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I. INTRODUCTION

On Saturday, October 15, 2005, the Iraqi people ratified their new Constitution.[1] Despite this endorsement, many believe the Constitution is flawed. Indeed, it has provoked hostility[2] since its provisions became known late in August

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As this article moved through the editorial process, facts on the ground in Iraq continued to change, often for the worse. *See, e.g.*, Damien Cave, *7 Killed As Full-Scale Sectarian Fighting Rages in Baghdad*, N.Y. TIMES, Aug. 18, 2006 I write therefore to clarify two potential points of confusion. First, although I advocate government cooperation with belief associations (*see, e.g.*, *infra* notes 102-104 and accompanying text), I do not endorse the creation or deployment of private sectarian militias. Rather, my argument is that the Iraqi government should work with those belief associations willing to join the political process, and encourage their competition with each other (as, for instance, the government has worked with Muqtada al-Sadr, who has become considerably less radical since he entered mainstream politics, *see, e.g.*, Int'l Crisis Group, *Iraq's Muqtada al-Sadr: Spoiler or Stabiliser?*, Aug. 16, 2006, *available at* http://www.crisisgroup.org/library/documents/middle_east___north_africa/iraq_iran_gulf/55_iraq_s_muqtada_al_sadr_spoiler_or_stabiliser.pdf.). *Cf.* Subcommittee on National Security, Emerging Threats, and International Relations July 11, 2006 (prepared testimony of Kenneth M. Pollack, Senior Fellow and Director of Research, Saban Center for Middle East Policy at the Brookings Institute) (noting that "[t]aking a page from Hizballah in Lebanon and Hamas in the Palestinian territories, the militias are providing average Iraqis with a semblance of security, social services, health clinics, jobs, and whatever else is required to gain their loyalty."). By contrast, the Iraqi government should restrain and demobilize those groups, particularly heavily militarized groups, which refuse to participate in the political process.

Second, I take no position on the extrinsic, or general, merit of government establishment of one particular religion or cooperation with non-dominant belief associations. My argument is unique to Iraq today. I take no firm position on the role religion should play in the United States, elsewhere in the Middle East (although Hizballah's ability to survive devastating Israeli air strikes suggests the futility of attempts to eradicate religious parties entirely), or in Iraq in the future.

1. *See* Kirk Semple & Robert F. Worth, *Early Signs Show Iraqis' Approval of Constitution*, N.Y. TIMES, Oct. 17, 2005, *at* A6.

2. *Compare* IRAQ CONST. art. 61(c) (Law of Administration for the State of Iraq for the Transitional Period), *available at* http://www.cpa-iraq.org/government/TAL.html (Mar. 8, 2004) (declaring that if two-thirds of the voters in any three provinces were to reject the Constitution, it would not be adopted, thereby confirming the fact that Sunnis have the ability to veto any constitution that is not to their liking) *with Iraq, Still Divided After Three Deadlines*, THE ECONOMIST: GLOBAL AGENDA, Aug. 29, 2005, *available at* http://www.economist.com/agenda/PrinterFriendly.cfm?story_id=4334638 (affirming that Sunnis are a majority in four provinces). *See also* Juan Cole, *The Iraqi Constitution: DOA?*, SALON.COM, Aug. 26, 2005, *at* http://www.salon.com/news/feature/2005/08/26/sunnis (explaining that the Sunnis levied attacks on both the substance of the Constitution and the procedure pursuant to which it was drafted, and claiming that "[m]ore than anything else, the Sunnis oppose the plans of the Kurdistan Provincial Confederation and the mooted Shiite Provincial Confederation

2005.[3] Characteristic of this early response are the reactions of Sheik Abdul Rahman Mished, who said, "Kirkuk's Arabs refuse any constitution that would divide the country by different names, which is at odds with Islam and with the Arabic nation of Iraq,"[4] and Abdul-Nasser al-Janabi, who exclaimed, "[w]e declare that we don't agree and we reject the articles that were mentioned in the draft and we did not reach consensus on them in what makes the draft illegitimate."[5] The hostility has not abated since the referendum[6] and may have even aggravated divisions expected to heal.[7]

In the United States, in the weeks between when the document was translated into English and the referendum, pundits focused on, and reserved their most vituperative language for, the role the Constitution assigns Islam--establishing it as the religion of the state. David L. Phillips of the Council on Foreign Relations opined, "[t]he Constitution pits Islamists against secularists, Shia against Sunnis . . . . The 'new Iraq' is a far cry from what President Bush had in mind when he promised freedom to the Iraqi people."[8] Likewise, the editorial board of the *New York Times* declared, "[p]rovisions that could strip away the legal rights of Iraqi women have been left unchanged [in the Constitution]. The chances of this language being interpreted benignly by a future legislature dominated by Shiite religious parties or a future Supreme Court packed with senior clerics is [sic] less than nil."[9] Since the referendum, these observers have reiterated this criticism.[10]

('Sumer') to keep substantial amounts of the petroleum profits in the regions rather than sharing them"); Robert H. Reid, *U.S. Envoy: Iraq Constitution May Change*, (Aug. 30, 2005), http://dehai.org/archives/AW_news_archive/0352.html (noting that Sunnis also objected to the Constitutional purge of the Baath Party, the former ruling, and heavily Sunni, party of Iraq, and to the designation of Iraq as an Islamic, but not Arab nation). *Cf.* Noah Feldman, *Agreeing to Disagree in Iraq*, N.Y. TIMES, Aug. 30, 2005, at A19 (arguing that "[t]he major problem is one of who is agreeing, not what they have agreed on").

3. *See* Dexter Filkins & James Glanz, *Shiites and Kurds Halt Charter Talks With Sunnis*, N.Y. TIMES, Aug. 27, 2005, at A6 (discussing the publication of the Constitution in draft form).

4. Robert F. Worth, *Sunni Arabs Rally to Protest Proposed Iraqi Constitution*, N.Y. TIMES, Aug. 27, 2005, at A3.

5. *Iraq's Sunnis Reject Constitution*, BBC NEWS, Aug. 28, 2005, *at* http://news.bbc.co.uk/1/hi/world/middle_east/4192122.stm.

6. *See, e.g.*, Sabrina Tavernise & Edward Wong, *Two Sides of the Sunni Vote: Deserted Polls and Long Lines*, N.Y. TIMES, Oct. 16, 2005, *available at* http://www.nytimes.com/2005/10/16/international/middleeast/16sunni.html (describing the views of Falluja residents, one of whom said, "[i]t's forbidden to vote yes because it contradicts Islamic law"); *see also* Hatem Mukhlis, *Voting 'Yes' to Chaos*, N.Y. TIMES, Oct. 18, 2005, http://www.nytimes.com/2005/10/18/opinion/18mukhlis.html?hp.

7. NATHAN J. BROWN, CARNEGIE ENDOWMENT FOR INT'L PEACE, IRAQ'S CONSTITUTIONAL CONUNDRUM 2 (2005), *available at* http://www.carnegieendowment.org/files/brown8_314.pdf [hereinafter IRAQ'S CONSTITUTIONAL CONUNDRUM]

8. David L. Phillips, *Constitution Process Risks a Civil War*, *available at* http://www.cfr.org/publication/8766/constitution_process_risks_a_civil_war.html (Aug. 26, 2005); *see also* IRAQ'S CONSTITUTIONAL CONUNDRUM, *supra* note 7, at 3 (noting that the Constitution would likely permit Shiite religious leaders to dominate at the polls).

9. *The Fragments of Iraq*, N.Y. TIMES, Aug. 27, 2005, at A12. *See generally* Hannibal Travis, *Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq*, 3 NW. U. J. INT'L HUM. RTS. 4 (2005) (describing and endorsing criticism of earlier versions of the Constitution).

Yet there are both ethical and practical reasons for the United States to approve those provisions of the new Constitution addressing religion and Islam. As Noah Feldman has explained in a recent book, we owe an ethical duty to the Iraqi people.[11] Feldman enumerates three roles for the "nonpaternalistic nation builder": 1) to impose security;[12] 2) support the freedoms of speech and assembly;[13] and 3) insure the participation of all relevant stakeholders in important negotiations.[14] Essentially, the role of outsiders like the United States is to assist in the processes of state and nation construction.

This is not only an ethical duty; it is also a practical imperative.[15] The sooner the United States can withdraw from Iraq, the better.[16] But it is only when Iraqis have built both state and nation that Baghdad will be safe and U.S. troops able to withdraw. Larry Diamond, an advisor to the Coalition Provisional Authority, emphasizes state building. One point he makes is that people are afraid of more than the state; they are also afraid of loosing their freedom through the absence of order. He argues that before Iraq can become a democracy "it must first become a state, which establishes a monopoly on the means of violence."[17] Toby Dodge, on the other hand, highlights the importance of nation building.[18] In 2004, he warned the Senate Foreign Relations Committee that Iraq's "largely atomized society" would have to come together for the U.S. mission to succeed.[19]

Accepting Feldman's thesis—that the United States is ethically required to work to help Iraqis build a state and construct a nation, and my extension of it—that it behooves the United States to do as Feldman urges, the worth of the new Constitution from the U.S. perspective will vary according to how well it advances state- and nation-building efforts.[20] In this article, I offer a preliminary assessment of that worth. I focus only on those provisions of the Constitution that relate to

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10. *See, e.g.*, Phyllis Bennis, *The Iraqi Constitution: A Referendum for Disaster*, Institute for Policy Studies, *at* http://www.ips-dc.org/comment/Bennis/tp34constitution.htm (Oct. 13, 2005) (arguing that "religious rights . . . remain at risk").

11. *See* NOAH FELDMAN, WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING 64 (2004) [hereinafter WHAT WE OWE IRAQ].

12. *Id.* at 72.

13. *Id.* at 66.

14. *Id.* at 83 (claiming that "we can guarantee that all Iraqis get a seat at the table").

15. *See* Stephen Townley, Foreword, *Perspectives on Nation-Building*, 30 YALE J. INT'L L. 357, 359-62 (2005) (explaining the practical importance of creating a nation and building a state).

16. Withdrawal is important not only because U.S. soldiers are dying every day in Iraq but also because recent empirical data suggests that suicide terrorism is fueled by U.S. military policies. *See* ROBERT A. PAPE, DYING TO WIN 246-50 (2005).

17. LARRY DIAMOND, SQUANDERED VICTORY 315-16 (2005).

18. *See generally* TOBY DODGE, INVENTING IRAQ: THE FAILURE OF NATION-BUILDING AND A HISTORY DENIED (2003).

19. *Iraq Transition: Civil War or Civil Society: Hearings Before the S. Comm. on Foreign Relations* at 4 (Apr. 20, 2004) (statement of Dr. Toby Dodge), *available at* http://www.foreign.senate.gov/testimony/2004/DodgeTestimony040420.pdf.

20. I do not mean to engage with the deeper debate over the morality or practical merit of providing assistance to Iraq as it develops and refines its Constitution. That debate is captured by a recent interchange between Noah Feldman and Madhavi Sunder. *Compare* Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857 (2005), *with* Madhavi Sunder, *Enlightened Constitutionalism*, 37 CONN. L. REV. 890 (2005).

religion, both because they are among the most controversial in the United States[21] and because they have great potential to affect the state- and nation-building processes.[22]

In the first half of the article, I contend that Iraqis can most easily build a state and construct a nation if they *cooperate* with religious groups, as the Constitution permits and impels them to do. I also argue that such cooperation is inconceivable unless the Constitution establishes Islam as the religion of the government, as it does. In the second half of the article, I take up another question: that of the rights due minorities and the requisite corollaries to cooperation and establishment. I suggest that Iraq should make a concomitant commitment to protect Muslim dissenters, those who neither want to abandon their Islamic faith nor accept the dictates of the Muslim majority without question. I lay out practical steps the Iraqi polity could take—including laws it could pass and judicial structures it could adopt—to realize such a commitment. In sum, the thesis of this article is that U.S. hostility to the new Constitution is misguided. I argue that the United States should instead refocus its energy on spurring Iraq to take steps to protect Muslim dissenters.

This article is sited at the intersection of policy and theory. The article could be useful to U.S. diplomats and policymakers. To date, U.S. lawyers and legal academics have not offered policymakers much assistance.[23] This article aims to remedy that failure and help U.S. policymakers prepare for the critical next two years of Iraq's constitutional and legal development.

The article also makes three theoretical contributions to legal scholarship. First, I offer a rebuttal to those who argue that the best way to render Islamic states more tolerant is by reinterpreting and re-imagining Islam.[24] Islamic constitutionalism is a burgeoning field.[25] But even after roughly ten years, most

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21. *See supra* notes 7-8 and accompanying text.

22. We can learn from Lebanon, an object lesson in the power of religious conflict to cripple a state and divide a nation. *See generally* KAMAL SALIBI, A HOUSE OF MANY MANSIONS: THE HISTORY OF LEBANON RECONSIDERED (1990).

23. Indeed, Sherman Jackson has shrewdly noted, "[o]ne of the limitations built into the study of Islamic law in the West is that the majority of scholars of Islamic law are products of Area Studies programs and have little to no training in law as a discipline." Sherman A. Jackson, *Shari'ah, Democracy, and the Modern Nation-State: Some Reflections on Islam, Popular Rule, and Pluralism*, 27 FORDHAM INT'L L.J. 88, 91 (2003). Two exceptions are Noah Feldman and Kristin Stilt. *See* NOAH FELDMAN, AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY 54 (2003) [hereinafter AFTER JIHAD]; WHAT WE OWE IRAQ, *supra* note 11; Kristin A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695 (2004). But Feldman speaks primarily in abstract terms and Stilt writes from a historical perspective.

24. *See, e.g.*, ABDUALLAHI AHMED AN-NAIM, TOWARD AN ISLAMIC REFORMATION 34 (1996) ("[*Naskh*, the Islamic principle of abrogation,] would permit applying some verses of Qur'an and accompanying Sunna instead of others."); Azizah al-Hibri, *Islamic and American Constitutional Law: Borrow Possibilities or a History of Borrowing?*, 1 U. PA. J. CONST. L. 492, 513 (1999) (discussing the Prophet Muhammad's tolerance for Jews).

25. "Islamic constitutionalism" is a term of recent provenance. By it I mean scholarship concerned with the customs, ideals and norms on the basis of which constitutions are written and that buttress those constitutions. *Cf.* Bassam Tibi, *Islam and Modern European Ideologies*, 18 INT'L J. MIDDLE E. STUD. 15, 16 (1986). Recent works on Islamic constitutionalism include NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD 92 (2002); WHAT WE OWE IRAQ, *supra*

scholars still seem content to look backward, tracing principles of tolerance through Islamic history.[26] As Erik Jensen has said, contemporary scholars "look[] superficially at selected passages from the Quran, the Constitution of Medina, as well as concepts and practices such as *shura*, *ijma* and *maslaha*, and pour[] Islam into liberal democratic vessels."[27] I take the Shari'a and unwritten Islamic constitution as I find them and explain how they can usefully be used to promote tolerance. Second, I describe a new way to conceptualize the relationship between religion and government. Although much ink has been spilled on the question, no one, to my knowledge, has mapped this relationship in two dimensions, rather than in one.[28] I do so. Third and finally, I strive to contribute to the ongoing discussion of the utility of comparative law.[29] I am fully expert in few of the areas of law I discuss. I am neither verifying a theory nor building one immediately susceptible of falsification.[30] Rather, by discussing and comparing constitutional experiences proximate to Iraq's, such as that of Egypt, and distant from Iraq's, such as that of the Netherlands, I hope first to debunk a popular perception (that the establishment of Islam as the religion of Iraq is a recipe for disaster),[31] second, to tentatively explore the role religion should play in Iraq,[32] and third, to show, by example, how

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note 11; AFTER JIHAD, *supra* note 23; SHERMAN JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI (1996); Khaled Abou El-Fadl, *Constitutionalism and the Islamic Sunni Legacy*, 1 UCLA J. ISLAMIC & NEAR E.L. 67 (2001-02); Khaled Abou El-Fadl, *Islam and the Challenge of Democratic Commitment*, 27 FORDHAM INT'L L.J. 4 (2003); and Sherman Jackson, *From Prophetic Action to Constitutional Theory: A Novel Chapter in Medieval Muslim Jurisprudence*, 25 INT'L J. OF MIDDLE E. STUD. 71 (1993).

26. *See, e.g.*, Jackson, *supra* note 23, at 73-74 (deriving a new principle of Islamic interpretation from the work of medieval philosopher Ibn Qayyim).

27. Erik G. Jensen, *Confronting Misconceptions and Acknowledging Imperfections: A Response to Khaled Abou El Fadl's 'Islam and Democracy'*, 27 FORDHAM INT'L L.J. 81, 83 (2003).

28. Professor Garlicki has come the closest to making this point. He has noted, "there is a range of systems from the most strict - even hostile - separationist models to the most friendly, positive separationist schemes. This range includes models based on accommodation, cooperation, and even churches supported or preferred by the state." Leszek Lech Garlicki, *Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts*, 2001 BYU L. REV. 467, 469.

29. *Compare* KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW (3d ed. 1998) (assuming that countries should adopt similar law to deal with similar problems) *with* Mark Tuhsnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225 (1999) (articulating a cautious approach to constitutional borrowing) *and* Roper v. Simmons, 543 U.S. 551, 628, 125 S.Ct. 1183, 1229 (Scalia, J., dissenting) *and* Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. OF EUROPEAN & COMP. L. 111-24 (1997).

30. *Cf.* GARY KING ET AL., DESIGNING SOCIAL INQUIRY (1994) (arguing for rigorous theory development and testing).

31. For an example of another effort to "debunk" a popular myth, see James Q. Whitman, *The Two Western Cultures of Privacy*, 113 YALE L.J. 1151 (2004) (discussing the myth that there is one international, universal conception of privacy).

32. *See* Alexander George, *Case Studies and Theory Development: The Method of Structured Comparison*, *in* DIPLOMACY: NEW APPROACHES IN HISTORY, THEORY AND POLICY 51 (1979) (noting that comparative studies can be useful "as a means of stimulating the imagination in order to discern important *new* general problems, identify possible theoretical solutions"). *Cf.* Harry Eckstein, *Case Study and Theory in Political Science*, *in* THE HANDBOOK OF POLITICAL SCIENCE at 91 (1975) (discussing hypothesis formulation).

Iraqis might better understand their own system by looking to other countries.[33]

Before laying out the structure of this article, I want to define a few important terms and offer a brief caveat. A "state" is a territorial entity that provides essential services (including security). The state should assure freedoms of speech and assembly. The state should also assure the full participation conducive to *national* legitimacy. A "nation" is a sociological and legal idea to which those who live within the territory of a state may or may not subscribe. "Government" means something different than either "state" or "nation." The government is the set of actors able at any given time to effect policy. Finally, a "belief association"[34] is a group of individuals who hold common and sincere beliefs[35] that help to define their relationships to other men, to the universe, or to God.[36] This term is broad and I mean it to include both religious and quasi-religious groups, like, for instance, scientologists and Jehovah's Witnesses. I do not intend it to include, however, the Church of No Taxation. Rather, a "belief association" facilitates and passes on "demands made upon us by society, the people, the sovereign, or God . . . . [It offers a set of symbols and] signs by which each of us communicates with others."[37]

Finally, I articulate this theory rather forcefully at least in part in an effort to stimulate a discussion on the merits of the new Iraqi constitution. I offer this caveat: this article is neither exhaustive nor comprehensive. Rather, I have simply tried to generate plausible arguments and apply them to the Iraqi Constitution. My hope is that this article will stimulate further discussion within the U.S. legal community.

This article proceeds in four parts. In Part I, I set the stage for argument by modeling the relationship between governments and belief associations in a new way: along two axes rather than along a single vector, with a government's position along the x-axis representing the extent to which it prefers one belief association (or indeed secularism) to other belief associations, and its position along the y-axis representing the extent to which it is willing actively to cooperate with non-dominant belief associations.

With this model in mind, in Part II I defend the way the Iraqi Constitution

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33. *Cf.* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1005 (1998) (arguing that the purpose of comparative study it to "make the object . . . 'strange' to us").

34. By using this term, and defining it in the way I do, I hope to avoid offering a definition of "religion." To attempt any definition of "religion" might debase it and offend those whom the definition excluded. *Cf.* Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 241 (1999) ("To define religion is to limit it."). I also do not feel competent to make the attempt. *Compare* Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984), *with* Jonathan Weiss, *Privilege, Posture and Protection: 'Religion' in the Law*, 73 YALE L.J. 593 (1964) *with* Ingber, *supra*.

35. By sincere I mean what the Supreme Court meant in United States v. Seeger, 380 U.S. 163, 176 (1965) and Welsh v. United States, 398 U.S. 333, 340 (1970).

36. To some extent, I endorse the definition offered by Judge Augustus Hand in *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943) ("[r]eligious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe . . .").

37. Robert M. Cover, Foreword, *Nomos and Narrative*, 97 HARV. L. REV. 4, 8 (1983).

treats religion. I do so by articulating what I call the privilege paradigm. I suggest that the two principal U.S. desiderata—the establishment of a state and the construction of a nation—can best be realized if Iraq *privileges* religion. Using the model, Iraq should not only cooperate with non-dominant belief associations (i.e. be above the origin on the y-axis) but also entrench Islam as the religion of the government (i.e. be to the right of the origin on the x-axis). I assert that this is precisely what the Constitution requires and impels Iraq to do.

In Parts III and IV, I turn from the descriptive to the prescriptive. I no longer defend the Constitution as it is, but rather, announce how I believe the United States should suggest that the Iraqi government interpret it and what ancillary laws and practices might help assure its success. First, in Part III, I enunciate what I call the protection paradigm.[38] The protection paradigm is a scheme designed to guarantee that neither the cooperation of the government with non-dominant belief associations nor the entrenchment of Islam as its religion stifles dissent. Using the feminist critique of the position I endorse in Part II to help limn the contours of the protection paradigm, I argue that the state should ensure that citizens are able to express dissenting opinions *from within* belief associations. Then, in Part IV, I apply the theoretical insights of Part III and explain precisely what the United States could suggest that Iraq do, should they wish to realize the protection paradigm.

To sum up, the privilege paradigm suggests that the Iraqi government has done well by approving the beliefs of the majority while at once ensuring that non-dominant belief associations can prosper and that the dominant belief association will continue to face competition for believers; but the protection paradigm requires that the government take care that each belief association be permitted to evolve, pressed from within by its own rebels. The Iraqi government still has much work to do to instantiate this second paradigm.

I. THE RELATIONSHIP BETWEEN GOVERNMENT AND BELIEF ASSOCIATIONS: A NEW MODEL

A. Two Dimensional Analysis

Many scholars, including Noah Feldman, model the relationship between governments and belief associations as a vector moving from disestablishment to establishment. In a description of the three shapes Islamic democracy might take, for instance, Feldman moves from the minimally Islamic state (Islam is to that state as Anglicanism is to England)[39] to the maximally Islamic state (a state that "adopt[s] Islamic law as its exclusive legal system").[40] This Part proposes a

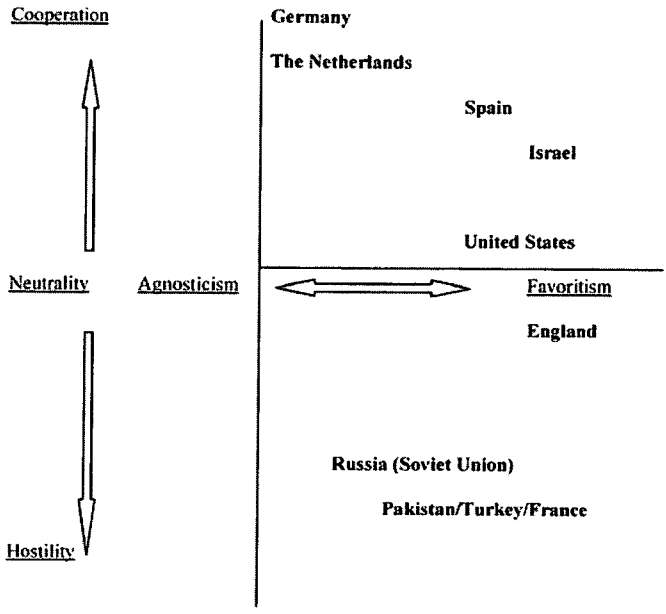
38. I borrow this term from Christopher Eisgruber and Lawrence Sager. Christopher L. Eisgruber & Lawrence G. Sager, *Mediating Institutions: Beyond the Public/Private Distinction: The Vulnerability of Conscience: the Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994).

39. AFTER JIHAD, *supra* note 23, at 54.

40. *Id.* at 55-56.

different way of modeling this relationship. Rather than as a vector,[41] this Part models the relationship in two dimensions. At one end of the x-axis is establishment *or* disestablishment. A government that has disestablished religion, like a government that has established religion, favors one belief association (or, more generally, one belief structure) over others. At the origin is what I will call agnosticism. At one end of the y-axis is hostility, at the origin is neutrality, and at the other end is cooperation [see Table One below].

TABLE ONE



41. *See* W.C. Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 15-25 (Johan D. van der Vyver & John Witte, Jr. eds. 1996) [hereinafter WITTE] for another formulation of the vector model.

Both England and Israel are at one end of the x-axis since both states favor one belief structure over others.[42] England, for instance, permits twenty-four bishops to serve as members of the House of Lords.[43] Turkey and France are similarly situated along the x-axis (since both endorse laicité/secularism over other belief structures).[44] Indeed, the Turkish government has dismissed employees who belong to fundamentalist groups without adducing evidence of the effect such membership may have had upon job performance.[45]

Spain and the United States, by contrast, are closer to the origin (along the x-axis) since both favor a single belief association over others (in the case of Spain the Catholic Church and in the case of the United States 'civic religion'), but only informally.[46] In Spain, for instance, religious education classes taught by members of belief associations other than the Catholic Church are not publicly funded.[47] Finally, at the other end of the x-axis, near the y-axis, are those governments that are agnostic, those states like the Netherlands and Germany that do not favor one belief association over others at all.[48] For those governments, "religious institutions must not be placed in a more disadvantageous position than societal groups."[49] Yet, "the system of church and state relationships is characterized . . . as one of separation."[50]

The y-axis measures the extent to which a government cooperates with non-dominant belief associations. Pakistan is at one end since it is hostile to belief associations other than the dominant belief association (Sunni Islam).[51] For instance, until recently, the government of Pakistan required Muslims entering and leaving the country to affirm that Muhammad was the 'seal of the prophets,'

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42. *See, e.g.*, Asher Maoz, *Religious Human Rights in the State of Israel*, *in* WITTE, *supra* note 41, at 357 ("Israel was established as a Jewish state."); Shimon Shetreet, *State and Religion: Funding of Religious Institutions – The Case of Israel in Comparative Perspective*, 13 ND J. L. ETHICS & PUB POL'Y 421, 431 (1999) ("'The process of establishment means that the state has accepted the Church [of England] as the religious body in its opinion truly teaching the Christian faith.'").

43. David McClean, *State and Church in the United Kingdom*, *in* STATE AND CHURCH IN THE EUROPEAN UNION 307, 311 (Gerhard Robbers ed., 1996) [hereinafter ROBBERS].

44. *See* ANAYASA [Constitution] art. 2 (Turkey); CONST. art. 2 (France).

45. *Cf.* Kalac v. Turkey, 41 Eur. Ct. H.R. (ser. A) 1199 (1997-IV).

46. *See* Constitución [C.E.] art. 16(3) (Spain) ("The public powers shall take into account the religious beliefs of Spanish society and maintain the appropriate relations of cooperation, with the Catholic Church and other denominations."); County of Allegheny v. ACLU, 492 U.S. 573, 595 n.46 (1989) (mentioning "ceremonial deism").

47. Ivan C. Iban, *State and Church in Spain*, *in* ROBBERS, *supra* note 43, at 107.

48. STATUUT NED. [Constitution] art. 6(1) (Kingdom of the Netherlands) ("Everyone shall have the right to manifest freely his religion or belief, either individually or in community with others"); GRUNDSETZ [GG] [Constitution] art. 4(1) (F.R.G.) ("Freedom of creed, of conscience, and freedom to profess a religious or non-religious faith are inviolable").

49. Gerhard Robbers, *State and Church in Germany*, *in* ROBBERS, *supra* note 43, at 60 (describing Germany).

50. Sophie C. van Bijsterveld, *State and Church in the Netherlands*, *in* ROBBERS, *supra* note 43, at 215.

51. *See generally* M. Nadeem Ahmad Siddiq, *Enforced Apostasy:* Zaheeruddin v. State *and the Official Persecution of the Ahmadiyya Community in Pakistan*, 14 LAW & INEQ. J. 275 (1995); *see also* Donna E. Arzt, *Religious Human Rights in Muslim States of the Middle East and North Africa*, 10 EMORY INT'L L. REV. 139, 153-54 (1996).

thereby forcing the Ahmadis, who consider themselves Muslim but believe in subsequent revelation, either to recant or to declare themselves non-Muslims. England and the United States are both near the x-axis, but England is below the x-axis (it is more hostile, especially to groups like the Sikhs)[52] whereas the United States is above the x-axis (it is more willing to cooperate, especially with groups like the Old Order Amish).[53] Finally, at the other end of the y-axis are Germany and the Netherlands. These states believe that "[c]hurch and state—throne and altar— . . . hav[e] different responsibilities, but they both have public responsibilities . . . and thus cooperation between the two works to the benefit of society as a whole."[54] These cooperative states strive to "maintain a sphere of positive tolerance that makes room for the religious needs of society."[55]

I will now render two examples in more detail, in the hope of clarifying the model. First consider Russia. Russia is in the bottom right-hand corner of my graph because it comes closest to combining agnosticism with hostility. Russia is at once predominantly Orthodox and a "secular state."[56] But it neither embraces secularism,[57] at least in part because secularism is tainted by its association with the Soviet past,[58] nor Orthodoxy.[59] Indeed, as one commentator has put it, Russia "forbid[s] 'the propaganda of exclusiveness' of religious communities [and this] is to impose an extremely harsh constraint on the preaching of . . . the main religion[]."[60] Russia is not only agnostic, it is also hostile to non-dominant belief associations. For instance, the government seems to discriminate against minority religious groups.[61] Moreover, there is no doubt that the Federal Law on

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52. *See generally* Satvinder S. Juss, *The Constitution and Sikhs in Britain,* 1995 BYU L. REV. 481.

53. *Cf.* Wisconsin v. Yoder, 406 U.S. 205 (1971).

54. THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES 171 (Stephen v. Monsma & J. Christopher Soper eds. 1997) [hereinafter MONSMA].

55. Robbers, *supra* note 49, at 60.

56. *See* KONST. (Constitution) art. 14 [Russian Federation] *available at* http://www.constitution.ru/en/10003000-01.htm ("1. The Russian Federation is a secular state. No religion may be established as a state or obligatory one. 2. Religious associations shall be separated from the State and shall be equal before the law.").

57. Indeed, Russia guarantees freedom of belief more extensive than that guaranteed by the United States. *See* KONST. (Constitution) arts. 29(1), (3) [Russian Federation] ("1. Everyone shall be guaranteed the freedom of ideas and speech. . . . 3. No one may be forced to express his views and convictions or to reject them."); *see also*, J. Brian Gross, Note, *Russia's War on Political and Religious Extremism: An Appraisal of the Law 'On Counteracting Extremist Activity,'* 2003 BYU L. REV. 717, 750 ("The 1990 law created a fairly liberal regime that promoted the growth of foreign religious organizations and, in some instances, led to a rise in religion-related abuses.")

58. The Soviet Constitution proclaimed, "[c]itizens of the USSR are guaranteed freedom of conscience . . . [but] the church is separated from the state, and the school from the church." KONST. (Constitution) art. 52 [U.S.S.R.]). While "all Soviet citizens who profess[ed] any form of religious belief [we]re placed on the same footing as all the other citizens who, pursuant to their right under article 52, [might] elect to become atheists," the Soviet Constitution "embodie[d] a distinct political ideology as well as a secular theology," Christopher Osakwe, *Equal Protection of Law in Soviet Constitutional Law and Theory – A Comparative Analysis,* 59 TUL. L. REV. 974, 1000 (1985).

59. *See* Gross, *supra* note 57, at 717.

60. Alexander Verkhovsky, *Taking Anti-Extremism to Extremes*, Johnson's Russia List, *at* http://www.cdi.org/russia/johnson/6401-1.cfm (Aug. 14, 2002).

61. *Putin's Anti-Extremism Drive Is Failing, Rights Group Charges,* 3 BIGOTRY MONITOR, *at* http://www.fsumonitor.com/stories/013103Russia.shtml (Jan. 31, 2003) ("For example . . . when a

Counteracting Extremist Activity[62] throws a damper on the work of belief associations.

Consider next the United States. The United States, because it favors civic religion and cooperates with non-dominant belief associations to a limited extent, is well to the right of and slightly above the origin on my graph. The United States government endorses what sociologist Robert Bellah calls civil religion[63]—that is, "a set of beliefs and attitudes that explain the meaning and purpose of any given political society in terms of its relationship to a transcendent, spiritual reality, that are held by the people generally of that society, and that are expressed in public rituals, myths and symbols."[64] Indeed, government officials frequently advert to 'our Christian heritage'[65] and rely on religious symbols in public ceremonies.[66] As Justice O'Connor has explained, religious images may "serve, in the only ways reasonably possible in our culture . . . [to] solemniz[e] public occasions, express confidence in the future, and encourag[e] the recognition of what is worthy of appreciation in society."[67] Although civic religion is not as obvious a dominant belief structure as, say, Islam is in Pakistan,[68] there is no doubting that the United

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group of Orthodox believers objected to the use of mandatory tax identification numbers on religious grounds, a court ruled to exempt them. But when Muslim women asked to wear their traditional headscarves in their passport photographs, a court ruled that the Interior Ministry ban on head coverings in ID photos took precedence over their faith.").

62. *See* Gross, *supra* note 57, at 717.

63. Bellah has defined American religion as "an elaborate and well institutionalized civil religion [i.e.] certain common elements of religious orientation that the general majority of Americans share [and that] have played a crucial role in the development of American institutions and still provide a religious dimension for the whole fabric of American life, including the political sphere." Robert Bellah, *Civil Religion in America,* 96 DAEDALUS 1, 24 (1967), *quoted in* Yehudah Mirsky, Note, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237, 1248 (1986).

64. E.M. West, *A Proposed Neutral Definition of Civil Religion,* 22 J. OF CHURCH & STATE 23, 39 (1980), *quoted in* Mirsky, *supra* note 63, at 1249.

65. John Quincy Adams, addressing the American people, once said, "the ark of your covenant is the Declaration of Independence. Your Mount Ebal, is the confederacy of separate state sovereignties, and your Mount Gerizim is the Constitution of the United States." H. Wayne House, *A Tale of Two Kingdoms: Can There Be Peaceful Coexistence of Religion with the Secular State*, 13 BYU J. PUB. L. 203, 205 (1999) (quoting *The Jubilee of the Constitution, A Discourse Delivered at the Request of the New York Historical Society in the City of New York, on Tuesday, the 30th of April, 1839, Being the Fiftieth Anniversary of the Inauguration of George Washington as the President of the United States, on Thursday, the 30th Of April, 1789; by John Quincy Adams (Entered According to the Act of Congress, in the Year 1839, by Joseph Blunt, for the New York Historical Society, in the District Court of The Southern District of New York*). More recently, Justice Douglas has pointed out, "[w]e are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952).

66. *See* Marsh v. Chambers, 463 U.S. 783, 794 (1983) (Nebraska's employment of a chaplain to open each legislative session with a prayer is not a violation of the Establishment Clause). In this respect, the government is simply responsive to recent polls, which suggest, "94% of Americans believe in God or a universal spirit, 71% believe in heaven, and 53% believe in hell." Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CALIF. L. REV. 293, 294 (1993).

67. Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring). For more on the Supreme Court's willingness to acknowledge our religious past, see Mirsky, *supra* note 63, at 1245 ("The legitimate functions of government are defined . . . by what government is already doing, without any reference to the substantive content and constitutional value of the activity in question.")

68. Mirsky, *supra* note 63, at 1250 ("A . . . characteristic of civil religion is its essentially political, non-sacral character.")

States favors it over all others.[69]

The United States occasionally, but not always, cooperates with non-dominant belief associations. On the one hand, the Supreme Court has excepted the Old Order Amish from educational requirements.[70] Other sects, on the other hand, have not fared so well. The Mormons, for instance, were subject to considerable persecution.[71] Some argue that the Unites States will only cooperate with those belief associations it considers harmless.[72]

B. What Is Cooperation?

While it is easy intuitively to understand what is meant by favoritism and agnosticism, it is considerably harder to parse the terms cooperation, neutrality and hostility. This sub-section strives to define the differences between cooperation and neutrality (and between full cooperation and some intermediate type of relationship, one that might be called benevolent neutrality). Simply put, a fully cooperative government affords belief associations the right to take belief-motivated *action*, *supports* belief associations, and offers belief associations *protection*. A neutral government affords some individuals, but no associations, the right to take belief-motivated action, does not support either individual members of or belief associations as groups, and does not protect belief associations.[73] A benevolent neutral government[74] affords members of belief associations a thicker right to take belief-motivated actions than would a neutral government, but otherwise differs little from that form.

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69. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 325 (1987) ("[The] concept [of neutrality and a civil religion] appears to be . . . irresistible.").

70. Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).

71. *See infra* text accompanying notes 161-62.

72. The harm principle finds its first expression in JOHN STUART MILL, ON LIBERTY 114-41 (Currin V. Shields ed., 1956). Subsequent proponents include Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099.

73. For more on this distinction from the European perspective, see MONSMA, *supra* note 54, at 165; Martin Heckel, *The Impact of Religious Rules on Public Life in Germany*, *in* WITTE, *supra* note 4141, at 199. *See also* Robbers, *supra* note 49, at 61 ("Freedom of faith . . . . [includes] a negative aspect, that is the right not to have and/or not to belong to a particular faith . . . . [but] also guarantees the right to act according to one's beliefs.").

74. Chief Justice Burger coined this term in *Walz v. Tax Commission of the City of New York*. He said, "[s]hort of . . . expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." 397 U.S. 664, 669 (1970). As Frederick Mark Geddes has explained, "[b]enevolent neutrality is the doctrinal combination to which we would return if religious exemptions were reinstituted without substantial change in establishment clause doctrine." *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 569 (1998).

First, a cooperative government offers belief associations thick rights to opt-out of generally applicable laws; that is what I mean when I say a cooperative government permits belief-motivated action. For instance, in the Netherlands, the government permits employees to rest on whatever their belief system designates as holy days.[75] Likewise, the German Constitutional Court has explained, "[r]eligious freedom [under the German Constitution] . . . encompasses not only the (internal) freedom to believe or not to believe but also the individual's right to align his behavior with the precepts of his faith and to *act* in accordance with his internal convictions."[76] Indeed, that court has maintained that a husband may not be prosecuted for neglect even when he refuses a life-saving blood transfusion for his wife on religious grounds.[77]

Neutral governments guarantee no such right of action. In the United States, for instance, the Constitution precludes the government from singling out associations for ill treatment[78] and protects the rights of individuals to believe as they wish,[79] but does not necessarily permit them, or those with whom they associate, to opt-out of generally applicable laws.[80] Indeed, as the Supreme Court explained in *Cantwell v. Connecticut*, the Free Exercise Clause "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[81] Finally, benevolent neutral governments offer a moderate right of action. In Greece, for instance, although members of belief associations may opt-out of some generally applicable laws, a Jehovah's Witness was nevertheless sentenced to prison for proselytizing. The European Court of Human Rights has summed up the attitude of benevolent neutral governments by saying, "in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on [the] freedom [of religion] in order to recognize the interests of the various groups."[82]

Second, cooperative governments support belief associations. In Germany, for instance, the government helps churches collect membership dues.[83] Likewise,

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75. *Cf.* MONSMA, *supra* note 54, at 65.

76. *Religious Oath Case* (1972), 33 BverfGE 23, *cited in* Monsma, *supra* note 54, at 165 (emphasis added); *see also* Axel Frohr. von CAMPENHAUSEN, *The German Headscarf Debate*, 2004 BYU L. REV. 665, 677 ("Religious convictions that dictate one behavior as the correct way to cope with circumstances are also protected by article 4.").

77. Edward J. Eberle, *Free Exercise of Religion in Germany and the United States*, 78 TUL. L. REV. 1023, 1049 (2004).

78. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993)

79. *Cf.* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.")

80. Employment Division v. Smith, 494 U.S. 872, 921 (1990) (refusing to permit a Native American Church an exemption from laws forbidding the consumption of peyote); *see also* Hamilton, *supra* note 72, at 1101 ("When it comes to the public good, the rule of law needs to govern religious institutions, just as it does other private entities.")

81. Cantwell v Connecticut, 310 U.S. 296, 303-304 (1940).

82. Kokkinakis v. Greece, Ser. A, no. 260-A, para. 33 (1993).

83. MONSMA, *supra* note 54, at 173.

in the Netherlands, the government guarantees belief associations a certain amount of media exposure.[84] Both Germany and the Netherlands also permit and fund dedicated schools run by belief associations.[85] Neutral governments, on the other hand, offer no such support. The United States forbids, for instance, the direct provision of federal funds to parochial schools.[86]

Finally, a cooperative government protects belief associations by offering them a remedy when their beliefs are impugned.[87] As Gary Jacobsohn has said of Israel, for instance, "the defense of the group against outrageous verbal assault can readily be assimilated into an argument for individual liberty."[88] A neutral government, on the other hand, affords no such remedy.[89]

II. THE PRIVILEGE PARADIGM AND THE NEW IRAQI CONSTITUTION

The model I have sketched of the set of possible relationships between governments and belief associations suggests that one may disaggregate two questions: the 'cooperation question' and the 'establishment question.' A government may be agnostic yet cooperative, or it may have an established church and remain hostile to other belief associations. From this model, my argument proceeds in two steps. First, I consider what answers to the 'cooperation' and 'establishment' questions would best conduce to the construction of state and nation in Iraq. I argue that cooperation is an engine that could drive Iraqi state- and nation-building. I further argue that cooperation requires establishment, at least in Iraq (and perhaps in other transitional Islamic states), and therefore that establishment is a necessary prerequisite to the state- and nation-building project. In brief, I maintain that the best way to build an Iraqi state and construct an Iraqi nation is by adopting what I call a privilege paradigm—that is, by privileging both non-dominant belief associations (cooperation) and the religion of the majority (establishment). Second, I assess whether the Iraqi Constitution is congruent with the theoretical ideals of the privilege paradigm and conclude that it is.

In making my argument for the privilege paradigm I echo Alexis de Tocqueville[90] and James Madison.[91] De Tocqueville emphasized the importance of civil associations, including and especially those I call belief associations,[92] to

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84. Van Bijsterveld, *supra* note 50, at 220.

85. MONSMA, *supra* note 54, at 183 (discussing German schools); Van Bijsterveld, *supra* note 50, at 219 ("Private schools are funded by the state under the condition that they meet certain educational standards.").

86. Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002) (noting that the Establishment Clause forbids "government programs that provide aid directly to religious schools").

87. Maoz, *supra* note 42, at 360 (describing stringent Israeli penalties for racist or religiously-inspired crimes).

88. GARY JEFFREY JACOBSOHN, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES 227 (1993).

89. *Cf.* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down a bias-motivated crime law as content-based and inconsistent with the First Amendment).

90. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 106 (Henry Reeve trans., Vintage Classics 1990) (1835).

91. Everson v. Board of Education, 330 U.S. 1, 63 app. (1946).

92. Indeed, this is unsurprising, since "[r]eligion is the leading force in American civil society . . . ." Maddigan, *supra* note 66, at 316.

the effective provision of state services and the construction of national identity. As John O. McGinnis has said, not only did de Tocqueville think that belief associations "generate what modern sociologists would call social capital," but he also believed that "civil associations have influence at the local level, making local government more responsive and contributory to a more public-spirited citizenry."[93] This is one of two important strands in my argument for the privilege paradigm—that privileging, and cooperating with, belief associations will best permit Iraq to create a state and forge a nation.

Madison saw "the establishment clause primarily as a means of . . . encouraging a multiplicity of mutually balancing sects, all competing for adherents and defining themselves in relation to each other, thus achieving a creative equilibrium."[94] As Michael McConnell has said, with "[j]udicially enforceable exemptions . . . [a government can] ensure that unpopular or unfamiliar faiths will receive the same consideration afforded mainstream or generally respected religions . . . ."[95] This is the second strand of my argument for the privilege paradigm—that Iraq should afford each belief association thick and equal rights in order to induce each to become more responsive to its constituents.

A. Cooperation, State Formation, and Nation Building

1. State Formation

To be legitimate, a state must provide certain services.[96] As Max Weber has put it, the state is an entity that monopolizes the use of force within its boundaries.[97] Some argue that this is the state's only responsibility.[98] Others, like Michael Walzer, believe that the state must also provide medical and social services.[99] Iraq seems likely to be the latter kind of state. Indeed, the Constitution purports to establish a welfare state.[100] This sub-section assumes, therefore, that state legitimacy in Iraq first requires the creation of a secure environment and second, the provision of certain services (including health-care and social services). In the words of a recent panel on UN reform, the latter is important to state formation "not because [it is] intrinsically good but because [it is] necessary to achieve the dignity, justice, worth and safety of . . . citizens."[101] These goals—security and services—can best be achieved by the Iraqi government through cooperation with belief associations.

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93. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 491 (2002).

94. Mirsky, *supra* note 63, at 1239.

95. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1419-20 (1990).

96. *Cf.* MICHAEL WALZER, SPHERES OF JUSTICE 84 ("[E]very political community attends to the needs of its members as they collectively understand those needs.").

97. MAX WEBER, THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (1947).

98. *See generally* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

99. *Cf.* WALZER, *supra* note 96, at 86-91 (discussing medical care and arguing that it should be dispensed to all who need it).

100. *See* IRAQ CONST. art. 30.

101. United Nations, *Report of the Secretary General's Panel on Threats, Challenges, and Changes* at 17 (2004), *available at* http://www.un.org/secureworld/report2.pdf.

First, as Noah Feldman has noted, the most "reliable guarantors of . . . security [in Iraq are] associations forming around denominational identity."[102] Indeed, many prominent Iraqis rely on their co-religionists to keep them safe when traveling about the country.[103] The way that Shi'a Ayatollah Ali Sistani was able to rein in rebel leader Muqtada al-Sadr[104] suggests how important belief associations may be to controlling Iraq.

Second, belief associations are effective purveyors of services. In the United States, for instance, local associations provide many social services, and are often more generous and effective than the federal government.[105] As one analyst has put it, "[r]eligious charities are some of the most efficient social service providers, as well as among the most successful, measured in terms of lives permanently changed for the better."[106] Therefore, there are strong *practical* reasons to permit federal funding of religious belief associations.[107]

The same is true elsewhere. In England "the church was the sole provider of education or health care long before the state assumed these roles"[108]; and in Germany, "[r]religious denomination[s] . . . have been a driving force for the organization of social activities."[109] As one prominent European commentator has put it, "[w]ithout [religious] services, the guarantees of a social state . . . . [w]ould be mere empty postulates."[110]

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102. WHAT WE OWE IRAQ, *supra* note 11, at 78.

103. Iyad Jamal Eddin, for instance, has "confirmed that the Shiite references are independent from the state . . . [and have] great weight . . . in the Iraqi street." *Al Hayat*, Oct. 18, 2005, *available at* http://www.almendhar.com/english_6984/news.aspx.

104. *See* WHAT WE OWE IRAQ, *supra* note 11, at 39 (describing Sistani's efforts to marginalize al-Sadr as "a classic defense by institutional authority against incipient charismatic appeal").

105. Peter J. Spiro, *The Citizenship Dilemma,* 51 STAN. L. REV. 597, 631 (1999) (book review) ("In the U.S. context, a state may be more likely to establish generous benefits than would the federal government, where those benefits will be enjoyed by established state residents, for they will share the solidarities that come with living in the same limited space.").

106. Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 39 (1997).

107. Michael Walzer, *Leary Lecture: Drawing the Line: Religion and Politics*, 1999 UTAH L. REV. 619, 635-36. *Cf.* Richard A. Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375, 382 (1990).

108. Rex Ahdar & Ian Leigh, *Is Establishment Consistent with Religious Freedom?*, 49 MCGILL L.J. 635, 647 (2004).

109. Van Bijsterveld, *supra* note 50, at 212.

110. Robbers, *supra* note 49, at 63.

All this is doubly true throughout the Middle East.[111] Moreover, not only are belief associations effective at ensuring the provision of basic services, but it was Islamic constitutionalism, lobbied for by groups like the Muslim Brotherhood,[112] that was the principal motive ideology behind and practical inspiration for the establishment of the modern welfare states of the Middle East. That is, Islamic constitutionalism has been a source of ideological justification.[113] Indeed, Islamic law requires the community to provide sufficient levels of food, clothing and housing for the poor; "every Muslim has the duty of *zakat*, to donate alms to the poor."[114] And Islamic constitutionalism has also been a source of procedural inspiration. Classically, there were few procedural limits on secular law. For instance, magistrates, those who dispensed secular law, were able to rely "on intimidation and on circumstantial and hearsay evidence."[115] Procedure was a matter of religious law. It has been at least in part by importing the procedures of religious law that modern Middle Eastern welfare states have been able to function.

Reaching out to religious communities, cooperating with them, will be necessary if Iraq is to provide the basic services that are the prerequisites to state-formation. Benevolent neutrality, or neutrality, would not likely be sufficient. Simply affording individual members of belief associations thick rights to opt-out of generally applicable laws would not foster the development of the partnerships that the German government, for instance, enjoys.

2. Nation Building

A nation is an imagined community.[116] Peter Schuck has suggested that citizenship and nationality have four components: the political; the legal; the psychological; and the sociological.[117] The political component "affirms the value of public participation in the project of self-government."[118] The legal component

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111. *Cf.* Soli Ozel, *Islam Takes a Democratic Turn*, N.Y. TIMES, Nov. 5, 2002, at A27 (describing the victory of the Justice and Development Party in Turkey as "for the angry, downtrodden, impoverished and excluded masses"); International Crisis Group, *Islamic Social Welfare Activism in the Occupied Palestinian Territories: A Legitimate Target?*, at ii (2002) ("[S]uch institutions [belief association in the Palestinian Territories] are more efficient than their secular or official counterparts, delivering aid without distinction as to religious belief or political affiliation.").

112. L. CARL BROWN, RELIGION AND STATE: THE MUSLIM APPROACH TO POLITICS 155 (2000) (Sayyid Qutb once said, "when there are those who cannot even find rags to cover their bodies, it is an impossible luxury that a mosque should cost a hundred thousand guineas").

113. *See, e.g.*, PATRICIA CRONE, GOD'S RULE: GOVERNMENT AND ISLAM 393 (2004) (citing Al-Amiri for the proposition that "'[r]eligions are never established for private benefit or individual advantage but always aim at collective welfare'"). There is at least one significant counter-example. The Iranian counter-revolution of 1907 led by Sheikh Fazlollah Nuri disputed, *inter alia*, the "use of funds allocated to religious ceremonies for the purpose of building factories." SAID AMIR ARJOMAND, THE TURBAN FOR THE CROWN: THE ISLAMIC REVOLUTION IN IRAN 51 (1990).

114. Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT'L L.J. 349, 371 (1996) [hereinafter *Heroes or Heretics*].

115. AL-MAWARDI, THE ORDINANCES OF GOVERNMENT 94 (Wafaa H. Wahba tr., 1996).

116. *See generally* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (Verso 2d ed. 1991).

117. Peter H. Schuck, *Citizenship in Federal Systems*, 48 AM. J. COMP. L. 195, 207 (2000).

118. *Id.*

"emphasizes the positive law that creates the distinctive status of citizen."[119] The psychological component concerns "whether [citizens] conceive of themselves primarily as members of a particular state rather than as members of some other political community."[120] Finally, the sociological component "looks to how individual citizens are integrated into civil society."[121] Since the Constitution of Iraq, like most constitutions, satisfies the requirements of the legal component,[122] and since I believe that the psychological and sociological components are inextricably tied to each other, this sub-section presumes that nation formation has two salient dimensions: the political/participatory; and the psycho-sociological.

The Political/Participatory Component

Citizens are likely to participate in national affairs when the government is tolerant of opposing views, and when the government recognizes and affirms group identities. When a government cooperates with belief associations, it exhibits tolerance and becomes more tolerant; it also reinforces group identities. When a government cooperates with belief associations, therefore, it stimulates political participation.

A tolerant government willing to affirm group identities is likely to induce participation. First, tolerance is good for participation. Many believe that tolerance is the glue that holds a nation together.[123] Both Chandran Kukathas and William Galston, for instance, argue that tolerance, rather than autonomy, is the fundamental value of the liberal government. Chandran Kukathas says "toleration is important, [as an independent value]."[124] Likewise, William Galston declares, "properly understood, liberalism is about the protection of diversity, not the valorization of choice."[125]

Second, affirming group identities is also good for participation. As George Mead has noted, "one has to be a member of a community to be a self."[126] Joseph Raz concurs, "membership in [a] cultural group is a major determinant of [an individual's] sense of who [she is]; it provides a strong focus of identification; it contributes to what we have come to call [an individual's] sense of [her] own

119. *Id.*
120. *Id.*
121. *Id.* at 208.
122. *See* IRAQ CONST. pmbl. ("We the sons of Mesopotamia . . . .").
123. There are, of course, others who argue that the liberal states should not afford groups *qua* groups rights. Emile Durkheim, *Individualism and the Intellectuals*, *in* ON MORALITY AND SOCIETY (Robert N. Bellah ed., University of Chicago Press 1973). However, it is hard to see how a state can avoid doing so, at least to some extent. *See* Naomi Mezey, *The Common Place of Law Out of the Ordinary: Law, Power, Culture, and the Commonplace*, 26 LAW & SOC. INQUIRY 145, 152 (2001); Nomi Maya Stolzenberg, *Liberalism and Illiberalism: The Return of the Repressed: Illiberal Groups in a Liberal State*, 12 J. CONTEMP. LEGAL ISSUES 897, 899 (2002) ("[The] reverse critique maintains that the exercise of individual rights produces group rights.")
124. Chandran Kukathas, *Cultural Toleration*, *in* ETHNICITY AND GROUP RIGHTS 69, 79 (Ian Shapiro & Will Kymlicka eds., New York University Press 1997).
125. William A. Galston, *Two Concepts of Liberalism*, 105 ETHICS 516, 523 (1995).
126. GEORGE H. MEAD, MIND, SELF, AND SOCIETY FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST 162 (Charles W. Morris ed., University of Chicago Press 1972).

identity."[127] Choices, and legal actions, are only meaningful when made or rendered against a rich backdrop of intersubjective norms.[128] As one theoretician has summarized, "[c]ultural freedom is . . . a precondition of liberal self-invention."[129]

But what is the link between cooperation and the establishment of a tolerant government willing to affirm group identities? In fact, cooperation demonstrates, entrenches, and begets tolerance. First, it is a visible sign that a government welcomes dissent. To demonstrate that this is so, I will briefly compare Israel and Turkey. Israel has a notoriously cooperative government (Israel plots as a favoritism-cooperation regime); Turkey, on the other hand, has a notoriously uncooperative government (Turkey plots as a favoritism-hostility regime). Gary Jacobson has said of Israel, "ethnoreligious groups compete with the state for the right to exercise coercive authority over individuals whom the group views as its members and whom the state recognizes as citizens."[130] By contrast, Ran Hirschl has said of Turkey that courts found it "problematic that pro-hijab [pro-female-head-covering] groups based their arguments on religious freedom grounds."[131] Rather, "[t]he FP [had to] present[] the head scarf ban as a human rights violation and a suppression of personal liberties, rather than as a matter of religion."[132] While members of belief associations have been able to dissent in cooperative Israel,[133] it has been historically quite hard for them to do so in hostile Turkey. In fact, Turkey routinely disbands political parties.[134] This has provoked widespread disaffection. Indeed, an anti-secular, anti-government trend began in 1946 when two "conservative deputies suggested th[e] reintroduction of religious education into the public schools."[135] The trend grew stronger when Necmettin Erbakan left the Justice Party in 1969 to found his own political party, and came to full national

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127. Joseph Raz, *Multiculturalism: A Liberal Perspective*, *in* ETHICS IN THE PUBLIC DOMAIN 178 (Clardendon Press rev. ed. 1995).

128. *Free Speech and Community: Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 475 (1997).

129. Eric J. Mitnick, *Three Models of Group-Differentiated Rights*, 35 COLUM. HUM. RTS. L. REV. 215, 234-35, 217 (2004); *see* Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 643 (1992) ("The individualist claims that her objective is to treat individuals equally, and that she does so by treating them as abstract individuals rather than as members of a group. In reality, for members of minority ethnic groups, having equal treatment turns out to be merely the right to be turned into some version of the members of the dominant culture. One can treat individuals equally only if one is comparing them from a given point of view. That point of view is not the abstract individual, for there is not such a creature, but rather the individual who is located in and defined by the dominant culture and tradition.")

130. JACOBSOHN, *supra* note 88, at 27.

131. Ran Hirschl *Constitutional Courts in the Field of Power Politics: Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1850 (2004).

132. Nilufer Narli, *The Rise of the Islamist Movement in Turkey*, *in* REVOLUTIONARIES AND REFORMERS: CONTEMPORARY ISLAMIST MOVEMENTS IN THE MIDDLE EAST 132 (Barry Rubin ed., State University of New York Press 2003) [hereinafter REVOLUTIONARIES].

133. Israel has, however, banned certain outrageous political parties (like the Kach Party).

134. *See* United Communist Party of Turkey v. Turkey, 1998 -I Eur. Ct. H.R. 1, *available at* http://www.worldlii.org/eu/cases/ECHR/1998/1.html..

135. Susanna Dokupil, *The Separation of Mosque and State: Islam and Democracy in Modern Turkey*, 105 W. VA. L. REV. 53, 72 (2002).

flower when Turgut Ozal proclaimed "Turkish-Islamist Synthesis" in 1983.[136] The trend culminated with the recent election that brought the Justice and Development Party to power.[137] As Hakan Yavuz puts it, Turkey's "uncritical modernization ideology prevents open discussion that would lead to a new and inclusive social contract that recognizes the cultural diversity of Turkey."[138] Cooperation therefore performs a signaling function; it shows that a government welcomes dissent.

Not only is cooperation a signal, but it also may entrench tolerance, at least in Iraq and the Middle East. Several of the most prominent liberal Islamists[139] rely on notions of cooperation to buttress their theories. When a government cooperates, it empowers liberal Islamists like them. When they are empowered, the government is in turn more likely to remain cooperative.[140] Sheikh Yusuf al-Qaradawi,[141] Abdol Karim Soroush, and Rachid Ghannouchi, for instance, require cooperation.[142] Both Qaradawi and Soroush believe that strong opposition from non-Muslim belief associations is necessary to progress. Qaradawi urges Islamic states to use what he calls the "*fiqh* of balances" to answer knotty contemporary questions—like whether one should assume public office in a corrupt state.[143] Fiqh "is, to a large extent, a road map of what the law is, how it is to be applied, and

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136. Ely Karmon, *Radical Islamist Movements in Turkey*, *in* REVOLUTIONARIES, *supra* note 132, at 46.

137. "[T]he intensity of secularization in Turkey implemented under Kemal Ataturk in the 1930s and 1940s ultimately precipitated a fundamentalist response by various Islamist groups in that country." Charles McDaniel, *Islam and the Global Society: A Religious Approach to Modernity,* 2003 BYU L. REV. 507, 522.

138. M. Hakan Yavuz, *Cleansing Islam from the Public Sphere*, http://interact.sunnirazvi.org/forum/read.php?14,1165,1165 (last visited Nov. 14, 2005).

139. By "liberal Islamists" I mean Islamists who argue for democratic participation in the government of their countries. I find some of the other positions taken by 'liberal Islamists' personally and morally reprehensible. *See infra* note 141 (noting that Qaradawi, while an advocate of democracy, has also supported bombing civilians in Israel).

140. AMR HAMZAWY, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE KEY TO ARAB REFORM: MODERATE ISLAMISTS (2005), *available at* http://www.carnegieendowment.org/files/pb40.hamzawy.FINAL.pdf; BASSMA KODMANI, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE DANGERS OF POLITICAL EXCLUSION: EGYPT'S ISLAMIST PROBLEM, *available at* http://www.carnegieendowment.org/files/CP63.Kodmani.FINAL.pdf.

> Crucial to the process of reclaiming a political space would be the legalization of Islamic parties as a less dangerous alternative to the domination by the supposedly apolitical religious establishment. A political party or movement is a recognizable player. If it seeks to be legalized, it registers under a name, has an address, publicizes the names of its leaders, and spells out its agenda.

141. Qaradawi is a controversial figure. *Cf.* AFTER JIHAD, *supra* note 23, at 64 ("Qaradawi is a complex, problematic figure. He wrote an influential fatwa declaring Islam and democracy compatible . . . . [he] was one of the first and most important Muslim clerics to condemn the killing of civilians at the World Trade Center . . . [b]ut Qaradawi also advises Hamas").

142. For an opposing liberal Islamist view, *see* Mohamed Talbi, *Religious Liberty*, *in* LIBERAL ISLAM: A SOURCEBOOK 162 (Charles Kurzman ed., Oxford University Press 1998) ("[R]eligious liberty is basically the right to decide for one's self, without any kind of pressure ...to espouse the faith of one's choice.").

143. YUSUF QARADAWI, PRIORITIES OF THE ISLAMIC MOVEMENT IN THE COMING PHASE 34 (1992).

where necessary, how law can be discovered."[144] But since the '*fiqh* of balances,' according to Qaradawi, is "a rather positivistic *[f]iqh* based on the study of contemporary reality,"[145] those who would use it need to be able to bounce their ideas off those who disagree with them.[146] Indeed, Qaradawi explains "[a]ppreciating the other view and respecting the opinions of those who adopt contradictory attitudes," including on questions of religion, is a requirement for those who would use this *fiqh*.[147]

Likewise, Soroush believes that opposition is necessary to ensure that religious knowledge itself continues to expand. He explains, "[i]n a religious society, it is not religion per se that arbitrates, but some understanding of religion which is, in turn, changing, rational, and in harmony with the consensual and accepted extrareligious criteria."[148]

Finally, Rachid Ghannouchi, unlike Qaradawi and Soroush who value cooperation for second-order reasons, makes cooperation the centerpiece of his theory of Islamic democracy.[149] He calls for "an Islamic system that features . . . protection of minorities, equality of all secular and religious parties."[150] A government that embraces views like theirs is more likely to remain tolerant than one that does not, and their views require cooperation.

Nor are Qaradawi, Soroush and Ghannouchi members of a lunatic fringe. Within Islamic communities, the concept of *shura* (consultation) has been much discussed in recent years. Muhammad Iqbal, for instance, has averred:

> The transfer of the power of Ijtihad [interpretation] from individual representatives of schools to a . . . legislative assembly *which, in view of the growth of opposing sects*, is the only form Ijma [or *shura*] can take in modern times, will secure contributions to legal discussion from laymen who happen to possess a keen insight into affairs.[151]

However, *shura* requires freedom of belief and of thought.[152]

Third and finally, cooperation begets tolerance. When there are more, and

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144. M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-making*, 1 U.C.L.A. J. ISLAMIC & NEAR E. L. 135, 137 (2002).

145. QARADAWI, *supra* note 143.

146. *Id.*

147. *Id.*

148. ABD AL-KARIM SURUSH, REASON, FREEDOM, AND DEMOCRACY IN ISLAM: ESSENTIAL WRITINGS OF ABDOLKARIM SOROUSH 132 (Mahmoud Sadri & Ahmad Sadri eds. & trans., Oxford University Press 2000).

149. Soli Ozel, *Turkey at the Polls: After the Tsunami*, *in* ISLAM AND DEMOCRACY IN THE MIDDLE EAST 164 (Larry Diamond et al. eds., Johns Hopkins University Press 2003).

150. *Id.*

151. John L. Esposito & John O. Voll, ISLAM AND DEMOCRACY 28 (Oxford University Press 1996) (emphasis added); *see also* Islamic Foundation, *The Political Framework of Islam*, http://www.jamaat.org/islam/HumanRightsPolitical.html (Ahmed Said Khan & Khurshid Ahmad trans.) (last visited June 15, 2003) (based on interview with Syed Abul A'la Maudoodi).

152. Ali R. Abootalebi, *Islam, Islamists, and Democracy*, 3 MIDDLE E. REV. INT'L AFF. J. 14, 17 (1999) ("An indispensable element in building such [an Islamic society] is freedom of thought and expression, including freedom from government control and suppression."), *available at*, http://meria.idc.ac.il/journal/1999/issue1/abootalebi.pdf.

more equal, belief associations, tolerance is more likely than when there is a dominant belief association and only a handful of weak non-dominant belief associations. In the United States, for example, the proliferation of religious sects antedated the entrenchment of a culture of religious tolerance. As Noah Feldman has argued, in nineteenth century America, when those who sought to teach morality in public schools confronted the fact of religious heterogeneity, they adopted non-sectarian curricula.[153] Feldman explains:

> [When] religious heterogeneity [arose alongside] the strong sense among American elites . . . that education was necessary to produce citizens capable of virtuous political action . . . [and that] it must include . . . moral virtues . . . the solution . . . had to be a non-sectarian stance.[154]

Indeed, it was only when Catholics grew sufficiently strong to challenge Protestants that Protestants began aggressively to push for disestablishment.[155] To take one famous example, Justice Douglas is said to have passed a note to Justice Black that read "if the Catholics get public money to finance their religious schools, we better insist on getting some good prayers in public schools or we Protestants are out of business."[156] What Justice Douglas meant was, the fact of competition compelled Protestants to make one of two moves: either they had to fight Catholics for believers, and establish more and more religious Protestant schools, or both Catholics and Protestants had to agree to tone down the religious rhetoric in public schools.

What this means for Iraq is that if the government cooperates with and affirms belief associations, belief associations are likely to proliferate, and if such associations proliferate, each will have to cooperate with the others, and the government will become more tolerant. Belief associations that do not cooperate and compete will become irrelevant in the court of public opinion. For instance, radical Saudi ideologues have been the subject of ridicule because of their *fatwas* (religious decrees) banning soccer.[157] As Michael McConnell has summarized, "protect[ing] the interests of religious minorities in conflict with the wider society . . . encourages the proliferation of religious factions."[158]

At this point, one might say, "stop, what about the Mormons and other disfavored religious groups in the United States—wasn't polygamy outlawed, not tolerated?" Indeed, in 1856, Republicans likened polygamy to slavery, calling

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153. Symposium, *Beyond Separatism: Church and State: Non-sectarianism Reconsidered*, 18 J. L. & POLITICS 65, 71, 103 (2002).

154. *Id.*

155. For excellent discussion of this thesis, see Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 232 (2003) [hereinafter *Religious Minorities*]. *See also* Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 123-51 (2001); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297-305 (2001).

156. *Religious Minorities*, *supra* note 155, at 234.

157. *See* Geoff D. Porter, *God Is in the Rules*, N.Y. Times, Oct. 16, 2005 at 13. *Cf.* FRANKLIN FOER, HOW SOCCER EXPLAINS THE WORLD: AN UNLIKELY THEORY OF GLOBALIZATION (Harper Collins 2004).

158. McConnell, *supra* note 95, at 1515.

them "twin relics of barbarism."[159] In *Reynolds v. United States*, the Supreme Court upheld a law forbidding polygamy.[160] Yet the Mormon experience is not a counter-example; rather, it reinforces my point. The Mormon Church resisted these legal attacks.[161] Attempts to suppress Mormons and eradicate their faith failed. Their continued vitality provoked some of their opponents to modulate their views; they began to advocate the "strict separation of church and state."[162]

Not only does cooperation demonstrate, entrench and beget tolerance, but it also reinforces group identities. A cooperative government supports belief associations, protects them, and affords them thick rights to opt-out of generally applicable laws. Belief associations are stronger under cooperative governments than under neutral governments, and members of such associations are therefore more capable of political participation (inasmuch as they feel more secure). Indeed, as Christopher Eisgruber has noted, "religion [and belief associations more generally] [are] a source of especially virulent political factions . . . [and as such are] a valuable haven for political and philosophical diversity."[163]

Some argue that cooperation discourages participation because it permits legislators to adduce arguments that are not publicly accessible. The syllogism that supports this argument goes as follows: if the government uses its power when the use of that power cannot be justified by a reason that each citizen could conceivably understand, it alienates some citizens[164]; a religious reason (or reason provoked by belief of any kind) is a kind of reason that not all citizens can understand[165]; therefore, cooperation fosters disaffection.[166] This argument goes

159. Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 659 (2005) (quoting SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA 55 (The University of North Carolina Press 2002)).

160. 98 U.S. 145, 167-68 (1879); *see also* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. U.S., 136 U.S. 1, 46 (1890); Davis v. Beason, 133 U.S. 333, 347-48 (1890).

161. Nathan B. Oman, *The Story of a Forgotten Battle: Reviewing The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America*, 2002 BYU L. REV. 745, 749 (2002) ("The Mormons responded [to persecution] by resisting.").

162. Sarah Barringer Gordon, *'Our National Hearthstone': Anti-Polygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America*, 8 YALE J.L. & HUMAN. 295, 337 (1996).

163. Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U.L. REV. 347, 349 (1995).

164. *Cf.* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 103 (1980); JOHN RAWLS, POLITICAL LIBERALISM 137 (1993) ("[O]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.").

165. *Cf.* Abner S. Greene, *The Incommensurability of Religion*, *in* LAW AND RELIGION 226, 234 (Stephen M. Feldman ed., 2000) ("[R]eligion often self-consciously revels in the insensible."). Why this need be so is unclear. *Cf.* William P. Marshall, *The Other Side of Religion*, *in* LAW AND RELIGION, *supra*, (discussing the assumption that reason enjoys epistemological pride of place).

166. Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, *in* LAW AND RELIGION, *supra* note 165, at 77 ("If I am coerced on grounds that cannot motivate me, as a rational informed person, to do the thing in question, I cannot come to identify with the deed and will tend to resent having to do it.").

too far.[167] First, it is not clear that cooperation permits legislators to rely exclusively on religious reasons (or reasons provoked by belief) in passing laws.[168] Second, it is not clear that religious discussion might not be the best way of framing the argument for or against a certain law. For instance, Ayatollah Ali Sistani's *fatwa* calling for elections was considerably more effective than lay lobbying could have been at democracy promotion in Iraq.[169] Nevertheless, I agree that cooperation has its disadvantages. It is insufficiently sensitive to the claims of the lone dissenter; and it requires the government to make judgments about what counts as 'belief.' Both of these disadvantages could curtail participation.

Cooperation does not protect the lone dissenter. In the United States, no child need hear prayer in school. Under a cooperative government, on the other hand, children may have to study morality in schools.[170] Likewise, pacifists may be compelled to participate in celebrations of military victories.[171] To cap it all off, the European Commission of Human Rights has held that a cooperative government may tax even those who are not members of any belief association to pay for the 'secular' services provided by a belief association.[172] This problem has, however, less bite in Iraq than it might elsewhere. Since insecurity prompts individuals to join together,[173] there are few lone dissenters at large.[174]

Cooperation also requires the government to determine what counts as 'belief.' In England, for instance, a court of appeals had to decide whether the Church of Scientology was a 'church.' It found that it was not.[175] Likewise, in

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167. *See, e.g.*, Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective*, 88 MARQ. L. REV. 867, 870 (2005) ("[I]t cannot be the case that establishmentarianism is violative of liberal democracy even as we readily count many western establishmentarian nations as liberal democracies. Of these two premises, one must necessarily be untrue. It is the former.").

168. *Cf.* KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 25 (1988) ("[T]hough liberal democracy involves a limited commitment to publicly accessible reasons for decision, it does not entail for the political realm either exclusive reliance on such reasons or an unqualified acceptance of a narrow form of rationalism.").

169. *See* WHAT WE OWE IRAQ, *supra* note 11, at 40-41. Indeed, many prominent Islamist reformers use religious reasons to endorse democracy. Abdullah an-Naim, for instance, advocates revival of the doctrine of *naskh*. ABDUALLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION 34 (1990) ("[T]hat [principle] would permit applying some verses of Qur'an and accompanying Sunna instead of others."). Moreover, Islamic reasons may be more accessible than reasons provoked by other beliefs. *Cf.* Khaled Abou El Fadl, *Muslims and Accessible Jurisprudence in Liberal Democracies: A Response to Edward B. Foley's Jurisprudence and Theology*, 66 FORDHAM L. REV. 1227, 1229-30 (1998) ("[T]he internal dynamics of Islamic law affirm the principle of accessibility [of reasons]. There is no formal church in Islam. Furthermore, no single institution can define the correct view in Islamic law.").

170. Bernard and others v. Luxembourg, No. 17187/90, 75 Eur. Comm'n H.R. Dec. & Rep. 57 (1993).

171. *Cf.* Valsamis v. Greece, 1996-VI Eur. Ct. H.R. 72.

172. Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217, 1262 (2004).

173. NOZICK, *supra* note 98, at 12 ("Groups of individuals may form mutual-protection associations.").

174. *Cf.* WHAT WE OWE IRAQ, *supra* note 11, at 78-79.

175. *See* R v. Registrar General ex parte Segerdal [1970] 2 Q.B. 697; *see also* McClean, *supra* note 43, at 313; Peter Cumper, *Religious Liberty in the United Kingdom*, *in* WITTE, *supra* note

Israel the Supreme Court struck down an organizational challenge to a budget allocation because it found that the plaintiff organization (claiming it had not received it fair share of 'Haredi'[176] money) was not Haredi.[177] Such disparate treatment has been upheld by the European Commission of Human Rights.[178] This is not, however, an intractable problem. As one commentator has put it, "[t]he case of the Church of Scientology in Sweden illustrates that there are possibilities for overcoming traditional inequalities in the treatment of new or minority religious communities."[179] Indeed, these two disadvantages, especially in the Iraqi context, are outweighed by the advantages of cooperation.

The Psycho-Sociological Dimension

Citizenship is meaningful only if it "formaliz[es] an emotional attachment to . . . [a country and] to its other citizens."[180] Citizenship is at once a good that is distributed to particular individuals[181] and the glue that holds a nation together.[182] As T. Alexander Aleinikoff has put the latter point, "[w]ithout a notion of citizenship, sovereignty has no home."[183] In the United States, some have argued that working with belief associations may be the only way for the government to stem the tide of "individualism in American life and [frustrate] its continuing potential to threaten other important democratic values."[184] Others have suggested that our democratic system of government requires a kind of semi-devotional commitment to our Constitution.[185] Certainly, in Iraq, if the government were to cooperate with belief associations, citizens would find at once that peculiar benefits inured to them by virtue of their citizenship and that they would have more in common with other citizens than they had thought.

When it is an incident to the distribution of useful goods, citizenship is valued. This is, of course, a truism. But in Iraq, and elsewhere in the Middle East

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41, at 220 ("The granting of tax exemption to religions . . . has been accompanied by detailed discussion of what actually constitutes a religion . . . .").

176. Haredi describes any one of several sects of Judaism.

177. Shetreet, *supra* note 42, at 444.

178. *See* Scharffs, *supra* note 172, at 1266.

179. Thilo Marauhn, *Status, Rights and Obligations of Religious Communities in a Human Rights Context: A European Perspective*, 34 ISR. L. REV. 600, 631 (2000) (the Church of Scientology was recognized by Sweden after a series of constitutional and legislative changes that separated the Church of Sweden from the state). Likewise, in Spain, a court struck down an attempt by the government to impose stringent registration requirements on New Religious Movements (NRMs). Augustin Motilla, *Religious Pluralism in Spain: Striking the Balance Between Religious Freedom and Constitutional Rights* 2004 BYU L. REV. 575, 589-90 (2004).

180. Stephen H. Legomsky, *Why Citizenship?*, 35 VA. J. INT'L L. 279, 291 (1994).

181. *See generally* Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGRATION L.J. 1 (1989).

182. *See, e.g.*, Frederick Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504, 1504-05 (1986); Michael Walzer, *The Distribution of Membership, in* BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS 1-35 (P. Brown & H. Shue eds., 1981).

183. T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9, 14 (1990).

184. Maddigan, *supra* note 66, at 311.

185. Sanford Levinson, *Pledging Faith in the Civil Religion; Or, Would You Sign the Constitution?*, 29 WM. & MARY L. REV. 113, 119 (1987).

where goods are scarce,[186] if membership in a national community offers an economic leg up, it will be much in demand. Indeed, when "[c]onfronted with a feeling of impotence against dire economic and social forces, patronage allows even the lowliest individual the possibility to survive and the recourse to be heard."[187] But how and why does cooperation make citizenship a conduit for economic goods? In fact, cooperation encourages the development of local industries and sub-state groups, which are necessary to the creation of social capital and to economic advances.[188] Robert Putnam has demonstrated, commercial development and the existence of trusting and vibrant sub-communities are inextricably linked.[189] And at a broader level Marcus Noland has found, despite critics' assertions to the contrary, "[i]f anything, Islam promotes growth."[190] Under a cooperative government, therefore, individual members of belief associations are likely to value citizenship more than they would under a neutral government; as members of belief associations, they will be able to lay better claim to shares of the growing pie.

Second, cooperation is congenial to Islam. Since the overwhelming majority of Iraqis are Muslims, if the state is cooperative, rather than neutral, they are more likely to see it as friend rather than foe. Islam has historically been, and remains, a communitarian religion.[191] A cooperative government values belief associations *qua* belief associations; a cooperative government is communitarian. A neutral government values belief associations only insofar as citizens value them; it, unlike a cooperative government, is individualistic.

Medieval Muslim religious thinkers, whether philosophers or jurists, have described Islam as a set of principles that, if followed, would permit a community to create the City of God on Earth. Al-Farabi, for instance, said, "there may be a number of virtuous nations and virtuous cities whose religions are different, even

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186. *Cf.* Timur Kuran, The Absence of the Corporation in Islamic Law: Origins and Persistence (2005) (USC Law and Economics Paper No. 04-21; USC CLEO Research Paper No. CO4-16), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=585687.

187. HISHAM SHARABI, NEOPATRIARCHY: A THEORY OF DISTORTED CHANGE IN ARAB SOCIETY 21, 46 (1988).

188. Ian Ayres & Jonathan R. Macey, *Institutional and Evolutionary Failure and Economic Development in the Middle East*, 30 YALE. J. INT'L. L. 397 (2005).

189. ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 167-71 (1993); *see also* Marcus Noland, Religion, Culture, and Economic Performance 1 (2003) (KDI Working Paper Series, Working Paper 03-13) (unpublished, on file with the author, *available at* http://ssrn.com/abstract=497702) ("[S]ects . . . provide for extra-legal means of establishing trust and sanctioning miscreants in intragroup transactions, . . . reducing uncertainty and improving efficiency . . . .")

190. Noland, *supra* note 189, at 7.

191. *See* JOHN L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 1 (1982) ("The Islamic community (ummah) is to be the dynamic vehicle for the realization of the divine pattern."); Ira M. Lapidus, *State and Religion in Islamic Societies,* 151 PAST AND PRESENT 3, 9 (1996) ("No distinction was made between the realm of religion and that of the state."); Jason Morgan-Foster, *Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement*, 89 YALE H.R. & DEV. L.J. 67, 82 (2005) ("Social virtue [in Islamic societies] is preeminently collective rather than inter-individual."); David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT'L L. 819, 823 (1993) ("Sovereignty is divine, and therefore the will of God, even regarding daily matters").

though they all pursue the very same kind of happiness. For religion is but the impressions of these things or the impressions of their images, imprinted in the soul."[192] Likewise, Al-Ghazali, although he condemned philosophy for "abandoning the [traditional] imitation of what is true by embarking on the imitation of the false,"[193] urged that religion inform government. That neither philosophers nor jurists questioned the community's need for a religious leader is telling; as Patricia Crone has summarized:

> [T]here were three views on what would happen to the community if there ceased to be an imam [a religious leader]. The first was that it would cease to exist altogether . . .The second position was that a community without an imam . . . would lose its public sphere . . . . The third view was that the community would continue to exist . . . because the imam's functions . . . would devolve to [other religious scholars].[194]

If religion were a personal matter, neither a religious leader nor religious scholars would be necessary.

Modern Muslim thinkers hold similar views. Article X of the Universal Islamic Declaration of Human Rights declares, "The Quranic principle 'There is no compulsion in religion' shall govern the religious rights of non-Muslim countries. In a Muslim country, religious minorities shall have the choice to be governed in respect of their civil and personal matters by Islamic Law or by their own laws."[195] Indeed, as one commentator has explained, "[m]odern Muslim writings on pluralism . . . particularly stress that pluralism in Islam is conceived within a framework of unity . . . . [This] reflects the distinctive attitude of these Muslim thinkers toward *prioritizing society over the individual*."[196]

3. Does Cooperation Require Establishment?

I have argued up to this point that the ethics and pragmatics of state and

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192. Al-Farabi, *The Political Regime* (Fauzi M. Najjar, tr.), *in* MEDIEVAL POLITICAL PHILOSOPHY: A SOURCEBOOK 31, 41 (Ralph Lerner & Muhsin Mahdi eds., 1972) [hereinafter MEDIEVAL POLITICAL PHILOSOPHY].

193. AL-GHAZALI, THE INCOHERENCE OF THE PHILOSOPHERS 2 (Michael E. Marmura tr., 2002).

194. CRONE, *supra* note 113, at 242-43.

195. Arzt, *supra* note 53, at 142.

196. Muhammad Khalid Masud, *The Scope of Pluralism in Islamic Moral Traditions*, *in* ISLAMIC POLITICAL ETHICS 135 (Sohail H. Hashmi ed., 2002) (emphasis added); *see* MOHAMMAD HASHIM KAMALI, FREEDOM, EQUALITY AND JUSTICE IN ISLAM 8 (Islamic Texts Soc'y 2002) (1999) ("Freedom in Islam finds its meaning in 'belonging to the community and participating with the people.'"). Indeed, this sentiment is at the root of Muslim attitudes toward apostasy. Abu al-A'la Mawdudi, a contemporary Islamist, expressed a common attitude when he said, "opposition of different political parties is ruled out [because] . . . [i]n a properly constituted Islamic state, interests and needs are reconciled." L. CARL BROWN, RELIGION AND STATE: THE MUSLIM APPROACH TO POLITICS 153 (2000). *See, e.g.*, Avempace, *The Governance of the Solitary* (Lawrence Berman tr.), *in* MEDIEVAL POLITICAL PHILOSOPHY, *supra* note 192, at 127 ("[I]t is, then, evident that every opinion arising in the perfect city [the City of God] that is different from the opinions of its citizens is false . . . ."); *see also* AHMAD S. MOUSSALLI, THE ISLAMIC QUEST FOR DEMOCRACY, PLURALISM, AND HUMAN RIGHTS 6 (2001) ("[A]postasy is distinguished from freedom of (un)belief, since it also implies treason against an Islamic state.").

nation building mean the Iraqi government should cooperate with belief associations. I do not mean to suggest, however, that the ethics and pragmatics of state- and nation-building require *as a first order matter* the establishment of Islam in Iraq. Yet, in this sub-section I explain that in order for cooperation to stand a chance, Iraq should establish Islam; establishment is required because it is a *prerequisite* to cooperation.[197]

Indeed, it seems ironic but is probably true that the establishment of Islam as the religion of the government in Iraq would conduce to cooperation with other belief associations.[198] When a state has a substantial Christian population, a government may be agnostic yet cooperative. Because Christianity conceives of the aims of church and state as distinct—"[t]he aim and function of the secular law is to secure outward peace and earthly welfare, whereas the law of the churches serves the preaching of the word of God"[199]—cooperation often entails separation of church and government. As one scholar has argued, Christianity makes "*claims of absoluteness*" that are "incompatible with and opposed to their integration into any secular concept . . . ."[200] However, when a country has a substantial Muslim population, a government will find it much harder to be agnostic yet cooperative. Islam is a communitarian religion that purports to govern everyday affairs. Cooperation with Muslim belief associations requires integration, not separation.[201]

Moreover, the establishment of Islam as the religion of the government may conduce to its moderation, permitting greater cooperation. As one journalist has reported, those clerics who have involved themselves in the drafting of the Constitution, and who might participate in the subsequent government of Iraq (including even firebrands like Muqtada al-Sadr), have "compromise[d] their vision."[202] In England, for instance, Parliament may reject measures passed by the clerical Synod,[203] and the Queen has the power to appoint some high church officials. The same could become true in Iraq. Indeed, Ahmad Moussalli, a

197. I do not bear a brief in this article for any particular form of establishment. *See supra* notes 42-50 and accompanying text (discussing different forms of establishment). Certainly, I do not mean to suggest, to give but one example, that all government employees in Iraq should be Muslim. Rather, I mean only to argue that Iraq should favor Islam over other religions in *some limited respects*.

198. This is somewhat counterintuitive. Some have argued that establishment and cooperation are incompatible. *Cf.* Cumper, *supra* note 172, at 228 (discussing the treatment of Sikhs in the United Kingdom). Blasphemy laws in the U.K., for instance, protect only Christianity. Arzt, *supra* note 53, at 117 ("Blasphemy is generally defined as denial of the truth of *Christian* doctrine or the Bible, using words which are 'scurrilous, abusive or offensive to vilify the Christian religion.'"); Haim H. Cohn, *The Law of Religious Dissidents: A Comparative Historical Survey*, 34 ISR. L. REV. 39, 91 (2000) ("[T]he attack on *Christianity* or the Scriptures must be calculated to outrage the feelings of the general body of the community."). Yet establishment and cooperation *are* compatible. Israel serves as an excellent example of this truth. Maoz, *supra* note 42, at 359 (discussing the penalties imposed on those who malign any belief association).

199. Heckel, *supra* note 73, at 192 (italics omitted).

200. *Id.* at 197 (emphasis added). Such is reflected in the biblical aphorism "[g]ive to Caesar what is Caesar's and to God what is God's." *Mark* 12:17.

201. As Garlicki has said, "Islam, from its very origins, has been aligned with the state . . . ." Garlicki, *supra* note 28, at 468.

202. Tavernise & Wong, *supra* note 6.

203. McClean, *supra* note 43, at 312.

prominent Muslim theorist, argues:

> [W]hen . . . religious views are projected as political matters, then there is a possibility for compromise . . . [f]or . . . politics is the art of the possible . . . . For instance, when Mu'awiya and Ali looked at their differences as political in nature, it was possible to find a compromise.[204]

Finally, the establishment of Islam as the religion of the government may be conducive to the production of negative constitutional culture, also a necessary prerequisite to effective cooperation. A constitution may be written for many reasons, not only in an effort to restrict the ability of government to act in certain ways. For instance, Nathan Brown has argued that many Middle Eastern constitutions are intended to serve as affirmative grants of power, not restrictive limits on government.[205] Yet the Constitution of Iraq should limit the power of the government if cooperation is to succeed. This idea of limiting the power of government is what I call negative constitutionalism. And in the Middle East, negative constitutionalism derives from Islam.

Indeed, medieval Muslim philosophers believed that religion limited the power of the king. Either the Philosopher King could be trusted to limit his own power—because of his proximity to the Active Intellect[206]—or religious law would limit it for him.[207] Other early Muslim thinkers articulated a contractarian view of government. Ibn Khaldun, for instance, distinguished religious law from secular law by arguing that the former was a chosen restraint and therefore compatible with *assabiyya* (communal solidarity). "When the Muslims got their religion from the Lawgiver (Muhammad), the restraining influence came from *themselves*."[208] *Assabiyya,* was "the restraining influence that had been Islam."[209] When secular law was imposed unilaterally and, subverting *assabiyya*, "[came from] the sword" dynasties began to fall.[210] For such thinkers, if the government did not live up to its promises, the people had the right to rescind their offer to participate.[211] Secular law, because it was not contractarian and did not afford the dissatisfied a right to revoke, was unacceptable; religious law, on the other hand, was endorsed.

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204. MOUSSALLI, *supra* note 196, at 159.

205. BROWN, *supra* note 25, at 92 (asserting that "[t]he final motivation adduced for issuing constitutional texts in the absence of constitutionalist intentions was the desire to organize or augment state authority"). *Cf.* Stephen Holmes, *Precommittment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 196 (Jon Elster & Rune Slagstad eds., 1988) (noting that constitutions do not "merely hobble majorities and officials . . . . [they] also assign[] powers").

206. Al-Farabi, *supra* note 192, at 37 (explaining, for instance, that only "if it does not happen that a man exists with [the appropriate] qualifications, . . . [should one] adopt the Laws prescribed by the earlier [Kings]").

207. CRONE, *supra* note 113, at 263 (summarizing that "God was the . . . source of legal/moral obligations").

208. IBN KHALDˉUN, THE MUQADDIMAH: AN INTRODUCTION TO HISTORY 260 (N. J. Dawood ed. & Franz Rosenthal trans. 1969) (emphasis added).

209. *Id.* at 427.

210. *Id.*

211. *Cf.* NIZAM AL-MULK, THE BOOK OF GOVERNMENT; OR, RULES FOR KINGS 24 ff. (Hubert Darke trans. 1960).

Finally, for a third set of early thinkers, the interpretation of religious law was a task the executive should not and could not shoulder. During the ninth century, the Caliph al-Ma'mun sought to persuade the Muslim community of the 'createdness' of the Qu'ran.[212] Many jurists resisted. Although the Caliph persecuted those who refused to accept his interpretation of the Qu'ran, the jurists won out in the end.[213] Islam entitled them to hold their own opinions.

However conceived, therefore, whether as an immanent, contractarian, or jurisdictional limit on government, negative constitutionalism in the Middle East derives from Islam and Islamic thought. Moreover, such is still the state of affairs today. For all its faults, the Saudi Arabian monarch is genuinely constrained,[214] in part because the Saudi Basic Law enshrines Islamic law,[215] whereas the Moroccan King is not, in part because the Constitution of Morocco does not.[216]

B. The New Iraqi Constitution: An Assessment

The new Iraqi Constitution (in its treatment of religion) is congruent with the privilege paradigm in that it has the potential to facilitate state and nation construction. First, it ensures that Iraq will cooperate with non-dominant belief associations. It does so by explicitly extending its protection to all religious believers, including "Christians, Yazidis, [and] Sabaean Mandeans,"[217] by forbidding the establishment of parties that advocate *takfir* (the practice of declaring someone an infidel),[218] and by ensuring that believers are free not only to assert *but also to practice* their faiths.[219] Like that most cooperative of countries, the Netherlands, the Iraqi Constitution permits not only Muslims but also Christians to leave work on their holy days.[220] It explicitly affirms that members of belief associations are entitled to form legally recognized groups to advance their goals[221] (and notes that Iraq is "keen to strengthen the role of civil society groups"[222]). The Iraqi Constitution uses the Arabic word *mumarisa* – meaning

212. *See generally* Hayrettin Yucesoy, *Between Nationalism and the Social Sciences: An Examination of Modern Scholarship on the 'Abbasid Civil War and the Reign of al-Ma'mun*, 8 MEDIEVAL ENCOUNTERS 56, 62-65 (2002) (discussing the source, development, and role of the doctrine of the createdness of the Qur'an).

213. *See generally* Lapidus, *supra* note 191, at 6-7.

214. Abdulaziz H. Al Fahad, *Ornamental Constitutionalism: The Saudi Basic Law of Governance*, 30 YALE J. INT'L L 375 (2005). ("[T]he [Saudi] Basic Law treats the king as neither sacrosanct nor an interpreter of Islam.").

215. *See* Ann Elizabeth Mayer, *Conundrums in Constitutionalism: Islamic Monarchies in an Era of Transition*, 1 UCLA J. ISLAMIC & NEAR E.L. 183, 192-93 (2002) (highlighting that while the Shari'a is the Constitution, the Basic Law is merely a *nizam asasi* (basic regulation)).

216. Mayer, *supra* note 215, at 208 (describing draftsmanship of the Saudi Basic Law as "amateurish, muddled" and praising the "clarity" of the Moroccan Constitution).

217. *See* IRAQ CONST. art. 2(2).

218. *Id.* at art. 7(1).

219. *Id.* at art. 10 (holding that "[t]he state is committed to maintain and protect their sanctity and ensure the exercising of (religious) rites freely in them"); *id.* at art. 40(1)(a) (recognizing that "[t]he followers of every religion and sect are free in: the practice of their religious rites, including the (Shiite) Husseiniya Rites").

220. *Cf. id.* at art. 12(2) (declaring that "official holidays . . . shall be fixed by law").

221. *Id.* at art. 40(1)(b).

222. *Id.* at art. 43(1).

'practicing' (as in a profession) – in describing the freedoms afforded belief associations.[223]

The words used and promises made in the Iraqi Constitution are significant. The constitutions of many predominantly Muslim countries do not permit members of belief associations to perform their 'rites';[224] and some restrict the freedoms of religion to members of particular sects.[225] For instance, in Brunei "[n]o person shall be appointed to be Prime Minister . . . [unless he] belong[s] to the [Shafeite] sect."[226] Even the Afghan Constitution, promulgated recently with U.S. assistance, permits ordinary legislation to override religious rights.[227] This the Iraqi Constitution explicitly forbids.

Second, the Constitution's articulation of the place of Islam in Iraq is conducive to the moderation of Islam and the creation of a negative constitutional culture (two of the three goals that establishment of Islam might achieve). The Constitution reads, "[n]o law can be passed that contradicts the undisputed rules of Islam."[228] The words used for "undisputed rules" are *thawabit ahkam*. These words mean something like the "fixed stars as adjudged." By using a derivative of *hakama*, the root of the Arabic word for government, the Constitution may suggest that the meaning of 'Islam' is for the people and their representatives, not the clerics, to define.[229] Indeed, unlike the Afghan Constitution, which requires jurists to adhere to the "provisions" of Islam, the Iraqi Constitution seems to contemplate popular involvement in the interpretation of Islam.[230] That religious leaders will have to enter politics is triply assured—not only by the use of the words *thawabit ahkam* but also by the number of legal questions the Constitution reserves for resolution by subsequent legislation[231] and by the spur to populism offered in

223. *Cf.* NATHAN J. BROWN, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE FINAL DRAFT OF THE IRAQI CONSTITUTION: ANALYSIS AND COMMENTARY 5 (2005), *available at* http://www.carnegieendowment.org/files/FinalDraftSept16.pdf [hereinafter ANALYSIS AND COMMENTARY] (underscoring that "[t]he Iraqi Constitution phrases religious rights in communal rather than individual terms").

224. *See, e.g.*, MOROCCO CONST. art. 6, *available at* http://confinder.richmond.edu.

225. *See, e.g.*, IRAN CONST. ch. 1, art. 13. (holding that "Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities"), *available at* http://confinder.richmond.edu.

226. BRUNEI CONST. art. 4(5).

227. AFG. CONST. ch. 1, art. 2, *available at* http://arabic.cnn.com/afghanistan/ConstitutionAfghanistan.pdf.

228. IRAQ CONST.art. 2(1)(a).

229. ANALYSIS AND COMMENTARY, *supra* note 224, at 3 (asserting that this formula "[t]he primary [interpretive] burden . . . on the parliament"). Some have argued, on the other hand, that the phrase *thawabit ahkam*, implies that a decision by a judge (*huqm*) would prevail were it to conflict with will of parliament. Mark Levine, *And the Winner Is . . . The United States?*, THE HUFFINGTON POST, http://www.huffingtonpost.com/mark-levine/iraqs-constitution-and-_b_6471.html.

230. *See* AFG. CONST. art. 3; *see also* Hamida Ghafour, *Afghanistan Gets New Name and a Constitution,* Jan. 6, 2004 (noting that no law under the Constitution can contradict Islamic beliefs), *available at* http://www.smh.com.au/articles/2004/01/05/1073267970952.html. Of course, choosing the wrong man or woman to serve as Chief Justice of the Iraqi Supreme Court would render this distinction moot. *Cf.* Alex Spillius, *Afghans to Carry On Stoning Criminals,* THE DAILY TELEGRAPH, Jan. 25, 2002 (discussing statements by the Afghan Chief Justice that stoning will continue in order to combat crime).

231. ANALYSIS AND COMMENTARY, *supra* note 224, at 5 (pointing out that significant details needed to define and protect rights have not been addressed in the Constitution, but are reserved

Article 5.[232] Moreover, when religious leaders have to take account of politics and popular sentiment, as Ali and Mu'awiya did, their views moderate. Indeed, as several prominent legal theorists have argued, when a legislature and a court are in dialogue about the content of constitutional rights, those rights are likely to be interpreted broadly,[233] and both the legislature and the court are likely to be responsive to popular sentiment.[234]

Moreover, the Constitution affirms, "[n]o law can be passed that contradicts the principles of democracy."[235] It thereby hints at the powerful role Islam and its principles can play in checking executive and legislative power. As in Saudi Arabia, where the religion clauses of the Basic Law are the only limits on the monarch's power, in Iraq, those provisions of the new Constitution that deal with religion ensure that no leader may rule by fiat.

III. THE PROTECTION PARADIGM

A. The Feminist Critique

The argument I elucidated in Parts I and II, like the Iraqi Constitution, is subject to criticism. When the government cooperates with belief associations it empowers the leaders of those associations. Many such associations, however, subordinate women. In Pakistan, for instance, some families in remote areas have been known to kill women that have "dishonored them."[236] Likewise, under the Pashtunwali, the tribal code of some Afghans, when one group needs to make

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for parliamentary legislation). *E.g.* IRAQ CONST.art. 4(2) (noting that "[T]he scope of the phrase 'official language' and the manner of implementing the rules of this article will be defined by . . . law . . .").

232. IRAQ CONST. art. 5 ("The law is sovereign, the people are the source of authority and its legitimacy").

233. Indeed, by using a word that connotes indisputability (*thawabit*), the Constitution suggests that laws may only be stricken when their interference with Islam is crystal clear. *See, e.g. infra* note 307 (highlighting that Egypt's Supreme Court generally strikes down laws only when there is clear interference with Islam's fundamental principles and that the Court has tentatively forwareded liberalism and democracy). *But see* Mark Levine, *And the Winner Is . . . The United States?*, THE HUFFINGTON POST, Aug. 30, 2005, http://www.huffingtonpost.com/mark-levine/iraqs-constitution-and-_b_6471.html.
(suggesting that *thawabit ahkam* would include morality rules like those in force in Iran). This interpretation seems implausible because the prior version of the clause used the words *mujmuaa aleihi* to describe the rules the Iraqi framers considered 'fixed.' *Mujmuaa* is a derivative of the word *jamaa*, which in turn is a term-of-art in Islamic law that connotes popular participation.

234. *See, e.g.*, Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 CAL. L. REV. 959, 982-83 (2004); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1950, 1983, 2003 (2003). *Cf.* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (striking down the Religious Freedom Restoration Act on the logic that "Congress does not enforce a constitutional right by changing what the right is"). *See generally* Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410 (1993) (providing a more precise explanation of why coordinate construction – dialogue between Congress and the courts – has permitted the elaboration of expansive individual rights).

235. IRAQ CONST. art. 2(1)(b).

236. Rachel A. Ruane, Comment, *Murder in the Name of Honor: Violence Against Women in Jordan and Pakistan* 14 EMORY INT'L L. REV. 1523, 1534-60 (2000)

restitution to another it may supply them with virgin women.[237] Finally, even in Europe churches are able to impose loyalty tests on their employees and affiliates. In Germany, where churches employ 600,000 people,[238] each employee is subject to dangerous ideological control.[239] The potential for oppression of women is therefore deepened when the government permits associations to promulgate their own personal status laws. Cooperation might also be a problem. As Susan Moller Okin argues, women might be better off if the power of belief associations were diminished.[240] If there is no response to this feminist critique then perhaps the United States cannot and should not endorse either cooperation or establishment. If women are oppressed, neither a state nor a nation will likely be built in Iraq.

In this Part, I articulate what I call the protection paradigm. The protection paradigm is a necessary corollary to the privilege paradigm. The protection paradigm imposes three requirements on government, each intended to ensure that women, or other members of groups subject to oppression, are able to express dissent or dissatisfaction from *within* belief associations. The protection paradigm flows from the duty Feldman suggests the United States should undertake and that I have argued the United States must undertake. For the Iraqi government to establish a state and build a nation, it should adopt not only the privilege paradigm but also the protection paradigm.

The first requirement of the protection paradigm is that Iraq should adopt a jurisdictional arrangement that ensures local Muslim courts will have to compete with national secular courts for business. The second requirement is that Iraq should offer financial support to those members of belief associations who wish to express disfavored opinions—e.g. the orthodox Muslim women who want to explain why the Qu'ran forbids polygamy. Finally, the third requirement is that the Iraqis should either force each school to offer a modern civics class or establish a uniform curriculum. Both the civics class and the uniform curriculum are designed to ensure that all students are willing and able to question the beliefs of their parents. Before launching into a detailed description of the protection paradigm, however, I will explain why other responses to the feminist critique are unsatisfactory.[241]

B. Responses to the Feminist Critique

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237. Mark A Drumbl, *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, 42 COLUM. J. TRANSNAT'L L. 349, 384-85 (2004). *See generally* Niloufer Qasim Mahdi, *Pukhtunwali: Ostracism and Honor Among the Pathan Hill Tribes*, 7 ETHOLOGY AND SOCIOBIOLOGY 295-304 (1986) (discussing the functions of ostracism and honor in Pathan society), *available at* http://www.bepress.com/context/gruterclassics/article/1036/viewcontent.

238. Robbers, note 49, at 66.

239. *Id.* at 67 (describing a Federal Constitutional Court decision upholding termination of a physician employed at a Catholic hospital who publicly supported abortion); Van Bijsterveld, *supra* note 50, 219 (noting that the same is true of the Netherlands, where religious schools may impose loyalty conditions on their staff).

240. Susan Moller Okin, *Is Multiculturalism Bad for Women?*, *in* IS MULTICULTURALISM BAD FOR WOMEN? 22-23 (Joshua Cohen et al. eds., 1999).

241. For an excellent recent discussion of the difficulty in responding to the feminist critique in a developing country, see Pratibha Jain, *Balancing Minority Rights and Gender Justice*, 23 BERKELEY J. INT'L L. 201 (2005).

Feminists are reluctant to embrace Okin's view.[242] Understandably, they may not want to embrace what Iris Marion Young calls a "progressively individualistic social ontology."[243] Therefore, they seek compromise. Some feminists believe that the autonomy of belief associations should be contingent upon observation of universal rights norms.[244] Others distinguish between the relationship of a belief association to the state and to its members; they demand that belief associations be protected against the state while members be protected against the association.[245] Finally, yet others suggest that government should permit belief associations a margin of appreciation[246] in dealing with its members.[247] This section analyzes these responses to the feminist critiques and finds them lacking.

The first two suggestions—what one might call the universal liberal and the autonomy approaches—are untenable. The universal liberal approach, and by this I mean any attempt to condition group recognition on the ability and desire of the group to respect liberal principles,[248] is imperialistic[249] and orientalist.[250] As Rama Mani has said, "[i]f ideas and institutions about as fundamental and personal a value as justice are imposed from the outside without an internal resonance, they may flounder, notwithstanding their assertions of universality."[251] Indeed, one candidate who stood in the January Iraqi election powerfully remarked, "[i]f I believe my right is to wear this black robe and you ban it, then my right has been

242. In fact, some argue that these are 'unavoidable costs' of multiculturalism. *But see* Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R.-C.L. L. REV. 385, 404 (2000) [hereinafter *The Puzzle*] (arguing that such a notion "overessentializes the distance between minority group cultures and the dominant state culture, thereby denying the inevitable interplay between them").

243. IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 28 (1990).

244. *See, e.g.*, Okin, *supra* note 241, at 23.

245. *See, e.g.*, WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995); Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883, 894-96 (1989).

246. I borrow this term from the jurisprudence of the European Court of Human Rights. The Court affords national governments a 'margin of appreciation,' and will not invalidate national action without good reason. For instance, even though the French policy of discriminating between gay and straight parents who wish to adopt plausibly violates the European Convention on Human Rights and Fundamental Freedoms, the Court did not strike it down. *See* Thomas Willoughby Stone, *Margin of Appreciation Gone Awry: The European Court of Human Rights' Implicit Use of the Precautionary Principle in* Frette v. France *to Backtrack on Protection from Discrimination on the Basis of Sexual Orientation*, 3 CONN. PUB. INT. L.J. 271 (2003).

247. Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights*, 15 EMORY INT'L L. REV. 391, 450-51 (2001).

248. Ayelet Shachar calls this the "re-universalized citizenship" approach. *The Puzzle*, *supra* note 243, at 403 (2000) (arguing that such an approach "fails to provide room for women (or any other group members facing systemic risk of internal maltreatment) to maintain their cultural identity").

249. *See, e.g.*, Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483 (2002).

250. Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1195-96 (2001).

251. RAMA MANI, BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR 49 (2002)

taken away."[252]

The autonomy approach, and by this I mean respect for belief associations only to the extent that such respect does not interfere with the autonomy of any individual member,[253] is somewhat, but not much, more difficult to impugn. First, it reifies culture, suggesting that it cannot be changed but only corrected.[254] Second, it is unjust; it deprives female members of 'oppressive' belief associations the option of preserving their concomitant membership in the belief association and in the nation.[255] As one female scholar of Islam has commented, "[t]he majority of Muslim women who are attached to their religion will not be liberated through the use of a secular approach."[256] And third, it may in fact perpetuate the oppression of women. In a fascinating study of Shari'a courts, Amira Sorbol has found, "[o]ne of the main reasons for the change in treatment of women in modern Shari'ah courts is . . . . [the] replace[ment][of flexible traditional methodology] by particular laws suitable to nineteenth-century Nation-State patriarchal hegemony."[257]

The third approach—the margin of appreciation approach—has more merit. Israel has implemented the margin of appreciation approach. As Ran Hirschl describes it, "the Israeli state . . . [works to ensure] the right of each community to demarcate its membership boundaries."[258] While it is possible that this approach would satisfy both feminists and multiculturalists, especially if it is true that Islamic law is more feminist than it appears,[259] the margin of appreciation

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252. Hannah Allam, *Iraqi women divided about whether to vote conservative and lose rights*, KNIGHT RIDDER/TRIBUNE, Jan. 11, 2005.

253. The autonomy approach differs from the universal liberal approach in as much as the autonomy approach does not presume that all women want, for instance, to throw off veils. However, as soon as a group member expresses dissatisfaction with group norms, any rights the group may hold fade away.

254. Volpp, *supra* note 251, at 1192 ("These assumptions [that third-world cultures are sexist] preclude the understanding that minority cultures, like all cultures, undergo constant transformation and reshaping."). Madhavi Sunder has persuasively disputed this idea. Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 507-508 (2001) [hereinafter *Cultural Dissent*] ("[W]hile anthropology evolves, law remains stuck in a century-old understanding of culture. Premised on a theoretical model that posits and normatively prefers cultural pluralism across groups, law seeks to help groups maintain their cultural distinctiveness.")

255. *See* Madhavi Sunder, *Piercing the Veil*, 112 YALE L. J. 1399 (2003) [hereinafter *Piercing the Veil*]; Catherine A. Hardee, Note, *Balancing Acts: The Rights of Women and Cultural Minorities in Kenyan Marital Law*, 79 N.Y.U.L. REV. 712, 717 (2004) ("[T]he right to choose one's cultural or religious beliefs is part of maintaining human dignity.").

256. Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U.J. INT'L L. & POL'Y 1, 3 (1997) [hereinafter *Islam, Law and Custom*].

257. Amira Sonbol, *Women in Shari'ah Courts: A Historical and Methodological Discussion*, 27 FORDHAM INT'L L.J. 225, 232-33 (2003). Indeed, that study found that in pre-modern times, "women came to court for all sorts of reasons. For example, women went to court to record marriage contracts and added any conditions they pleased." *Id.* at 248.

258. Hirschl, *supra* note 131, at 1840.

259. *See* Joelle Entelis, Note, *International Human Rights: Islam's Friend or Foe?*, 20 FORDHAM INT'L L.J. 1251, 1281-87 (1997); Leila P. Sayeh & Adriaen M. Morse, Jr., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT'L L.J. 311 (1995); Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Law of Pakistan from a Woman-Sensitive Perspective*, 18 MICH. J. INT'L L. 287 (1997).

approach is probably inadequate. When a practice of a belief association is not within the margin of appreciation, women and other in-group minorities must still decide between their identity as member of the belief association and their identity as member of the nation, just as they must when the government adopts an autonomy approach. Madhavi Sunder, who has made an extensive study of Afghan women, says, "[the Afghan women's] campaigns present powerful critiques of current law, which offers women a right to religious freedom (on leaders' terms) or to equality (within the public sphere), *but no right to both.*"[260]

Others advocate a twist on the margin of appreciation approach, what one might call the multiple identity approach. If a government permits a variety of sub-state groups, including belief associations, significant autonomy, the argument goes, individuals will be able to construct their identities out of many component parts and the chances of oppression will be reduced.[261] If they are able to draw on resources by virtue of some component parts of their identities, they will not face subjugation.

In Iraq there are two axes of potential additional identity formation: tribal and federal. First, as in Kenya, where "it is not uncommon for a Kenyan to have multiple identities . . . to consider herself a Kenyan, a Masaii, and a Christian,"[262] it is not uncommon for an Iraqi to be at once an Iraqi, a Tikriti, and a Sunni.[263] Second, Iraq is, and will likely remain, a federal state; so just as an American may consider herself an Iowan or a Californian (or indeed an Angelino), so an Iraqi might consider herself a resident of Anbar or Basra.[264] However, it is not clear that feminists would want to encourage the reification of tribal identities. Nor is it clear, as Peter Schuck has noted, that "[f]ederalism [will] resolve the political conflicts generated by diversity . . . [instead of] deepen[ing] and harden[ing] them,"[265] especially since federal division in Iraq more or less tracks sectarian division.[266] Although there are nuances to this argument—inasmuch as external pressure may exert more leverage over some component parts of identities than over others (e.g. no province is likely to want to do without foreign assistance)[267]—the multiple identity approach seems little better than the liberal universal or autonomy approaches.

C. The Design of the Protection Paradigm

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260. *Piercing the Veil*, *supra* note 256, at 1404 (emphasis added).

261. As Peter Spiro has argued, "members of a disadvantaged ethnic group may also be members of religious, corporate, and other communities that command substantial resources of their own." Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 632 (1997).

262. Hardee, *supra* note 256, at 720.

263. On the continuing importance of tribal law throughout the Middle East, and in Palestine, *see* Ifrah Zilberman, *Palestinian Customary Law in the Jerusalem Area*, 45 CATH. U.L. REV. 795 (1996).

264. *See* Schauer, *supra* note 182, at 1516 (discussing how Americans consider themselves at once 'black or white,' 'rich or poor,' and American).

265. Schuck, *supra* note 117, at 212.

266. *See, e.g.*, David E. Sanger, *Bush Hails Vote*, N.Y. TIMES, Jan. 31, 2005, at A1 (discussing low turnout in the three mainly Sunni provinces).

267. Peter J. Spiro, *supra* note 262; *see also* AFG. CONST. art. 7.

None of the four responses described in the prior section seems adequate. Rather than focusing on the rights of women and the rights of belief associations, the better way to blunt the feminist criticism is to focus thoroughly on *the rights of women within groups*. That is what the protection paradigm strives to do.[268]

Women will be secure within belief associations when they have a prominent role in defining the rules of such associations.[269] They must be allowed exit.[270] Yet they must also be allowed to remain and redefine the group. The goal of this section is to articulate "a normative theory of cultural change that allows individuals a way of imagining autonomous and egalitarian lives outside the secular, bureaucratic freedom of traditional liberalism [and within groups]."[271] To that end, this section argues that if Iraq complements the privilege paradigm described in Part II with a system designed to ensure that dissident voices within belief associations are heard, the feminist critique will not obtain, and the United States will be able to recommend and commend cooperation, establishment, and the Constitution itself.

Rather than only resolving disputes when a dissenter brings a particular claim to the attention of a government decision-maker, the protection paradigm aims to *encourage* dissent.[272] It does so first by using innovative jurisdictional structures to discipline the courts of belief associations; second by affording members of belief associations an affirmative right to resources; and third by promulgating rules for schools that encourage open-mindedness. If dissenters are to be able to make their voices heard in meaningful ways, belief associations will welcome complaint and dissenters may feel sufficiently empowered to complain.

1. Jurisdictional Tinkering

Non-traditional jurisdictional structures may provide incentives for the courts of belief associations to welcome complaint. A court may have independent

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268. As I was thinking through the protection paradigm, I drew substantially on the innovative work of Madhavi Sunder. *See Cultural Dissent*, *supra* note 255. Her work persuaded me that "cultures now more than ever are characterized by cultural dissent," *id.* at 498, and that those dissenters require protection. Nevertheless, her work on *how* best to protect cultural dissent is remarkably thin. She argues that a "state [sh]ould refuse to reinforce a culture's traditional boundaries where leaders cannot control the norms of the community on their own." *Id.* at 558. But of course it is difficult to determine who is 'in' and who is 'out.' *Cf. id.* at 558 n. 353 ("The cultural dissent approach to freedom of association law I describe deals exclusively with internal challenges made by a group's members."). For instance, this might require parsing the formal rules and informal norms of expressive associations to determine the legitimacy of dissenters' claims to membership. Additionally, her argument is premised on the assumption that dissenters will be confident enough to speak out.

269. *See generally The Puzzle*, *supra* note 243; *Piercing the Veil*, *supra* note 256, at 1404; Hardee, *supra* note 256, at 718 ("[A]ll members of a culture should be part of the voice that speaks for the group.").

270. Bahia Tahzib-Lie, *Applying a Gender Perspective in the Area of the Right to Freedom of Religion or Belief*, 2000 BYU L. REV. 967, 970 (2000) ("[F]reedom means that women should be free, at any time, to explore other beliefs and to . . . avoid or openly reject a religion or belief if so inclined.").

271. *Piercing the Veil*, *supra* note 256, at 1462.

272. *But cf. Piercing the Veil*, *supra* note 256, at 1466 ("[L]egal decision makers [sh]ould cease privileging the norms of religious elites and [sh]ould instead place elites and dissenters on an equal footing - but only when a specific dispute is brought before a decision maker.").

jurisdiction, it may be subordinate to another court, it may share jurisdiction with another court over some aspects of a case, but not others,[273] or it may exercise some fourth, ill-defined form of jurisdiction. If the courts of belief associations exercise independent jurisdiction, dissenters will have no recourse. There will be no reason for the belief association to welcome complaint.

Hierarchical systems are better. If a court knows that its decisions are subject to review, it is more likely to welcome complaint. However, a hierarchical system pits government against belief association, and is subject to the criticism suggested of the universal liberal and autonomy approaches. Indeed, in the United States for instance, the Supreme Court will not intervene to resolve religious disputes precisely because it knows that to do so risks giving grave offense.[274] As Frederick Mark Gedicks has put it, "courts may not resolve disputes among the members of religious organizations when doing so requires interpretation of the organizations' dogma or theology, even though courts are free to resolve internal disputes in secular organizations."[275]

Fragmented systems—where several courts share jurisdiction over a case—are better yet. This is the design perfected in the United States. In the United States, state supreme courts remain the ultimate arbiters of state law, yet the Supreme Court may review their decisions for compliance with the federal Constitution. Likewise, the Supreme Court tends to defer to the judgments of Indian courts unless doing so would result in harm.[276] The courts of belief associations under such a system would be disciplined because they would fear that if they did not decide cases in responsive fashion, plaintiffs would frequent rival courts (e.g. in the U.S. context state court plaintiffs would move to federal court or vice-versa). Such a system "critically challenges discriminatory and subordinating internal norms and practices by delegating to the group's [courts] the power to decide whether to risk alienation and exit by upholding [oppressive] traditions."[277] Indeed, as one commentator has noted, in states like Kenya, where there are many ways to marry,[278] "women [have a] way to express their preferences and to amplify their voice."[279] The threat of exit is powerful.

Israel has such a fragmented design, and it has worked more or less as scholars might have predicted[280]: the secular and religious courts have competed

273. These are what Shachar calls hierarchical and fragmented jurisdiction. *The Puzzle*, *supra* note 243, at 409-411.

274. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

275. Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1074 (2002).

276. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 717 (1989).

277. *The Puzzle*, *supra* note 243, at 421.

278. Hardee, *supra* note 256, at 721.

279. *Id.* at 731.

280. For instance, Moussa Abou Ramadan has explained, "[w]ithin [any given legal] field, there are struggles among the [interpretive] agents themselves . . . . The agents thereby contribute to the

with each other for business, and each court has been responsive to the concerns of those before it. After the passage of Amendment No. 5 to the Family Court Laws, "disputes concerning custody could be adjudicated in either civil [Israeli] or Islamic courts."[281] Although "the Supreme Court [could] only overturn religious court rulings which [we]re ultra vires by reason of a denial of natural justice or in exceptional cases . . . the Supreme Court [wa]s authorized to interpret [religious law]."[282] This meant that when cases presented questions of both Shari'a and secular law, both Shari'a courts and the Supreme Court could exercise jurisdiction. Because the Shari'a court knew the Supreme could reverse their decisions on *Islamic grounds*, it began to hand down increasingly *liberal and Islamic* opinions. As Abou Moussa Ramadan has explained, "[t]he Shari'a Appeals Court [sought] to restrict the intervention of the High Court of Justice."[283] This is the advantage of a fragmented system. It promotes competition between court systems.

Consider another example: Malaysia. Although there is no appeal from the decisions of the highest Shari'a courts in Malaysia, each federal state is entitled to set up its own religious courts, and Malaysians are well able to 'jurisdiction shop.' Some state Shari'a courts permit a man to marry a second wife upon the declaration of a *qadi*, whereas others require a full hearing with both the present and future wife present.[284] Not only have Shari'a courts modernized and liberalized—they now use procedural rules that are derived in part from the principles of Islam (including, for instance, the requirement that two witness testify to an out of court statement) and in part from colonial law (including, for instance, permitting women to testify)[285]—but they have done so by updating Islamic law.[286]

Ayelet Shachar has suggested a fourth alternative. She believes that 'transformative accommodation' systems might be better than hierarchical or even fragmented systems.[287] According to Shachar, such systems are more flexible than fragmented systems.[288] Rather than assigning one court jurisdiction over, say,

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ongoing process of change and maintenance of the structures of which they are a part." Moussa Abou Ramadan, *The Transition from Tradition to Reform: The Shari'a Appeals Court Rulings on Child Custody*, 26 FORDHAM. INT'L L.J. 595, 620 (2003). Likewise, Ayelet Shachar has said, when there is no jurisdictional 'monopoly,' "decision-makers . . . . benefit from a simultaneously cooperative and competitive situation . . . [and they have] to work that much harder to win the support of their constituents." AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 121 (2001) [hereinafter MULTICULTURAL JURISDICTIONS].

281. Ramadan, *supra* note 281, at 596.

282. *Id.* at 622.

283. *Id.* at 623.

284. Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change*, 42 AM. J. COMP. L. 233, 285 (1994) [hereinafter Horowitz 1].

285. *Id.* at 270-71; *see also* Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change*, 42. AM. J. COMP. L. 543, 545 (1994) [hereinafter Horowitz 2] ("[D]ecisions of . . . appellate bodies are replete with secular methods of statutory interpretation, applied even to sacred sources, with common law incrementalism.").

286. Horowitz 2, *supra* note 286, at 559.

287. *See* MULTICULTURAL JURISDICTIONS, *supra* note 281, at 118.

288. She maintains, "transformative accommodation . . . . guarantees that [both] the state [and] the group . . . . [must] abandon their perfectionist and maximalist jurisdictional aspirations." MULTICULTURAL JURISDICTIONS, *supra* note 281, at 143.

family law, and the other court jurisdiction over claims to equality, both courts could have concurrent jurisdiction over family law, but over different features of any given case. Shachar offers the following example:

> Assume that a divorcing couple has entered marriage through a religious solemnization. This couple has no children and the only issue that they have to resolve is how to divide the $10,000 that they accumulated during the marriage. Suppose that it were clear that the state distributive rules would award one-half of the sum to each spouse. This property allocation rule would kick in as soon as proof was established that the couple has been separated for a minimum period (perhaps one year), even if the parties are still considered married by the group's demarcation rules . . . . [W]ithout the separation of demarcation and distribution sub-matters, this divorce could degenerate into an unnecessary legal battle where group-specific gender-biased status demarcation rules are used to achieve material gain . . . .[289]

She suggests, if only a religious court may solemnize divorces, the husband, who alone may be legally entitled to seek that divorce, might hold out for more than his fair share of the $10,000.[290] Yet if the "woman . . . [can] pursue basic capacities and freedoms in the wake of a separation [under secular rules], some of her husband's exclusive power will be dissolved."[291] Like fragmented systems, 'transformative accommodation' systems may discipline the courts of belief associations. But unlike fragmented systems, a transformative accommodation system permits a group to retain total control "over sub-matters [the group] views as crucial for cultural survival."[292]

Although I agree with much of what Shachar says, I think she goes too far. The protection paradigm requires the adoption of a fragmented system, not a transformative accommodation system. I can best explain my skepticism of transformative accommodation by first describing the jurisdictional structure of Pakistan. In Pakistan, Shari'a courts have exclusive jurisdiction in certain subject areas.[293] Their decisions in other subject areas are amenable to review by the Supreme Court.[294] The problems are, first, that no one is quite clear on who has the power to declare laws un-Islamic (i.e. unconstitutional), and second, that it is even less clear who gets to decide who has that power.

By a series of presidential orders promulgated between 1980 and 1985, the Pakistani government endowed the Federal Shariat Court with the power to hear

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289. *The Puzzle*, *supra* note 243, at 420.

290. MULTICULTURAL JURISDICTIONS, *supra* note 281, at 134 ("[T]his divorce could degenerate into an unnecessary legal battle where group-specific gender-biased demarcating-status rules are used to achieve material gain.").

291. *Id.*

292. *Id.* at 144.

293. *See* Jeffrey A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 VA. J. INT'L L. 759, 772 (2004).

294. *See id.* at 771.

constitutional/Islamic challenges to laws.[295] The court has used this power, for instance, by ruling un-Islamic laws permitting banks to charge interest on their loans.[296] However, the Supreme Court has fought back. It has argued that the Federal Shariat Court may not rule *constitutional* provisions un-Islamic; the Court suggests this is foreclosed by Article 203-B of the Pakistani Constitution.[297] Shari'a judges have offered a sur-reply. They contend that the incorporation into the Constitution of the Objectives Resolution, which says that Islam is the 'Grundnorm' of society, authorizes them to declare any law, whether statutory or constitutional, un-Islamic.[298]

So return to Shachar's hypothetical. What if the husband were to challenge the state rule requiring equal division of marital assets? Who would decide whether the rule comported with religious principles? Moreover, if there was dispute on this question, who would decide who could decide? A fragmented system, because it has clearer lines of authority, is a better choice for a nation like Iraq, already embroiled in considerable chaos.

There is no reason to think that a fragmented system would be inimical to Islam. In fact, there are four juridical schools of Muslim legal scholarship[299] and these schools developed and grew strong by competing with each other for adherents. Originally, there were "no less than nineteen schools of fiqh (*fiqh madhhabs*)."[300] As George Makdisi has put it:

> [D]isagreement (*khilāf*) leads to disputation (*munāzara*) the purpose of which [was] to defend the validity of one's own opinion . . . and to convince the opponent of its validity, or reduce him to silence by destroying his thesis . . . legal opinions were pitted against one another, and the best-defended opinion survived.[301]

He calculates, "[s]ome five hundred schools of law . . . disappeared at or about the beginning of the third/ninth century."[302] Even once the number of *madhab* had been narrowed to four, those four remained in stiff competition with each other. As Chibli Mallat has explained, the Egyptian sultan "Baybars (ruled

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295. Charles H. Kennedy, *Repugnancy to Islam–Who Decides? Islam and Legal Reform in Pakistan*, 41 INT'L & COMP. L.Q. 769, 772 (1992).

296. *See id.* at 783-84; Chibli Mallat, *Commercial Law in the Middle East: Between Classical Transactions and Modern Business*, 48 AM. J. COMP. L. 81, 126 (2000).

297. Kennedy, *supra* note 295, at 772.

298. *Id.* at 780.

299. *See* Bassiouni & Badr, *supra* note 144, at 138. If you count Shi'ism, there are five such schools.

300. Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 38 (2002).

301. George Makdisi, *The Significance of the Sunni Schools of Law in Islamic Religious History*, 10 INT'L J. MIDDLE E. STUD. 1, 3 (1979).

302. *Id. see also* Abdullahi Ahmed An-Na'im, *Globalization and Jurisprudence: An Islamic Law Perspective*, 54 EMORY L.J. 25, 43 (2005) ("[T]he subsequent development and spread of these schools has been influenced by a variety of political, social, and demographic factors. These factors sometimes resulted in shifting the influence of some schools from one region to another, confining them to certain parts, as is the case with Shi'ah schools at present, or even the total extinction of some schools like those of al-Thawri and al-Tabari in the Sunni tradition.").

from 658-675 & 1260-1277) . . . appointed qadis . . . along strict quadripartite lines of the judiciary."[303] The situation remains unchanged today. Indeed, "in most other countries, several schools co-exist, and the integration efforts attempted by the state [are] carried out through the process of *takhayyur* (choice, eclecticism), and not through the imposition of any one school."[304]

Competition is not only theoretically congenial to Islam, but it has also been adopted in Muslim countries. Indeed, Egypt has a de facto fragmented jurisdiction system. In 1980, Egypt amended its Constitution and began to require that laws conform to the Shari'a. If a citizen believes that a law is un-Islamic, he may bring suit in the Supreme Court.[305] On the one hand, the Supreme Court must consider such suits carefully, since many jurists believe that only they are competent to say what the Shari'a requires;[306] the Supreme Court has acknowledged, its "interpretations of the Qur'an are supposed to be validated by the agreement of the [Islamic] schools."[307] On the other hand, the Court may not strike down laws willy-nilly since to do so would be to reject the people's will, expressed by the legislature; Supreme Court justices are aware of the "malleability of the [Shari'a]" and are leery of anointing themselves all powerful arbiters of Egypt's laws.[308] The Court, therefore, has struck "a balance between 'normative Islamic principles' and Egypt's 'democratic character.'"[309] Disciplined by the Islamists and the legislature, it has sought to retain its constituents by rendering opinions that are at once Islamic but also liberal. In fact, it has taken the same tack as that taken by the Shari'a courts in Israel.

Consider first the claim of a woman whose husband refused to pay the alimony required by the Personal Status Laws of Egypt because he believed the Personal Status Laws were un-Islamic. The Court said, "legislation should not contradict those Islamic Sharia principles that [are] derived from definitive sources and which *represent[] the religious foundations of Egyptian society*."[310] The Court explained that it would "make sure that the *peremptory* provisions of the *Shari'a* are applied on all laws . . . . [and also] *make sure that ijtihad* [interpretation of

303. Chibli Mallat, *From Islamic to Middle Eastern Law: A Restatement of the Field (Part II)*, 52 AM. J. COMP. L. 209, 270 (2004).

304. *Id.* at 275.

305. *See* Ran Hirschl, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CANADIAN J.L. & JURISPRUDENCE 191, 197 & n.21 (2002).

306. Clark Benner Lombardi, Note, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State*, 37 COLUM. J. TRANSNAT'L L. 81, 115 (1998) ("Islamists generally insist that only professional Islamic scholars can properly identify and apply the principles of the Sharia. Such scholars alone have the training required to interpret properly the Qur'an and Sunna."). In fact, one prominent law professor has proposed that Egypt empanel a number of jurists to review Supreme Court interpretations of Islamic law. *Id.* at 116.

307. *Id.* at 116.

308. *Id.* at 122.

309. Scott Kent Brown II, Note, *The Coptic Church in Egypt: A Comment on Protecting Religious Minorities from Nonstate Discrimination*, 2000 BYU L. REV. 1049, 1085.

310. Hatem Aly Labib Gabr, *The Interpretation of Article Two of the Egyptian Constitution by the Supreme Constitutional Court*, *in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 217, 221 (Kevin Boyle & Adel Omar Sherif eds., 1996) (emphasis added).

Shari'a] *in the non-peremptory provisions are achieving the interest of the people.*"[311] In one fell swoop, the Court combined Islamic and democratic principles. It defined Shari'a for constitutional purposes as only those Islamic laws the Egyptian people could agree upon. As Clark Benner Lombardi has put it, the Court held, "fundamental principles are [those] laid down in the Qur'an and [that] have been accepted, at least implicitly, by all schools of Islamic law over the years."[312] Only laws that are incongruent to those principles are to be struck down.

On another occasion, the Egyptian Supreme Court "was presented with the issue of the constitutionality of Article 11 of the 1929 Law on the family, which gives the judge the right to grant a woman a divorce upon a determination that reconciliation with the spouse is impossible."[313] The plaintiff argued that the Qur'an establishes that divorce is a male prerogative.[314] The Court agreed.[315] Nevertheless, the Court contended, "there [is] another determinate rule in the Quran that [is] relevant to the dispute, the rule requiring the appointment of an arbitrator from each spouse's family to reconcile the spouses in the case of dispute."[316] Because the Court did not believe the principle the plaintiff had cited to be one to which Egyptian society had acquiesced, it refused to strike down the law.

2. Affirmative Rights

Jurisdictional tinkering is not enough. Eric Mitnick has explained, "a model premised on individual agency in a multicultural context must, at a minimum, provide for the sort of social, educational, and financial resources at-risk group members require to recognize, and take advantage of, jurisdictional options."[317] Madhavi Sunder likewise notes, "[i]n many cases, communities may lack serious dissent."[318] Additionally, "practical and cultural constraints . . . may indeed be so deep and powerful as to block individuals from exercising any choice."[319] Finally, Sally Engle Merry has said, although "state law penetrates and restructures other normative orders through symbols and through direct coercion . . . , at the same time . . . non-state normative orders resist and circumvent penetration or even capture and use the symbolic capital of state law."[320] The protection paradigm, therefore, requires the government to take affirmative steps to ensure that those who wish to dissent from within their belief associations are able to do so. This is

311. John Murray & Mohamed El-Molla, *Islamic Shari'a and Constitutional Interpretation in Egypt*, *in* DEMOCRACY, THE RULE OF LAW AND ISLAM 507, 513 (Eugene Cotran & Adel Omar Sherif eds., 1999) (emphasis added).

312. Lombardi, *supra* note 307, at 97.

313. Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT'L L. 1043, 1139 (2004).

314. *Id.*

315. *Id.*

316. *Id.*

317. Eric J. Mitnick, *Individual Vulnerability and Cultural Transformation*, 101 MICH. L. REV. 1635, 1660 (2003) (book review).

318. *Piercing the Veil*, *supra* note 256, at 1467.

319. Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1553 (1991).

320. Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 881 (1988).

the second component of the protection paradigm. In this sub-subsection, I argue that the Iraqi government should financially support dissenters.

I argue that a government adopting the protection paradigm should adopt a variant of the model of the First Amendment to the United States Constitution proposed by Owen Fiss. Fiss has urged that instead of "a shield, . . . [as] a means of protecting the individual speaker from being silenced by the state,"[321] courts should understand the First Amendment as endowing individuals with the ability to make affirmative claims on the state, demanding the use of state power to "resist the pressures of the market and thus to enlarge and invigorate our politics."[322] A government adopting the protection paradigm should ensure that those whose voices are marginalized within a belief association are vested with the right to make affirmative claims on state resources in order to permit them better to raise their voices and visibility.[323]

I will offer two examples to explain what I mean. First, consider the history of campaign finance reform in the United States. Sensible to the fact that many believe "restrictions on the speech of some [are permitted] in order to prevent a few from drowning out the many,"[324] the U.S. government has permitted "massive subsidies of a wide variety of sorts."[325] These subsidies are intended to facilitate the popular participation that is the necessary precondition to democracy.[326] Even Robert Post, who in general has been skeptical of Fiss's interpretation of the First Amendment, admits "the possibility that the achievement of democratic values may, in discrete circumstances, require carefully bounded structures of managerial control. The narrow objective of such structures should be the correction of conditions which cause disabling citizen disaffection."[327] These subsidies have taken several forms. To name two, the government has required TV stations to be even-handed in the distribution of airtime[328] and the government continues to fund the political campaigns of candidates who might not otherwise be able to afford to

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321. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408 (1986).

322. Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 794 (1987).

323. *See* Shane O'Neill, *The Equalization of Effective Communicative Freedom: Democratic Justice in the Constitutional State and Beyond*, 17 CANADIAN J.L. & JURISPRUDENCE 83, 87 (2004) ("The flow of undistorted communication that originates in [the] 'wild' public sphere must be protected by a set of constitutional rights that makes equal citizenship socially effective for all. . . . [including] []equal access to the sources of communicative power.")

324. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring). For a recent description of the equality goal, see Yoav Dotan, *Campaign Finance Reform and the Social Inequality Paradox*, 37 U. MICH. J.L. REFORM 955 (2004). Justice Stephen Breyer is its most prominent champion on the bench; he has said of campaign finance reform, it "helps to maintain a form of government open to participation . . . . [by] democratiz[ing] the influence that money can bring to bear." Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 253 (2002).

325. Guy Pessach, *Media, Markets, and Democracy: Revisiting an Eternal Triangle*, 17 CANADIAN J.L. & JURISPRUDENCE 209, 212 (2004) (quoting C. Edwin Baker).

326. *See* J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1948-49 (1995) (reviewing CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993)).

327. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1134 (1993).

328. *Cf.* Red Lion Broad. Co. v. Fed. Comm'n, 395 U.S. 367 (1969) (upholding right of reply regulations imposed on television broadcasters).

run.[329]

Consider next the case of Mukhtaran Bibi, a woman gang-raped in Pakistan. Her case might not have come to light if not for the *New York Times*.[330] But international donors have delivered significant money to her. She has started a school.[331] Furthermore, "[s]he has also emerged as a ferocious spokeswoman against honor killings, rapes and acid attacks on women."[332] If a government wishes to adhere to the protection paradigm, it, rather than Mercy Corps, should deliver funds to dissenters.[333]

3. Liberal Education

Not only should a government establish a competitive jurisdictional structure and help dissenters express themselves, it should also open the eyes of belief association members to their options. This requires the government to assist potential dissenters in developing "the necessary cognitive skills that allow them to evaluate critically a variety of competing claims."[334] As Leila Sayeg and Adriaen Morse note, "no single right is as important as education, as it alone forms the basis of women's ability to affect Muslim society and determine for themselves the correct application of Islam to their needs."[335] Sunder concurs. She says, unless a state ensures "women equal access to educational . . . institutions . . . at all levels" women are unlikely ever to exercise their right to complain about repressive belief association behavior.[336]

There is no doubt that those most capable of criticizing themselves and others are those who are at once culturally grounded[337] and yet who have also been exposed to a variety of opinions at an early age.[338] Most agree that an effective

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329. *See generally* John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591 (2005).

330. *See, e.g.*, Nicholas D. Kristof, *The 11-Year-Old Wife*, N.Y. TIMES, June 21, 2005, at A21; Nicholas D. Kristof, *A Free Woman*, N.Y. TIMES, June 19, 2005, at 413.

331. Nicholas D. Kristof, *Raped, Kidnapped and Silenced*, N.Y. TIMES, June 14, 2005, at A23.

332. *Id.*

333. Nor is this a pipedream. With United States prodding, the TNA has funded and assisted in the development of new radio stations, television stations, and other media outlets. *See Measuring Stability and Security in Iraq*, at 8 (Oct. 2005), *available at* http://www.defenselink.mil/news/Oct2005/d20051013iraq.pdf (noting that "[f]rom no independent media under Saddam, there are now 44 commercial television stations, 72 commercial radio stations, and more than 100 independent newspapers and magazines that represent all points of Iraq's political spectrum")

334. O'Neill, *supra* note 324, at 93.

335. Leila P. Sayeh & Adriaen M. Morse, Jr., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT'L L.J. 311, 324 (1995).

336. *Piercing the Veil*, *supra* note 256, at 1468.

337. Yael Tamir suggests, "individuals are members of particular human communities. Outside such communities they cannot develop a language and a culture, or set themselves aims." YAEL TAMIR, LIBERAL NATIONALISM 7 (1993).

338. In a state that has adopted the privilege paradigm, the concern of Nomi Maya Stolzenberg that "schools' seemingly objective appeal to individual reason plainly inculcate[s] the values of individual choice, toleration, and reason -- values that, rather than transcending culture, derive from and reproduce a liberal, pluralist society," simply has no bite. Nomi Maya Stolzenberg, *"He Drew A Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106

school system is the best way of developing citizens who share these two characteristics.[339] As Meira Levinson has explained, the state must endow children with "a *plurality* of constitutive desires and values . . . . [Such] enables individuals to question any particular value without suffering a wholesale loss of identity."[340] But what kind of school system could an overtly Islamic state adopt that would do so? The answer I give is that the protection paradigm requires the Iraqi government either to ensure that all schools teach what we might call "civics" or to establish a uniform national curriculum, permitting each school to deviate from that curriculum only to the extent necessary to teach the religion it supports.

Two additional points are important at this juncture. First, religious schools are not *necessarily* incapable of serving a liberal educational function.[341] Rosemary Salomone has argued, "[t]he assertion that [a] religious orientation impairs [one's] ability to participate effectively in the democratic process or to engage in republican deliberation is purely speculative."[342] Second, the notion of universal education is entirely compatible with Islam.[343] In fact, Imam Shafi'i once said that a ruler has a duty to ensure that all the people in a province are

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HARV. L. REV. 581, 612-13 (1993). Stanley Ingber's concern, that "[c]hildren are unlikely to internalize the value of and a belief in individual autonomy if their schools appear to trivialize and ignore it systematically," is a deeper one. Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 73 (1987). However, at root, the state must privilege "the . . . *political community*." Stephen Macedo, *Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism*, POLITICAL THEORY 26 No. 1, at 59 (1998).

339. Schools are effective arena for the communication of ideas. *See* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 213 (1983) ("[P]ublic schools are a communications theorist's dream: the audience is captive and immature . . . and a system of rewards and punishments is available to reinforce the messages."). Moreover, as Bruce Ackerman has explained, "[a] system of liberal education provides children with a sense of the very different lives that could be theirs . . . [while insuring that their] need for cultural coherence [is met]." ACKERMAN, *supra* note 164, at 139; *see also* MEIRA LEVINSON, THE DEMANDS OF LIBERAL EDUCATION 31 (1999) [hereinafter THE DEMANDS OF LIBERAL EDUCATION] ("[A] coherent, attractive conception of autonomy must incorporate . . . . a commitment to the development and preservation of cultural coherence . . . [and] develop[ment] . . . of a wide range of faculties."). *Cf.* Amy Gutmann, *Children Paternalism, and Education*, PHILOSOPHY AND PUBLIC AFFAIRS 9 No. 4, at 349 (1980) (the state must ensure that children are "capable of choosing between alternative conceptions of the good and of participating intelligently in democratic politics")

340. THE DEMANDS OF LIBERAL EDUCATION, *supra* note 340, at 33; *see also* Amy Gutmann, *Civic Education and Social Diversity*, ETHICS 105 No. 3, at 557 (1995) ("At issue here is not mere exposure to different ways of life for the sake of giving children more choices among good lives but, rather, teaching future citizens to evaluate different political perspectives that are often associated with different ways of life.").

341. As Rosemary Salomone has explained, we should not assume that "accommodating religious views in the curriculum would necessarily compromise liberal autonomy, democratic citizenship, or republican deliberation." Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 215 (1996). In fact, nationalizing and centralizing the *madrasa* school system would create many positive externalities. Some *madrasas* in peripheral provinces, little supervised by national authorities, are havens for fundamentalists and terrorists. Children who went to state-run religious schools, rather than such *madrasas*, might be less susceptible to terrorist recruiters.

342. *Id.* at 216.

343. Asma Afasaruddin, *Religious Education and the Liberal State: Muslim Views on Education: Parameters, Purview, and Possibilities*, 44 J. CATH. LEG. STUD. 143, 178 (2005) ("[T]he project of regenerating and revamping faith-based schools in Islamic societies—existing alongside secular schools—is quite feasible based on religiously-mandated core principles.").

educated.[344] Moreover, the Afghan Constitution recognizes that education should be universal.[345] A recent empirical study has found that in Lebanon, Muslim girls have received more education than their male counterparts.[346]

But how would either version of the protection paradigm look? Consider first the contemporary experience of Germany (and several other European states). German public schools teach religion where "religion classes are treated as ordinary subjects. They are taught on equivalent terms as other classes, are totally integrated in the school's curriculum and schedule, and are graded like other subjects."[347] As one commentator has summarized, at some schools "grades for religion classes are not listed on school report cards. [At other schools,] grades are listed but do not affect graduation or further education, and [at yet a third set of schools], religion grades are treated the same as grades for other subjects."[348] The "[s]tate authorities are entitled to request reports and information from schools and have the power to lustrate the operation of the school."[349] Thus, in this version, Iraqi public schools could each teach their own brands of religion, alongside a uniform secular curriculum.

Consider next madrasas in Pakistan. The Pakistani government has slowly begun to press madrasas to teach what we might call civics.[350] While this has provoked some resistance, the plan is entirely consistent with the history and development of madrasas in Pakistan and throughout the Middle East. Historically, "*madaris* [madrasas] . . . were used to propagate state ideology."[351] More recently, as Pervez Hoodbhoy has explained, madrasas have been "an instrument for forging a . . . national identity."[352] In this version, Iraqi schools would teach civics classes in addition to giving religious instruction.

IV. THE NEW IRAQI CONSTITUTION: A SECOND ASSESSMENT

I have praised the Iraqi Constitution because it ensures the government will cooperate with belief associations and because it establishes Islam (a necessary corollary to cooperation). Yet Iraq should also cleave to the protection paradigm. First, the Iraqi government should interpret the ambiguous provisions of the Constitution describing the future judicial structure of the country to provide for fragmented jurisdiction. Article 90 requires that members of the Supreme Court be

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344. *Islam, Law and Custom*, *supra* note 257, at 37. Likewise, Abu Hanifah argued in favor of broad education. *Id.*

345. AFG. CONST. art. 44.

346. Mandana Hajj, *Islam and Female Education: Evidence from Individual-Level Data* *3-4 (unpublished) (on file with the author and available through SSRN).

347. Garlicki, *supra* note 28, at 505.

348. *Id.*

349. *Id.* at 497.

350. *See generally* International Crisis Group, *Pakistan: Madrasas, Extremism and the Military* (29 July 2002), *available at* http://www.crisisgroup.org.

351. Aziz Talbani, *Pedagogy, Power, and Discourse: Transformation of Islamic Education*, COMP. EDUC. REV. 40, No. 1, at 71 (1996).

352. PEREZ HOODBHOY, IDEOLOGICAL PROBLEMS FOR SCIENCE IN PAKISTAN, IN ISLAM, POLITICS AND THE STATES 174 (Asghar Khan ed., 1985); *id.* at 76.

"experts in (Islamic Jurisprudence) and law."[353] From the Arabic, it is not clear whether all judges must be experts in *both* kinds of law or whether some must be experts in Islamic law and some in secular law. The distinction is an important one. If it is the former, the court could look something like the Egyptian Supreme Court. If the latter, it would look more like the Pakistani Supreme Court. The former is far preferable.

In crafting and implementing legislation establishing the Federal Supreme Court, Iraqis should take care that the Supreme Court shares jurisdiction with local courts, both religious and regional. Article 39 provides, "Iraqis are free in their adherence to their personal status according to their own religion, sect, belief and choice, and that will be organized by law."[354] Some have read this to mean that Shi'a, Sunnis, Christians, and members of other belief associations are free to organize independent court systems.[355] The Iraqi government should endorse this reading and strive to spur competition between sectarian and federal courts in ways that conduce to the moderation of both. Iraq, as Afghanistan has not, should ensure that multiple religious viewpoints can successfully be presented in court.[356]

The Constitution also permits Iraqi provinces to establish their own legal systems.[357] Indeed, the Kurds are apparently in the process of drafting a regional Constitution.[358] This is to the good, and the government should encourage it. Indeed, the establishment of regional legal systems and courts may provoke the kind of jurisdictional competition that has arisen in Malaysia. As one Malaysian scholar has explained by way of example, when "the Gombak district *Syariah* [court] declared that the male privilege of pronouncing unilateral divorce upon his wife . . . was permissible even if effected by short messaging service . . . [the

353. IRAQ CONST. art. 90.

354. *Id.* at art. 39.

355. *See* ANALYSIS AND COMMENTARY, *supra* note 224 ("[I]t is clear that individuals must be offered the option of following sectarian law.")

356. The new Afghan Constitution "requires that courts render decisions based on 'provisions of the Hanafi jurisprudence' when 'there is no provision in the Constitution or the laws with respect to a case.'" Tad Stahnke & Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries* *11 (unpublished) (on file with the author and available through SSRN). An analogous provision of the 1964 Afghan Constitution was one the roots of the Taliban regime in Afghanistan. Hanafi jurisprudence is particularly strict; *see* Bharathi A. Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 1970-71 (1995), and it had no competition, see Travis, *supra* note 9, at 22 (the 1964 Constitution "required Afghan court[s] to render justice in cases not controlled by the Constitution or statutory law 'by following the basic principles of the Hanafi jurisprudence of the Shari'a of Islam'")

357. *See* ANALYSIS AND COMMENTARY, *supra* note 224 ("By regional standards, the list of those areas that are exclusively the responsibility of the central government is remarkably short."). *Cf.* United States Institute of Peace, *Iraq at a Juncture* (Sept. 2005) http://www.usip.org/newsmedia/releases/2005/1005_iraq.html (quoting Peter Galbraith to the effect that Shia leaders initially negotiated for an Iranian-style Guardian Council, despite objections over the use of the court solely as a vehicle to ensure legislative alignment with Islam; as a compromise, Galbraith noted, the Court was stripped of its power to review regional legislation.)

358. ANALYSIS AND COMMENTARY, *supra* note 224. *Cf.* IRAQ CONST. art. 116 .

decision inspired] both ire and endorsement."[359] Just as Malaysian courts have imposed different conditions upon a husband who wishes to take a second wife, "from relatively more demanding to almost negligible,"[360] so courts have freely chosen either to adhere to the Gombak precedent or reject it. Iraq should foster this kind of competition between regional courts; it is a recipe for dissent within belief associations.[361]

Not only should it strive to promote jurisdictional competition, but the Iraqi government should also vest the Supreme Court with a responsibility to promote *ijtihad* (independent interpretation of Islamic precepts).[362] The Iraqi government should also explicitly grant the government the ability to refer constitutional questions to the Supreme Court[363] since it is generally true that as the number of constitutional references goes up so too does judicial responsiveness to rights assertions.[364]

Second, the Iraqi government should take affirmative steps to insure that (potential) dissenters have all the resources they need to express their opinions.[365] Although Article 36 of the Constitution affirms the freedom of the press and of opinion, it leaves open how these freedoms are to be realized.[366] The legislature should immediately offer subsidies to those wishing to express disfavored opinions.[367] This is not a farfetched proposal. Iraq is one of the few countries in the world that requires that a certain proportion of its elected officials be women.[368] Iraqis clearly have no aversion to principled affirmative action.

Third and finally, Article 34 affirms the importance of a national educational scheme, but provides no details. The Iraqi government should, as soon as practicable, pass a law either establishing a uniform national educational system,

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359. Jacelyn Ling-Chien Neo, *"Anti-God, Anti-Islam and Anti-Quran": Expanding the Range of Participants and Parameters Over Women's Rights and Islam in Malaysia* *33 (unpublished) (on file with the author and available through SSRN).

360. *Id.* at *56.

361. *Cf. supra* text accompanying note 286.

362. ALGERIA CONST. art. 171.

363. *Cf.* AFG. CONST. ch. 7 art. 121.

364. *Cf.* Alec Stone Sweet, *Constitutional Politics in France and Germany* *203-207 (on file with the author).

365. Other Middle Eastern countries have constitutional or legal provisions that impose such a requirement on the government. *See, e.g.*, SYRIA CONST. ART. 45 (requiring the government to insure that women have "all opportunities enabling them to fully and effectively participate in the social, cultural, and economic life.")

366. IRAQ CONST. art. 36(2).

367. The Iraqi government eliminated what had been Article 44 of the August draft from the Constitution it presented to the people on October 15. *Cf.* ANALYSIS AND COMMENTARY, *supra* note 224. That article provided, "[a]ll individuals shall have the right to enjoy all the rights mentioned in the international treaties and agreements concerned with human rights." If possible, the substance of this article should also be restored, as lawsuits brought by human rights groups may be an effective way to insure that dissenters within belief associations are given the resources and opportunities the protection paradigm counsels that Iraq assure them. *Cf.* Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1229 (2005) (suggesting that discrete and insular minorities have turned to international law and norms to secure vindication of their rights in national courts).

368. IRAQ CONST. art. 48(1).

as the Afghans have,[369] or requiring all schools, whether public or private, to teach a civics class.

The Iraqis need not do this alone. These measures are preconditions to United States support for the Constitution (and to U.S. withdrawal); the United States should use its influence to ensure that Iraqis put them into effect. Indeed, this article has argued that the ethics and practicalities of state-and-nation-building *require* the United States to endorse efforts by the Iraqi government to cooperate with belief associations. It has also sought to demonstrate that this commitment entails a corollary endorsement of establishment. But the privilege paradigm is meaningless without insuring protection for those who might dissent from within belief associations. That should be the next U.S. priority.

369. *See supra* text accompanying note 340.