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## Mohammed and Madison: A Comparison of the Qur'an and the U.S. Constitution

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### Cover Page Footnote

J.D., The Florida State University College of Law (anticipated May 2003); BA., The Florida State University, 2000. After writing this article, the author clerked in the Riyadh office of Baker & McKenzie to gain first-hand knowledge of the Saudi legal system. Mr. White would like to sincerely thank John Xefos for making that possible. This Comment is dedicated to my wife, Sarah. Thank you for your support, and encouragement in everything. I could not have done it without you!

# MOHAMMED AND MADISON: A COMPARISON OF THE QUR'AN AND THE U.S. CONSTITUTION

JOSHUA WHITE\*

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## I. INTRODUCTION

What do the Prophet Mohammed and James Madison have in common? Both Mohammed and Madison were instrumental in the development of documents that formed the foundation of their respective legal systems.<sup>1</sup> James Madison is commonly referred to as the “Father of the Constitution” because he was influential in its development and implementation.<sup>2</sup> Similarly, Mohammed was instrumental in the development of the *Qur'an*. According to

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1. David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94, 154 (2002); Joelle Entelis, *International Human Rights: Islam's Friend or Foe?*, 20 FORDHAM INT'L L.J. 1251, 1253 (1997).

2. Reiss, *supra* note 1.

Islamic tradition, the Archangel Gabriel gave the text of the *Qur'an* to the Prophet Mohammed.<sup>3</sup> The *Qur'an* in Saudi Arabia and the United States Constitution ("Constitution") have many similar characteristics and functions.

The Constitution is the foundation of American jurisprudence. It is supreme to all other laws in the United States ("U.S."), and it is the source of authority and supremacy of government. The Constitution is a document created by, and for the use and benefit of, humans. As a man-made instrument, it was intended to be changeable and to develop with society.<sup>4</sup> By nature, it is secular because humans created it for the use of other humans and the drafters claimed neither religious visions nor divine inspiration in the writing of the Constitution.<sup>5</sup> Americans know the Constitution is the foundation of the government, however, no one claims that it is the divinely-inspired word of God that provides guidance for every aspect of human life. The Constitution is secular because it was intended not to be a religious source, as is understood in the Establishment Clause.<sup>6</sup> A constitution, however, does not have to be secular for a religious instrument can serve as a kind of constitution as well.

Both the *Qur'an*, and more broadly *Shari'a*, or Islamic law, have similar roles in Saudi Arabia and serve as a constitution for Saudi Arabia in the same ways that the Constitution is the foundation for the U.S. legal system. The *Qur'an* is the word of God as delivered to his prophet Mohammed.<sup>7</sup> As the word of God, the *Qur'an* is not subject to adaptation or development within society.<sup>8</sup> Islam is a religion, a legal system, and a lifestyle all in one.<sup>9</sup> The Constitution and the *Qur'an* both serve as the basis for their prospective legal orders. The Constitution has many roles and characteristics that hold the American system of governance in place. Likewise, the *Qur'an* has many roles and characteristics that serve as a foundation for the Saudi Arabian legal system. The

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3. Entelis, *supra* note 1, at 1253.

4. David J. Karl, *Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know*, 25 GEO. WASH. J. INT'L L. & ECON. 131, 133 (1992).

5. *Id.* at 134.

6. U.S. CONST. amend. I. The Establishment Clause reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.*

7. Karl, *supra* note 4, at 134 n.14; Interviews with Muslims, Islamic Center of Tallahassee, Al Ansar Mosque, Tallahassee, Fla. (Ramadan, Nov. 16, 2001) [hereinafter Interviews - Al Ansar Mosque]; C.G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE* 5 (1988); AINSLIE EMBREE, *SOURCES OF INDIAN TRADITION* 383 (2d ed. 1988).

8. EMBREE, *supra* note 7.

9. *Id.*

*Qur'an* is similar to the United States Constitution in several ways and is a constitution in and of itself.

## II. THE UNITED STATES CONSTITUTION

What functions and characteristics does the Constitution have? There are countless functions of the Constitution and many pages could be devoted exclusively to this topic. For the sake of simplification, there are four main characteristics of the Constitution that will be discussed. The Constitution is permanent, amendable, provides a power map, and establishes rights.<sup>10</sup>

### *A. The Constitution is Permanent*

The Constitution is permanent.<sup>11</sup> This permanence is established in the Supremacy Clause of Article VI:

This Constitution, and the [l]aws of the United States which shall be made in [p]ursuance thereof; and all [t]reaties made, or which shall be made, under the [a]uthority of the United States, shall be the supreme [l]aw of the [l]and; and the [j]udges in every state shall be bound thereby, any [t]hing in the Constitution or [l]aws of any State to the [c]ontrary notwithstanding.<sup>12</sup>

It is clear from Article VI that the Constitution is more than a statute; it is supreme and it is permanent.

### *B. The Constitution is Changeable*

The Constitution is permanent, however at the same time, it is changeable. In drafting the Constitution, the framers recognized that there was a need for changeability so that the Constitution could last. Article V, in particular, establishes a procedure that can be used to make amendments.<sup>13</sup> Also, the Supreme Court in early

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10. The author developed this definition. It was influenced by a discussion on constitutions and constitutionalism in professor Liz Fischer's European Union class at The Florida State University College of Law. Specifically, the word "power map" was taken from Professor Fischer's class, but the broader notion of what a constitution is and what its functions are, particularly the definitions and functions of the U.S. Constitution, for the purpose of this paper, were contemplated and developed by the author.

11. Permanent in this context means the Constitution is more enduring than regular laws that come and go. The Constitution is the foundation on which all other laws in the United States are created. Any new law must fit within the Constitutional framework.

12. U.S. CONST. art. VI, cl. 2.

13. U.S. CONST. art. V.

case law demonstrated that the Constitution could be interpreted and developed by the judicial system through judicial review.<sup>14</sup> The ability to change and adapt existing constitutional doctrines through amendment and judicial review establishes the Constitution as a living document.

### C. *The Constitution Creates a Power Map*

This ability to change is not a boundless power, however, and the Constitution also provides a "power map."<sup>15</sup> Articles I, II, and III outline the structure of the U.S. Government.<sup>16</sup> Important in this power structure is the idea of separation of powers.<sup>17</sup> The separation of powers safeguards each branch of government from the other branches and ensures that no one branch becomes tyrannical by amassing more power than the other branches.<sup>18</sup> The framers laid out a precise way that laws were to be made under the Constitution that would ensure this separation of powers remained intact.<sup>19</sup> Recent case law demonstrates that the Supreme Court still closely interprets the constitutionally-prescribed methods of law making.<sup>20</sup> Two Supreme Court cases illustrate this point. In *Clinton v. City of New York*,<sup>21</sup> the Supreme Court struck down a law that would allow the President to have a line item veto because the law effectively allowed the President to amend two Acts of Congress by repealing a portion of each.<sup>22</sup> The court held that this did not conform with Article I of the Constitution.<sup>23</sup> In *INS v. Chadha*,<sup>24</sup> the Supreme Court struck down Section 244(c)(2) of the Immigration and Nationality Act which authorized "either House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General, to allow a particular deportable alien to remain in the

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14. See, e.g., *Marbury v. Madison*, 5 U.S. 137 (1803); see also *McCulloch v. Maryland*, 17 U.S. 316 (1819).

15. See *supra* note 10. More specifically, the term "powermap" means that the Constitution acts as an instruction book. It provides a guideline for how the American system of governance should operate and how powers are to be exercised and separated.

16. U.S. CONST. arts. I, II, III.

17. THE FEDERALIST NO. 47 (James Madison).

18. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1326 (2001).

19. U.S. CONST. arts. I, II, III.

20. See *INS v. Chadha*, 462 U.S. 919 (1983); *Clinton v. New York*, 524 U.S. 417 (1998).

21. 524 U.S. at 417.

22. *Id.* at 438-39.

23. *Id.*

24. 462 U.S. at 919.

United States.<sup>25</sup> The Court held that this “legislative veto” was unconstitutional.<sup>26</sup>

#### D. *The Constitution Establishes Rights*

Finally, the Constitution establishes rights. The Bill of Rights, with its original ten amendments, establishes the rights that belong to the citizenry and to the states. These rights are undeniable and permanent. The Bill of Rights establishes certain minimum rights of individuals, such as the freedom of religion, the right against self-incrimination, the right to a public trial, the right to counsel, the right to have equal protection of the laws, and the right to be free from cruel and unusual punishment.<sup>27</sup> Although these rights are formally established in the Constitution, occasionally there is a disparity between the rights formally possessed by the citizenry and those actually exercised. U.S. history is full of instances where citizens are not given the full rights that are formally contained within the Constitution, such as racial and gender discrimination.<sup>28</sup>

### III. THE BASIC SOURCES OF ISLAMIC LAW: THE *QUR'AN* AND *SUNNAH*

Saudi Arabia is an Islamic country where Islam is the authority for its legal system.<sup>29</sup> The *Qur'an* is the revealed word of God and is the foundation of Islamic law.<sup>30</sup> According to Islamic history, the Archangel Gabriel gave the text of the *Qur'an* to the Prophet Mohammed.<sup>31</sup> The *Qur'an* is the foundation of *Shari'a*, or Islamic law.<sup>32</sup> Meaning “the way” or “the path that leads to refreshment,” *Shari'a* is the path to a moral life for Muslims who are seeking to follow God.<sup>33</sup> The two primary sources of *Shari'a* are

25. *Id.*

26. *Id.* at 959.

27. U.S. CONST. amends. I, V, VI, VIII, XIV.

28. *See, e.g.,* Johnson v. M'Intosh, 21 U.S. 543 (1823); Plessy v. Ferguson, 163 U.S. 537 (1896); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Bradwell v. Illinois., 83 U.S. 130 (1873); Reed v. Reed, 404 U.S. 71 (1971).

29. CIA, THE WORLD FACTBOOK, Nov. 11, 2001, available at <http://www.odci.gov/cia/publications/factbook/geos/sa.html>.

30. Purva Desphande, *The Role of Women in Two Islamic Fundamentalist Countries: Afghanistan and Saudi Arabia*, 22 WOMEN'S RTS. L. REP. 193, 193 (2001); Entelis, *supra* note 1, at 1257; Karl, *supra* note 4, at 135; Interviews - Al Ansar Mosque, *supra* note 7; Interview with Sayed, American Muslim, Hanafi Branch of Sunni, Tallahassee, Fla. (Mar. 27, 2002) [hereinafter Interview - Sayed]. *See also infra* notes 46-48 and accompanying text.

31. Entelis, *supra* note 1, at 1253 n.9; *see infra* note 45 and accompanying text.

32. Karl, *supra* note 4, at 137; Interviews - Al Ansar Mosque, *supra* note 7; Interview - Sayed, *supra* note 30.

33. Karl, *supra* note 4, at 137; INT'L ISLAMIC UNIV. MALAY., GLOSSARY OF ISLAMIC TERMS (Mar. 27, 2002), available at <http://www.iiu.edu.my/deed/glossary/index2.html>; Interview with John Kelsay, Richard L. Rubenstein Professor of Religion & Department Chair of the Department of Religion, Florida State University, Tallahassee, Florida (Mar. 28, 2002).

the *Qur'an* and the *Sunnah*.<sup>34</sup> *Sunnah* means "customary procedure or norm."<sup>35</sup> The *Sunnah* is a set of rules developed from the conduct and practices of Mohammed.<sup>36</sup> When the *Qur'an* does not address a certain area, Muslims look to the *Sunnah* to resolve the issue. Sources outside the *Qur'an* are necessary because less than 100 verses of the approximately 6300 verses in the *Qur'an* deal with issues that Western jurists would consider legal.<sup>37</sup>

#### IV. THE SAUDI ARABIAN CONSTITUTION

Formally, these two primary legal sources, the *Qur'an* and the *Sunnah*, serve as the Saudi Arabian Constitution. "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet . . . are its constitution."<sup>38</sup> This statement contained in the 1992 Basic Law of Government demonstrates that the *Qur'an*, at least officially, does have the role of a constitution in Saudi Arabia. Saudi leaders were reluctant to adopt a constitution because of their commitment to the *Shari'a* principle that only God can make law and because of the fear that constitutionalism could threaten the royal family's monopoly on power.<sup>39</sup> There was vast debate and various pressures leading up to the adoption of the 1992 Basic Law of Government.<sup>40</sup> The oil boom of the past twenty years led to a more educated and well traveled society that saw incompetence in their government and sought a greater influence in the running of the government.<sup>41</sup> This oil boom brought Saudi Arabia into the international spotlight and Western nations pressured the country for a stable government that was more compatible with Western systems of government.<sup>42</sup> The rising success of democracy and political participation caused liberal Saudis to call for a reform in government, while conservative religious leaders felt that Islam was under threat.<sup>43</sup> In response,

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34. Entelis, *supra* note 1, at 1263-64.

35. Karl, *supra* note 4, at 138.

36. *Id.* at 139.

37. Hossein Esmaeili & Jeremy Gans, *Islamic Law Across Cultural Borders: the Involvement of Western Nationals in Saudi Murder Trials*, 28 DENV. J. INT'L L. & POL'Y 145, 148 (2000).

38. BASIC LAW OF GOVERNMENT (Saudi Arabia) art. I, translated in INTERNATIONAL CONSTITUTIONAL LAW (A. Tschentscher ed., last visited May 21, 2002), <http://www.uni-wuerzburg.de/law/sa00000.html> [hereinafter Basic Law].

39. Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. J. INT'L L. 307, 351 (1994).

40. *Id.* at 353; Rashed Aba-Namay, *The Recent Constitutional Reforms in Saudi Arabia*, 42 INT'L & COMP. L.Q. 295, 300 (1993).

41. Aba-Namay, *supra* note 40, at 299.

42. *Id.*

43. *Id.* at 300; Mayer, *supra* note 39, at 351.



King Fahd passed the Basic Law of Government on March 1, 1992.<sup>44</sup> The most notable effect of the Basic Law of Government was to secure the legitimacy, position, and necessity of the royal family.<sup>45</sup> To understand the issue more completely, it is important to look at the official and unofficial legal systems and processes of Saudi Arabia.

## V. COMPARING THE *QUR'AN* IN SAUDI ARABIA TO THE U.S. CONSTITUTION

### A. *The Qur'an is Permanent*

The *Qur'an*, like the Constitution, is also permanent. According to Muslim tradition, God revealed the *Qur'an* to his prophet Mohammed for more than twenty years, beginning in about 610 A.D.<sup>46</sup> To Muslims, the *Qur'an* is God's holy and inspired word and is the ultimate authority.<sup>47</sup> Although there are different schools of Islam, all Muslims view the *Qur'an* as the permanent and everlasting word of God.<sup>48</sup>

### B. *Shari'a is Amendable and Provides a Power Map*

Although the *Qur'an* itself is not amendable, the *Shari'a* is amendable. On this point it is important to distinguish between the *Qur'an* and the broader category of *Shari'a*. The *Qur'an* was completed nearly fourteen hundred years ago and is unchangeable.<sup>49</sup> The *Qur'an* establishes this principle of permanence and rigidity by simply stating: "My word shall not be changed."<sup>50</sup> In contrast, *Shari'a* is changeable and can be developed to suit the needs of society.

The *Qur'an* provides a power map. The *Qur'an* does not always contain the law, but contains just the principles that should be used to discover the law. The *Qur'an* provides the authority from which the law is developed. To understand the way that *Shari'a* develops, it is important to look at some of the secondary sources of Islamic law.

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44. Basic Law, *supra* note 38; Mayer, *supra* note 39, at 353.

45. *Id.*

46. EMBREE, *supra* note 7, at 383.

47. *Id.*

48. Asad Latif, *Islam Has Scope for Diversity*, THE STRAIT TIMES (Singapore), Oct. 16, 2001.

49. EMBREE, *supra* note 7, at 383.

50. *Qur'an* 50:29.

Unlike man-made, or created law, *Shari'a* is discovered law.<sup>51</sup> In traditional Islamic theory, the only room for human intrusion was in interpretation.<sup>52</sup> This meant that the rules were contained in the source, which only required the correct reading. Because of this traditional theory, *Shari'a* was largely a jurists' law that greatly limited the power of Muslim rulers in traditional Islamic legal systems.<sup>53</sup> However, sometimes a situation would arise that was not dealt with in the *Qur'an* or the *Sunnah*. In situations of this type, a class of highly trained religious scholars, "*ulama*," traditionally had the responsibility of interpreting the *Qur'an* and the *Sunnah* and applying them to new circumstances.<sup>54</sup> Religious scholars working as jurists were called "*fuqaha*" and their juristic works, "*fiqh*" were the authority on Islamic law.<sup>55</sup> This role of interpretation made Islamic law a jurists' legal system, largely independent of political rulers.

Another secondary source of *Shari'a* is known as "*ijma*."<sup>56</sup> *Ijma* is the doctrine of consensus and follows the principle "that the unanimous opinion of the Sunnite community . . . on a religious matter constitutes an authority."<sup>57</sup> In Saudi Arabia *ijma* is limited to those of the companions of the Prophet.<sup>58</sup> "*Qiyas*" is the use of analogy from matters that are contained within the *Qur'an* to determine a rule for matters that are not contained within the *Qur'an*.<sup>59</sup> For example, if a small amount of a food is forbidden, scholars analogize that a larger amount is also forbidden.<sup>60</sup> If the killing of a non-Muslim who engages in war against Muslims is permissible, scholars conclude that acts that come short of killing, such as taking property, are also permissible.<sup>61</sup> One final source of *Shari'a* is known as "*ijtihad*," or independent reasoning based on evidence found in the other sources.<sup>62</sup> According to Hanbali tradition, however, *ijtihad* is limited.<sup>63</sup>

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51. Ann Elizabeth Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1022 (1991) [hereinafter Mayer, *Islam and the State*].

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. ISLAMIC LAW AND LEGAL THEORY 155 (Ian Edge ed., 1996); WEERAMANTRY, *supra* note 7, at 39.

57. ISLAMIC LAW AND LEGAL THEORY, *supra* note 56, at 155.

58. See WEERAMANTRY, *supra* note 7, at 39-40.

59. ISLAMIC LAW AND LEGAL THEORY, *supra* note 56, at 207-8; WEERAMANTRY, *supra* note 7, at 40.

60. ISLAMIC LAW AND LEGAL THEORY, *supra* note 56, at 208.

61. *Id.*

62. *Id.* at 274.

63. See FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 83 (2000); Karl, *supra* note 4, at 141.

Following the death of the Prophet Mohammed in 632 A.D., the world community of Muslims, "*umma*," broke into two main camps: *Sunnis*, who make up approximately eighty-five percent of all Muslims today, and *Shi'ites*.<sup>64</sup> According to Mohammed's teachings, another prophet could not follow him. However, the Muslim community needed a leader.<sup>65</sup> The majority argued for the election of a leader, while a small minority believed that the Prophet had designated a spiritual leader.<sup>66</sup> The majority became the *Sunnis* while the minority became the *Shi'ites*.<sup>67</sup> There are four main schools within Sunni Islam: the *Hanafi*, the *Shafe'i*, the *Maliki*, and the *Hanbali*.<sup>68</sup> Saudi Arabia follows the *Hanbali* school, the strictest of the four *Sunni* schools.<sup>69</sup> The *Hanbali* school is named after Imam Ahmad Ibn Hanbal, who lived in 780-855 A.D.<sup>70</sup> Hanbal taught that the only sources of law were the *Qur'an* and the *Sunnah*, and repudiated *ijtihad*, independent reasoning.<sup>71</sup> In 1928, the Supreme Judicial Council of Saudi Arabia passed a resolution that required courts to use *Hanbali* texts when reviewing civil transactions.<sup>72</sup>

The existence of the many schools of Islam brings up an important point about the *Qur'an* in general, which is not strictly limited to Saudi Arabia. Although the *Qur'an* may have many of the roles and functions of Constitution in Saudi Arabia, it does not have the role of a constitution for Muslims as a whole. This is because there is no one ultimate authority in the interpretation of the *Qur'an*. There are many different schools of Islam and each has its own interpretation of the *Qur'an* and its own understanding of Islamic law. Different Islamic groups can act in contravention to the interpretation of other Islamic schools and still be following the *Qur'an*. There is no universal interpretation. In comparison, there is an ultimate authority in the interpretation of the U.S. Constitution - the Supreme Court. Like the *Qur'an*, the Constitution must be construed and read in light of a changing

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64. Esmaeili & Gans, *supra* note 37, at 148.

65. Latif, *supra* note 48.

66. *Id.*

67. *Id.*

68. Esmaeili & Gans, *supra* note 37, at 148; WEERAMANTRY, *supra* note 7, at 49, 51-52, 54.

69. Karl, *supra* note 4, at 140.

70. *Id.* at 141.

71. *Id.*

72. Karl, *supra* note 4, at 10. See also ISLAMIC FAMILY LAW PROJECT, at <http://els41.law.emory.edu/ifl/legal/saudi-arabia.htm> (last visited May 20, 2002). These sources were ranked as follows: "*Sharh Mutaha al-Iradat* of al-Bahuti, *Kashshaf al-Kina an Matn al-Ikna* of al-Bahuti, commentaries of al-Zad, commentaries of al-Dalil, and if no suitable provision is found, then secondary sources in Hanbali legal manuals, and lastly, reference to authorities of other *madhahib*." *Id.*

world. The key difference is that there is one body that has the final authority to interpret the Constitution, rather than multiple bodies that each issue simultaneous and possibly conflicting interpretations.

Saudi Arabia is unique in the Muslim world because it is the only Muslim country that still gives only *Shari'a* the official status as law.<sup>73</sup> All other lawmaking activity is described as "regulation" or "administration."<sup>74</sup> Works of *fiqh* remain the official source of law.<sup>75</sup> As could be expected, works of *fiqh* are insufficient to govern a modern industrialized nation. Although the *Shari'a* is the only official source of law, other law-like devices must still be used.

Royal decrees are one such method of supplementing the *Shari'a* as modern needs demand.<sup>76</sup> Royal decrees generally deal with issues such as business law and foreign investment and trade law. Royal decrees follow principles of Western legal thought.<sup>77</sup> *Shari'a* is generally insufficient to provide guidance for modern businesses and indeed it is often in conflict with Western contract law and insurance.<sup>78</sup> Several key Islamic legal principles are controlling in these areas, specifically the doctrines of "*gharar* and *riba*".

The doctrine of *gharar*, or risk, is associated with gambling and ventures with risk involved.<sup>79</sup> Contracts involving speculation or where the gain of each party is not clearly defined are in violation of *gharar*.<sup>80</sup> Insurance, for example, is against the traditional principles of Islamic law as a violation of *gharar*.<sup>81</sup>

The doctrine of *riba* means "usurious interest."<sup>82</sup> Violations of *riba* occur when a lender charges interest, or a bargain occurs where one party receives payment greater than that which was exchanged.<sup>83</sup> Banks in Saudi Arabia have been faced with this

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73. Mayer, *Islam and the State*, *supra* note 56, at 1026; VOGEL, *supra* note 63, at 3; Interview with Abdulgader, Saudi Arabian Muslim, Hanbali Branch of Sunni, Tallahassee, Fla. (Ramadan, Nov. 16, 2001) [hereinafter Interview with Abdulgader].

74. Mayer, *Islam and the State*, *supra* note 56, at 1026.

75. Karl, *supra* note 4, at 143; VOGEL, *supra* note 63, at 3; Aba-Namay, *supra* note 40, at 295.

76. Karl, *supra* note 4, at 143; Interview with Abdulgader, *supra* note 73.

77. Karl, *supra* note 4, at 142.

78. *Id.*

79. *Id.* at 153.

80. *Id.*

81. *Id.* at 156.

82. *Id.* at 151-52.; Barbara L. Seniawski, Note, *Riba Today: Social Equity, the Economy, and Doing Business Under Islamic Law*, 39 COLUM. J. TRANSNAT'L L. 701, 708 (2001); Interviews - Al Ansar Mosque, *supra* note 7.

83. Seniawski, *supra* note 82, at 708.

problem when they are unable to collect the interest in their loan agreements.<sup>84</sup>

Nevertheless, insurance and interest are necessities in modern economies and Saudi Arabia is no exception. These commercial tools are just as important in Saudi Arabia as in other countries and thus, Saudi Arabia accommodates these kinds of necessities through the use of legal fictions or "*hiyal*."<sup>85</sup> *Hiyal*, the plural form of *hila*, accomplish end results that would otherwise be incompatible with *Shari'a* principles, while technically staying within the lines of *Shari'a*.<sup>86</sup> One such *hila* is the double sale. For example, a debtor sells a piece of property to a creditor for cash, then immediately buys it back at a higher price which will be paid at a later date.<sup>87</sup> The higher price of the second sale operates as loan interest.<sup>88</sup> Similarly with insurance, policyholders pay into a pool while the insurance company acts as a policyholder. The insurance company invests premiums; if a policyholder has a loss, he files a claim.<sup>89</sup> If he has no losses, he gets back all premiums and any gains on the money minus expenses.<sup>90</sup>

### C. *The Qur'an and the Constitution: Comparing Blueprints for Two Systems of Government*

First, the *Qur'an* is unlike the U.S. Constitution in that the *Qur'an* cannot be amended, whereas the Constitution was created with the idea that it could be amended in the future. The framers constructed procedures for the amendment process which Mohammed, on the other hand, did not intend for the *Qur'an* to be changed or amended. He meant for it to permanently survive in its original form. Not only is there no process for amendment contained within the *Qur'an*, the *Qur'an* explicitly states that it is not to be changed. However *Shari'a*, which contains the *Qur'an*, is amendable. Islamic legal doctrine is able to develop through the use of secondary sources of law such as *ijma*, *qiyas*, works of *fiqh*, and *ijtihad*. Although Saudi Arabia formally limits sources such as *ijma* and *ijtihad*, and despite its claims that *Shari'a* is the only source of law within the kingdom, it is clear that other sources of law exist in Saudi Arabia. Royal decrees<sup>91</sup> and the use of *hiyals* or "legal

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84. Karl, *supra* note 4, at 152.

85. *Id.* at 153-54; Interviews - Al Ansar Mosque, *supra* note 7.

86. Karl, *supra* note 4, at 154; Interviews - Al Ansar Mosque, *supra* note 7.

87. Interviews - Al Ansar Mosque, *supra* note 7.

88. *Id.*

89. Karl, *supra* note 4, at 157.

90. *Id.*

91. See *supra* notes 76-78 and accompanying text.

fictions<sup>92</sup> are law-like devices, even if they are not considered to be “law” per se. While these sources may sometimes be compatible with *Shari’a*, they may also conflict with *Shari’a* and yet still be used. The conclusion that can be drawn is that the *Qur’an* in Saudi Arabia has many of the characteristics of the U.S. Constitution in that it provides the ultimate authority for the law but does not contain all the law. In both countries, law is developed outside of the source. The law is usually developed in the spirit of the source, but occasionally it is in breach of the source.

Secondly, the *Qur’an* is like the U.S. Constitution in that it provides a power map. The Constitution provides the method for lawmaking and it contains the directions for a system of government. Similarly, the *Qur’an* contains the directions for a holy life. It contains general principles that direct Islamic law. It is widely accepted by citizens that the U.S. Constitution is the foundation for the system of governance in the United States. Similarly, it is well accepted among Muslims that the *Qur’an* is a map for a holy life, forming a legal foundation and providing the standards which should be used to discover the law.

#### D. The *Qur’an* Establishes Rights

The *Qur’an* establishes rights. Before discussing specific rights established in the *Qur’an*, it is important to understand the concept of rights in Islamic jurisprudence. In Arabic, “*haqq*,” a right or claim, has a broad meaning.<sup>93</sup> It means “to engrave” onto some object, “to inscribe or write,” “to prescribe and decree,” “that which is established and cannot be denied,” “truth,” and that which is “due to God or man.”<sup>94</sup> *Haqq* could mean a right, claim, duty, or truth depending on the context in which it is used.<sup>95</sup> Medieval Muslim clerics distinguished between three central kinds of rights: the rights of God, “*huq uq Allah*,” the rights of persons, “*huq-uq al ‘ibad*,” and the dual rights shared by God and persons.<sup>96</sup> An example of a right of God is fulfilling the five tenets of Islam,<sup>97</sup> to

92. See *supra* notes 85-90 and accompanying text.

93. Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, 15 J.L. & RELIGION 185, 191 (2001-2002).

94. *Id.*

95. *Id.*

96. *Id.* at 191-92.

97. The five tenets of Islam are: *Al-Shahadah* (Testimony) - “There is no God but Allah and Mohammed is His Prophet,” *Al-Salah* (Prayer) - five times a day toward the holy city of Makkah, *Al-Siyam* (Fasting) - during the month of Ramadan, *Al-Zakat* (Almsgiving) - to the poor, and *Al-Haji* (The Pilgrimage) - to the holy city of Makkah, once in a lifetime. SAUDI ARABIAN INFORMATION RESOURCE, at <http://www.saudinf.com/main/b63.htm> (last visited May 16, 2002) [hereinafter SAUDI ARABIAN INFORMATION].

while examples of rights of persons include the right to have children and the right to health and safety. Dual rights are a combination of religious and secular rights such as the mandatory three-month waiting period after a divorce or death before a wife can remarry.<sup>98</sup> This is a dual right because God demands the protection of lines of kinship within wedlock, and it is a right of persons because parents and children need to be able to establish paternity.<sup>99</sup> The significance of this system of rights is that there is a connection between *haqq*, "rights," and *wajib*, "obligations."<sup>100</sup> Every right has a corresponding obligation.<sup>101</sup> This means that the person with greater responsibilities also has greater rights.<sup>102</sup> The rights that will be examined in the successive sections are several of the rights that belong to women under the *Qur'an*.

### 1. *The Rights of Women*

Women are given many rights under the *Qur'an*. The *Qur'an* states that men and women are equal and are both equally created by God: "O mankind, we created you of a single soul, male and female."<sup>103</sup> According to Muslim and Islamic tradition, women are equal under Islam, however, they are "equal but different."<sup>104</sup> The Crown prince of Saudi Arabia, Abdullah bin Abdul-Aziz Al Sa'ud, proclaimed that "a Saudi woman is a first class citizen [who] . . . has rights[,] . . . duties[,] . . . and responsibility . . . [W]hen we talk about the comprehensive developments which our country is experiencing in all aspects we can not ignore the role of Saudi woman . . . and her participation in the responsibility of this development."<sup>105</sup> Woman was "created different than man," but "both are equal and both have equal rights."<sup>106</sup> The belief is that men and women have complimentary roles: "[t]he strengths of man compliment the weaknesses of woman and vice versa."<sup>107</sup> This

98. Moosa, *supra* note 93, at 192.

99. *Id.*

100. *Id.*; Interview with Abdul, Turkish Muslim, Hanafi Branch of Sunni, Tallahassee, Fla. (Ramadan, Nov. 16, 2001) [hereinafter Interview with Abdul].

101. Moosa, *supra* note 93, at 193.

102. Interview with Abdul, *supra* note 100.

103. *Qur'an* 49:13.

104. Interview with Hanif, American Muslim, Sunni, Tallahassee, Fla. (Ramadan, Nov. 16, 2001) [hereinafter Interview with Hanif].

105. Desphande, *supra* note 30, at 198 (quoting Press Release, Amnesty International, Saudi Arabia: Time is Long Overdue to Address Women's Rights (Sept. 27, 2000), available at [http://www.amnestyusa.org/news/2000/Saudi\\_Arabia09272000.html](http://www.amnestyusa.org/news/2000/Saudi_Arabia09272000.html), and citing a report in Al-Jazeera newspaper that quoted Abdullah bin 'Abdul 'Aziz Al-Sa'ud, Crown Prince of Saudi Arabia).

106. Interview with Hanif, *supra* note 104.

107. Interview with Michael, American Convert to Islam, Tallahassee, Fla. (Ramadan, Nov. 16, 2001) [hereinafter Interview with Michael].

notion of the complimentary role of men and women is seen throughout many areas of Islamic jurisprudence, especially in property ownership and marriage.

#### a. *The Right to Own Property*

Women can own property under Islamic law.<sup>108</sup> Any money that a married woman earns belongs to her and she is free to do with it whatever she chooses.<sup>109</sup> A woman can own property and she, not her husband, holds legal title to her earnings. This right was in place even before European Common Law systems allowed women to own property and this fact is often pointed out by Muslims in defense of Islam and the fairness of *Shari'a*.<sup>110</sup>

#### b. *The Right to Dower*

Dower is a payment from the husband to the bride that belongs solely to the bride.<sup>111</sup> She can ask for whatever she wants for dower. "If she asks for ten Mercedes, then he [her husband] must pay it."<sup>112</sup> A woman has an absolute right to dower and if a man cannot pay it at the beginning of the marriage, he must continue to make payments until he pays her the full amount.<sup>113</sup> Similarly, maintenance and care of the wife is the husband's responsibility and the wife's right under the *Qur'an*.<sup>114</sup> The husband, not the wife, has the responsibility of providing for the family.<sup>115</sup>

#### E. *The Right to Freely Choose a Husband*

A woman has free choice in agreeing to marriage. A woman must accept a man's proposal of marriage either herself or through a representative.<sup>116</sup> This freedom of choice in marriage is something

108. Moosa, *supra* note 93, at 204. See also SAUDI ARABIAN INFORMATION, *supra* note 97, at <http://www.saudinf.com/main/h61.htm>.

109. SAUDI ARABIAN INFORMATION, *supra* note 97, at <http://www.saudinf.com/main/h61.htm>; Interview with Abdul, *supra* note 100.

110. SAUDI ARABIAN INFORMATION, *supra* note 97, at <http://www.saudinf.com/main/h61.htm>; Interviews - Al Ansar Mosque, *supra* note 7.

111. JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* 87 (2d ed. 1990); PAMPHLET ON UNDERSTANDING ISLAM AND THE MUSLIMS, ISLAMIC AFFAIRS DEP'T OF THE EMBASSY OF SAUDI ARABIA, Washington, D.C.; I.A. IBRAHIM, *A BRIEF ILLUSTRATED GUIDE TO UNDERSTANDING ISLAM* 63 (1996); Interviews - Al Ansar Mosque, *supra* note 7.

112. Interview with Abdul, *supra* note 100.

113. *Id.*

114. *Qur'an* 4:3.

115. Interview with Abdul, *supra* note 100.

116. NASIR, *supra* note 111, at 41, 53; JAMES NORMAN DALRYMPLE ANDERSON, *ISLAMIC LAW IN THE MODERN WORLD* 43 (Greenwood Press 1975) (1959); Interview with Abdul, *supra* note



that Muslims are quick to point out.<sup>117</sup> Under some Islamic traditions, women are also free to place conditions on the marriage agreement itself.<sup>118</sup> Women retain their own names and do not take the name of their husband.<sup>119</sup> The idea that women are forced into marriage is offensive and contrary to the beliefs of Muslims.<sup>120</sup>

## 2. Contradictions: The Rights of Men

Since men have more responsibilities than women, it seems only fitting that they should have more rights.<sup>121</sup> Women do not have to pay a dower to get married nor do they have the responsibility of providing for the family. Muslims defend the disparity between the rights enjoyed by men and the rights enjoyed by women<sup>122</sup> by arguing that women are equal under the *Qur'an* and *Shari'a*, and they merely have different roles.<sup>123</sup> Muslims argue that the covering of women is for their protection and respect.<sup>124</sup> Men are likely to lust after women; if they are covered it is better for both men and women.<sup>125</sup> Similarly, the prohibition against women drivers in Saudi Arabia is justified as protecting women from harms that could befall them while driving.<sup>126</sup> It is pointed out that mothers are highly respected in Islamic society.<sup>127</sup> While it is true that the *Qur'an* and *Shari'a* establish rights for women, they are not equal. There are many inequalities between men and women under the *Qur'an* and *Shari'a*, such as repudiation of a wife and polygamy.

### a. Repudiation

Under *Shari'a*, men can divorce their wives by repudiation. If a man says "I divorce you" three times, this is an irrevocable divorce.<sup>128</sup> The husband then has the obligation to pay any outstanding amount of dower left unpaid.<sup>129</sup> The woman does not

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117. Interviews - Al Ansar Mosque, *supra* note 7.

118. NASIR, *supra* note 111, at 67.

119. IBRAHIM, *supra* note 111, at 63.

120. Interviews - Al Ansar Mosque, *supra* note 7.

121. Interview with Abdul, *supra* note 100.

122. Interviews - Al Ansar Mosque, *supra* note 7.

123. Interview with Abdulgader, *supra* note 73.

124. Interviews - Al Ansar Mosque, *supra* note 7.

125. Interview with Michael, *supra* note 107; Interviews - Al Ansar Mosque, *supra* note 7.

126. Interview with Abdulgader, *supra* note 73. It is important to note that this is not a view held by all Muslims. This issue is debated among Muslims and Muslims interviewed for this paper had differing opinions on the issue.

127. Interviews - Al Ansar Mosque, *supra* note 7.

128. NASIR, *supra* note 111, at 68; ANDERSON, *supra* note 116, at 53; Interview with Abdul, *supra* note 100.

129. Interview with Abdul, *supra* note 100.

have this right; she cannot unilaterally divorce her husband as her husband can unilaterally divorce her.<sup>130</sup> This practice is defended in several ways. First, it is argued that although women cannot divorce their husbands through repudiation they always have the right to go before a court and ask for a divorce.<sup>131</sup> Also, they do not have to stay in a marriage if it is abusive.<sup>132</sup> Although this is a positive step, not being required to stay in an abusive relationship is not equal to having the right to divorce a wife at any moment by merely repudiating her three times. Second, it is argued that since men must pay any remaining amount of the dower upon repudiation, they have an incentive not to repudiate.<sup>133</sup> While this may be true, it does not make women equal. Third, it is argued that women are emotional, and should not be allowed to divorce as easily as men. Women are considered to think with their emotions first, while men think first with reason.<sup>134</sup> This rationale is based on generalizations about men and women. A legal system allowing unilateral divorce should not and cannot be justified by broad sexual stereotypes.

### b. Polygamy

Under the *Qur'an*, men are given the right to have up to four wives.<sup>135</sup> "Marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly, then only one."<sup>136</sup> Women do not have the right to have more than one husband. Still, Muslims are quick to point out that most men only have one wife.<sup>137</sup> The main justification for this is that if a wife had more than one husband and she was pregnant, it would be impossible to know the

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130. Desphande, *supra* note 30, at 194; Interview with Abdul, *supra* note 100.

131. JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* 34, 35 (1982); Interview with Abdul, *supra* note 100.

132. Interview with Abdul, *supra* note 100. Divorce on the grounds of cruelty, refusal or inability to maintain the wife, desertion, or serious disease or ailment that would make a continuation of the marriage dangerous to the wife, is allowed in the Maliki school of Islam. ESPOSITO, *supra* note 131, at 35.

133. *Id.*

134. *Id.*

135. DAVID PEARL, *A TEXTBOOK ON PERSONAL MUSLIM LAW* 69 (2d ed. 1979); NASIR, *supra* note 111, at 67; Interviews - Al Ansar Mosque, *supra* note 7; Desphande, *supra* note 30, at 194.

136. *Qur'an* 4:3. This was very progressive for its time. Women had a very low status in pre-Islamic Arabia. A marriage agreement closely resembled a contract in which the wife became the property of her husband. Women had no voice in the initiation or termination of a marriage and a husband's unlimited right of polygamy was limited only on his ability to capture or purchase women. Consequently the status of women was greatly increased by the guidelines set out for marriage under the *Qur'an*. ESPOSITO, *supra* note 131, at 14-15.

137. Interview with Abdul, *supra* note 100.

identity of the father.<sup>138</sup> "This is how Allah has created it."<sup>139</sup> Muslims also point to the fact that women out-number men in many societies and that allowing men to have more than one wife compensates for these extra women in society.<sup>140</sup> "It is better to have an extra wife than a wife and a girlfriend."<sup>141</sup> Although these are all good arguments, they don't make women equal; that is, they do not give women the ability to marry more than one husband. Ultimately, under the *Qur'an*, men can have more than one wife, but women cannot have more than one husband.

The *Qur'an* and *Shari'a* undoubtedly establish rights for women. They provide guidance and direction as to how the family should operate and how women are to be treated. Women hold a position of respect; however, it is not a position of equality. Perhaps this inequality is due more to culture and *Qur'anic* interpretation and not Islam per se. The *Qur'an* establishes rights for women, but these rights are not equal to the rights of men.

## VI. CONCLUSION

The *Qur'an* in Saudi Arabia plays a similar role to that of the U.S. Constitution. First, the *Qur'an* is permanent; it transcends normal laws and was written with the understanding that it would last. Muslims have the idea that only God can make law and that the *Qur'an* is the revealed word of God. This means that the *Qur'an* is a permanent part of *Shari'a*. Second, like the Constitution, *Shari'a* is changeable. Although the *Qur'an* cannot be changed, *Shari'a* has traditionally been a jurists' law that developed and changed through works of *fiqh* and *ijtihad* just as constitutional law has developed through U.S. Supreme Court decisions. Third, the *Qur'an* provides a power map. Just as the U.S. Constitution provides for separation of powers and methods of voting, the *Qur'an* is a guidebook to a holy life. Like the Constitution, the *Qur'an* provides the outline. The details are developed through subsequent works. Finally, like the Constitution, the *Qur'an* provides rights. Similarly, like the Constitution, under the *Qur'an*, rights are not always distributed evenly, and there is a disparity between rights that are formally established and rights that are actually exercised. The *Qur'an* in Saudi Arabia similarly serves the roles that are served by the U.S. Constitution, and most importantly, both the

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138. *Id.*; Interviews - Al Ansar Mosque, *supra* note 7.

139. Interviews - Al Ansar Mosque, *supra* note 7.

140. *Id.*

141. *Id.*

*Qur'an* and the Constitution are the foundations for their respective legal regimes.

Mohammed and Madison have more in common than is commonly recognized and likewise Saudi Arabia and the United States have similarities at the core of their legal systems. Mohammed and Madison both created a system of governance that is based on the supremacy of a document but that develops through the work of judicial interpretation. Both *Shari'a* and United States Constitutional law have a rich history and both systems continue to make important contributions to the legal world.