionalism written in 1906, Khomeini's Najaf lectures did not include a call for an Islamic constitutional government: *Hokumat-e Eslami* is a pure political tract, not a constitutional blueprint. In fact, it resembles very closely what the late American legal scholar John Hart Ely referred to as a political "brief" — a complaint or statement of charges and grievances.⁷⁵ In that regard, it is more in the realm of the American Declaration of Independence than of the Federalist Papers or the subsequent Constitution. The latter two documents laid

⁷³ Recall that the separation of powers is a fundamental element of constitutionalism. Also, in pertaining to the legislature, Khomeini affirms Nuri's arguments about the "completeness" of the Qur'an and sunnah, and adds that even during Mohammad's time, there was no legislature because all the necessary laws were already in place. What is missing today, unlike then, is a strong executive to enforce them.

⁷⁴ Ibid, 43. Almost all parliamentary systems of government divide the roles of "head of government" and "head of state" into two different offices (prime minister and president, respectively). Here, Khomeini suggests that they should be united into one.

⁷⁵ John Hart Ely, *Democracy and Distrust* (Harvard University Press).

out a framework for governance; the former merely hinted at the ideal principles of governance (where “all men are created equal” and endowed with “inalienable rights”) and served primarily as an indictment against King George of England.

Like Nuri before him, Khomeini puts forth an alternate meaning of *constitution* and explains how an Islamic constitution differs from other constitutional systems:⁷⁶

Islamic government is neither tyrannical nor absolute, but constitutional. It is not constitutional in the current sense of the word, *i.e.*, based on the approval of laws in accordance with the opinion of the majority. It is constitutional in the sense that rulers are subject to a certain set of conditions in governing and administering the country, conditions that are set forth in the Noble Qur’an and the Sunna.... It is the laws and ordinances of Islam comprising this set of conditions that must be observed and practiced. Islamic government may therefore be defined as the rule of divine law over men.

In Michael Fischer’s interpretation of Khomeini’s brand of constitutionalism, it is “neither authoritarian, allowing a ruler to play with people’s money and punish and execute at will, nor is it constitutional in the modern sense, but conditioned (constitutional) by the Qur’an and sunnat.”⁷⁷ Khomeini is not treading on new ground, but restating and updating Nuri’s constitution-as-condition theory for the appropriate Pahlavi, rather than Qajar, context. In highlighting other differences between his constitutionalism and the existing model, Khomeini continues in the

⁷⁶ Khomeini, 55.

⁷⁷ Fischer, 153.

Legalist fashion when it comes to the role of legislatures in an Islamic government. Once again, we see little variance from Nuri's general position, albeit with greater detail and reasoning in Khomeini's approach:⁷⁸

The fundamental difference between Islamic government, on the one hand, and constitutional monarchies and republics, on the other, is this: whereas the representatives of the people or the monarch in such regimes engage in legislation, in Islam the legislative power and competence to establish laws belongs exclusively to God Almighty. The Sacred Legislator of Islam is the sole legislative power. No one as the right to legislate and no law may be executed except the law of the Divine Legislator. It is for this reason that in an Islamic government, a simple planning body takes the place of the legislative assembly that is one of the three branches of government. This body draws up programs for the different ministries in the light of the ordinances of Islam and thereby determines how public services are to be provided across the country.

Two points of departure for Khomeini are evident here. First, he acknowledges that a tripartite governmental structure (“three branches of government”) is an established norm, if not *the* norm, and does not suggest deviation from it, but rather a change — in the form of a “simple planning body” — to facilitate its accommodation with *shari'ah*. Nuri never made any such acknowledgments, perhaps because it took the decades separating the two men for the tripartite arrangement to become recognized as a viable model for governance. Second, Khomeini can no longer ignore the reality shaped by the two Pahlavi monarchs

⁷⁸ Khomeini, 55.

over the years: efforts at creating a modern state illustrate the need for a broad and full bureaucracy in order for government to function and serve the needs of the people. Indeed, Khomeini's mere reference to a "planning body" admits as much. State institutions, which the Legalists typically abhor, have now become a necessary evil, a byproduct of modernity and without which effective governance would be not be possible.

One of the last important topics Khomeini addresses in *Islamic Government*, and of Legalist doctrine, pertains to the role of the public in government. He avoids a head-on critique of popular sovereignty, having expressed his support for a government under God earlier in the text. The issues in this last section pertain to representative government (does it actually benefit the citizenry?), republicanism (is it merely another form of state tyranny?) and the need for the consent of the governed (is it not already implied as an article of faith?). Beginning with the last subject, Khomeini posits that the very fact that someone is a Muslim axiomatically signals acceptance of the Qur'an and sunna, and is thus a "consent and acceptance" of Islamic constitutional government.⁷⁹ This approach, he maintains, is better than both the existing form of government (constitutional monarchy) and a republic. A republic! Here, for the first time, Khomeini addresses republican government in a constitutional context — the very same type of government he will soon preside over and bless as the spiritual leader of the 1979 revolution. His qualms, in 1970, about republicanism should sound familiar: "most of those claiming to be

⁷⁹ Khomeini, 56.

representatives of the majority of the people will approve anything they wish as law and then impose it on the entire population.”⁸⁰ This is nothing less than Nuri’s fears of a tyranny of the majority, revisited and refreshed for a more educated, enlightened audience.⁸¹ What these arguments actually reveal, however, is Khomeini’s ignorance of the principles of modern republicanism.

Is it republicanism that Khomeini fears? The idea that man, left to his own destiny, will act in his self interest, and elect representatives to government who will ultimately do the same? This is *not* republicanism, it is representative government. More precisely, it is exactly what Madison warned against in *Federalist No. 10*: a pure democracy. To be even more specific, it is not pure democracy that can undermine a government, but a secondary characteristic of it: *factionalism*, the enemy of stable governance.⁸² Khomeini’s concerns are about what factionalism might produce, factionalism that can only be created in a democracy. The antidote to factionalism is not to discard representative government, as Khomeini suggests, but to mollify its effects. The solution is, in short, a republican form of government; a government with democratic institutions but not a democracy — a Madisonian-Hamiltonian republic. It would become, in its 1979

⁸⁰ Ibid.

⁸¹ Khomeini in the 1970 faced an audience and congregation entirely different from those of Nuri at the turn of the century. The former was competing with a new generation of Muslim intellectuals educated in European Enlightenment, Muslims who held important positions in academia, the media, and government.

⁸² Madison, *Federalist No. 10*: “By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, of interest, adverse to the rights of other citizens, or the permanent and aggregate interests of the community.”

manifestation, a government entirely *for* the people, but only partially *by* the people, and definitely not *of* the people.⁸³

Also noteworthy is Khomeini's selective consternation over the potential for tyranny. A tyranny of the majority is, indeed, a plausible phenomenon, but government could just as easily suffer from its lesser-known but equally-dangerous counterpart: tyranny of the counter-majority. More commonly referred to as the counter-majoritarian difficulty (or dilemma), this problem can occur in constitutional systems where one of the branches is unaccountable to the people.⁸⁴ Typically, this takes place within the judicial branch, wherein there exists the possibility for unelected judges to "veto" legislation or constitutional protections as part of their judicial review authority. The irony, intentional or not, of Khomeini's disquietude over democratic tyranny is that his theory of governance, *vealayāt-e faqih*, essentially invites a counter-majoritarian tyranny to take hold. The *faqih*, or *fuqaha*, acting as a minority are just as dangerous and destabilizing as any other faction the legislature may produce, if not more so given the unequal separation of powers in Khomeini's system in favor of the jurists. But for this, there is a possible solution as well: *constitutional* republicanism, a representative and constituent-based government, with safeguards built into the fundamental law and governing

⁸³ It would not be *of* the people because of a key function of the unelected and publicly unaccountable Council of Guardians: to vet candidates for all positions of elected office. The adverse effects of the Guardian Council, and how it has undermined constitutionalism in Iran, is thoroughly analyzed in Chapter Two of Chibli Mallat's *The Renewal of Islamic Law*. I will also expand on this topic, and offer an alternative to Mallat's conclusion on the same, in a subsequent paper.

⁸⁴ Required reading for anyone interested in the anti-democratic nature of constitutional courts and the threat of counter-majoritarian tyranny includes Alexander Bickel's famous work, *The Least Dangerous Branch*. Written some fifty years later, Ran Hirschl's *Towards Juristocracy* offers a more contemporary assessment of Bickel's "dilemma".

framework so as to prevent abuses of power by a majority or minority in any branch. Khomeini, however, appears to express no affection for, or knowledge of, such a system, despite railing against the very dangers such a system would obviate.

What conclusions may be drawn about Khomeini, as a Legalist, regarding constitutionalism and the appurtenances of a republic? Vali Nasr suggests that Khomeini, as a young low-level cleric, found inspiration from Plato's *Republic*, providing him with an early model and the notion that the best form of (Islamic) government was one comprised of "a specially educated 'guardian' class let by a 'philosopher-king' wise enough to know transcendent truth and able with that knowledge to produce and maintain a perfect government that would safeguard all national and spiritual interests."⁸⁵ The implication is that Khomeini had no particular interest in constitutionalism, and his appreciation for the Platonic model of republicanism requires either a misreading of the Greek philosopher's text (and failing to notice, according to Nasr, that Plato's idealized philosopher-king was an exercise in irony) or a gross exaggeration of it.⁸⁶

Said Amir Arjomand also does not recognize Khomeini as a constitutionalist, citing the Ayatollah's own words in *Kashf-e Asrar* (or "Secrets Revealed," Khomeini's earliest published work as a cleric) that "deceiving appearance notwithstanding, there is no fundamental distinction among constitutional,

⁸⁵ Vali Nasr, *Shia Revival* (WW Norton & Co.), 126.

⁸⁶ Ibid. Assuming Plato was not being ironic, there is little in common between Khomeini's *vali faqih* (the supreme guardian jurist) and the Platonic philosopher-king, and the republic over which each is supposed to preside.

despotic, dictatorial, democratic ... and communist regimes.”⁸⁷ Arjomand even suggests that Khomeini’s interest in republicanism in 1979 cannot be interpreted as a belief in a republican form of government. Rather, he argues that Khomeini accepted a constitutional Islamic republic as the framework for the new Iran only as a temporary or transitory move. Khomeini’s actual intent, articulated by his protege and chief architect of the constitution, Ayatollah Mohammad Beheshti, on the eve of the 1979 referendum, was to create a “regime of the *umma* and Imamate” (*nezam-e ommat va emamat*).⁸⁸ The title “Islamic Republic” was merely a “slogan,” and did not express the “true and perfect name for this regime” or its system of governance.⁸⁹ Khomeini’s experiment with constitutional republicanism was, at best, a flirtation to excite the masses.

Arjomand’s theory about Khomeini’s actual intent in shaping the Islamic Republic is, as he maintains, a manifestation of the phenomenon espoused by Max Weber decades earlier. What the revolutionary and post-revolutionary period represented was the transformation of Shia legal tradition from the “jurists’ law” (*fiqh*) to something resembling public law — that is, law that could be used to govern a modern state and codified in a constitution (*qanun*).⁹⁰ This process

⁸⁷ Said Amir Arjomand, *After Khomeini* (Oxford University Press), 20. In addition, *Kashf al-Asrar* provides Khomeini’s earliest opinions regarding constitutional legislation (laws created by a constitutionally-sanctioned legislative body), whereby he considers such laws as having “emanat[ed] from the syphilitic brains of a senseless bunch,” in contrast to *shari’ah*-based constitutionalism and “the law of Islam, which God has sent down for eternity and all of humankind.”

⁸⁸ *Ibid.*, 26.

⁸⁹ *Ibid.*

⁹⁰ The development of common law, as it originated in Britain and has come to dominate the legal systems of the Commonwealth nations and the United States, followed a similar course, albeit without the heavy theological component.

required a transition between, or transformation from, *fiqh* to *qanun*. The first step in this process, according to Arjomand, was reconciling Shia *fiqh* with constitutionalism.⁹¹ During this transitory process, the reconciliation would take place under the rubric of an Islamic *republic*; the “republic” element was to be merely a temporary guidepost along the way from a despotic monarchy to an Islamic theocracy. The Islamic *Republic* was never meant to be permanent.

In regards to Beheshti’s remark about a “regime of the *umma* and Imamate”, This statement represents more of a proclamation — an undemocratic, unilateral, authoritarian, and extra-constitutional move to fundamentally alter the system of government. According to Beheshti, the flaw of the earlier constitutional revolution was that it sought to create a new system based on a constitution (*masbruta*), a model that was, in his words, “borrowed and did not pertain to the Islamic culture.”⁹² This is familiar Legalist rhetoric and should be not be surprising. But Beheshti went further, revealing that the prior movement’s flaw came from the fact that it was a *pure* constitutional movement, as in one that met (or sought to meet) the elements of constitutionalism discussed earlier. The current constitution (of 1979) did not suffer from this imperfection because its premise was an Islamic constitution — a *conditional constitution* — based on a relationship between the *umma* and the Imamate. In such a relationship, the people are not citizens of the state with rights guaranteed and protected by a constitution; they

⁹¹ Arjomand, 26.

⁹² Ibid, 29.

are part of the Islamic community, under the leadership of the Imam (Khomeini), and governed by his authority as conditioned by the *shari'ah*. It would be safe to assume that the majority of Iranians who supported the revolution of 1979 probably would not agree with, and certainly would not vote for a constitution endorsing, such a system of governance.⁹³ Yet, according to the man most responsible for drafting that constitution, and his superior who led the movement entirely, this arrangement was legitimate, it was justified, and, most consequentially, it was to be *the law*.

What about the new parliamentary assembly, the *Majles*? How would it fit in the umma-Imamate model? Like all other aspects of Western constitutionalism and Madisonian republicanism in the new Islamic Republic — equality, justice, popular sovereignty, the rule of law — it would be an illusory component of governance. As the most senior member of the Assembly of Experts said following the referendum,⁹⁴

[t]he *Majles* is party to consultation by the Jurist. This does not mean obeying its enactments for the people is obligatory. Its enactments [matter] because it is a consultative body to the Jurist, and it is obedience to the Jurist's ordinance that is obligatory for the people. The [Jurist's] endorsement is required for obedience to the law to become obligatory for the people.... As for the rumors in people's mouths about "government of the people by the people," nobody has given such a government to the people...government is only God's.

⁹³ Arguments in support of this assumption are found in Abrahamian, *Iran Between Two Revolutions*; Bakhsh, *Reign of the Ayatollahs*; and Arjomand, *The Turban for the Crown*.

⁹⁴ Arjomand, *After Khomeini*, 221. Note 54.

2. Constitutional Structuralism

Constitutional Structuralists do not believe that the foundation for government exists in the *shari'ah*, to be augmented by political structures and institutions where needed to ensure a functioning state. Rather, it is the inverse: effective government is premised by sound political structures and bureaucratic institutions operating within the *spirit* of Islamic law. This approach parallels modern constitutional theory (in the Western sense) in that “constitution” is defined as a set of governing principles, and serves as a framework for governance, not as a set of conditions against *shari'ah*.⁹⁵ The emphasis is on structure: organs of government created to implement the will of the people and promote the general welfare of the nation, but also to proscribe limits on government conduct and power. In favoring institutions, Structuralists envision three distinct branches of government with adequate separation of powers between and among them. *Shari'ah* represents the moral code — not the literal one — and the legal line that cannot be crossed when new laws are considered.

Whereas the Legalists resisted a national unified code of law and governance because it was incompatible with Islamic (specifically, Shia) jurisprudential traditions, the Structuralists took the opposite position. The unitary model stood in

⁹⁵ Brown, *Constitutions in a Nonconstitutional World*

contrast to the existing legal structure in pre-1906 Iran. Prior to the constitutional revolution, the Iranian “code” consisted of a hodge-podge of ad hoc laws and rulings issued by various clerics and councils, differing from region to region, with no consistency or hint of proper due process or procedure. From the Structuralists’ perspective this was, by all accounts, a national embarrassment; they cited the various exemptions, or “capitulations,” granted to Europeans during the 18th and early 19th centuries.⁹⁶ Under these “regime of capitulations,” a European who was to be tried in an Iranian court had the right to have one of his own representatives present and, if the decision was not in his favor, to have that representative approve or “sign off” on the verdict; without such a “countersignature,” the jurist’s ruling would have no effect whatsoever. As Mottahedeh describes, “the Europeans insisted that they had these rights ... because no one knew what laws foreigners would be judged by. After all, there might be many Shiah law books, but where were the actual laws?”⁹⁷ This was the power of judicial review, exercised by Europeans in an Iranian court in the form of a veto, and it made a mockery of the *shari’ah*-based legal system that dominated Iranian towns and villages throughout the country. In 1914, the future prime minister Mohammad Mossadeq complained of the same issue. In a treatise he published that year, he supported the notion of implementing a unified law for the entire country, and acknowledged that doing so would be inconsistent with Shia jurisprudential tradition. But he supported it nonetheless, if for no other reason that to “deprive Europeans of their excuse,”

⁹⁶ Kasravi

⁹⁷ Mottahedeh, 225.

cognizant of the fact that “our condition is like that of a sick man whose only remedy is wine. Even though wine is forbidden, in such circumstances, for the sick man to drink wine becomes a religious obligation.”⁹⁸

In the Structuralist doctrine, therefore, we find that political expediency and the need for a stable, functioning government takes precedence over strict and literal adherence to legal tradition. As in Mossadeq’s example, where a political need conflicts with the sacred law, the latter is used to support the former, but it is not disregarded or reinterpreted, only applied in context. The Structuralist model accommodates the *shari’ah* but is not defined by it. Taking the literal meaning of *shari’ah* (“way” or “path”) and applying it metaphorically, the divine law functions as guideposts, with watchtowers off in the distance should the traveller stray too far from the correct path, and not as concrete barricades adjacent to the road. Where *shari’ah* can serve as the basis for governance, it is used accordingly; where it cannot, “conditions” based on Islamic principles are applied. The union of the two serves as the model for Islamic governance under Structuralist doctrine.

Episode One: The Mantle of Constitutional Structuralism: Mirza Mohammad Hossein Na’ini

In the years leading up to and into the constitutional revolution of 1905, Mohammad Kazem Khorasani (commonly referred to as Akhund Khorasani, or

⁹⁸ Ibid, 226.

just Akhund) was the most senior and respected cleric to support the constitutionalist, anti-shah faction.⁹⁹ One of the leading Shia *marja* of his generation, Akhund's influence was so great that when he denounced his main anti-constitutionalist rival at the time, Nuri, as an apostate for his views against the movement and in support of the unpopular shah, it led to Nuri's execution.¹⁰⁰ Akhund's most distinguished student, and the cleric who would most strongly champion the message of constitutionalism in the wake of Akhund's feud with the monarchists, was Mirza Mohammad Hossein Nuri.

In 1909, during the height of the constitutional movement, Na'ini wrote what would become a landmark treatise on constitutionalism. Therein, not only did Na'ini expatiate on a "conditional" constitution, as Nuri had done a few years earlier (*masbrutiya* and *masbrutiyat*), but he broke from his contemporaries by also adding the following words to his description of constitutional government: accountable, checks and balances, delegated, partnership, liberty, trusteeship.¹⁰¹ Na'ini wrote of the supervision (*velayat*) of government by a special class of protectors or guardians, but unlike Nuri and anyone else who had previously written or spoken on the subject, this supervision was to be in the form of a "stewardship" for the law, and not absolute dominance over its application to governance.¹⁰² Most important of all, Na'ini's text propounded its own elements of

⁹⁹ Boozari.

¹⁰⁰ The execution of a senior cleric was then, and remains today, almost without precedent in modern Iranian history.

¹⁰¹ Boozari, 206.

¹⁰² Ibid.

constitutionalism befitting a Muslim society, providing a framework for governance that many in Iran's Green Movement find applicable today.¹⁰³

According to Na'ini, there exists an international consensus, amongst all Muslim and non-Muslim "sages," that "some form of polity and government is necessary for the constitution of the society and the life of humankind."¹⁰⁴ Paramount is the need to preserve a nation's "honor, independence, and nationality." To accomplish this, government has two responsibilities vis-a-vis the polity, one internal and the other external. In other words, there are two dimensions to the government's responsibility, with each representing one of Na'ini's elements of constitutional government.

The first dimension, or responsibility, is what Na'ini refers to as the "protection of domestic order, education of the citizenry, ensuring that rights are allotted to the rightful, and deterring people from invading others' rights." These are the core "internal duties of government."¹⁰⁵ The second dimension — external — involves the "protection of the nation from foreign invasion, neutralizing the typical maneuvers in such cases, providing for a defensive force, and so on — these are what the experts in terminology call the 'protection of the essential constitution' of

¹⁰³ Abbas Milani

¹⁰⁴ Ibid, 208.

¹⁰⁵ Ibid, 265. In a different translation of the same passage, this principle is presented as, "preservation of the internal order of the country, the education of the people, the respecting of each other's rights, the prevention of tyranny and the oppression of any portion of the country by another and such other duties as are related to the internal interests of the country and the people".

Islam.”¹⁰⁶ Na’ini maintains that the second, external dimension is “the highest of duties,” and the responsibility to protect it is tasked to an Islamic government, in the form of the imamate, under self-rule.¹⁰⁷

In Na’ini’s model, the relationship between *constitution* and *shari’ah* is straightforward. The state, as discussed, has external and internal duties. The constitution is needed in order to protect the integrity of the state — its external structure as a sovereign entity — so that it may safely and effectively satisfy its internal obligations — what Na’ini means by “conditions” (*mashrutiya*) — that are, in turn dictated by the *shari’ah*. Phrased differently, we can say that Na’ini’s “constitution” refers to the fundamental principles of Islam. The state, through the ruler, is charged with taking appropriate measures to protect the state and, thereby, those very principles. This represents the external component, and it has no direct connection with *shari’ah* because *shari’ah* governs the internal component.

What is to be said of a written constitution? Na’ini does not appear to be supporting a written document *per se*, and in many regards, he and Nuri are in agreement when it comes to role of *shari’ah* in governance. The difference resides in Na’ini’s broader interpretation and application of constitutionalism: whereas for Nuri, it meant only a “conditional government,” Na’ini takes it to mean the “*conditions of government*.” In Na’ini’s model, the *shari’ah* has a direct relationship

¹⁰⁶ Ibid, 266. An alternative translation: “Preventing the interference of foreigners and stopping their typical cunning and preparing defensive forces and other military needs and the like. This principle in the language of the keepers of the holy law is called preserving the core of Islam and in the language of other nations, preserving the fatherland”.

¹⁰⁷ Ibid.

with the people — it is both a guarantor and protector of rights.¹⁰⁸ Nuri’s conditionalism is not about individual liberty, but proscriptions on the government. Both men address a common problem of the era — weak and ineffective governance — yet approach its origins and symptoms from a different perspective.

Na’ini posits that there are two types of government, “possessive” (which is tyrannical and dictatorial) and “preservative” (limited government with no absolute ruler).¹⁰⁹ The former lacks “responsibility, accountability, watchful deliberation, and checks and balances.” It is, in words and deeds, the Qajar monarchy. Preservative government “is based on discharging the aforementioned legitimate responsibilities” — which, I should note, sound remarkably similar to the elements of constitutionalism presented in Part One — and “is a limited form of government,” where “the ruler’s authority is rule-bound and conditional to the same extent.”¹¹⁰ Na’ini’s use of “conditional,” in this instance, mirrors Nuri’s very closely: the ruler’s legitimacy and authority are premised upon him satisfying certain conditions. But in Na’ini’s case, those conditions consist of the two tiers of responsibility discussed above which, very importantly, include positive rights. Specifically, “the authority of the government is limited to the above-mentioned matters,” Na’ini argues, “and its interference in its citizens’ affairs is conditional

¹⁰⁸ Ibid, 266. The ruler, according to Na’ini, must “perform ... for the sake of the public benefit,” and to that end, “he is bound and conditioned from transgression those rights” afforded to the public by the sacred law. Nuri, in contrast, makes no reference to any such public rights.

¹⁰⁹ Ibid, 208-209.

¹¹⁰ Ibid, 209.

upon the necessity of reaching those [national] goals.”¹¹¹ The current government has failed in its duties — it has “degenerat[ed] into an absolute and arbitrary rule” — because it lacks “accountability, vigilance, and responsibility.”

After providing for the basic principles of constitutionalism for an Islamic government, Na’ini proceeds to outline the structure of that government in greater detail; he is not content to leave this matter to divine law and tradition, realizing that institutions — even if they are Western in origin — are necessary for a functioning state. He begins by acknowledging, however, that this model is not ideal: the best way to ensure that government will uphold its duties and not betray the trust of the people is for that government to be infallible, a condition that may only be satisfied under the leadership of the imams or, to a lesser extent, where there is a “just kingship.”¹¹² In their absence, “nations may attempt a pale likeness of such a rule only under two conditions.”¹¹³ The first is by imposing and adhering to the limits of authority discussed earlier, “so that the government will strictly refrain from interfering in affairs in which it has no right to interfere.” This is to be accomplished through “the establishment of a constitution limited to what has been mentioned,” one that will “set out clearly the duties and level of authority of the king and freedom of the nation,” and that “specifies all the rights of the classes of the people according to the requirement of their religion officially and

¹¹¹ Ibid.

¹¹² Without providing details as to what qualifies a “just king,” Na’ini cites the Sassanid king Khosro I (531-579, CE) as an example.

¹¹³ Boozari, 210.

definitely.” Na’ini calls this framework, or constitution, a “charter and fundamental law.”¹¹⁴ Government powers, as in the United States constitution, are to be clearly delineated (“stipulated in degree and kind”).¹¹⁵ Individual rights and freedoms are, thereby, guaranteed, however only to the extent of and “in accordance to the requirements of religion”; the *shari’ah* is not to be disregarded. Na’ini then, and for the first time, clearly applies a name to this type of system and governing code: because this “written document ... sets limits and the penalty for exceeding them, such a document is called the constitutional law or the constitution.”¹¹⁶ Na’ini’s model for constitutionalism, therefore, and the one which serves as the bedrock for Structuralist doctrine, is of a “written document concerning political and civil affairs of the nation,” with clear duties and proscriptions, as well as the consequence of not adhering to them. Fealty to this written code is subject to “religious laws” where the latter conflicts with the former.

Na’ini’s second condition brings his theory even closer to modern constitutional republicanism: “the principles of vigilance, accountability, and complete responsibility may be strengthened by appointing a supervisory assembly of the wise, the well-wishers of the nation, and the experts in internal and external affairs, so that they can discharge their duties in preventing violation and wrongdoing.”¹¹⁷ What Na’ini is suggesting here, in the form of an “Assembly of

¹¹⁴ Ibid, 267. With this declaration, Na’ini is elevating a “constitution” to the same legal status previously only occupied by divine scripture, *i.e.*, it is now considered part of the canon of “fundamental law”.

¹¹⁵ Ibid, 210.

¹¹⁶ Ibid. Note that Na’ini maintains that *conditionality* remains a fundamental component of constitutional law.

¹¹⁷ Ibid.

National Consultation,” is nothing less Madison’s vision of republican government. Furthermore, not only does Na’ini put his faith in the superior wisdom of these MPs over other members of Iranian society (and other institutions), he describes them in terms we most associate today with clerical, rather than lay, officials: possessing “elements of perfect guardianship.”¹¹⁸ Just as the American constitutional framers had envisioned the legislature as being “the people’s branch,” so does Na’ini view the Iranian equivalent as the true stewards of government in the imams’ absence.

All of this stands in contrast to Khomeini and, to a lesser extent, Nuri, who did not believe in the need for a legislative branch of government. For them, the true guardians were the *fuqaha*; the jurists, not the elected representatives, served as the cerebral hub of government. Na’ini, to the contrary, maintained that “the whole intellectual power of the country is put into service within the official setting of the national consultative assembly.”¹¹⁹ Against the Legalist theories of a strong executive, Na’ini’s proposals for the proper hierarchy, and the checks-and-balances power needed to enforce it, seem almost heretical: the only way to prevent a return to possessive government, he argued, and to ensure limits on the executive power, is to place the executive “under the supervision of the legislative branch,” wherein the latter would then become “responsible to every individual in the nation.”¹²⁰

¹¹⁸ Ibid, 267. Here, Na’ini sees the perfect opportunity to assign the duty of “guardianship” to the jurist. He does not, and chooses the more democratic legislature.

¹¹⁹ Ibid, 268.

¹²⁰ Ibid, 210.

A few comments regarding Na’ini and his approach towards republican constitutionalism are warranted. First, his affection for the legislative branch was not entirely unqualified. The same danger posed by a legislature too weak to adequately check the executive could also exist with an unrestrained legislature. The former, he wrote, would lead to “reversion of constitutional government to absolutism,” and the latter to an “oligarchic autocracy of the legislature.”¹²¹ The antidote to executive absolutism was to ensure a strong legislative branch whose authority would be enshrined by the constitution. The check on the power of the legislature, however, would not come from another branch of government — under Na’ini’s model, the legislature was the most powerful of the three, if not at least equal to the judiciary — but from the people themselves. In a bid to the notion of popular sovereignty, Na’ini believed that the ultimate counterweight to government excess would come from the public. Khomeini, in contrast, maintained that the best way to prevent an autocratic legislature was to disembowel it to begin with.

Second, Na’ini undoubtedly favors the legislative branch as the strongest of government, assumedly because it is the most accountable to the governed and its membership the most diffuse, thus decreasing the chance for factional aggrandizement (as Madison also argued). However, this arrangement — of an executive subordinate to the legislature — is non-constitutional: it does not satisfy the element of separate and co-equal branches of government. The public is not

¹²¹ Ibid.

considered a fourth branch, and thus cannot be the sole check on legislative power without risking the same “oligarchic autocracy.”¹²²

Third, Na’ini imbues in the legislative assembly a certain “legitimacy of supervision.”¹²³ This legitimacy, however, does not originate from the assembly itself, and there are two approaches to it, one Sunni and the other Shia. In the former, the legitimacy of supervision “rests conclusively on the will of the nation’s selection ... which relies on the contractual powers of the *umma*.” Under the Shia approach, during the greater occultation, “legitimacy rests in the principle of the supervision of the ‘public representatives’ of the Hidden Imam.” In the absence of the Imam, and when “the community falls far short of purity ... and the above-mentioned duties [Na’ini’s elements of constitutionalism] are trampled upon and disregarded,” there should be a “deputyship of the jurists and their assistants.”¹²⁴ Na’ini is referring to a council of jurists, or *fuqaha* — the very same oversight body and check on legislative power Nuri had asked for, and which ultimately became a part of the 1906 constitution through the 1907 supplemental laws. This reveals that although Na’ini may have full confidence in the public’s ability to supervise legislative power in matters of governance, a more qualified intermediary body is necessary where governance and faith overlap. This oversight function is not to be entrusted with the people, yet this aspect of it does not make

¹²² The reasons why an arrangement of three co-equal and separate branches of government is more stable than Na’ini’s hierocratic model is beyond the scope of this paper.

¹²³ Ibid, 268.

¹²⁴ Ibid. This oversight body exists today as the Guardian Council (*Shura-e Negabban*).

the council non-constitutional nor non-republican (in fact, the American Framers believed in the same approach). The only aberration comes in the form of the supervision and distinction between the Sunni model — wherein that supervision is entrusted to the greater community (or however one wishes to define *umma*) — and the Shia model, where that authority vests with the *marja* or *marja'iyya*. Accordingly, Na'ini calls for the inclusion in the legislature of either “some of the experts in religious law or be comprised of people who are given leave by such personages to adjudicate on their behalf.”¹²⁵ These specific representatives will have the legitimate authority to correct or confirm the legislature’s decisions, and the imprimatur of these “grand experts in religious law” is all that is necessary (how and why will be explained later, Na'ini writes).

Ultimately, Na'ini’s approach towards constitutional government can be summarized as follows: it is to be based upon the two principles of “limitation of powers” and “responsibility of government.”¹²⁶ To that, I would add a third principle — limited popular sovereignty. Na'ini and his like-minded *ulama* perceived that the best way to limit government was to vest more authority with the people.¹²⁷ Most important of all, perhaps, Na'ini deliberately did not advocate for an Islamic government, where ultimate sovereignty resided with God, favoring instead a “constitution that declared people sovereign, within limits,” as opposed to

¹²⁵ Ibid.

¹²⁶ Ibid, 215. “Responsibility of government,” under Na'ini’s model, takes the form of representative government.

¹²⁷ Nasr, 122.

an Islamic state.¹²⁸ These three principles — limited government, representative government, and popular sovereignty — as the bedrock of political institutions and governance stand in stark opposition to the Legalist approach and its preference for an unaccountable juristic-centered power system under divine sovereignty.

Episode Two: The Constitutional Antihero: Ayatollah Shariatmadari

Of the four “eminent Persians” (to borrow the term from Abbas Milani’s work) I profile here, each a major figure in Iranian constitutional history, Ayatollah Shariatmadari stands as the most compelling and aberrant. During the 1978-1979 revolutionary period, he was to Khomeini as Na’ini was to Nuri: a clerical rival, an ideological foe, a political opponent, and, ultimately, a personal enemy. The personal relationship between Shariatmadari and Khomeini, however, was far more complex than that of their early 20th century counterparts. While bedfellows on many issues pertaining to Islamic governance — including a common belief in the guardianship of the jurist — they were, concurrently, dipolar when it came to the actual practice of governance. The differences between them epitomize the contradistinction between the Legalist and Structuralist jurisprudential doctrines, and their legacies continue in the current political clashes in Iran as well as those of neighboring Iraq.

¹²⁸ Ibid. This position, Nasr notes, was also shared by Grand Ayatollah Sistani during the debates over the Iraqi constitution in 2005.

The first draft of Iran's constitution, hastily put together by an ad-hoc committee in Paris and Tehran in 1979, made no mention of *velayat-e faqih*. When Khomeini finally introduced his theory of Islamic governance to the Iranian people in a revised draft in August, many of his revolutionary supporters were unequivocally opposed to the concept of "guardian jurists." Shariatmadari, however, was not one of them. A *marja* and grand ayatollah in his own right, and the only other cleric who ranked equally with Khomeini in the Iranian Shia hierarchy, Shariatmadari's endorsement of Khomeini's brand of government was crucial to the success of the movement.¹²⁹

Shariatmadari's support of *velayat-e faqih* was not unqualified. To be more specific, his support of *Khomeini's* version was not without significant objections. Shariatmadari envisioned the supreme jurist's role integrated with a democratic process, "without multiplying boards of clerical overseers in all areas of government."¹³⁰ This was, ironically, very similar to Nuri's proposition in 1905 for a committee of five *mujtahids* supervising parliamentary legislation to ensure its comport with the sacred law. Unlike both Nuri and Khomeini, however, Shariatmadari was adamantly opposed to the idea of clerical involvement in politics, to the extent that even called for a boycott of the August 1979 election for the Assembly of Experts (*majles-e khobregan*), whose purpose was to approve or amend the final draft of the constitution before it was to be submitted to a

¹²⁹ Bakhsh, *Reign of the Ayatollahs*.

¹³⁰ Fischer, 154.

national referendum. Under Khomeini's orders — at the insistence of Beheshti — the decision was made to allow for clerics to stand for election to the Assembly, despite an earlier pledge by Khomeini to keep clerics out of the constitutional process. At the end of the election process, over sixty percent of the Assembly members were clerics.¹³¹

The Assembly of Experts election was particularly important because it was the body that ultimately, and thoroughly, changed the constitution from the secular-inspired, French-based and Structuralist model of early 1979 to the Legalist form it is today, where all the functions of government are placed under strict clerical control.¹³² Additionally, it was this Assembly that weakened the section pertaining to checks and balances, and also failed to explain how the process would function. Cumulatively, what this extensive redraft accomplished was to institutionalize the position of *vali faqih* in a manner that was unprecedented in the history of Islamic governance and contrary to anything suggested by Khomeini since his days of Parisian exile. This was challenged not just by Shariatmadari, but also by key lay political figures in Khomeini's coterie, including Mehdi Bazargan and Abol-Hassan Bani-Sadr. But Shariatmadari's voice of protest was the loudest and most prominent: he argued that because the doctrine of *velayat-e faqih* was still open to multiple jurisprudential interpretations, it has no place in a governing document like the constitution.¹³³ Most of all, Khomeini's application of the doctrine stood

¹³¹ Ibid, 221.

¹³² Ibid.

¹³³ Ibid, 222.

in complete contradiction with Article 56 and the vesting of sovereignty to the people.

Shariatmadari's criticism of the December 1979 referendum — when the constitution officially became the law and Khomeini's Islamic Republic was born — continued well after its ratification. Once again, his denunciations centered on the work done by the Assembly of Experts to the prior draft. With greater force and vigor than the year before, and with more at stake, he attacked the very essence of the new regime — the “doctrine of the viceregency of the *faqih*.”¹³⁴ During this tense post-revolutionary period, Shariatmadari attracted many to his cause. Clerics associated with him, along with other secular leaders, formed one of the two major Islamic parties, the Islamic People's Republican Party (IPRP). The IPRP's position regarding the system of governance was notable because it was in direct opposition to the other major (and far more dominant) party, the Islamic Republic Party (IRP).¹³⁵ The principal difference, as was expected, regarded the *velayat-e faqih* doctrine: although the IPRP was committed to the greater objectives of the Islamic Republic, it was not as committed to Khomeini as its sole leader, favoring instead a “collective religious leadership” (or *marja'iyya*, as Na'ini had also endorsed seventy years earlier).¹³⁶

¹³⁴ Bakhshash, *Reign of the Ayatollahs*, 89.

¹³⁵ The IRP was founded and led by six close and devoted former students of Khomeini, three of whom would continue to play prominent roles in the future of the Islamic Republic: Beheshti, Ali Khamene'i, and Ali-Akbar Hashemi Rafsanjani. I consider these key founding members, and thus the party as a whole, to be at the vanguard of modern Legalism.

¹³⁶ Bakhshash, p. 67.

It should be noted that Shariatmadari, in criticizing Khomeini's *velayat-e faqih*, was not the most prominent Shia voice *internationally* to do so. Iraq's most senior Shi'ite cleric, and the man considered the spiritual leader of all the Shia in the Arab world, Grand Ayatollah Abol-Qasem al-Khoi of Najaf, also saw in Khomeini's theory a philosophy that was inimical to Shia tradition and, worse, "an innovation with no support in Shia theology or law."¹³⁷ Khoi, who shared an enmity with Khomeini going back to the latter's days in exile in Najaf in the 1960s and '70s (where Khomeini's theory was conceived), had a following that dwarfed Khomeini's in both size and financial stature — not surprising given the larger number of Arab Shia in the world, many of whom viewed the Iranian Ayatollah with suspicion. If anyone outranked Khomeini in the Shia world, it was Khoi. Therefore, it was no small matter when Khoi, after Khomeini assumed the mantle of power in 1979, went even further and called Khomeini's theory "a deviation from Shi'ism."

To these and other critics — many of whom were highly regarded and esteemed jurists — that Khomeini became, in the words of Vali Nasr, a "turbaned shah" only reinforced their positions.¹³⁸ And while Khoi led the campaign against Khomeini in Iraq and beyond, Shariatmadari did the same in Iran as the *other* senior Iranain *marja*. Khomeini, of course, and his new Islamic Republic had much

¹³⁷ Nasr, 125. Khoi was also the mentor to the current spiritual leader of international Shi'ism, Grand Ayatollah Ali Sistani of Najaf.

¹³⁸ The idea that the shift from Pahlavi monarchy to Islamic theocracy entailed nothing more than *trading one dictatorship for another* — or as Arjomand calls it, "the turban for the crown" — has been a common refrain amongst students of Iranian politics in the last three decades.

to lose if both men succeeded in their respective campaigns against him. Though powerless to retaliate against Khoi, Khomeini extracted the toughest possible punishment against his Iranian rival, defrocking Shariatmadari in an unprecedented move, “an affront that no shah had ever contemplated,” as described by Nasr.¹³⁹ This extreme action by the Legalist Khomeini underscored how effective and dangerous Shariatmadari, as a Structuralist grand ayatollah and ethnic Azeri commanding the loyalty of millions, had been in his critique of the regime. Furthermore, in defrocking Shariatmadari, Khomeini was also insulting every other cleric of equal stature. Shi’ism traditionally maintained that no *one jurist* could outrank all the others, regardless of his following or mastery of theology and jurisprudence. Moreover, according to tradition, each *mujtahid* was independent of all the others, especially those “sources of emulation” (*maraje’-e taqlid*) who had reached the pinnacle of the Shi’ite hierarchy.¹⁴⁰ Khomeini’s move, therefore, was without precedent but also of questionable legality: nowhere in the 1979 constitution is the *vali faqih* granted such authority.¹⁴¹

This incident involving Shariatmadari represented the most direct and confrontational stage of the Legalist-Structuralist battle for the soul of Iranian constitutionalism, a battle that had begun over seventy years earlier. In the 1980s, the two ideologies would clash again, sparking a constitutional crisis that nearly

¹³⁹ Ibid.

¹⁴⁰ Arjomand, *The Turban for the Crown*, 22.

¹⁴¹ The “duties and powers” of the *marja-e taqlid* are provided in Article 110. Constitutionally, Khomeini was within the scope of his authority to remove jurists from various leadership and oversight committees, but the power to defrock a *mujtahid*, let alone a *marja* of Shariatmadari’s stature, was not among those “duties and powers.”

toppled the Islamic Republic from within. The latter episode, however, occurred in a different arena, with new participants, and featured an intervention by Khomeini that took all participants by surprise, resulting in a fundamental change of both his *velayat-e faqih* doctrine and the 1979 constitution. This second battle will be discussed in a later section, where I analyze the evolution of Iranian constitutionalism from 1980 through the present.

Chapter Three: On What Islamic Constitutionalism Means

By the eve of the Islamic Republic's first decade, just as the frenzy of the revolution began to subside and members of the IRP moved to consolidate control over all the key levers of government, the Legalist-Structuralist divide was unmistakable. After seventy years of opposing views, the differences between the two camps is reflected on three levels, which can be posed as questions. First, what is the purpose of constitutional government? Second, should government be the grantor or protector of rights? And third, who is the authority?

As the last twenty pages have revealed, Legalists and Structuralists do not find agreement on the definition of *constitution* or *constitutionalism*. The former, beginning with Nuri, believe that the purpose of the law is to bind the ruler. In this regard, we can think of the Legalist's constitution as the terms-and-conditions portion of a bilateral contract between government and the governed, but it

consists of only that section and not the remainder of the contract, and it is enforceable not by the parties to the agreement, but by God or His duly appointed (or anointed, as it were) representatives. What would be considered the material portion of the contract — the offer, acceptance, and consideration — is not included in the Legalist's constitution because it is not to be drafted by earthly, temporal agents of government. Rather, the important provisions already exist in the form of the *shari'ah*. All that man is obliged to do in an Islamic government is enforce the law through an executive power. No legislature is necessary. The purpose of constitutional government, therefore, is to ensure the proper execution of the sacred law, and not to create new ones. If proper execution entails additional institutions beyond the executive and judiciary branches, these institutions are to be considered incidental, rather than essential, to government.

The Structuralist credo views a constitution as a complete framework for governance, whereby it may incorporate, but not sit beside or be subordinate to, the sacred law. It is a contract between government and the governed, with enforceable rights and a degree of individual autonomy. Popular sovereignty is an essential component of the Structuralist constitution, but it is not absolute; there is an awareness of the infallibility of the common man, and this necessitates a degree of clerical input in the day-to-day affairs of the people's branch of government (legislature). However, in contrast to the Legalist approach, the clergy are *in* the government, but not *of* the government. Na'ini's suggestion for a council of *mujtaheds* to work alongside the legislative assembly — also supported by

Shariatmadari in what *he* interpreted as the true meaning of “guardianship of the jurist” — allocates to the *fuqaha* the role of “stewards” of governance as opposed to overlords of the regime.¹⁴² Furthermore, Structuralists believe in the perfection of the *shari’ah*, but not as a framework for government — the divine law is incomplete for this purpose and requires appurtenant institutions to provide the necessary structure. Lastly, the Structuralist constitution is not just a conditional document with stipulations placed upon the leadership — it is also a rights-based document. I shall expand on the concept of rights in the following section.

1. A Question of Rights

The second area of major disagreement between the Legalist and Structuralist doctrines is over the issue of rights. Neither side believes that the people are, or should be, without rights. Where they differ is in regards to where those rights originate, and whether government plays a role. Because the Legalists see no need for a democratically elected legislative assembly, they are, in effect, acknowledging that government is disconnected from the process of rights *creation*. The rights of man, in other words, originate from the divine law, and are the exclusive domain of *shari’ah*. Government, therefore, can at most only protect those rights, not create them anew. Moreover, the task of protecting those rights belongs to the “just guardians of society,” the *fuqaha*, and not to the elected government, which is

¹⁴² Bakhsh, *Reign of the Ayatollahs*.

neither qualified nor fully trusted to interpret and apply the aspects of the divine law. Under this model, a constitution will only serve to impose conditions on the ruler's authority to govern, not to grant or guarantee rights — the latter is done by the *shari'ah*.

Structuralists hold that the constitution must both limit the ruling authority and guarantee individual and collective rights. These rights are based in part on what Na'ini called the “essential constitution of Islam,” suggesting that they are rooted in *shari'ah* but not exclusive to it.¹⁴³ The constitution requires that these be delineated and respected by the government; that is to say, the government is both the grantor and protector of rights. Any rights that augment those already provided in the *shari'ah* — *i.e.*, man-made rights — are to be created by a representative legislative assembly, separate from the executive and judiciary and not subordinate to them.

But *whose* rights are we discussing? Although the implication is that the rights in question are to be enjoyed by all, each of the two groups is nevertheless addressing a different constituency. The debate over rights, and the identity of the constituency for whom those rights are being especially considered, turns on the application of the label of “minority”: how each side defines the minority determines the type of constitution they want.

¹⁴³ Boozari, 231.

Let us begin with Legalists, and Khomeini in particular. From his perspective, the “endangered” minority is represented by the clerical-religious class in Iranian society. The 1905 constitutional revolution and the decades of governance that followed under the Pahlavis consisted of one long period of assault on clerical power and societal religiosity, thereby relegating this group to a substantially weakened minority status.¹⁴⁴ The 1979 revolution was an attempt to reverse this trend, thus the safeguards in the constitution needed to be framed so as to protect against the oppression of the Islamist element of the populace. How can we ensure that this particular targeted class is protected in a new government? Under the Legalist doctrine, this would be accomplished by making all constitutional provisions “conditional” to the *shari’ah*. The constitution, therefore, become a set of *shari’ah*-based conditions on the ruler.

In contrast, the Structuralists would argue that the minority is represented by the common man or woman, who may or may not be religious, but is distinguished from the majority because he or she is not a member of the ruling elite. It is government, in other words, that the Structuralist doctrine perceives as the tyrannical majority. To protect the minority, a rights-based constitution is adopted to curb governmental excess and also guarantee the rights of the people *against* their rulers. The Structuralists believe, as did James Madison in the *Federalist No. 10*, that a democratic constitutional republic also includes safeguards against a tyranny of the majority, beginning with a strong legislative branch.

¹⁴⁴ For a detailed argument on how the Pahlavi monarchy took proactive steps to marginalize the clergy, see Abrahamian, *Iran Between Two Revolutions*; and Arjomand, *The Turban for the Crown*.

Lastly, there is the related issue of how to define a “republican” government. We know from his earlier works that Khomeini’s defined “republic” according to the Platonic model.¹⁴⁵ Western republicanism, he argued, with its secular institutions and popular, unchecked legislative assemblies was a recipe for tyranny (where the Structuralists saw in the legislative branch a bulwark against tyranny, the Legalist viewed it as the source).¹⁴⁶ Nuri expressed similar concerns. Regardless, they both had it wrong. The republican government that the Structuralists desired — which was a virtual replica of the Madisonian model, whether they were aware of it or not — was designed precisely to address and avoid the type of tyranny Nuri and Khomeini feared, not encourage it. The outstanding question is whether Nuri and Khomeini were aware of their misinterpretation of constitutional republican theory and opposed it anyway, under the guise of its “potential to incite tyranny,” or whether their positions were borne of complete ignorance of political theory and governance.

2. ‘He Who Issues Orders’

The third major area of difference involves the identity of “he who gives/issues orders,” taken from the Qur’an. Sura Nisa’:62 states, “O you who have faith, obey God, obey the Prophet of God, and obey the *uli’l-amr*” (issuer of orders). Michael

¹⁴⁵ Nasr.

¹⁴⁶ Algar.

Fischer asks, who is the *uli'l-amr*?¹⁴⁷ Sunnis and Shi'ites have different answers to this question (the sultan or twelve imams, respectively). But we can also apply this query to the Legalist-Structuralist debate. The Legalists would argue that the *uli'l-amr* — the issuer of the orders — is the *faqih* (in the Twelfth Imam's absence). The Structuralists would content that it is the law, itself, in the form of the *shari'ah* and the constitution, and not an individual. Indeed, there will be institutions and organs of government to promulgate and enforce these orders, but they act as agents for the *uli'l-amr*, not surrogates.

3. Opposing Narratives and the Consequences for 1979

It may come as no surprise that the Legalists and Structuralists, in 1979, held contrasting perspectives on the first constitutional episode and, as a result, applied the lessons of that experience differently. On the eve of the 1979 revolution, the Legalists looked back at the earlier movement with cause for concern. In their assessment, they saw a movement that was begun, championed, and made successful by the *ulama* ultimately hijacked by “intellectuals and bureaucrats.”¹⁴⁸ From there, they seized upon the movement's success to exclude the clergy from their rightful place in the governing system. Islam, in other words, was used in the beginning of and throughout the movement to mobilize the masses, only to be

¹⁴⁷ Fischer, 151.

¹⁴⁸ Arjomand, 17

discarded afterwards once the objectives had been accomplished. Said Amir Arjomand, having interviewed Khomeini in Paris in January of 1979, maintains that the Ayatollah most definitely held this view.¹⁴⁹ Conversely, the Structuralists within the Islamic revolutionary coalition, especially the lay members of the movement such as Bazargan and Bani-Sadr, “evoked positively” those very same events, according to Arjomand.

Ultimately, the Structuralist camp in 1979 viewed the earlier episode as a populist, mass movement that sought to shift control from a singular authority to the public (through their representatives). The 1905-1911 Structuralists did not necessarily agree as to what role Islam would play (Na’ini’s was but one voice in the movement), but they did agree that a single-ruler model or anything avoiding a modicum of democratic structure would be insufficient.¹⁵⁰ The intent was to mitigate, if not eliminate completely, the two scourges of the time, imperialism and domestic authoritarianism. The Legalists, meanwhile, saw the same movement as an opportunity to protect the religious class from complete marginalization in society and government, and to wrestle control from the shah and back in the direction of “Islam,” rather than to the just the people as a whole. The issue also becomes one of sovereignty: both sides knew who they wanted to divest sovereignty *from*, but did not agree as to whom it would go *to*.

¹⁴⁹ Ibid.

¹⁵⁰ I am not suggesting that some or any members of the Structuralist movement sought a *democracy*, but merely (and at the least) some *democratic* elements.

By most accounts, the Legalist narrative “won” — the 1979 constitution largely reflects the IRP perspectives on both the first constitutional episode and for governance going forward.¹⁵¹ Nevertheless, there was still the problem of incorporating the very strong and influential Structuralist contingent of the revolutionary coalition. Shariatmadari and the other members of IPRP and their sympathizers, such as Bazargan and Bani-Sadr, could not be ignored. The two ideologies, with their diametrically opposing views of the key elements of Islamic constitutionalism and republicanism, needed to reconcile if a new government were to exist. The result, to borrow from corporate parlance, was more of an acquisition than a merger of equals, with the Legalists of the IRP clearly in the more dominant position. The result was a constitution for the new Islamic Republic that was rife with contradictions and elements that were nothing short of being mutually exclusive of one another.¹⁵² These included at least the following: separate clauses that proclaimed the sovereignty of the jurists, but also sovereignty of the people; the Islamic community (*umma*) is placed above and against the Iranian nation; rights of the people that are inherent in republicanism are explicitly and directly limited by Islamic regulations and principles; and the power of the *Majles*, as given by the constitution, is simultaneously undermined by another section giving full oversight power to the Guardian Council.¹⁵³

¹⁵¹ Arjomand, *After Khomeini*.

¹⁵² Both Arjomand and Bakhash have written extensively about this critical period early in the revolution, as has former president Abolhassan Banisadr since his exile following impeachment proceedings in 1981 (see *My Turn to Speak*, his memoir published in Paris in 1991).

¹⁵³ Schirazi, 19.

4. A *New* Islamic Republic?

There is an inherent challenge, to state the obvious, when comparing different systems of governance. Even when we narrow the field to a specific sub-type, such as constitutional republicanism, the underlying theory can assume different manifestations based upon overriding cultural and, in some cases, religious elements: the raw materials going in might be the same, but the finished product will reflect the conditions and circumstances of those who crafted it. Furthermore, and as I hope part one of this paper has demonstrated, even one system — the same system — can be interpreted differently by those being governed by it. Such is the tragedy with Iran’s constitutional experiment over the last one hundred years.

The Legalist champions of Iran’s 1979 revolution would have been content with a new government that was neither defined constitutionally nor formed as a republic. We know this based upon how the leaders of the IRP, and Khomeini himself, defined “constitutional” and “republic.” Moreover, even the most basic elements of constitutionalism — if we were to strip away all of the appurtenant components included in various successful constitutional regimes the world over, including those of the French Fifth Republic upon which the 1979 Iranian constitution was modeled — are not satisfied by the Iranian document.

Safeguarding of the constitution, the most important of those elements, especially in a theocratic system, is non-existent. There is nothing to prevent the

interpretations or re-interpretations of the fundamental law by the Expediency Council or the Supreme Leader from fundamentally altering the constitution. There is, to put it concisely, no curb on judicial excess or activism. Absent this protection, the resulting document becomes nothing more than a glorified statement of principles, neither binding nor lasting. You simply cannot build a house of laws on this foundation.

The next important element, separation of powers, does not even exist on paper. The 1979 constitution sets up the *Majles* against the Guardian Council. The latter, a body of jurists and legal scholars accountable only to the Supreme Leader, has absolute veto power over anything passed by “the people’s house” with which it disagrees, ostensibly on the grounds of incompatibility with the sacred law. That a judicial body with such sweeping authority and little accountability sits in the same branch of government as the legislature (Article 62, creating the National Assembly, and Article 91, creating the Council of Guardians, are found in Chapter Six, under the title “The Legislative Power”) makes a mockery of the notion of separate but equal powers. Meanwhile, I have yet to even address the Guardian Council’s veto power over candidates for both the *Majles* and the presidency.

Finally, we arrive at the appellation itself: the Islamic *Republic* of Iran. Let us begin with the most basic *negative* definition of “republic” — a state in which ultimate power is *not* held by a hereditary monarch or other unelected official. This is a *prima facie* irreconcilable doctrine vis-a-vis the theory of *velayat-e faqih*. The

notion of a “supreme jurist,” unelected, self-appointed, and with divine attributes that not only make him infallible but also qualified to completely rewrite and reinterpret centuries of jurisprudence and tradition does not even comport with the Platonic fantasy of the “philosopher-king.” What Legalism leaves us with in practice — the figure of the guardian jurist-consult — is a pale imitation of Plato’s ideal, which Khomeini admired and wished to emulate; and even as a theory, wrote Asghar Schirazi, “*velayat-e faqih* reduces the idea of a republic to an absurdity.”¹⁵⁴

The Iran of December 1979 — after the ratification of the constitution — was about many things: a new nation, free from an authoritarian king, relieved of duplicitous allies, built by a genuine populist movement riding upon a platform of social justice, individual autonomy, and religious dignity. But a *constitutional republic* it was, and is, not.

¹⁵⁴ Ibid.

PART TWO · A Jurists' Republic

In late October of 1988, months away from the tenth anniversary of the Islamic Republic of Iran, Ayatollah Khomeini received a letter from a senior member of the clergy. He did not need to open it to know its contents; he knew it could only be grim. A year-long impasse and discord between the Majles (parliament) and the twelve-member Guardian Council, displayed publicly for all to see, the entire constitutional mechanism that served as the foundation for the Islamic Republic's system of governance was nearing catastrophe. If the gears of government were to fail, as it appeared they would, so would the entire Iranian experiment of 1979, and with it, perhaps, Khomeini's precious theory of *velayat-e faqih* (guardianship of the jurist). In this letter, delivered during the republic's most desperate hour, the senior cleric beseeched Khomeini to save the system—the second such request in six years. Clearly, something was wrong, and Khomeini was compelled to act quickly and decisively. His response to the crisis, however, was notable not because of what it included, but because of what it didn't.

The issue with Khomeini's reaction to the constitutional crisis of 1988 was that it was no different from his response to the last constitution crisis that took place in 1983: he offered no strategy to rescue the republic from the institutional challenges that had befallen it. The 1988 crisis was the metastasization of a self-inflicted cancer; and much like the actual cancer that consumed Khomeini eight months later, so would this one come to gut the entire edifice of governance in the

Islamic Republic, leaving behind an atrophied system that would be no longer constitutional nor republican, and at best nominally Islamic. What remained, and remains today, after Khomeini's passing and the constitutional crises of the 1980s may be more accurately described as a theocratic authoritarian oligarchy: a jurists' republic.

The problem that faced Khomeini, and that continues to challenge the regime today, was simple to identify. It had existed since the inception of the Islamic Republic, and had raised concerns as early as 1981: the system of governance, modeled after the French Fifth Republic, was relying on a balance-of-power arrangement that was never designed to accommodate a strong judiciary.¹⁵⁵ The issue was not, and remains not, with *velayat-e faqih* and its incongruities with constitutional republicanism (although the guardianship of the jurist approach does bring its own complications for governance). Rather, it was because of the system's over-reliance on jurists at the expense of all other agents of government, coupled with its fealty to an inchoate jurisprudential tradition. Shi'a jurisprudence, as it existed in 1979, would find no comfort in the house Khomeini and his fellow jurists had built.

The consequence of this forced marriage between Khomeini's brand of jurist-centric progressive Islamism and Western constitutionalism has resulted in unelected and unaccountable bodies making not only legal pronouncements, but

¹⁵⁵ Throughout this paper, the word "clergy" may be considered inclusive of "jurist," as in all clergy are also jurists (however, not all jurists are clerics). In addition, "judiciary" and "juristic" are used interchangeably.

also shaping legislative and executive affairs. It is a legal framework for governance that is self-destructive, coming at the expense of the democratic principles guaranteed in the Constitution. It is the counter-majoritarian dilemma run amok.

How did the Islamic Republic get to this point of inefficacy? Was this the intent of the framers of the Constitution all along? If so, why? And if not, could this outcome have been avoided?

In this part of the paper, I address all of these questions with respect to the first republic period (1979-1989), and conclude the following: (1) the framers of Iran's Constitution of 1979 intentionally crippled the dispersment-of-power arrangement amongst the three branches of government; (2) the direction of development of constitutional law during the first republic was unanticipated, resulting in at least two major crises; and (3) the leadership, despite structuring the Constitution in a manner that made the crises inevitable, could have acted to preempt them or, at the least, mitigate their effects.

The most important realization of Iran's constitutional experiment of the last thirty years is this: the *mujtahids* (scholars of Islamic law), led by Khomeini, set out after the constitution's adoption to "judicialize" every branch and organ of government, even where it violated the constitution's own separation of powers restrictions, infringed the sovereignty of the people as guaranteed to them by the constitution, and was inconsonant with traditional Shi'a jurisprudence. Through the sheer force of clerical will—which carried the legitimacy of sacred law—

Khomeini and his allies used extra-constitutional legal procedures to exploit the Constitution's inherent inconsistencies to their advantage. Or so they thought. What they did not expect was for these very same machinations to undermine their house of cards, bringing the entire enterprise to the brink of collapse.

In the pages to follow, I reveal the reasons behind the clerics' attempts to rewrite the law, how they were able to pursue this objective legally (that is to say, without explicitly flouting constitutional parameters), and why it did not succeed. In section one, I discuss the application of the separation of powers doctrine to the Iranian model, including its origins as a political theory. Section two offers an examination of the consequences of the Iranian approach to this doctrine, and how it fomented two major constitutional crises in the 1980s. Lastly, in section three, I analyze the motives behind the Islamic Republic's approach towards constitutional republicanism, where it went wrong, and why that wrong could have been avoided.

Chapter One: Separation of Powers for a Constitutional Republic

In part one of this paper, I offered three minimum elements required for a modern constitutional republic.¹⁵⁶ Among them, I argued that the disbursement of power between the different organs of government was the most important because its absence suggests a first step towards authoritarianism or tyranny. I will now explore why this is the case, beginning with the man most responsible for advancing this theory, Montesquieu.

1. Montesquieu and the Origins of the Modern Separation of Powers Doctrine

In the 13th century, an alliance of rebellious barons and nobles succeeded in getting the despised King John of England to agree to, but not necessarily abide by, an agreement limiting the scope of his sovereignty. This agreement, later known as the Magna Carta, was the precursor to what eventually became the Constitution of England.¹⁵⁷ From this collection emerged the doctrine of parliamentary sovereignty, and in 1689 a new regime of constitutional monarchy. This system incorporated some elements of a separation of powers, but it was by no means

¹⁵⁶ Benjamin Radparvar, “The Jurists’ Republic,” Qualifying Paper, UCLA, 2010. They are: entrenchment of the fundamental law, safeguarding the constitution, and separation of powers.

¹⁵⁷ Although, it should be noted, England did not have a single framing document referred to as “the constitution,” it did benefit from a series of codified law, statutes, court decisions, and agreements that served the same purpose.

complete or even effective: parliament had the absolute right to create laws, the king was given the absolute authority to execute them, and the judiciary the power to interpret them, but absent were any procedures for one branch to curb the abuses of the other. Nevertheless, it was the most comprehensive in all of 17th century Europe. That, alone, was a remarkable achievement, and one that was admired greatly by a French Enlightenment political thinker and noble, Baron de Montesquieu, who in 1748 extolled its virtues in his most famous work, *The Spirit of the Laws*.

Considered one of the most influential texts of political legal thought ever written, *The Spirit of the Laws* devotes an entire section to the English Constitution. In that context, Montesquieu wrote:

In order to have ... liberty, it is requisite the government be so constituted as one man need not be afraid of another. When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty Again, there is no liberty, if the judiciary power be not separated from the legislative and executive There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Montesquieu argued that the primary concern for every government should be the preservation of liberty, which he measures by the degree of personal safety each

citizen feels vis-à-vis the government and his fellow citizens.¹⁵⁸ The best way to ensure liberty, he maintained, was by separating the three common functions of government. Though this theory of separation of powers may seem familiar to most, given that it has been adopted by almost every modern constitutional republic (most notably, the United States), Montesquieu's procedure for how it should be designed may come as a surprise to scholars of contemporary political systems.

Today, if we are asked to name the branch of government most typically identified with abuse of power, we may think of the executive, first, and then perhaps the legislative. In the modern Middle East, examples of executive authoritarianism are replete, especially in so-called constitutional regimes (e.g., Pahlavis, Assads, Mubarak, Saddam Hussein). If we were to ask Montesquieu the same question, he would most likely disagree with our choices. The power "most terrible to mankind," he would contend, is the judiciary.¹⁵⁹ In *The Spirit of the Laws*, Montesquieu argues against many of the principles adhered to by judicial bodies throughout the world today, notably that they "ought not to be given to a standing senate"—no fixed courts or tribunals, rather they are to be convened only when needed and for "so long as necessity requires."¹⁶⁰ He so distrusted jurists, and

¹⁵⁸ De Montesquieu, *The Spirit of the Laws*, Book XI. "It is requisite the government be so constituted as one man need not be afraid of another." For the 1979 Iranian revolutionaries, particularly those in the clerical class, this notion of protection against both government and the public played the most important role in determining how the new republic would be structured legally and politically. I will discuss this in greater detail in section three.

¹⁵⁹ Montesquieu, Book XI.

¹⁶⁰ Ibid.

feared the effects that judicial tyranny would have on the public consciousness, that he insisted they remain “invisible”: the public should “fear the office, but not the magistrate.”¹⁶¹

From Montesquieu’s own experiences in Louis XV’s France and knowledge of European history, he concluded that the executive and legislative branches also posed a threat to liberty, but less so. He suggested they remain as perpetually standing bodies, in contrast to the judiciary, because their actions impact the common citizen less directly: the legislative power exercises “no more than the general will of the state,” and the executive is merely assigned with the “execution of that general will.”¹⁶² The greatest threat to individual liberty, Montesquieu maintains, had been, and remains, the judiciary—the only branch with the ability to impose its own will and judgement on the public.

Four decades after publication of *The Spirit of the Laws*, Montesquieu’s theories of state and governance directly impacted the drafting of two of the most consequential political framing documents ever produced, the Constitution of the newly-formed United States of America (1787) and the Declaration of the Rights of Man and of the Citizen (1789) adopted by the National Constituent Assembly of France during the French Revolution.¹⁶³ Before we appraise the legacy of the

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ If elements of the latter document also resemble the U.S. Declaration of Independence, written thirteen years earlier, it is probably because its author, Thomas Jefferson, was serving as the U.S. ambassador to France during the time, and maintained frequent contact with Assembly delegates.

separation of powers doctrine in the Constitution of the Islamic Republic of Iran, it is worthwhile to understand how it evolved through these intermediate applications, in particular, with regards to American constitutional development.

2. Montesquieu Applied: The American Experiment with Separation of Powers

On the evening of Sunday, June 28, 1981 in Tehran, seventy-three members of the Islamic Republic Party (IRP), the leading political faction in the new regime, met for a conference to strategize for the upcoming presidential elections.¹⁶⁴ The men who were convened represented the top echelon of the Iranian government. They included four key cabinet ministers, twenty-seven members of the Majles, and other party officials. One man towered above them: Ayatollah Mohammad Beheshti. After Khomeini, no one was more powerful or influential in the entire Islamic Republic than Beheshti. In addition to being the “father of the Constitution” (he was responsible for writing the first draft of what ultimately became the state’s fundamental law), he was also the chief justice of the judiciary and the secretary general and co-founder of the IRP. The presence of the number two man in government, therefore, underscored the importance of the meeting. And indeed it was historic, but for reasons none of them would anticipate.

The mood that evening was tense. Eight days earlier, the largest opposition group and IRP archenemy, the People’s Mojahedin of Iran (*Mojahedin-e Khalq*, or MEK), staged one of the largest anti-government demonstrations since the Shah’s

¹⁶⁴ Milani, *The Making of Iran’s Islamic Revolution*, 187.

departure. Hundreds of its members were killed, and thousands of supporters were arrested. Moreover, only two days prior, Abolhassan Bani-Sadr, the most powerful moderate in government, had been impeached by the Majles. Given all of this activity, it was perhaps understandable that no one noticed the presence of Mohammad Reza Kolahi, a MEK operative who had recently obtained a job in the IRP building headquarters under the guise of a sound engineer. Kolahi gained access to the conference room where the meeting would be held, and then quickly left the building. Not long after the conference began, a huge explosion tore through the massive room, killing seventy-three people, including Beheshti. The attack, known as the “*Haft-e Tir* bombing” (it occurred on the seventh day of the Iranian month of *Tir*), has been commemorated every year since as an official state holiday.¹⁶⁵

Beheshti’s legacy has far outlasted his relatively few years as an Islamic revolutionary and government official. In addition to writing the first draft of the Constitution, he also led the campaign following the Constitution’s ratification to “judicialize” the government, for which he was rewarded the post of chief justice by Khomeini, the highest position in the judicial branch.¹⁶⁶ He was a staunch proponent of the *velayat-e faqih* doctrine, therefore there is no question that he

¹⁶⁵ It is worth noting that two other important IRP members were supposed to be in attendance at the time of the bombing: Mohammad Ali Raja’i, who served as Bani-Sadr’s prime minister and became president after the latter’s impeachment, and the deputy minister of defense, Ali Khamenei, the man who would succeed Khomeini as the next supreme leader of the Islamic Republic. Raja’i happened to leave the room minutes before the explosion only to be assassinated several months later, and Khamenei was in a nearby hospital recuperating from injuries suffered as a result of a failed assassination attempt against him just the day before.

¹⁶⁶ I shall discuss this process of “judicialization” in further detail in section three.

believed in the power and supremacy of the judiciary. Given this, we can safely assume that Beheshti would disagree with the following statements:

“Of the three powers above mentioned, the judiciary is next to nothing.”

“The simple view of the matter suggests that ... the judiciary is beyond comparison the weakest of the three departments of power.”

The first remark comes courtesy of Montesquieu, the second is Alexander Hamilton writing in *The Federalist, No. 78*—both written in reference to the judicial branch. We can surmise Montesquieu’s thoughts on this issue from the previous section’s discussion: he does not believe that the judiciary is really “next to nothing” by nature; rather, this is how it ought to be by design. Hamilton, along with his *Federalist* co-author James Madison, also believed that a thoroughly eviscerated judicial power was best for preserving liberty and maintaining accord between the three branches.¹⁶⁷ In fact, both Hamilton and Madison pay tribute to Montesquieu’s wisdom on this issue, referring to him as “the celebrated oracle who is always cited on this subject.”¹⁶⁸

In making the case for ratification of the new constitution, following the failed Articles of Confederation, Hamilton expounds on the reasons why the judiciary is the “least dangerous” branch:

¹⁶⁷ Madison, incidentally, is considered the “father of the U.S. constitution,” just as Beheshti is for Iran’s.

¹⁶⁸ Madison, *The Federalist, No. 47*. Hamilton also refers to Montesquieu as the “celebrated” authority regarding the separation of powers in *Federalist No. 78*.

[The judiciary] will be least in a capacity to annoy or injure [the other departments of power] ... [It] has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.¹⁶⁹

Like Montesquieu before them, the framers of the U.S. Constitution were staunch believers in a system of government with disbursement of powers between three distinct bodies; and as with Montesquieu, so did the Americans fear the power of a strong judiciary. This is why they argued that the best judiciary was a weakened one: no sword and no purse—or to borrow Hamilton’s more nuanced phrasing, it should be deprived of the *force* and *will* to perform any direct act of governance. This stands in stark contradistinction to Khomeini’s doctrine of *velayat-e faqih*, where the jurist is empowered with force and will at the expense of all other agents of government. Beheshti and the IRP were in pursuit of furthering this objective.

Regardless of which branch is designed to be the most powerful, all constitutional regimes must tackle at least one common problem: how to keep one branch from usurping power from the others. Madison sought to address this issue when he looked at the British constitution and concluded that “it will not be denied, that power is of an encroaching nature, and that it ought to be effectually

¹⁶⁹ Alexander Hamilton, *The Federalist*, No. 78, emphasis in original.

restrained from passing the limits assigned to it.”¹⁷⁰ The means of restraint is what the new American constitution was tasked with designing, if not perfecting. To that end, Madison suggests taking Montesquieu’s doctrine one step further, but to where and in what form, he was yet unsure: “After discriminating, therefore, in theory, the several classes of power ... the next, and most difficult task, is to provide some practical security for each, against the invasion of others. What this security ought to be, is the great problem to be solved.”¹⁷¹ The challenge, therefore, is complementing separation of powers with the right mix of checks and balances.

The United States Constitution took Montesquieu’s foundation for constitutional governance and added an additional layer of checks and balances to maintain structural integrity. Otherwise, why expend the effort to overthrow tyranny only to have it remerge in another form from within? The American framers looked at the development of English constitutionalism and realized that curbing the excesses of each branch vis-à-vis the other was the only way to avoid a regression back to the politics of King George.

With this in mind, I now turn to the Iranian Constitution of 1979. The parallels between it and the U.S. Constitution are striking. As with the First Continental Congress of the United States in 1787, the framers, led by Beheshti, sought to create a new and improved framework based on eradicating the deficiencies of the old one. And also like their early American counterparts, the

¹⁷⁰ Madison, *The Federalist*, No. 48.

¹⁷¹ Ibid.

Iranian revolutionaries looked to Montesquieu (albeit, indirectly) for inspiration. And lastly, like Madison and Hamilton, Beheshti was determined to craft a checks-and-balances mechanism that would ensure against the rise of another tyrant. The question is, would he find the same degree of success in this endeavor as did the Americans?

3. A New Constitution for a New Republic

On the morning of February 1, 1979, a chartered Air France jet departed from Charles de Gaulle airport in Paris headed for Tehran. On board was Khomeini, who was returning to Iran after sixteen years in exile. Soon after his arrival, Khomeini ordered the provisional government, led by Bazargan as prime minister, to draft a new constitution. Bazargan assigned this task to his minister of state for revolutionary affairs, Yadollah Sahabi, and a committee under Sahabi's control and accountable to Bazargan.¹⁷² What they produced was a Western-influenced constitutional framework, and is notable because it featured a strong executive power and absolutely no mention of or reference to *velayat-e faqih*. Although it did call for a "guardian council" to ensure that all legislation comported with Islamic principles, this council would be comprised of mostly non-clerical jurists, and their veto powers would be limited.¹⁷³ Bazargan's constitution was as close to a secular

¹⁷² Bakhash, *Reign of the Ayatollahs*, 74.

¹⁷³ Ibid. I will discuss the significance of the Guardian Council in greater detail later in this section.

model as could be expected amidst the revolutionary fervor. Modeled after the Constitution of the French Fifth Republic, it reflected Montesquieu's values regarding separation of powers, specifically on curbing judicial authority. But unfortunately for Bazargan and other moderates in the new regime, the draft would not survive the summer.

Rather than being submitted to a constituent assembly for approval, as Khomeini had promised Bazargan back in Paris, the draft was given to an "elected" panel of the newly-formed Assembly of Experts in August. The elected members comprised mostly of clerics and revolutionaries allied with the IRP. When the assembly convened in August to discuss the draft constitution, it was again revised and reworked from the ground up by a sub-committee chaired by Beheshti. It was here that Beheshti finally found the opportunity to write the constitution he and his IRP cadres had wanted all along. Removed from the draft were practically all the democratic elements included by Bazargan and Sahabi, and for the first time in modern Islamic history, a system led by the guardianship of the supreme jurist was introduced. If the period from January to February of 1979, when the Shah left Iran and Khomeini arrived, was the most important in the revolution's history, this period during the Assembly of Expert's session regarding the constitution would qualify as the second. One could say, as Bazargan and Bani-Sadr have, that it was at that precise moment that a clerical coup de e'tat began, and the people's Iranian Revolution became Khomeini's Islamic Revolution.¹⁷⁴

¹⁷⁴ Arjomand, *The Turban for the Crown*, 137.

Beheshti's rework of the Constitution, most of which went into the final product, is too extensive to be completely reviewed here. I will only touch upon a few sections that relate to the separation of powers doctrine in general, and to the judiciary in particular. I begin with Chapter V, "The Right of National Sovereignty and the Powers Deriving Therefrom," which contains the articles explicitly dividing the tasks of government amongst three distinct departments.¹⁷⁵ Article 57 states that the three powers—legislative, judiciary, and executive—are to be wholly "independent of each other." Article 58 reserves the legislative power exclusively for the "National Consultative Assembly" (Majles), whereby the laws are to be "communicated to the executive and the judiciary for implementation"—up this point, all Montesquieuan.

Article 61 pertains to the judiciary branch: "The exercise of the judiciary power is by means of courts of justice, which are formed in accordance with the criteria of Islam and are to examine and settle cases, protect the rights of the public, dispense and enact justice, and establish divine limits." If we are speaking in terms of separation of powers, there are two issues to identify. First, within the scope of duties that are part of the "exercise of judiciary power," there is nothing stated about adjudicating cases or controversies arising over the interpretation of the Constitution, raising the question of whom is expected to resolve disputes that arise over the interpretation of constitutional law, if not the judiciary. Second, the

¹⁷⁵ All references to the Constitution of the Islamic Republic of Iran (1979) are from Hamid Algar's translation.

judiciary is given the exclusive power to discern the boundaries of Islamic law. To followers of Montesquieu, this should be worrisome not because the judicial branch is given the absolute right to interpret the law (most judicial agencies in a constitutional republic have this power), but because the law it is allowed the sole right to interpret does not reflect popular will. It is divine, and therefore subject to no check by the public or other branch of government. The Majles, if it disagrees with the court's interpretation regarding a question of law, cannot draft new legislation to counter it, nor provide any remedy against the court's ruling if its interpretation compromises either of the two other branches. Beginning with Article 61, Beheshti's impact becomes evident.

Next is Chapter VI, "The Legislative Power," which provides the substantive and procedural duties of the legislative branch, including its powers and limitations. It is here, specifically in Articles 91 through 99, where I believe the greatest challenges to the Montesqueuiian doctrine are to be found. If one is to make the claim that Iran is not a constitutional republic, these sections provide the most compelling evidence to support it, and reflect the apex of Beheshti's influence.

Article 91 states: "In order to protect the ordinances of Islam and the Constitution by assuring that legislation passed by the [Majles] does not conflict with them, a council to be known as the Council of Guardians is to be established with the following composition...." The Council is to be comprised of twelve

members: “six just *fuqaha* [Islamic jurisprudents] ... to be selected by the leader” and six lay jurists “to be elected by the [Majles] from among the Muslim jurists presented to it by the Supreme Judicial Council.”

Before I address the basis for the Guardian Council’s existence, I want to call attention to its composition: the members are jurists either directly appointed by the supreme leader or by a judicial council comprised of members who, themselves, are directly appointed by the supreme leader. Furthermore, of the twelve, six are clerics, and the other six are elected by the Majles from a slate of candidates chosen by another body of clerics.¹⁷⁶ Therefore, we have clerics either serving as jurists, or pre-qualifying lay Islamic lawyers to serve as jurists, and none of them are accountable to the public or the other branches of government, yet they are given the ultimate power of judicial review, which, in most constitutional regimes, is afforded to the judicial branch. But here, judicial review is vested in an unelected body that sits within the legislative branch.¹⁷⁷ This is inconsistent with separation of powers doctrine, and leaves little doubt that Beheshti intended to assault the separation and balance of powers arrangement found in Bazargan’s draft.

¹⁷⁶ An excellent, and more detailed, analysis of the Guardian Council and its position vis-à-vis the other powers of government is offered by Mallat, *The Renewal of Islamic Law*.

¹⁷⁷ Under the French Constitution, the power to review acts of the legislature for any inconsistencies with the fundamental law rests with a specific body of jurists, the Constitutional Council, which sits outside the legislative branch. In the United States, the power of judicial review was not afforded to the Supreme Court explicitly in the Constitution, only to be added to the Court’s penumbra of authority in the landmark case of *Marbury v. Madison*.

Articles 92 through 96 further delineate and enshrine the Guardian Council’s judicial review authority, procedurally and substantively. Article 97, meanwhile, introduces another extreme departure from the separation of powers doctrine:

In order to accelerate their work, the members of the Council of Guardians may attend the [Majles] and listen to its debates when a bill of draft is under discussion. When an urgent draft or bill has been inscribed on the agenda of the Assembly, the members of the Council of Guardians must attend the Assembly and make their views known.

This provision unequivocally grants to the Guardian Council the unprecedented power of judicial legislation. This unelected judicial body, sitting in the legislative branch, not only has the authority to veto any legislation, but to directly shape it as well. Here is James Madison critiquing the very same arrangement as found under the British Constitution, where he could just as easily be describing the Islamic Republic:

One branch of the legislative department, forms also a great constitutional council The judges [on this council] are so far connected with the legislative department, as often to attend and participate in its deliberations, though not admitted to a legislative vote. From these facts, by which Montesquieu was guided, it may clearly be inferred that ... “there can be no liberty ... if the power of judging, be not separated from the legislative and executive powers” ... and that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.¹⁷⁸

¹⁷⁸ Madison, *The Federalist*, No. 47, emphasis in original.

In any government where a judicial body, acting within the scope of legislative agency, is granted both the powers of judicial review and legislation, there can be no pretense of separation of powers. It is simply inconsistent with modern constitutional theory, and does not function in practice.

Chapter Two: Separation of Powers, Tested

The servant government and the officials in charge of the administration of the country will execute the Imam's [Khomeini] decrees as a religious incumbent duty.

— *Prime Minister Mir Hossein Moussavi, August 1982*¹⁷⁹

1. The Constitutional Crisis of 1981-1983

In 1963, the Shah launched the “White Revolution” campaign to propel Iran towards modernity through social and economic reform. Two of the more important elements of the program were the granting of suffrage to women, and the far more controversial land reform and redistribution initiative. The latter was aimed at ridding Iran of its ancient “feudal” system by reallocating land to the working class and villagers in the rural parts of the country. Indirectly, the Shah was also looking to take the opportunity to undermine the increasing middle class

¹⁷⁹ Arjomand, *After Khomeini*, 163.

agitation against his government by garnering support amongst the lower socio-economic classes.

The largest class of landowners at the time was the wealthy *bazaari* merchants, who also happened to be relatively pious folk, representing the largest base of financial support for the clerical establishment in Qom. Thus, it came as no surprise that the *bazaaris* resisted the White Revolution, and when the Shah paid them no heed, they took their grievances to the mosques and seminaries. Their powerful *mujtahid* allies wasted no time in excoriating the Shah, especially because the other components of the reform program challenged their own authority over traditionally clerical duties pertaining to family law. And lastly, the clerics knew that their largest base of popular support—the rural working class—would shift to the Shah if the redistribution program were to succeed (a likely possibility).

Given the stakes, the clergy decided that they would not stand for the Shah's White Revolution. In response, they initiated the largest and most aggressive street campaigns and demonstrations since the coup that toppled Mohammad Mossadegh a decade earlier, led by a high-ranking cleric who, until then, had abstained from all political involvement, Ruhollah Khomeini. After giving an extraordinary speech in June of that year, where he attacked the Shah directly for the first time, Khomeini was arrested, sparking riots by his followers and, consequently, the harsh response of the Shah's forces. Thousands were killed, and a year later, Khomeini was sent into exile until 1979.

With the turmoil over land reform, it is perhaps unsurprising that the first major constitutional crisis of the new republic took place over the very same issue. The cause of land redistribution and taxation was one of the major battle cries of the 1979 Revolution, and was as important to the middle and working class support base of the Islamic government, then, as in 1963. In addition, it continued to face the same opposition from the merchant *bazaari* class. But now, in 1981, when they were no longer the opposition but the party in power, the clerics faced an entirely new challenge: should they accommodate the middle and working class and push land reform, or placate the merchant class by maintaining the status quo? They could not do both without exposing the regime to serious risks. Yet, that is precisely what they did.

The champion of land reform in government consisted of a majority bloc in the Majles. They were opposed by a cadre of senior ulama, who also had the support of the powerful Guardian Council. The Council was also against other economic measures before the Majles, including the nationalization of urban land and of foreign trade.¹⁸⁰ The stage was set for a battle within the same branch of government, created by the awkward exercise of the Council's judiciary powers against the legislature. Seeking to avoid a public confrontation, Khomeini ordered the Majles to abandon the program. But by then, it was too late. The Majles and the younger members of the Revolutionary Guard and *komitehs* (precursor to today's plainclothed Basij street militia and government enforcers) had already

¹⁸⁰ Shaul Bakhash, "Islam and Social Justice in Iran" (Oxford University Press), 103.

mobilized in support of the plan and thrust it into the consciousness of the public.¹⁸¹

By October of 1981, the impasse that Khomeini had wanted to avoid—over such sensitive matters as class-based legislation and which branch of government, according to Shi’a jurisprudence, had the authority to implement it—had arrived and became public. The Guardian Council and other senior *mujtahids* on one side, the Majles and rank-and-file of the powerful Revolutionary Guards (and their rural supporters) on the other. The Constitution offered no explicit means of breaking the institutional deadlock. It fell unto Khomeini to find a way out. However the Ayatollah, himself, was also vexed.

Hashemi Rafsanjani, at the time the Speaker of the Majles, offered a surprise solution rooted in Sunni, rather than Shi’a, jurisprudence: Khomeini should invoke the relatively obscure doctrine of “over-riding necessity,” or *maslahat*. This would allow the supreme jurist the authority to enact or suspend virtually any rule under the pretense that it serves the public good. Rafsanjani made his appeal directly to Khomeini: “This is an area for the exercise of the authority of the jurist. The jurist is the guardian of the community, exercising his authority in the situation where over-riding necessity requires extraordinary decisions to be taken.”¹⁸² Rafsanjani suggested that Khomeini take the then-unprecedented step of piercing the veil that separates the primary tier (the office of the supreme leader) from the

¹⁸¹ Ibid.

¹⁸² Ibid, 104. Arjomand derisively refers to this practice as the “Sunnification” of Shi’ism.

secondary (executive, legislative, judiciary). An act of such magnitude could undermine the separation of powers completely, and would most probably be unconstitutional.¹⁸³ Everyone awaited Khomeini's response.

After deliberating, the Ayatollah demurred, declining to personally intervene. The reason was because he found the procedural aspects of Rafsanjani's proposal to be based on an unsound interpretation of *fiqh* (jurisprudence) that lacked precedent, and was ungrounded in any established Shi'a legal tradition.¹⁸⁴ Absent any doctrinal support, acting upon Rafsanjani's suggestion would expose Khomeini to intense judicial scrutiny. He could not afford to compromise his reputation and standing as a jurist, let alone the supreme jurist, especially so early in the development of the new republic. His opponents, both within the clerical hierarchy and the non-clerical political opposition, were ready to take him down, and he wanted to afford them no easy opportunity by introducing innovative legal interpretations and rewriting Shi'a jurisprudence overnight. Judicial activism might be tolerated, but *this* would be portrayed by his enemies as judicial tyranny.

Beyond the doctrinal challenges, Khomeini had more personal misgivings. The legislation in dispute pitted the economic reformers in the Majles with the more traditional established landed class and clergy. To side with one would invoke the immediate wrath of the other. At best, he would open himself up to criticism on

¹⁸³ Chapter V, Article 56 grants "man" the "God-given right" to determine his own "social destiny," which "no one can deprive ... nor subordinate to the interests of a given individual or group." This is the Constitution's one and only popular sovereignty clause.

¹⁸⁴ Bakhsh, "Islam and Social Justice in Iran," 104.

doctrinal grounds; at worst, this would create an irreparable division among the senior ulama and guardians of the revolution (and, indeed, it most probably did anyway).¹⁸⁵ That Khomeini might have personally sympathized with the reformers was of no consequence to him; maintaining the loyalty of the clerical order was of far greater import.

Rather than issue an opinion to resolve the crisis, Khomeini remanded the matter back to Rafsanjani with explicit instructions that the Majles work out a compromise with the Guardian Council. Khomeini did not, however, close the door completely to *maslahat*. Nevertheless, a standoff ensued between the Majles and the Guardian Council as the former, over the course of the next twelve months, passed numerous land laws, hoping to close the gulf of disagreement between the two bodies. The Council vetoed all of them, in the process arousing voices of dissent and frustration:

*“I ask the Guardian Council to tell us what solution they have thought of for these vast and new problems ... I urge the Imam [Khomeini] to think of a way out ... to call a shoura [council] of fuqaha [jurists] at the highest jurisprudential level ... and give the final, decisive view on these issues.”*¹⁸⁶ —Mohammad Mohammadi, a Majles deputy.

¹⁸⁵ I refer here to attacks on Khomeini by the only other cleric in Iran considered his jurisprudential equal, Ayatollah Shariatmadari, and Shariatmadari’s supporters amongst the other clergy.

¹⁸⁶ Bakhash, “Islam and Social Justice in Iran,” 107-108.

*“We do not know what to do. We have books of jurisprudence. Yet, no one has scratched their surface, and their validity in jurisprudence has not been diminished.”*¹⁸⁷ — Ayatollah Abdol-Karim Musavi-Aradabli, Chief Justice of the Judiciary.

*“This is not right. It is necessary to think. Our jurisprudence, the decrees of our ulama, the Sayings [of the Prophet] are rich enough. The road is sufficiently clear so that we have no need for recourse to other things. But they do not let these things be implemented.”*¹⁸⁸ —Rafsanjani, as Speaker (Chairman) of the Majles.

Finally, by January 1983, Khomeini offered an alternative approach: he issued the equivalent of an executive order permitting the Majles, in certain limited cases, to use a two-thirds supermajority to override the Guardian Council’s veto.¹⁸⁹ Although this approach managed to diffuse the crisis, the fix was short term. Furthermore, there were three major issues with Khomeini’s directive. First, he did not define under what conditions and circumstances this parliamentary maneuver could be employed. Second, would this supermajority option last beyond the current crisis, *i.e.*, would the Constitution be amended to add this additional component to the separation of powers arrangement? This assumed that the Constitution could even be amended; there is not one article or clause in the entire document stipulating an amendment process, or whether such a process would even be legal. Third, the Guardian Council continued to hold itself as the final

¹⁸⁷ Ibid, 108.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid, 106.

authority on issues of constitutional law, as it was legally obliged to do, irrespective of the Majles' threat to invoke the supermajority override.

The consequences of Khomeini's failure to act decisively and thoroughly became evident: doctrinal inconsistency led to ideological confusion, undermining the public's confidence in the entire judicial apparatus, and muddling the boundaries separating the powers of the three branches to the extent that the boundaries, themselves, became meaningless, thereby calling into question the very constitutional-ness of the system itself. Lastly, absent any meaningful strategy to avert the underlying issues, what would prevent a similar crisis from emerging in the future?

The regime had little time to ponder that question, because the future arrived in 1987.

2. The Constitutional Crisis of 1987-1988

President Ali Khamenei came to Tehran University on Friday, January 1 of 1988, to lead the weekly prayer service as the *imam-e jom'eh* (Friday prayer leader, a very prestigious and symbolic post). When it came time for the sermon, he gave, by most accounts, an innocuous lecture on a detailed point of Islamic law as it applied to the *velayat-e faqih* doctrine. Standing at the podium, he spoke to a compliant crowd of the faithful, intending to lecture about the latest deadlock

between the Majles and Guardian Council, this time over a series of economic reform bills. He measured his words deliberately so as to remain within the approved script of established Shi'a jurisprudence. But within days, his lecture would elicit a very public rebuke from Khomeini that not only embarrassed and intellectually undermined the president in front of the entire nation, but also fundamentally changed constitutionalism in the Islamic Republic for good.

Khamenei's provoking words were merely a restatement of what was in the Constitution and had been upheld by the Guardian Council: an Islamic government's mandate to rule is subject only to the sacred law of the Qur'an.¹⁹⁰ Applied specifically to the Islamic Republic of Iran, this maxim affirmed that the two non-juristic branches of government are subordinate to a higher authority.¹⁹¹ It was neither controversial, in and of itself, nor inconsistent with precedent. Nevertheless, the motive behind Khamenei's statements was perplexing: here was the president of the republic, reminding everyone of the inherent weaknesses and inferiority of his office vis-à-vis the Guardian Council, and doing so on a very public stage. Why he did this is unknown—perhaps it was to reaffirm his loyalty, going back to his days as an IRP operative and Beheshti protege, to the belief that government should be jurist-centric. And like Beheshti, Khamenei was not a proponent of the separation of powers arrangement, but tolerated it.

¹⁹⁰ Arjomand, *After Khomeini*, 34.

¹⁹¹ Mallat, *The Renewal of Islamic Law*, 90.

Whatever Khamenei's motive, Khomeini took the opportunity to remind the junior cleric, and everyone else, that *he* was in charge, shattering all previously-held perceptions of *velayat-e faqih* and extending its authority to a level that absolutely no *mujtahid* in the Shi'a world had ever recognized.¹⁹² Here is the key section of his response to Khamenei:

It appears, from your remarks at the Friday prayer meeting that you do not recognize government as a supreme deputyship bestowed by God upon the Holy Prophet and that it is among the most important of divine laws and has priority over all peripheral divine orders. Your interpretation of my remarks [regarding *velayat-e faqih*] is completely contrary to what I have said.¹⁹³

Nikki Keddie has written that, with this letter, Khomeini “made the startling and unprecedented statement that the needs of the Islamic state outweighed Islamic law, including such basic commandments as prayer.”¹⁹⁴ Said Amir Arjomand refers to this moment as the “explicit degradation of the Constitution.”¹⁹⁵ For Islamic legal scholar Chibli Mallat, Khomeini's letter to Khamenei “constitutes a major turning point in the history of the Iranian Republic.”¹⁹⁶ Now, Khomeini's edicts could supplant not just the temporal law, but the spiritual as well. Even religious obligations governing fasting, the Hajj, and

¹⁹² Ibid, 91.

¹⁹³ Ibid, 90.

¹⁹⁴ Keddie, *Modern Iran*, 260.

¹⁹⁵ Arjomand, *After Khomeini*, 34.

¹⁹⁶ Mallat, 91.

daily prayer fell under the purview of *maslahat*—Khomeini could annul any of them whenever he deemed it overridingly necessary and expedient. With one move, he incorporated the doctrine of *maslahat* into the powers of the supreme jurist, despite his earlier misgivings. Ayatollah Musavi-Ardabili, the chief justice who had pushed for greater judicial activism in government affairs, hailed Khomeini's move because, finally, "*maslahat* was declared to be the final decisive principle of legislation," in the process becoming "the most important of all the achievements of the revolution."¹⁹⁷

Maslahat, a legal decree to be wielded by a jurist, had been suddenly reconstituted as a "principle of legislation." The assault by the judiciary on the legislative branch had now become a full-blown war, and the Majles was outgunned, outmanned, and outnumbered on all fronts. The separation of powers between the branches, assuming it actually ever existed in the Islamic Republic, was now shattered.

From Khomeini's perspective, he had no choice but to make this move. The continuous ideological battles between the Majles and Guardian Council over legislation were like a festering wound in the organs of the regime, and the bloodletting only served to undermine his authority as well as the doctrine of *velayat-e faqih*. The cause of constitutionalism had to be martyred in order to sustain the *imamate* (the theory of the vicegerency of the Prophet). The

¹⁹⁷ Arojomand, *After Khomeini*, 35.

preservation of the order (*nezam*) was what mattered above all. No one understood this better than the now-humbled president, Khamenei, who, soon after receiving Khomeini's rebuke, said:

The commandments of the ruling jurist are primary commandments and are like the commandments of God The Guardianship of the Jurist is like the soul in the body of the regime. I will go further and say that the validity of the Constitution ... is due to its acceptance and confirmation by the ruling jurist. Otherwise, what right do fifty or sixty or a hundred experts have ...? What right do the majority of people have to ratify a Constitution and make it binding on all the people?¹⁹⁸

The Constitution had now become political chaff, to be disregarded or trampled upon at the jurist's discretion. Any and all legislative functions, or any duty that fell within the scope of executive authority for that matter, belonged to the new ruling class of the jurisprudent. At this ideological inflection point, the regime became a constitutional republic in name only.

There was, however, still the matter of the body of legislation stuck between the Guardian Council and the Majles. Khomeini now had to take his new interpretation of Shi'a jurisprudence and adapt it to the political reality. Given the opposition to his interpretation of *fiqh* as it applied to *maslahat*, he could not just issue a directive (*fatva*, in Persian) to that effect: neither the other senior clerics, who remained opposed to Khomeini's implementation of *velayat-e faqih*, nor the

¹⁹⁸ Ibid, 34.

Majles and their constituents would stand for it.¹⁹⁹ Instead, he had to pursue a more politically “legitimate” route: it needed to be done constitutionally. But how? The Constitution contained no provisions or clauses allowing for its amendment, presumably because when it was ratified, it was assumed to be complete.

If the only acceptable method was through a constitutional amendment, then the Constitution first had to be amended so as to allow for amendments. On February 6, 1988, Khomeini appointed a commission comprised mostly of *mujtahids* (once again, jurists), and chaired by Khomeini (another jurist), to determine how to resolve the long-running conflict between the Guardian Council and the Majles over legislation. This group was called the Council for the Determination of the Interest of the Islamic Order, or the “Maslahat Council.”²⁰⁰ Until the Constitution could be amended to provide for the formal use of *maslahat* in breaking future deadlock, the Maslahat Council would fill that role—somewhat equivalent to the function served by conference committees in the United States Congress, where variations of the same bill from the House and Senate are brought before select members of both chambers to be reconciled. However the Maslahat Council would also possess the authority to push through or veto outright the pending bill, subject to the supreme leader’s final approval. The actual

¹⁹⁹ In fact, Khomeini’s interpretation, and the procedure he employed to implement it, led to the resignation of the most senior and highly regarded jurist on the Guardian Council, Ayatollah Lotfollah Safi (Arjomand, *After Khomeini*, 35). Ayatollah Montazeri, Khomeini’s successor-designate, also vehemently disagreed with his mentor’s reinterpretation of Shi’a tradition. He was eventually forced to resign, for this and other reasons (Mallat, *The Renewal of Islamic Law*, 93). Other clerics accused Khomeini of incorporating Sunni “Wahhabism” into Shi’a jurisprudence (Bakhash, *Reign of the Ayatollahs*, 252).

²⁰⁰ Arjomand, *After Khomeini*, 34.

amendments to the Constitution were adopted one year later, and the Maslahat Council, now commonly referred to as the Expediency Discernment Council, became a permanent part of the Islamic Republic's system of governance, occupying its own branch that made it neither a judicial nor a legislative body, but had authority over all three branches.²⁰¹ It is not subject to, nor does it acknowledge, any separation between its duties and those of the other branches of government, further blurring the distinction between judicial and legislative power in the republic.

After enduring eight long years of perpetual legislative impasse, the Islamic Republic ultimately found its white horse, guised in definitively non-Shi'a garb. The formal adoption of *maslahat* into the framework for governance heralded several accomplishments. First, just when it had appeared that the well of *velayat* had run dry, along came an obscure jurisprudential abstraction to save it from extinction. Second, it introduced, or rather, imposed, Sunni legal practice into a purely and proudly Shi'a political tradition. And third, it dispelled any prior-held convictions that Iran operated as a constitutional republic with the requisite separation of powers between its three major organs of government. *Maslahat* broke several legal and political barriers, and not all to positive effect. Combined, these three "achievements" would serve only to weaken the republic and, more importantly, the doctrine of the guardianship of the jurist in the years to come,

²⁰¹ Technically, its function and powers are provided for in Chapter VIII: The Leader or Leadership Council, of the revised Constitution (Article 112).

especially after the death of its founder, leader and sole charismatic figure in 1989. They symbolized the complete transformation of revolutionary Iran from a theocratic republic with perfunctory democratic elements into a juristic oligarchy with distinct authoritarian overtones. The state's sole claims to popular sovereignty—the Majles and the office of the president—became slowly enfeebled.²⁰²

This raises several important questions. Why did the regime push the evolution of government in this direction? That is to say, what did it expect to accomplish by enabling the juristic powers while concurrently diminishing the others? What did it have to fear in the legislative and executive branches as they had been designed in the 1979 Constitution?

Was this increased “judicialization” an inevitability? Could events have turned in a different direction? Was the Constitution designed in such a way, *i.e.*, ineffectively, that foreclosed any other preferable outcome? Or does the blame reside with the leadership? These issues I address in the next, and concluding, section.

²⁰² I have chosen not to discuss the executive branch and the office of the president in this paper for several reasons. First, the duties that the president enjoys today were, up until the 1989 amendments when the position was abolished, shared with the office of the prime minister. This made the prime minister a very important political player during the first ten years of the republic, if no other reason than because he served as a foil to the agenda of the president and who, on most occasions, was more politically aligned with the public. Second, the current Supreme Leader, Ali Khamenei, served as president for most of the Islamic Republic's first ten years, and his preoccupation during that time was in executing the nation's brutal war with Iraq. On domestic matters, Ayatollah Khomeini's edicts and prescriptions ruled the day (up until his death). Lastly, Iranian presidents became more relevant in the constitutional struggle between the three branches beginning with the 1997 election of Mohammad Khatami, and peaked with his successor, Mahmoud Ahmadinejad, through the contested 2009 elections. To the extent that the executive branch has made an impact in the constitutional process, it has been a relatively recent phenomenon.

Chapter Three: Prospects for a Republic: Minority Rights and the Legacy of Shi'a Mythology

The context of Iranian politics can often be framed as a series of majority-minority struggles. Earlier, I discussed how the interpretation of constitutionalism during this time turns upon the designation of minority status for a particular group. For example, the religious class, holding themselves as the persecuted minority leading up to the 1905-1911 Constitutional Movement, insisted upon a definition of constitutionalism that implied a strong degree of conditionality upon the Qur'an. This group, typically associated with Sheikh Fazlollah Nuri (and whom I refer to as the Legalists), believed that the only way to prevent the subjugation of pious Muslims by corrupt Westernized monarchs was to hold the Qajar shahs accountable to an Islamic constitutional framework.

From this perspective, the majority is represented by everyone else—and it is, indeed, a broad and disparate coalition: monarchists, secularists, Western-education intellectuals, technocrats, Marxists, and ethnic and religious minorities. These groups, the Legalists would argue, form the tyranny that oppresses the clerical and religious classes of society. The new constitution, or any constitution, therefore must curb the avaricious political appetites of these factions. This could only be done, and guaranteed, through a *shari'a*-based legal framework supervised, but not necessarily governed by, the ulama. The framework of the 1979 Constitution, as I will explain shortly, reflects this ideology.

1. Shi'a Mythology and the Legacy of Majority Rule

Hamid Enayat, the late Islamic scholar, once wrote that Shi'ism maintains “an attitude of mind which refuses to admit that majority opinion is necessarily right.”²⁰³ Shi'a history is, in great part, about an oppressed minority battling a more powerful majority. Ali, the fourth caliph and first Shi'a imam (saint), represented a small faction of early Muslims who believed that he was the only true successor to Mohammad, in the face of the majority opposition who supported Abu Bakr. Ali's son, Hossein, died a martyr's death while standing up to the mighty army of Yazid at Karbala. In the centuries that followed, the Shi'a narrative was that of a besieged minority under Sunni majority rule, and it is through this narrative that we can find the roots of a Shi'a separation of powers theory.

There also exists a certain “elitism” in Shi'a hermeneutics that further explains the power structure we find in the Islamic Republic today. It is based on the belief that there are two levels of comprehension when seeking the meaning of the Qur'an and its hadiths (written accounts of the words and deeds of Mohammad, used for Islamic jurisprudence). There is the lower level, *zahir*, which refers to the “apparent meaning of the text,” which is where lay Muslims are deemed capable of

²⁰³ Milani, *The Making of Iran's Islamic Revolution*, 159.

comprehension.²⁰⁴ The higher level of analysis, *baten* (“secret meaning”) is reserved for qualified *fuqaha*. Hossein Nasr suggests that, in Shi’ism, only the imams possess the ability to process both levels simultaneously.²⁰⁵ This arrangement, in the Islamic Republic, is extended to governance as well: two tiers of authority, with the *vali faqih* (supreme leader) above and the republican system (three branches) below.

The distribution of power amongst the three branches, and between the *vali faqih* and the lower tier, reflects not only aspects of Shi’a elitism in matters of Qur’anic interpretation, but also a mistrust of the masses. (This quality is not exclusive to Iranian revolutionaries of 1979—we also find it in the writing of the framers of the American Constitution as well as other Western constitutional systems.)²⁰⁶ Power is to be disbursed because if it is not, the risk that the majority will subjugate the minority is ever-present. Government, therefore, must take measures to empower the minority because Shi’a historical experience demonstrates that they (Ali, Hossein, etc.) were the virtuous ones. This mistrust creates an uneasy relationship between the Iranian ulama and their followers, and thereby between the government and the governed. And it is not without reason: Imam Ali once said that the masses tend to “follow every crowing,” and thus need

²⁰⁴ Ibid.

²⁰⁵ Nasr, *Shi’ite Islam*, 10.

²⁰⁶ Milani, *The Making of Iran’s Islamic Revolution*, 159–160. Milani writes: “The implicit assumption is that the people are often incapable of distinguishing good from evil and truth from falsehood, a view that a host of Western thinkers, ranging from Plato to Machiavelli, shared with the framers of the Islamic Constitution”.

to be kept at a distance from the levers of politics.²⁰⁷ The structure of government in the Islamic Republic was a response to the long-standing belief that the public simply cannot be trusted, and that popular sovereignty cannot be granted to a credulous mob subject to exploitation and with the propensity to make self-destructive choices for themselves and the greater body politic. The Guardian Council was created to address this very concern, acting as a filter between popular will and the true governors of the state. It is endowed with the authority to screen candidates for the Majles and the presidency, in addition to the judicial review of legislation. Its *raison d'être* is to exclude the likelihood of “demagogic leaders” from emerging, either through public office or by legislative fiat.²⁰⁸

In *Federalist No. 51*, Madison proposes the following:

It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part If a majority be united by a common interest, the rights of the minority will be insecure.

Madison is addressing the experience of living under 18th century British rule, but this could easily have been written by and for the Iranian revolutionaries of 1979. The framers of the 1979 Constitution responded to this admonition in two ways. First, by empowering the clergy as a privileged class, giving them control of the highest and most sensitive positions in government. Every branch would be

²⁰⁷ Ibid, 159.

²⁰⁸ Ibid.

under juristic control or influence. For this purpose, the Guardian Council served the lead role, joined by the Expediency Council after its creation in 1989. By giving the ulama the keys to the castle, the public is kept outside the gates and, subsequently, away from the governing apparatus. This is one approach, and it addresses the concern over the tyranny of the majority that can arise in a democratic republic.

There is a second threat to an Islamic government, which comes not from the people but from within the regime itself. Again, Madison provides the applicable wisdom: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”²⁰⁹ What Madison is referring to is a doctrine that is often overlooked or conflated with the separation of powers, and deserves a separate treatment of its own: checks and balances. As a point of reference, in the United States government, power is disbursed “horizontally” across three branches, each possessing powers unique to itself that are not shared with the other two. The primary intent behind this arrangement is to protect the people from subjugation by any one branch should it accumulate too much power. But there is also the matter of competition between the branches, and the risk of one encroaching upon the duties of the others. To obviate this threat, government must be protected from itself.

²⁰⁹ Madison, *Federalist No. 51*.

The Iranian framers addressed this concern, but not by imposing a bi-directional checks-and-balances system commonly found in other constitutional republics, where each branch curbs the advances of the other. Instead, they made it unilateral. The jurists are given the authority to check the executive and legislative powers, but are not subject to any balancing themselves. Once again, the Guardian Council best illustrates this process: six Islamic jurists (*fuqaha*) and six lay jurists oversee the affairs of the president and the Majles. Meanwhile, the judicial branch, with an ayatollah as its chief justice, is given the exclusive power to determine the “divine limits” of all laws enacted by the Majles and enforced by the president. Lastly, there is the Expediency Council, itself comprised of Islamic jurists or members selected by the supreme jurist, whose function is to reconcile those matters that the Guardian Council cannot resolve. The lawyers are everywhere, and they are uncontested and unrestrained.

Whereas earlier, I discussed the ineffective implementation of separation of powers in the 1979 Constitution as the cause of political stagnation, we now see that it was destructive by design. The arrangement and distribution of authority is meant not only to undermine the equal balance of power so as to subdue popular will, but also to deny the ability of the non-juristic powers to push for institutional equilibrium. This is all done within the context of Shi’a mythology and the legacy of living under majority rule. The irony of such an arrangement—and perhaps it is not so much an irony as it is a welcomed, but unintended, consequence—is that in

seeking to prevent a tyranny of the majority, the framers created a tyranny of another kind.

2. The Islamic Republic's Counter-Majoritarian Dilemma

If the written law tells against our case, clearly we must appeal to the universal law, and insist on its greater equity and justice.

—Aristotle²¹⁰

The unequal distribution of authority in the Islamic Republic was engrained in the framework of governance rather than imposed *ex post*. It was installed to provide the *fuqaha* with the sweeping power of judicial review. The purpose of imbuing the regime's jurists with this power was to quell the possibility of an "anti-Islam, pro-Western" majority arising either in government (*hokumat*) or from the people (*mellat*). Jurists, presumably, would serve as the last line of defense in the face of tyranny; where the "written law," to paraphrase Aristotle, acted against their interests, they possessed the mandate to appeal to a higher source, through the *vali faqih*. Such was the state of affairs in Iran during the first republic period.

However, in the process of fortifying against a majority inimical to the clerical hierarchy, and while insulated from any checks or balances against it, the hierarchy created an authoritarianism of its own.

²¹⁰ Aristotle, *On Rhetoric: A Theory of Civic Discourse* (Oxford University Press).

The legal philosopher Alexander Bickel coined the term “counter-majoritarian difficulty” to refer to a judicial authority, unaccountable to the public, possessed with the power to undue popular will through judicial review. Courts, Bickel argued, can occupy the apex of anti-democratic behavior in a republic: they are typically appointed, not elected, and represent a small minority within government with the ability to impose their own force and will—despite Hamilton’s assertions to the contrary. The other two branches of government, as Montesquieu argues, are mere appendages of the majority (public). Yet it is the judiciary, free from public accountability, that can act on its own by virtue of its power to speak for the law. The consequence is a tyranny of the minority, a condition that already affects the Islamic Republic.

In the Iran of the first republic period, the majority—in the form of the Majles, the executive branch, and the *mellat* that elected them—were not the ones to be feared. Rather, they were the ones held hostage to the dictates and whims of a juridicial minority that was not accountable to anyone but God. This condition is not so much a symptom of the framers’ constitutional design as it is their original intent. So paranoid were they, after six decades of Pahlavi autocracy, that they deliberately structured the document so that there would be no means for enforcing checks and balances against the jurists, or curbing any “potential abuse of power” by them.²¹¹ The counter-majoritarian dilemma, therefore, was only a dilemma for the majority, and that suited the minority juridicial class just fine.

²¹¹ Milani, 160.

But it need not have turned out this way. Hamilton and Madison did not account for the United States Supreme Court to reach the level of authority it currently enjoys; and if they had, they most certainly would have built safeguards into the Constitution to curb the potential for judicial tyranny.²¹² Express limits on the Court's power, however, were not necessary. In the landmark case of *Marbury v. Madison* (1803), under the leadership of the first chief justice, John Marshall, the Court took two steps that no one expected, and no constitutional court of its kind had done before. First, Marshall single-handedly forged the power of judicial review—a power that was nowhere to be found in the Constitution—and gave it to the Court. Next, he surprised everyone in government a second time by choosing to not exercise that power for the decision in *Marbury*. Thus, in one motion, he established the dual constitutional doctrines of judicial review and judicial restraint as precedent for the entire judiciary.

Nevertheless, in American constitutionalism, the courts have not lived up to Hamilton's and Montesquieu's characterizations as the "least dangerous branch." But neither has it reached a state of judicial tyranny, due to the Court's readiness to restrain its exclusive power of judicial review. This is why Montesquieu's fear of a counter-majoritarian judiciary co-opting popular will has not materialized.

²¹² "Ambition must be made to counteract ambition. The interest of man, must be connected with the constitutional rights of the place. It may be a reflection of human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflection on human nature?" Madison, *Federalist No. 51*.

Iran, meanwhile, began with judicial review already enshrined: in the 1979 Constitution, it was explicitly provided for and given to the Guardian Council (Chapter VI, Sections 91-96). Unlike with Chief Justice Marshall, Khomeini or any jurist in the Guardian Council need not have invented it. Moreover, this judicial review power was exercised often (I would say excessively) by the Guardian Council in the Republic's first few years. Chibli Mallat argues that the Guardian Council's near-abuse of judicial review was to be expected, given its explicit mandate in the Constitution:

Along with the supremacy of the *faqih*, the importance of the Council of Guardians is a decisive indication of the juristic hold over society. It is an irony of the constitution that, because the power allocated to the ulama (and more specifically to the jurists *qua* Shi'i hierarchy) is so extensive, this power was difficult to sustain in practice Only by a tremendous exercise of self-restraint could a limit to those overwhelming prerogatives be found. The Council of Guardians could not avoid exercising this power.²¹³

Mallat goes on to suggest that we should not have expected such self-restraint given how much power the Guardian Council enjoys. However, no less a jurist than Khomeini himself, at the peak of the 1981 constitutional crisis, proved otherwise. As I discussed in section two, Rafsanjani made a direct appeal to Khomeini to exercise his judicial review power as the supreme jurist and end the jurisprudential impasse. The Ayatollah refrained, fearing that imposing his judicial review authority, in that specific context, would undermine the system entirely. It

²¹³ Mallat, 95.

was an act of pure judicial restraint, and it set a precedent that the Guardian Council could have followed.²¹⁴

Could have. The Guardian Council, by repeatedly exercising its legislative license in the face of popular resistance, has instead deliberately chosen a path of judicial activism. Rather than deferring to the supreme jurist during those formative years when he was alive, the Council pursued a policy judicial combativism against the Majles, its co-member in the legislative branch, bringing the counter-majoritarian dilemma to reality.

²¹⁴ That Khomeini, in the 1987 crisis, did what he said he would not do in 1981—invoke *maslahat* as part of his judicial review power—does not change the fact that he demonstrated that judicial restraint was part of the jurist’s arsenal, and that it needn’t be, nor should be, disregarded.

Chapter Four: 'A Lion without Head, Tail, and Body'

The Revolution cannot be lasting unless it is embodied in a framework of legal order.

—*President Ali Khamenei*²¹⁵

1. The Mechanics of a Seventy-Year Search for a Constitution

Iranian political history of the last one hundred years can best be understood through the metaphor a mechanical clock, with the arms representing the passage of time, and a massive pendulum symbolizing the system of governance. The pendulum must swing for the clock to function, but the intensity and severity of the swings can alter the clock in unforeseen and undesirable ways; a consistent rhythm is ideal, but in Iran's case, is rarely sustained for long.

Like the framers of the 1979 constitution, the Legalist faction of the 1905-1911 Constitutional Movement believed in a system of government that was conditional to the sacred law, and were confident that their movement would lead them to it. The Persian Constitution of 1906 included, in its supplemental laws, a proto-Guardian Council—a committee of Shi'a jurists whose duty it was to ensure that the laws of the nation and the affairs of the monarch were in accordance with Islam. Its underlying purpose was to prevent the subjugation of the socio-political

²¹⁵ Arjomand, *After Khomeini*, 163. Quoted in August 1982.

class of pious Muslims and their clerical leaders, whom the more secular Qajar shahs found displeasable. In that endeavor, the 1906 Constitution failed. The Pahlavi shahs that followed ignored the supplemental laws and increased their control over the state in the ensuing decades. The pendulum leans to the left.

Along came the 1979 Revolution. It was, in its genesis, a populist movement, represented by a broad cross-section of society. It only became an Islamic revolution when, during the chaos of 1979-1980, the IRP led the drive to purge the undesired elements from shaping the new government. This drive began with the framing of the constitution, and the system that emerged reflected their aspirations and insecurities. Moreover, they were committed to avoiding the trappings of revolutions past, which taught them two lessons. The first was to not trust that any constitution, no matter what its intent, can necessarily limit the executive powers of a monarch or president so that he does not infringe upon the civil liberties of the people, particularly of the religious class. Second, popular government is not necessarily a barrier to tyranny: the public, through less insidious means, can be just as oppressive as the dictator. The threat is majority rule, no matter what its form. The framers trusted no political institution or source of authority unless it was a product of their own ambition or conviction. Consequently, theirs was never an intent to create, with the Constitution of 1979, a system of governance with the proper distribution of powers, along with a procedure to monitor that distribution through checks and balances. Where these constitutional elements did exist, they were confined to the second tier of

government, where they would be of no threat to the clerical judicial establishment. And even at that second tier, power was structured in such a manner so that the *fuqaha* maintained a check on the other branches of government, but not vice versa. This would ensure that the development of constitutionalism would favor their approach. The pendulum leans to the right.

2. At What Price an Islamic Republic?²¹⁶

In an attempt to reverse the excesses of the Pahlavi dynasty, the Islamic revolutionaries traded one political misalignment for another. Their readjustment of the clock overcompensated for the existing imbalance that had been in the Shah's favor. The question I raised earlier was whether this overcompensation was done intentionally. I maintain it was.

During the early years of the first republic period, a second revolution took place, a coup d'état led by the clerical establishment. Through the power and force of law, the Legalist IRP faction initiated an ideological desecration of the existing constitutional order. New institutions were created, literally overnight and outside the purview of the other branches of government, to advance the IRP's ideological framework. The older, non-ideological agencies weren't replaced—they were

²¹⁶ This phrasing comes courtesy of the late Dr. Hossein Ziai, former Director of Iranian Studies at UCLA.

absorbed, swallowed whole.²¹⁷ Other government offices, including the military, were purged of members not sympathetic to the new order. They were followed by sham trials and mass executions by the hundreds. Most of these judicial acts were not even exercised by the judiciary branch, but by ad hoc “Revolutionary Courts” established by Khomeini, at the urging of the IRP, for this very purpose. By 1981, an entire parallel government had come into existence, technically unconstitutional, but blessed and sanctioned by the jurists. There is no doubt that this process of “judicialization” of government was done deliberately, trampling every major defining principle of constitutional republicanism. As an experiment, the cohabitation of Islamic Legalism and Western constitutionalism did not necessarily fail; it was extinguished prematurely. What we can conclude from these developments is that the Islamic Constitutional Republic of Iran during the first republic was neither constitutional nor republican, as those terms were understood in 1979.²¹⁸ The campaign to strip the political framework of any Western-inspired appurtenances has brought Iran full circle, back to a state of authoritarian rule—whether it is a tyranny of the monarch or of the jurist, over time the difference becomes one of degree rather than kind.

That the Revolution created a jurists’ republic is indubitable; that, by the summer of 1979, this was a *fait accompli* is not. One day in August of that year,

²¹⁷ Arjomand, *After Khomeini*, 163.

²¹⁸ Recall from the first section that the principles of a “constitutional republic” that were used for the 1979 Constitution were borrowed from the French Constitution, itself inspired by Montesqueiu’s theories on the subject. Therefore, we can conclude that we have a basic understanding of what those terms meant in 1979.

while the Assembly of Experts was still debating whether the “mandate of the jurist [should be] the protector of the revolution” rather than the principles of popular sovereignty and the balance of powers already enshrined in the draft constitution, a senior *faqih* stood up in the chamber. Frustrated and concerned with the direction of the debate, he made this foreboding plea to his colleagues: “Do not allow our enemies to say that a bunch of mullahs sat there and wrote a constitution to justify their own rule. For God’s sake, don’t do this ... by consigning all the power to the jurist, do not turn the sovereignty of the people into a lion without head, tail, and body. For God’s sake, don’t do this!”²¹⁹

²¹⁹ Ibid, 28.

PART THREE · Discourse on Comparative Constitutionalism and Islam

In the field of comparative constitutionalism, Ran Hirschl's scholarship stands out for the breadth and depth of his analysis of constitutional systems within various regime types. Two of his works, in particular, apply in the context of Iran and are worthy of discussion. The more general of the two, *Towards Juristocracy*, captures the core of Hirschl's charge that the last two decades have seen a shift in political power from representative institutions to judicial ones. This process, he argues, is done constitutionally (either through an existing constitutional framework or through the creation of a new one). The result is a system that favors, and is led by, the judiciary at the expense of other branches—a *juristocracy*, in Hirschl's parlance.

A “juristocratic” regime, by Hirschl's definition, requires an empowered judiciary that is able to exercise the force of judicial review, or a variation of it, as needed and without obstruction from any other agents of government. With the sole power to say what the law *is*, such a system functions less as a “pure democracy” (where the legislature is sovereign) but instead becomes what Hirschl calls a “constitutional democracy”. The fundamental characteristic of this latter democracy-archetype is that it protects the polity's minority from an over-zealous and over-reaching majority, a safeguard that a pure democracy cannot guarantee. A constitutional democracy is able to afford such protection by means of a legal framework of rights (the constitution) helmed by jurists with the exclusive authority to interpret them (judicial review).

In *Constitutional Theocracy*, Hirschl applies his theory of juristocracy to a specific context: a government where political and religious authorities coexist but are not conjoined. Depending upon the particular flavor of constitutional theocracy (Christian, Judaic, Islamic, etc.), the juristocratic element may reside in the political branches, in religious bodies, or a combination of both. Hirschl contrasts this arrangement from “pure theocracies”, where the offices of supreme political and religious leader reside in one body (under the traditional pre-Ottoman Islamic caliphate model, for example) and, most importantly, said leader possesses a divine right to rule, thereby imbuing his legal proclamations with equal weight to those directly from God. Under Hirschl’s model of constitutional theocracy, a formal political-religious separation is enshrined by law (though, as is the case with Iran and will be expanded upon later, whether that formal separation actually exists in practice is an entirely different matter).

Another form of theocracy Hirschl acknowledges is an ecclesiocracy, which arguably better describes Iran’s current form of government: a political hierarchy led by religious figures who govern the state but without a divine mandate. Hirschl cites the Vatican’s papal system as an example, which elects the supreme religious-political leader (the Pope) through a quasi-legislative assembly (the College of Cardinals). In the Twelver Shi’a tradition, during the period referred to as the Greater Occultation (the absence of the final *imam zaman*, or Imam Mahdi), there can be no other political-religious leader with the divine right to rule: only the twelve imams hold such privilege. Instead, what we have in the imam’s absence is a

vicegerency — a corporeal deputy of the hidden imam who operates as a steward of the Shi'a Islamic state. If this system appears to resemble the Catholic ecclesiocratic model more than a pure theocratic one, it is because Iran's system is, for all intents and purposes, an ecclesiocracy (although Hirschl doesn't acknowledge it as such).

According to Hirschl, the classification that best applies to the Islamic Republic is *constitutional theocracy*. Under this model, a formal and legal separation exists between the political and religious leadership. The power to govern (and what is meant by “govern” is open to fierce debate with respect to Iran) is granted by the constitution exclusively to political officials; the religious figures, technically, are divorced from any authority to govern the republic. That this separation, therefore, is enshrined in a constitution further distinguishes Iran from a pure theocracy.²²⁰

A constitutional government, Hirschl maintains, must also provide for some form of “constitutional court” with the vested power of judicial review of legislative and executive enactments. This leads to a second form of “separation”—that between the various branches, as I discussed earlier with respect to the *horizontal* and *vertical* dispersement of power as part of an “ideal” constitutional structure. In fact, Hirschl presents his own ideal model of a constitutional theocracy, with the following elements:

²²⁰ One can argue, as many have, that a true separation does not exist in Iran, and that this condition — absence of a discernable separation — should strip the system of its classification as a constitutional theocracy. I have explained elsewhere in this paper why such an argument is shortsighted.

1. Fealty to the main components of “modern constitutionalism”, if not to all of them, the most important of which are a formal separation of political and religious authority (tier one separation) and a similar demarcation between the various political branches (tier two separation, highlighted by the power of judicial review).
2. One formal state religion, recognized by all political institutions.
3. Constitutional provisions designating the state religion—its sources, interpretations, traditions, etc.—as the foundation of and inspiration for all non-religious laws, and that said religion serves as the basis for all jurisprudence and judicial applications of the law. Put another way, this element protects religion and its institutions from the non-religious agents of government.
4. Collective of “religious bodies and tribunals”—judicial agents, essentially—which serve alongside or instead of a “civil court system”. Hirschl notes that although these bodies enjoy a degree of “jurisdictional autonomy”, they must nonetheless be accountable to “constitutional review” by upper courts (presumably non-religious).

Having offered his model of a proper constitutional theocracy, Hirschl then proceeds to find evidence of it throughout the world, but primarily in the Islamic Middle East where, either in form or substance, it “governs the lives of hundreds of

millions from Egypt to Pakistan” (where *shari'a* has heavy influence on legislation, in one form or another). Iran, of course, is a member of this club. However, Hirschl’s choice of geographic bookends (Pakistan and Egypt) for his assertion that constitutional theocracies prevail in the region reveals an interesting fact that either Hirschl is unaware of or simply dismisses as immaterial to his thesis: Pakistan, Egypt, Iran—and many other states in between—are not just examples of Islamic constitutional theocracies, but also of Islamic constitutional *republics*.

What impact does a republican form of government have on a theocracy? As it turns out, quite a lot, although it can vary depending upon the degree of religious influence in the state’s government. Republicanism, as I explained in an earlier chapter, in theory imposes limits on any would-be theocratic enterprise, chief among them is the prevention of any form of dynastic succession in political leadership; furthermore, a constitutional Islamic republic should also obviate any tendencies towards the establishment of a powerful, permanent priestly class (though, as with Iran, that has clearly not always been the outcome). Ultimately, there must be a reason why the majority of Islamic states have chosen to form as republics rather than, as in the outlier cases of Jordan, Saudi Arabia and the Gulf states, monarchies or emirates; and if there are any reasons—which I argue there are—Hirschl does not offer them.

What Hirschl does provide are observations about constitutional theocracy and its place in the world—observations that are better explained by considering *republicanism* as a material part of the political landscape. As one example, in

looking at the last forty years, he makes the generalization that there are two diverging “constitutional trajectories” vis-a-vis modernity: for Western societies, we see the “gradual political and constitutional refinement of religion”; Islamic systems, meanwhile, have “taken the opposite route”. Hirschl makes the case for a singular origin for constitutionalism that, over time, splits into different variants depending upon the thrust and vector of religious forces on the polity. With a limited model of constitutional theocracy as his guide, he tries to make disparate pieces fit together when he takes a political system that has become associated with political Islam (theocracy) and seeks to reconcile it with a legal framework for governance (constitutionalism) that is uniquely Western in origin. That is not to say that theocracies do not or have not existed in the Western world (they have, but Hirschl elects to call them *ecclesiocracies*) nor that constitutionalism has no roots in Islam. Rather, it goes back to the argument made earlier that there is no unitary model of constitutionalism, and that what we have seen in certain Islamic societies (namely, Iran) is constitutionalism of a different kind, not degree. In other words — and this is where Hirschl gets it wrong—there has been no constitutional divergence in the last forty years because these are different parallel strands of constitutionalism that were *never converged to begin with*. If you give both Western and Islamic constitutionalism the same evolutionary history, or argue that they share a common origin, then you can easily make the case for this divergence, as Hirschl does. But then you must also accept a revisionist interpretation of the historical tableau that frames this “divergence” narrative.

None of this is to suggest that Hirschl is entirely misplaced in suggesting that the West and Islamic Middle East have pursued different “trajectories” with respect to their political systems. But instead of looking at constitutionalism for an explanation, Hirschl should consider republicanism: as the Western world has moved closer to a “pure republic” model of governance, it has simultaneously shifted away from a religion-dominated or -influenced system. We should expect this to be the case given that republicanism does not accommodate dynastic or hereditary succession, whereas Islamic societies tend to favor one or several prominent religious leaders and, afterwards, looks to their designated spiritual heirs or successors for leadership. Put another way: theocracy and republicanism can coexist, but not without tension, and most definitely not in their “pure” respective forms; to the extent that theocratic republics can be stable and prosper, it is only by the grace of a well-written constitution that is able to minimize those tensions. Currently, the Islamic Middle East is bereft of any such examples.

With respect to Iran, the trajectory taken by its clerical leaders is towards a dilution of republicanism — *this* is where, as Hirschl states, it has followed “the opposite route” from the West. As discussed earlier, the founder of the Islamic Republic began with a classical source for republican theory, Plato, and applied his own interpretation of it as seen through his speeches and publications in the early 1970s. The West, meanwhile, took the concept of Plato’s republic and turned it into what we know today as “modern republicanism”. Two different and parallel tracks, but each arguably with the same roots.

Furthermore, Hirschl sees constitutional theocracy as the logical defense to the threat of a religious dictatorship, or any other worst-case-scenario imaginable whereby a religious leader, or leaders, are able to run amok across the political order — it is a form of “aspirational constitutionalism” that permits religious doctrine to breathe freely in all aspects of politics but not at the expense of the greater public interest. Constitutionalizing religion, Hirschl argues, “neutralizes its revolutionary sting” and ensures that it remains part of the state political apparatus rather than become the entirety of the state itself.

But how accurate are these claims? Can we point to any period in modern history and find viable examples of the type of progressive constitutional theocracy that Hirschl propounds? Ultimately, is Hirschl *describing* constitutional theocracy or is he *designing* an idealized incarnation of it? One way to address these questions is to consider Hirschl’s arguments in support of his model of constitutional theocracy, one at a time, while keeping in mind that Iran’s post-1979 experience challenges the validity of each and every one of them:

- *Constitutionalizing religion, by virtue of granting legitimacy to matters of faith, mollifies public demands and relieves pressure for more radical change.* This maxim holds only if, as a function of political reform, a constitution is enacted in response to demands for one; if the constitution is merely an accessory-after-the-fact meant to paper over the undesirable byproducts of political reform, there is no guarantee it will placate anyone. Take as an example Iran’s two political revolutions of the 20th century. In the first,

beginning in 1906, the creation of a constitution that would limit the powers of the shah while also creating a more representative system was the explicit goal. The process that ended in 1911 left a comprehensive legal framework for governing a modern state where none had existed before. In 1979, the stakes were different: replacing an entire regime-type with something heretofore unseen in the modern era. Islamic government, as Khomeini stated many times, was the objective; a constitution was incidental to the process, and ultimately created only after the insistence of progressive factions within the Islamist revolutionary groups. And when the constitutional process was subverted by the more radical elements within the committee tasked with drafting it, the result was what Hirschl might have predicted—religion enjoying a protected and “legitimate” status under the laws of the state—but without the critical result of public appeasement. By the time the greater Iranian public became aware of the extent to which the new constitutional Islamic Republic of Iran was more “Islamic” than it was “constitutional” or a “republic”, it was too late. As the last thirty-plus years have shown, the constitutionalization of religion has left the Iranian people in various degrees of dissatisfaction with their government.

- *Constitutionalizing religion co-opts its leaders.* The 1979 Islamic Revolution did precisely the opposite of what Hirschl’s model predicts: instead of checking the power of clerics at the legislative door, it gave them a direct invitation to not only interpret the law but to write it as well. The result has

been a degree of religious-clerical empowerment that no one could have foreseen in the fall of 1978. A similar argument could be made for the first Egyptian constitutional government under Mohammad Morsi—and subsequent rise, albeit short-lived, of the Muslim Brotherhood—following the removal of Hosni Mubarak from power.

- *Where religious doctrine is to serve as a basis, or the basis, for public law, constitutionalization gives non-religious agents of the state a say in how those laws will be drafted and interpreted.* Inviting scripture into law and politics is a major concession of constitutionalization; but what about allowing religious clerics, themselves, to run for political office? What would happen if a coalition of religious legislators, executive appointees, judges, and bureaucrats become a majority? Unless Hirschl's model of constitutional theocracy completely forecloses the option for clerics to become politicians—a question he does not even consider—it is at best naive to assume that constitutionalizing religion will do anything other than open the door to the theocratic monopolization of the state's political institutions.

Lastly, and beyond all other reasons provided, Hirschl writes that constitutionalizing religion “brings an alternative, even rival order of authority under state control and supervision”. We need not fear of invoking a fox-in-the-hen-house scenario when inviting religion into government because, as it were, the mere existence of a “constitution” stands in the doorway that separates political

participation from political *dominance*: “Just as in constitutional democracy the ‘constitutional’ keeps in check the ‘democracy’ aspect, so does ‘constitutional’ in constitutional theocracy limit the spread of theocratic governance in settings prone to such expansion,” Hirschl maintains.

Indeed.

The crux of Hirschl’s most important claim—that constitutionalism can act as an organic check-and-balance against religion in a theocratic system—ultimately rests on the fallacy that there is a universal understanding of what “constitutionalism” means or what a constitution should look like. But forget about a global or even regional consensus: in Iran, the status quo is one where even those within the very same state, religious sect, or branch of government cannot agree on what constitutionalism entails. Until a comprehensive accounting of what constitutional government is can (a) be formulated and (b) generally agreed upon in the Islamic Middle East—or at least in the Shi’ite world—there can be no such thing as a genuine “constitutional theocracy”.

None of this, however, is to dismiss the observations Hirschl makes or the conclusions he puts forth about constitutions in theocratic regimes; his descriptions of the process are correct, but the designation is not: what he is describing is not “constitutional theocracy” but a “constitutional republic” operating within a theocratic framework. It is the institutions and mechanisms found in republicanism that can function to curb religious tides in a constitutional order, which, at a minimum, includes a republic’s aversion to and incompatibility with a

hereditary-based system or other arrangement where the succession of power is transferred by appointment. A republican form of government, where the election of its leaders is vested to the public and where governance operates according to the rule of law enshrined in a constitution, offers the very protections against religious tyranny of which Hirschl advocates. Although Iran calls itself a constitutional Islamic republic, it is republican in name only, and operates in actuality as a constitutional theocracy led by a clique of “turbaned shahs”. With only token vestiges of republicanism, and despite the supposed safeguards built into the constitution, Iran has become the very model of constitutional theocracy that Hirschl claims should not exist, notwithstanding the fact that, on paper, it bears all the traits of constitutional theocracy that Hirschl espouses.

In *Constitutions in a Nonconstitutional World*, Nathan Brown examines the role of constitutionalism in the Islamic Middle East, with a primary focus on the Arab world. He argues that the cumulative Arab experience with constitutionalism may help scholars better understand the broader constitution-making process elsewhere—especially where states are transitioning from non-constitutional to constitutional systems (rather than, say, from one constitutional scheme to another). Challenging what he refers to as a pervasive cynical view of constitutions as non-constitutional, Brown maintains that there are deeper reasons why constitutions are written in this part of the world, and that they are not just facades meant to mask the true, often authoritarian, system underneath. Accordingly, he identifies and designates two constitutional archetypes: the standard kind that

limits the power of government, and a “non-constitutional constitutions” that do not. It is the existence of the latter type upon which he expends the greatest attention, arguing that they serve an important purpose: to systematize power without restraining it.

And this is where Brown’s probe into constitutionalism stops. He does not consider the material role played by religion, or the absence of it, on constitutional regimes. No discussion of constitutions within theocracies is offered, and certainly no mention of constitutional republics as a distinct strain of constitutionalism worthy of further analysis on their own. As Hirschl also writes of Brown’s work, “religion and secularism do not play a key role in [his] matrix.” Moreover, Hirschl cites Brown as a premier example of how, within the field of comparative constitutional law, the “silence is deafening” when it comes to in-depth analyses of the nexus that is “the potentially explosive combination of modern constitutionalism and ... theocratic governance”. As I have shown, Hirschl’s own analysis suffers from similar gaps in coverage of the same topic. My purpose is not necessarily to fill in those gaps, but to acknowledge that they exist.

Ultimately, Hirschl’s very brief consideration, and subsequent dismissal, of Brown and other comparative constitutional scholars rests upon the premise that there is very little scholarship to even consider. Another recent attempt—and I would argue, the most comprehensive overall—comes from Grote and Roder in their edited volume *Constitutionalism in Islamic Countries*.²²¹ Where Grote and

²²¹ Rainer Grote and Tilmann Roder, *Constitutionalism in Islamic Countries* (Oxford University Press).

Roder separate from the existing literature is with their multidisciplinary approach towards comparative constitutionalism (in this instance, focused on Islamic systems, only): the essays that make up the text come from Islamic and wells as constitutional scholars, with each offering a unique perspective. Furthermore, the issues addressed are both general and country-specific.

Grote and Roder begin with an exposition on Islamic constitutionalism's historical development and interactions with other constitutions of the time, starting with the premise that Islamic constitutionalism as understood today did not exist until, and cannot stand on its own without, European influence. The attempt to read early Islamic porto-constitutionalism into such documents as the Charter of Medinah, they argue, is a recent phenomenon (perhaps even revisionist?) and is not backed by centuries of constitutional development or application. Modern constitutionalism arrived in the Islamic Middle East aboard a series of political reforms and movements in Tunisia, Egypt, and the Ottoman Empire during the 19th century. Their source of inspiration was, primarily, the Belgian Constitution of 1831. This and other early European constitutions also served as the model for the Iranian constitution of 1906, as well as others in the 20th century. No effort at comparative constitutionalism and its impact on the Middle East may be considered complete without accounting for these early European paradigms, in particular that of Belgium.

Grote and Roder maintain that efforts at “constitutionalizing” the Islamic world by reconciling it with European models of constitutionalism, by and large,

met with no lasting success. And it wasn't until 1906, with the drafting of the Fundamental Law during the early stages of Iran's constitutional revolution, that "the hitherto unquestioned belief of the early Islamic reformers of the compatibility of European-style constitutionalism with Islam was shaken for the first time". It was at that moment when first observed Islamic constitutionalism develop into a product and process of its own legal and religious tradition: no longer would it be subordinate to or limited by European dictates of what a constitution is, or should be. Iranian constitutionalists began asking, "What does *constitution* actually mean?" They introduced (or re-introduced, depending upon the source) the theory of *masbruteh-ye mashru'eh*—"constitutionalism that conforms to the Sacred Law". As a result of this Iranian experiment, constitutionalism in the Islamic context took on a possible new meaning, and with it a new identity and purpose: conditionality. That is to say, laws of accountability of government, and the consent of the governed, are to be conditional to the Sharia. This novel interpretation of Islamic constitutionalism began as part of the discussions surrounding Iran's constitutional revolution; unfortunately, as I stated earlier, that discussion was silenced and remained dormant until Khomeini resurrected it—and then altered it completely—decades later in his treatise on Islamic government.

Finally, Grote and Roder also consider the example of "the first independent Islamic constitutional republic", Pakistan. Here, they discuss how the 1956 constitution attempted to reconcile *republicanism* (whatever that may be—Grote and Roder do not define it) with principles of governance "as enunciated by Islam".

²²²This leads back to my main contention that any discussion of Islam and constitutionalism must also consider what it means to be “Islamic and constitutional” in a the context of a republican form of government, as almost all constitutional regimes in the Islamic Middle East claim to be. Grote and Roder conclude by revisiting Iran and its second great revolution, in 1979, and determine that Khomeini succeeded in converting “Shi’ite doctrine and law from a mere limitation imposed on constitutional government into the very foundation of the constitutional legal order”. And yet again, what they *do not* include in their analysis exposes the limitations of the current scholarship in the study of Islamic constitutionalism, in general: no discussion of or reference to what it means to be an Islamic constitutional *republic*.

To summarize the current lacuna that exists within comparative constitutional studies in religious societies, I must return to Hirschl: he and his contemporaries are looking at—and looking *for*—the coexistence between constitutional law and religion, whereas the inquiry should really be about the function of constitutional law *in* religion. To wit:

[V]ery few works have explored the intersection among constitutional law, religion, and politics in the new world of constitutional theocracies, with their competing commitments, conflicting worldviews, and rival visions of the "good sociopolitical order."²²³

²²² Grote and Roder.

²²³ Ran Hirschl, *Towards Juristocracy: the Origins and Consequences of the New Constitutionalism* (Harvard University Press).

If, as Hirschl suggests here, we want a greater understanding of constitutional law and religious politics against the backdrop of constitutional theocracy, “intersection” is both the wrong visual metaphor as well as guiding methodology: it is not about the weaving of two distinct roads but of one dominant road being augmented by another secondary one—a second road which may, over time, usurp the dominance of the first.

On the Republic of Turkey and Turkish Constitutionalism

Although Iran is not the only self-proclaimed “constitutional republic” in the Middle East, its legacy of constitutional experimentation and development stand above all its neighbors — both republic and non-republic alike — but for one prominent exception. The modern Turkish republic, formed after the collapse of the Ottoman Empire, also boasts a rich history of constitutionalism. Indeed, the argument could be made that Turkey has enjoyed a greater contiguous and linear trajectory of constitutional development. Nader Sohrabi makes such a claim, arguing that although historians may overlook Turkish constitutional achievements vis-a-vis Iran, the Turks have “succeeded” where the Persians have not by creating, in his words, enduring political institutions.²²⁴

No doubt, a deeper comparative analysis of Turkish and Iranian constitutional development is warranted, in particular one that expands Sohrabi’s cursory

²²⁴ Sohrabi, *Revolution and Constitutionalism in the Ottoman Empire and Iran*, 30.

discussion of religious legal tradition and its impact on constitution-making in both countries. It is, to be precise, the role of Islam in the constitutional process that most distinguishes the Ottoman-Turkish experience from the Persian-Iranian one: the former Sunni, the latter Shi'a, each sect carries its own rich jurisprudential narrative that shapes the thrust and vector of the constitutional trajectory. This discussion is too demanding in scale and scope to be included here, but that it must be included in any broader survey of constitutionalism is beyond question.

PART FOUR · Conclusion

Suppose we were to require that “success at constitutionalism” exhibit the following traits: clear separation between the branches of government, an equitable checks-and-balances arrangement, mutual respect for the duties and powers of each office, fealty to the rule of (constitutional) law, and either an absence of constitutional crises or a smooth mechanism for resolving them. If these are to be the virtues of constitutionalism, then by all accounts no one can claim that Iran has succeeded at creating a lasting constitutional system of government, either in monarchical or republican form. However, the enactment of a *constitution*, and the fact that the constitution does not reflect the qualities we desire, should not speak as to the success or legacy of *constitutionalism*; the former is a singular event connected to a unique charter or document, the latter is a process that is associated with a movement. Iran's two major constitutions of the 20th century may have failed to live up whatever standards we establish for success, but it would be premature to close the book on the process of Iranian constitutionalism. Going back to the late 19th century, Iran represents a laboratory where all manner of political, legal, and religious theories and ideologies have been mixed together, to varying degrees. There is value to be found in this larger experiment, even when — and *especially* when — that experiment seems to fail. Let me be clear, however: Iranian history does not stand as a testament to or paragon of effective constitutional development. But it stands as example of constitutional development nonetheless; it has been, and continues to be, a unique example of the

greater exercise of constitution-making, warts and all. To that end, Iran is not offered as an example of constitutionalism done perfectly, but as a perfect example of the *process of constitution-making*.

Central to this process, however, is the institution of the judiciary. It is the jurists who can ultimately shape whether a constitutional republic succeeds as both a constitution and a republic, or whether it fails. Because, in a constitutional system, it is legal power that begets political power, Iran's political struggles as a republic since 1979 are directly attributable to the institution charged with stating what the law is. Put simply, where the judiciary is empowered as a co-equal institution to the other branches of government, and where it is endowed with independent (free from external influence) judicial review, the likelihood of success as a constitutional republic are materially greater — assuming all other elements of constitutional governance and republicanism are satisfied. Iran's constitutional successes came when the jurists acted, and were able to act, in such fashion.

Conversely, there is a darker underside to judicial empowerment, whereby it goes too far and becomes a source of tyranny and absolutism in its own right. As I've shown, examples of such behavior are replete in the modern Islamic Republic. Yet despite its numerous issues, or perhaps because of them, the Iranian constitutional experience can help us understand constitutionalism in general. Iran's contribution to this field is due in part to the proactive role of its Shi'a jurists, and also because it has stood at the nexus of traditional Islamic

jurisprudence and post-Enlightenment European political development. When both of these elements are combined, what results is an over one hundred-year narrative of constitutionalism that is without parallel. *Within* this narrative, many of the constitutional challenges that affect the modern Middle East have already been addressed, and *through* this narrative, these challenges can be resolved.

Iran's failures stand out, however, because it pioneered constitutionalism in the early 20th century in a region where few understood what constitutionalism meant, and because its 1979 revolution was meant to serve as an inspiration for constitutional republicanism in the entire Muslim world. This paper has explored the reasons behind these failures: why Iran has been unable to implement a successful and lasting constitutional order. I conclude that the dominant source of constitutional failure, and of republicanism along with it, is a political system with weak or otherwise deformed judicial institutions; only an empowered and independent judicial branch can ensure that the constitutional process survives, and that the principles of republicanism endure. There are three reasons why, I argue, this is true.

First, contrary to James Madison's assertion in *The Federalist* papers, the judiciary in a republic is not and need not be the least dangerous branch of government. In fact, as I have argued, an empowered and independent judiciary is central to a well-functioning constitutional republic. The constitutionalists of Iran's 1906-1911 movement understood this concept, and even succeeded in

incorporating a form of judicial empowerment into the constitution. What they lacked was the political capital to make it survive beyond the constitutional text. The constitutionalists of 1979, overflowing with political strength and the type of hubris that comes with revolutionary triumph, learned from this experience, and as a result enacted a constitution that elevated the Islamic jurist to the most powerful positions in government. But it ended up empowering these jurists in excess — the pendulum swung too far in the opposite direction. Over the course of two constitutional systems, the Iranian judiciary has gone directly from impotence to tyranny, without a stop anywhere in between.

Second, Iran, like many other Muslim states in the Middle East, found it fit to graft European constitutionalism onto Islamic legal tradition, but in the least effective way possible. In 1906, Iran borrowed heavily from the Belgian and German constitutions of the period when formulating its own; in 1979, the inspiration was the constitution of the French Fifth Republic. In both instances, Iranian constitutionalists looked to *civil law* European models, disregarding English *common law* tradition as an alternative. This, I argue, was and remains a critical mistake, and it is a mistake shared by other constitutional republics in the Middle East where the legal tradition draws heavily from Islamic jurisprudence.

Third, Iran has pursued a form of Islamic constitutionalism for over a century, but not once during that time has a consistent understanding of what "Islamic constitutionalism" *means* emerged. The country's political leaders are flying in the

dark, legally speaking, shifting and taking dramatic maneuvers with little guidance and no provenance. The problem, therefore, is not a lack of debate on the meaning of constitutionalism is Islam, but a lack of consensus.

Despite these challenges, and in some ways because certain mistakes were made, there is much that can be learned and applied from Iran's one hundred-plus years of constitutional politics. This experience demonstrates, and offers as a lesson in, the following:

1. *The role of the jurist/judiciary as a vanguard against tyranny and authoritarianism.* The warm-up to the 1906 constitutional revolution began with the famous "Tobacco Protest" of 1890, an uprising against the Qajar king Naser al-Din Shah. The protest was initiated by a cleric, Grand Ayatollah Mirza Hassan Shirazi. The revolution that it ushered in sixteen years later would not have occurred without the support and role of two other ayatollahs, Khorasani and Na'ini. In 1963, it was a junior cleric who stood up and led the resistance to Mohammad Reza Pahlavi's "White Revolution", a series of political and social reforms that the Shah sought to implement as a means of modernizing Iran and, indirectly, weakening the power of the clergy in Iranian society; that cleric, Ruhollah Khomeini, would resurface the following decade to lead the revolution that ultimately ousted Mohammad Reza Shah. The Iranian clergy have taken pride in their role as "defenders of liberty" and, they would argue, often the lone

opposition to a despotic central government. Although these claims suffer from a degree of hyperbole (some of this having to do with the Shi'ite tradition of quietism, and also the question of the clerical role during the 1953 coup), they are not baseless and, in fact, deserve praise.

2. *A template for an East-meets-West political and legal system.* The constitutional movement that began in 1906 included amongst its boosters an influential segment of Iran's clerical elite as well as the newly-minted secular intelligentsia (*rohshanfeker-ha*). The resulting constitution, therefore, had to incorporate an ideological tent big enough to fit both of these very dissimilar constituencies. With the addition of the supplementary fundamental laws (1907), that is precisely what happened: a secularist charter initially modeled after the Belgian constitution now included official language as to the state religion (Twelver Shi'ism) and the role of ulama in government (a clerical committee to oversee acts of parliament). This represented a first for the Muslim Middle East: a constitutional system of governance incorporating both Western secular principles and Islamic legal tradition. The process was repeated, again, in 1979: the new Islamic republic was infused with elements of Western republicanism and constitutionalism (the text of the constitution borrowed heavily from the constitution of the French Fifth Republic) with an ultimate deference to Islamic law, creating a hybrid system that included both popular sovereignty (in the offices of the presidency and the parliament) and divine

sovereignty (in the form of the *vali faqih* and the “guardianship of the jurist”).

3. ***Constitutionalism as a process-oriented, not event-oriented, phenomenon.***

Phrased differently (and to borrow from Franklin Roosevelt), a constitution should not be a formal legal document, but a statement of general principles — a “layman's document, not a lawyer's contract”. Too often, constitutions are drafted and, in subsequent generations, interpreted as if they are static, immutable and sacred words. Ultimately, as I have maintained, constitutionalism is a process, not a product tied to a singular event. In that regard, we could say that constitutional movements should never actually stop *moving*; there is no end point. Thus perfection cannot and should not be attainable, because that implies the process has stopped (Voltaire: “Perfect is the enemy good”). Iran's constitutional movement began in 1906 with the document itself, but it was incomplete. It took the supplementary laws added the following year to sufficiently empower the judiciary. The process ended prematurely in 1911 after years of resistance from the Qajar Shah Muhammad Ali with the support of the British. But for foreign power intervention, we don't know how thoroughly Iran's 1906 constitution would have evolved; there is no doubt that it was evolving, however, and we know that the constitutional process was moving forward. The same scenario played out with the 1979 constitution of the Islamic Republic: incomplete and imperfect following the revolution, but a

series of constitutional crises during the early 1980s forced Khomeini to intervene, whereby he both expanded and restrained the strength of the judiciary in order to end the existing power struggle between the jurists and members of the Majles (parliament) — a struggle which could have brought down the entire system. But the 1979 constitutional movement, like its 1906 predecessor, faced a premature death of its own along with the supreme leader in 1989: the sudden (and, one could say, unconstitutional) ascendancy of Khamene'i to ayatollah status and then, subsequently, to the position of supreme leader accompanied several key amendments to the 1979 constitution. The cumulative effects of these events brought the constitutional movement which began in 1979 to a halt, leaving Iran in the state of constitutional stasis and underdevelopment that it suffers from today.

Iran's rich constitutional history — one of the most enduring and exhaustive in the region — is worth understanding in detail because it is both a source of counsel *and* caution for any Muslim states seeking to establish functional and lasting systems of governance based upon constitutional republicanism.

Cumulatively, the Iranian experience may also serve as primer for constitutionalism in general and adds to what political and legal scholars have come to know about constitutional government: what it is, how it can be applied, and the methods by which it can best be preserved. The narrative of Iranian constitutionalism is so compelling because it underscores why the judiciary — the seat of legal power —

is the most important political branch of a constitutional republic; it is the one institution, if properly set up, that is most qualified to illuminate the breadth and boundaries of a constitution, and the body most capable of moving constitutionalism forward to where it needs to go in order to survive. The purpose of a modern republic, be it Iran or Egypt or France or the United States, is to advance liberty and justice through a constitutionally enshrined legal order. It is jurists who serve as the guardians of that order, and the institution of the judiciary where the *process* of constitutionalism remains in motion. Constitutional evolution, therefore, must follow political revolution — *that* is the singular conclusive message we should derive from over one hundred years of Iranian constitutionalism.

Iranian Constitutionalism and the Ayatollah's Legacy

“I cannot believe ... that the purpose of all of these sacrifices was to have less expensive melons.”

This was Khomeini's response to the disaffected masses in the streets of Tehran and everywhere else in Iran, late in the summer of 1979. His Islamic revolution meant many things to many people. To the country's working class, which represented his main populist base of support and for whom the hyper-inflation of the Shah's last years made day-to-day survival an economic burden beyond measure, it was all about melons, either literal or in the metaphorical sense (lower

price and greater access to basic foodstuffs, or any similar pressing need). For the upwardly mobile middle class, the technocrats, the intelligentsia, and the secular elites, their fruits would be the promise of a constitutional republic and all of its trappings. Regardless, everyone wanted some form of melons: cheaper melons, greater variety of melons, equal access to melons for all, regulated melons, or the right to abstain from melons altogether.

In a way, Iran's multiple constitutional movements, like produce at a farmers' market, have always been about something being offered or sold to the public. The difficulties arise when buyer and seller, in legal parlance, fail to have a meeting of the minds; the constitutional architects have in mind a particular product while the public, as buyers, are expecting something wholly different. But when it comes to a preference for a constitutional republican form of government in the Islamic Middle East, Iran does not stand alone — the collapse of the Ottoman Empire and the end of European imperialism in the region has led to a plethora of constitutional republics in recent decades, in Iraq, Egypt, Syria, Lebanon, Tunisia, Yemen, Turkey, Algeria, and, if we go further east, Afghanistan and Pakistan. One could argue that the appeal of constitutional republicanism for newly independent or post-monarchical states is that, on the surface, it represents the ultimate antipode of tyranny, oppression, and dictatorship. Particular attributes of republican theory, as discussed herein, support this conception. If we begin, therefore, with what a republican form of government promises to deliver — liberty and justice — what constitutionalism serves to do, then, is to protect these

desired attributes through a formal mechanism of laws and an institutionalized judiciary to interpret them. Yet, despite these promises, constitutional republicanism for almost all of the states listed above has repeatedly failed to deliver either liberty or justice — their systems are rendered neither properly republican (because, although not monarchies, they suffer from hereditary rule) nor sufficiently constitutional (due to a compromised or overly-dominant judiciary). The question I am asking here — and have aspired to answer— is *why* constitutional republicanism has failed as a system of governance in this important part of the world, and whether, even in this purported failure, there is something valuable to learn about the *process* of constitution-making. Iran’s unique and compelling constitutional experience goes a long way towards answering these questions.

Constitutionalism — the process of constitution-making — need not be a success story exclusive to the Western world. And much about how we ascertain “success” or “failure” in this regard turns entirely on whether we are judging the product (the constitution) or the process (constitutionalism). If nothing else, my intent is that this paper will offer an alternative to how legal and political scholars consider and evaluate what it means to be a constitutional republic. As the world’s last remaining monarchies and dictatorships are slowly being swept away into the ashes of history, and as the Islamic Middle East continues to play an increasingly important role in international relations, this question becomes more worthy of consideration with each passing day.

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