

Book Review

TAKING SHARI'A SERIOUSLY

THE FALL AND RISE OF THE ISLAMIC STATE.
Noah Feldman.¹ Princeton University Press. 2008. Pp. 189.
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Paradigm shifts are not easy. Noah Feldman is taking on a big one in his latest book, *The Fall and Rise of the Islamic State*, where he sets out to re-conceptualize *shari'a* in the American mind as an Islamic rule of law. This is a valuable contribution to a discourse in which Muslim desires for *shari'a* are often dismissed as naive steps backwards into theocracy, or worse, condemned as demands for gruesome and misogynistic punishment, or even terrorism. Against these assumptions, Feldman confidently insists—quite correctly, in my opinion—that classical Islamic legal and political institutions were organized in a “constitutional” structure that operated as a “separation of powers” between the temporal rulers and the religious legal scholars. In these systems, Feldman says, because God’s law (*shari'a*) was always supreme, it was respect for law that held rulers in check, their authority operating in a complex (although unwritten) shared power arrangement with the scholars who interpreted *shari'a* for society. Feldman believes that an appreciation of the primary feature of these traditional Islamic states³—that the rule of God’s law stood above the rule of individual men—will help explain why the idea of an Islamic

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3. Feldman’s use of contemporary legal-political terms like “constitutional,” “separation of powers,” and even “state” strikes me at times as awkwardly anachronistic, but I see its usefulness in the ready associations these terms have in his readers’ minds. Nevertheless, I remain concerned that these terms, without careful caveats and explanations, may ultimately detract from the overall persuasiveness of his presentation.

state is so popular today, especially in regions where corrupt dictators are the norm. He imagines ways a new Islamic state could recapture some of the key features of this old order, suggesting models for modern Islamic constitutionalism. His book ends with the bold recommendation that a United States that is committed to rule of law around the world should support new Islamic legal and constitutional institutions when they make their play for legitimacy on the basis of promising justice and the rule of law via *shari'a* (p. 150).

It is obvious what sorts of criticisms Feldman's portrayal invites. Any description of a rule of law in which God's Law is supreme sounds to most Americans like a theocracy.⁴ And if Islamic constitutionalism means a *shari'a*-based rule of law in which religious law could trump democratic legislation, it is to be expected that Americans committed to secular democracy would oppose any form of Islamic constitutionalism, modern or otherwise. Moreover, looking around the world at Islamic states today, many find that the sorts of laws promoted as *shari'a*-mandated conflict with global civil and human rights norms. If it is believed that Islamic law demands, for example, that an Islamic state should stone adulterers and give men more divorce rights than women, then no version of a *shari'a*-inspired separation of powers will alleviate the problems many have with the substance of Islamic law itself.⁵

These are powerful arguments, only partially answered in Feldman's book. Where he does not answer them directly, appropriate conclusions could be extrapolated by the reader, but, because the paradigm shift Feldman attempts is so great, many of his readers are not likely to do so, leaving his ultimate conclusions vulnerable. Below, I offer a critique of Feldman's

4. See, e.g., Leon Wieseltier, *Theologico-Politicus*, THE NEW REPUBLIC, April 9, 2008, at 48 (describing Feldman's argument as a "shilling for a soft theocracy").

5. These arguments are primary themes in critiques by people like Haider Hamoudi and Saïd Arjomand. See Haider Ala Hamoudi, *Orientalism and "The Fall and Rise of the Islamic State"* 17 (Univ. of Pittsburgh Legal Studies Research Paper No. 2008-27), available at <http://ssrn.com/abstract=1266386> (citing, among other examples, the case of the Sudan, yet another devastating example of the entire disrespect of an Islamist party, the National Islamic Front ("NIF") for the rule of law"); Posting of Saïd Amir Arjomand to The Immanent Frame, <http://blogs.ssrc.org/tif/2008/03/28/why-shariah/> (Mar. 28, 2008) (critiquing Feldman's *New York Times* Magazine article entitled "Why Shariah?" which previews many arguments in *The Rise and Fall of the Islamic State* ("The legal evidence we have from the countries in which it has been tried suggests that the demands for the implementation of the Shariah primarily means that of its penal code (*hudud*) with severe punishments for adultery, theft and blasphemy which gravely disadvantage the women, the poor and the religiously deviant, and has no constitutional component.")).

book that focuses on how his thesis could be strengthened by more direct engagement with these important contemporary concerns. First, I believe that Feldman's arguments could be framed with clearer language in order to distinguish the various types of law implicated in his presentation. In Part I below, I explain why, without more careful delineation of the differences between *shari'a* and *fiqh*, and *fiqh* and *siyasa*, some very important normative distinctions inherent to the field of Islamic law can be lost. Then, in Part II below, I comment on the modern *shari'a* constitutional models imagined by Feldman, pointing out the confusion that can result from his amalgamation of *fiqh* and *siyasa* lawmaking. I explain why, when translated into global questions about modern Islamic constitutionalism, this merging of concepts can cause unnecessary distortions and concerns about the viability of *shari'a* as the rule of law principle that Feldman has so skillfully set out to articulate.

I. LANGUAGE CHOICE: DISTINGUISHING *SHARI'A*, *FIQH* AND *SIYASA*

Language is crucial when writing in a field unfamiliar to a large part of one's audience. For Feldman's current work, this is especially true of the word "*shari'a*," and he realizes this. As he put it in a recent New York Times Magazine article, "[o]ne reason for the divergence between Western and Muslim views of Shariah is that we are not all using the word to mean the same thing. Although it is commonplace to use the word 'Shariah' and the phrase 'Islamic law' interchangeably, this prosaic English translation does not capture the full set of associations that the term 'Shariah' conjures for the believer."⁶ In *The Fall and Rise*, Feldman does a good job of appropriately broadening the meaning of *shari'a* beyond its most narrow translations, but his word usage is nevertheless not always consistent and at times can be confusing. Feldman uses *shari'a* to refer not only to broad concepts of justice, like the "rule of law," and even "law" itself in the most abstract sense,⁷ but also to overall structures of government⁸ and then to "Islamic law" as the body of doctrinal rules articulated by religious legal scholars.⁹

6. Noah Feldman, *Why Shariah?*, NEW YORK TIMES MAGAZINE, March 16, 2008, at 46, 48.

7. See, e.g., p. 6 ("The Islamic state is preeminently a *shari'a* state, defined by its commitment to a vision of legal order. . . . The system was justified by law, and the system administered basic government through law.")

8. See, e.g., p. 21 ("'Islam' means the *shari'a*, understood as an all-encompassing

The problem with using the same word (*shari'a*) for both religious legal doctrine and big rule-of-law concepts is that these two ideas contradict each other in many readers' minds. Many Americans already identify *shari'a* with things like stoning, hand amputation and unequal rights for women. Given this backdrop, an assertion that *shari'a* is the "rule of law" for Muslims risks entrenching the idea that Muslims have a warped sense of justice that cannot be reconciled with contemporary international norms. Noah Feldman himself does not subscribe to this notion, but without more careful use of terms and conceptual categories, his book might be misconstrued to support it. By providing more information about Islamic law at a theoretical as well as practical level, Feldman could avoid much of this confusion, and moreover, place his ruler-scholar "separation of powers" thesis into greater context.

Specifically, Feldman's book could better emphasize the difference between the terms "*shari'a*" and "*fiqh*." Although both can be translated as "Islamic law," the two words portray very different concepts. *Shari'a* literally means "way" or "road," and as a legal term, refers to "God's Law," a divine exhortation to all Muslims about the ideal way to behave in this world. Because the two scriptural sources of information about this road (the *Quran*, and the life example of the Prophet Mohammed) do not answer every possible life and legal question, Muslim scholars engaged (and continue to engage) in legal interpretation of those sources to come up with detailed rules on a wide range of legal topics, including those that American lawyers would put in categories like torts, contracts, property, family and criminal law. These rules are called "*fiqh*," which literally means "understanding."

The use of the term "*fiqh*" and not "*shari'a*" for these doctrinal rules of Islamic law is epistemologically significant. It reflects the classical Muslim scholars' awareness that interpretation of divine texts is an unavoidably human, and therefore fallible, effort. Moreover, the fallibility of *fiqh* rules had several significant consequences for the evolution of Islamic

structure that precisely orders social relations and facilitates economic justice. . . . [T]o understand the *shari'a* as a constitutional ground rule is to invoke a rich and complex history of constitutional law and theory that stretches back centuries.").

9. See, e.g., p. 115 ("The negative political side of the invocation of the *shari'a* is that, taken as a set of substantive rules, the classical Islamic law is decidedly nonmodern."), p. 116 ("the non-modern features of the *shari'a* that are most salient include harsh corporal punishment.").

law and government. First, because *fiqh* scholars recognized that their extrapolations of legal rules were always at best only probable (rather than certain) articulations of God's Law (*shari'a*), every *fiqh* scholar's conclusions (as long as they were the product of sincere interpretive effort) had equal legitimacy and authority for Muslims who sought to live by *shari'a*. Islamic law as a whole, therefore, is not one legal code but rather a pluralism of legal schools, each with distinct interpretive methodologies and corresponding bodies of legal doctrine.

The fallible and pluralistic nature of the *fiqh* also contributed to a bifurcation of legal authority in classical Muslim societies—a bifurcation that is important to Feldman's "separation of powers" thesis. *Fiqh* scholars were generally reluctant to have the *fiqh* doctrine of one school forced upon the whole population, and instead advocated institutional mechanisms that allowed Muslims to live according to the school of their choice. At the same time, rulers of Muslim lands sought to establish uniform rules to govern society, especially in areas like taxes, marketplace standards, criminal investigation and prosecution, and military service. These ruler-made laws—*siyasa*—were quite different in nature and effect than the *fiqh*. *Fiqh* was the product of jurisprudential analyses of divine texts by individual religious scholars whose work in this regard did not depend upon any official position or appointment. *Siyasa*, on the other hand, was created not by scholars parsing divine texts, but by those holding physical power, following their own philosophies of government and ideas about how best to maintain public order. From a *shari'a* perspective, rulers had legitimate authority to do this because maintenance of public order and safety is part of the Qur'anic vision of a good ruler.¹⁰ The two realms of legal authority, *fiqh* and *siyasa*—scholars and rulers—operated in many different institutional forms throughout Muslim history, but the interdependence of these powers was a consistent feature of the rule of law of classical *shari'a*-based societies.¹¹

10. Whether the rulers actually did act for the public good is another question, and was the source of much discussion and frustration for many scholars. Nevertheless, as long as the ruler allowed a basic minimal level of religious practice (i.e. did not force Muslims to sin), the classical jurists writing political theory generally gave great latitude to the ruler's power, and the rulers in turn generally left the articulation of the *fiqh* to the *fiqh* scholars.) For a brief description of the scholars' attitudes on this point, see Mohammad H. Fadel, *The True, the Good, and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21 CAN. J.L. & JURIS. 5 (2008).

11. For a look at how these two realms intersected on the ground in everyday

When Noah Feldman describes the “constitutional” structure of the traditional “Islamic state” as a separation of powers between rulers and scholars, he essentially describes the *fiqh* and *siyasa* realms, but without using these particular terms. He does use the word *fiqh* to refer to scholar-created Islamic legal doctrine, but the term appears only once in the entire book.¹² And instead of *siyasa*, he uses the phrase “administrative regulations,”¹³ which has the effect of downplaying its status as “law,” giving the impression that ruler *siyasa* merely filled administrative gaps in a *fiqh*-dominated legal universe. This can be misleading. *Siyasa* was powerful law; it was the legal arm of caliphs, sultans and kings, giving them a way to directly impact people’s lives in a wide range of areas from crime to taxes. It is important to recognize the real lawmaking aspect of the *siyasa* power of Muslim rulers because it gives it a status parallel to that of the *fiqh* authority of the scholars and thereby further elucidates the “checking and balancing” relationship between them.¹⁴

Using a *fiqh-siyasa* template to explain the classical Muslim “separation of powers” also helps to show why a *shari’a*-based system does not necessitate a theocracy. The classical *fiqh-siyasa* division of legal and political authority was, quite simply, never a

society. see Kristen Stilt’s study of the *muhtasib* in Mamluk Egypt. Kristen Stilt, *Price Setting and Hoarding in Mamluk Egypt*, in *THE LAW APPLIED: CONTEXTUALIZING THE ISLAMIC SHARI’A* 57 (Peri Berman, et al. eds., 2008).

12. See p. 42 (denoting the “Islamic legal doctrine” applied by judges).

13. See, e.g., p. 42 (“ . . . the Islamic constitutional order always included administrative regulations with the force of law that were issued by the ruler or his deputies”), p. 46 (“It . . . made sense for [the ruler] to use his power to issue administrative regulations to enhance his wealth or to punish those who opposed him.”), p. 50 (“Because the shari’a as interpreted by the scholars ultimately authorized the ruler to issue administrative regulations . . .”), p. 61 (“In the classical Sunni constitutional balance, the shari’a existed alongside a body of administrative regulations that governed many matters in the realms of taxation and criminal law.”).

14. Further confusion on the nature of ruler *siyasa* results from Feldman’s using the word “*shari’a*” where *fiqh* would be more appropriate. For example, his descriptions that *shari’a* existed “alongside” ruler administrative regulations (p. 61) seems to directly contradict the idea that these regulations had to comply with *shari’a*. See p. 64 (“Under the classical Islamic constitution, the condition for the administrative regulations was that the *shari’a* authorized the ruler to issue these regulations.”). Another example of the confusion of using *shari’a* where *fiqh* would make more sense, is the following statement: “In each situation where administrative regulations were issued and enforced, one could say that the rules that applied to ordinary people in their daily lives were not the rules of the shari’a itself” (p. 43). This prompts a useful commentary from Feldman on the misplaced questioning of whether Islamic law is really “law” at all. But, despite the helpful insights Feldman offers on this point, his discussion would benefit from more carefully-crafted use of language, in which “*fiqh*” refers to discrete legal doctrine based on scripture, “*siyasa*” is ruler-made temporal law, and “*shari’a*” is reserved for the abstract concept of God’s Law, of which the other two are both subordinate.

theocratic distribution of power. Rulers and scholars occupied separate realms in classical Muslim societies. Though there was occasional cooperation and coordination between them, as a norm, Muslim religious scholars did not hold temporal power, and Muslim rulers did not articulate religious law. Even taking into account the political-theological differences between Sunni and Shi'a doctrines about ideal government,¹⁵ for the bulk of Muslim history neither Sunni nor Shi'a *fiqh* scholars sought control of the political realm of the rulers.¹⁶ And Muslim rulers made *siyasa* law not by jurisprudential analysis of divine texts (as the *fiqh* was), but from their own determinations of governing needs.¹⁷ In short, the early indeterminacy and bifurcation of the

15. Classical *shi'i* legal and political theory centers the authority of decision-making in the infallibility of a divinely-inspired *Imam* descended from the Prophet. From this, it follows that the ruler should be not only a jurist but also the divinely-appointed *Imam* of that age. See ABDULAZIZ SACHEDINA, THE JUST RULER IN SHI'ITE ISLAM: THE COMPREHENSIVE AUTHORITY OF THE JURIST IN IMAMITE JURISPRUDENCE (1988). In *Shi'i* legal theory, God is the fountainhead of the Law, and enforces this Law through the *Imam*, who in turn is served by the *mujtahids* (scholars of *ijtihad*-qualifications) for the interpretation of the law and by the heads of *Shi'i* temporal states. *Shi'i mujtahids* can neither create law nor deduce new rules: theirs is merely the duty to interpret, referring always to the *imam's* word. See A.A.A. Fyzee, *Shi'i Legal Theories*, in LAW IN THE MIDDLE EAST 113, 121–27 (Majid Khadduri & Herbert Liebesny eds., 1955). But when the last *Imam* went into occultation, this aspect of *Shi'i* law ceased to have much practical impact, since traditional *Shi'i* theology held that jurists should not be in a position of political power without the presence of the *Imam*. Until the *Imam's* return, Shi'a *fiqh* scholars found themselves in much the same position as their Sunni counterparts: aware of their own fallibility, yet nevertheless offering probable articulations of God's Law.

16. This, of course, changed with Ayatollah Khomeini's theory of the *vilayat-al-fagih*, which ultimately changed the political doctrine of legitimacy of the Islamic Republic of Iran after 1979. But it is important to remember that Khomeini's theory itself represents a departure from the classical Shi'a position which maintained that political power was for the *Imam's* return. See ISLAM AND REVOLUTION: WRITINGS AND DECLARATIONS OF IMAM KHOMEINI (Hamid Algar trans., 1981); CHIBLI MALLAT, THE RENEWAL OF ISLAMIC LAW (1993); SACHEDINA, *supra* note 15.

17. Islamic legal and political history is thus different from Christian legal and political history in this very significant way: not only was there no state "church" in Islamic history, but there was no "church" at all for the state to co-opt (or to be co-opted by). Most historians point to the Abbassid period called the "*mihna*" as the major—and ultimately unsuccessful—attempt by Muslim rulers to dictate belief upon the people. See 1 MARSHALL G.S. HODGSON, THE VENTURE OF ISLAM: THE CLASSICAL AGE OF ISLAM, 285–319, 479–89 (1974). It was the resistance of the religious legal scholars (most famously Ahmad Ibn Hanbal) to this attempt, upon pain of torture and even death, that many see as the crucial moment that resulted in the lasting division of rights and responsibilities of Muslim rulers and scholars: Rulers would maintain order in society, but they could not control belief; and religious legal scholars could articulate God's Law, but they would not claim political power. This division of power reflects in many ways the same motivation behind the separation of church and state in modern western democracies (namely, avoiding the oppression that can result from state control of belief), but, as Islam did not have a "church" to separate from the state, to protect religious freedom Muslims separated types of law: Rulers would make *siyasa* (binding on everyone, but not an articulation of God's Law), and religious scholars would make *fiqh*

law in Muslim societies essentially demanded non-theocratic government structures.

Noah Feldman knows this, of course, but some of the descriptive language he uses in *The Fall and Rise* can at times obscure this reality. For example, in describing the similarities of Saudi Arabia to the classical system, he writes: “the king lacks the authority to legislate—and it goes without saying that no other legislative body exists either. Law, properly speaking, is what the scholars, using the interpretive process, understand God to have commanded” (p. 96). But of course this is not exactly correct. Classical Muslim “kings” did have the authority to “legislate”: rulers made *siyasa* law all the time. What they did *not* have authority to create was *fiqh*. However, this point is obscured by Feldman’s description of the classical Muslim legal landscape, which presents *fiqh* as the dominant law, only supplemented by rulers’ “administrative regulations.”¹⁸ In other words, in this book, Feldman often equates “law” with the *fiqh* enterprise of interpreting the *shari’a* (depicted as “God’s legislation”), and therefore all other rulemaking pales in comparison. This is actually a common attitude for any study of “Islamic law,” defined as the doctrinal rules derived from Islamic scripture. From this perspective, it makes sense to say that law is “what the scholars . . . understand God to have commanded,” (p. 96) because this accurately describes what *fiqh* is.

But *fiqh* does not exhaust the field of what can be considered “law” in Muslim history if one is looking at the larger “balance of powers” picture that includes both rulers and scholars—which is the perspective that Feldman presumably wants us to take. From this view, *siyasa* rules are law too—perhaps even more properly so, from a modern secular perspective. Without this awareness, readers might easily interpret Feldman’s *fiqh*-centric depiction as describing a theocracy, with religious scholars in charge of all legislation. This would be an inaccurate understanding of classical Muslim law and government, because *siyasa* lawmaking was not dictated by *fiqh* authorities any more than *fiqh* lawmaking was dictated by *siyasa* authorities. The potential for confusion is heightened by Feldman’s dual use of the word *shari’a* to refer both to *fiqh* legal doctrine as well as an Islamic “rule of law.” Only by keeping the

(an articulation of God’s Law, but only with probable authority to be the truth, and therefore not binding in and of itself).

18. See, e.g., p. 115 (“the classical Islamic state with its qadis, muftis and supplemental administrative regulations”).

two ideas distinct does the following sentence *not* sound like a theocracy: “as a matter of principle, the complex of [ruler] administrative regulations was subordinate to the authority of the shari’a—and hence to the authority of the scholars who were uniquely in control of its content” (pp. 43-44). This is true—and should not be a threatening idea to American readers—if we understand *shari’a* to mean the rule of law ideal of God’s Law, but not if it means the doctrinal *fiqh*. Moreover, attention to the parallel legal powers of *siyasa* and *fiqh* also gives weight to Feldman’s “separation of powers” thesis. That is, it makes sense that rulers and scholars would “check and balance” each other if *siyasa* and *fiqh* occupy separate but interdependent and equally powerful lawmaking realms. But if *siyasa* is unimportant and the law of *fiqh* is the only law that exists, this leaves very little space for negotiation of power between them.¹⁹

II. INSTITUTIONAL AUTHORITY: CONTEMPLATING A SHARI’A-INSPIRED MODERN SEPARATION OF POWERS

I agree with Noah Feldman’s basic thesis that there was a constitutional separation of powers between rulers and scholars in pre-modern Muslim societies, and that this arrangement constituted a *shari’a* rule of law. I especially support this approach because I believe it is the most accessible way to translate classical Islamic legal and political history into twenty-first century concepts for western-educated audiences. I am also very glad to see Feldman focus on the role played by the scholars as a crucial element missing in failed attempts to establish the rule of law in many Muslim-majority countries today. Many observers do not fully appreciate the significance of the changed role of *fiqh* scholars that occurred with the transformation of legal institutions in Muslim societies from the classical to the modern era. As Feldman puts it, “the displacement of the *shari’a* and the decline of the scholarly class left behind no institutional force capable of effectuating a replacement” (p. 90) of the previous separation of powers, without which these societies

19. When the scholars publicly criticized a ruler’s behavior on *shari’a*-based grounds, the potential for social resistance and revolt was often enough for a ruler to modify his actions. On the other hand, because the *fiqh* scholars commanded no army, rulers could in turn “check” the scholars, by simply choosing to ignore their protests and address any potential social resistance with their considerable police power. In other words, the complex and interdependent relationship between these two realms of legal authority (*fiqh* and *siyasa*) is important to fully appreciating Feldman’s rule of law thesis.

were left subject to the whim of domineering executives. He suggests that if new Islamic states “can find an institution to fill the role traditionally played by the scholars, it has a reasonable chance of establishing political justice, and through it, popular legitimacy” (p. 14). I find this suggestion very insightful and forward-looking.

But I have concerns about Feldman’s vision for what these new institutions might look like. Islamists looking to develop new institutions with “their own original and distinctive way of giving real life to the ideals of Islamic law,” he suggests, might create an “Islamically oriented legislature, infused with the spirit of a democratized shari’a” or “a court exercising Islamic judicial review to shape and influence laws passed in its shadow” (p. 147).²⁰ That is, Feldman imagines that a *shari’a*-enacting legislature or a *shari’a*-checking court could fill the void previously occupied by the classical *fiqh* scholars. This proposal answers the obvious need for a strong counter-balance to the lopsided dominance of executive power in so many Muslim-majority countries today, but it draws a strained parallel between the lawmaking power of *fiqh* scholars and that of modern legislatures and judges. Let us take the “Islamically-oriented legislature” proposal first. Simply put, *fiqh* lawmaking is not democratic lawmaking. *Fiqh* doctrine, recall, emerges from jurisprudential parsing of Muslim scriptural sources, whereas democratic legislation results from political debates and pragmatic evaluations about what best serves the public good. Moreover, from its inception *fiqh* lawmaking has existed independent of the state: the authority of *fiqh* scholars comes not from any state appointment but from the public reputation established by their work. In fact, of the two types of law of the classical Muslim world (*fiqh* and *siyasa*) it is actually *siyasa* lawmaking—not *fiqh* lawmaking—that better parallels the work that goes on in a democratic legislature. The work of *fiqh* scholars is closer to the work of contemporary law professors than legislators. In fact, it is likely that it was precisely the “academic freedom” of the *fiqh* scholars that made their ability to check the power of the rulers viable, because their articulation

20. Feldman is vague about the details of what this might look like, creating many unanswered questions. For example, in his reference to “[a] democratically elected legislature responsible for enacting provisions in accordance with—or at least not repugnant to—the shari’a” (p. 124), he does not elaborate whether this means a codification of established *fiqh* doctrine, or just legislating within the context of a respect for an abstract divine rule of law, and avoiding legislation that forces Muslims to sin.

of *shari'a* was not tainted by suspicion of government control. A modern legislature cannot carry the same sort of “outside the beltway” external check on government power because it is itself part of the government.

Moreover, the concept of a *shari'a*-enacting legislature prompts some peculiar questions. For example, Feldman asks: “what must be done if the laws passed by the legislature . . . do not correspond to the ‘true’ content of Islamic law or values” (p. 121)? This is a strange question because (as Feldman alludes to with quotation marks around the word “true”) Muslims have long accepted that it is impossible for humans in this lifetime to know with any certainty the “true” content of God’s law. As described earlier, human fallibility and the corresponding indeterminacy of truth were building blocks of Islamic jurisprudence. This is, after all, why there are so many established schools of *fiqh* doctrine—each operating on the probability that it might have articulated the “true” *shari'a*, but leaving open the possibility that it might be wrong. This brings us to the inherent challenge in the proposal for a *shari'a*-checking court. If the many schools of *fiqh* are all simultaneously legitimate articulations of *shari'a*, then on what basis will the court “check” legislation for *shari'a* compliance? Whatever *shari'a*-based judgments are made by such a court will likely be felt by the population as a state adopts one *fiqh* interpretation over others and imposes it upon the entire population. This merges *fiqh* and *siyasa* power in a new and dangerous way. If the government has the power to enact its understanding of *shari'a*, get approval of this interpretation from a *shari'a* court judgment, and then use its police power to enforce it, those citizens who disagree with the government’s interpretation of Islam are left with no avenues to opt-out, even if their interpretation is based on a historically-established *fiqh* school of law.²¹ Ironically, this

21. This state monopoly of law is quite different from the classical Muslim ruler-scholar model in which rulers controlled the content of only *siyasa* law, and did not influence *fiqh* articulations of *shari'a*. It is true that rulers enforced *fiqh*-based judgments, by appointing judges to adjudicate cases litigating *fiqh* issues, but in doing so, they did not articulate *fiqh* doctrine. The content of the *fiqh* by which these judges ruled was that of the *fiqh* literature, not ruler decrees. Rulers never had authority to create or change the content of *fiqh* scholars’ articulations of God’s Law. Their power over *fiqh* extended only as far as the *siyasa* arm of enforcement could reach. Thus, classical Muslim legal systems could accommodate pluralistic applications of *fiqh* within its populations because of the inherent bifurcation of legal realms: the rulers would create and enforce only *siyasa* laws—those that are based on evaluations of general public order, while the scholars would articulate God’s Law (*shari'a*) as best they could, but their resulting legal doctrine (*fiqh*) was not binding in and of itself. Moreover, many rulers respected *fiqh*

scenario is more theocratic than most classical Islamic systems were. A crucial element is the modern nation-state context, which operates not with a pluralistic, opt-in type of legal authority, but rather one of uniformly enforced laws. Uniform laws enforced on everyone works quite well for general public order, *siyasa*-type, laws, but a government risks oppression and theocracy when it enforces laws enacted on the basis of a religious mandate. In other words, from both a classical Muslim perspective as well as a modern secular one, it is not appropriate for a legislature to be trying to “get *shari’a* right,” nor for a court to be declaring whether or not it did so.

A final note on the popular relevance of *fiqh* today. The independent nature of *fiqh* scholarship continues today, despite the widespread dismantling or reforming of classical Islamic educational institutions during and after colonialism. The *fiqh* scholars extant today still hold incredible prestige with large numbers of Muslim populations, as Feldman himself has eloquently illustrated in his description of Ayatollah Sistani’s role in influencing the state-building process in Iraq.²² Pluralistic though it is, and lacking the institutional infrastructure that it once had, the loosely-linked global community of *fiqh* scholars nevertheless remains the authoritative source of *shari’a* knowledge for vast numbers of Muslims around the world. Thus, even when a modern state claims to enact Islamic law, or strike down secular legislation for *shari’a*-non-compliance, it does not carry the same *shari’a* authority that *fiqh* scholars do with a large percentage of their Muslim populations.

Keeping all this in mind, it does not seem that Feldman’s vision of a *shari’a*-enacting democratic legislature or a court’s *shari’a*-checking power of judicial review can fill the void left by the *fiqh* scholars. Under the classical model described by Feldman, state *siyasa* power was balanced by the non-state power of the scholars and vice versa. But Feldman’s proposal separates only *siyasa* power, dividing it into three parts (executive, legislative and judicial). In itself, this is not a bad idea. Dividing unilateral (often dictatorial) state power into separate entities such that no branch has a monopoly is certainly a step forward in the evolution of *siyasa* organization. But balancing the executive with a legislature is not the same thing as

diversity by appointing a variety of judges to adjudicate cases according to different school doctrine, as needed by the population.

22. See NOAH FELDMAN, WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING 35–42 (2004).

balancing rulers with scholars. And assigning *shari'a*-checking authority to a court cannot accomplish the same *shari'a* check on government power as the *fiqh* scholars did because these government branches would likely lack the *shari'a*-interpreting credentials and credibility of independent *fiqh* scholars.

In addition, the idea of a legislature with the authority to enact *shari'a*-compliant legislation can create some odd—and ultimately counter-productive—concepts. For example, Feldman and others posit that one positive potential of democratic bodies enacting *shari'a*-based legislation is a “democratization of the *shari'a*,”²³ an idea which resonates with secular democrats as well as many Muslim reform thinkers and Islamists who are generally frustrated with traditional *fiqh* scholars claiming a monopoly over *shari'a* interpretation.²⁴ But a promise to “democratize” the *shari'a* will likely draw immediate resistance from anyone understanding *shari'a* as God’s Law, because it implies that God’s Law itself is subject to a human vote. Even more fundamentally, “democratization of *shari'a*” is inaccurate as a description of *shari'a*-based legislation itself. A legislature is, after all, a *siyasa* institution. By giving it *shari'a*-enacting power, all that has been accomplished is an “Islamization” of government (*siyasa*) lawmaking, but it does not change the content of *shari'a* itself, which still exists as ideal God’s Law. Not even the *fiqh* articulation of God’s Law has been “democratized” because, for vast numbers of Muslims, a *fiqh* conclusion is legitimate as a possible articulation of *shari'a* only if it is the result of independent jurisprudential analysis by a *fiqh* scholar.

23. See (pp. 117–21). He describes this as a fundamental change in the theoretical structure underlying Islamic law:

the *shari'a* is democratized in that its keeping is given over to a popularly elected legislature charged with enacting legislation derived from the source that is the *shari'a*. In practice, this democratization of the *shari'a* means that the interpretation of what the *shari'a* requires is in the first instance put in the hands of the public and its elected representatives. The problem of the missing scholars who traditionally interpreted is addressed through the substitution of the elected legislature for the scholars. Applied Islamic jurisprudence of the kind once practiced by the scholars remains only insofar as it might be relevant to a public that wants to draw upon Islamic legal reasoning to ascertain what Islamic law requires. (p. 120)

24. For Feldman’s description of the Islamist attitude toward traditionally-trained scholars, see pp. 105–17.

CONCLUSION

Towards the end of *The Fall and Rise of the Islamic State*, Noah Feldman comments that a “new Islamic state, if it is to succeed, can learn from aspects of traditional practice, but it must do for itself the difficult and slow work of establishing new institutions with their own ways of operating that will gradually achieve legitimacy” (p. 149). This is an insightful comment, and one that I hope his readership will take to heart. I believe, as Feldman does, that every society is entitled to legal and political institutions that reflect their own culture, values, heritage, and aspirations. This premise is a central feature of this book, and features prominently in much of Feldman’s body of work to date.²⁵ In *The Fall and Rise*, he does an honorable job of bringing legitimacy and respect to Islamically-motivated political activism. This is not an easy task, given the heavy suspicion of Islamism in current western minds. Yet Feldman is persistent. These groups are not crazy religious zealots, he insists, but rather a modern manifestation of a sincere and laudable desire for justice. And their justice-seeking sentiment is rooted in a broad-based affinity for *shari’a*, which itself deserves respect as a rule of law. He realizes that, for those working in the field of Islamic law and constitutionalism, it is important to take seriously the ideas of Islamist political parties, whether or not one agrees with their overall platforms.²⁶ This is why Noah Feldman’s work is valuable paradigm-shifting material. He powerfully argues why popular calls for recognition of religious law should be addressed, not suppressed. His book offers American readers a plausible way to take them seriously, and he suggests alternatives to what is often the liberal impulse to find ways to make the Islamic resurgence go away.²⁷

If Feldman succeeds in nothing more than bringing respect to the word *shari’a* in American minds, he will have made a huge and invaluable contribution. But his book has the potential to

25. See, e.g., FELDMAN, *supra* note 22; NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2006); NOAH FELDMAN, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* (2004).

26. He even ends his book with the bold recommendation that, “[w]hen new legal and constitutional institutions, Islamic or otherwise, do manage to enter onto the scene and make their play for legitimacy, it is imperative to support them” (p. 150).

27. As Feldman points out, “[w]here Islamists win elections in a functioning state, the United States and other regional actors are sufficiently nervous about Islamist government that opponents—including those prepared to use force—will typically find external support for undermining the Islamists in power” (p. 145).

accomplish even more. If it can help shift American attitudes about Islamic constitutionalism from dismissive condescension of an oxymoron to respect for a legitimate—if complex—pursuit, then Feldman's book can have a powerful paradigm-shifting influence on global constitutional discourses. I offer the present critique in the spirit of supporting this potential. Although I disagree with the particular institutional scenarios Feldman imagines for modern Islamic constitutionalism, I nevertheless strongly appreciate his overall project, and the door that it opens to more productive discussion and debate of this important world topic. Feldman's approach displays optimism, not suspicion. It looks in the direction of mutual respect and engagement, which is the best long-term antidote to the violence threatened by today's global religious-political conflicts. It is a valuable work.