REFLECTIONS ON THE "CONSTITUTION OF MEDINA": AN ESSAY ON METHODOLOGY AND IDEOLOGY IN ISLAMIC LEGAL HISTORY

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The Constitution of Medina (the wathiqat al-Madina) is a document reportedly drawn up by the Prophet Muhammad (d. 11/632), upon his migration from Mecca to Medina. The document establishes rights and obligations among the Ansar (Helpers) of Medina, the Muhajirun (Emigres) who left Mecca with the Prophet, and the Jewish tribes of Medina as they embarked upon a new journey of co-existence and cooperation in the nascent Muslim polity founded in Medina. The only documentation of the Constitution, however, exists in literary references by historians living centuries after the document's supposed creation. Indeed, two authors living within two centuries after the Prophet's death reproduce the text in full. Yet, there is no original document or archaeological evidence testifying to it, and little evidence exists concerning the nature of government that existed in this early period of Islamic history. Nonetheless, as the scholarly literature shows, his-

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1 To indicate dates, I will utilize both the Islamic and Gregorian dating systems.

2 The migration from Mecca to Medina occurred in 622 CE and is considered a turning point in the nature and direction of the early Muslim community. With the migration, the Muslim community transformed from being a purely moral and spiritual community into a political one. It is in the context of this transformation that the Constitution of Medina was drafted and that it gains its significance. J. MARSHAL G.S. HODGSON, THE VENTURE OF ISLAM: CONSCIENCE AND HISTORY IN A WORLD CIVILIZATION 172-74 (1977); HUGH KENNEDY, THE PROPHET AND THE AGE OF THE CALIPHATES 33-35 (1986); IRA M. LAPIDUS, A HISTORY OF ISLAMIC SOCIETY 27 (1991) (1988).
torians of medieval Islam consider the Constitution of Medina to be a window into the political context and social dynamics of the early Muslim community. The interplay between religious identity, tribal politics, community building, and defense potentially find expression in the document and are addressed in varying degrees by the historiographical literature written about this document. 3

Whether the Constitution is in fact an authentic document is not at issue in this study. Rather, this study evaluates the secondary literature on the Constitution. The Constitution of Medina provides a window not simply to the medieval Islamic past, but also to the methodological weaknesses and ideological biases of those historians and scholars who attempt to interpret it. The ways in which various problems associated with the Constitution are discussed illuminate how the particular biases or methodological failings of historians can affect not only the meaning of the Constitution, but also, more generally, the interpretation of the Prophet's mission in Medina. To illustrate the impact of bias and methodological weaknesses on the interpretation of the Constitution, this essay focuses on three issues commonly addressed in studies of the Constitution: (1) whether the Constitution is authentic; (2)

3 The scholarly literature on this text relies, for the most part, on the literary version of this document related by Ibn Ishaq (d. 151/768) in AL-SIRA AL-NABAWIYYA, although few make reference to the slightly different version in KITAB AL-AMWAL, 1/2 IBN HISHAM, AL-SIRA AL-NABAWIYYA, 501-04 (Mustafa al-Saqa et al. eds., n.d.) (author died 213/828); AL-QASIM B. SALAM ABU UBAYD, KITAB AL-AMWAL 202-06 (n.d.) (author died 224/839). Incidentally, Ibn Kathir (d. 774/1372) quotes Ibn Ishaq’s version in full in his chronicle. 3/4 ABU AL-FIDA ISMA’IL IBN KATHIR, AL-BIDAYA WA AL-NIHAYA 238-40 (1996). He mentions the existence of Abu Ubayd's version, but does not cite it. Id. at 240. Importantly, no actual original document is ever mentioned by the modern commentators on the text. This raises a considerable problem for historians of this early period. Both authors above lived well after the Prophet's death, and yet provide what is meant to be a verbatim transcript of the Constitution. One of the greatest challenges to Islamic historiography is to know or even approximately know, from the much later literary tradition, what occurred in the early Islamic past, particularly in the period of the Prophet Muhammad's life. See for instance the works by Albrecht Noth and Fred Donner who attempt to study the period after the Prophet's death by using a thematic approach to the Islamic historical tradition. ALBRECHT NOTH (with Lawrence I. Conrad), THE EARLY ARABIC HISTORICAL TRADITION: A SOURCE-CRITICAL STUDY (Michael Bonner trans., Darwin Press 2d ed. 1994); FRED M. DONNER, NARRATIVES OF ISLAMIC ORIGINS: THE BEGINNINGS OF ISLAMIC HISTORICAL WRITING (1998). On the other hand, Patricia Crone and Michael Cook would argue against relying on the Islamic historical literary tradition since, according to them, the sources are untrustworthy. PATRICIA CRONE & MICHAEL COOK, HAGARISM: THE MAKING OF THE ISLAMIC WORLD (1977). It is not uncommon for historians to seek from the Islamic literary tradition, that so-called "kernel of truth." R. STEPHEN HUMPHREYS, ISLAMIC HISTORY: A FRAMEWORK FOR INQUIRY 87 (rev. ed. 1991). In the Constitution of Medina, however, various authors, noted below, contend that they found not only a kernel, but rather the "pay-dirt" of historical truth.
whether the Constitution is comprised of multiple documents or not; and (3) whether and in what sense the Constitution is a constitution at all.

The question of authenticity is not inherently an interesting question or one that can easily be resolved, especially in a paper of this length. The specific inquiry here involves a review of the methods by which various writers on the Constitution have approached the issue of the Constitution's authenticity. Through this review, what becomes clear is not whether the document is authentic, but rather the kinds of presumptions, presuppositions, and source limitations that find their way into the analysis of the text. Likewise, these presumptions will color the issue of compilation. Whether or not there are multiple documents within the Constitution is not of central concern to this study. Instead, the analysis reveals that ambiguities inherent in the text of the Constitution permit authors to evaluate the issue of compilation in a way that reflects their own interpretive biases rather than anything inherent in the text. Finally the debate surrounding the "constitutionality" of the Constitution allows one to consider writings by predominantly Muslim authors. These writers attempt to establish and emphasize an Islamic constitutional theory on the basis of the Constitution, yet this emphasis may have more to do with the relevance of constitutionalism in a newly independent Muslim world than with the fundamental role played by this document in Islamic political and legal history.

I. THE DOCUMENT

The Constitution of Medina is reported to be an agreement orchestrated by the Prophet Muhammad between the Ansar, Muhajirun, and the Jewish tribes in Medina. Muslim historians identify the date of this agreement around 622 A.H., shortly after the Prophet's migration from Mecca to Medina. The text itself consists of a preamble and forty-seven clauses outlining various aspects of community organization, procedures for common defense, and the relations between the Muslims and the Jewish tribes of Medina. The document, as related by medieval Muslim historians, opens by stating that it is a writing (kitab) of Muhammad "the Prophet" between "the believers and Muslims of Quraysh and Yathrib and those who follow them and are at-
tached to them and who fight along with them." The document provides that the parties to the document are a "single community" (umma wahida) distinct from any other. Furthermore, it breaks down the believers in accordance with their tribal affiliations and states that each group is liable for any wrongs done by one of its members (clauses 2-10). According to the document, debtors shall be aided and supported. Furthermore, the Constitution calls the believers (mu'minin) to unite against wrongdoing by others, while cautioning them against fighting each other on behalf of unbelievers, and against disrespecting any protection granted by one of them to a third party (clauses 11, 13-15). Where a contention arises between two parties on a matter, the issue is to be referred to God and to Muhammad for a decision (clauses 23, 42). In the second half of the document, the Constitution specifically addresses the rights of the Jewish community in Medina. For instance, the Jews of the distinct tribes are considered "a community along with the believers. To the Jews their religion and to the Muslims their religion. . ." (clauses 25-31). Furthermore, Jews who aid the believers are entitled to the same rights and privileges granted to believers under the document (clause 16) while charged with their own expenses and obligations of support in defense and war (clauses 37-38). Military action must be taken only with the permission of Muhammad, although one is able to avenge personal injuries received from another (clause 36).

The language of the text is difficult. As the noted Islamic historian Montgomery Watt indicates, the language is terse and often pronouns are used where nouns would be expected in English. This complexity of the

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6 Id. at 130. Quraysh was the tribe that controlled Mecca, the city from which Muhammad and his followers escaped. Yathrib was the early name for Medina prior to the Prophet's migration.

7 Id.; 1/2 IBN HISHAM supra note 3, at 501; ABU UBAYD, supra note 3, at 215. Underlying the debates on the meaning of this clause are questions concerning who is included in this single community. The preamble leaves the designation open-ended since it addresses not just the Muslims of Quraysh and Yathrib, but also those who "follow them and are attached to them and who fight along with them." WATT, supra note 5, at 130. Furthermore, assuming the document is a single document, the later mention of the Jews suggests that the Jews are also a part of the umma. However whether the document is a single document or a compilation of many documents, drawn up over a period of time, is a topic of debate among scholars. See below.

8 WATT, supra note 5, at 130-31.

9 Id. at 132-133.

10 Id. See below for further discussion on this provision and the debates about the relation of the Jews to the notion of umma.

11 Id. at 131.

12 Id. at 132-33.

13 Id.
language not only affects the ability to translate the text itself, but also raises the question of authenticity. Was the document written for a group that would understand those provisions that are ambiguous to a modern reader? The question of authenticity is of immense importance to many historians of this period, and it is often raised in connection with sources reporting about the life and times of the Prophet Muhammad.

II. QUESTIONS ON AUTHENTICITY

The question of authenticity is significant because no actual original evidence of the Constitution of Medina exists.14 Rather the principal sources of this document are the accounts by Ibn Ishaq and Abu Ubayd, both written within two centuries after the Prophet's death. This fact has not prevented scholars from utilizing the Constitution and mining it for what it can tell of the early history of the Medinan polity. Nearly unanimously, scholars have held that the document as presented by the later sources is in fact authentic. The methods by which they arrive at this conclusion, however, reveal less about the inherent authenticity of the document than the biases and methodological limitations that the authors bring to their historical evaluation of the Constitution.

One author, Julius Wellhausen,15 writing in 1889, provides various justifications for the Constitution's authenticity, yet his approach suffers from various limitations in historical analysis.16 The Constitution of Medina calls the parties to the Constitution a single umma (umma wahida), yet leaves unclear whether the Jewish tribes noted in the text are included within this umma.17 Noting the ambiguity in the text concerning the inclusion of the Jewish tribes within the notion of umma, Wellhausen argues that a later Muslim forger would not have incorporated such ambiguity into the text.18 Wel-

14 HUMPHREYS, supra note 3, at 92-99.
15 Wellhausen was the first to break down the Constitution into forty-seven separate articles. MUHAMMAD HAMIDULLAH, LE PROPHÈTE DE L'ISLAM 124 (1959); Uri Rubin, The "Constitution of Medina": Some Notes, 62 STUDIA ISLAMICA 5, 5 (1986). This scheme was later adopted by W. MONTGOMERY WATT, MUHAMMAD AT MEDINA 221-25 (1956); WATT, ISLAMIC POLITICAL THOUGHT 130-34 (1968); HAMIDULLAH, supra at 133-37; HAMIDULLAH, MAJMU AL-WATHA'IQ AL-SIYASIYYA FI AL-AHD AL-NABAWI WA AL-KHILAFA AL-RASHIDA 1-7 (1941); and for others, see, for example, Rubin, supra; Gil, supra note 4.
17 Technically, the question of what umma means is often a separate category of discussion and debate for most authors. To facilitate the discussion on authenticity, however, this question will be addressed here.
18 Wellhausen, supra note 16, at 135.
Ihausen's conclusion suffers from methodological weaknesses associated with his concentration on Ibn Ishaq's version of the Constitution to the exclusion of other versions of the text and the commentary associated with it.

Theologically, the implication of Jewish inclusion within the conception of umma is problematic because of classical Muslim understanding of the notion of umma as being a closed religious community.\textsuperscript{19} If this were the case, Wellhausen argues, then the developed theology would have prevented a later forger from adopting such ambiguous language. Therefore, according to Wellhausen, the fact that the relevant language in the document is ambiguous suggests that the document is authentic. But it is important to note that some have argued that umma does not necessarily imply a closed religious community. If umma can include Muslims and Jews together, whether through a theological or political interpretation of the term, then there is effectively no ambiguity in the usage; thus the question of authenticity is not so readily answered.\textsuperscript{20}

\textsuperscript{19} Watt, Muhammad: Prophet and Statesman 94 (1961); Ann K.S. Lambton, State and Government in Medieval Islam 13-14 (Oxford University Press 1991) (1981). For instance, Abu Ubayd specifically addresses this issue after presenting the text of the Constitution. He states that the reference to the Jews as an umma from among the Believers refers to the aid (nasr) the Jews will give to the Believers against their enemies. However, concerning matters of religion and faith (din), the Jews are not part of the Believers. So that the reader is not confused, he cites the following provision from the Constitution: "to the Jews their religion and to the Believers theirs." Abu Ubayd, supra note 3, at 219.

\textsuperscript{20} Wellhausen considers umma to mean a religious community that was at the same time not a closed political community. It could include non-Muslims in their capacity as confederates or clients of the Ansar. Wellhausen, supra note 16, at 129. However, he does suggest that the Jews were not as closely tied to the umma as the Arab tribes of the Aws and Khazraj. He understands this distinction in their membership in the umma by analogy to pre-Islamic tribal customs establishing relations between an Arab tribe and its mawali, or clients. Id. at 131. Incidentally, Watt adopts the same reasoning to consider the Jews as only contingently part of the umma anticipated by the Constitution of Medina. Watt, supra note 15, at 227. Under this theory, the Jews were considered part of the umma only to the extent they were clients of the Arab tribes of Medina.

Another view maintains that the reference to umma in the Constitution of Medina excludes the Jews from the Muslim umma, and instead renders them a separate and parallel community. For instance, R.B. Serjeant, who has written extensively on the Constitution of Medina, writes that the Constitution establishes the Jews as "an ummah, a community, along with the Mu'mins, each side retaining its own 'din', a word which, one must remember, can mean 'law' as well as 'religion'." R.B. Serjeant, The "Constitution of Medina," 8 The Islamic Q. 3, 13 (1964). Denny adopts Serjeant's reasoning, suggesting that it "satisfies the religious stipulations of the term's meaning at this time, which are reflected in those Qur'anic instances which refer exclusively either to the Muslims as an ummah or to other ummahs, especially the Jews and Christians." Frederick Denny, Ummah in the Constitution of Medina, 36 J. of Near E. Stud. 44 (1977). For Denny, the Constitution was a political-military document that was
Wellhausen further argues that the anti-Quraysh\textsuperscript{21} sentiment in the Constitution would not have existed had the text been forged much later.\textsuperscript{22} Although he does not fully develop this point, Wellhausen seems to suggest that since the Quraysh were already conquered by the first Islamic century, and later held positions of political leadership in the community, there would be no reason or even desire to negatively portray them in the text of a constitution. Originally, members of the Quraysh tribe persecuted the Prophet and his followers, resulting in their migration to Medina. Once the Islamic polity in Medina conquered not just Mecca but the entire Arab peninsula, the socio-political role of the Quraysh drastically changed. The first four caliphs who politically ruled the Muslim community were members of the Quraysh tribe.\textsuperscript{23} Thereafter, members of the Umayyad clan, a subset of the Quraysh, held the caliphate.\textsuperscript{24} Later, the Abbasids, whose eponym was the Prophet's Qurayshi uncle al-Abbas, overthrew the Umayyads and assumed the caliphate. In fact, treatises on the caliphate written well into the Abbasid period argued that the rightful caliph must be a member of the Quraysh tribe.\textsuperscript{25} Ibn Ishaq lived around the time of the Abbasid rebellion; Abu Ubayd (not con-

designed to ensure the security and safety of its inhabitants. The Jews could be a party to it, "as a sort of special group, a 'sub-ummah' with its own din." \textit{Id.}

The Muslim writer Muhammad Haykal sidesteps the issue of Jewish inclusion in the \textit{umma} and instead argues that the Constitution of Medina was a pact of friendship between the Ansar and Muhajirun on one side, and the Jews on the other. The pact was created, he argues, in order to safeguard religious freedom in the city. MUHAMMAD HUSAYN HAYKAL, \textit{The Life of Muhammad} 179-80 (Isma'il R.A. al Faruqi trans., 1976) (this translation was prepared from the eighth edition of the Arabic text, \textit{Hayat Muhammad}, originally published in 1935 or 1936). Likewise, the Egyptian historian Husayn Mu'nis does not explicitly address the inclusion of the Jews within the \textit{umma}. Rather, he says simply that the Jews were included in the document (\textit{sahifa}). HUSAYN MU'NIS, \textit{Dirasat fi al-Sira al-Nabawiyya} 56 (2d ed., 1985).

\textsuperscript{21} The Quraysh was a powerful tribe that controlled Mecca, and organized a series of battles with the Muslims after their migration to Medina. Many of the Muslims who migrated to Medina, including the Prophet, were members of Quraysh. After the Muslims conquered Mecca, the Quraysh began to play a more prominent role in the politics of Islamic empire and expansion. On the role of the Quraysh in Muslim political treatises, see below. The Constitution of Medina expresses an anti-Quraysh sentiment in clause forty-three, which provides: "No 'neighbourly protection' is given to Quraysh and those who help them." WATT, I SLAMIC POLITICAL THOUGHT, \textit{supra} note 15, at 133.

\textsuperscript{22} Wellhausen, \textit{supra} note 16, at 135.

\textsuperscript{23} These were Abu Bakr (r. 11/632-13/634), Umar b. al-Khattab (r. 13/634-23/644), Uthman b. Affan (r. 23/644-35/656), and Ali b. Abi Talib (r. 35/656-40/661).

\textsuperscript{24} The first caliph of the Umayyad dynasty was Mu'awiya b. Abi Sufyan (r. 40/661-60/680). The dynasty continued until 132/750, when it was overthrown by the Abbasids who, in turn, ruled until the Mongol invaders sacked the Abbasid capital of Baghdad in 656/1258.

\textsuperscript{25} On this point, see, ABU AL-HASAN ALI B. MUHAMMAD B. HABIB AL-MAWARDI, AL-AHKAM AL-SULTANIYYA WA AL-WILAYAT AL-DINIYYA 6-7 (1985) and AL-QADI ABU YA'LA
sidered by Wellhausen) lived exclusively under Abbasid rule. Both authors therefore were well-acquainted with the high political esteem Muslim society had for the Quraysh. According to Wellhausen, if the text of the Constitution were forged, neither author would have so negatively portrayed the Quraysh. Rather, they might have been inclined to alter the historical record to diminish the negative elements of the Qurayshi past. Wellhausen uses the fact that the Quraysh are portrayed negatively to suggest that the text is not forged but authentic.

Wellhausen makes a good point when he suggests that the ambiguities in the text speak against the possibility of fabrication. However, Wellhausen's analysis focuses so exclusively on the authenticity of the Constitution that he fails to account for alternative versions of the text, or interpretations of the text provided by the narrative context in which it falls. In other words, his positivist inquiry into the authenticity of Ibn Ishaq's version of the Constitution blunts him to the way in which the different medieval historians differed in their representation of the text or understood the Constitution and constructed the history surrounding its writing.

For instance, one reason scholars differ over the Jewish inclusion in the Constitution's use of *umma* involves how one understands the relevant phrasing in the document is used. Ibn Ishaq writes in article 25: "The Jews of Banu Awf are a community along with the believers" (wa inna bani awf ummatun ma'a al-mu'minin). The use of the Arabic preposition *ma'a* (lit. "with") confuses historians concerning whether the Jews were part of the Muslim *umma* or not. However, Wellhausen's analysis of the issue fails to account for a competing version reported by Abu Ubayd. In this second version, Abu Ubayd uses the preposition *min* (lit. "from," "among") instead of *ma'a*, which can have two possible meanings. *Min* can indicate that the Jewish *umma* is included within the Muslim *umma* (or larger body of believers) and therefore acts as an "explanatory *min"* (*min li al-bayan*). In other words, the reference to the Jewish *umma* is an elaboration on the constituent parts of the general *umma*, and does not distinguish one *umma* from another. Alternatively, the use of *min* may distinguish or segregate the Jewish *umma* from the Muslim *umma* (*min li al-tab'id*). However, Abu Ubayd does

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29. Rubin, supra note 15, at 13-17. Rubin offers another interpretation of this type of *min*. In this context, he argues that the use of *min* is meant to indicate that the Jews are part of a larger
more than simply relate the text of the Constitution. He specifically addresses the question of whether the Jewish tribes are considered part of the Muslim umma. He writes that when the Constitution states that the Jewish tribes are an umma of the Believers (umma min al-mu'minin), it is referring to the aid and assistance (nasr, mu'awana) the Jews will give to the Believers against their enemies. However, as far as religion (din) is concerned, Abu Ubayd looks to the next clause of the Constitution which states: "to the Jews their religion, and to the Believers their religion" (li al-yahud dinuhum wa li al-mu'minin dinuhum). Unfortunately, Wellhausen does not even consider Abu Ubayd's version of the Constitution, let alone this statement. Wellhausen's concern for the authenticity of Ibn Ishaq's version of the Constitution prevents him not only from inquiring into alternative sources and going beyond the pages of the Constitution, but from recognizing that the Constitution has a meaning within its narrative context, and not simply within a positivist paradigm of historical truth. In other words, by focusing on Ibn Ishaq's wording alone, Wellhausen not only closes himself off from investigating alternative versions of the Constitution, but also ignores the fact that the text falls within a narrative context in which the medieval author does more than reproduce the text, but indeed constructs its meaning.

Approaching the question of authenticity from a different perspective, R.B. Serjeant, in his two articles on the Constitution of Medina, suggests that the basis for the Constitution's authenticity is found in a cultural anthropological analysis. Prior to 1964, Serjeant lived in South Arabia as a colonial officer, and had an opportunity to observe the formalities and circumstances surrounding the practices of local tribes in the region. Serjeant argues that seventh-century pre-Islamic cultural and linguistic practices were somehow preserved in his then-contemporary South Arabian context. But Serjeant fails to provide any evidentiary support for this position. For Serjeant, the presumed continuity of cultural and linguistic practice is particularly relevant for understanding the Constitution of Medina. By correlating unity, and yet it also postulates their difference in monotheistic belief. Furthermore, Rubin argues that the use of min in this context is more appropriate, given Qur'anic usage, and therefore suggests that the Abu Ubayd version is more authentic than the Ibn Ishaq version. He argues this also on the basis of a more general and broad interpretation of the word umma in light of the Prophet's early efforts to make "far reaching concessions" in the early Medinan period in order to reconcile with the Jews.

30 ABU UBAYD, supra note 3, at 217, 219.
31 HUMPHREYS, supra note 3, at 94.
32 Id.
33 See for instance, Serjeant, Two Tribal Law Cases (Documents): (Wahdi Sultanate, South West Arabia), J. ROYAL ASIATIC Soc'y 1951, at 156-169.
then-current South Arabian cultural and linguistic practices with certain literary aspects of the text of the Constitution, Serjeant argues he can authenticate the text. He bases his argument on two factors. First, he notes that South Arabian contract drafting practices utilize certain types of closing statements to indicate the end of a document. These same phrases, he argues, can also be located in Ibn Ishaq's representation of the Constitution of Medina. According to Serjeant, the Constitution of Medina must be authentic because it reflects the continued and preserved practice of the South Arabian community. The later practice not only correlates with the earlier practice described in the text, but also corroborates and validates the Constitution's authenticity.34

Serjeant's second argument for authenticity relates to the methods of document preservation. He writes that in South Arabia, to preserve important papers, "tribesmen do carry documents in a little leather pocket behind the scabbard of their daggers."35 He notes that a historical report relates that Ali b. Abi Talib (r. 35/656-40/661), the fourth caliph or ruler, kept a document in the sheath of his sword. That document was purportedly about issues of blood money.36 Serjeant concludes that the document mentioned in the tradition must have been the Constitution of Medina, given the similarity in subject matter. Relying on the methodology noted above, he argues that the prevailing practice of document preservation in South Arabia constitutes a continuation of a prior cultural practice from the time of Ali b. Abi Talib. Consequently, the twentieth century practice corroborates the medieval textual reference, thereby authenticating the tradition and indirectly supporting the authenticity and existence of the Constitution of Medina.

Serjeant's arguments regarding authenticity are problematic for two reasons. First, Serjeant's methodology relies on a presumption of cultural continuity over a vast period of time. Effectively, he argues that aspects of the cultural context of twentieth-century South Arabia never progressed from

35 Serjeant, supra note 20, at 5.
36 Id. Al-Tabari notes a similar practice by the Prophet involving the document he wrote concerning the Jews and the issue of blood money. 2 Abu Ja'far Muhammad b. Jarir al-Tabari, Ta'rikh al-Tabari: Ta'rikh al-Umam wa al-Muluk 51 (1995). For more on this reference, see below. The issue blood money concerns the rights, obligations and liabilities of parties to the agreement in the case of murder or injury. As indicated above, the Constitution addresses similar issues of rights and obligations, thereby suggesting to Serjeant that perhaps the document in Ali's sheath may have been the Constitution.
what they were in the seventh-century. The idea that a society, particularly a tribal society, would not develop and evolve new linguistic, contractual, or document-preservation practices over a period of nearly thirteen centuries is an argument about the backwardness of South Arabian society — an argument which is often used to justify colonial efforts in the region. Serjeant's methodology and conclusions may very well stem more from his own role as a colonizer justifying his presence on foreign soil than from a systematic methodology of cultural anthropological analysis and investigation.

Second, a comparison of Serjeant's analysis of Abu Ubayd's and Ibn Ishaq's version illustrates, however, that his historical methodology lacks consistency. Although Serjeant expressly considers Abu Ubayd's version defective, he does not adequately explain his position. Abu Ubayd provides an isnad (chain of transmission) with his version of the Constitution that originates with al-Zuhri (d. 124/742), an early Muslim historian. The isnad does not, however, provide a direct connection to the Prophet himself. For Serjeant, this fact poses the problem of determining from whom al-Zuhri got his information. Implicitly relying on classical Islamic hadith analysis, Serjeant raises the specter of fabrication and therefore undermines the authenticity of the document. In contrast, Ibn Ishaq's version does not have an isnad. However, Ibn Ishaq is reported to have studied under an Alid leader, Abd Allah b. Hasan. Serjeant, relying on the tradition above about Ali and his sword sheath, suggests that the Constitution of Medina may have passed from Ali to each subsequent Alid leader. Serjeant argues that the Constitution, or some version of it, may have been in the hands of Abd Allah b. Hasan, and consequently Ibn Ishaq may have worked from an actual document (perhaps even the original) when he wrote his version of the Constitution. Serjeant's analysis on this point is methodologically weak on two levels. First, he challenges Abu Ubayd's version of the Constitution by relying on a form of isnad criticism. However, Serjeant does not present an isnad analysis of the tradition regarding Ali and the sword sheath. Instead, he simply assumes the latter to be authentic on the basis of his observations of South Arabian practices (which have been shown above to be methodologically flawed). Second, the argument that Ibn Ishaq worked from an actual

37 Serjeant, supra note 34, at 9. On the other hand, Serjeant does explain why he accepts the version from Ibn Ishaq. See Serjeant, supra note 20, at 5.
38 For a short biographical sketch on al-Zuhri, see Tarif Khalidi, Arabic Historical Thought in the Classical Period 32-24 (1994).
39 Serjeant, supra note 20, at 4-5. An Alid leader is one whose legitimacy as a leader is based upon his connection to Ali b. Abi Talib and the family of the Prophet (ahl al-bayt).
40 Id. at 4.
41 Id. at 6.
document in Abd Allah b. Hasan's possession is purely speculative. One would expect biographical treatments of the lives of Abd Allah b. Hasan and al-Zuhri. However, Serjeant provides no such historical treatment. What seems clear is that Serjeant's approach to the text fails to incorporate a methodologically consistent and coherent analysis of the text. Rather, his conclusions seem driven by his adherence to a belief in the continuity of Arabian culture — a belief that yields a conclusion of Arabian backwardness as opposed to documentary authenticity.

Despite methodological flaws and ideological biases that have characterized both Wellhausen's and Serjeant's studies on the authenticity of the Constitution, it must be acknowledged that the text of the Constitution, as presented by both Ibn Ishaq and Abu Ubayd, is seemingly unique. Both versions of the text utilize an arcane language style that makes the document challenging to understand. Indeed, the form and style of the wording would be peculiar if the text was in fact fabricated. As Wellhausen states, "The briefness and insufficient clarity of the sentences were meant for contemporaries for whom even allusions were sufficient."42 In other words, the wording of the text is too ambiguous to be understood by audiences in the second and third Islamic centuries. The fact that ambiguity exists in the text suggests that it may have been written for an audience that would understand the ambiguity.43 It is unlikely that a later fabricator would intentionally create such ambiguities. Although this ambiguity supports the notion of the Constitution's authenticity, the fact remains that there are two different versions of the text. Yet neither of the authors mentioned addresses the variations in the different versions.44 Serjeant's reliance on Abu Ubayd's partial isnad to negate the authenticity of his version, and a presumed opportunity that Ibn Ishaq may have had to establish the authenticity of his version, is not convincing, especially when both texts utilize arcane terminology and include ambiguities in language. Clearly Wellhausen's and Serjeant's methodological weaknesses and ideological biases show that treatments of the Constitution of Medina are far from being entirely reliable analyses of the document itself. Rather, their research shows that when dealing with early documents like the Constitution of Medina, one cannot ignore how the limits of the sources themselves prevent a decisive answer to many questions. And it is in this limitation and its resulting ambiguity that methodological weaknesses and ideological biases can enter into the analysis.

42 Wellhausen, supra note 16, at 135.
43 Id.; Humphreys, supra note 3, at 92.
44 An exception to this trend is Rubin, supra note 15.
III. THE CONSTITUTION AS A COMPILATION OF SEPARATE DOCUMENTS

Many authors accept the authenticity of the text and therefore consider it to be documentary evidence of the early history of the Medinan polity during the life of the Prophet Muhammad. More specifically, they try to use the text to explain and elucidate the development of the early Muslim polity, the political and religious authority of the Prophet, and the Prophet's motivations for expelling and even executing members of the three main Jewish tribes in Medina.45 This scholarly trajectory leads these writers to inquire about the nature of the Constitution itself and whether or not the text, as presented by Ibn Ishaq, is a compilation of different documents or is a single document. If the text represents a political history of the early Muslim community, then the question is whether the various segments of the Constitution can be historically distinguished from each other to create a historical narrative of the early Muslim community. The compilation argument not only illuminates

45 Incidentally, what is often overlooked is the fact that the three main Jewish tribes, the Banu al-Nadir, Banu Qurayza, and Banu Qaynuqa are not mentioned in the text of the Constitution. This issue is another topic of discussion and debate among historians of this text. Some writers suggest that the reference to Jewish groups in the text is really a reference to members of the Arab tribes who converted to Judaism. Rubin, supra note 15, at 6. In other words, "a phrase like Yahud Bani Awt denotes the Arab members of the Banu Awt who accepted Judaism." Id. However, as Wellhausen argues, the number of Arab converts to Judaism would have been too small to warrant their express identification in the text. Rather, Wellhausen argues that the Jewish tribes mentioned in the text were part of the three main Jewish clans. The fact that they were listed in relation to an Arab tribe suggests to Wellhausen that the Jewish clans were clients of the major Arab tribes, the Aws and the Khazraj. Wellhausen, supra note 16, at 130; Rubin, supra note 15, at 6; Gil, supra note 4, at 61. And still others like Rubin consider the Constitution of Medina to apply to only those tribal groups, Jewish and Arab, that lived in and around Medina. Rubin, supra note 15, at 9. Rubin argues, for instance, that the Constitution established a unity based on locality of territory. Id. In other words, one must consider the geography and tribal demographics of the region to understand the scope and reach of the Constitution. He argues that the phrase "Yahud Bani" refers to "nameless Jewish groups, who, unlike the great Jewish tribes, did not have a territory of their own, nor a distinct tribal affinity. Id. They had hilf relations with various Arab tribes in whose territory they dwelt and by whose names they used to be called." Id. Therefore, he concludes, since the three main Jewish tribes lived in their own territory outside Medina, there was no need to include them within the Constitution. Id. at 10. Haykal suggests that although the three main Jewish tribes did not in fact join the Constitution, they joined other pacts at a later date. Haykal, supra note 20, at 83. However Haykal presents no evidence for his assertion. Watt argues that the three main Jewish clans were large enough to be acknowledged in the text. He argues, however, that these three tribes were not included in the text of the Constitution because they were in fact deemed hostile to the Prophet and the Muslim polity in Medina. He supports his conclusion by reference to Ibn Ishaq, who lists sixty-seven opponents of the Prophet, many of whom had tribal affiliations to the three main Jewish tribes. Watt, Muhammad at Medina, supra note 15, at 227.
the reader about aspects of the early events in Medina, but significantly for this study, reveals the biases and attitudes of recent scholars about that early history. In his historiographical survey of Islamic history, R. Stephen Humphreys vividly and accurately encapsulates the importance of the question of compilation. He writes: "on the resolution of this apparently technical matter rests one's whole interpretation of its social and political significance." How one understands the issue of compilation will influence one's characterization of the Muslim polity's growth and development in Medina. Importantly the ambiguities concerning the text's possible compilation allow authors to shape their interpretation, perhaps unconsciously, to fit the conclusions they may wish to see.

The earliest writer on the Constitution, Wellhausen, did not entertain the question of whether the text is a compilation. Rather he seems to assume the text to be a single, cohesive unit. Likewise, Muhammad Haykal seems to imply that the text does not represent a compilation of separate documents. However, as in the case of Wellhausen, there is no express discussion on this point.

The Muslim scholar, Muhammad Hamidullah, considers the text to reflect a compilation of two separate documents — a conclusion that also resolves the earlier discussed theological tension concerning the reference to umma. Hamidullah argues that a reading of the Constitution reveals a change in tone in how the Jews are treated and addressed. Specifically, he suggests that the first half of the text (i.e., articles 1-23) represents a document that addresses the rights and obligations of the Ansar and Muhajirun toward one another. The second half (i.e., articles 24-47), on the other hand,

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47 Humphreys, supra note 3, at 93.
48 Wellhausen, supra note 16, at 134.
49 Haykal, supra note 20, at 183.
50 Watt also argues that the text is a compilation of different documents. He supports his position by reference to various repetitions in the text. For instance, the Prophet Muhammad is mentioned as being an arbiter in both articles 23 and 42. If the text were a single, cohesive unit, then no repetition would be necessary. Watt, supra note 15, at 226; W. Montgomery Watt, Chapter 2: Muhammad, in 1A Cambridge History of Islam 41 (P.M. Holt et al. eds., 1970); Watt, supra note 5, at 5. For this reason, Watt considers the text to reflect a compilation of two or more documents, but does not address where the demarcations between each document occur. Interestingly, Watt also dates the compiled document, which takes the form presented by Ibn Ishaq, to no earlier than 5/627. However he does suggest that parts of the document date to the Prophet's arrival in Medina. Watt, supra note 5, at 5.
represents a document that addresses relations with the Jews.\textsuperscript{51} For Hamidullah, the change in tone distinguishes two underlying documents. Importantly, by arguing that the Constitution reflects two documents, one dealing with the Muslim migrants and Ansar and another dealing with the relationship between the Muslims and the Jews, Hamidullah implicitly suggests that the Prophet came to Medina with the express purpose of uniting Muslims. The Prophet created the second half of the document secondarily in light of later tensions that arose between the Muslims and Jews in the wake of battles with Quraysh soldiers.\textsuperscript{52} This reading significantly affects how one determines whether the notion of umma implies a closed religious community or an open one. If the Constitution is read as one document, then the question on the meaning of umma remains ambiguous. By reading the Constitution as two separate documents, Hamidullah implicitly supports a reading of the initial reference to umma as referring only to Muslims. Thus, the later reference to the Jews as part of the umma indicates a separate but parallel umma.

Like Hamidullah, the Egyptian historian Husayn Mu'nis adopts the view that the Constitution is a compilation; however unlike Hamidullah he devalues the historical importance of this issue by reorienting the normative significance of the Constitution. He admits that the Prophet wrote the Constitution in stages (marahil).\textsuperscript{53} But Mu'nis does not indicate how many documents were compiled into the text. Rather, Mu'nis considers the meaning and cohesiveness of the Constitution to be unaffected by any potential divisions.\textsuperscript{54} Fundamentally, though, Mu'nis is not interested in the historical significance motivating the inquiry into the compiled nature of the text. Rather he wants to understand the text for its contemporary normative significance for Muslims.\textsuperscript{55} In other words, Mu'nis admits that the Constitution is a product of

\textsuperscript{51} Hamidullah, supra note 15, at 125. Importantly, Hamidullah's position is founded upon a change in tone of the text and not the express content. This is an important point, given that in the first half of the text there are references to Jewish tribes.

\textsuperscript{52} Muslim-Jewish relations in Medina became tense in the wake of various battles between the Muslims of Medina and the Quraysh of Mecca. After the Battle of Badr in 2/624, the Banu Qaynuqa were the first of the three Jewish tribes to be banished from Medina. Thereafter, the Banu Nadir was expelled from the city in the wake of the Battle of Uhud in 3/625. The grounds for the expulsion of the two tribes varied from cooperation with the enemy to marketplace discord and violence. And finally, the Banu Qurayza, who were charged with cooperating with the Quraysh at the Battle of the Trench in 5/627, suffered the execution of their male members and the sale of their women and children into slavery. Kennedy, supra note 2, at 36-40; Hodgson, supra note 2, at 177, 190, 191.

\textsuperscript{53} Mu'nis, DUSTUR [CONSTITUTION] UMMAT AL-ISLAM 112 (1993).

\textsuperscript{54} Id. at 112.

\textsuperscript{55} Id. at 112-113. See below for discussion on this point.
numerous texts. But his interest in the Constitution does not lie in what the Constitution can tell about the past. While a historian would parse the Constitution into its various segments and try to interpret from the segments a political history of the early Medinan polity, Mu'nis has a different vision of the Constitution's importance. Instead, Mu'nis focuses on what the Constitution means as a normative statement of unity among Muslims in the modern period. The Constitution therefore is not important for what it says about the past, but rather for how it supports an ideology of political unity and camaraderie.\footnote{For more elaboration on Mu'nis' view, see below.}

Unlike the above authors, Serjeant makes perhaps the most radical argument on the issue of compilation. However, his argument falters from a methodology that relies on presuppositions of Arabian culture that likely reflect Serjeant's ideology as a colonial officer as opposed to the textual dynamics of the Constitution. He suggests that the Constitution of Medina, as presented by Ibn Ishaq, reflects a compilation of eight separate documents. He supports this argument by analyzing the text in light of contract drafting practices in twentieth-century South Arabia. Specifically, he argues that the existence of contractual terminating formula in the Constitution indicates the demarcations between different underlying documents within the document. Such formulas, for instance, are those enjoining probity and justice (e.g., \textit{wa inna Allaha ala abarri hadha} — God is with those who are dutiful to this [agreement]).\footnote{Serjeant, \textit{supra} note 20, at 8; Humphreys, \textit{supra} note 3, at 94.} Formulas like these occur throughout the text, and according to Serjeant, they distinguish one document from another within the Constitution. Once the text can be distinguished into its underlying documents, then each sub-text can be dated, and thereby illuminate the historian's understanding of the development of power and social relations in the early Medinan community. However, Serjeant's methodology falters by assuming a continuity in drafting practices from the mid-seventh century to the mid-twentieth century. Serjeant assumes that drafting practices in twentieth-century Arabia reflect those used in the medieval period. In other words, the culture of document and contract drafting has not changed over time. Where he finds certain statements in the Constitution that parallel contract terminating formula used in twentieth-century South Arabian contracts, he assumes that the medieval phrases are also contract terminating formula. Consequently, he believes he can designate and demarcate the various sub-documents within the Constitution. As suggested earlier, however, this method implicitly suggests that the culture of the Arabian peninsula has not changed — or to put it in more colonial terms, Arabian culture is backwards. Serjeant's
methodology suffers from what is likely a predisposition held by colonial officers in the region about the continuity and discontinuity of Arabian culture.

An Israeli scholar, Moshe Gil, provides an analysis of the compilation issue in a way that reflects how his own interpretive bias of the socio-political context of this early history influences his position on the compilation question. He does not find any satisfactory reason to read the Constitution as anything but a single text. The change in tone as to the treatment of the Jews does not necessarily indicate that the text represents two or more underlying documents. The abrupt style and the unexpected language cannot be the basis for finding multiple documents reflected in the text because, according to Gil, this style is unique to the Prophet: "Repetitions, abrupt and unexpected entries of new elements, and linguistic variations cannot serve as adequate arguments in such a case, certainly not where Muhammad is concerned, for they are peculiarities of his style, well known from the Qur'an."\footnote{Gil, supra note 4, at 48.}

This conclusion serves Gil's principal argument that the Prophet had an anti-Jewish policy from the moment of his migration to Medina. What happened to the Jewish tribes after the Battle of Badr is not, according to Gil, a surprising contrast to this text. Rather, the expulsion of the Jews after Badr was "the realization of [the Constitution's] main points."\footnote{Id. at 64.} It must be remembered that the Constitution addresses the various Arab tribes directly in the first half of the document and in the context of the creation of a Muslim \textit{umma}. Furthermore, the Jewish tribes are discussed in the second half of the Constitution, and presumably in isolation from their relations to other tribes. Does this mean that the Constitution was a means by which the Prophet could distinguish the Jews from their Arab neighbors and marginalize them politically? According to Gil, by drawing up a single, unitary document upon his migration to Medina, the Prophet presented a "formal statement of intent to disengage the Arab clans of Medina from the Jewish neighbours they had been allied with up to that time."\footnote{Id. at 65.}

Gil's analysis, however, seems so focused on the treatment of the Jews that it ignores the overall context and content of the Constitution. Prior to the Prophet's migration, Yathrib had been locked in a civil war between its two major tribes, the Aws and the Khazraj.\footnote{Kennedy, supra note 2, at 33; Hodgson, supra note 2, at 172.} The Prophet's migration was intended to result in a period of peace in which the Prophet himself would act as an arbitrator and leader. In fact, the Constitution provides that the Prophet
would act as an arbitrator in disputes. While attempting to establish peace, the Prophet did not seek to undermine tribal affiliations, but sought to maintain the tribe as the main institution of social organization. Consequently, there are numerous references to various tribes and their rights and obligations in the Constitution. It is in this context of a pre-existing civil war between the Aws and Khazraj, and the rise of a new peace brought by the Prophet's arrival to Medina, that tribal affiliations were both respected and established as the basis of rights and obligations within the new polity. For Gil to suggest that the Constitution was a means of disengaging the Jews from their affiliation to Arab tribes, without acknowledging the function of the tribe in defining rights and obligations ignores a fundamental aspect of the socio-political context of medieval Arabia.

The studies analyzed above reflect more than just a treatment of the Constitution itself. Serjeant finds eight documents in the text, but perhaps he finds eight documents because he wants seventh century drafting practices to correlate with a twentieth century tribal culture of South Arabia, thereby implying a social and cultural backwardness that justifies his colonizing presence in the region. Gil wants to suggest that the Prophet Muhammad had an anti-Jewish policy from the moment he stepped into Medina. This serves the purpose of suggesting that from its earliest beginnings, the Islamic message has been fundamentally anti-Jewish. But, is this anti-Jewishness inherent to the Islamic message, the Prophet's mission in Medina, and more specifically the Constitution, or is it perhaps an interpretive construction fueled by the flames of contemporary Middle Eastern politics? Debates regarding the Constitution of Medina arise amidst so many seemingly unresolvable ambiguities in the text that it is not surprising to find possible self-serving arguments offered as academic proofs. Where historical proofs are lacking and the Constitution itself is ambiguous, perhaps these authors would rather see themselves and their present in the text — a present that is projected onto the past and, because of the ambiguities, validated by that past.

IV. ON CONSTITUTIONS AND CONSTITUTIONALISM

One point of divergence between Muslim and non-Muslim writers is the treatment of the Constitution as a formal constitution. Rarely do non-Muslim authors comment on this usage, question the applicability of using the term "constitution," or elucidate its implications, if any, on the early Islamic his-

62 See Articles 23 and 42 of the Constitution. Watt, supra note 5, at 132-133.
63 See for instance, Articles 2-10 of the Constitution. Watt, supra note 5, at 130.
64 Notably, Gil is an award-winning historian. In 1998, he received the Israel Prize from the State of Israel, for research on the history of Israel.
Reflections on the "Constitution of Medina"

Historical period. An exception to this general trend is Serjeant who, when writing about the Constitution of Medina, remarks that it "is not really a constitution at all."65 None of the authors reviewed above are legal scholars. Consequently, it is not surprising to find them uncritically and unquestioningly applying the term "constitution" to this text. In contrast to their non-Muslim counterparts, Muslim writers are not so dispassionate about using the term "constitution" to identify this text. This interest on their part identifies a particular disjunction between them and non-Muslim writers that may have more to do with twentieth-century nation state formation in the Middle East than with the significance of the Constitution as a founding document of an Islamic political order.

The term "constitution" was applied to this text at least as early as 1956 by Watt and later by Hamidullah in 1959. Despite Serjeant's off-handed criticism of using this term, later commentators, Muslim and non-Muslim alike, continue to use the term to identify this text.66 Often the Arabic terms used for this text are sahifah (document), wathiqah (agreement), or in some cases, dustur, the latter of which expressly conveys the meaning of "constitution" in Arabic more than the former two terms. Muslim authors, like their non-Muslim counterparts, primarily adopt the term "constitution."67 However they go farther than the non-Muslim writers and attempt to understand the significance the document has as a formal constitution for contemporary Muslim society.

Yet, as the Muslim discourse on the legal significance of the Constitution of Medina illustrates, any effort to read the Constitution of Medina as a formal constitution runs the risk of being historically anachronistic. The methodological difficulty in doing so is well illustrated by the work of Mu'nis. Mu'nis uses a broad, spiritual approach to understand the importance of the Constitution. For instance, he writes that the idea of a single umma (umma wahida) does not necessarily imply a particular constitutional structure or political system, but rather can be used to refer to a variety of power structures that existed in Islamic history, such as khilafah and sultan.68 The

65 Serjeant, supra note 34, at 1.
66 See for example, the titles of some of the articles and books that treat this text: Serjeant, supra note 20; Gil, supra note 4; Denny, supra note 20; Goto, supra note 46; Rubin, supra note 15; Mu'nis, supra note 53; Humphreys, supra note 3, who uses "The Constitution of Medina" as a subheading.
67 See for instance, Hamidullah, supra note 15, at 123; Mu'nis, supra note 53.
68 Mu'nis, supra note 53, at 125-26. Khilafa refers to the political structure denoted by the term Caliphate. While there are various theories about the nature of the caliphate, generally it refers to the early form of government that existed upon Muhammad's death in which both secular rule and religious authority was vested in a single ruler. Sultan, on the other hand,
text by itself does not define the constitutional structure of the Islamic state. Rather, Mu'nis argues that the formal constitution of the umma is the Qur'an and Sunna of the Prophet; the Constitution of Medina, he notes, is only part of the Prophet's Sunna. It would be a mistake, Mu'nis argues, to believe the Prophet erected a state in the nascent Muslim polity at Medina. Instead, he established a brotherly umma (umma muta'akhiyya), which was built on faith (aqīda) and the principles of decent manners (qawa'id akhlaqiyya). There were no legislative bodies or an executive branch that carried out special directives on the basis of a constitutionally delegated power or authority. There was only the Qur'an, the Sunna of the Prophet, and the hearts of the believers, which motivated them to uphold the laws. Clearly, Mu'nis wants to avoid associating the nascent Muslim polity with the structures of constitutional government articulated by contemporary political theory. The nature of his argument suggests that he is challenging those who would put a functional and institutional spin on the early history of the Muslim polity at Medina. Mu'nis wants to emphasize that the value of the Constitution lies in the spiritual dimension of unity and brotherhood that prevailed in the early Muslim polity, and thereby challenge those who would interpret the past for a purely political lesson.

On the other hand, Mu'nis does elaborate upon the kind of political theory one can derive from the Constitution. Mu'nis indicates that the idea of an Islamic umma is similar to a federalist nation such as the United States. This argument is likely based on the provisions in the text which grant to each tribe control over their own affairs, while granting to Muhammad an arbitral power in the case of inter-tribal disagreement. Just as the tenth Amendment of the U.S. Constitution divides powers of government between the federal and state governments, so too does the Constitution of Medina divide power between the tribes and the Prophet, the latter sitting as an arbitrator over unresolved disputes. However, for Mu'nis, the "federalism" he contemplates for the Islamic umma does not concentrate as much power at the center as does the United States' system. Clearly Mu'nis' analysis cannot be mistaken for a sophisticated political and institutional analysis of the Constitution. He fails to elaborate upon his theory of the division of power between


69 Mu'nis, supra note 53, at 128.
70 Id.
71 Id.
72 See generally, Watt, supra note 5, at 130.
73 Mu'nis, supra note 53, at 127-28.
the tribes and the Prophet, or the significance of the "federalism" in the Constitution of Medina for a modern Muslim nation. However, what is important is that by considering the Constitution to be a formal statement of the distribution of governmental power, Mu'nis reads the Constitution less as a historical document of a particular age, and more as a prescriptive statement of political philosophy. Mu'nis approaches the Constitution of Medina as part of the normative Sunna of the Prophet; this allows him to read it as a normative statement espousing a system of political organization, albeit a simplistic one. In other words, he looks at the Constitution as a normative statement of a prophetically inspired governmental precedent. By itself, he urges, the Constitution cannot express a cohesive political theory for the governance of an Islamic umma. Nevertheless, because it is part of the Prophet's Sunna, he must identify what the normative message of the Constitution is. Yet to make his discussion relevant for a contemporary Muslim state, he reads contemporary constitutional philosophy into a medieval text. By doing so, though, he necessarily stumbles over the limits of history and historical methodology.

The most recent article to address the political significance of the Constitution of Medina is by Azizah al-Hibri. In her exploration of the failure of democracy in the Middle East, al-Hibri analyzes whether the American democratic system "is so alien to Muslim thinking as to make its export to Muslim countries an impossibility, or whether the resulting system represents a truly viable solution for Muslim problems today." Al-Hibri argues that exporting American democracy to Muslim settings is in fact a viable option because Muslim societies are organized Islamically according to certain principles that make them amenable to the U.S. democratic system. First, Muslims are free to select their constitutional order. Second, the ruler (khalifa) in a Muslim state has no divine attributes. The khalifa is understood to be the political successor to Muhammad, but not a spiritual or prophetic successor. Third, the will of the people in a state is expressed through the Islamic conception of bay'a. Bay'a is technically the mechanism by which people accept, and thereby obligate themselves to, the leadership of a ruler; but as viewed by al-Hibri, it is tantamount to a classical precedent for the institution of voting. Finally, there is no ecclesiastical structure in an Islamic setting. The power to define the good is not vested in a centralized, hierarchical structure. According to al-Hibri, all of these factors indicate that there is in

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fact little difference between an Islamic constitutional setting and a secular one.\textsuperscript{75}

Relying on the Constitution of Medina (referred to by al-Hibri as the Charter of Medina), al-Hibri indicates that the early Muslim polity utilized a federalist system of government, akin to that of the United States.\textsuperscript{76} She states:

The Charter of Madinah. . .declared all Muslim and Jewish tribes of Madinah. . .to be one community. At the same time, each tribe retained its identity, customs and internal relations. The "federal" system of Madinah was responsible, however, for such matters as common defense and peacemaking purposes similar to those in the Preamble to the American Constitution. . . The Charter also contained its own partial bill of rights, which was supplemented by the Qur'an and sunna. Among the rights that it protected were the right to freedom of religion, and the right not to be found guilty because of the deeds of an ally.\textsuperscript{77}

Given the alleged parallels she discovers between the Constitution of Medina and the U.S. Constitution, al-Hibri considers the possibility that the founding fathers of the United States were directly or indirectly influenced by the Islamic precedent. She notes that Thomas Jefferson was aware of Islam since he had in his library a copy of George Sale's translation of the Qur'an.\textsuperscript{78} Al-Hibri suggests that Sale presented Islam in as fair a light as possible under the circumstances of the eighteenth-century, thereby making the Prophet's precedent amenable to Jefferson.\textsuperscript{79} Al-Hibri argues that if the founding fathers were in fact influenced by the Islamic model of constitutionalism, then this would "support the argument that American constitutional principles have a lot in common with Islamic principles. Such a conclusion would be

\textsuperscript{75} Id. at 511. According to al-Hibri, the only real difference is the presumed origin of the laws.

\textsuperscript{76} Id.

\textsuperscript{77} Id. at 512.

\textsuperscript{78} The Koran (George Sale trans., 1927).

\textsuperscript{79} Al-Hibri’s discussion of this point lacks sufficient historical depth. For instance, she states that when Sale refers to the Prophet Muhammad as an imposter, he is simply reflecting public opinion. Al-Hibri, supra note 74, at 499. Al-Hibri argues that Sale actually bestows praise on the Prophet. For instance, she relates a passage from Sale: "For how criminal soever Mohammad may have been in imposing a false religion on mankind, the praises due to his real virtue ought not to be denied to him." Id. at 500. Al-Hibri does not properly illustrate the basis for asserting that the founding fathers, let alone the general public in post-Revolutionary America, had an opinion about Islam, whether negative or positive. When Sale juxtaposes the Prophet's criminality with his virtue, al-Hibri does not adequately illustrate how one living in late eighteenth-century America would necessarily interpret this passage or others. In other words, she makes an argument for a general mentality without adequate support.
helpful in evaluating the possibility of exporting American democracy to Muslim countries."\textsuperscript{80}

Al-Hibri's arguments are problematic on numerous fronts. First, while Al-Hibri attempts to uncover Jefferson's exposure to the Islamic constitutional precedent, nowhere in her account is there a reference to Jefferson's actual, presumed, or even possible knowledge of the Constitution of Medina. How can he have borrowed from the Islamic constitutional model if he was not familiar with it? Perhaps Al-Hibri thinks that Jefferson relied upon Qur'anic paradigms of justice since he had a copy of Sale's Qur'an; but if that is the case, she makes no real argument for this position. At best, she simply shows similarities between the two traditions, using the American tradition as the standard of evaluation.\textsuperscript{81}

Second, Al-Hibri's principles characterizing a Muslim society, such as 
\textit{bay'a} and \textit{khalifa}, are inadequately defined. She utilizes the terms as if they are self-evident proofs, but in reality they do not have a consistent or universal meaning. For instance, how does one understand the idea of \textit{bay'a} in light of the Islamic historical tradition and practice? What did \textit{bay'a} mean and represent as an historical matter, and furthermore, is it fair to render that concept equivalent to the concept of voting in modern elections? Muslim apologists commonly equate the notion of \textit{bay'a} with the democratic principle of popular voting in order to suggest that Islam is not only consistent with democratic principles, but in fact expounded them before democracy's emergence in the West.\textsuperscript{82} Historical and legal treatments of \textit{bay'a} within the Islamic tradition, however, provide a more nuanced picture. The \textit{bay'a} must be understood within the context of a complex political history. For instance, upon the death of the Prophet, the first caliph Abu Bakr was selected by a group of people, the \textit{ahl al-hal wa al-aqd}. They gave him their \textit{bay'a} and thereby he became the caliph. In contrast, the second caliph, Umar b. al-Khattab, was appointed by Abu Bakr alone, without consultation with a committee. The third caliph, Uthman b. Affan, was selected by a committee of individuals appointed by Umar. And finally, under the Umayyad and Ab-

\textsuperscript{80} \textit{Id.} at 514.

\textsuperscript{81} For example, she states that the Constitution of Medina has a "partial" bill of rights. \textit{Id.} at 512. It cannot be partial unless it is being evaluated according to a separate standard, for instance the U.S. Bill of Rights.

\textsuperscript{82} For other examples of apologetic works making the same point, see \textsc{Fathi Osman}, \textit{Sharia in Contemporary Society: The Dynamics of Change in the Islamic Law} 94 (1994); \textit{The Islamic Ruling System: Beacon of Justice} 25-26 (Arshad Mohammad et al eds., n.d.); \textsc{Shaikh Shaukat Hussain}, \textit{Human Rights in Islam} 20 (1990). For a further analysis and critique of Muslim apologetics, see \textsc{Khaled Abou El Fadl}, \textit{Speaking in God's Name: Islamic Law, Authority, and Women} (2001).
basid dynasties, the caliphate became a hereditary position. From these examples, the nature of the bay'a is unclear. In two cases, a committee selected and vested the caliph with authority. In one instance, the caliph was simply appointed by his predecessor. And in the case of the Umayyads and Abbasids, the bay'a seems to have been a mere formality in light of the hereditary nature of the caliphate. Furthermore, the precedents above do not indicate that the bay'a was taken from every member of society. Specifically, the group whose bay'a seems to matter the most was the ahl al-hal wa al-aqd, the group of people theoretically empowered to select the ruler. What this group designation refers to in any given context, though, may differ depending on the socio-political context involved. Generally it refers to a class of notables, supplemented by religious scholars and political officials; but the historical and legal traditions provide little guidance on who is a member of this group and how it is ascertained in a given instance. Consequently, a bay'a from this group may invest the caliph with his powers; although in the case of a hereditary caliphate, the bay'a of the ahl al-hal wa al-aqd may have been a test of the nobility's loyalty to the caliph. What does seem clear, though, is that the general populace's involvement in the selection of the ruler is marginal. In the case of every caliph from Abu Bakr onward, the agreement of the general populace was only confirmatory (if considered at all). In fact, there is debate as to whether the general populace is required to grant its bay'a individually and explicitly, or rather is presumed to adhere to the bay'a granted by the ahl al-hal wa al-aqd. Al-Hibri's contention that the bay'a represents a medieval precedent for modern notions of suffrage, therefore, ignores the complexity of this concept in the Islamic tradition.

Underlying both al-Hibri's and Mu'nis' analysis is a presumption that the Constitution of Medina is in fact a foundational document with formal political significance. Fundamentally, though, what does it mean to have a constitution? In the American context, this question is often addressed in the form of interpretive methodologies. Does one look at the Constitution with an emphasis on original intent or in light of other factors such as public policy or institutional practice? But interpretive methodologies do not address the
more fundamental question of the proper role of a constitution within a governmental structure. Is a constitution simply a written document whose significance does not take into account the extent to which it is applied in society? Or rather, is a constitution an applied document that provides a fundamental philosophical framework for the workings of government? Clearly the former articulation makes little sense if a constitution is to be more than a simple documentary artifact relegated to the crevices of history. Rather a constitution must serve a more fundamental, "constitutive" organizing purpose.

By adopting a "constitutive" framework for a constitution, one can better assess the historical significance of the Constitution of Medina within the historical literature. As Mu'nis indicates, there is no recorded historical practice that reflects the Constitution of Medina's impact upon medieval Muslim society. Furthermore, contemporaneous evidence of the existence of state institutions exists only as early as the beginning of the Umayyad caliphate, starting with Mu'awiyah's reign (r. 661-680), during which the governing structures reflect a hereditary monarchy. Original evidence for the period prior to Mu'awiyah is too meager, although it is of course possible that certain state structures may have existed. Without evidence contemporary with the actual period of the Prophet, one is left to look at the later literary tradition for its references to the Constitution.

The treatment of the Constitution by early Muslim historians is similarly limited. To the extent the Constitution is addressed, it appears that the Constitution is not treated as a document of significant normative import. At

_Framers' Science of Politics_, 75 VA. L. REV. 1311 (1989). Some have argued that the Constitution is not simply a text, but rather "text-based institutional practice." Stephen R. Munzer & James W. Nickel, _Does the Constitution Mean What it Always Meant?_, 77 COLUM. L. REV. 1029, 1029-62 (1977). In other words, the Constitution is not only a text written in the late eighteenth-century. Rather, the Constitution is an "intricate product of text and institutional practice and that the notions of 'meaning,' 'interpretation,' and 'fidelity' to the Constitution must reflect that duality." _Id._ at 1030.


87 Donner does not suggest that there is no evidence for a state structure in the nascent Medinan polity during the Prophet's lifetime. Rather, he argues that such evidence for this early state is literary in form, and not "documentary." The methodology Donner employs in his article is to rely on purely documentary evidence, such as coins and original letters, which were contemporaneous to the events in question. He does so in order to avoid the charge by radical source skeptics, such as Patricia Crone, that he is indulging in literary sources that are essentially untrustworthy. _Id._ at 284. Consequently, Donner can only say that "[t]he question of whether or not a state already existed in the days of the prophet Muhammad or of the caliphs Abu Bakr, Umar, Uthman, and Ali, must remain unanswered, in view of the absence of documentation." _Id._ at 293.
most, it provides a simple historical precedent of the Prophet's treaty-making power. Early historians such as Ibn Ishaq (d. 151/768) and Abu Ubayd (d. 224/839) provide a complete text of the document, as does Ibn Kathir (d. 774/1372) who relies on Ibn Ishaq's version. Ibn Ishaq specifically states that Muhammad dictated a writing (kitab) between the immigrants and the Ansar of Medina, and included within it the Jews with whom he had established an agreement (wada'a fihayahud wa ahadhahum). Abu Ubayd and Ibn Kathir likewise refer to the document as a writing (kitab). Al-Tabari (d. 310/923) does not even mention this document at all in year one hijra; however, in year two he uninterestingly mentions an agreement reached on issues of ma'aqil or blood money. Ibn Khaldun (d. 808/1406) describes a treaty (sulh, muwadi'a) between the Prophet and the Jews made upon the Prophet's migration to Medina, but he fails to elaborate upon the nature of the agreement, let alone provide a rendition of the text. Both Ibn al-Wardi (d. 749/1348) and Ibn al-Athir (d. 630/1233) make a brief allusion to an agreement (ahd) when they refer to the Jewish tribe Banu Qaynuqa and its breach of an agreement made between them and the Prophet upon the latter's entry into Medina. However, like Ibn Khaldun and al-Tabari, they do not provide much more. Al-Mas'udi (d. 346/957) speaks of the various battles fought by Muhammad and his followers, but I could not find mention of the Constitution. Likewise with the work of Ya'qubi (d. 292/905) and Ibn Khayyat (d. 240/855).

This lack of reference to the Constitution indicates that historians did not consider it to be a central or foundational document worthy of note.

88 Ibn Hisham, supra note 3, at 501; Abu Ubayd, supra note 3, at 219; Ibn Kathir, supra note 3, at 238-240.
89 1/2 Ibn Hisham, supra note 3, at 501.
90 Abu Ubayd, supra note 3, at 215; Ibn Kathir, supra note 3, at 238.
91 2 Muhammad b. Jarir Al-Tabari, Ta'rikh al-Tabari: Ta'rikh al-Ummam wa al-Muluk 51 (1995). The extent of his treatment is as follows: "It is said that in this year, the messenger of God, peace and blessings of God be upon him, wrote a [treaty] on blood money, and it was kept with his sword" (wa qil: inna fi hadhahi al-sanna kataba rasulu Allah, salla Allahu alayhi wa salam al-ma'aqila fa kana mu'allaqan bi sayfihi). Id.
94 3 Al-Mas'udi, Muruj al-Dhabab wa Ma'adin al-Jawhar (Charles Pellat ed., 1970).
Reflections on the "Constitution of Medina"

Rather, it seems to have been nothing more than a treaty. This interpretation is further supported by Ibn Khaldun’s use of the legal technical terms for treaty, sulh and muwadi’a, which can refer to agreements ranging from peace accords between Muslims and their non-Muslim enemies (ahl al-harb), peace accords between loyalist Muslims and rebel Muslims (i.e., ahl al-adl, ahl al-baghy), or even an agreement between spouses if there is fear of discord between them. The term ahd can likewise mean an agreement or oath by which someone pledges himself. The term was used by both Ibn al-Wardi and Ibn al-Athir to refer to an agreement made between the Prophet and the Jews. In other words, the terms used by medieval historians to describe this document suggest that they did not consider the Constitution to be anything more than a treaty between the Prophet and the various tribes in Medina, whether Arab or Jewish.

The purpose of this brief historical and philological analysis is to suggest that the way in which medieval historians characterized the Constitution indicates that it did not play the constitutive role generally presumed of a formal constitution. Rather, the Constitution of Medina seems to have been little more than a treaty addressing the relationship between Muslims themselves, and the relationship between the Jews of Medina and the nascent Muslim polity. To find in this document the beginnings of a political theory or a constitutional system seems to go beyond what the context of the text and its constructed historical legacy supports. Rather, contemporary claims concerning the political significance of the Constitution may be better explained by reference to the political context of the Muslim world in the twentieth century.

With the rise of independent governments in the Middle East in the twentieth-century, and the desire to create representative forms of government, the interest in constitutionalism in a Muslim milieu possibly created a socio-political context in which a fascination with the Constitution of Medina was only natural. As indicated above, the term "Constitution" was applied to this text as early as the 1950s. In the period between 1930 and 1970, various countries in the Muslim world achieved independence and experimented with constitutional regimes of civil government. Lebanon for example had a constitution as early as 1926. The Lebanese found the constitution unsatisfac-

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tory, however, because it was subject to the decision-making power of the French government (which held a mandate over the country). Indeed, the French suspended the constitution between 1932-1937 and again between 1939-1941. Moreover, French authorities pressured the Lebanese government to amend the constitution to increase the power of the president at the expense of the legislature, thereby facilitating the French government's colonial enterprise while undermining the representative nature of the Lebanese government. When the French suspended the constitution in 1931, an opposition movement calling for a restoration of the constitution arose against the French. In 1941, French officials promised a return of the constitution and the complete independence of Lebanon. In 1943, opposition forces forced the French High Commissioner to reinstate the constitution. The country claimed full independence from France that same year, and amended the constitution to remove the provisions regarding France's mandatory power.98

Many of the Gulf States also achieved independence in this period and worked to establish constitutional regimes.99 For instance, Kuwait gained independence from British rule in 1961. In the following year, Abdullah al-Salem al-Sabah, the ruling amir of Kuwait, sanctioned and promulgated the country's constitution, confirming the hereditary rule of the al-Sabah family and creating a constitutional monarchy.100 The constitution limited the ruler's power by forcing him to share legislative power with the newly created National Assembly.101 Yet democratic ideals of representative government have not been completely embraced. According to a 1962 election law, the right of suffrage was limited to Kuwaiti male citizens over twenty-one years of age; in 1999, legislation proposing to give women the right to vote


100 See Part I, Arts. 4 and 6 of the constitution in Blaustein and Flanz, Kuwait, in Constitutions of the Countries of the World, supra note 98, at 12.

101 See Blaustein & Flanz, Kuwait, in Constitutions of the Countries of the World, supra note 98, at 19, pt. IV, art. 51.
and hold parliamentary office failed to receive parliamentary approval.\textsuperscript{102} Furthermore, the ideal of representative government has been compromised by the assertion of monarchical authority. Specifically, despite the creation of the National Assembly as a check on the amir's ruling power, the National Assembly has been suspended for over one-third of the period since its establishment, thereby creating among many a degree of pessimism about Kuwait's experiment with democracy and constitutional government.\textsuperscript{103} Nonetheless, the concern with democratic principles of representation and constitutionalism remain.

As a final example, Syria achieved its independence from the French in 1946. The Syrians, however, experimented with constitutions since 1919 when they drafted their first constitution to create a limited monarchy. Syria never fully implemented this constitution. In 1930, the French High Commissioner for the region promulgated a constitution that created a form of government akin to the French republican model. This constitution remained in force until 1950. In that year, an elected constituent assembly drafted its own constitution, although that document succumbed to the various coups that arose in the country in the 1950s and 1960s. Nonetheless, with each coup, a call was renewed to return to constitutional government. The Provisional Constitution of the Syrian Arab Republic of 1964 annulled the 1950 constitution, which the Syrian Arab Constitution of 1973 later repealed.\textsuperscript{104}

The above case studies are simply three examples of how concerns with constitutionalism in the Middle East have taken center stage in domestic and regional politics. In light of the political circumstances in the mid-twentieth century, it is possible that the interest in and claims about the Constitution of Medina, including its English title, may reflect a particular interest in constitutionalism at a time when such interests were (and still are) highly relevant to the growth and development of nation states in the Muslim world.


\textsuperscript{103} Peck, \textit{ supra} note 99, at 119, 124.

V. Conclusion

The historical problems associated with learning about the early Medinan polity during Muhammad's lifetime are considerable. The literary tradition, written well after Muhammad's death, poses concerns regarding the authenticity of sources. Yet writers on the Constitution of Medina are convinced that the text of the Constitution is authentic — that a constitution did in fact exist, and its contents correlate with its representation in later literary sources. Furthermore, many assert that the text reported by Ibn Ishaq does not reflect a single original document, but a compilation of different documents. According to some, each sub-document can be differentiated from the others and can be dated, thereby providing guidance about developments concerning the Prophet's authority, the motivations for expelling and executing the Jewish tribes, and the nature of the relationship between the different tribes in Medina. Finally, some Muslim authors, such as al-Hibri, go so far as to argue that the constitutional nature of present Muslim society has a normative example in this prophetic model. Relying on apologetic arguments about notions of bay'a and governmental organization, she argues that the model of Islamic government coincides with the constitutional model of the United States, thereby suggesting that American forms of democracy may have fertile roots in the Middle East.

The authenticity of the text is irrelevant to the present analysis. Given the arcane nature of the language and the ambiguities in the text, there is a strong likelihood that the text may be authentic, although determining its "kernel of truth" is far from clear. Furthermore, whether or not the text is in fact a compilation appears to be an unresolved matter. None of the methods adopted by historians prove the case of compilation one way or another. Discussions on each of these issues suffer from one fundamental problem — lack of clarity in the text itself. Because of the ambiguities in the text, interpreters exercise considerable discretion in presenting the arguments they believe best represent the past. It is not surprising to find writers on this topic indulging in flawed methodology or inserting their own biases into their research and conclusions. Serjeant and Gil, as suggested above, may have their own reasons for approaching the text in the way they do. Serjeant, as a colonial officer in Arabia, needs to understand the culture as backward to justify colonial efforts in the region. Gil, an Israeli scholar, reads the dynamics of Middle Eastern politics and Arab hostility to the State of Israel into the Constitution, and thereby interprets the Constitution to reflect an anti-Jewish policy beginning with the inception of the Muslim polity in Medina. Al-Hibri effectively engages in an apologetic argument to suggest that Muslims
share a constitutional legacy that is very much akin to American democratic ideals. Whether this is in fact the case is not proven in her article.

The Constitution of Medina is likely not a constitution at all. Relying on historical sources from the medieval period, it appears that few medieval Muslim authors paid serious attention to this agreement. Rather, they referred to it in passing as little more than a treaty negotiated by the Prophet in accordance with his treaty-making powers. The fact that recent Muslim authors often address a presumed constitutional theory implicit in the document may have more to do with twentieth century politics in the Muslim world than with anything inherent in the text. The independence of Muslim nations, their implementation of constitutions and constitutional regimes, and the aims of European and U.S. foreign policy make the debate on "Islamic constitutionalism" particularly relevant for Muslims interested in the economic, social, and political development of the Muslim world. Whether or not apologetic or politicized reference is made to concepts like bay'a or documents like the Constitution of Medina, the Islamic tradition provides a complex picture that cannot be readily reduced to politically convenient essentialisms.
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