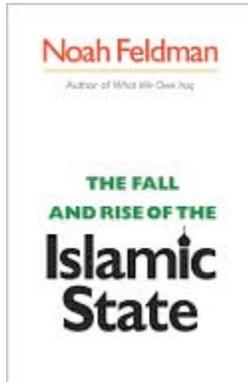




## The Fall and Rise of the Islamic State

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### Introduction

**JOANNE MYERS:** Good afternoon. I'm Joanne Myers, Director of Public Affairs Programs, and on behalf of the Carnegie Council, I would like to welcome our members and guests, and to thank you for joining us.

Today it is a delight to welcome back Noah Feldman. I know that he will educate, enlighten, and enable us to understand everything we want to know about [The Fall and Rise of the Islamic State](#).

It is practically a law of nature that all people make a priority of something. Even those who lead unstructured lives will unconsciously adhere to some set of unarticulated principles. For many people, religious practice, as in striving to obey God's commandments, is a high priority—the highest even—and for many Muslims, living in accordance with the divine laws of Allah or [Sharia](#) is their ultimate priority.

Sharia, in its truest sense, is, of course, law itself—not just any law, but the divine law that governed the Islamic state through centuries of success. Sharia is derived from the words and deeds of the seventh-century prophet Muhammad, and if followed, Muslims believe, it will provide the path to salvation. Sharia and the scholars that served as the guardians have influenced the legal code in most Islamic countries, but the extent of its impact varies widely. Avowedly, secular Turkey is at one extreme, and at the other end of the spectrum are the Islamic Republic of Iran, where mullahs are the ultimate authority, and the Kingdom of Saudi Arabia, where the Qur'an is considered to be the constitution.

Still, in Iraq, the question of whether Sharia should be more strictly applied in the post-[Saddam Hussein](#) era is one of the most divisive issues facing the transitional government.

In *The Fall and Rise of the Islamic State*, our guest this afternoon gives us the sweeping history of the traditional Islamic constitution. His goal is to help explain why today there is so much support for the idea of Sharia in many Muslim countries. He also explores how the past, present, and future of Islamic government illuminates the debate. He traces the beginnings, when executive power was balanced by the scholars who interpreted Sharia and the rulers who administered the law, to its downfall when this balance of power was destroyed by the reforms of the modern era.

The result has been the unchecked executive dominance that now distorts politics in so many Muslim states, where corrupt and oppressive governments are incapable of even providing the basic services to their people.

As these citizens run out of options, Islam appeals more and more to many voters, precisely because it resonates with those Muslims who took to Islam for universal, as well as political, values and for a state that mandates the rule of law, political pluralism, and free and fair elections.

Professor Feldman writes that a modern Islamic state could provide political and legal justice for today's Muslims, but only if new institutions emerge that restore a constitutional balance of power. Our speaker has done quite a bit of thinking about the intersection of religion and law in the Arab world. He is a constitutional expert who teaches at Harvard Law School, is fluent in Arabic, and holds a doctorate in Islamic studies from Oxford University, where he was a Rhodes Scholar.

However, it wasn't until 2003, when he was an adviser to the Coalition Provisional Authority and had to draft the Iraqi constitution, that the origins of the book began to develop. It was during this time that Professor Feldman realized how little in the way of credible institutional authority remained after the fall of Saddam. Yet religious scholars still seemed to play a role. With this fact lingering, he researched their historical place in serving as guardians of Sharia. This took him on an intellectual journey through history, Islamic law, and modern politics. In the end, his findings resulted in the publication of *The Fall and Rise of the Islamic State*, which he will discuss with us today.

Please join me in welcoming to the Carnegie Council a person who has often been referred to as one of the legal rock stars of his generation, our speaker, Noah Feldman.

Thank you for coming.

## Remarks

**NOAH FELDMAN:** Joanne, thank you very, very much for that thoughtful introduction. In fact, it was such a good introduction that I'm a little unclear about what I should say about my book now. That was a very good description of it.

I would like to, first, with your permission, acknowledge my editor from Princeton University Press, Fred Appel, who is here in the audience today, who played, as all excellent editors do, a formative and central role in the drafting of the book.

Thank you very much, Fred. I'm very grateful to you. With that, all errors in what follows are my own and not Fred's.

Let me, in the time that we have, begin by sketching out to you the question that motivated the writing of this book and then try to give you an overview of an answer that captures the core of the argument of the book, and then open things up for what I'm confident will be a lively and, I hope, contentious discussion. Those are the most fun discussions, I think.

The question with which I begin is a contradiction. There is a fundamentally striking fact about the difference between the view in the Muslim world of the Sharia, the Islamic legal system, and the view that we hold in the West. In the Muslim world, if you allow free elections, or even relatively free elections, in almost every Muslim country—I don't say every, but in almost every Muslim country—and in every Arab-speaking country where such elections have been permitted, people advocating an important or central role for the Sharia in governance have won almost as many of the seats as they have been able to contest, in many cases, and in all cases have done much better than anyone expected them to do.

So that means that parties that present themselves as simultaneously democratic and Islamic, and who make as the central plank in their platform the making of Sharia into the source of law—not just a source of law, but the source of law—tend to do tremendously well in elections.

By contrast, in the West, I think it's no exaggeration to say that the word "Sharia" is radioactive. When

the Archbishop of Canterbury, who is hardly known as one of the great world advocates of Islam, since he is head of the world's second-largest Christian denomination, [gave a speech at the Inns of Court](#), a really academic lecture—those of you who have actually read it will know what I'm talking about—in which he rather cautiously suggested that under some very narrow circumstances, just as the law of the Church of England governs a whole range of family-law matters in England still, despite England's modern status, it might be possible to admit some principles of Islamic law into judgments of family law between Muslims, only when men and women were held equal by the law and only with the consent of the parties.

This led to an outcry that included a call for his resignation. He is managing some pretty tough circumstances right now. Things in the Anglican Communion are not smooth, having to do with a potential split within that Communion. Yet throughout all of the trouble he has been through, nobody has actively been calling for his resignation until this moment.

So there's something funny going on here, and that's really the contradiction with which I begin this evening's conversation and also with which I begin the book. Why this disparity? Why does the word "Sharia" have such radically different meanings in these two contexts?

The answer that I offer is that we mean something rather different in the West when we think of the word "Sharia" than people mean in the Muslim world. It's that the associations in the West of the chopping off of hands, of stoning, of the mandatory veiling of women are, in fact, not the features of the Sharia tradition that are motivating large numbers of people, and indeed majorities in many Arabic-speaking and some other Muslim countries, to vote for Sharia-oriented political parties. In fact, what's motivating people to vote for those parties is a complex set of factors, some of which are very familiar to you, because we hear about them a lot. There is frustration with the failures of secular nationalist government in the Arab and Muslim worlds. There is frustration with the corruption that, unfortunately, is a feature of governments in some countries that fit those descriptions. There is also the sense that executive dominance, the unfettered dominance of the executive, has not been a good system of government.

But what has been, to an astonishing degree, overlooked by Western analysts—and I think this is even true of some people analyzing these phenomena in the Arab worlds—when evaluating why people are voting for parties that advocate the Sharia, is something that on some level seems so obvious that I inevitably open myself up, when I say it, to the form of criticism that says, "Well, what's surprising about that? That's obvious." So what I'm about to say—if it sounds obvious to you, that's fine with me. It's just that almost nobody else is saying it. Someone needs to say it. I make no claim to its originality, just to its significance.

That is, if parties are running for office on a platform that says, "We want law"—and Sharia is a form of law, as Joanne was saying—and if people are voting for those parties, maybe what they want is law.

Maybe you should take seriously, at face value, what the parties say they are offering to the electorate and what the electorate says it wants when it votes for them. The legal system in question has as its most salient feature that for more than 1,000 years it functioned very, very effectively, by any objective measure, by any comparative measure, as the basis for a system of government throughout the Muslim world that met very closely what Western analysts today call the rule of law—very, very closely.

Now, let me add a quick caveat here again. The phrase "the rule of law" is one of those phrases that is often used by people to mean "stuff we like." "Democracy" is another such term. Everyone says democracy is good, and they sometimes are saying this about radically opposed systems, so they can't all mean the same thing. The same is true of rule of law.

By rule of law, I mean what is sometimes called the very thin conception of the rule of law, which is not to say that it's not an important one. What I mean is a system in which:

- One, the law governs the behavior of all people in society, including, most importantly, the government itself, in which the government is constrained by the law.

- Second, in which there are institutional mechanisms in place in the society—courts and other enforcement mechanisms—so that when the law is applied, it actually binds the people who purport to be bound by it. It actually binds the parties to a litigation. It actually binds government officials who are supposed to be bound by the rule of law.

That's all I mean by the rule of law. But I would claim that that definition of the rule of law is sufficient to cover most of what we would ordinarily consider effective legal government in most places in the world. That's something I would be happy to talk about in the discussion session, if anyone would like.

By those definitions, those two key components of the rule of law—that is to say, everyone is governed by the law, including the governments (governments are subject to the rule of law), and there are institutional mechanisms to make sure the law is followed—the classical Islamic legal system fits this description.

In the traditional Muslim world, which is what I discuss in the first third of the book, the constitutional arrangements which existed operated on the basis of a balance of powers. I'm not saying you have to have a balance of powers to make a constitutional system or the rule of law work. I just don't know of any systems with the rule of law that don't have a balance of powers. I don't want to say it's impossible, but I don't know of any examples.

The reason you need a balance of powers is that no executive, no ruler, likes to be limited by the law. It's just the most common-sense thing in the world that you would like not to be limited by the law. Indeed, in the [Roman legal code](#), [Justinian's](#) great code, the second or third sentence announces that the prince is not bound by the law. If you were writing a code of law and you were the emperor and you thought you could get away with it, you would probably say that, too.

In the Muslim world, by contrast, the principle that the law was God's law meant that human beings who interpreted the law, and therefore applied it in practical terms, had to be people expert in discerning what God's word meant. That, from the very early time in Muslim history, was not the ruler. It was nice if the ruler had those kinds of qualifications, but typically he did not. (It was always "he" in the classical Islamic constitution.) The people who had the qualifications to interpret God's law, to say what it meant, and therefore, in effect, to make the law—as an outsider, one would say they made the law. In the same way that in the common law, in the Anglo-American tradition, the judges always announced that they were discovering the law, but an outsider would say they were making it, similarly in the Muslim world the scholars said that they were finding the law, but in fact an outsider would say they were making the law.

Those scholars were a class of persons who were not part of the executive, who were not the ruler. They were different.

How did you become a qualified scholar? By studying with other qualified scholars. The scholarly class was not part of the state apparatus in a direct way. It was—this is an awkward phrase, but I will use it anyway—a quasi-non-state institutional body, the body of the scholars. The reason they weren't completely out of the state is that the judges, who actually applied law on a day-to-day basis, were appointed by the ruler. But they were appointed from among a class of scholars which was not controlled by the ruler.

So the scholarly class had an independent basis outside of rule, and that basis was based on the fact that they had been around for a long time as a class and, most importantly, that they asserted that they were the ones in charge of interpreting God's word. Furthermore, they said that the job of the ruler was to command the good and prohibit the wrong. How do you know what is the good and what is the wrong? Not by what the ruler says, but by what the scholars say.

That was the basis for the separation of powers.

Part of what I have just said would be widely agreed upon by all historians who study the classical Islamic constitutional arrangement. They would point out, very correctly, that classical Islamic states varied in size from global empires, like the [Ottoman Empire](#), the [Mughal Empire](#), all the way down to self-governing city-states, small fortified towns. So, of course, there was great variation in how these constitutional principles were applied. But they would probably agree that what I just described was the constitutional law on the books. It's what the scholars—who were the ones, after all, who wrote the books—said the system was.

But until pretty recently, I would say, until the last 10 or 15 years, the standard view among Westerners who study the classical Islamic constitution—and this may still be the view of many scholars today—is that, in fact, in practice, there was no way for the scholars to force the ruler to do what they wanted. The rulers may have talked a good game by pretending to listen to the scholars, but they ignored the scholars when they wanted to, and the scholars couldn't do anything about this because the scholars didn't have an army.

The argument that I advance in the book—and I'm going to close my description of the first section of the book with this and move on to the next couple of sections—the argument that I make in the book is that, in fact, that assessment, that if you have no army you can't enforce the rule of law, is based on an impoverished sense of how a constitutional government actually works. Our Supreme Court in the United States does not have an army. If the president wants to ignore the Supreme Court, in theory he can. There have been historical instances where presidents have ignored the Supreme Court, on occasion. Nevertheless, everyone accepts, operating within and outside the U.S. constitutional system, that the Supreme Court plays a major checking role in checking the executive.

Why is that? The answer is that words and institutional practices and customs are far and away the most effective way of checking an executive. Having an army is just one way of doing it, but it's actually a very risky way. That's sort of the Turkish model today, where if the army isn't happy with what the elected government is doing, it threatens a coup d'état—even what they call now "the postmodern coup d'état approach," where they just make a few phone calls and the government has to walk away. But it's still a form of a coup d'état, backed by the threat of force.

But in a well-functioning constitutional system, it's much more efficient to delegitimize the ruler more subtly and force the ruler to do what you want him to do, to adhere to the legal system, by means of the public assertion, and sometimes even the private assertion, that he is not following the rules that he is commanded to follow.

So this is a system that was in place for a long time in the Muslim world, more than 1,000 years. But if you look around the Muslim world today, it's rather obviously not in evidence. So what happened?

In the second part of the book, I take up the "what went wrong" question, which I answer in a way very fundamentally different from the way that [Bernard Lewis](#) answered it in his catchily titled book of the same name. I point to the same period that Lewis points to, the end of the Ottoman Empire, because it's pretty clear that the end of the Ottoman Empire was the point when the Muslim world went from, broadly speaking, being characterized by well-functioning governments and an influential world power to something much less effective and much less influential, and indeed much less politically just.

But instead of focusing on cultural changes in the broadest sense, I focus on constitutional design, governmental design. I do that in part because that's what I do for a living—I'm a constitutional lawyer, so I tend to notice those things—and in part because I myself, as Joanne said, became interested in these issues while involved in the Iraqi constitutional process. But it's not just biography. I also think that an account of the changes in the way constitutional design operated in the period will help us explain what changed, because the people at the time in the Ottoman Empire thought that what they were doing was constitutional reform. This isn't, I hope, attaching my own views to what they were doing. This is by their own account what they were trying to do.

In the period of reforms known as the Tanzimat period, which ranged from the 1830s into the 1870s, the elites in the Ottoman Empire, who knew they were falling behind the West, explicitly said that they were going to reform their constitution and their institutions so that the Ottoman Empire would be more Western, and therefore be more effective at competing with the West.

For our purposes, there were two reforms and one failed reform that matter the most.

The first was the codification of the law. The traditional Sharia is a common-law system in the sense that it's not written down in just one place. You have the Qur'an itself, where the words of God are recorded. You have the words of the Prophet as told to his companions, who reported them down through the years. Then you have a human practice of evaluating and analyzing the meanings of those texts. Then you have a large body of legal interpretation of lawyers and jurists trying to make sense of this material. In a system which operates like this, an unwritten system—the system has only some written documents—the way you decide about an individual legal judgment is that you have to be an expert. You can't go look it up in a book. You have to look at all the sources. You have to know all of the opinions, all of the views, in order to develop an opinion. So you have to be well trained. That means someone has to train you. That means you have to be part of an institutional body of training, like the one I was describing, the body of the scholars.

A legal code is different. The theory behind a legal code is that you look it up in the book, you find on page 142 what the legal ruling is in this case, and you can apply it. That's the aspiration of a legal code. When the Ottomans who went about codifying the Sharia for the first time in well over 1,000 years decided to take this step, they were self-consciously imitating the European model of a bureaucratized judiciary which had become popular over the previous century.

There is a complicated and interesting story about how it happened in Europe, having to do with the rediscovery of the Roman codes. But that's a story for another day, and maybe another book.

It's enough for our purposes just to say that there was an attempt to imitate the Western style here, and that through doing that, the Ottoman Empire and the reformers radically marginalized the scholarly class. They took away from them the thing that made them unique—namely, their ability to say what the law was. Now it was the state that would say what the law was through this code. Even though the code was supposed to incorporate some of God's words, it was still the state that was promulgating the code.

That was a perfectly fine reform, insofar as it went, and it was indeed a Westernizing reform, as it was intended to be. It would have been, I think, not a major problem for the rule of law in the late Ottoman Empire, insofar as it went alongside the second important reform, and that was the promulgation of a constitution by the Ottoman sultan which, among other things, created a legislative body, which had two houses and was supposed to engage in legislation in the modern Western way.

In Western countries, parliamentary authority grew over the 19th century; royal authority declined. So it didn't matter so much in terms of the balance of powers that law was being incorporated in codes, because this new legislature had interests in balancing the king. That was a new form of the balance of powers. That could have happened in the Ottoman world. It's conceivable that that could have happened.

But—and here's the failed reform—the Ottoman sultan was not very happy with the legislature which he called into being, because the first thing it did was exactly what legislatures like to do when they are called into being, which is, it criticized the sultan.

People think that legislatures are primarily about legislation. That's not true. Legislatures are, first and foremost, about criticizing and checking and making problems for any other power in the society. Then, when they are done with that, they get around to making laws.

So the sultan noticed this and he shut down the legislature less than a year after it was formed, and he

never called it back into existence ever again.

What that meant was that codification had taken the power to make the law away from the scholars, but instead of giving it to a new legislature, it now remained with the sultan and with the state itself. The legislature never came into being in any meaningful way to counterbalance the sultan. What was left was just the rule of the sultan.

This did not go well in the later Ottoman Empire. The later empire was a disastrous time for the Ottoman Empire, rife with stupid decisions, the genocide of the Armenians—a whole range of things that were in many ways deviations from the history of the Ottoman Empire.

Unfortunately, the model that emerged of a powerful state that issued law, a small and much reduced role for Islamic scholars, and a legislature that, if it existed at all, was to a great extent a rubber stamp—that became the paradigm, at least in Arabic-speaking countries and in some other Muslim countries as well, even after the collapse of the Ottoman Empire and the emergence of new states in various places in the Arabic-speaking world which were under colonial guidance or dominance.

This is one of the trickiest parts of the book. It requires some effort to explain why a system that was part of the collapsing of the Ottoman Empire was adopted in these other state contexts. Part of that story is colonialism. Colonialism is a part of it. But I suggest in the book that it's not the only part of the story, that the roots of this problem actually preexisted the colonial period and existed already in the Ottoman period.

But that's "inside baseball." I'm happy to talk about it if anyone in the audience is interested, but I'm not going to belabor you with it now.

So that creates the present circumstance, which I will turn to now. This will be the last part of my comments. Then I will open it up for discussion.

Today, if you look around certainly the Arabic-speaking world, and in many places in the Muslim world more broadly, you see this phenomenon of executive dominance. That's what the political scientists like to call it. It's a situation where a king or a president has enormous power and is not effectively checked by any voice in the society.

On the one hand, it's important to notice that many less developed or Third World countries have similar problems. You can go to Africa and see the same phenomenon in countries that are not Muslim. You can go to Latin America and see the same phenomenon in some countries that are not Muslim. So the point is, this isn't unique to the Muslim world.

But what I think is distinctive for the Muslim world is that the voice that traditionally would have served as a counterbalance to the executive—namely, the scholars—is largely muted. What has come in place of the scholars is the movement which calls itself the Islamist movement.

It's in this that the Muslim world today is very different from Africa or Latin America, where what you get are various liberation movements or pro-democratization movements. You might even include the former Soviet countries in Eastern Europe in this model. In those countries, the criticism of the executive that has emerged is of a certain type that is particular to those environments. But in the Muslim world, the most powerful voice opposing the autocratic governments has been that of the Islamists.

Now, what is Islamism? It's crucial to my argument to see that Islamism is not the same thing as Islam. Islam is a world historic religion with ancient roots and modern manifestations that remains lively and important for many people. Islamism is a political movement, with its roots in Islam, that is nevertheless a thoroughgoing modern political movement. It has a lot in common with all the other "isms" that you can think of, from environmentalism to Zionism, to communism, to socialism.

What these "isms" have in common is that they all picture, typically, a small vanguard of people who get it, who see the answer to historical problems, who take control—preferably by peaceful means, but if necessary not by peaceful means—of the reins of the state and use the modern state, and reform and fix the modern state, by using their principles of politics and morality.

In the case of the Islamists, the aspiration is to restore the effectiveness, the efficiency, the justice, the fairness of the states in which they live by reference to what they call Islamic values or the spirit of Islam. The phrase "Islamic values" and the phrase "the spirit of Islam" are absent from the classic Islamic sources. You won't find them before the middle of the 19th century. Why? Because if you have the real deal, if you have Islam, you don't need the spirit of Islam. The idea of the spirit of Islam or of Islamic values is the idea of taking aspects of the religious tradition and using them to infuse modern political institutions.

It turns out that if you read what the Islamists have to say when they talk about implementing the Sharia in most countries in the Muslim world today—and now by Islamists I'm talking about those who run for office on the democracy and Islam platform. I'm not talking about the radical jihadis. I'm talking about the people who are running for office and actually doing very well in many Muslim countries. In the Sunni world they are associated with the [Muslim Brotherhood](#); in the Shia world, especially in Iraq, or the mixed Shia-Sunni world like Iraq, some of them are affiliated with certain relatively moderate strands of Shia political thought.

If you look at what they are advocating, they are actually not, in almost any case, advocating rule by the scholars. They are not saying they want to go back to the classical Islamic constitution. That's because they are modernists in their orientation. They don't want to bring back this class of scholars. What's more, the vast majority of Islamists are not classically trained scholars. They are mostly, if they are educated, people who have gone to Western or Western-style universities, and often who have studied engineering or the sciences—not always, but often. They are interested in governing through a constitution that has a legislature and a judiciary and some sort of an executive, either a prime minister or president, in which Islamic values do the work of saying what the legislation should consist of and also in informing the judiciary, which they often say should check the legislature to make sure that the laws that it passes are indeed Islamic.

If you want two very good examples of what the contemporary Islamist movement is calling for, you only have to look at the constitutions of Iraq and Afghanistan. These are constitutions drafted in the shadow of American occupation, whether de facto or de jure, and with the United States doing everything we could—I know this because I was there—to try to put a thumb on the scales and make them as secular as possible. They are profoundly non-secular constitutions. They each declare Islam as the official religion, they each say Islam is the source of law, and they each have judicial review by the highest court to ensure that any legislation is truly Islamic. That's the big three. That's a homerun for the Islamist political program. There is nothing in the constitution of Iraq that doesn't fit exactly the program of the Muslim Brotherhood, for example, in Egypt—not a thing. They got everything they wanted—not some of what they wanted, but everything they wanted.

There are also guarantees of equality of all people, men and women. There are also guarantees of freedom of religion for Muslims and non-Muslims. But if you read their political programs, all these political parties say that's okay with them. Whether they really mean it or not is a separate question, but they are all prepared to say publicly that they do, in fact.

By the way, you can read all these programs. You can go on the Web, and even if you don't read Arabic, oftentimes you will find translations in English. They are not always the best translations, and it's important to check them against the Arabic, because they don't always say the same things. But you will find sources like this on the Web, and anyone can check it out.

So these constitutions reflect, not surprisingly, contemporary belief among the Islamists.

Will they succeed? I will close on this thought. This is indeed how I close the book as well.

It would be nice, and it would make me happy, if I could somehow say, sure, they are going to do very, very well, because they are going back to this Islamic tradition. But I actually don't conclude that way—though one of the frustrating things, as anyone here in the room who writes knows, is that sometimes when your books get analyzed by other people, they don't get to the last page, or the last chapter even, to be a little less generous. Another phenomenon that we have today is if you describe something happening in the world, if you describe the rise of Islamist political thought, and you say that it's the most vibrant movement opposing autocracy in the Muslim world today (which is, I think, objectively true), people think that by virtue of describing it, you must be saying how much you love it.

I'm not saying that I love it in the book, nor am I ultimately saying it's going to succeed. Instead, what I say is that these new institutional arrangements of legislatures informed by Islamic values, of high courts that are supposed to engage in some kind of Islamic judicial review, are actually very unlikely to deliver successfully the kind of good government that we saw in the classical Islamic world. The reason is that we are talking about inventing new institutions, and to invent new institutions is the single hardest thing to do in political science, in political theory, in political practice. You can write them up on a piece of paper with no trouble at all, but to make them actually operate and function in the real world requires the commitment of people, it requires time, and, most importantly, if you have a strong executive, as you have in Egypt, in Syria, in Jordan—you name it—that executive is going to fight back against allowing institutions to check his power (and it's still mostly "his").

In Iraq you have the opposite problem. By destroying a centralized authority and failing to replace it with anything else, you don't have any substantial central authority. That's a different kind of problem.

So it's going to be very hard for these systems actually to deliver the kind of effective government that they promise.

What I do think, though, is that people are going to continue to support these movements, regardless of whether they are going to succeed or not, until they get a chance to succeed or to fail. I think repressing them or making it harder for them to gain power is unlikely to be successful in convincing people not to pursue them.

So if there is a policy punch line, it's that when we in the West, or the United States, who are engaged with the Muslim world think that what we should be trying to do is somehow stand in the way of the rise of Islamic government motivated by the aspiration to Sharia, we should think long and hard about what it is we are standing in the way of. If we are standing in the way of religious values we don't like, fair enough. It might be a good or bad idea, but at least it's comprehensible. But if we are standing in the way of the rule of law, we are putting ourselves on the wrong side of an actually desirable impulse.

I will just finish with a practical example of this. When President [Musharraf](#) recently suspended the constitution, arrested the chief justice of the Supreme Court, put under house arrest several other justices, and then arrested many of the 50,000 lawyers in the country, most of whom were secularists, and did this on the public justification that he was protecting the country against Islamists, the United States essentially went along with him. The secretary of state put in a private call to Musharraf, the content of which we don't know because it was a private call. But our public position was, "Okay, suspend the constitution; suspend of the rule of law. What do we care?"

To my mind, this is an unbelievably short-sighted policy. In fact, in Pakistan we were shocked—shocked!—when just a few months later in the elections, people overwhelmingly voted against Musharraf.

The United States can't be, and I think should not be, on the wrong side of the rule of law. This is a little different than saying we should be out democratizing. It's a slightly different claim. Democratizing has its positive sides, especially when it involves putting pressure on governments to allow elections, rather than

knocking out those governments completely and hoping that a democratic society will suddenly emerge. But what I'm pointing primarily to is the idea that the rule of law remains a powerful and popular idea in the Muslim world and that one of the main sources of support for Islamists—not the only, but one of the important ones—is their aspiration to deliver the rule of law and their claim that, in keeping with the Sharia, which is, after all, a system of law, they can do so.

Thank you very much for listening. I look forward to your comments and questions.

### Questions and Answers

**QUESTION:** First of all, thank you very much for your presentation.

I want to draw you out on what all this means for U.S. policy in Iraq, which is arguably the number-one foreign policy issue the next administration will face. At least what I infer from what you have just said, it was not a very good idea for the United States to try to determine the political and constitutional outcome of Iraq. You said something about our sort of tearing things down, there was no central government, and so on. Then you made, I think, a significant point about the importance of the rule of law and how this is embedded in Sharia values and constitutional approach.

Should the United States government—without going back over what has happened—be involved in the future, in 2009 and beyond, in trying to determine the structure of whatever will be the political outcome in that country, drawing on your experience and what you have just said in summarizing your book?

**NOAH FELDMAN:** Thank you for the question. What we will do in Iraq will primarily be dictated, realistically, by the security situation on the ground and by how effective we are at creating enough security for Iraqis to reach a nationally negotiated power-sharing arrangement, which is the only thing that can save them now from a return to the civil war that we saw happening about 10 or 12 months ago.

So today when people say the too-rapid withdrawal will lead to a civil war and others say, "Well, how do you know that?" my answer to that is, because there already was a civil war. Ten months ago, we saw a civil war in Iraq, a low-level one. It's now dying down a little bit, but it could easily flare up again. It has not been brought to an end, by any stretch of the imagination.

With respect to the political and constitutional arrangements, I would say, every time we have put our thumb on the scales, we have done terribly. Let me mention what the latest iteration of this is, because some of you may not have heard about it.

As you may know, the system for elections in Iraq is a party system, where people voted for a political party, and then there was a party list of names, and depending on how many votes the party got, that number of people from their list made it into the legislature. The latest craze among Americans involved on the ground in Iraq and in Washington is to suggest that in the next national elections, the next parliamentary elections, which are scheduled for some time in 2010, the party system should be abolished and that people should run on a district-by-district basis.

This is a good example of something that in theory sounds like it should be fine. We are worried about the rise of some unpleasant political parties, like [Muqtada al-Sadr's](#) party, which is half party, half militia, and all wannabe [Hezbollah](#).

So we think to ourselves, "Maybe we can weaken the effect of that party by following this mechanism." The problem, of course, is, if what we need is coordinated action among leaders to negotiate a settlement or a solution, electing hundreds of local leaders who don't belong to any national political party—who represent, let's say, local tribes that have been empowered by our counterinsurgency strategy, where we work closely with locals—will facilitate a much higher degree of difficulty in negotiating a national political reconciliation than working with parties.

This is just a classic example. I know, because I worked with these folks and I was one of them for a time, that it's natural to want to grab hold of just one twist of the constitutional system and say, "Oh, that's the problem with the Iraqi political paralysis. The reason we have paralysis is the party list system." And you identify a real problem. Then you open the door for a whole set of other problems.

It seems to me that when it comes to the design of institutions, we are very poor; we are very bad at it. It's not that the local Iraqis—I don't have some romantic view that they are so good at it. I just think that we are especially bad at it. In the long run, if you want a self-sustaining political system of political arrangements, you generally want the political elites who are going to administer that system forever to be the ones to design the system. They are going to be self-interested. They are going to negotiate among themselves. They will have a better idea than you will about what the right way to allocate power among themselves is.

With respect to security, we can't back off, and we should not back off lest the consequences be disastrous. With respect to dictating constitutional design, we should back off. The same is true with respect to saying, "We need a hydrocarbon law now," "We need provincial elections now." "By the way, those should be in October"—just a randomly selected date, October of 2008. That has nothing to do with anything.

This kind of randomly selected date, designed to satisfy primarily our domestic political interests, is a perfect example of the kind of meddling that has so far not done any good.

**QUESTION:** As you just mentioned, you were with the Coalition Provisional Authority early on. That has been one of the most highly criticized of all of the American involvements, especially the role of [Paul Bremer](#). Since you worked with him, one, what did you do with him? And two, how can you justify what you did or did not do in that particular period, since it is continually an item of contention?

**NOAH FELDMAN:** When I was sent out to work as a constitutional adviser in Iraq, I was actually sent out to work for [Jay Garner](#). Jay didn't hire me. Some people in Washington decided that—does anyone remember the name, Jay Garner? I see mystified expressions.

So it was decided in the Pentagon that Jay actually didn't have any idea about political design, institutional function, and maybe some people should be sent out who had some idea of political governance. Even though I'm a lifelong Democrat who had litigated for [Al Gore](#) in Palm Beach County, it so happened that I speak decent Arabic and I'm a constitutional scholar. So there was a very short list of people who could go, and when they called me, I said, "Look, you're not going to want me because I have the wrong political affiliation."

The people who were doing the hiring for the Office of Reconstruction and Humanitarian Assistance, ORHA, which was the predecessor to the CPA, were nonpartisan, just like Jay Garner was nonpartisan. They said, "We don't care. Get on a plane."

So off I went. I landed in Baghdad, and within a week Jay Garner had been fired. Jerry Bremer didn't pick me and I didn't pick him. As a consequence, the relationship between us was not, I would describe, particularly close at any moment.

I defined my role—it was the kind of environment where you pretty much had to make up a role for yourself, because there was no organizational chart—as just trying to prepare a document that would explain to Ambassador Bremer or whoever would be involved what the constitutional process was likely actually to look like whenever it actually happened, with a detailed accounting of the likely viewpoints of the various political players, with the flashpoint negotiation issues, and with a range of possible negotiated outcomes, with some guesses as to what the best outcomes that would be possible to negotiate might be.

So I prepared this. It was a very unpopular document, I discovered, because it said a lot of things that,

at least in the spring of 2003, were things you weren't allowed to say in the U.S. government. For example, it said that there would be Islam provisions in the constitution, probably very extensive ones, and that there would be nothing that could be done about this, provided there was a public referendum process. This was construed in the government as though Feldman was advocating an Islamic state, instead of that Feldman was saying that if you work with people and you have a public referendum, there is no reason to think that Iraqi voters are going to be fundamentally different from Arabic-speaking voters in any other country.

Since the premise of the invasion was that Iraqi Arabs, especially, were fundamentally different than all other Arabs, especially with respect to Islam—that it was a, quote/unquote, secular country, something which I was pretty sure wasn't true before I got there and was 100 percent sure wasn't true the minute I landed and actually left the Green Zone, which I did every day, to talk to people—those were heady days, when you could just take a car—you weren't supposed to do this, but in practice I would just take a car from the motor pool and I would drive out. It was obvious that this was a society in which the Islamists, within a week, were far and away the most efficient political movers in the society, except the Baathists, who were still the best-organized people.

In any case, I presented this document, and it was made pretty clear to me that this would be a very useful document, provided that no one had ever written it and no one ever read it. So I took that as a cue to come back (to the U.S.), and I did, after about three months.

As it turned out, the document was actually used extensively in the constitutional negotiation process. The only reason I know that is that I got to know almost all the Iraqi players while I was there. When I left, people started calling me. I said to everybody, "Look, I'm going to talk to everybody, including people on the U.S. side. I'm not going to be your distinct adviser. We don't have any attorney-client privileged information," which I thought was important to know, because every conversation was completely taped by the government anyway, so it's not as though there was any actual secrecy.

That's just an assumption that I make, but since it was the U.S. government that had given everybody their cell phones, it seems like a logical inference to draw.

So I ended up involved as sort of an ad hoc adviser to lots of different Iraqi political players, who would call me and ask me random questions, ranging from, "What's the Arabic word for the interpolation of a minister?"—which is kind of funny, to be asked an Arabic term by Arabs working on this—to, "What do you think so-and-so will agree to in this negotiation on this contentious point?"

I could tell from watching the U.S. folks that the documents were being used, not because anyone thought they were good, but just because there wasn't any other document. Like anything else in Iraq, it was mostly about necessity.

Can I justify any of this? No, not really. I went initially because it seemed to me that, regardless of what you thought about the war, regardless of your political affiliation, it was better for the U.S. to do a good job in Iraq than to do a bad job. I still believe that.

Did I cause us to do a better job than we would have done absent my presence there? No, I don't think I did. Am I sort of sad about that? Yes.

There is a sort of do-no-harm principle in life. That's true. But there is also a principle that you should try to do the best you can under the circumstances. Instead of it being kind of "ethic of conscience," to use Weber's terms, it's kind of the ethic of responsibility. If you are in a position to do something, you try to do something.

So that's what I tried to do.

**QUESTION:** I just returned Saturday from a week in Iran. There, in theory, it is the religious scholar

class that actually has the final say. Could you say a little bit about your interpretation of what's going on there, in terms of the legal questions?

**NOAH FELDMAN:** As you know, [Ayatollah Sistani](#), who was at the time of the negotiation of the constitution far and away the most influential religious figure in the country, deeply disagrees with Ayatollah [Ruhollah Khomeini](#)'s view of the role of the scholar-jurist. Khomeini invented, brilliantly and disastrously, a brand-new theory of rule, unprecedented in either Shia or Sunni Islamic political thought, according to which a jurist should be in charge of the whole kit-and-caboodle. Historically, there was the ruler here and there were the jurists here. But Khomeini said, "No. How about just merging them all into one?"

In fact, although they don't like to say this in Iran, his view owed a lot more to [Plato's vision of the philosopher-king](#) than it did to anything in the classical Islamic tradition.

Sistani always thought this was a bad idea. Sistani is a little bit younger than Khomeini, but they certainly knew each other at home and they knew each other in Najaf. Sistani always was one of those scholars who thought this was the wrong view, that the scholars should be advisers to the state, and that there should be elected politicians who were not clerics, not scholars, who would be religious people, who would listen on important questions to the [religious] authorities, but the authorities would not be the ultimate decision makers.

So in the course of the constitutional negotiations, for example, the ordinary politicians went to Sistani and asked him for his okay on a whole range of provisions.

Today it's true that Sistani still plays a role as an adviser in this respect. But his power has actually been eroded significantly by the rise of Muqtada al-Sadr. Sadr is a young guy. Though he is a cleric, he's not a qualified cleric. Part of the reason he has been living in Qom is in a desperate attempt to try to improve his scholarly status. That's doomed to failure. He has a kind of political skill, but he is not a scholarly person. According to persistent rumor, his father called him *hammar*, which means "the ass of the family," compared to his older brother. He is never going to be an influential scholar.

But he is actively affiliating himself with a more Khomeinist strand of political thought, so as to claim that as a cleric—albeit not a very qualified one—he should play a bigger role in the society, and because of his political skill in appealing to the poorer people in the Shia community, he has done surprisingly well. Many, many people, myself included, have underestimated Muqtada over the last five years. Each time we have underestimated him, he has come out and outperformed expectations.

He can be seen as a challenge of charismatic authority to the institutional authority of Sistani.

So it seems to me that, going forward in Iraqi politics—and especially we are going to see this in the next provincial election and in the 2010 elections, if they exist, at the national level—there is a rise of the claim among the Sadrists that scholars should have a more direct role in government, with some voices in Iran really backing them on this. On the other side, what was formerly the Supreme Council for Islamic Revolution, SCIRI, now called ISCI, the Islamic Supreme Council in Iraq—because the revolution has already happened, so you don't need a revolution anymore (they had their revolution, and now they have what they wanted from the revolution; they are in charge)—is still more in the Sistani mode.

With respect to family-law matters, the constitution says that you get to choose whether you want to be governed by Sunni, Shi'i, or code law. In practice, this means that if you are from a Shia family, you are going to be heavily pressured by everyone around you to go into family court of the Shia religious variety. That is, itself, the product of the way that the Islamic scholars on the Shia side hated the civil code instituted in 1958, which was a kind of example of codification. They saw the codification as taking power away from them, and they hated it. The first thing that they did once they came to power, even before they had a state, was to abolish that code.

Iran is a more complicated question. I was a big optimist about Iran in 2003-2004, because President [Khatami](#) was elected twice by huge majorities and was on the way towards a reformist vision, in which he and others were calling for a weakening of the power of the supreme leader. The hardliners shut them down, incredibly effectively, a little bit at a time. I think the hardliners essentially created a circumstance where the only way you could fight this view, this sort of accepted Khomeinist view, would be if you would have another revolution. They gambled, correctly so far, that no one among the reformists in Iran has the stomach for a revolution.

So I don't see in the short to medium term any voice in Iran capable of effecting and willing to effect substantial reform in the constitutional structure there, not because it wouldn't be popular. You see this from the numbers of people who voted for Khatami. But it's one thing to vote for the reformists and it's another thing to do something when his supporters are jailed and not allowed to run for Parliament, which is what essentially happened.

So I'm now a pessimist about it.

**QUESTION:** You mentioned the fact that codes are perceived to be undermining the authority of the scholars. You mentioned the Ottoman example and the Iraqi code of the 1950s, the civil code. My question is whether there has been an attempt ever to develop a code derived from Sharia principles, which would then presumably be like Justinian's codification, and therefore there would still be scope for the Islamic scholars to interpret a code that they had subscribed to, so to speak.

**NOAH FELDMAN:** Interestingly, the first Ottoman code, the [Majalla](#), was exactly that. It's a big issue in Ottoman historical studies, and the subfield is the study of the Ottoman scholars. Why did these scholars accept codification? It's a complicated answer that is totally contentious in the field. But I think that the answer is that the code as drafted purported to be exactly what you just said. It presented itself as just a summary of the views of the traditional Islamic law. So it didn't seem at the time as the kind of challenge that it actually turned out to ultimately be to the authority of the scholars.

Similarly, the codes of the 1930s, 1940s, and 1950s in the Arab world combined Swiss and other European civil law codes with some elements of Islamic law, typically in some kind of complex hybrid that you either think of as a wonderful example of legal hybridity or, if you are a scholar, as a disastrous example of the corruption of the true spirit of Islam.

I think the short answer is that that was the strategy initially. If you ask the Islamists today, "What do you want to have happen to the legal system?" they actually want codes. They want those codes to be incorporating Islamic values and, maybe more, Islamic judgments. So they actually believe in continuing the strategy. They are not calling, for the most part, for the abolition of the codes.

Iraq poses an exception. In Iraq the Shia clerics are more sophisticated and they retain greater power than the Sunni clerics did, in almost anywhere in the Sunni Muslim world. So they had a clear vision of how bad these codes were. They were interested in abolishing them to a significant degree.

**QUESTION:** You referred to the lawyers and to the legal system, the judiciary, in Pakistan. That's a tradition of rule of law. I wonder if you would comment on whether that is consistent with or compatible with an Islamic rule of law. Are these lawyers really upholding an Islamic rule of law, since Pakistan is an Islamic state?

**NOAH FELDMAN:** It's a good and complicated question. On the one hand, when you say that Pakistan has a tradition of the rule of law, Pakistan has a tradition of lawyers who believe in the rule of law, but not a tradition of the rule of law. You have a legal class that was trained in the Anglo-American legal tradition because of the colonial experience, and they like the idea of the rule of law. But, actually, the recent efforts by the Supreme Court to stand up to the president are the first major incidents of a Pakistani high court really standing up to an executive ever in Pakistani history.

Pakistan is actually most famous for a Supreme Court opinion back in the 1950s, after a clearly unlawful coup d'état, in which the court actually cited, in a very questionable way, the English legal scholar, [H.L.A. Hart](#), and they used his ideas to propose that if the whole legal system changes, all the court can do is listen to the new legal system. They basically legitimated the coup d'état. In international constitutional law circles, that was the famous tradition of Pakistani acquiescence of the judiciary.

What was amazing about this latest round was that the judiciary actually acted and the lawyers got behind them, in what to me was an inspiring way. What was disastrous about it is, the court acts, the lawyers get behind them, and the public doesn't follow it up. There is nothing more devastating to the birth of rule of law.

It remains to be seen after these elections whether there is—there is now legislation for the restoration of the Supreme Court. Maybe you will see—and this is the optimist in me—some big gains for the rule of law, now that the elections have happened. But it's equally possible that the result will be the opposite.

With respect to the Islam side, I think if you talk to Pakistani judges, they are very ambivalent about this. On the one hand, they have Islamic law on the books. There are blasphemy laws on the books which are framed as kind of public-order laws. As you say, under [Zia](#), the constitutional system in Pakistan was Islamized to a certain degree.

I think the judges apply that as though it were part of their legal system. So in that sense, they see it as compatible with the rule of law. But I think, at a private level, many judges are uncomfortable with it. Judges who have a more secularist orientation—and many Pakistani judges do—are sort of uncomfortable with that feature of the constitutional structure. I think a lot of them would like to see it pulled back constitutionally.

**QUESTION:** It was very interesting to hear what you had to say. I think that you are owed a debt of gratitude, really, because your successors on the American side were far less qualified than you were. So I think what you contributed—there were flaws, of course, and we can all debate that, but I think you are owed a debt of gratitude.

On your thesis, I thought it was a great argument. To what extent do you see Islam providing a path towards modernity or the Islamic democratic parties providing a path towards modernity, as you saw, maybe, in other contexts? For example, in Latin America you saw the Catholic Church and liberation theologians playing that role of moving the state towards a more legitimate reality, a more legitimate governance structure.

As you said, it's not so much that it's unique, but it's that this fear that is espoused about the Islamic parties maybe is unhealthy, and maybe it's just a state of transition. Is that a way to look at it, do you think?

**NOAH FELDMAN:** First of all, thank you for your comments.

I think that is a way to look at it. I would characterize it as the optimistic version of how to look at it. I myself feel that optimism often.

I'm always nervous about using the term—I liked it when you said "legitimacy," rather than "modern." Even in the case of the Catholic Church, there were many people in Latin America in the 19th century who thought that what you needed to move Latin America forward was to get the Catholic Church out of politics. That was sort of the Mexican justification for shutting down the Catholic Church, to a great extent. So in a way, the Catholic Church's involvement was a kind of "back to the future." But I think it did facilitate legitimacy, in a certain respect, in some places.

Similarly, in the Islamic world, there was a modernist movement in the Muslim world in the 1920s and the 1930s, and it was closely affiliated with nationalism and socialism. It didn't really work so well. That's

a broad-brush statement, but I think it's basically true. So today I'm not sure the Islamists are going to—although they are modernist in their minds, they often depict themselves as traditionalists. But I do think they are capable of helping to operationalize political legitimacy.

The trick is—and this is really the hard part, and this would be the negative picture—to the extent that the governments of the states which are not seen as legitimate resist the Islamists, the way they do so is by saying that any political order in which the Islamists have a role will itself be illegitimate.

So when we have this transition in Egypt that is coming up, that everyone is looking forward to so unhappily, the line coming from the army—and it doesn't really matter whether [Gamal Mubarak](#), the son of the president, is their candidate or somebody else is—their line in pushing out the Muslim Brotherhood is going to be to say, "If we want to have legitimacy as a political authority, we can't have these religious folks playing any part in that." And we in the United States have a tendency to support that.

Now, there is an unbelievable irony here. When it comes to Iraq and Afghanistan, where we actually got our hands dirty and got involved in the political process, and there were local political forces calling for a greater role for Islam, we had no choice but to go along with it. So we did. Meanwhile, in the countries where we have continued our traditional policy of supporting the dictators, we support them in large part because we think they will repress the Islamists. So there is something just schizophrenic about the policy the way it stands.

I made this presentation earlier when I was working on a draft chapter of the book to a group of political scientists at Yale. This was about 18 months ago. I made this point about the schizophrenia, and a very senior political scientist raised his hand and said to me, "Are you trying to say there's something unusual about American foreign policy being schizophrenic?"

I was chastened by that answer. It was a fair point.

But that said—maybe because I'm young enough to think so—I think it's very strange and ineffective to have a schizophrenic policy on this question. I think we are literally on both sides of this issue.

I saw this in a very clear way in a sort of humorous context when I was on [Stephen Colbert's show](#) the other day, which nowadays is the kind of thing—you write an academic book for an academic press about Islamic constitutional history, but to sell copies you are supposed to go on Stephen Colbert's show.

He hit upon this contradiction. He was saying, "But I thought we were against the Sharia. I thought our policy was to oppose the Sharia. Isn't that why we went to the Middle East? And you're telling me that our soldiers are actually enforcing the Sharia there?"

I said, "Yes, that's what I'm telling you."

He had a good answer. He said, "I'm going to choose to ignore that." [Laughter]

**JOANNE MYERS:** I'm not going to choose to ignore the fact that you educated us, enlightened us, and just really enriched our understanding of Sharia and Islamic states. Thank you so much for being here today.

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