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On Fallibility and Finality: Why Thinking Like a *Qadi* Helps Me Understand American Constitutional Law

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INTRODUCTION

Qadis have gotten a bad rap in American law. Justice Frankfurter seems to have started it. Emphasizing that the United States Supreme Court "is a court of review, not a tribunal unbounded by rules," Frankfurter chose this contrasting image: "We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."[1] This image of a Muslim judge as a symbol of arbitrary decisionmaking has persisted in

* Assistant Professor, University of Wisconsin Law School. I am sincerely grateful to David Ball, Andrew Coan, Anver Emon, Mohammad Fadel, Noah Feldman, Heinz Klug, Sadiq Reza, and David Schwartz for their very insightful comments and suggestions on an earlier draft of this Essay. I also thank Christopher Lund for inviting me to participate in the AALS Section on Law and Religion panel that prompted me to put these thoughts down in writing.

1. Terminiello v. Chicago, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting). Frankfurter's imagery undoubtedly was inspired by the judicial archetypes devised by Max Weber, who described uncontrolled judicial discretion as "kadi justice." *See* 2 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 845-1115 (Guenther Roth & Claus Wittich eds., 1978). There have been several credible critiques of Weber's typology, but whenever the image of the *qadi* turns up in American law, it appears to further this Weberian image. For some examples, see infra note 2.

American case law,[2] which is unfortunate, because its flat, one-dimensional depiction discourages more complex and illuminating comparisons that could be made between the *qadi* institution and the American judiciary. I hope here to undertake one such comparison. As a specialist in American constitutional law and Islamic law, I see theoretical similarities that transcend the institutional differences between these different legal cultures,[3] and have noticed that paying attention to these similarities can reveal deeper insights about why the differences are what they are, and what we might learn from them.

Judges and scholars in both Islamic and American jurisprudence have wrestled with the question of their own fallibility and how uncertainty and indeterminacy should be accommodated in the law. Complicating matters is society's need for finality in the resolution of important legal disputes. Both

2. Here are some examples, from both state and federal courts, spanning several decades: Olivieri v. Ward, 801 F.2d 602, 606 (2d Cir. 1986) ("[This court] does not kowtow without question to agency expertise, nor does it dispense justice according to notions of individual expediency 'like a kadi under a tree.'" (quoting *Terminiello*, 337 U.S. at 11 (Frankfurter, J., dissenting))); Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1163 (7th Cir. 1984) ("Our function is complete when we are satisfied that the arbitrator was not dispensing qadi justice but was construing the collective bargaining agreement."); Boston & Me. Corp. v. Ill. Cent. R.R., 396 F.2d 425, 425 (2d Cir. 1968) ("[I]f we were dispensing Cadi justice, we would be disposed to rule in defendant's favor. However, the limited scope of judicial review under the Federal Arbitration Act forbids our doing so . . . ."); Colonial Trust Co. v. Goggin, 230 F.2d 634, 636 (9th Cir. 1955) (noting that the plaintiff had no "intention . . . that the adjudication of its title and right to possession should proceed upon such abstract theory of justice which might be entertained by an oriental cadi"); Credit Union Cent. Falls v. Groff, 871 A.2d 364, 368 (R.I. 2005) (quoting Sullivan v. Chafee, 703 A.2d 748, 753 (R.I. 1997)) (commenting that the court will not consider "moot, abstract, academic or hypothetical questions" because "[w]e do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency"); Konover v. Town of W. Hartford, No. 538098, 1996 Conn. Super LEXIS 1097, at *13 (1996) ("The role of the court on appeal is not to sit in Solomonic judgment to consider the value of whatever property Konover may happen to own. 'We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.' The role of the court is instead to decide cases properly brought to it by appropriate legal procedures." (quoting *Terminiello*, 337 U.S. at 11 (Frankfurter, J., dissenting))); Dexter v. Idaho State Bar Bd. of Comm'rs, 780 P.2d 112, 115 (Idaho 1989) ("The current administration of moral character criteria is, in effect, a form of Kadi justice with a procedural overlay."); *Dexter*, 780 P.2d at 115 (citing MAX WEBER, *Bureaucracy*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 216-21 (H. H. Gerth & C. Wright Mills eds., 1946) ("defining Kadi justice as informal judgments rendered according to individual decisionmaker's ethical or practical valuations")); First Fed. Sav. & Loan Ass'n v. Vandygriff, 639 S.W.2d 492, 500 (Tex. App. 1982) (rejecting concept that "Commissioner's adjudicatory powers be exercised in oriental fashion where he sits 'like a kadi under a tree dispensing justice according to considerations of individual expediency'") (quoting *Terminiello*, 337 U.S. at 11 (Frankfurter, J., dissenting))).

3. Elsewhere, I have described similarities in methodologies of interpretation in Islamic law and American constitutional law. *See* Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67 (2006).

legal cultures have responded to the challenges of fallibility and finality in their own ways, and with profound impacts upon the nature of their respective legal institutions. The institution of the *qadi*, it turns out, provides an illuminating lens through which to consider these different approaches to legal order, and the nature of Supreme Court judging in particular, especially as performed in constitutional law cases.[4] Taking the *qadi* perspective illustrates that the Court simultaneously performs two roles: it is both the final adjudicator of constitutional disputes and also the ultimate expositor of constitutional law.[5] These roles are skillfully intertwined in judicial opinions, but I have found that disentangling them helps to bring into clearer view the core elements of a justice's chosen interpretive methodology and when (and perhaps why) it is compromised in individual cases. The result is, I believe, a new awareness of the choices made by Supreme Court justices when faced with the competing pulls of their methodological convictions, the nature of the United States legal system, and their sense of their role within in it.

I. THE *QADI*

First, it's time we got the *qadi* out from under that tree. I will start with a brief summary of Islamic law and legal systems,[6] with special reference to the job of the *qadi*. An Islamic legal system, at the most basic level, is one that purports to uphold the *shari`a*. *Shari`a* is usually—but somewhat misleadingly—translated as "Islamic law." Literally, it means "way" or "road." As a legal term, *shari`a* indicates "God's Law," the ideal way to behave in this world, a divine exhortation to all Muslims including legal and political authorities—a sort of Muslim rule of law. Muslims have two tangible sources of information about this road. The first is the *Qur'an*, which Muslims believe is the revealed word of God. The second is the lived example of the Prophet Mohammed, (believed by Muslims to be the last of the Abrahamic prophets), largely collected in stories called *hadith*. Because, of course, the *Qur'an* and *hadith* do not answer every single life and legal question, Muslim legal scholars have engaged (and continue to engage) in rigorous analysis and interpretation of those sources to come up with more detailed legal rules. These rules are what most people mean when referring

4. The general common law could also be a productive area for comparisons with Islamic jurisprudence, but I focus here on my more immediate realm of expertise, American constitutional law.

5. United States v. Morrison, 529 U.S. 598, 617 n.7 (2000) ("[E]ver since *Marbury* this Court has remained the ultimate expositor of the constitutional text.").

6. I have provided a more detailed introductory summary of Islamic law and jurisprudence at Asifa Quraishi, *Who Says* Shari'a *Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism*, 1 BERKELEY J. OF MIDDLE E. & ISLAMIC L. 163 (2008).

to the Islamic law that governs Muslim lives. These rules are called "*fiqh*," which literally means "understanding."

Why refer to these rules as "*fiqh*" and not "*shari`a*"? The terminology reflects the epistemological premises of Islamic jurisprudence. From the beginning, Muslim legal scholars have undertaken the job of interpreting the divine texts with a conscious awareness of their own human fallibility. Their work of legal reasoning is called *ijtihad*, a word derived from the root "*jahada*," meaning "to strive" or "struggle." Because this is a human process, a jurist's *ijtihad* conclusion can at best be only a probable articulation of God's Law and can never claim with certainty to be the "right answer." This demanded a basic acceptance of uncertainty in legal conclusions. No one could be sure (at least in this life) who was right and who was wrong, so all *ijtihad* efforts shared equal legitimacy. This epistemological premise is the foundation of all Islamic jurisprudence and is reflected in the vocabulary used by Muslim jurists. They labeled the collective body of their *ijtihad* legal conclusions "*fiqh*," derived from the Arabic word "*faqiha*," meaning "to understand." The doctrinal rules of Islamic law, therefore, are accurately called *fiqh*—not *shari`a*—because they are the result of *ijtihad*, a fallible human effort, representing the best "understanding" of God's Law by Muslim legal scholars.

Thus, the authority of *fiqh* is grounded not in the correctness of its result, but rather in the process of *ijtihad* that generates it. As long as it is the result of sincere *ijtihad* reasoning, any *fiqh* conclusion qualifies as a possible articulation of God's Law. Multiplied over time, this phenomenon grew a healthy and unavoidable Islamic legal pluralism,[7] both in interpretive methodologies and specific legal doctrines. Because each *ijtihad*-generated legal opinion is equally legitimate as a possible articulation of God's Law, the conclusions of every *fiqh* scholar (*faqih*) must be respected as law, even as they differed with those of other *faqihs*. *Faqihs* therefore asserted the truth of their *ijtihad* conclusions using language of probabilities, rather than of certainty.[8] Eventually, the divergent methodologies coalesced into several definable schools of law, each with equal legitimacy and authority for Muslims seeking to live by *shari`a*. Thus, for a Muslim, there is one Law of God (*shari`a*), but there are many versions of *fiqh* articulating that Law here on earth.

7. This diversity is generally thought to be a healthy thing in Islamic thought, inspired by Qur'anic verses such as: "We created you from a male and female and formed you into nations and tribes that you may know one another," QUR'AN 49:13, and "if your Lord had so willed, He would have made mankind one people, but they will not cease to differ . . . and for this did He create them." QUR'AN 11:118-19. There is also the oft-quoted phrase "diversity of my community is a mercy from God," thought by many to be a *hadith* of the Prophet.

8. *See* KHALED ABOU EL FADL, SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY, AND WOMEN 39 (2001) ("Islamic legal methodologies rarely spoke in terms of legal certainties (*yaqin* and *qat`*). The linguistic practice of the juristic culture spoke in terms of probabilities or the preponderance of evidence. . . . Muslim jurists asserted that only God possesses perfect knowledge—human knowledge is tentative."). According to a reported saying ("*hadith*") of the Prophet Muhammad, an *ijtihad* resulting in a correct result will receive two rewards from God in the afterlife, while an incorrect *ijtihad*-derived conclusion will garner one heavenly reward. Thus, even though a correct *ijtihad* will be doubly rewarded, it will not be until after we die that we can discover who was right and who was wrong. The practical result is that, here on earth, each jurist must each operate on the assumption that she may very well be incorrect. This sentiment was aptly memorialized in nearly every classical Muslim jurisprudential text, with the closing remark "*Allahu a`lam*," meaning "God knows best." As Khaled Abou El Fadl points out, "[t]his invocation was much more than a rhetorical device—it was an articulation of the very epistemological foundation of Islamic law." *Id.* at 32.

But *fiqh* is only part of the legal landscape in classical Islamic legal systems. Stepping back a bit now to see more of the forest, we notice that *fiqh* scholars populated only one of two major realms of legal authority in pre-modern Muslim societies. The second realm, separate from the scholars, was that of the Muslim rulers—a variety of caliphs, sultans, and kings, depending on the time and place. Rulers and scholars operated in both cooperation and tension with each other (the particulars, again, depending on time and place) in a kind of Muslim "separation of powers," to borrow a modern constitutional term.[9] The two realms created two types of law, respectively: (1) *fiqh*—the collection of divergent interpretations of divine texts (described above) and (2) *siyasa*, the rules and regulations for public order created by the rulers of Muslim lands.[10]

Fiqh and *siyasa* represented fundamentally different types of lawmaking. *Fiqh* was the product of jurisprudential analyses of divine texts by religious scholars whose work in this regard did not depend upon any official position or appointment. Working in academic freedom from the temporal rulers of Muslim governments, these scholars jealously guarded their independence when it came to articulating *fiqh* content.[11] So Muslim rulers did

9. For other descriptions of the relationship between rulers and scholars as a balance of powers, see, for example, FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 169-363 (2000); Frank Vogel, *An Introduction to Law of the Islamic World*, 31 INT'L J. LEGAL INFO. 353, 364 (2003) [hereinafter Vogel, *Introduction*]; NOAH FELDMAN, THE FALL AND RISE OF THE ISLAMIC STATE (2008).

10. The laws, policies, rules and regulations made by Muslim rulers have gone by many names ("*qanun*" is another popular term), but I have found the most useful term to be "*siyasa*" (literally "administration, policy, management"). In this I am persuaded by the *fiqh-siyasa* typology presented by Frank Vogel. *See* Vogel, *Introduction*, *supra* note 9, at 364 ("The pole of power, rulership, the state, and its delegated functions within the *fiqh* legal system, ended up being called . . . *siyasah*, meaning 'the running of things.' . . . *Fiqh* and *siyasah* are complementary.").

11. Summarizing this history, see, for example, Sherman A. Jackson, *Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?*, 30 FORDHAM INT'L L.J. 158, 165 (2006) ("Islamic law was emphatically neither the product nor preserve of the Muslim state. In fact, it developed in conscious opposition to the latter."); Khaled Abou El Fadl, *Islam and the Challenge of Democratic Commitment*, *in* DOES

not create *fiqh*. Their *siyasa* rules and regulations governed such things as investigating and prosecuting crimes, raising armies, monitoring marketplace standards, collecting taxes, and so on. In terms of *shari`a* legitimacy, the authority of Muslim rulers to create this *siyasa* law was considered necessary for public order. Because this need was so fundamental to society, *faqihs* supported obedience to *siyasa* law, as long as it did not compel Muslims to sin.[12] Comparing the two, it could be said that *fiqh* is legitimate because of the *ijtihad* of its authors, and *siyasa* is legitimate because it serves the public good (*maslaha*).

Muslim rulers usually applied a uniform set of *siyasa* rules to everyone and created a variety of *siyasa* tribunals to adjudicate disputes that arose under their *siyasa* jurisdiction. Some examples include: the *muhtasib*, whose job it was to oversee marketplace practices; the *sahib al-shurta*, who handled police and military-related disputes; and the *diwan al-mazalim*, which operated as a general appeal direct to the ruler regarding any abuses by appointed officers or general problems in the public sphere.[13] But our focus here is another ruler-appointed position: the *qadi*.

Historically, the *qadi* stood at an interesting intersection of *fiqh* and *siyasa* authority. The law applied by *qadis* was generally *fiqh*, but *qadis* obtained their office by direct delegation from the ruler. Thus, they operated neither as private *fiqh* scholars nor as pure *siyasa* adjudicators. They represented the ruler, but they were generally selected from the *fiqh* community in order to be able to adjudicate *fiqh*-related legal conflicts. Thus, their discretion was circumscribed by detailed *fiqh* rules of doctrine and procedure and sometimes further restricted by jurisdictional boundaries set

HUMAN RIGHTS NEED GOD? 58, 74 (Elizabeth M. Bucar & Barbra Barnett eds., 2005) ("Particularly after the age of *mihna* (inquisition [833-848 AD]) the *'ulama* (religious scholars or jurists) were able to establish themselves as the exclusive interpreters and articulators of the [D]ivine law. . . . [T]he inquisition was a concerted effort by the state to control the juristic class and the method by which Shari'ah law was generated. Ultimately, however, the inquisition failed and, at least until the modern age, the jurists retained a near exclusive monopoly over the right to interpret the divine law.").

12. That is, as Mohammad Fadel puts it, the ruler cannot force a Muslim to perform an act that is religiously prohibited (such as drinking wine) nor prohibit actions that are religiously mandatory (such as praying the five daily prayers). *See* Mohammad Fadel, *The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21 CANADIAN J.L. & JURISPRUDENCE 5, 24-27 (2008). Beyond that, classical Muslim jurists writing political theory gave great latitude to the ruler's power, and the rulers in turn generally left the articulation of the *fiqh* to the *faqihs*.

13. Much has been written on each of these tribunals, of which I here reference only a few introductions. For more on the *muhtasib*, see R.P. Buckley, *The Muhtasib*, 39 ARABICA 59, 59-117 (1992); 1 MARSHALL G.S. HODGSON, THE VENTURE OF ISLAM: CONSCIENCE AND HISTORY IN A WORLD CIVILIZATION 347 (1974); KRISTEN STILT, THE EXPERIENCE OF LAW IN MEDIEVAL CAIRO (forthcoming). On the *shurta* and *diwan al-mazalim*, see Emile Tyan, *Judicial Organization*, *in* 1 LAW IN THE MIDDLE EAST 236, 236-278 (Majid Khadduri & Herbert J. Liebesny eds., 1955).

by the ruler as part of the judicial appointment.[14] *Qadis*, therefore, performed what could be called "applied *ijtihad*": they were responsible for determining the truth of the facts argued and then applying the *fiqh* to those facts. Unlike *faqihs* answering hypothetical *fiqh* questions in an academic setting, *qadis* resolved real disputes between real people.[15]

The *fiqh* community recognized the importance of judicial resolution of these real disputes. The office of the *qadi* was, in fact, included in their list of community-wide religious obligations (*fard kifaya*). And, in order to effectively serve this need, a *qadi's* ruling must have the enforcement power of the ruler behind it. This is why, although a *qadi's ijtihad* was just as fallible as that of a private *faqih*, her rulings were binding upon the parties appearing before her, whereas the *fatwas* of private *faqihs* were not. It is important to remember, though, that this binding quality had nothing to do with the content or correctness of the *qadi's* conclusions, but rather resulted from the important public good (*maslaha*) served by the *qadi's* resolution of legal disputes. In this way, *qadis* served the need for finality in a system conscious of the reality that those who articulate its law are fallible.

II. ON FALLIBILITY

United States Supreme Court justices are also aware of their own fallibility, although it might be said that jurisprudential discussion of this awareness is a relatively recent phenomenon in the United States. Classical common law conceptions of the judicial role depicted the process of judicial reasoning as the act of "discovering" the law. American legal education, beginning with Harvard Law School's Langdellian case method, was founded upon the idea of law as a science and the premise that legal reason-

14. One example is the creation in Mamluk Egypt of Four Chief Judges representing the four most prominent schools of law and creatively distributing subject-matter jurisdiction between them. *See* Yossef Rapoport, *Legal Diversity in the Age of* Taqlid*: The Four Chief* Qadis *Under the Mamluks*, 10 ISLAMIC L. & SOC'Y. 210, 222 (2003) (noting the limitation of certain types of contracts to only one of the four *madhhabs*, listing *Hanafi* jurisdiction over violation of a marital dispute, and *Maliki* and *Hanbali* jurisdiction over wife-initiated judicial divorce).

15. This distinguishes a *qadi*'s ruling (*hukm*) from a *fatwa*, which is an *ijtihad*-based conclusion by a *faqih* in response to a layperson's voluntary request for an *answer to* a *fiqh*-based question. Because any *faqih*'s *ijtihad* is a legitimate articulation of God's Law, average Muslims could—and do—approach any *mufti* (a *faqih* who issues *fatwas*) for a *fatwa* to help them resolve real life legal questions. These *fatwas* can then be acted upon by a layperson with the confidence that she is complying with God's Law. Significantly, (and contrary to the impression of many Americans) *fatwas* are not binding. This is because each *fatwa* is the product of (humanly fallible) *ijtihad*, and therefore represents at best a probable articulation of God's Law. Because we cannot know until the hereafter which *ijtihad* conclusions have actually hit upon the truth in God's eyes, *fatwas* are authoritative but not binding. Individual Muslims are expected to decide for themselves whether or not to follow a given *fatwa*.

ing can find legal truths by carefully examining past case precedents.[16] But that image of law has changed significantly with the evolution of American legal theory. Legal Realist scholars, for example, took a decidedly skeptical view of the power of reason to be a reliable guide to ascertaining legal and moral truths.[17] Scholars like Jerome Frank and Karl Llewellyn displayed irreverence for and sometimes ridiculed the idea that formal legal reasoning could be performed apolitically and free of substantive value choices.[18] Supreme Court Justices like Benjamin Cardozo and Oliver Wendell Holmes, Jr. were portrayed by the Realists as examples of the few enlightened jurists who realized the uncertainty of legal reasoning,[19] a sentiment exemplified by one of Holmes' many oft-quoted statements: "certainty generally is illusion, and repose is not the destiny of man."[20] Judge Learned Hand illustrated a similar attitude with his belief "not in the philosophical view that no moral conviction can be objectively true, but in a disabling uncertainty that he—or anyone else—could discover which convictions were true."[21]

16. In Langdell's words, "[l]aw, considered as a science, consists of certain principles or doctrines. . . . [T]o be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs is what constitutes a true lawyer." C. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871). *See also* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329 (1979). Christopher Columbus Langdell came to Harvard Law School in 1870, and became its Dean in 1875. His "case method" was based on the idea that the principles of law are best learned by inductive study of the actual legal situations (the cases) in which they occur. It was so successfully introduced at Harvard that it eventually became adopted as the norm of law teaching throughout the United States and, with adjustments, continues to be so today. *See Grey, supra.*

17. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 170 (1992) ("Perhaps the most significant difference between Realism and its pre-war reformist predecessors can be expressed in terms of skepticism about reason and morality. . . . The Realist generation . . . had lost much of the pre-war faith in reason, both as a reliable source of moral understanding and as a powerful internal guide to law.").

18. *See id.* at 170-87.

19. *Id.* at 178. Frank described Cardozo as having reached "adult emotional status" because, unlike other thinkers, he was willing to share his belief in legal uncertainty with the public. JEROME FRANK, LAW AND THE MODERN MIND 276 (Peter Smith ed., 1970). In Frank's words, "[n]o one has expounded more elaborately than Cardozo . . . the fact that law is uncertain and must be uncertain, that overeagerness for legal certainty and denials of legal contingency are harmful." *Id.* at 255. Holmes is in turn described as "The Completely Adult Jurist" because he had "put away childish longings for a father-controlled world" as Frank believed classical common law thinkers did, as indicated by their faith in the truth-finding power of legal reasoning. HORWITZ, *supra* note 17, at 178.

20. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

21. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 341-42 (1996). As Ronald Dworkin puts it, Hand "thought moral matters were much too subtle and complex to allow anyone much confidence in his own opinions." *Id.* at 432.

Legal Realist skepticism challenged not just the possibility but even the desirability of legal certainty, creating ripple effects in American attitudes about its legal institutions, especially the judiciary. Accepting indeterminacy in legal reasoning would mean that legal rules are made and not discovered. For a common law system in which the rule of law had been identified with the discovery and application of objective legal rules, the idea that these rules cannot be completely separated from subjective value choices had significant implications. Consider the impact on judicial review: if law is not discovered but made, then how can the Supreme Court be expected to make truly neutral, non-subjective evaluations of the constitutionality of legislation? And, as the line between law and politics blurs,[22] why should the Court's decisions supersede those of Congress?[23] These and related questions have actively engaged American judges and legal scholars for many years. Some have attempted to defend the determinacy of legal doctrine—and the practice of judicial review—by seeking to distinguish it from political decisionmaking, while others have aimed to craft new ways to think about adjudication and lawmaking in general.[24] The details of the

22. The argument that law is merely politics had especially powerful force during the New Deal's "court packing plan" and the subsequent "switch in time" on the Court. As then-Professor (later, Justice) Frankfurter wrote President Roosevelt after this event, "now with the shift by Roberts, even a blind man ought to see that the Court is in politics, and understand how the Constitution is 'judicially' construed." ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945, 392 (Freedman ed., 1967).

23. Judge Hand's skepticism of legal certainty, for example, led him to assert in a famous Holmes Lecture that there is no justification for constitutional review of democratic legislation. Given the indeterminacy of legal reasoning, Hand could see no clear way to distinguish when the Court should assume the "role of 'a third legislative chamber'" and when it should limit that authority and exercise restraint. HORWITZ, *supra* note 17, at 264. *See also* LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES 10 (1958).

24. For example, Herbert Wechsler's Legal Process approach aimed to articulate the neutral rules of "judicial process" upon which constitutional cases could principally be decided. Wechsler answered the challenge to judicial review by insisting that the fact that the Court "ha[d] been decreeing value choices" did not in itself make judicial intervention illegitimate, as long as those value choices could also be justified by "neutral principles." Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 17, 20 (1959). Other prominent scholars associated with the Legal Process school were Henry Hart and Albert Sacks whose legal process theory incorporated the insights of Legal Realism, especially the recognition that doctrinal formalism could not itself eliminate discretion in the law. Hart and Sacks sought to channel that discretion through institutional arrangements. Legal process focused on procedure, rather than substance, and attempted to re-conceptualize the idea of the common interests of people existing in procedural fairness rather than substantive norms. *See* HENRY HART & ALBERT SACKS, THE LEGAL PROCESS (William Eskridge & Philip Frickey eds., 1994). Another methodological approach asserting to control the risks of subjectivity is originalism. Originalists insist that the only effective protection against the risk of human whim in adjudication is adherence to the "original meaning" of the text. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 352 (1990) ("Once adherence to the original understanding is weakened or abandoned, a

literature are beyond the scope of this Essay, but we can note that it has been said that contemporary American legal theory has largely been "preoccupied with finding a method that can either determine values objectively or avoid the value question entirely."[25] Indeed, according to Philip Bobbitt, the "central position in the constitutional debate of the last quarter century has been occupied by the idea of the legitimacy of judicial review of constitutional questions by the United States Supreme Court."[26]

Of course, the idea of judicial review has been of some concern and controversy since the beginning of American history.[27] But what I want to emphasize here is how the concern became seriously heightened with the epistemological challenges presented by Legal Realist criticism and its legacy. It is in the conceptual shift from certainty to uncertainty about the truth-finding capacity of legal reasoning where there are interesting comparisons to be made with Islamic jurisprudence. Recall that in Islamic law, legal reasoning is performed in an atmosphere of probabilities, not certainty. Each *faqih*, self-conscious of her own fallibility, is engaged in *ijtihad* legal reasoning fully aware that her legal conclusions may or may not correctly articulate God's Law.[28] The *ijtihad* process itself bestowed a status of legitimacy upon each *fiqh* conclusion—and even upon several different conclu-

judge, perhaps instructed by a revisionist theorist, can reach any result, because the human mind and will, freed of the constraints of history and 'the sediment of history which is law,' can reach any result."); Edwin Meese III, *Address before the D.C. Chapter of the Federalist Society Lawyers Division*, *in* INTERPRETING LAW AND LITERATURE 6 (Sanford Levinson & Steven Mailloux eds., 1988) (asserting that a "[j]urisprudence of [o]riginal [i]ntention . . . . would produce defensible principles of government that would not be tainted by ideological predilection" because it is bound by a study of the background of constitutional text). Originalists argue that this is the only appropriate legitimate exercise of the power of judicial review. Justice Antonin Scalia, for example, argues that judicial rulings following the "original meaning" of the Constitution best legitimize judicial review in a democratic system. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) [hereinafter Scalia, *Originalism*] ("[O]riginalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system."); *see also* BORK, *supra*, at 143 ("[O]nly the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy. . . . [and] is consonant with the design of the American Republic.").

25. HORWITZ, *supra* note 17, at 210.

26. Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 698-99 (1980).

27. For just one of many examples of the literature on this topic, see Larry D. Kramer's recent examination of the history in THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

28. *See supra* Part I. Judge Hand would likely have found much support in the *fiqh* community for his belief that the spirit of liberty is essentially the spirit "that is not too sure that it is right." DWORKIN, *supra* note 21, at 342. He emphasized this idea in his Holmes Lecture in which "[h]e recommended . . . Benjamin Franklin's plea that people should on occasion 'doubt a little of [their] own infallibility.'" *Id.*

sions at once—but it could not grant it any certainty of being correct.[29] (That was left for God to determine in the afterlife.) In short, it might be observed that Islamic jurisprudence followed Justice Holmes' warning that "certainty is an illusion." Indeterminacy was an acknowledged essential ingredient of all Islamic legal reasoning, and uncertainty an attribute of all of *fiqh* doctrine.

But, as comparative work so often reveals, these similarities at the theoretical level can manifest quite different results in different institutional contexts. In the United States, where judicial review means that the Supreme Court can strike down democratic legislation on constitutional grounds, the recognition of uncertainty in the capacity of legal reasoning to arrive at (constitutional) truth has led many to advocate judicial restraint, preferring a legislative weighing of values instead of what seems to be unavoidable judicial weighing.[30] Others continue to support the practice of judicial review, premised on methodologies (such as originalism) believed to minimize subjectivity in legal analysis. Muslim jurists, on the other hand, operated in a very different context, with very different results for the idea of the indeterminacy of legal reasoning. Operating in the largely private sphere of the legally-bifurcated world of *fiqh* and *siyasa* law, the law (*fiqh*) that the *fiqh* scholars articulated was not uniformly imposed by the rulers on everyone. They thus could overcome the uncertainty inherent in *ijtihad* lawmaking by simply embracing it: because no one could be sure which *ijtihad* conclusion would ultimately be correct, equal legitimacy was given to everyone. The result was a pluralism of *fiqh* doctrine in which each was legitimate and authoritative without anyone being certain it was correct.[31]

Putting the two legal systems side by side for a moment, we can notice that the idea of legal indeterminacy had a dramatic impact upon the institutions and practice of both American and Islamic law. But the nature of this impact seems to have been influenced by *when* in the evolution of each legal system the idea was introduced. In Islamic history, juristic fallibility was an integral part of the earliest building blocks of the legal system: it

29. Philosophical support for this approach was especially aided by the basic *Ash'ari* epistemology, which over time became the dominant theological affiliation in Islamic law and philosophy. Briefly, *Ash'arism* had opposed *Mu'tazilism*'s emphasis on reason as the means by which one can discern right from wrong. *Mu'tazilis*, in their insistence that reason alone cannot make such determinations with certainty, were viewed by *Ash'aris* as representing a rather naïve faith in the capacity of pure human reason to find ultimate truths. These ideas have obvious similarities with the skepticism of the early Legal Realists described above.

30. DWORKIN, *supra* note 21, at 342-43.

31. It was up to the Muslim layperson to select which *fiqh* school she would opt to follow, and the rulers generally appointed *qadis* from each school sufficient to serve the public's needs in each locale.

was woven into the very foundations of the Islamic concept of law. And acceptance of the uncertainty of legal rules then became a catalyst for the creation of a pluralistic Islamic legal culture, where multiple sets of doctrinal rules existed side by side with equal authority. In the United States, on the other hand, serious concerns over the uncertainty and indeterminacy of legal reasoning were introduced after the legal and political institutions had already been built. Fallibility thus operated as a negative force against judicial legitimacy in the United States and a continuing topic of jurisprudential debate. In other words, skepticism of certainty in legal conclusions threw a rather large legitimacy-questioning wrench into the American system to be worked out over time. But in the world of Islamic law, it was merely an early speed bump on the road of *fiqh* development, accommodated by a legal pluralism operating largely in the private realm, as separate as possible from the state.

That said, Muslim rulers did try to control the *fiqh*, when the opportunity arose. In much the same way that Congress, the President, and the Supreme Court continually push the boundaries of their respective spheres of authority, Muslim rulers and scholars also experimented with various configurations of the boundary between *fiqh* and *siyasa* law. The almost infinitely pluralistic nature of the early *fiqh* made this an especially challenging border for the *faqihs* to police. With so many divergent *fiqh* doctrines on a given legal question, there was very little legal predictability in the *fiqh* upon which people could rely in planning their lives, potentially giving the rulers a strong ground upon which to claim the need to control the *fiqh*. Such attempts were made in a variety of ways throughout the history of Islamic legal systems, with varying success.[32] This pressure presented the

32. Rulers' efforts to control the *fiqh* began as early as the founding era of the schools themselves. It is reported, for example, that Abbasid Caliph al-Mansur (753-775 AD/135-158 AH) (apparently upon the suggestion of his advisor Ibn al-Muqaffa) approached Malik ibn Anas, the famous Medinan scholar (and later eponym of the *Maliki* school), to adopt Malik's law book, "*al-Muwatta*," as the official law of the empire. Malik evidently did not like the idea. According to one report, Malik asserted that it would be "too difficult [*shadid*] to force the people of different regions to give up practices that they believed to be correct and which were supported by the *hadith* and legal opinions that had reached them." Umar Faruq Abd-Allah, Malik's Concept of 'Amal in the Light of Maliki Legal Theory 100 (Sept. 1978) (unpublished Ph.D. Dissertation, University of Chicago) (on file with author); *see also* VOGEL, *supra* note 9, at 315 (noting that later Caliphs al-Mahdi and Harun al-Rashid also reportedly made the same request, and quoting Malik's response). Another ruler approach to achieve some sort of *fiqh* control was by favoring one school over others in the appointment of *qadis*. This was the approach taken by many Muslim rulers, such as the Abbassids in Damascus, the Almohads in Andalusian Spain, the Ottomans ruling from Istanbul, and many others. Another approach was that taken by the Fatimids and Mamluks in Egypt in which the ruler appointed four Chief Qadis, each representing one of the four extant major schools of law, and exercised control over the subject-matter jurisdiction (but not content of the *fiqh* doctrine itself) applied by each Chief Qadi and subordinate *qadis* under him. For more on the Fatimid experiment, see Adel Allouche, *The Establishment of Four*

fiqh community with its own institutional legitimacy challenge, not unlike the challenge to the Supreme Court as ultimate expositor of constitutional law. Ultimately, the *fiqh* community answered with the practice of *taqlid*, the solidification (some say stagnation[33]) of each legal school into predictable collections of doctrinal rules.[34] With *taqlid*, the *fiqh* remained pluralistic overall, but internally very predictable, with recognized majority and minority rules comprising the doctrine of each school. This happened over time, but eventually *taqlid* eventually became so entrenched in Islamic jurisprudence that "the text and the precedent of each school became the source of legitimacy in juristic thinking."[35]

With all this in mind, we can see that American and Muslim jurists, each motivated by the idiosyncrasies of their respective institutional structures, devoted significant energy to legitimating the location of lawmaking power within them. In both systems, elite jurists defended their authority to articulate the law against contrary assertions that would give this authority to the political institutions. And a complex evolution of jurisprudential thought followed this effort in each system. In the United States, it centered on the nature of judging and the relationship of common law doctrine and democratic legislation, and engaged a lot of postmodern-influenced considerations of the possibility of objectivity in legal reasoning. In the world of Islamic law, this meant complicated thinking about how to legitimate non-

Chief Judgeships in Fatimid Egypt, 105 J. AM. ORIENTAL SOC. 317 (1985). On the Mamluks, see Rapoport, *supra* note 14; SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHĀB AL-DĪN AL-QARĀFĪ (1996).

33. The idea of Islamic law's metamorphosis from *ijtihad* to *taqlid* is not uncontroversial, as it is linked to an apparent declaration by Muslim legal scholars that the "gates of ijtihad" had closed, representing an assertion that the voluminous *madhhab* literature fostered by *taqlid* had succeeded in asking and answering every legal question that could arise. In the contemporary period, the question of whether these doors actually did close is a subject of interesting social and jurisprudential debate. For a key voice in the literature, see Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT'L J. MIDDLE. E. STUD. 3 (1984) (challenging the accepted belief that the *ijtihad* doors had closed).

34. As Mohammad Fadel puts it, *taqlid* resulted from an attempt to create a stable rule of law, and not from intellectual decline. *See* Mohammad Fadel, *The Social Logic of* Taqlid *and the Rise of the* Mukhatasar, 3 ISLAMIC L. & SOC. 193, 197 (1996).

35. ABOU EL FADL, *supra* note 8, at 35. Along with the solidification of the schools, *fiqh* scholars themselves became individually identified according to a hierarchy of *ijtihad* ability, with lower-level scholars qualified only to apply the doctrine of their school to individual cases. New *ijtihad* was reserved for the rare scholar who had full *ijtihad* ability at the highest level. This system made the regulation of *fiqh* possible, both by elite *faqihs* at the top of the hierarchy, as well as the rulers. The rulers, who remained in charge of all *qadi* appointments, could thus be creative in using *taqlid* to put tangible limits on the jurisdictional boundaries of *qadi* appointments. For example, a *qadi* could be appointed (upon penalty of removal) to adjudicate, say, divorce cases according to the majority opinion in the Maliki school. In this way, even though rulers were still unable to dictate *fiqh* content, they could have some real impact on the results of actual cases—an especially useful tool in those subject areas that had significant social or political importance.

ijtihad-based *fiqh* decisions in a realm where the very authority of legal rules had been founded on the process of free *ijtihad* reasoning. In the end, even accounting for the differences in context and history, the question of the authority of those articulating the law—the Supreme Court in the United States – and the *fiqh* community in Muslim systems—seems to have directly influenced the contours of legal theory and the role of the legal institutions in both legal cultures.

III. ON FINALITY

Then again, sometimes it is not as important *who* gets to decide something, or even if it gets decided correctly, as *that* it gets decided. Some assert that this is, in fact, the primary purpose of courts. As Daniel Farber puts it, the core function of courts is not to issue opinions but to issue judgments: "Even if those decisions are sometimes wrong (as they assuredly are), it is better to resolve issues of constitutional interpretation so that society can move on."[36] In other words, there is something crucially important about bringing society's legal conflicts to a final conclusion, even if the decision itself is ultimately incorrect. Justice Jackson's famous description of Supreme Court justices still resonates: "We are not final because we are infallible, but we are infallible only because we are final."[37] There was a similar sentiment in Islamic legal systems. The office of the *qadi* served the same public need for finality in dispute resolution of *fiqh* issues. The public good (*maslaha*) served by the resolution of legal conflicts is, after all, why a *qadi's* rulings were enforced by Muslim rulers even though the content of these rulings was fallible.[38]

But American judges have another job as well—one that is not demanded of *qadis*.[39] Because the common law itself is a product of case law, each judicial opinion contributes to the literature that makes up the law of the land. And the justices of the United States Supreme Court, sitting at the top of the judicial hierarchy, are the ultimate expositors of constitutional law. Seen through our comparative law lens, we might say that an American Supreme Court justice is both a *faqih* and *qadi* at the same time. That

36. Daniel A. Farber, *The Importance of Being Final*, 20 CONST. COMMENT. 359, 361 (2003). *See also* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371-72 (1997) (on "The Settlement Function of Law").

37. Brown v. Allen, 344 U.S. 443, 540 (1953).

38. *See supra* notes 15-16 and accompanying text.

39. The *qadi*'s role was almost exclusively adjudicative. *Fiqh* doctrine did not emanate from court judgments, but instead were (and still are) found in the academic literature of the *fiqh* scholars. A *qadi* might also be qualified to do some *fiqh* articulation, but if she did so, it would not be via her judicial opinions, but rather through scholarly contributions to the *fiqh* literature.

is, Supreme Court justices in the United States have to be simultaneously high-level legal theorists *and* extremely competent real-time judges. Their opinions often intertwine these two roles, switching back and forth between factual judgments and jurisprudential theory and commentary. Not surprisingly, significant tensions can arise between these two roles. One of the most obvious is when a past precedent conflicts with a justice's interpretive method. In such cases, the purity of the justice's legal theory (one might say, her "*faqih*" work) is challenged by pragmatic considerations of predictability and finality (her "*qadi*" job) served by following precedent.

This has been an especially difficult challenge for originalism as a method of constitutional interpretation,[40] given the volume of precedent that (most agree[41]) is inconsistent with an original understanding of the Constitution.[42] Many things now taken for granted as settled constitutional law—from the use of paper money to sitting in classrooms that are not forcibly racially segregated—would apparently be threatened if our Supreme Court used originalism when interpreting the Constitution.[43] In response, some

40. Although this topic is most popularly discussed with regard to originalism, it is of course a potential problem for any interpretive methodology. As Michael Paulsen puts it, "[w]hatever one's theory of constitutional interpretation, a theory of *stare decisis*, poured on top and mixed in with it, always corrupts the original theory." Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005).

41. I include this caveat because some jurists have attempted to articulate originalist justifications for some of these cases. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). These efforts, in turn, are countered with significant criticism. *See, e.g.*, Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995).

42. The topic has been, and continues to be, a popular one in academic discourses on constitutional theory. For example, at the 2005 Annual Meeting of the Association of American Law Schools (AALS), the Section on Constitutional Law presented a panel titled "Originalism and the Problem of Precedent." The numerous books, articles and speeches on the topic are too voluminous to document here, but the AALS panel (which sparked many of my own ideas forming this present Essay) featured many of the leading scholars and arguments on the topic, and was documented in the 2005 Symposium issue of the journal *Constitutional Commentary*, *Can Originalism Be Reconciled with Precedent? A Symposium on* Stare Decisis, 22 CONST. COMMENT. 257 (2005). The essays presented there include: Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257 (2005); Thomas W. Merrill, *Originalism,* Stare Decisis *and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271 (2005), Paulsen, *supra* note 40; David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299 (2005); Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311 (2005).

43. Nonoriginalists point out that "insistence upon original intent as the only legitimate standard for judicial decisionmaking entails a massive repudiation of the present constitutional order." Henry Paul Monaghan, Stare Decisis *and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 727 (1988). *See also id.* at 739 ("[N]o acceptable version of original understanding theory can yield a convincing descriptive account of the major features of our 'Bicentennial Constitution': nontextual guarantees of civil liberties; a powerful, presidential-

originalists introduce pragmatic exceptions to their originalism. Justice Scalia, for example, self-identifies as a "faint-hearted originalist" because he accommodates those non-originalist precedents that are now unassailable as a matter of simple social reality.[44] But he does so reluctantly, and aims to do so only rarely. In principle, he does not like the practice of compromising what he believes to be the correct result just for the interest of stability. Scalia believes that when the Court is faced with a mistaken past decision, it "provide[s] far greater reassurance of the rule of law by eliminating than by retaining such a decision."[45]

Scalia, of course, is not the only justice to make pragmatic adjustments to his legal analysis on a case-by-case basis. According to a plurality of justices on the Supreme Court, *stare decisis* itself can be put aside for prudential reasons. More specifically, the Court has stated that the consideration of adverse social consequences is relevant to the question of whether or not to abide by past precedent. Thus, in *Planned Parenthood v. Casey*, the plurality opinion took into account "a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."[46] This is quite a powerful assertion for judges in a common law system to make. In the common law, *stare decisis* is generally associated with the rule of law itself, in that it promises to provide the finality and predictability that enables people to plan for the legal consequences of their actions.[47] On the other hand, *stare decisis* is not an

ly centered national government; a huge administrative apparatus; and national responsibility for what had long been conceived of either as local responsibilities or as not the responsibility of government at all."). *Brown v. Board of Education*, striking down racially segregated classrooms as unconstitutional, has become the quintessential test case. 347 U.S. 483, 495-96 (1954). The *Brown* decision is nearly uniformly agreed to be a non-originalist ruling because the authors of that Amendment condoned racial segregation in the Washington, D.C. public schools under their authority. *See* Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857, 1866 (1997) ("The difficulty *Brown* poses for originalists illustrates th[e] direct confrontation between principles of justice and the other sources of law. Minor tinkering with the originalist view of legitimacy cannot reconcile it with the virtually unchallengeable proposition that *Brown* was rightly decided. Instead, *Brown*'s rightness challenges originalism head-on.").

44. Scalia, *Originalism*, *supra* note 24, at 864; *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION 140 (1997) ("*[S]tare decisis* is not *part of* my originalist philosophy; it is a pragmatic *exception* to it."); Scalia, *Originalism*, *supra* note 24, at 861 ("[A]lmost every originalist would adulterate it with the doctrine of *stare decisis*."). *See also* BORK, *supra* note 24, at 158 (conceding that some judicial practices are "so accepted by the society, so fundamental to the private and public expectations of individuals and institutions" that they cannot now be revised by the Supreme Court).

45. South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting).

46. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

47. Ronald Dworkin states that strict doctrines of precedent serve a basic principle of fairness "because they encourage citizens to rely on doctrinal pronouncements and assumptions that it would be wrong to betray in judging them after the fact." RONALD DWORKIN, LAW'S EMPIRE 405 (1986). And, in the words of Justice Powell, "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood*, 505 U.S. at 854; *see also* Lewis F. Powell, Jr., Stare Decisis *and Judicial Restraint*, 1991 J. SUP. CT. HIST. 13, 16 (1991). Similar thoughts have been expressed by Chief Justice Rehnquist: "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991).

"inexorable command,"[48] and in the United States it has not been as strictly binding as it was in English history.[49] Nevertheless, if "precedent binds absent a showing of substantial countervailing considerations,"[50] then how much predictability and finality can it really offer?

This, in fact, was one of the central issues in the legal discourse about *Planned Parenthood* itself: is the Court consistent in its reasons to uphold one precedent and strike down another?[51] And when this happens in politically controversial cases, it tends to reaffirm the concern that law really is just politics. As Henry Monaghan put it, "[b]ecause a coherent rationale for the intermittent invocation of *stare decisis* has not been forthcoming, the impression is created that the doctrine is invoked only as a mask hiding other considerations,"[52] such as political and ideological preferences. Indeed, Legal Realist Karl Llewellyn went so far as to say that there are really two concepts of precedent: one for those the court favors, and another for those that it does not.[53] This state of affairs not only threatens the public's interest in finality (fallible or not), but also weakens the Court's authority as the

48. *Planned Parenthood*, 505 U.S. at 854.

49. Monaghan, *supra* note 43, at 756-57.

50. *Id.* at 757.

51. *Planned Parenthood v. Casey* is, of course, one of the most controversial Supreme Court opinions in recent American history for a variety of reasons, not the least of which is our strong and continuing socio-political controversy about abortion. But much of the legal debate centered on the issue of how the Court applied *stare decisis*. In *deciding* not to overrule *Roe v. Wade*, 410 U.S. 113 (1973) (upholding the constitutionality of abortion), despite the apparent belief by many justices that the legal reasoning (and conclusion) in *Roe* was faulty, Justice O'Connor, joined by Justices Kennedy and Souter, said the Court could not "reexamin[e] the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973," for to do so would "run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." *Planned Parenthood*, 505 U.S. at 864. This position drew serious criticism from fellow Justices such as William Rehnquist, who wrote in dissent that the Court's "constitutional watch does not cease merely because [it] ha[s] spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question." *Id.* at 955 (Rehnquist, C.J., dissenting in relevant part).

52. Monaghan, *supra* note 43, at 743.

53. KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL 67-71 (11th prtg. 2008).

premiere expositor of constitutional law.[54] If, after all, the standard upon which the Court will decide whether or not to adhere to precedent is one which involves pragmatic evaluations of social circumstances, then it seems inevitable that the Court will always be vulnerable to accusations that it is making political, not legal, judgments.

But what might this issue look like from the perspective of a *qadi*? Reviewing the academic debates about *stare decisis* and the role of the Supreme Court in this light, it occurs to me that perhaps we have become too focused on the constitutional expositor (the "*faqih*") part of the Court's job, paying insufficient attention to its role as adjudicator (the "*qadi*"). That is, if we imagine a Supreme Court justice wearing two hats—one of a *faqih* who articulates authoritative constitutional law and one of a *qadi* who resolves constitutional conflicts—then it is not so surprising that practical and pragmatic considerations (the type a *qadi* would weigh), separate from pure jurisprudential analysis, are part of Supreme Court decisionmaking. Recall that *qadi* judgments are enforced by the *siyasa* rulers, not because of their jurisprudential sophistication or correctness of their conclusions, but simply because it serves the public good (*maslaha*) to resolve society's legal disputes. Thus, it is logical that *qadis* make practical evaluations of the public good as part of their judicial analyses. So, for example, when Justices O'Connor and Kennedy vote not to overturn *Roe v. Wade*, despite their apparent disagreement with its content, they could be seen to be performing a *maslaha*-type analysis that stems from the *qadi* responsibility to resolve cases in furtherance of the public good, even if it might conflict with what they might believe would have been a superior analysis if they were allowed to operate purely (*faqih*-like) doctrinally. Similarly, when Justice Scalia allows exceptions to his originalist methodology to accommodate unassailable precedent like *Brown v. Board of Education*, he could be seen to be taking the *qadi* part of his job seriously, thereby sacrificing a little (*fiqh*) methodological purity in furtherance of the public good of not interfering with a very crucial social norm.

Of course, there is plenty of room for debate about the public good. Reasonable *qadis* and justices can differ as much as citizens and politicians over what in fact *is* in the public interest, and when these differences show

54. Justice Scalia saw the *Planned Parenthood* ruling as catering to public pressure in a futile attempt to bolster its own legitimacy:

> I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—*against* overruling no less—by the substantial and continuing public opposition the decision has generated. . . . [W]hether it would "subvert the Court's legitimacy" or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening.

Planned Parenthood, 505 U.S. at 998 (Scalia, J., dissenting in relevant part).

up in case law, they are exactly what give rise to accusations of judicial activism and the conflation of law and politics. But looking at the phenomenon through the eyes of a *qadi* provides new appreciation for the nature of these practical evaluations. That is, when a justice engages in a pragmatic analysis of social consequences in order to decide whether or not to overrule a prior case, I imagine that she is shifting from her *faqih* role of elaborating constitutional law to her role as *qadi* to resolve a conflict with attention to the real life impact on society (*maslaha*). Seen in this light, it seems only natural for the justice to conduct some *maslaha*-type analysis of the practical impact of her decision.

Back in the realm of constitutional theory, this use of in-the-field adjustments to doctrinal purity for the public good strike some as the Achilles heel of impractical methodologies like originalism. Jack Balkin has commented that "Scalia's originalism must be 'faint-hearted' precisely because he has chosen [an] unrealistic and impractical principle of interpretation, which he must repeatedly leaven with respect for *stare decisis* and other prudential considerations."[55] And those following the constitutional methodology of pragmatism assert that, because their already-practical methodology gets them all the way to their conclusions without having to be "faint-hearted," their method is superior to those that have to make later adjustments for social consequences.[56]

55. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 297 (2007).

56. As described by Judge Richard Posner: "The originalist faces backwards, but steals frequent sideways glances at consequences. The pragmatist places the consequences of his decisions in the foreground." Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1380 (1990). Not surprisingly, pragmatism is pejoratively criticized by its opponents as too "results-oriented," to which its proponents answer that pragmatism is not short-sighted lawlessness, but instead broader-minded judging. *See, e.g.*, Stephen G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL'Y 875, 887 (2008) ("There is an obvious problem with pragmatic, results-oriented judging, which is that it produces bad results by gutting the rule of law."); *contra* Posner, *supra*, at 1380 ("The pragmatist judge does not deny that his role in interpreting the Constitution is interpretive. He is not a lawless judge. He does not, in order to do short-sighted justice between the parties, violate the Constitution and his oath, for he is mindful of the systemic consequences of judicial lawlessness."); Andrew B. Coan, *Talking Originalism: A Constitutional Dialectic*, BYU L. REV. (forthcoming 2009) ("Pragmatist judges aren't stupid or reckless. They understand the importance of stable ground rules as well as anyone. That's why they consider the Constitution's original meaning, and especially its original purpose, as an important factor in deciding constitutional cases. They also take precedent seriously, especially where it has induced public reliance. But unlike originalists, pragmatists understand that stability is a matter of degree and in some cases must give way to other goods."). The results-oriented characterization of pragmatist judges is especially interesting to us here because it bears a strong similarity to the reductionist depiction of the uncontrolled discretion of the Muslim *qadi*, sitting under a tree, with which this Essay began. Not surprisingly, the defenses of pragmatism reflect many of the arguments made in response to Weber's original concept of "kadi justice."

But I am not sure that exception-making for pragmatic *maslaha*-type considerations makes an interpretive methodology illegitimate *per se*.[57] It seems to me that a constitutional methodology can exist as a legitimate theory of constitutional interpretation, even if it can never be purely applied across the board in actual cases.[58] This is a bit easier to see in the world of classical Islamic law, where the *fiqh* realm (detailing the methodologies of the various schools of law) was largely separate from the *qadi* realm (of real case adjudication). In Islamic law, a methodology could exist in the *fiqh* realm as a coherent school of law, without direct reference to its manifestation on the ground in case adjudications by *qadis*. As mentioned earlier, Islamic law is made up of several schools of law. At one time there were hundreds of these, most of which died out for lack of a sufficient public following, but they nevertheless all constituted legitimate *fiqh* articulations of God's Law. The now-extinct *Zahiri* school, in fact, was influential in the realm of legal theory, despite its rigid adherence to a textual literalism, which earned it the popular criticism that it was unworkable as a practical matter. Some even asserted that scholars of this school should therefore not be appointed as judges.[59]

Why shouldn't American judges also be entitled to subscribe to a constitutional methodology that maintains a pure internally coherent version of itself separate from the current state of case law?[60] Judges following such a methodology probably will face more practical dilemmas than judges who choose to follow a methodology that already incorporates practical considerations as constituent elements of their interpretive method. But their decision to leave pragmatic considerations as a later judicial adjustment rather than an element of the theoretical method does make some jurisprudential sense. In this way, these jurists can seek to preserve the coherence of their chosen methodology as a theoretical matter, separate from its operation in a legal system that insists on *adherence to* precedent that is inconsistent with

57. It might well be a good reason for the methodology to be of limited use in a common law system with a vigorous adherence to *stare decisis*, but that is a different question than its legitimacy as a methodology generally.

58. This, of course, is true of every theory of constitutional interpretation suggested by a non-sitting judge.

59. *See, e.g.*, IBN KHALDUN, 3 THE MUQADDIMAH: AN INTRODUCTION TO HISTORY 5-6 (Franz Rosenthal trans., Princeton Univ. Press 2d ed. 1967) (1958) (describing students of *Zahirism* as "[w]orthless persons" who will "get nowhere and encounter the opposition and disapproval of the great mass of Muslims"); DUNCAN B. MACDONALD, DEVELOPMENT OF MUSLIM THEOLOGY, JURISPRUDENCE AND CONSTITUTIONAL THEORY 110 (Russell & Russell 1965) (1903) (on disqualification of Zahiris for judicial appointment).

60. Of course, one might answer that American law is based on the common law, which itself comes from the case law, and this, therefore, requires American jurists to reconcile their methodologies with all the extant case law. But this just seems to re-state the question, because we have already seen that adherence to case precedent is not absolute. No theory attempts to reconcile itself with every case precedent.

that method. Thus, for example, when I see pragmatic considerations popping up in an opinion by a self-described originalist judge, I do not necessarily see it as a betrayal of her pure method of originalism. Rather, I see it as potentially an example of an originalist constitutional scholar (*faqih*) doing her job as a judge (*qadi*). Such a scholar is simultaneously aware of her expertise as an independent constitutional theorist as well as her judicial responsibility to serve the public good by offering a workable resolution of the legal dispute at hand. Therefore, she finds herself considering the practical consequences of her ruling even if it may be inconsistent with the analysis she would perform in a pure realm of academic constitutional theory. In Islamic law terminology, we might say that a methodologically pure originalist analysis is what would be written by an "originalist" *faqih* in the *fiqh* literature. Scalia's begrudging accommodation of precedent is what might happen when that same originalist *faqih* is put in the role of *qadi*, now with the responsibility of applying her *fiqh* methodology in a real case, and thus considering *maslaha* factors to fulfill her responsibility of serving the public good in her role as adjudicator of legal disputes.[61]

That is not to say there are not good arguments against originalism as a constitutional method. I only mean to point out another way to see that many critiques of a methodology of constitutional interpretation are not all about methodology.[62] Instead, theoretical analyses are naturally mixed with pragmatic judicial evaluations of fact because American Supreme Court justices are asked to do the complicated job of serving as both constitutional

61. What's more, not every "originalist" *qadi* will perform the exact same *maslaha* calculations. This point is nicely illustrated by the differing positions taken by Justices Scalia and Thomas, both self-described originalists, who do not always join each others' opinions. Whereas Justice Scalia often becomes "faint-hearted" and chooses to compromise his pure originalism for what he sees as practical necessity, Justice Thomas will frequently hold out for pure method and write a separate opinion. Compare, for example, Justice Scalia's joining with the *United States v. Morrison* majority opinion building on decades of commerce clause doctrine with Justice Thomas' separate opinion insisting on a strictly originalist reading of the commerce clause. 529 U.S. 598, 627 (2000) (Thomas, J., concurring) ("I write separately only to express my view that the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases. . . . Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.").

62. A parallel observation has been made by Jack Balkin:

> Many theories of constitutional interpretation conflate two different questions. The first is the question of what the Constitution means and how to be faithful to it. The second asks how a person in a particular institutional setting—like an unelected judge with life tenure—should interpret the Constitution and implement it through doctrinal constructions and applications. The first is the question of *fidelity*; the second is the question of *institutional responsibility*.

Balkin, *supra* note 55, at 308.

articulator and adjudicator. I have found that thinking like a *qadi* helps me to disentangle these two roles from each other in order to see more of each.

CONCLUSION

Legal academics often get frustrated with judicial opinions that compromise theoretical purity for practical reasons, whether it is past precedent, sensitivity to public opinion, or merely the securing of consensus with colleagues on the bench. We co-author books like *What* Brown v. Board of Education *Should Have Said*[63] and contemplate what the equal protection or commerce clauses would mean today if, for example, the privileges and immunities clause had been treated with more respect back in the day. In other words, it could be said that we (*fiqh*) scholars love the academic freedom of our relatively unfettered world of legal theory and the high vantage point it gives us to judge the judges (*qadis*) constrained by the practical (*siyasa*) realities facing them in their world. Rarely does a judicial opinion, after all, have the internal methodological purity of a law review article (or a *faqih*'s treatise).

But perhaps we are too quick in our judgment. These are judges doing a judge's job. Perhaps it is perfectly natural for them to take the *siyasa* aspect of their job seriously and give heightened attention to the public good, even when it forces compromises in their analytical purity. Some judges' results may be more predictable than others, perhaps because their interpretive methodology already incorporates some pragmatic *maslaha* considerations in the first instance. Others may be doomed to be dissenters more often than not because they follow an interpretive method that does not incorporate these pragmatic considerations much, and they believe the reasons for this are significant enough not to compromise the method in its application to instant cases. But nevertheless, each judge is following her own method of interpretation, operating in interesting and constantly changing contextual circumstances. They are all, it might be said, doing the work of *qadis*. Each with her own fallible humanity, Supreme Court justices find ways to combine considerations of *fiqh* (pure law) and *maslaha* (public order) to create workable finality for the law of the land.

63. WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001).