The lyrics from a popular Egyptian colloquial song, which was widely sung in the streets during the 1919 revolution against the British, include the following words: “The Egyptian is resilient; and now he is willing and able and can do anything. His achievements are worthy of praise and he will do this all to gain a constitution. We are the sons of the Pharaohs, which no one can dispute.”¹ The lyrics of this song show how the idea of a constitution contained the promise of an undefined but better political future. In this song, the promise of a constitution is inextricably linked to independence and the establishment of a new political order. The song sung by protestors reflected something abstract about the power of a constitution. The constitution, it implied, could lay the foundations of a new political order and speak for the nation as a whole.

In Egypt, constitution making has formed an inherent part of the ending of political orders and the making of new ones. Constitutions—particularly the most recent—have played an essential role in articulating the essence of the nation or the national will through which the state claims the right to represent its citizens. Constitution making has become bound up with the ongoing making and remaking of Egyptian nationalism.

Constitution drafting and constitutional annulment have played an important role in Egypt’s history since the promulgation of its first constitution in 1923 and the establishment of the 1956 Constitution shortly after Egypt’s full
independence in 1952. In 1971 a new constitution was promulgated under Sadat’s neoliberal order when concerns about the Islamic nature of the state became increasingly vocal. Yet constitution writing played a particularly important role in the events after the Egyptian revolution of 2011. The Constitutions of 2012 and 2014 took on a rhetorical power that transcended the specifics of the constitutional clauses themselves. The 2012 Constitution, which became known as the “Brotherhood’s constitution,” was maligned, and was directly associated with the organization’s brief period in power. Conversely, the 2014 Constitution was framed as a way of healing the divisions in Egyptian society. Critiquing one constitution and praising the other became a key tool in the polarized politics that characterized Egypt. The fact that constitutions were able to be used as weapons in political maneuvering speaks to the role of constitutions in Egyptian identity politics. In the debates about the 2012 and 2014 Constitutions, the very nature of the Egyptian state and society was, it was argued, at stake.

The central role of constitution making in the articulation of Egyptian national identity forms the first part of this chapter. The second part of the chapter focuses on the introduction of Article 2 to the 1971 Constitution, which made a formal commitment to the closer entanglement of the sharia and state law. The fact that constitutions were not seen simply as a means for directing political processes, but increasingly as a reflection of the very core of the Egyptian nation itself, explains why, starting in the 1970s, Islamists were so interested in establishing a commitment to the sharia in the constitution. Since its introduction in 1971 and amendment in 1980, this article has continued to form the cornerstone for the relationship between religion and the state in Egypt. The introduction of Article 2 in 1971 linked the sharia to state law in a new way. In tying the sharia to state law, the sharia was seen as an expression of the essence of the nation.

**The Making of the Egyptian State**

In the Arab and broader Islamic world over the past century and a half, there has been a rich history of constitution writing. There is a clear link between the act of independence and the founding of a new political order through a constitution. Constitutions in the Arab and Islamic world have also played an important role in articulating the political and social ideologies that form the basis of these new political orders. The first Ottoman Constitution was promulgated by Sultan ʿAbd al-Hamid II in 1876. It was done under pressure from a small group of reformist bureaucrats. The constitution provided a means by which ʿAbd al-Hamid II assured European powers that the Ottoman
Empire was reforming and would not fragment. The Ottoman Constitution is reflective of the state of transition that the empire was going through. It contained a number of reformist measures to check the power of the sultan and contained references to national identity and homogeneity. It promoted Ottomanism, which advocated that citizenship was based on a geographical area without regard for religion (Article 8), and Article 17 established equality before the law “without prejudice to religion.” The Ottoman Constitution established Islam as the official religion and declared that “the state protects the free exercise of all the religions recognized in the Empire and accords the religious privileges granted to the different communities on condition that no offense is committed against public order and good morals” (Article 11).

Egypt’s first constitution appeared in 1882, shortly after the promulgation of the Ottoman Constitution. It only had fifty-three articles, many of which were short and focused on the role of the ruling council, and on questions of electoral procedure. Nathan Brown argues that the constitution was designed to support a state more able to resist foreign occupation. It did little to proclaim a new ideological orientation. This lack of ideological orientation must be partly understood by the fact that Egypt was still technically part of the Ottoman Empire and did not separate from it until 1914. Up until then, Egyptians had been Ottoman citizens. The nationalist narrative emphasizes that Egypt was only nominally part of the Ottoman Empire throughout the nineteenth century. Khaled Fahmy, however, contends that Muhammad 'Ali should be understood as an Ottoman reformer, who did not aim for Egyptian independence from the Ottoman Empire, but rather had ambitions to establish hereditary rule over this Ottoman province.

The Egyptian nationalist perspective also emphasizes that Egyptians saw themselves as Egyptians and not as Ottomans by the latter part of the nineteenth century. Will Hanley, however, questions the idea that Egypt was independent of the Ottoman Empire before the turn of the century. He maintains that Egyptians saw themselves as Ottoman subjects with Ottoman nationality until as late as 1905.

It is perhaps for this reason that the Egyptian Constitution of 1882 did not contain ideological statements. Neither did it contain any statement of basic principles about Islam. According to Brown, at the time, “Islam was simply not an issue... Egypt’s first constitution did not dabble in transcendental truths.” Brown argues that the Constitution of 1882 and other nineteenth-century Arab constitutions did not proclaim new principles. They often reiterated Ottoman norms, referring to the will of the ruler rather than to the people or the nation. Brown argues that the fundamental purpose of nineteenth-century constitutions was to reform state authority and enhance its efficacy.
By the 1919 revolution against the British occupation in Egypt, many called themselves Egyptians. The second Egyptian constitution was promulgated in 1923 and followed Egypt’s formal separation from the Ottoman Empire in 1914 and the 1919 revolution after which it gained partial independence from the British. The 1923 Constitution laid the foundation for the emerging Egyptian nation state. A number of the concepts that were to feature prominently later on, such as the concept of the Egyptian people and the nation, were present. The constitution “discussed the relationship that men and women had to the ‘nation’ (العُمَّة) as the source of power/authority (مصدر السلطة).”

The 1923 Constitution declared Egypt a sovereign, free, and independent state, with Islam as its religion and Arabic its official language. The Egyptian Constitution of 1923 was seen by royalists as maintaining the position of the monarchy in Egypt, whereas the nationalists saw the constitution as establishing the nation as the source of all power and representing a contract among members of the nation. Private property was protected and the sanctity of the home affirmed (Articles 8 and 9). The constitution guaranteed freedom of thought and gave freedom of expression “according to the limits of the law” (Article 14). It gave freedom of assembly, also subject to the law (Articles 20 and 21). It asserted the equality of all citizens before the law regardless of origin (الجنس), language, or religion (Article 3).

The constitution received little opposition from Islamic reformers. At the Muslim Brotherhood’s Fifth General Conference in 1939, Hasan al-Banna, who founded the Muslim Brotherhood in 1928, expressed his support for the constitution, seeing its potential to guarantee personal freedom, preserve the principle of consultation (شُرُوع), and necessitate the ruling powers’ procurement of popular support. Constitutions, he asserted, help ensure the responsibility and accountability of the rulers before the people. Al-Banna claimed that “the Muslim Brotherhood considers the system of constitutional rule the closest existing system of governance in the world to Islam.” He did, however, state that the constitution was in need of clarification and certain parts were vague and subject to a variety of interpretations. He also argued that the constitution is one thing and laws another, and called for greater compatibility between the laws of Egypt and the teachings of Islam. He felt that the constitutional stipulation that Islam is the religion of the state was sufficient to require that the laws of Egypt not contradict Islam, mentioning the Islamic laws on adultery, usury, drinking, and gambling in particular.

The Constitution of 1923 declared Islam as the religion of the state (Article 149). According to B. L. Carter, the Constituent Assembly agreed to the inclusion of this article without discussion or opposition including
from its Coptic members. Carter also reports that there was little opposition from Copts among the broader Egyptian populace, although the newspaper *al-Watan* clearly preferred that a state religion not be established. Carter argues that “many Copts seemed to feel that the constitution adequately protected their interests, and they counted on the continuance of Muslim good will.”

During discussions about the 1923 Constitution, the British supported a parliamentary quota for the Copts, while both Muslims and Copts were divided on the issue of quotas. The Constitution of 1923, however, did not mention quotas for Christians. It stipulated the equality of all Egyptians before the law regardless of religion (Article 3), and gave absolute freedom of belief (Article 12). It stipulated that “the state protects freedom to practice religious rites and creeds according to prevailing customs in Egypt within the bounds of public order (al-nizam al-ʿamm) and decency (adab)” (Article 13).

While the constitution declared that Islam was the religion of the state, no commitment was made to the sharia. Brown argues that the absence of any constitutional reference to the sharia was not publicly criticized. Issues related to Islam and the relationship between the sharia and positive law, he contends, attracted little public debate, and after the promulgation of the constitution, “debates about religion were rarely phrased in constitutional terms.” Hasan al-Banna, for example, did not lament the absence of a constitutional statement on the sharia. While he argued that the Muslim Brotherhood considers the principles of constitutional rule “agreeable with, or rather derived from the system of Islam,” he mentions that some laws need clarifying, tightening, and limiting so that they are not so subject to manipulation. While he was concerned that Egyptian law should be more consistent with religion, he was more concerned with cultivating an allegiance to Islam within the next generation.

The Constitution of 1923 has been praised for having provided opportunities to realize a state free from religious bias and from state interference. For Samir Marcos, this was a time that emphasized citizenship for Copts that transcended religious identity. According to Carter, the constitution laid the foundation for Copts’ legal equality with Muslims. Paul Sedra contends that, from the late nineteenth century on, elite Copts possessed “disproportionate influence and wealth” and played a prominent role in negotiating the nature of Egyptian nationalism. The constitution—along with the 1919 revolution against the British in which Muslims and Copts participated—has been credited with the onset of a kind of golden age for Egyptian Copts in which lay Copts were active in the political arena.

However, for Carter, the expectations created by the 1923 Constitution were not fulfilled. He contends that the use of ethnicity and religion in the
struggle for power that characterized the 1930s stymied the constitution’s potential. Copts, he writes, felt that the rules of the constitution had not been followed. Secularism, “had failed, and in its place kinship, communal networks and the church became increasingly important to those trying to escape the effects of discrimination.” Carter maintains that it was only when the constitution’s promise of equality failed to materialize that Copts began to voice their concern about Islam being the religion of the state.  

**We, the Egyptian People**

The Constitution of 1923 remained in force (albeit interrupted from 1930 to 1935) until the revolution of 1952 which brought an end to the British occupation and the Egyptian monarchy. A new constitution was issued by Gamal ʿAbd al-Nasser in 1956. Unlike the 1923 Constitution, the 1956 Constitution made repeated references to “We, the Egyptian people.” This reflected the growing need for the constitution to invoke the national will as the source of its legitimacy. The constitution declared the right to liberty, freedom from fear, dignity, and justice and reflected a more inclusive national discourse. Article 3 of the 1956 Constitution declared Islam to be the religion of the state.  

The constitution’s emphasis on the Arab identity of Egypt was a key feature. The preamble stated that “We the Egyptian people feel our reciprocal existence in the greater Arab entity.” This was, according to Mervat Hatem, quite new and “partly designed to stress the homogeneity of the new nation.” The Constitution of 1956 made the president stronger than the Egyptian monarch had been by weakening the legislative authority and enhancing the president’s ability to issue decrees with the force of law. According to Brown, this ensured that “Egypt’s judicial institutions would now operate within an authoritarian context.”

The Constitution of 1956 has similarly been singled out for its secular nature. According to Hatem, the emphasis in the 1956 Constitution on Islam as the religion of the state “did not seek to subordinate the Copts to Muslims in the new national society.” Article 31 stipulated that “Egyptians are the same (sawaʾ) before the law. They are equal in rights and in public duties. There is to be no distinction between them on account of sex, origin (asl), language, religion, or creed.” In addition, Article no. 43 stipulated that freedom of belief was absolute. However, it contained an important caveat, which was similar to one in the 1923 Constitution: the right to religious worship and beliefs would have to be in “in accordance with the customs prevailing
in Egypt within the bounds of public order (al-nizam al-ʿamm) and decency (adab).” Reflecting common narratives about the constitution’s secularity, Hatem argues that such articles about freedom of belief and religious discrimination “fostered a legal belief in the horizontal comradeship between Muslims and Copts and men and women.” Not only that, Hatem writes, but the constitution actually forbade the formal use of religion to discriminate and create divisions. In this way, she argues, it helped secure equal citizenship for everyone.

After Anwar Sadat became president in 1970, he issued a new constitution in 1971 which remained in effect (with some important amendments in 1980 and 2007) until the removal of Hosni Mubarak from office in 2011. Sadat suggested that the new constitution would express “the true Egyptian way of life and tradition.” By this time, the Egyptian public sphere had come to be dominated by conceptions about the relationship between the secular and the Islamic. It reflected a growing concern with the question of what role religion should have. This was increasingly expressed in constitutional terms. According to Brown, members of the 1971 drafting committee had many debates about the relationship between socialism and democracy, the role of Islam, and women’s rights.

The 1971 Egyptian Constitution contained a number of measures that have been described as liberal. It stated that the government would be based on the rule of law. Article 46 guaranteed “freedom of belief (ʿaqida) and freedom to practice religious rites.” It guaranteed freedom of thought and gave freedom of expression within the limits of the law (Article 47). It strengthened parliamentary autonomy and the independence of the judiciary. It also prohibited unauthorized searches and torture. However, these liberal measures were counteracted by the increasing power that the constitution gave to the presidency.

The 1971 Constitution also established the importance of judicial review. Article 68 prohibited any legal provision for removing an administrative act or decision from judicial review. This, according to Brown, represented an initial step toward a more liberal order, while laying the foundation for a state of law and institutions. While Nasser had undermined the independence of the judiciary by “establishing new judicial structures that operated under thinly disguised executive domination,” the constitution made a clear commitment to developing state institutions, particularly Egypt’s judicial institutions. The constitution stated that “the rule of law (siyadat al-qanun) is the basis of rule in the state” (Article 64).

However, the most significant part of the 1971 Constitution was that it formally introduced an explicit statement on the sharia. In so doing, it
translated the idea of the sharia as a civilizing order and a symbol of Islamic cultural authenticity and projected it onto the constitution. Article 2 of the 1971 Constitution stated that “Islam is the religion of the state, Arabic is the official language, the principles of the Islamic sharia are a main source of legislation.” In 1980 Article 2 was amended to read, “The principles of the Islamic sharia are the main source of legislation.”

The Arab Spring and the Heart and Soul of Egypt

In February 2011, President Hosni Mubarak was deposed in a revolution that ended his thirty-year presidency. At the time, it was assumed that the revolution would usher in a new era of democratic accountability. The aims of the revolution were simple: the protesters called for Mubarak to relinquish the presidency and demanded bread, freedom, and social justice. The revolution was characterized by a broad range of participants, and included Egyptians from all classes, political affiliations, and religions. The revolutionary atmosphere of Tahrir, the square in which the protesters assembled, was celebrated for its inclusive and ecumenical nature: constant references were made to Christians and Muslims praying alongside one another. According to Brown, in March 2011, when asked if the judiciary was divided over the revolution, a senior judge who was connected with the part of the judiciary that did not want confrontation with President Mubarak, said, “Everyone is with the revolution now!”

The description of Mubarak’s ouster as constituting a revolution or an Arab Spring was premature. In 2013 what was called a “popular-backed” coup took place in which Egypt’s first democratically elected president, Muhammad Mursi, was removed from office. This resulted in the reestablishment of military rule by Mursi’s minister of defense, ‘Abd al-Fattah al-Sisi, who was supported by the army. Brown points out that most state institutions survived and remained relatively unchanged. In fact, since 2011, the army has succeeded in augmenting its power, its control of the Egyptian economy, and its visual presence in Egyptian public life. Despite the aims of the revolution, Egypt’s torture epidemic continues unabated.

What was notable about the revolution of 2011 and the counterrevolution of 2013 was the prominent role that the abolition of constitutions, the writing of constitutions, and the promulgation of constitutions played in the unfolding events. This says something about the intrinsic role and function of constitutions in revolutions as recording the founding moment of politics. The conflict that occurred over the constitution, its drafting, and its role in the transition raises questions about the relationship between sovereignty,
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democracy, constitutionalism, and the judiciary. The following questions have been raised, but not answered: Does the collectivity of the people exist prior to the constitution or is it the very act of constitution making which creates that collectivity and, consequently, its constituent power? Whenever a constitution is created, what is the source of the constituent power? Who gets to decide what voices get to count in the forming of a constitution? How is what Ulrich Preuss describes as the “pre-political commonness of a group of people” to be represented in constitution drafting?  

Postrevolutionary environments are mostly unstable and often there are no existing procedures for answering these questions. Groups tend to take the position of supporting the strategy that will maximize their interests. The history of the events that took place after the revolution of 2011 is complex and fraught. There are two features, however, that are particularly important with regard to the constitutional writing process that took place. One is the importance that was attached to constitution writing. Constitutions were seen as having to reflect the will of the people, although whether the will of the people could—or should—be captured was generally unquestioned. The other feature of the constitutional writing that took place was the moral outrage that accompanied the drafting and promulgation of the 2012 Constitution. This outrage illustrates that the importance of constitutions transcends their ability to provide mechanisms for the workings of government and various procedures. The uproar was symbolic of how constitutions had become the focus for the political struggles over the essence of the Egyptian nation.

Following the ouster of Mubarak, the Constitution of 1971 was suspended on February 13, 2011. In the months following Mubarak’s removal, debate focused on the procedure for writing a new constitution. There was considerable debate about how a new Constituent Assembly to draft a new constitution would be formed. The road map established by the Supreme Council of Armed Forces (SCAF) scheduled the election for the People’s Assembly and the Shura Council before the formation of a Constituent Assembly, which was the body that was to be responsible for drafting the constitution. It would thus allow the electoral process to determine the Constituent Assembly’s makeup. This came to be a deeply acrimonious issue that colored the whole process. Liberals, intellectuals, and the youth were concerned that this road map favored preexisting political groups and organizations, such as the former National Democratic Party and the Muslim Brotherhood, and would therefore prejudice the constitution writing process. Thus, liberal and secular forces pushed to draft a new constitution ahead of parliamentary elections. They wanted to focus on a new
constitution first, with a broad committee representing all sectors of Egyptian society taking the time to draft the document that would then guide Egypt through the first elections. Such groups, Kristen Stilt argues, were willing to put up with a long military rule in order to prepare the constitution before holding elections. They criticized the Muslim Brotherhood for wanting to have elections before the writing of the constitution. Amina Shafiq of al-Ahram complained that, for the Brotherhood, democracy “is little more than having ballot boxes that are not tampered with.” She called for “a full-fledged and liberal democracy, not one that is reduced to having multiple parties or free elections.”

During the summer of 2011, SCAF granted some concessions to liberal secular groups who had opposed elections before the writing of a constitution. A number of parties that formed the Democratic Coalition for Egypt were asked to draft a set of supraconstitutional principles, which would serve as guidelines for the drafting of the new constitution. Yet Islamist parties objected to the idea of supraconstitutional guiding principles, claiming that they “would circumvent or expropriate the will of the people.” Muhammad Sa’d al-Katatni, secretary-general of the Muslim Brotherhood’s Freedom and Justice Party, warned that “the people will protect the gains of their revolution and defend their right to a constitution that expresses their opinions and is the sole document governing them, drawn up without any prior restrictions.”

In November 2011, a document containing principles intended to guide the drafting of a new constitution was issued. While it stated that these principles were not supraconstitutional and they were not unchangeable, and while it affirmed that “the people are the source of sovereign power,” the document laid down a number of fundamental principles and gave SCAF power to veto any provision of the forthcoming constitution that “contradicts the fundamentals of Egyptian state and society and the general rights and freedoms that have become consolidated through successive Egyptian constitutions.” It also stated that “the Arab Republic of Egypt is a democratic state based on the principle of citizenship and upon the rule of law. It respects pluralism and ensures freedom, justice, equality and equal opportunity for all citizens without bias or discrimination. The Egyptian people are a part of the Arab nation and will work to bring about its comprehensive unity.” It reiterated a commitment to Article 2 of the 1971 Constitution declaring that “Islam is the religion of the state, Arabic is its official language, and the principles of the Islamic sharia are the main source of legislation.” It also affirmed that non-Muslims are able to have control over their own personal status laws and religious affairs.
The elections for the Shura Council and the People’s Assembly in the period November 2011–January 2012 returned an Islamist victory. The Salafi al-Nur party became the second largest party in the People’s Assembly after the Freedom and Justice Party. The Freedom and Justice Party decided to translate their electoral success into domination of the Constituent Assembly. The People’s Assembly and the Shura Council selected a Constituent Assembly in March 2012. However, opponents stressed that, because parliamentary majorities are transitory, the assembly’s makeup should reflect all aspects of Egyptian society. This Constituent Assembly was dominated by Islamists, although several Copts were placed on it. According to Zaid Al-Ali, despite the concerns of liberals, “one of the more remarkable aspects of Egypt’s constitution-drafting process is that it is the country’s first by an elected body,” since Egypt’s past constitutions were drafted in secret by unrepresentative and unelected political elites.

In April 2012, the Supreme Administrative Court declared this first Constituent Assembly to be unconstitutional on the grounds that its membership included fifty members of the People’s Assembly. In addition, on June 14, 2012, the Supreme Constitutional Court announced that the elections held six months earlier for the People’s Assembly were invalid because of a misapplication of rules for independent candidates. Barely noticed by the Western media, SCAF followed with an administrative decree to dissolve the People’s Assembly. Nimer Sultany calls the intervention by the Supreme Constitutional Court “juristocratic” and argues that it effectively subordinated constituent power to judicial power and thus collapsed the “distinction between legislation and adjudication.”

During this time, Mursi was elected president in June 2012 after two rounds of elections. In early June, a new Constituent Assembly somewhat less dominated by Islamists was established. The drafting of the constitution, however, continued to be acrimonious both in terms of process and content. Those deemed secularists walked out and boycotted the drafting process, repeatedly citing the failure of the dominant Islamist factions to compromise on key issues, including the place of religion in the affairs of the state. The Constituent Assembly and the constitution itself were criticized for being unrepresentative and noninclusive. The constitution was criticized for being “more Islamic” than any previous constitution.

In November 2012, it looked like the Supreme Constitutional Court was set to dissolve the Shura Council. Mursi abandoned the Muslim Brotherhood’s policy of “risk aversion and gradualism” and, in November 2012, issued a Constitutional Declaration in which he immunized the Constituent Assembly and the Shura Council from dissolution by the Supreme
Constitutional Court. The step allowed the president to issue decrees and draft laws with no oversight from parliament or the judiciary. Mursi had told the Muslim Brotherhood leadership that the declaration would remain in effect until mid-2013, by which time the new constitution would have been drafted and the next national elections held. The Muslim Brotherhood claimed that the Supreme Constitutional Court was poised to dissolve the Constituent Assembly and the Shura Council and said that if they did not do something now, the Muslim Brotherhood headquarters—and possibly the organization itself—were in danger of being dissolved.

The decree enraged the secular opposition, members of the judiciary, and the revolutionary and leftist youth movements. The Western media emphasized that this was an Islamist president showing his true Islamist colors. Representatives of the three Coptic denominations withdrew from the Constituent Assembly “protesting what they believed was a plan by the Freedom and Justice party to ensure that Islamists would be able to control the wording of the new constitution.” It was claimed that the draft constitution was “unrepresentative of Egypt’s diverse identity.” The military also stepped in, arguing, somewhat disingenuously, that while the army had wanted to remain out of politics, “we are citizens with families who are not immune to the effects of what’s going on,” advising that “the ruling party should learn the way people ought to be governed” and the Islamists cannot alone write the constitution.

While the events were used to criticize the Muslim Brotherhood and undermine its legitimacy, they raised the complex problem of the very source of national sovereignty itself. It is arguable that the origin of the Supreme Constitutional Court was the—as yet—unratified constitution. It is therefore a question whether the Supreme Constitutional Court could claim to have jurisdiction over the process of drafting the very document that would give it its powers.

The declaration of immunity resulted in getting the Constitution of 2012 passed. In December 2012, the Constitution of 2012 was ratified by referendum. Sixty-four percent voted in favor although only 33 percent of eligible voters turned out to vote. In the spring of 2013, a grassroots organization called Tamarod was founded to register opposition to Muhammad Mursi and to force him to call early elections. Tamarod created a surge in opposition to Mursi, and in July 2013, the army and the old regime used this opposition to remove Mursi from power. Both the recently appointed Coptic Orthodox pope, Tawadros II, and the shaykh of al-Azhar were at the side of ‘Abd al-Fattah al-Sisi when he announced the end of the Mursi government. It was deemed to be a popular revolution, with Tamarod led by the “people’s will.”
Muslim Brotherhood accounts see the institutions of the state, such as the judiciary and the police, as having deliberately undermined Mursi’s ability to get anything done. The Muslim Brotherhood has argued that the reason for its failure was that the deep state was set against it. Mursi was elected with no political support from the institutions of the state. He did not have the backing of the police, the army, the judiciary, or the press. This meant that, while the Muslim Brotherhood was officially in power, it did not have effective control. There are suggestions that Tamarod was aided by the army, which was supported by the Gulf monarchies. Yasser El-Shimy argues that “no single institution has been as effective in undermining Morsi’s presidency, and the Brotherhood’s rise to power in general, as the judiciary.”

Much has been said and written about the reasons for Mursi’s swift removal from power. The majority of accounts lay the blame with the Muslim Brotherhood itself. Yet promoting factional interests, political miscalculations, and overstepping one’s mark fail to account for the vitriol and moral outrage that accompanied the crushing of the Muslim Brotherhood. In fact, despite claims that the Muslim Brotherhood was trying to bring about the “Brotherhoodization” of the state, Brown argues that “the extent of personnel changes was not that large.” For Brown, Mursi attempted “to placate the state rather than reform it.” For example, the Muslim Brotherhood attempted to appease the military through establishing a National Defense Council which would take control of the military’s budget (Article 197). In addition, Sultany argues that judges in Egypt “generally maintained institutional continuity that hampered judicial reform, legal continuity that thwarted holding former regime officials accountable, and constitutional continuity that obstructed political re-constitution.” This allowed the status quo to reassert itself.

One mistake was that the Constituent Assembly used the 1971 Constitution as a starting point for its discussions. This was partly because the Constituent Assembly was limited by a six-month time frame. The draft of the 2012 Constitution had considerable continuity in terms of style, tone, and organization with the 1971 Constitution. Thus, Zaid Al-Ali argues, “while the new constitution claims to be a product of the people’s will, it is heavily influenced by the preceding decades of autocratic rule.”

The political incompetency of the Muslim Brotherhood also fails to explain why protests in favor of Mursi were violently suppressed with the dispersal and massacre of pro-Mursi protesters at sit-ins in al-Nahda Square and Rabīʿa al-ʿAdawiyya Square in Cairo in August 2013. Amid the unrest, journalists and several hundred to a thousand protestors were killed by police and military forces. The shaykh of al-Azhar has not spoken out against the
subsequent atrocities against the Muslim Brotherhood and ‘Ali Guma‘a, the former grand mufti of Egypt, legitimized the violence. This, Masooda Bano argues, has exposed al-Azhar’s “moral authority to unprecedented risks.”

After the coup, the Constitution of 2012 was suspended. A new constitutional declaration was issued by ‘Adly Mansour, head of the Supreme Constitutional Court. It stated that the redrafting process would be overseen by a Constitution Committee of ten jurists and law experts—chosen by judicial bodies—who would then refer their draft of the constitution to a Constitution Committee made up of fifty individuals, later known respectively as the Committee of 10 and the Committee of 50. The Committee of 50 was dominated by state institutions and syndicates. Only six of its members came from political parties and therefore reflected a very different perception of how Egyptian society should be represented. Sultany argues that each side ended up doing what it accused the other of doing—that is, excluding the other side from the process. He contends that the “drafting committee’s product, like the previous Islamist-dominated committee, reflected the drafters’ attempts to promote their factional and institutional interests.”

As had happened with the Constitution of 2012, little debate was offered about Article 2 of the 1971 Constitution. Negotiations continued on the basis that Article 2 should remain, with some suggestions that explanatory clauses be added. The 2014 Constitution continued the privileges for the military that had appeared in the 2012 Constitution. In addition, judges obtained guarantees of their independence. The drafting of the new constitution was not without complaint, although this was far more muted. The vitriol and moral outrage were no longer present and coverage in the Western press was considerably reduced.

The Constitution of 2014, like its predecessors, has failed to accomplish what many of its drafters claimed it would—establish a stable, democratic state in which human rights are respected. The consistent failure of Egypt’s constitutions to deliver on their promises does not fully account for the continued importance attached to them. I suggest that constitutions should also be seen in terms of their foundational character, and their ability to construct new orders and mark the end of old ones. They must also be seen in terms of their ability to make the state legible on both the international and national levels. Constitutions function as maps by which members of society navigate and by which the state itself projects on its citizens the expectations it has of them. They should be seen in terms of how the citizen is fashioned and how the relationship between religion and politics is defined. In Egypt, constitutions were not seen simply as tools for political processes, but as a reflection of the very essence of the Egyptian nation. This explains why, starting in the
1970s, Islamists were so interested in establishing a commitment to the sharia in the constitution, and why this clause was retained in subsequent constitutions. For them, and for many other Egyptians, the centrality of the sharia in the constitution helped define the core of Egypt itself.

**Article 2**

Constitutions often serve as a means by which the state lays out the social and political expectations it has of its citizens as well as the expectations those citizens may have of the state. This is why the increasing concern with the Islamic or secular nature of the state was translated into particular constitutional statements. The Constitutions of 1923 and 1956 only made nominal and symbolic references to Islam by stating that Islam was the religion of the state. However, no commitment was made to the sharia. In the 1930s, the Egyptian public sphere became increasingly concerned with the legitimacy of Western law and with whether Egypt was a secular or an Islamic state. This helps explain the appearance of Article 2 of the 1971 Constitution, which had enormous symbolic importance and represented the culmination of the idea that the state was the appropriate vehicle for the application of the sharia. It read that “the principles of the Islamic sharia are a main source of legislation.” This was amended in 1980 to read, “the principles of the Islamic sharia are the main source of legislation.”

The introduction of Article 2 was seen by many as a retrograde move. Yet, in many respects, it constituted a departure from the premodern idea that the sharia was jurists’ law. While the premodern ruling polity could supplement the sharia, it could not supersede or control it. Thus, a constitutional commitment to the sharia was predicated on a modern conception of the relationship between the state and law, whereby the state monopolizes legal authority. Central to the development of this way of thinking was the political ideology of the Islamist thinker Sayyid Qutb (1906–66). During the 1960s, Qutb developed a more fully fledged theory of the state that was to play a prominent role in Islamist thinking. Qutb articulated the modern concept of sovereignty (hakimiyya), the belief that the right to make judgments and issue laws belongs only to God. Giving the right to make judgments and issue laws to anyone other than God rendered one an unbeliever. Islam, he asserted, does not simply “involve words and slogans or religious rites and prayers. Indeed, it is next to this and that and before this and that a system (nizam) that judges and a method (manhaj) that passes judgment and a leadership that is obeyed and a creation that leans towards a specific system and a specific method.” Sayyid Qutb argued that legislation made by an
individual or governing class cannot be free of self-interest and puts people in a state of “servitude” (ʿubudiyya) to someone other than God. Only by adhering to the system—which he also referred to as a “manhaj”—that God had revealed for the life of people, could people be freed from such servitude. Only when the manhaj of God rules the life of human beings does the dominion of one individual, family, class, community, or sex disappear “and true and complete justice [become] realized.”\footnote{86} It is only the manhaj of God that is not subject to the vagaries of human weaknesses.\footnote{87}

Qutb’s concept of hakimiyya, while having roots in the thought of the Pakistani thinker Abu al-ʿAla Maududi (1903–79), was quite new. In calling for God’s right to legislate through the concept of hakimiyya, Qutb firmly tied the sharia to the sovereignty of the state. In so doing, it could be argued that Qutb ironically made the sharia more—rather than less subject—to the hakimiyya of someone or something other than God by more specifically intertwining the sharia with the sovereignty of the modern state. Qutb’s thought had a profound influence on Islamic thinking during the 1970s and became central to the oppositional politics that led to the assassination of Anwar Sadat in 1981.

Dawood I. Ahmed and Tom Ginsburg refer to Article 2 as a type of Islamic supremacy clause. The idea of the supremacy clause may have come from colonial India where the British could constrain “the application of domestic and customary laws which they may deem to be repugnant to British law and moral sentiment.”\footnote{88} Almost half of the constitutions of Muslim countries contain these supremacy clauses with the majority having been put into effect between the 1990s and 2002. Ahmed and Ginsburg argue that Sadat included an Islamic supremacy clause in order to legitimate the extensive presidential authority given by the 1971 Constitution since, in spite of its more liberal provisions, the constitution substantially increased the president’s powers. As such, the Islamic supremacy clause was a concession to secure the regime and its constitution’s legitimacy.\footnote{89}

Yet Article 2 was not specific. No definition was given about the way the principles of the Islamic sharia would be interpreted and applied. The constitution did not mention the role of various state and state-related institutions that deal with religious matters: the state mufti, the Ministry of Endowments, mosques, al-Azhar, or the courts.\footnote{90} Article 2 was promulgated because the sharia as an abstract idea had taken root among the Egyptian public. Article 2 reflected the idea that the sharia could speak to the cultural commitments of the state and its populace.

The introduction of Article 2 represented a much more explicit attempt to amalgamate the sharia and state law to produce a new modern Islamic state law. Adel Omar Sherif, deputy chief justice of the Supreme Constitutional
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Court, argues that a juristic paradox was created by the adoption of Article 2. The constitution presents itself as the fundamental law of the state and the expression of the will of a sovereign people. Yet the implication that the sharia should guide interpretation and that it supersedes other legal rules implies that the sharia constitutes a presupposed body of substantive rules from which state-enacted legislation should be developed. This would invalidate any state positive legislation—along with, potentially, the law contained in the constitution itself—unless such legislation conformed to the sharia. At the same time, Sherif argues, “Islamic law does not acquire validity unless it is incorporated into the state-enacted legislation.” This, he contends, “suggests that Islamic law on the one hand and state-enacted legislation or secular law on the other, reflect two different autonomous legal orders.”

Sherif is clearly uneasy with allowing the sharia to constitute a presupposed body of substantive rules, or supralegal norms, from which state-enacted legislation should be developed. This reflects a general attitude in the judiciary that supports the supremacy of state-enacted positive legislation. According to Brown, “one of the most senior judges in the country claimed in a personal interview in 1991 that judges who insist on the superiority of the Islamic shari'a to positive legislation will find their careers stalled.” The Supreme Constitutional Court, according to Brown, has upheld state-legislated positive law and has confirmed that the source of law is the state.

The other aspect that is new about the application of Article 2 is that a Supreme Court ended up taking over judicial review of the sharia. Prior to 1969, all Egyptian courts were authorized to consider the constitutionality of legislation. From 1969 on, the right to exercise the constitutional review of legislation was vested in the Supreme Court, which was renamed as the Supreme Constitutional Court in the 1971 Constitution and reformed into a more independent entity in 1979. Thus, by 1980, the Supreme Constitutional Court of Egypt had been established as the highest authority on questions of constitutional interpretation. While the Constitution of 1971 had not stated who would interpret the sharia, the Supreme Constitutional Court emerged as the main institution for dealing with Article 2 cases.

Giving constitutional review in sharia-related matters to the Supreme Constitutional Court affirms the authority of the state to speak for the sharia. This marks a shift from premodern notions of the relationship between law and the state which assumed that the jurists and the four schools of law would put limits on the polity’s legislative capacities even if that limit was in the form of a negative restriction. The Supreme Constitutional Court judges are civil law judges with little training in Islamic law. Clark B. Lombardi has
shown that it has been the Supreme Constitutional Court and not the ulama of al-Azhar, which, since the court’s founding in 1979, has assessed whether legislation conforms to the principles of the sharia. The Supreme Constitutional Court judges, when adjudicating Article 2 cases, do not generally consult with al-Azhar. The court clearly does not wish to look to the ulama for guidance and does not agree with the idea that only those judges who have Azhari training can interpret the sharia. In the first six Article 2 cases from 1989 to 1992, the court did not refer to the ulama or even cite the ulama to support its conclusions.97

Despite the lack of strong parallels between the role of the Supreme Constitutional Court and premodern sharia, Islamists have used Article 2 cases as a judicial avenue to push for the implementation of the sharia. For Islamists, Tamir Moustafa argues, “litigation was one of the few available avenues to challenge the status quo from within the formal legal/political system.”98 It is common for lawyers to challenge laws and the actions of government claiming their opposition to the sharia. This is one possible strategy that a litigant can pursue.99

In adjudicating on Article 2, the Supreme Constitutional Court was faced with the challenge of defining what counts as the “principles of the Islamic sharia.” In defining what the sharia is and what religion is, the court itself has an important role that, according to Lombardi, it has handled carefully. When the court was first confronted with Article 2 cases, it was a young and fairly weak institution.100 For this reason, it was initially reluctant to adjudicate on Article 2 cases. In 1985, however, the court was faced with a case that was initially brought by the shaykh of al-Azhar at the time, ‘Abd al-Halim Mahmud (1910–78), but was continued by his successor, Shaykh Jadd al-Haqq ‘Ali Jadd al-Haqq (1917–96). The case was connected to interest on overdue payments. The court held that constitutional change was not retroactive and that Article 2 was addressed solely to parliament as a guide for its legislative authority. With this ruling, the Supreme Constitutional Court hampered attempts to make Egypt’s European-based civil and criminal codes comply with the sharia. Nevertheless, the ruling stipulated that Article 2 requires all Egyptian legislation enacted after the amendment to be consistent with the principles of the sharia.101

For some time after this, the court did not establish any clear method of interpreting and applying Article 2. Lombardi argues that in the 1990s, however, the court began to publicly express a more systematic methodology for deciding on the principles of the sharia. The methodology has been articulated in a way that relates to a number of methods of Islamic legal reasoning, while giving judges the freedom to interpret the sharia themselves so as to
“develop a jurisprudence of Islamic law that preserves (and even reinforces) the Court’s existing jurisprudence—including its progressive property rights and women’s rights jurisprudence.”

Lombardi illustrates that the Supreme Constitutional Court’s interpretation of the sharia has been in line with liberal constitutionalism and the liberal rule of law. He argues that the court has used a range of modernist methods for interpreting Islamic law. It has referred widely and directly to the Islamic tradition, “drawing vocabulary and concepts from a range of classical and modernist Islamic legal theories, but leaving unclear its position on some particularly controversial matters.” This method has given the court considerable latitude in its interpretation of the principles of the sharia. The court emphasized that rulings unambiguously recorded in Islamic legal literature and known to be authentic must be respected. However, the court considers the number of such cases to be small. In a case over custody law in 1993, the Supreme Constitutional Court rejected the ruling that Egyptian legislation had to be consistent with Hanafi law and declared that modern Muslims were not bound by the classical juristic tradition. The court has also emphasized that any ruling must further the broader goals of the sharia. These goals have been interpreted in a manner that reinforces the court’s liberal constitutional values and liberal jurisprudence. Brown and Lombardi show how such an approach was continued in a 2013 case relating to Egypt’s personal status law and grandparental visitation rights.

The Supreme Constitutional Court has therefore taken a flexible approach to the application of the sharia. Mohammed Fadel argues that the Supreme Constitutional Court has not felt the need to systematically connect modern Islamic state law to premodern Islamic legal norms. He argues that the court has treated Article 2 as just one of numerous constitutional principles rather than as a body of supraconstitutional norms. He has argued that all these constitutional principles must be read together as a whole to reconcile premodern sharia with modern notions of democracy and human rights.

According to Lombardi, the move to insert the sharia into the constitution and therefore to constitutionalize the sharia in late twentieth-century Egypt “represents a commitment to the idea that state law must be a modern analogue of siyāsa shar‘iyya,” or administration in accordance with the sharia. Yet the relationship between siyasa and the sharia in premodern jurisprudence was based on the assumption that the two systems would remain distinct and would work parallel to one another. The obligation was that the former should not contradict the latter. However, Article 2 cases represent a greater amalgamation of siyasa and the sharia than was envisaged by those who had theorized about this relationship. Article 2 has in
some respects confirmed the authority of the state over the sharia itself. This is distinct from allowing the sharia to limit siyasa. In this sense, the sharia is integrated into state law in a way that takes the concept of siyasa sharʿiyya further and results in modern Islamic state law. In amalgamating the sharia and siyasa, the Supreme Constitutional Court is carving out a considerable space for positive legislation. This is enabled by the fact that the sharia is being interpreted by the Supreme Constitutional Court as a set of principles or as a cultural ideal. The court is interpreting Article 2 in narrow terms as applying to only those norms and principles specifically stated—as mandatory or prohibited—in the text. According to Adel Omar Sherif, deputy chief justice of Egypt’s Supreme Constitutional Court, “when the Egyptian constitution upholds the primacy of Islamic law in its Article 2, it is upholding the primacy of these clearly known core values that lie at the center of Egyptian society. If those values are violated, a breach of the Constitution has occurred. Anything less than a violation of these clear, core values does not constitute a violation of Islamic law under the Egyptian Constitution. Rather, anything else is viewed as a realm within which the legislature has space to govern accordingly.”109 Thus, what has emerged is a strong statist approach to the regulation of the sharia. A minimalist understanding of the extent to which the sharia can limit state legislation has also emerged. The court is effectively asserting the primacy of the state as the locus of law and has declared that the sharia does not constitute a presupposed body of substantive rules from which state-enacted legislation should be developed, but rather a body of principles which can be referenced and serve as a guiding point in the development of state-enacted legislation. Giving a court judicial review of the sharia constitutes a new form of centralization of legal power.

In this chapter, I have addressed the popularity and importance of constitution making in the modern Egyptian nation state. Constitution writing has been a key part of the remaking of the Egyptian political order. The nature of the evolving Egyptian state has been mirrored in the priorities expressed by Egypt’s various constitutions. The constitution writing process of 2012–14 symbolized the prominent position that constitution writing has come to hold not only in Egypt, but also in the Arab world and beyond. Considerable energy and anxiety were expended on constitution writing, such that it became central and vital to the legitimacy—or lack thereof—of the political process after the revolution of 2011. The heart and soul of the polity, and the relationship between the state, Egyptian citizens, and the law, were being determined. Likewise, the very origins of the polity itself—where it comes from and who gets to speak for it—were being decided.
Constitutions were not seen simply as establishing mechanisms for political processes, but as a reflection of the spirit of the Egyptian nation. This partly explains why, starting in the 1970s, Islamists, armed with notions of the concept of Islamic state sovereignty, were so interested in establishing a commitment to the sharia in the constitution. While Article 2 was initially controversial, it has evolved to form a largely unquestioned cornerstone of the relationship between religion and the state in Egypt. There was relatively little discussion of removing Article 2 during the 2012–14 constitutional debates.

Article 2 has been seen as a violation of Egypt’s secular nature, which was embodied in the Constitutions of 1923 and 1956. Yet it shows the way in which the relationship between the religious and the secular is being renegotiated. The article does not constitute the insertion of premodern sharia but is the product of the changes that occurred to the sharia in the nineteenth and twentieth centuries. Those changes included seeing the state as the appropriate vehicle for the sharia along with seeing the sharia as an idea or concept divorced from its institutions and methodologies. In fact, it was the emergence of the idea of the sharia itself in the early nineteenth century that then made the introduction of a statement on it possible in the Constitution of 1971. Article 2 represented the sharia as a concept, detached from its institutional props and premodern methodologies. It also, however, represented the subordination of the sharia to state positive legislation. It has been the Supreme Constitutional Court that has adjudicated Article 2 cases thus establishing the state as the locus of legal authority. At the same time, questions have been raised over the extent to which the decision making process of the Supreme Constitutional Court should be restrained by the sharia.