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## Legal Roots of Authoritarian Rule in the Middle East: Civic Legacies of the Islamic Waqf†

*In the legal system of the premodern Middle East, the closest thing to an autonomous private organization was the Islamic waqf. This non-state institution inhibited political participation, collective action, and rule of law, among other indicators of democratization. It did so through several mechanisms. Its activities were essentially set by its founder, which limited its capacity to meet political challenges. Being designed to provide a service on its own, it could not participate in lasting political coalitions. The waqf's beneficiaries had no say in evaluating or selecting its officers, and they had trouble forming a political community. Thus, for all the resources it controlled, the Islamic waqf contributed minimally to building civil society. As a core element of Islam's classical institutional complex, it perpetuated authoritarian rule by keeping the state largely unrestrained. Therein lies a key reason for the slow pace of the Middle East's democratization process.*

### INTRODUCTION

Even after the Arab uprisings of 2011, the Middle East<sup>1</sup> remains the world's least democratized region.<sup>2</sup> The checks and balances

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1. For present purposes, the “Middle East” consists of the twenty-two members of the Arab League plus Iran and Turkey.

2. On a standardized 0–10 scale (10 being the best), the population-weighted 2016 Freedom House civil liberties score for the Middle East is 2.3, as against 8.2 for the member states of the Organisation for Economic Co-operation and Development (OECD). See *Freedom in the World 2016—Anxious Dictators, Wavering Democracies: Global Freedom Under Pressure*, FREEDOM HOUSE, <https://freedomhouse.org/report/>

within its political regimes tend to be weak.<sup>3</sup> That is why the region's secularists and Islamists, and also its Shi'ites and Sunnis, object vehemently to being governed by parties under the other's control.

For all their insights, the literatures on these patterns raise puzzles.<sup>4</sup> Certain important findings relate to only part of the region. For example, the observation that oil revenues allow rentier states to silence their critics<sup>5</sup> leaves unexplained the persistence of autocratic rule in oil-importing states. Other popular arguments clash with evidence from outside the region. The treatment of the Middle East's low political performance as a legacy of colonialism<sup>6</sup> raises the question of why many former colonies elsewhere, including India and Brazil, have better political records. A common trait in the literature is a focus on proximate factors.<sup>7</sup> Since the end of foreign rule, it is commonly observed, monarchs and presidents have emasculated the news media, suppressed intellectual inquiry, restricted artistic expression, banned political parties, and co-opted regional, ethnic, and religious organizations. With political advocacy by non-governmental organizations (NGOs) severely restricted, sustained collective action is generally limited to extraordinary circumstances. Moreover, NGOs that overcome obstacles to political action tend to be unaccountable to their constituencies.<sup>8</sup> But these well-documented patterns do not explain why the oppressive policies in question have been effective for decades on end or why NGOs were weak at the start of the establish-

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freedom-world/freedom-world-2016. The 2015 rule of law index of the World Justice Project is 4.7 for the Middle East, as against 7.2 for the OECD. See *Historical Data, WORLD JUSTICE PROJECT*, <http://worldjusticeproject.org/historical-data>. In both calculations, Turkey is included in the Middle East and excluded from the OECD, and the population data is taken from *World DataBank: World Development Indicators, WORLD BANK*, [http://databank.worldbank.org/data/reports.aspx?Code=SP.POP.TOTL&id=af3ce82b&report\\_name=Popular\\_indicators&populartype=series&ispopular=y#](http://databank.worldbank.org/data/reports.aspx?Code=SP.POP.TOTL&id=af3ce82b&report_name=Popular_indicators&populartype=series&ispopular=y#).

3. Using cross-country regressions under various specifications, Jerg Gutmann and Stefan Voight show that the rule of law tends to be weaker in countries with a high share of Muslims. A lack of judicial independence and systematic discrimination by religion and gender are among the characteristics of predominantly Muslim countries. See Jerg Gutmann & Stefan Voight, *The Rule of Law and Constitutionalism in Muslim Countries*, 162 PUB. CHOICE 351 (2015).

4. For critiques of the influential explanations, see Larry Diamond, *Why Are There No Arab Democracies?* 21 J. DEMOCRACY 93 (2010); Ani Sarkissian, *Religious Regulation and the Muslim Democracy Gap*, 5 POL. & RELIGION 501 (2012); Steven M. Fish, *Islam and Authoritarianism*, 55 WORLD POL. 4 (2002).

5. See Michael L. Ross, *Does Oil Hinder Democracy?* 53 WORLD POL. 325 (2001) (showing that oil wealth hinders democratization).

6. Tareq Y. Ismael & Jacqueline S. Ismael, *Civil Society in the Arab World: Historical Traces, Contemporary Vestiges*, 19 ARAB STUD. Q. 77 (1997).

7. The most insightful contributions include MICHAELLE L. BROWERS, *DEMOCRACY AND CIVIL SOCIETY IN ARAB POLITICAL THOUGHT: TRANSCULTURAL POSSIBILITIES* (2006); Sean L. Yom, *Civil Society and Democratization in the Arab World*, 9 MIDDLE EAST REV. INT'L AFF. 14 (2005); Vickie Langohr, *Too Much Civil Society, Too Little Politics: Egypt and Liberalizing Arab Regimes*, 36 COMP. POL. 181 (2004); Quintan Wiktorowicz, *Civil Society as Social Control*, 33 COMP. POL. 43 (2000).

8. Asef Bayat, *Activism and Social Development in the Middle East*, 34 INT'L J. MIDDLE EAST STUD. 8 (2002).

ment of national regimes. Indeed, neither the colonial period of the Middle East nor its precolonial centuries featured NGOs capable of restraining the state.

This Article suggests that the patterns in question, including the persistence of authoritarianism, the political passivity of the masses, and the weakness of non-state organizations, are rooted in historical processes that predate European colonialism. Colonial as well as postcolonial political institutions were superimposed on an institutional complex that was poorly suited to democratization. My focus is on a key element of that complex: the Islamic *waqf*. Also known in English as a “pious foundation” or “Islamic trust,” the Islamic *waqf* is called *habous* in parts of North Africa and *bonyad* in Iran. It is a foundation established under premodern Islamic law, and differs from the modern *waqf* that has emerged in certain countries.<sup>9</sup>

Within the premodern Islamic legal system, the Islamic *waqf* was the closest thing to an autonomous private organization. As such, it might have served as a vehicle for organized political participation, mass collective action, and political accountability, among other indicators of democratization. It might have generated a vibrant civil society capable of constraining rulers and majorities. But, in fact, the Islamic *waqf* impoverished civil society and made democratization more difficult. The rest of the Article substantiates this claim.

Civil society refers to the collectivity of associations that people form outside the family, the state, and the commercial sector to advance common interests. It has played vital roles in every successful democratization process, including the building of checks and balances into the state itself.<sup>10</sup> To be sure, the specific trajectories differed across today’s democratic societies. Beginning their transformations at different times, they also experienced different social cleavages. Their democratic characteristics—enforced human rights, broad political participation through parties and lobbies, autonomous legislatures and judiciaries, and universal suffrage—did not develop in lockstep.<sup>11</sup> Hence, looking at the history of civil society in other societies would not amount to treating them as the only model of po-

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9. See *infra* Parts VII–VIII.

10. The seminal argument was developed by ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop trans., 2000) (1835–1840). For extensions of this argument, see ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993).

11. The roles of peasants, cities, and merchants in constraining the monarch all varied across different contexts. Although England’s Glorious Revolution (1688) and the French Revolution (1789) both instituted checks and balances, the key coalitions differed. See Daniel Ziblatt, *How Did Europe Democratize?*, 58 *WORLD POL.* 311 (2006); CHARLES TILLY, *CONTENTION AND DEMOCRACY IN EUROPE, 1650–2000* (2005); BARRINGTON MOORE, JR., *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD* (1966).

litical success. The multiplicity of Western political paths suggests that the Middle East could have followed a distinct political path, even several paths unique to particular sub-regions. Yet, for all their differences, the European paths to democracy also have commonalities. They all involved protracted struggles by perpetual private associations. These struggles taught impoverished, dominated, and relatively poor groups to organize themselves effectively. All of the paths produced checks and balances of some sort.

Hence, investigating the waqf's political consequences amounts to asking why the Middle Eastern counterpart of European private organizations achieved less power. A fine-grained identification of the waqf's political functions will also illuminate critical obstacles to sustained democratization in the present.

This Article proposes that the waqf limited democratization through several mutually supportive mechanisms. Its use of resources was set by its founder, which limited its capacity to meet new political challenges. In disregarding the preferences of its beneficiaries, it limited political participation. It could not pool resources with other entities, which kept it from joining durable political coalitions. It limited political participation further by denying its beneficiaries a say in the selection of officers.

In the modern Middle East, the corporation, which is a self-governing organization conducive to politics, has taken over many social functions long performed by the Islamic waqf. Notwithstanding its name, which harkens to early Islam, even the modern waqf is a non-profit or charitable corporation. Islamic charities of the twenty-first century tend to be organized as modern waqfs, rather than as Islamic waqfs. This makes it especially useful, in identifying the Islamic waqf's political consequences, to keep an eye on corresponding developments in Western Europe, the region where the corporation first facilitated democratization.

### I. THE ISLAMIC WAQF AND ITS ECONOMIC SIGNIFICANCE

Under classical Islamic law, which took shape between the seventh and tenth centuries, a waqf was a foundation that a Muslim individual established by turning privately held real estate into a revenue-producing endowment. The endowment was to provide a designated service in perpetuity. Ordinarily a judge (*kadi*) ratified the waqf's purpose. He also recorded the assets placed in the endowment and the founder's stipulations regarding disposition of the income. The resulting deed (*waqfiyya*) was meant to govern the waqf's operation forever.<sup>12</sup>

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12. For general accounts of waqf rules and practices, see JOHN ROBERT BARNES, AN INTRODUCTION TO RELIGIOUS FOUNDATIONS IN THE OTTOMAN EMPIRE (1987); Jeffrey A. Schoenblum, *The Role of Legal Doctrine in the Decline of the Islamic Waqf: A Com-*

The service could be anything legitimate under Islamic law. Thus, waqfs were commonly established to support mosques, schools, fountains, hospitals, soup kitchens, bathhouses, inns, and funerary complexes. Whatever the particular service, the endowment would be expected to support operational expenses, including repairs and staff salaries.<sup>13</sup> Sometimes the deed explicitly named the beneficiaries: for example, a particular family, or the indigents of a particular town, or a class of taxpayers. When no beneficiaries were specified, the locational choice might privilege certain communities—the patients of a Damascus hospital would consist disproportionately of Damascenes, for instance. Ordinarily the waqf's income was exempt from taxation.<sup>14</sup>

Responsibility for managing the waqf's endowment and implementing its deed fell to a caretaker (*mutawalli*). The caretaker rented out properties, authorized repairs, hired and supervised employees, and delivered services. He<sup>15</sup> performed these duties as the founder's agent; he was supposed to implement the wishes that the founder expressed through the deed. The initial caretaker of a waqf was selected by the founder, who could specify succession procedures. Sometimes he would name a sequence of individuals. Another common pattern was to reserve the position for a particular office holder, such as a certain mosque's imam. Some founders simply assigned the succession decision to the caretaker. Ordinarily the appointment was for life.

Before modern times, expropriation was common in the Middle East. A waqf enjoyed considerable immunity against confiscation because of the belief that its assets were sacred.<sup>16</sup> This belief thus served as a credible commitment device. Knowing that a ruler could not confiscate a waqf without appearing impious, people expected him to respect the inalienability of endowed assets. The exceptions generally occurred during regime changes or major internal challenges. Rulers would declare a cluster of waqfs invalid, usually on the ground that the founders did not own the endowed assets, as waqf law required. The best-known exceptions prove the rule. Mamluk and

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*parison with the Trust*, 32 VAND. J. TRANSNAT'L L. 1191 (1999); Timur Kuran, *The Provision of Public Goods Under Islamic Law: Origins, Impact, and Limitations of the Waqf System*, 35 LAW & SOC'Y REV. 841 (2001).

13. Certain modest waqfs offered services without any dedicated physical structure. They included those established for paying a neighborhood's taxes, assisting widows, liberating indebted prisoners, or conducting prayers for the dead.

14. BARNES, *supra* note 12, at 38–40; RICHARD VAN LEEUWEN, *WAQFS AND URBAN STRUCTURES: THE CASE OF OTTOMAN DAMASCUS* 53–54 (1999).

15. Although women could establish a waqf and serve as a waqf caretaker, most founders and most caretakers were men. The use of the male pronoun alone in this article is for expedience.

16. The sacredness belief was reinforced through waqf deeds, which typically stated that anyone who harmed a waqf would suffer in the afterlife. See NAZIF ÖZTÜRK, *TÜRK YENİLEŞME TARİHİ ÇERÇEVESİNDE VAKIF MÜESSESESİ* 23 (1995).

Ottoman expropriators usually backed down in the face of resistance. On balance, an asset was much less likely to be confiscated if it belonged to a waqf than if it was privately owned.<sup>17</sup>

TABLE 1. WAQF ASSETS OR REVENUES: ESTIMATES.

Source	Place	Date	Tax revenue collected by waqfs	Waqf assets	Estimation method
Behrens-Abouseif	Egypt	1517		Half of land	Ottoman land survey
Barkan and Ayverdi	Anatolia	1530	27%		Statistical sampling
Yediyıldız	Anatolia	1601–1700	26.8%		Statistical sampling
Ubicini	Turkey	1800		Three-quarters of landed property	Aggregation of official opinions, reports
Öztürk	Anatolia	1801–1900	15.8%		Statistical sampling
Berque	Algiers	1830		Half of buildings in city	French land survey
Deguilhem	Damascus and environs	1922		More than half of real estate	Impressions of historians

Sources: ÖMER LÜTFİ BARKAN & EKREM HAKKI AYVERDİ, İSTANBUL VAKIFLARI TAHİRİ DEFTERİ 953 (1546) TARİHLİ 17 (1970); Doris Behrens-Abouseif, *Waqf*, pt. II: *In the Arab Lands*, pt. 1: *In Egypt*, in 11 ENCYCLOPAEDIA OF ISLAM 64, 66; JACQUES BERQUE, MAGHREB: HISTOIRE ET SOCIÉTÉS 173 (1974); Randi Deguilhem, *On the Nature of Waqf: Pious Foundations in Contemporary Syria*, in LES FONDATIONS PIEUSES (WAQF) EN MÉDITERRANÉE: ENJEUX DE SOCIÉTÉ, ENJEUX DE POUVOIR 395, 410 (Randi Deguilhem & Abdelhamid Hénié eds., 2004); NAZİF ÖZTÜRK, TÜRK YENİLEŞME TARİHİ ÇERÇEVESİNDE VAKİF MÜESSESESİ 54 (1995); M.A. UBİCİNİ, LETTRES SUR LA TURQUIE 261 (2d ed. 1853); Bahaeddin Yediyıldız, *XVII. Asır Türk Vakıflarının İktisadi Boyutu*, 18 VAKIFLAR DERGİSİ 26, 54 (1984).

The relative security of waqf property steered resources into waqfs. Although no comprehensive data set exists, various indicators testify to their vast economic significance. First of all, practically every monograph on a premodern Middle Eastern city devotes at least a chapter to local waqfs, invariably establishing that they played critical economic roles. Second, the available estimates of waqf assets and income involve huge figures (see Table 1). The three studies using statistical sampling show that the share of tax revenue accruing to Anatolian waqfs through their tax-paying assets was 27% in the 1530s, 26.8% in the seventeenth century, and 15.8% in the

17. YAACOV LEV, CHARITY, ENDOWMENTS, AND CHARITABLE INSTITUTIONS IN MEDIEVAL ISLAM 155 (2005); VAN LEEUWEN, *supra* note 14, at 88–89, 96; Doris Behrens-Abouseif, *Waqf*, pt. II: *In the Arab Lands*, pt. 1: *In Egypt*, in 11 ENCYCLOPAEDIA OF ISLAM 64 (P. Bearman et al. eds., 2d ed. 2002); ROBERT IRWIN, THE MIDDLE EAST IN THE MIDDLE AGES: THE EARLY MAMLUK SULTANATE, 1250–1382, at 96, 141 (1986); Bahaeddin Yediyıldız, *Vakıf*, in 137 İSLÂM ANSİKLOPEDİSİ 161 (1982).

nineteenth century.<sup>18</sup> The Ottoman treasury received about half of its tax revenue from real estate; poll taxes and opportunistic taxes (*avarız*) formed the other major categories. Hence, until the nineteenth century, which marked the start of fundamental reforms, waqfs claimed around half of all imperial real estate taxes. The dip in the nineteenth century reflects the nationalizations that accompanied the reforms; they are discussed below. A third indicator is that waqf-related cases appear very frequently in court records. Of 9,074 commercial cases in a judicial database of seventeenth-century Istanbul, 17% concerned a waqf matter. By contrast, a state official was involved in just 7.6% of the cases.<sup>19</sup> Finally, a large majority of all surviving Middle Eastern buildings from before the nineteenth century were financed through a waqf. The main exceptions are palaces, fortresses, and harbors.

The waqfs' huge asset base made them potentially powerful political players. They could have used their resources to constrain the state on behalf of the beneficiaries whom they were supposed to serve. In the process, the nucleus of a civil society capable of advancing political objectives might have emerged. The resulting decentralization of power could have placed the Middle East on the road to democratization.

Being in charge of an organization commanding income-producing assets, a waqf caretaker was usually esteemed for that reason alone. He was the natural leader of his waqf's constituency—the teachers and students of a school, the poor who depended on a soup kitchen, or the community living near a particular fountain.<sup>20</sup> With each such constituency, the caretaker provided a focal point for coordinating individual demands. Hence, every waqf constituency formed a community potentially capable of collective action. Insofar as waqf beneficiaries worked collectively to advance their joint interests, they might have developed the organizational, communicational, and strategic skills to pursue collective action in other contexts and through different groups. Waqfs could have turned the Middle East into a region hospitable to initiatives requiring social organization—in other words, a region rich in “social

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18. ÖMER LÜTFİ BARKAN & EKREM HAKKI AYVERDİ, İSTANBUL VAKIFLARI TAHRİR DEFTERİ 953 (1546) TARİHLİ 17 (1970); Bahaeddin Yediyıldız, *XVII. Asır Türk Vakıflarının İktisadî Boyutu*, 18 VAKIFLAR DERGİSİ 26 (1984); ÖZTÜRK, *supra* note 16, at 54.

19. 5–8 SOCIAL AND ECONOMIC LIFE IN SEVENTEENTH-CENTURY ISTANBUL: GLIMPSES FROM COURT RECORDS (Timur Kuran ed., 2010–2013) [hereinafter SOCIAL AND ECONOMIC LIFE IN SEVENTEENTH-CENTURY ISTANBUL].

20. A common theme in historical accounts of Middle Eastern cities involves the esteem enjoyed by waqf caretakers. CEM BEHAR, A NEIGHBORHOOD IN OTTOMAN ISTANBUL: FRUIT VENDORS AND CIVIL SERVANTS IN THE KASAP İLYAS Mahalle 65–83 (2003); VAN LEEUWEN, *supra* note 14, ch. 4. In court records they carry an honorific title, which points to the institutionalization of their elevated social status.

capital.”<sup>21</sup> Such initiatives could have included campaigns to influence state policies. However, as we shall now see, the waqf was designed to inhibit collective action by sub-communities, not to facilitate it.

## II. ORIGINS OF THE WAQF'S POLITICAL FEATURES

Nothing is certain about the waqf's origins except that it is not among Islam's original institutions. The Quran does not mention it, which suggests that it had not yet emerged by Muhammad's death in 632.<sup>22</sup> Although numerous remembrances about early Islam (*hadīth*) hold that Muhammad's companions formed waqfs, these accounts were probably concocted to legitimize an addition to the Islamic institutional complex.<sup>23</sup>

Institutions resembling the waqf were present in pre-Islamic civilizations of the Middle East. In the Sassanid and Byzantine empires, temples had long been financed through some form of trust.<sup>24</sup> In all likelihood, the idea of endowing assets to provide a permanent service was appropriated from these empires during Islam's expansion into Syria and Iraq.<sup>25</sup> The administration of the Umayyad Empire (661–750) and then that of the Abbasid Empire (750–1258) drew liberally on the talents of bureaucrats who had served other states.<sup>26</sup> Under both dynasties, the consolidation of power involved higher taxes on various groups, with exemptions provided to accommodate political pressures. These policies bred insecurity among administra-

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21. A rich literature treats social capital as fundamental to economic development. See EDWARD C. BANFIELD, *THE MORAL BASIS OF A BACKWARD SOCIETY* chs. 5–8 (1958); JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* ch. 12 (1990); FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 3–57 (1995); ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993); Luigi Guiso, Paola Sapienza & Luigi Zingales, *Social Capital as Good Culture*, 6 J. EUR. ECON. ASS'N 295 (2008). On the Middle East specifically, see AMANEY A. JAMAL, *BARRIERS TO DEMOCRACY: THE OTHER SIDE OF SOCIAL CAPITAL IN PALESTINE AND THE ARAB WORLD* ch. 6 (2007).

22. Norbert Oberauer, *Early Doctrines on Waqf Revisited: The Evolution of Islamic Endowment Law in the 2nd Century AH*, 20 ISLAMIC L. & SOC'Y 1 (2013).

23. HÜSEYİN PERVİZ HÂTEMİ, ÖNCEKİ VE BUGÜNKÜ TÜRK HUKUKUNDA VAKIF KURMA MUAMELESİ 29–38 (1969). During Islam's first few centuries leading scholars dismissed hundreds of thousands of such recollections as apocryphal. Modern investigators consider most of the remainder fabricated. See Jonathan A.C. Brown, *Even If It's Not True It's True: Using Unreliable Ḥadīths in Sunni Islam*, 18 ISLAMIC L. & SOC'Y 1 (2011).

24. JOHN PHILIP THOMAS, *PRIVATE RELIGIOUS FOUNDATIONS IN THE BYZANTINE EMPIRE* (1987).

25. Fuad Köprülü, *Bizans Müesseselerinin Osmanlı Müesseselerine Tesiri*, 1 TÜRK HUKUK VE İKTİSAT TARİHİ MECMUASI 165 (1931). See also Onur Yıldırım, *Pious Foundations in the Byzantine and Seljuk States: A Comparative Study of Philanthropy in the Mediterranean World During the Late Medieval Era*, 73 RIVISTA DEGLI STUDI ORIENTALI 27 (1999) (showing that in certain respects the waqf and the Byzantine “pious foundation” developed in parallel, influencing one another).

26. On the Middle East's political evolution during this period, see IRA LAPIDUS, *A HISTORY OF ISLAMIC SOCIETIES* chs. 3–8 (1988).



tive cadres. Although a talented person could prosper by serving an Umayyad or Abbasid caliph, he was always at risk of being fired, expropriated, even executed; a misjudgment or a rumor could make him lose everything suddenly.

The resulting insecurity would have fueled a quest for institutions capable of alleviating the risks in question. The debated alternatives are evident in the earliest compendium of waqf rules, al-Khassaf's ninth-century *Kitāb ahkām al awqāf*.<sup>27</sup> According to this treatise, the waqf entered the Islamic institutional complex in the eighth century. Apparently, the principle of freezing the use of waqf assets in perpetuity drew clerical opposition. The rules that emerged from the negotiations were legitimized through late-appearing recollections of Muhammad's life. Collectively they gave powerful constituencies a stake in the waqf. State officials obtained material security through the right to shelter wealth from unpredictable rulers. Religious officials (*ulamā*) gained access to rents through their supervisory authority. As for rulers, officials would serve them more willingly, the rulers themselves would obtain insurance against a palace coup through the ability to shelter wealth for their own families and descendants, and, finally, waqf-supplied social services would reflect well on their regimes. The achieved agreement allowed the ruler and his aides alike to establish socially beneficial waqfs in return for secure control over their assets and the right to keep some of their income.

From the eighth century onward, some of the largest waqfs were established by members of the ruling dynasty. Known as imperial waqfs, they include the Complex of Sultan Barquq in Cairo (1384) and the Süleymaniye Complex in Istanbul (1557).<sup>28</sup> Relatives of a sultan formed imperial waqfs as insurance against loss of intra-dynastic influence. The mother of the crown prince might want an autonomous financial base in case her son died prematurely or was outmaneuvered by a rival claimant, for example. An imperial waqf also provided security against changes in state priorities. By virtue of its sacredness, a waqf built in the name of Sultan Süleyman II would endure even if his descendants spurned its objectives.

Two waqf characteristics, both already mentioned, betray the fact that the benefits of forming a waqf were expected to accrue primarily to high officials and their families. The immovability requirement favored state officials, who were paid primarily through land grants. This restriction discriminated against merchants, whose wealth consisted largely of movable goods. Not until the sixteenth

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27. For an English translation, see *A NINTH CENTURY TREATISE ON THE LAW OF TRUSTS (BEING A TRANSLATION OF AL-KHASSAF, AHKĀM AL-WAQŪF)* (Gilbert Paul Verbit trans & ed., 2008).

28. A waqf complex typically included a mosque plus several charities.

century did merchants secure the ability to shelter liquid wealth, and then only in Anatolia and the Balkans.<sup>29</sup> The requirement that the founder be a Muslim also favored political elites, most of whom were Muslim by birth or conversion. Strategically valuable non-Muslims were allowed, by special permission, to form a functionally similar organization.

The claim that the waqf favored landowning Muslim elites goes against a huge literature that treats it as an expression of pious charity.<sup>30</sup> But it is consistent with the lack of restrictions on non-Muslims with regard to the *use* of waqf services. Ordinarily, Christians and Jews were eligible to drink from waqf-maintained fountains and stay in waqf-funded inns. True, they were unwelcome in mosques, unless they intended to convert, and the founder of a waqf could restrict its services to Muslims. However, the resulting consumption exclusions stemmed from in-group biases that infused daily life. They did not reflect a requirement of waqf law. A Muslim was free to establish a waqf for the benefit of a non-Muslim neighborhood. Also telling is that non-Muslims freely used another Islamic institution that absorbed private capital: the Islamic partnership. An Islamic partnership's capital had to be liquid, and it served short-lived cooperative ventures.<sup>31</sup> Its unsuitability for sheltering wealth explains why Christians and Jews, banned from forming waqfs, were allowed to form legally supported commercial ventures (see Table 2).

Various details of Islamic law accord, then, with the waqf's emergence as a wealth shelter for high state officials and their families. Although some officials participated in commerce, their wealth was concentrated in real estate. In adapting pre-Islamic models of the trust creatively, they gave themselves the lion's share of the gains. There is evidence that they continued to benefit disproportionately up to the modern era. In the eighteenth century, 42.7% of all Anatolian waqfs were founded by state officials, and an additional 16% by clerics generally allied with the sultan.<sup>32</sup> Because officials formed the largest waqfs, the disproportion was even greater in relation to control of waqf assets.

The Umayyad and Abbasid sultans who consented to the law of the waqf must have understood that it raised the likelihood of challenges from officials. To dampen waqf-based threats, they would have restricted the uses of waqf assets. Several rules discussed in the

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29. Jon E. Mandaville, *Usurious Piety: The Cash Waqf Controversy in the Ottoman Empire*, 10 INT'L J. MIDDLE EAST STUD. 298 (1979).

30. Leading examples include LEV, *supra* note 17; AMY SINGER, *CONSTRUCTING OTTOMAN BENEFICENCE: AN IMPERIAL SOUP KITCHEN IN JERUSALEM* (2002).

31. TIMUR KURAN, *THE LONG DIVERGENCE: HOW ISLAMIC LAW HELD BACK THE MIDDLE EAST* 48–52, 59–68 (2011).

32. BHAHAEDDİN YEDIYILDIZ, *INSTITUTION DU VAQF AU XVIII<sup>e</sup> SIÈCLE EN TURQUIE: ÉTUDE SOCIO-HISTORIQUE* 121–22 (1990).

Parts ahead served that objective: the requirement to follow the founder's instructions, the courts' duty to monitor waqf operations, and obstacles to waqf mergers. It also mattered that many high officials were foreign-born slaves;<sup>33</sup> their status enhanced rulers' ability to eliminate those who posed a threat.

TABLE 2. RESTRICTIONS ON THE TWO MAIN INVESTMENT INSTRUMENTS OF ISLAMIC LAW.

	Islamic waqf	Islamic partnership
<b>Faith of founder</b>	Must be Muslim	Unrestricted
<b>Type of investment</b>	Real estate	Currency

This interpretation is consistent with recorded correlations between the “democratic deficit” of the modern Middle East and the diffusion of the Islamic institutional complex. Highlighting the reliance of Muslim sultans on slave armies, Lisa Blaydes and Eric Chaney find that this pattern of military recruitment caused Middle Eastern rulers to lag behind Western European rulers in legitimacy.<sup>34</sup> In related work, Chaney identifies a positive relationship between the share of a country's landmass that early Muslim armies conquered and its present democratic deficit.<sup>35</sup> Insofar as premodern military recruitment has affected modern politics, the influences would have operated through the entire institutional complex associated with slave armies. As both works underscore, foreign-born slave soldiers had difficulty forming coalitions with disgruntled local groups. However, slave soldiers and their descendants came to control enormous wealth. Besides, the families of slaves often became assimilated into local communities. These two factors would have undermined the objective of keeping officials loyal to the sultan. The reliance on slave soldiers required, then, the adoption of measures to inhibit the formation of opposition movements. Because of its indefinite life, the most pertinent institution was the waqf. Under the

33. GODFREY GOODWIN, *THE JANISSARIES* (1994); DANIEL PIPES, *SLAVE SOLDIERS AND ISLAM: THE GENESIS OF A MILITARY SYSTEM* (1981).

34. Lisa Blaydes & Eric Chaney, *The Feudal Revolution and Europe's Rise: Political Divergence of the Christian and Muslim Worlds Before 1500 CE*, 107 AM. POL. SCI. REV. 16 (2013).

35. Eric Chaney, *Democratic Change in the Arab World, Past and Present*, 42 BROOKINGS PAPERS ON ECON. ACTIVITY 363 (2012). See also Lisa Blaydes, *Comment on Eric Chaney's "Democratic Change in the Arab World: Past and Present"*, 42 BROOKINGS PAPERS ON ECON. ACTIVITY 404 (2012) (showing that Arab League membership today and early conquest by Muslim armies are comparably sized predictors of contemporary authoritarianism).

adopted rules, the waqfs of slave soldiers would have kept the ruler's power unchallenged.<sup>36</sup>

Islamic legal discourses customarily distinguish between the charitable waqf (*waqf khayrī*), which serves a broad constituency such as a neighborhood or the poor, and the family waqf (*waqf ahlī*), which provides income to a family. In practice, these legal categories represented the ends of a continuum. Many family waqfs devoted some income to a public service. As for charitable waqfs, typically they benefited the founder's family disproportionately; thus, their caretaker often belonged to the founder's line.<sup>37</sup> For his services a caretaker received a fixed salary, or a proportion of the waqf's revenue, or its residual revenue after mandatory expenses were met; hybrid patterns were not uncommon.<sup>38</sup> As Table 3 shows, family waqfs were typically minuscule, which is consistent with the objective of limiting autonomous power centers. The third canonical category is the imperial waqf, mentioned above. Its endowment could consist of imperial real estate that was granted to the founder expressly to finance a waqf.

TABLE 3. THREE CATEGORIES OF WAQFS: MAIN PROPERTIES.

	Family waqf	Charitable waqf	Imperial waqf
<b>Source of endowment</b>	Muslim individual outside ruling family	Muslim individual outside ruling family	Member of ruling Muslim dynasty
<b>Recorded beneficiaries</b>	Founder's family and descendants	Constituency much broader than founder's family	Large constituency outside of ruling dynasty
<b>Size of endowment</b>	Typically very small	Highly variable	Usually large

36. Another politically critical element of the institutional complex was the bundling of political and religious authority. See Jared Rubin, *Institutions, the Rise of Commerce, and the Persistence of Laws: Interest Restrictions in Islam and Christianity*, 121 *ECON. J.* 1310 (2011); BERNARD LEWIS, *ISLAM IN HISTORY: IDEAS, PEOPLE, AND EVENTS IN THE MIDDLE EAST* ch. 21 (rev. ed. 1993). Still another consisted of rules that kept businesses atomistic. See Timur Kuran, *Religious Obstacles to Democratization in the Middle East: Past and Present*, 5 *ANN. PROC. WEALTH & WELL-BEING NATIONS* 17 (2012–2013).

37. Local social norms determined the dividing lines between family waqfs and charitable waqfs.

38. For deeds involving a fixed salary, see cases Istanbul 3 (1618), 31b/4, 85b/1, 62a/2, and Istanbul 9 (1662), 167b/1, and for a stipulation of residual income, see case Galata 41 (1617), 36b/3, all in 5–7 *SOCIAL AND ECONOMIC LIFE IN SEVENTEENTH-CENTURY ISTANBUL*, *supra* note 19. See also GABRIEL BAER, *STUDIES IN THE SOCIAL HISTORY OF MODERN EGYPT* 80 (1969) (referring to salaries proportional to the endowment). For examples of all payment patterns, see 1 *BURSA VAKFIYELERİ* (Hasan Basri Öcalan, Sevim Sezai & Doğan Yavaş eds., 2013) (fixed 361; proportional 190, 378, 388, 415, 556; residual 397, 550; hybrid 455, 479).

Ready to address how the waqf hampered democratization, we will now consider several characteristics that shaped civic patterns. For each, we will draw attention to historical continuities.

### III. LIMITS ON SELF-MANAGEMENT

By design, the waqf was a rigid organization. In its canonical form, its assets were inalienable; never sold, bequeathed, pawned, or transferred, they were to finance its activities forever through steady rental income. The services were to be delivered in perpetuity according to instructions in the deed. Thus, a waqf-financed school was to teach designated subjects through an indicated number of teachers. The deed would also identify real estate whose income would cover the waqf's expenditures, including staff remuneration and maintenance.<sup>39</sup>

The ideal presumed that a complete contract was feasible. It also posited a static world with fixed relative prices, technologies, and preferences. For instance, land values would never change in ways that might prevent the financing of the stipulated services. The ideal also presumed that the judge ratifying the deed would evaluate assets accurately, that he and his successors would monitor caretakers flawlessly, and that successive caretakers would manage waqf assets competently.

Nevertheless, it was understood that conditions relevant to the waqf's usefulness might change. To limit inefficiencies, the architects of waqf law allowed founders to pre-authorize specific modifications. Accordingly, a school's waqf deed could permit the caretaker to swap an asset for a substitute. It could also allow the construction of new classrooms in case of need. But legitimate changes were limited to those explicitly allowed. If the deed permitted one asset swap, once that option was exercised, the waqf's properties became strictly inalienable. Sooner or later, every waqf obeying classical law would become frozen.<sup>40</sup> Incentives would arise along the way to circumvent restrictions through extralegal means. The resulting corruption had long-term political consequences of its own, though they lie outside this Article's scope.<sup>41</sup>

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39. For deeds with detailed stipulations, see case Istanbul 4 (1619), 54b/1, in 6 *SOCIAL AND ECONOMIC LIFE IN SEVENTEENTH-CENTURY ISTANBUL*, *supra* note 19; VAN LEEUWEN, *supra* note 14, at 128–30; 1 *BURSA VAKFIYELERİ*, *supra* note 38, at 360–63, 406–07, 550–51.

40. Some waqf deeds authorized the founder to make unlimited changes. But this flexibility ended with his death. For examples, see cases Istanbul 4 (1619) 31b/3, Istanbul 23 (1696), 51 b/2, and Galata 224 (1713), 82a/1, all recorded in 5, 8 *SOCIAL AND ECONOMIC LIFE IN SEVENTEENTH-CENTURY ISTANBUL*, *supra* note 19. See also VAN LEEUWEN, *supra* note 14, at 145.

41. See Kuran, *supra* note 12, at 869–75, 883–87.

Just as significant as the operational restrictions on the caretaker was what he was *not* required to deliver. He was not obligated to meet any efficiency target. Thus, a caretaker in charge of a school was not expected to reach some threshold of educational performance, such as ensuring that students attained reading proficiency by a particular age. He was accountable to the founder alone, and the courts, not students or their parents, determined whether he was meeting the founder's wishes. Whatever the type of waqf, the preferences of the founder trumped those of the end users. For their part, the intended beneficiaries were not expected to participate in governance. They were to consume services passively.

In reality, however, waqfs enjoyed greater managerial discretion than the ideal would suggest, because the waqf deed was necessarily an incomplete contract. Unavoidably, it gave the caretaker some discretion. Through creative interpretations, a caretaker could make adjustments that the founder could not even have contemplated. Any given adjustment might well accord with the spirit of the founder's objectives. By the same token, discretion could lead to choices that the founder would have ruled out, had he been able to imagine future circumstances.

#### IV. CURBS ON POLITICAL PARTICIPATION

The many varieties of democracy all emphasize broad political participation, which is achieved through such means as town meetings, referenda, lobbies, protests, opinion polls, and elections. The masses participate in governance through choices at the ballot box, but also by voicing preferences and ideas, working with like-minded citizens within advocacy organizations, and linking their future votes to the performance of elected officials. Such grassroots politics contributes to shaping public discourse. It also helps to make governance reflect the popular will.

Another characteristic feature of democracy is mandatory information sharing. Although even the most transparent democracies conceal sensitive data such as defense strategies and health records, officials are always required to report periodically about their activities. Moreover, many government decisions, including government budgets, are debated in public. Whether the typical citizen learns about the intricacies of public policies is beside the point.<sup>42</sup> For the system to serve the electorate better than any practical alternative, it may suffice to have a few citizens follow any given issue.<sup>43</sup> A common problem is that political players distort information self-servingly,

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42. On widespread voter ignorance even on fundamental policies, see BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* (2007); JOHN ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* (1992).

43. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* ch. 16 (1989).

confusing even citizens intent on staying informed. Democracies try to limit information pollution by standardizing disclosure requirements.

The rules of the Islamic waqf promoted neither broad political participation nor transparency in governance. Authority to execute the waqf deed belonged to a single person, though he might have had subordinates. Apart from the courts, no one, not even his staff, was entitled to information about assets, income, expenses, or service quality. The consequent lack of transparency facilitated whatever modifications he wanted; it also hindered those that he opposed.<sup>44</sup>

Ordinarily, the deed itself was public knowledge, which generated expectations concerning services. People living near a fountain counted on access to running water, because a plaque typically publicized its endowment. If the water stopped running, residents could sue the caretaker, and if the court found the caretaker negligent, it might dismiss him. Examples exist of lawsuits brought by displeased beneficiaries against a caretaker.<sup>45</sup> But to make a convincing case, aggrieved beneficiaries could not simply make a show of frustration. They had to prove that the deed was being violated. Because information concerning the waqf's finances and actions were not public knowledge, beneficiary-launched lawsuits against caretakers were rare. Out of 1,544 waqf-related court cases in a seventeenth-century Istanbul sample, only eleven entailed an accusation of caretaker mismanagement. None of these involved a plaintiff who was also a beneficiary. In all but one of these eleven caretaker mismanagement cases, the plaintiff was an active or former waqf official privy to inside information.<sup>46</sup>

In any case, the right to complain was no substitute for formal accountability to beneficiaries through periodic disclosures. Some judges were prepared to overlook improprieties in return for bribes. If the judge was in collusion with the caretaker, yet another option was to report both to higher authorities. That risked alienating officials capable of retaliation. Indeed, the fear of retaliation made people refrain from suing state officials unless their case was exceptionally

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44. A tradeoff between governance quality and decision-making costs exists whenever there are multiple stakeholders. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* ch. 8 (1962).

45. MIRIAM HOEXTER, *ENDOWMENTS, RULERS AND COMMUNITY: WAQF AL-HARAMAYN IN OTTOMAN ALGIERS* ch. 5 (1998); HAIM GERBER, *ECONOMY AND SOCIETY IN AN OTTOMAN CITY: BURSA, 1600–1700*, at 166–69 (1988); VAN LEEUWEN, *supra* note 14, at 159.

46. The caretaker management cases are in 6–8 *SOCIAL AND ECONOMIC LIFE IN SEVENTEENTH-CENTURY ISTANBUL*, *supra* note 19: Istanbul 3 (1618), 7b/4, 84a/1; Istanbul 4 (1619), 40b/2; Istanbul 9 (1662), 228a/1, 244b/3, 250b/2; Galata 130 (1683), 55a/5; Istanbul 22 (1695), 80b/2, 95a/2, 98a/2; Istanbul 23 (1696), 32b/1. The exception mentioned in the text is Istanbul 3 (1618), 7b/4.

strong.<sup>47</sup> Court fees alone could deter a lawsuit. In practice, then, a waqf's beneficiaries had only a limited sway over its caretaker's actions. Although capable of combating egregious mismanagement, they could not ensure his good will, let alone his competence.

Every waqf defined a group of beneficiaries who formed a potential political entity. Whether they developed a group identity was not assured. The users of an inn on a trade route could remain mutual strangers for years. The rules of the waqf did nothing to enhance group consciousness among those co-beneficiaries who had no reason to interact anyway. And even where a group identity formed naturally, as with the users of a fountain, there was nothing to turn them into a political community. By contrast, the residents of a modern city know that they form a political community because they vote periodically to select a mayor. The consequent sense of powerlessness would have discouraged waqf beneficiaries from trying to influence policies relevant to their welfare. They would also have refrained from seeking information about possible alternatives. Accepting what came their way and withholding feedback from service suppliers, they would have become accustomed to passive consumption.

One indication of the powerlessness of waqf beneficiaries lies in the tenure of caretakers. In the Anatolian town of Sivas, 1,902 waqf caretakers were replaced between 1700 and 1850. No fewer than 74% of the replacements followed a death in office. Typically, the successor was the retiring caretaker's son. A caretaker's performance had to slip severely before it would provoke a challenge, and only occasionally did a firing occur. One Sivas caretaker was replaced by his son when he became deaf; another was dismissed when he could no longer perform one of his major duties, which was to read the Quran.<sup>48</sup> Poor financial management alone rarely resulted in dismissal.<sup>49</sup>

Remember that rulers would have sought to keep the privilege to shelter wealth in waqfs from facilitating political opposition. Each of the aforementioned limitations on mass participation would have suited the ruler's survival strategy. Leaving waqf beneficiaries ignorant about management promoted stability by keeping waqfs from becoming foci of discontent. The passivity expected of beneficiaries limited mass political activity. It also reduced the capacity of the masses to react effectively to economic downturns, military defeats, and other such misfortunes. In the absence of preexisting consumer organizations and given their lack of experience in organized collec-

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47. Timur Kuran & Scott Lustig, *Judicial Biases in Ottoman Istanbul: Islamic Justice and Its Compatibility with Modern Economic Life*, 55 J.L. & ECON. 631, 649–52, 659 (2012).

48. ÖMER DEMİREL, SIVAS ŞEHİR HAYATINDA VAKIFLARIN ROLÜ 127–31 (2000).

49. VAN LEEUWEN, *supra* note 14, at 135, reports cases from eighteenth-century Damascus. Each involved a major waqf.



tive action, disgruntled subjects had to start organizing from scratch. As for the caretaker's lack of accountability to end users, it would have dampened expectations of official accountability in other domains; had the caretaker been required to deliver periodic public reports, this would have set politically undesirable precedents for inclusive governance generally. The instituted rules thus helped to perpetuate political centralization by preventing potentially subversive communities from becoming organized. They served as an instrument of authoritarian governance.<sup>50</sup>

Students of participatory politics distinguish between "tame" and "rebellious" organizations.<sup>51</sup> In barring waqfs from political advocacy, Islamic law ruled out the latter type. But it reduced participation even further by denying even the beneficiaries of tame waqfs a hand in management. This restriction would have impoverished public discourse on social services. The masses would also have failed to develop the habits and skills needed to communicate thoughts, expectations, and grievances concerning social services.

An immediate unintended consequence would have been a reduction in the efficiency of existing waqfs. Over the longer term, institutional innovations would have slowed. The pace of innovations is correlated with the number of ideas in circulation. That is why metropolises, which bring together diverse people, contribute to knowledge advancement far beyond their population share.<sup>52</sup> In excluding the masses from politics, the rules of the waqf would have diminished the production of ideas for change and reduced institutional creativity across the social system.<sup>53</sup> Awareness of shared problems would also have diminished. For both reasons, long-term political development would have suffered, along with economic development.

## V. THE WAQF VS. ITS EUROPEAN COUNTERPARTS

The properties of the waqf may be contrasted with those of the corporation, whose use spread in Western Europe as the waqf gained popularity in the Middle East. The comparison will be useful because

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50. For complementary observations focused on the weaknesses of Ottoman civil society, see Gizem Zencirci, *Civil Society's History: New Constructions of Ottoman Heritage by the Justice and Development Party in Turkey*, 19 EUR. J. TURKISH STUD. 1, 3–4 (2014).

51. Archon Fung, *Associations and Democracy: Between Theories, Hopes, and Realities*, 29 ANN. REV. SOC. 515, 534–36 (2003).

52. EDWARD GLAESER, *TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER* chs. 1, 9 (2011).

53. This accords with slower urban growth in the Middle East than in Western Europe between 800 and 1800. See Maarten Bosker, Eltjo Buringh & Jan Luiten van Zanden, *From Baghdad to London: Unraveling Urban Development in Europe, the Middle East, and North Africa, 800–1800*, 95 REV. ECON. & STAT. 1418 (2013).

it is in Western Europe that democracy emerged, providing the standards by which regimes are now measured.

Of the factors that fueled the first democracies, one was that social services were delivered through a rich mix of organizations that allowed the decentralization of political power, steady collective action by what we now call NGOs, and the formation of durable coalitions across interest groups. The corporation was part of the organizational mix, and its significance expanded during the Middle Ages and beyond.

A corporation is an association established under some law; claiming collective authority in a particular domain, it has legal personhood and a perpetual existence independent of its membership. Although its decisions may be determined by the entire membership, ordinarily certain officials hold the reins. With regard to the selection of officials, various options exist. The officials themselves may appoint their successors. Alternatively, the general membership may participate in the selection. Precisely because a corporation is self-governing, it may modify its own rules. Hence, its management patterns present bewildering variety.

Figure 1 depicts several organizational forms that involved the provision of social services. The horizontal axis represents the discretion allowed under the organizational form regarding asset management and service delivery. The vertical axis represents the share of its beneficiaries and officials who participate in decisions. At one extreme, decisions are made by a single person; at the other, every official and beneficiary participates. Of the four forms depicted,  $W^I$  represents a canonical Islamic waqf: required to follow the founder's directions, its limited discretion is exercised by two people, the caretaker and a judge. C represents a corporation, which differs by design along both dimensions. It has greater managerial flexibility, and more individuals participate in its decisions. As shown in Figure 1, the default for a corporation is complete autonomy. In practice, a corporation has a charter that defines a mission. If its purpose is education, it cannot provide poor relief. Its mission and management may also be constrained through its founding charter. State-imposed covenants may compound the restrictions.<sup>54</sup>

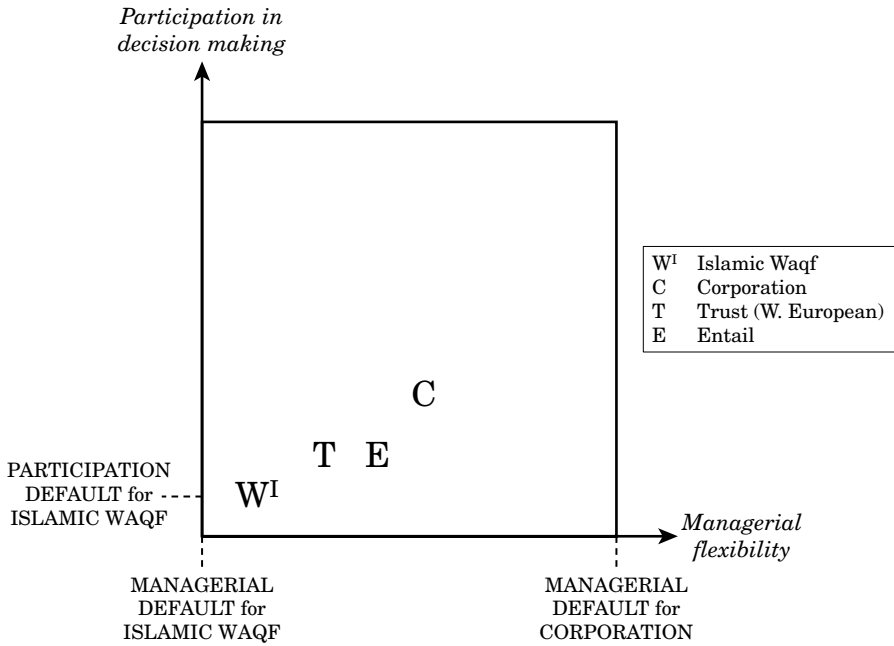
A medieval European university established as a corporation had greater managerial flexibility than a waqf-supported madrasa.<sup>55</sup> Figure 1 captures the relationship, in that C lies to the right of  $W^I$ . Some European corporations, including guilds, involved the broad membership in its decisions. Others assigned authority to professionals

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54. Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497 (1981).

55. GEORGE MAKDISI, *THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST* (1981).

FIGURE 1. MANAGERIAL FLEXIBILITY AND PARTICIPATION IN DECISION MAKING: ISLAMIC WAQF VS. CORPORATION, TRUST, AND ENTAIL.



delivering services. At a university, for instance, the curriculum was set by professors and administrators; students were not consulted. At a waqf-maintained school, even fewer people were involved: the caretaker and perhaps also a judge. The vertical coordinates of C and W<sup>I</sup> indicate that more people participated in a corporation’s decisions than in those of an equivalent waqf.

The difference in managerial default conditions need not have mattered at the outset. That is because the respective founders could have accommodated the prevailing conditions. Rather, the difference in question would have mattered as evolving conditions presented situations that were unimaginable earlier.<sup>56</sup> The corporation could exercise options that might have been barred if foreseen. By contrast, the waqf could not even exercise options that the founder would have granted happily.

56. For explanations as to how this organizational adaptability contributed to Europe’s economic ascent, see JAN LUITEN VAN ZANDEN, *THE LONG ROAD TO THE INDUSTRIAL REVOLUTION: THE EUROPEAN ECONOMY IN A GLOBAL PERSPECTIVE, 1000–1800* ch. 2 (2009); Tine de Moor, *The Silent Revolution: A New Perspective on the Emergence of Commons, Guilds, and Other Forms of Collective Action in Western Europe*, 53 *INT’L REV. SOC. HIST.* 179 (2008); AVNER GREIF, *INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE* chs. 3, 10 (2006).

Whereas in the Middle East the waqf was the only organizational form available for the private provision of public goods, in Europe alternatives existed to the corporation. From the early Middle Ages, social services were also supplied through organizations similar to the waqf. Indeed, hospitals and soup kitchens were often established as a trust, also known as a foundation. Like a waqf, a trust was designed as an inflexible organization with set rules. The deployment of its assets was predetermined, usually to prevent the diversion of resources to unintended uses. For all their similarities to waqfs, however, European trusts were relatively more pliable. They were not as committed to upholding the wishes of the founder.<sup>57</sup> Provided cumbersome procedures were followed, their assets could be directed to new uses, even liquidated. In 1526, for example, officials of a Dutch hospital established as a trust traveled to Rome for permission to take over a monastery's assets.<sup>58</sup> European trusts also made decisions more democratically. This is because they could be administered by boards of trustees rather than a single caretaker. In Figure 1, the location of T, our prototypical trust, reflects the observation that trusts were generally more flexible and more democratic than waqfs. T lies below C because ordinarily trust beneficiaries were excluded from governance.<sup>59</sup>

Yet another European vehicle for providing social services was the entail. Like the Islamic family waqf, the entail sheltered wealth for a family and its descendants. Creditors could not touch entailed assets; generally, neither could the state. This made it particularly popular in times of weak property rights. As in the case of a waqf, an entail's founder could direct expenditures from the grave. Nevertheless, the entail was less rigid than the waqf. Depending on the region, the founder's authority was limited to between two and four generations; eventually, therefore, his descendants could use the assets freely. An entail was also revocable through an agreement of its living beneficiaries. Moreover, decision making within an entail was relatively more democratic.<sup>60</sup> More than one beneficiary participated in its management. Thus, in Figure 1, E lies above and to the right of W<sup>1</sup>.

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57. Auke Rijpma, *Funding Public Services Through Religious and Charitable Foundations in the Late-Medieval Low Countries* ch. 2, especially at 54 (May 21, 2012) (unpublished Ph.D. dissertation, Utrecht University), available at <http://dspace.library.uu.nl/handle/1874/240533>.

58. Regional Archive of Leiden 503, no. 212 (based on communication with Auke Rijpma). The hospital was itself established by a religious order.

59. At least in the Middle Ages, no sharp distinction existed between the trust and the corporation. Because their characteristics could be combined, their practical differences were matters of degree rather than kind. Rijpma, *supra* note 57, at 30–33.

60. Jaco Zuijderduijn, *Grave Concerns: Entailment and Intergenerational Agency in Amsterdam (1600–1800)*, 16 *HIST. FAM.* 343 (2011).

In sum, two of the organizational options for providing social services in premodern Europe, the trust and the entail, had waqf-like features, but they were less rigid. In any case, the corporation served as a third option, one that differed fundamentally from the waqf in that it allowed self-governance by at least some living beneficiaries. Thus, Europe provided social services through organizations that were more adaptable as well as more democratic.

None of the above interpretations imply that the waqf's political effects were uniformly negative. Consider again political participation. Although limited participation closes political possibilities, it has advantages too. Reducing the number of decision makers can accelerate decision making and lessen the danger of gridlock. Such benefits can swamp the losses from being unable to fine-tune services to beneficiary preferences. It is possible, then, for a single caretaker to provide a waqf service more efficiently than a committee. That is the logic underlying the separation of beneficiaries and management in modern charitable corporations. Consider Doctors Without Borders, which cares for victims of disasters and wars. Its managerial team forms a tiny fraction of its benefactors and beneficiaries.<sup>61</sup>

But there is a critical difference between Doctors Without Borders and a hospital established as an Islamic waqf. The former can shift its operations easily between regions; it can also adapt its surgical teams and procedures to new technologies. Although its board of directors may disagree on details, widely favored modifications will be made. For its part, the waqf hospital was unhampered by the challenges of achieving group consensus; if the caretaker needed to convince anyone, it was a single judge. By the same token, the deed of his waqf limited his discretion. For one thing, the founder would have situated the hospital, precluding its relocation. For another, the caretaker could not adjust expenses just because of technological advances, even with the support of the intended beneficiaries.

Critical here are the political consequences of the regional differences in organizational options. For the reasons outlined, the West's broader menu was more conducive to civic participation in governance, and hence to democratization, than the Middle Eastern menu, which was restricted to the Islamic waqf.

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61. In 2014, the work of Doctors Without Borders (*Médecins Sans Frontières*) was conducted by around 36,500 administrators, support staff, physicians, and other professionals. The organization provided over eight million outpatient consultations and half a million patient admissions, among other health services. Its activities were financed by more than 5.7 million individual donors along with dozens of governments and international organizations. See MÉDECINS SANS FRONTIÈRES, INTERNATIONAL ACTIVITY REPORT 2014, at 9–13, 90–91 (2015), [http://www.msf.org/sites/msf.org/files/msf\\_international\\_activity\\_report\\_2014\\_en.pdf](http://www.msf.org/sites/msf.org/files/msf_international_activity_report_2014_en.pdf).

## VI. OBSTACLES TO FORMING COALITIONS

Waqfs need not have pursued activities in mutual isolation. They could have formed coalitions with an eye toward maximizing their joint influence. Just as European cities worked together to limit royal taxes, so waqfs could have mobilized to advance their common interests and address their shared grievances. And just as urban communities produced rationales for local administration, waqf-based coalitions might have generated ideologies partial to their beneficiaries. In the millennium preceding Europe's early democracies, diverse corporate entities, including universities and guilds, contributed to institutionalizing constraints on monarchs.<sup>62</sup>

However, for all their wealth and the status of their caretakers, waqfs did not participate in politics. Their rigid managerial rules kept them from using resources for political purposes. In any case, they were envisaged as apolitical organizations. Thus, whereas an incorporated European church was free to participate in politics, a waqf-based mosque was not. And whereas European cities formed coalitions, waqfs within the same city did not cooperate among themselves, to say nothing of forming political blocs across cities. Indeed, there emerged no federation of madrasas, or association of fountain operators, or confederation of diverse waqfs. The lack of ties among waqfs reduced their already compromised capacity to constrain sultans. Unlike Europe's politically vocal universities, municipalities, and professional associations, they did not contribute to democratization.

The inability to pool resources at will also limited the political potential of waqfs through the waste it generated. If a waqf's founder did not explicitly allow it to work with other organizations, achievable economies of scale or scope had to remain unexploited. Services that a single large waqf could deliver most efficiently—road maintenance, piped water—would instead be provided at high cost by multiple waqfs. Founders were free to authorize transfers to a large waqf. But such resource pooling required an unlikely coincidence of goals between the donor waqf and the receiving waqf.<sup>63</sup> Moreover, the coincidence had to be predictable. The founder of a fountain in 1500 had to foresee the water distribution technologies of the Industrial Age. Admittedly, resource sharing by closely situated waqfs did occur. A waqf-funded bathhouse might draw its water from the pipeline of a pre-existing mosque in the area, for example. But such excep-

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62. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* ch. 12 (1983); SUSAN REYNOLDS, *KINGDOMS AND COMMUNITIES IN WESTERN EUROPE 900–1300* chs. 2, 9 (1997).

63. MURAT ÇIZAKÇA, *A HISTORY OF PHILANTHROPIC FOUNDATIONS: THE ISLAMIC WORLD FROM THE SEVENTH CENTURY TO THE PRESENT* 48 (2000). Vanity must also have limited pooling; a founder eager to be remembered as a philanthropist would have wanted to keep his waqf from being swallowed up by a larger waqf.

tions involved informal arrangements; they required bending the prevailing rules.

One must distinguish between a group-endowed waqf and a merger of separately established waqfs. Neither kind of pooling was common. Mergers of existing waqfs were discouraged because of obstacles to ascertaining whether the founders would have accepted the terms. Consider two adjacent schools. Merging their waqfs could economize on administrative overhead. But would the founders have agreed to combine classes in one building and rent the other for additional income? If the schools were kept separate and administrative overhead shared, what if one needed more repairs? Would the founder of the better-constructed school have endorsed the merger had he foreseen the other's maintenance needs? Because such questions were unanswerable, many potentially beneficial mergers were not even considered.<sup>64</sup> Consequently, when new technologies generated once unimaginable economies of scale, preexisting waqfs continued to operate independently.

The foregoing logic would not apply to waqfs established simultaneously. Suppose that three property owners decided simultaneously to found a school. They could agree to future mergers under certain conditions and record the agreements in their respective deeds. But such synchronized waqf founding was uncommon. Moreover, because Islamic law required the founder to be an individual property owner,<sup>65</sup> the trio could not merge their resources from the start. The rationale for the latter requirement probably lay in rulers' aversion to private coalitions—the very consideration that excluded the corporation from Islamic law in the first place. In any event, restricting the number of founders set a pattern that lasted a millennium. Rifaah al-Tahtawi, an Egyptian thinker of the nineteenth century, wrote that “associations for joint philanthropy are few in [Egypt], in contrast to individual charitable donations and family endowments.”<sup>66</sup>

The near-absence of resource-pooling opportunities kept waqfs with common needs from campaigning jointly for external resources. Consider the caretaker of an educational waqf who found that his school's supplies were being pilfered. Although he could petition state officials for protection, he could not establish an association to advocate better protection for all schools. Waqf regulations barred her from combining forces with the caretakers of other waqfs suffering from theft. Each caretaker faced the state alone.

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64. Among the 1,544 waqf-related cases in 5–8 SOCIAL AND ECONOMIC LIFE IN SEVENTEENTH-CENTURY ISTANBUL, *supra* note 19, not one concerns the merger of two or more waqfs.

65. Kuran, *supra* note 12, at 842.

66. Quoted by Juan R.I. Cole, *Al-Tahtawi on Poverty and Welfare*, in POVERTY AND CHARITY IN MIDDLE EASTERN CONTEXTS 223, 229 (Michael Bonner, Mine Ener & Amy Singer eds., 2003).

Nothing in Islamic law kept individual beneficiaries from working together to prevent theft. Parents from multiple neighborhoods could form a delegation to request better policing. However, this was unlikely to occur in the absence of leadership from caretakers. Here too, the hindrances to collective action in large groups would generally block cooperation. Isolated constituencies do not easily gain consciousness of potential gains from cooperation. Nor do they develop a common political identity. Moreover, beneficiaries who somehow notice the gains from joint action will be unmotivated, as individuals, to incur the setup costs.<sup>67</sup> For all these reasons, waqf-related petitions to sultans rarely came from groups representing multiple waqfs. Actions were initiated either by lone individuals or by groups concerned about a single waqf.<sup>68</sup>

Just as cooperation between waqfs was lacking within sectors, it was absent between those of any given locality. Imagine a school, hospital, and a fountain, all serving a neighborhood through separate waqfs. The caretakers and beneficiaries of these waqfs had a common interest in developing the neighborhood's infrastructure. Nevertheless, they could not combine their resources to campaign for better roads. They had to act independently, because their deeds were interpreted as not authorizing such joint action.

## VII. THE TWILIGHT OF THE ISLAMIC WAQF

Along with political consequences, the Islamic waqf's inflexibilities had economic consequences.<sup>69</sup> The economic costs rose over time for existing waqfs, and by the nineteenth century, organizations unable to adapt to new technologies looked glaringly inefficient.<sup>70</sup> Among intellectuals, merchants, and bureaucrats, the Islamic waqf came to be seen as an anachronism.<sup>71</sup> Meanwhile, wide-ranging economic reforms got under way as a matter of state survival. As part of the reforms, Ottoman and Egyptian administrators started building new state institutions to provide social services long supplied privately. The required resources were to come chiefly from the nationalization of waqfs. In earlier times, the sacredness of the waqf would have de-

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67. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* chs. 1-3, 5 (rev. ed. 1971).

68. Even group-initiated cases against a single waqf were rare. Out of 1,544 waqf-related cases in *SOCIAL AND ECONOMIC LIFE IN SEVENTEENTH-CENTURY ISTANBUL*, *supra* note 19, only two involve an official complaint by a group of individuals: Istanbul 9 (1662), 274b/2 and Istanbul 22 (1695), A4b/2.

69. Kuran, *supra* note 12, at 861-69; KURAN, *supra* note 31, ch. 6.

70. The inefficiency raises the question of why groups that were harmed did not address the problems immediately. The obstacles that needed to be overcome are discussed in KURAN, *supra* note 31, ch. 7.

71. For accounts of nineteenth- and early twentieth-century thinking on the waqf, see NAZIF ÖZTÜRK, *MENŞE'İ VE TARİHİ GELİŞİMİ AÇISINDAN VAKIFLAR* 140-51 (1983) (for Turkey) and ACHILLE SÉKALY, *LE PROBLÈME DES WAKFS EN ÉGYPTÉ* 402-54, 601-59 (1929) (for Egypt).



nied rulers that option. The now common view that the waqf was poorly suited to an economy in motion allowed statesmen to confiscate assets that were beyond the reach of their predecessors. Nationalizations continued in waves in the twentieth century.

The formation of new waqfs had already fallen precipitously. One reason lies in the strengthening of property rights in response to pressure from European businesses and from the beneficiaries of expanding trade with the West.<sup>72</sup> As arbitrary expropriations fell, the demand for wealth shelters followed suit.<sup>73</sup> Another factor is that new means emerged for securing wealth, including ones conducive to accumulation. Publicly traded companies and banks began to absorb savings that had flowed into family waqfs.<sup>74</sup>

The appeal of waqfs was also dented by new instruments for funding charity. In the mid-nineteenth century, it became possible to establish, under special laws, corporations to provide services such as education, water supply, and health care. Thus, municipalities took on the functions of urban waqfs; and semi-official agencies, such as the Red Crescent, assumed responsibility for emergency aid and poor relief. Monarchs themselves started forming charitable organizations outside of waqf law. By the early twentieth century, legal transplants enabled the forming of non-profit corporations through simple procedures. Private parties took to establishing perpetual NGOs to deliver social services more flexibly than through waqfs.<sup>75</sup>

Nationalization drives were launched on the pretext that public bureaucracies could fulfill the wishes of waqf founders more reliably. Thus, a “Ministry of Waqfs” was established in Istanbul in 1826, and in Cairo shortly thereafter.<sup>76</sup> These agencies were supposed to keep separate accounts for the thousands of waqfs under their control. But in stages the assets became part of a fungible resource base. The nationalization of waqf assets was accompanied by a transfer of its functions to service providers modeled after Western archetypes,

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72. KURAN, *supra* note 31, chs. 10–12.

73. In the Ottoman Empire, the practice of arbitrary expropriation was abolished in 1838. CARTER V. FINDLEY, *BUREAUCRATIC REFORM IN THE OTTOMAN EMPIRE: THE SUBLIME PORTE, 1789–1922*, at 145–46 (1980). Thereafter property rights were strengthened. In Egypt, the process was more rapid. GABRIEL BAER, *A HISTORY OF LANDOWNERSHIP IN MODERN EGYPT, 1800–1950*, at 62–74 (1962); BAER, *supra* note 38, at 1–70.

74. KURAN, *supra* note 31, at 161–64, 251–53.

75. See NADİR ÖZBEK, *OSMANLI İMPARATORLUĞU’NDA SOSYAL DEVLET: SIYASET, İKTİDAR VE MEŞRUIYET, 1876–1914* (2002) (documenting the institutional transformation of charity in Turkey). On Egypt, see MINE ENER, *MANAGING EGYPT’S POOR AND THE POLITICS OF BENEVOLENCE, 1800–1952*, at 1–25 (2003); MAHA M. ABDELRAHMAN, *CIVIL SOCIETY EXPOSED: THE POLITICS OF NGOs IN EGYPT* chs. 4–6 (2004).

76. As in several other Arab countries, in Egypt, a Ministry of Waqfs remains in operation. In Turkey, the administration of nationalized waqfs was downgraded to a directorate in 1924, as part of efforts to exclude Islam from public life.

such as municipalities.<sup>77</sup> Meanwhile in Iran, where waqf nationalization followed a distinct trajectory, the result was the same. By the twentieth century, many waqf assets had passed to the state or individuals.<sup>78</sup>

The road not taken in the nineteenth century was to transform the Islamic waqf itself. Emerging problems might have been handled through a reinterpretation suited to changing economic conditions, or by creating new waqf categories for certain sectors, such as urban water delivery, where greater flexibility was particularly desirable. Such reforms would have required working with clerics (*ulamā*), who tended to be conservative and were identified with stagnant parts of the economy. Because clerics controlled the lion's share of waqf assets,<sup>79</sup> reformers opted instead for initiatives that would shrink the holdings of waqfs. In keeping existing waqfs rigid, however, the reformers compounded the troubles that fueled apprehensions about waqfs in general.

The reformers' inclination to modernize waqfs was also dampened by opportunities to improve the provision of social services without taking on Islamic laws and norms. By the early twentieth century, the corporation, a transplanted institution, had become the basic delivery vehicle for various services historically provided through Islamic waqfs.<sup>80</sup>

### VIII. EMERGENCE OF THE MODERN WAQF

More than a century after the first wave of assaults on the waqf, it has been reborn in a more flexible form. The name is the same, and some of its promoters tout its Islamic origins. Yet in Turkey, Kuwait, the United Arab Emirates, and even theocratic Iran, it operates under rules fundamentally different from those of the premodern era. In legal texts, the new institution is called "new waqf" or "civil law waqf" to distinguish it from its historical namesake.<sup>81</sup>

77. On the Ottoman transformation, see ÖZTÜRK, *supra* note 16, at 63–107, 379–471; on the Egyptian reforms, see BAER, *supra* note 38, at 79–92.

78. ÇİZAKÇA, *supra* note 63, at 141–57.

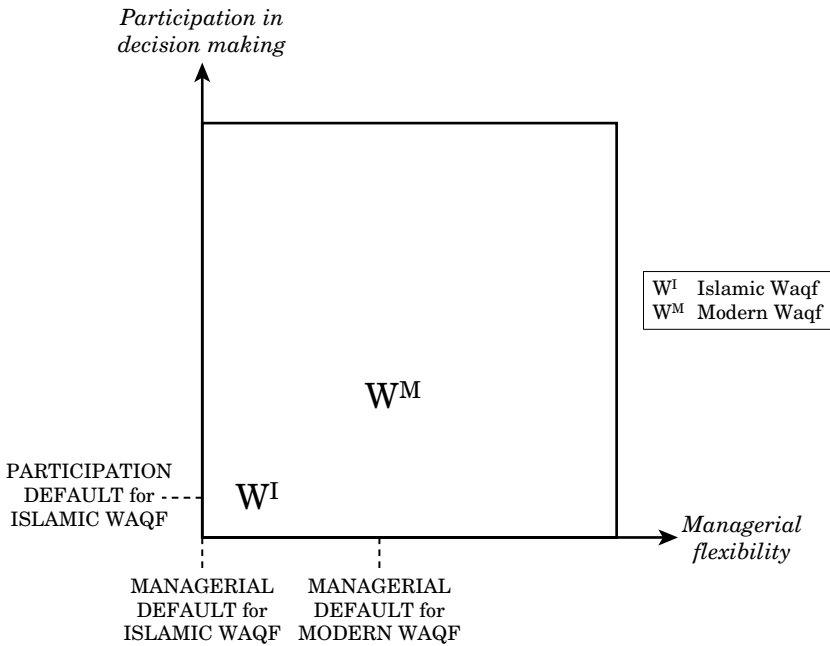
79. ÖZTÜRK, *supra* note 71, at 45; BEHAR, *supra* note 20, at 67, 70–78; BAER, *supra* note 38, at 79–92.

80. İ HÜSEYİN HÂTEMİ, *MEDENİ HUKUK TÜZELKİŞİLERİ* 58–318 (1979); MARWA EL DALY, *PHILANTHROPY IN EGYPT* 119 (2007).

81. Turkish law refers to "waqfs formed according to Turkish civil law." İLHAN DEMİR, *YENİ VAKIFLARIN TEMEL KİTABI* 89 (1998) (citing Law No. 23117 of Sept. 21, 1997, Communication About Waqfs Formed According to Turkish Civil Law) (translated by author). The Iranian Constitution of 1911 incorporated waqf law into the nascent civil code, with a relaxation of traditional requirements. Under Iran's Civil Code of 1928, a waqf is a legal entity and the management of its assets may be left to the discretion of its caretaker. See QANUNİ MADANİ [CIVIL CODE] 1928, art. 87, translated at <http://www.refworld.org/docid/49997adb27.html>. Under the Islamic Republic of Iran, a radically new waqf law has been instituted. For further details of the law and evidence of novel applications, see ÇİZAKÇA, *supra* note 63, at 157–68.

A modern waqf can be formed by a group, whose members may include organizations. It can accept donations and run fundraising campaigns. It may invest in liquid assets, such as equities. It is directed by a board of trustees rather than a single caretaker. Whereas traditionally only the caretaker had standing before the courts, the modern waqf enjoys legal personhood, which enables it to sue and be sued as a legal entity. Merit plays a greater role in the selection of its administrators, who do not appoint their own successors. A modern waqf must issue financial reports periodically. It has managerial flexibilities denied to its Islamic namesake; most importantly, it can dissolve itself or recast its objectives.<sup>82</sup> Figure 2 illustrates the differences.

FIGURE 2. MANAGERIAL FLEXIBILITY AND PARTICIPATION IN DECISION MAKING: ISLAMIC WAQF VS. MODERN WAQF.



Particularly critical here is that the modern waqf can engage in politics. Although it cannot endorse political parties, it may express opinions on policy issues. It can organize conferences, issue publications, give awards, and make grants, all to influence political

82. For relevant Turkish statutes, see DEMİR, *supra* note 81, at 60–65, 67–68, 76–77, 79–80, 119–21, 128–37, 159.

outcomes. It can pursue such endeavors in cooperation with other entities, including other waqfs.<sup>83</sup>

Just as the caretaker of an Islamic waqf had to follow the founder's stipulations, so a modern waqf's trustees must abide by the directives of its founders. But there is no longer a presumption that the waqf deed constitutes a complete contract. A modern waqf's board is authorized to change services, procedures, and goals without outside interference. It is charged with maximizing the overall return on all assets, subject to intertemporal tradeoffs and the acceptability of risk. The permanence of any particular asset is no longer an objective in itself. The board may judge that the waqf's substantive goals require a payroll cut in order to finance repairs, for example. Another innovation is that the board plays an integral role in determining how goals are served. To preserve an obsolete hospital merely out of deference to a founder's preferences would be considered irresponsible. All these observations hold irrespective of the political and religious preferences of the founders. They apply to essentially secular modern waqfs such as the Antalya Culture and Art Vakıf (AKSAV), whose activities include Turkish film festivals, and also to Islamist modern waqfs, such as the Fatih Youth Vakıf in Istanbul, which promotes Islamic education.<sup>84</sup>

Even in Egypt, where autocratic regimes from 1952 to 2011 nationalized nonreligious waqfs and placed religious waqfs under state supervision, waqfs are administered in subordination to the wishes of bureaucrats. For that reason, surviving Egyptian waqfs have metamorphosed into organizations distinct from their former selves, into what are best called "government waqfs." Because their loss of autonomy is well understood, no more than ten new Egyptian waqfs are formed each year, mostly to support mosques and burials.<sup>85</sup>

If Egypt lacks modern waqfs of the Turkish variety, it is not for lack of motivation. Due to tight supervision, Egyptians wishing to supply non-governmental social services generally establish foundations (*mu'assasat*), which are charitable corporations governed under the NGO law of 2002.<sup>86</sup> Although foundations are also subject to political pressures, they can at least move resources around and raise funds continuously from multiple sources, including both natural and

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83. For surveys of various reforms, see ÇIZAKÇA, *supra* note 63, ch. 4; Daniela Pioppi, *Privatization of Social Services as a Regime Strategy: The Revival of Islamic Endowments (Awqaf) in Egypt*, in *DEBATING ARAB AUTHORITARIANISM: DYNAMICS AND DURABILITY IN NONDEMOCRATIC REGIMES* 129 (Oliver Schlumberger ed., 2007).

84. ULUSLARARASI ANTALYA FILM FESTİVALİ, <http://www.altinportakal.org.tr/festival/kurumsal>; FATİH GENÇLİK VAKFI, <http://fgv.org.tr/>.

85. MONA ATIA, *BUILDING A HOUSE IN HEAVEN: PIOUS NEOLIBERALISM AND ISLAMIC CHARITY IN EGYPT* 86 (2013).

86. Law No. 84 of 2002 (On Non-Governmental Organizations), *al-Jaridah al-Rasmīyah*, 5 June 2002, no. 22 ter (A), translated at <http://www.icnl.org/research/library/files/Egypt/law84-2002-En.pdf>. The law makes no reference to the waqf.

legal persons. Only a single modern non-governmental organization bearing the word “waqf” in its name has been founded in Egypt. This is the Waqfeyat Al-Maadi Community Foundation, which funds local development in poor Cairo neighborhoods and lobbies for better public education.<sup>87</sup> It was established in 2007 to revive a tradition of social solidarity (*takāful*) through waqfs, under modernized rules. The founder received special permission to use the word “waqf” in the organization’s name.<sup>88</sup> Dozens of other foundations formed under the 2002 NGO law (or its successors) characterize themselves as waqfs informally, even as they operate under modern legislation. Examples include seven Cairo foundations of Mohamed Al Fangary, most of which assist students at religious schools.<sup>89</sup>

In countries where the modern waqf exists, it carries much less importance in daily life than the Islamic waqf once did. It is not the primary vehicle for social services, which are supplied largely by state agencies and firms organized generally as a corporation. The beneficiaries, now considered consumers because they pay for the services they receive, help to determine the suppliers’ characteristics and longevity. With services provided by private corporations, market choices favor certain suppliers over others. For instance, parents choose among private schools depending on the quality of education. In the case of public corporations, at least in places with some form of local democracy, consumers can punish poor performance at the ballot box. The availability of alternatives to the modern waqf motivates waqf officers to keep them flexible. Competition makes them conscious of the needs of their consumers, if only to stay relevant.

The modern waqf has not overcome all obstacles to organizational efficiency. As with the constituents of other organizational forms, those of a modern waqf may lack the incentives to educate themselves about their choices. Vested interests may render officials unresponsive to the wishes of non-paying beneficiaries. The threat of retaliation may silence potential critics. Nevertheless, there is a fundamental difference in accountability between the caretakers of Islamic waqfs and the officials of modern service providers, including those of modern waqfs. In the Middle East today, suppliers are essentially expected to serve the end consumer. In the premodern Middle East, the recipient was expected to be a passive beneficiary of goods subsidized, if not provided freely, in perpetuity by elites.

## IX. PERSISTENCE OF HISTORICAL POLITICAL PATTERNS

The differences between the now largely extinct Islamic waqf and its modern namesake raise the question of whether the former

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87. MAADI COMMUNITY FOUNDATION, <http://waqfeyatalmaadi-cf.org/en/index.php>.

88. ATIA, *supra* note 85, at 89–90.

89. EL DALY, *supra* note 80, at 73–74. *See also* ATIA, *supra* note 85, ch. 4.

matters to current civic life. Might the Islamic waqf be irrelevant to modern Middle Eastern politics? In fact, the region's premodern civic patterns were reproduced, to one degree or another, in its modern organizations. Low political participation and limited organizational autonomy have endured even as the region's nation-states acquired the trappings of modern political life, such as parties, elections, and constitutions embodying basic human rights.

The literature on modern Middle Eastern civil society is replete with observations that mirror the historical accounts above. For example, in an influential 2002 article, Asef Bayat writes:

Many NGO advocates have complained about the absence of a spirit of participation in the NGOs . . . Paternalistic NGOs perceive their beneficiaries more as recipients of assistance than as participants in development . . . It is not the place of beneficiaries to question the adequacy and quality of services or the accountability of NGOs.<sup>90</sup>

One of the mechanisms accounting for the endurance of the Islamic waqf's legacy involves links between civil society and kinship ties. The very process that held down civil society kept kinship ties strong. The inability to obtain protection against the state by developing autonomous organizations made people seek security from kin. It kept alive primordial attachments based on ties of blood, race, language, region, or religion, and even strengthened them in times of social unrest.<sup>91</sup> It induced individuals to keep their wealth within the family by doing business through family-owned enterprises. Exchanges remained largely personal. Cousin marriages provided another vehicle for preserving family ties in the absence of reliable private organizations that transcend kinship. All such responses to weak civil society have suppressed generalized trust—the readiness to cooperate and engage in civic endeavors with fellow citizens.<sup>92</sup>

Indicators of civil society have been changing in the Middle East, which is consistent with the enrichment of civic life and weakening of kinship ties through urbanization. But the Middle East still has the world's highest consanguineous marriage rates. The rate is 18.5% in Turkey, 33.5% in Iran, and 32.5% in the Arab world,<sup>93</sup> as compared

90. Bayat, *supra* note 8, at 17–18.

91. FUKUYAMA, *supra* note 21, chs. 7–12.

92. Dietlind Stolle, *Trusting Strangers—The Concept of Generalized Trust in Perspective*, 31 ÖSTERREICHISCHE ZEITSCHRIFT FÜR POLITIKWISSENSCHAFT 397 (2002); FUKUYAMA, *supra* note 21; PUTNAM, *supra* note 21.

93. *Tables of the Global Prevalence of Consanguinity*, CONSANG.NET (last visited Mar. 26, 2016), [http://www.consang.net/index.php/Global\\_prevalence\\_tables](http://www.consang.net/index.php/Global_prevalence_tables). The Arab world figure is a population-weighted average based on the latest country figures in these tables. The population data are from *World DataBank: World Development Indicators*, WORLD BANK, *supra* note 2. See also Tadmori et al., *Consanguinity and Reproductive Health Among Arabs*, 6 REPRODUCTIVE HEALTH 17 (2009).

with estimates ranging from 10.2% to 15.1% for the whole world.<sup>94</sup> It also has conspicuously low generalized trust. On a scale from 0 to 200, where 100 indicates that half of all people trust others, the generalized trust score for the Middle East is 37.3, as against 67.5 for OECD countries.<sup>95</sup>

A complementary factor is that the void created by the demise of Islamic waqfs has been filled largely by state agencies. Organized hierarchically, they have tended to execute orders issued from the top, showing little responsiveness to the citizenry. Although the modernist leaders responsible for their creation understood that keeping the population happy promoted political stability, they sought above all to overcome the institutional weaknesses responsible for Western domination.<sup>96</sup> Their reforms did not require democratic organizational governance. In any case, the absence of a legacy of mass participation in service provision no doubt tempered expectations. Low political participation was thus transplanted to modern organizations.

Not all functions of the Islamic waqfs passed to state agencies. Under new laws of association that began to be instituted before World War I, modern NGOs took on expanded roles. These organizations have included charitable associations, trade unions, chambers of commerce, and professional associations, generally structured as some form of corporation.<sup>97</sup> Autonomous to one degree or another and empowered to change with the times, they began to instill in individuals the skills of self-governance that Islamic waqfs had failed to impart, including strategic planning, public relations, consensus building, coalition formation, and collective negotiation. As such, though starting from a low base, modern NGOs have contributed to building civil society.

The earliest Middle Eastern charitable organizations established outside the Islamic waqf sector were not necessarily “non-governmental,” if by that we mean they lacked government direction. During the first decade of the Republic of Turkey (1923–1933), the top three charitable organizations as measured by mass participation and fundraising were the Red Crescent Society, the Children’s Protection

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94. The global average is based on the lower- and upper-bounds given for countries in the map and tables at Consang.net, *supra* note 93. The average is population-weighted.

95. Turkey is included only in the Middle East. These figures were obtained by averaging population-weighted scores derived from values surveys conducted between 1995 and 2009, as presented in Jaime Díez Medrano, *Interpersonal Trust*, BANCO DE DATOS ASEP/JDS, <http://www.jdsurvey.net/jds/jdsurveyMaps.jsp?Idioma=I&SeccionTexto=0404&NOID=104>. Ten Middle Eastern countries were included: Algeria, Egypt, Iran, Iraq, Jordan, Kuwait, Lebanon, Morocco, Saudi Arabia, and Turkey.

96. BERNARD LEWIS, *THE EMERGENCE OF MODERN TURKEY* chs. 3–4 (3d ed. 2001); AFAF LUTFI AL-SAYYID MARSOT, *EGYPT IN THE REIGN OF MUHAMMAD ALI* chs. 7–8 (1984).

97. 1 HÂTEMİ, *supra* note 80, at 58–318; EL DALY, *supra* note 80, at 119.

Society, and the Turkish Aviation Society. Each pursued government-shared goals, without seeking to restrain the state in any way. A lack of accountability to the citizenry is another feature that these organizations shared. Though formally autonomous, each was a GONGO—a *government-organized* non-governmental organization.<sup>98</sup>

In Egypt, various NGOs were formed in the early twentieth century in reaction to foreign cultural influences. Eschewing a political identity, many of them subordinated themselves to the government. Over subsequent decades, governments encouraged NGOs, but only if they remained apolitical and allowed state officials to control the selection of leaders, members, and activities. Under President Gamal Abdel Nasser (1956–1970), Egyptian NGOs became appendages of the state bureaucracy. No fewer than 60,000 NGO employees received a government salary.<sup>99</sup> A 1964 law authorized the state to close down any NGO that refused to cooperate with the regime.<sup>100</sup> An even harsher NGO law was adopted in 1999.<sup>101</sup>

In the early twenty-first century, Middle Eastern states have by and large continued to control NGOs. Organizations established privately without state guidance are susceptible to state capture. Consider Egypt, where by 2006 there existed about 31,000 officially registered NGOs, along with a few dozen advocacy NGOs disguised as law offices to minimize state interference and hundreds of unregistered NGOs.<sup>102</sup> Some of the registered NGOs had been infiltrated by government agents; others were being persecuted. Under the circumstances, they could not expose government corruption or mobilize public outrage against the perpetrators. Most NGOs had agreed implicitly to respect the government's red lines with respect to criticism. Only superficially did they monitor or constrain the state.

Revealingly, NGOs played marginal roles in the Egyptian uprisings of 2011–2013. The revolution that ended President Hosni

98. MESUT ÇAPA, KIZILAY (HİLÂL-İ AHMER) CEMİYETİ (1914–1925), at 52–59 (2009); MAKBULE SARIKAYA, TÜRKİYE HİMAYE-İ ETFAL CEMİYETİ, 1921–1935, at 58–67 (2011); YAŞAR BAYTAL, ATATÜRK DÖNEMİNDE SOSYAL YARDIM FAALİYETLERİ (1923–1938), at 6–69 (2012).

99. ABDELRAHMAN, *supra* note 75, at 128.

100. Law No. 32 of 1964 (Law of Associations), *al-Jarīdah al-Rasmīyah*, 12 Feb. 1964, no. 37, *cited in* ABDELRAHMAN, *supra* note 75, at 129.

101. Law No. 153 of 1999 (Law Regulating Civil Associations and Institutions), *al-Jarīdah al-Rasmīyah*, 27 May 1999, no. 21. Although the Constitutional Court voided this law within a few months, its critical clauses were included in Law No. 84 of 2002 (On Non-Governmental Organizations), *al-Jarīdah al-Rasmīyah*, 5 June 2002, no. 22 ter (A), *translated at* <http://www.icnl.org/research/library/files/Egypt/law84-2002-En.pdf>. See ABDELRAHMAN, *supra* note 75, at 131–32.

102. Ehaab Abdou, Mona Atia, Noha Hussein, Homi Kharas & Amira Maaty, *How Can the U.S. and International Finance Institutions Best Engage Egypt's Civil Society?* 3 (Brookings Inst. Global Views Policy Paper No. 2011-06, June 2011), [http://www.brookings.edu/~media/research/files/papers/2011/6/egypt-civil-society/06\\_egypt\\_civil\\_society.pdf](http://www.brookings.edu/~media/research/files/papers/2011/6/egypt-civil-society/06_egypt_civil_society.pdf). In 1991, the number was 12,832. Mustapha K. Al-Sayyid, *A Civil Society in Egypt?*, 47 MIDDLE EAST J. 228, 231 (1993).



Mubarak's thirty-year rule was dominated by youths without any history of active opposition or cooperation with known dissidents.<sup>103</sup> Although this high youth participation was unprecedented in Egypt, the absence of NGOs in the movement was nothing new. They had played no key role in prior regime changes. Military officers initiated Egypt's secession from the Ottoman Empire in the 1800s, and their successors overthrew the monarchy in 1952. Another striking characteristic of both the Mubarak and post-Mubarak periods is the lack of collaboration among NGOs. Just as Islamic waqfs were barred from forming coalitions, successive Egyptian regimes have generally discouraged cooperation among NGOs in order to block avenues for mass mobilization. The exceptions have involved strictly economic or social projects with goals complementary to those of the government.<sup>104</sup>

Turkey has substantially more private organizations, which accords with its more democratic governance and greater protection of civil liberties than other predominantly Muslim countries of the Middle East, in spite of huge setbacks since 2011.<sup>105</sup> In 2005, it had 71,240 active associations (94 per 100,000 people, as against 36 for Egypt) and 4,367 modern waqfs (6 per 100,000 people, as against none for Egypt).<sup>106</sup> Nevertheless, participation in civic life is muted according to the standards of advanced democracies, as is support for the work of NGOs. This is reflected in Table 4, which is based on data of the World Alliance for Citizen Participation (CIVICUS). As this table indicates, in Turkey, participation in civic activities is consistent with the OECD average. However, *political* participation is strikingly low, as is philanthropy—used here in the sense of *organized* philanthropy. Consequently, civil society is relatively ineffective. Turkey's figures generally exceed those for the Arab League, which accords with the political comparisons above.

Proximate reasons for Turkey's relatively poor civic performance include decades of restrictive legislation. A deeper factor is the absence of a tradition of mass involvement in organized philanthropy. As in the past, the vast majority of people assist close kin and neigh-

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103. Sheila Carapico, *Egypt's Civic Revolution Turns "Democracy Promotion" on Its Head*, in *ARAB SPRING IN EGYPT: REVOLUTION AND BEYOND* 199 (Bahgat Korany & Rabab El Mahdi eds., 2012).

104. Yom, *supra* note 7.

105. On a standardized 1–10 scale (10 being the best), Turkey's scores on the 2015 "clean government" index of Transparency International, the 2015 World Justice Project Rule of Law index, and the 2016 Freedom House civil liberties index are 4.2, 4.6, and 4.3, respectively. The corresponding Arab League figures are 3.1, 4.9, and 2.0; and for Iran, they are 2.7, 4.3, and 1.4. The Transparency International data are from *Downloads*, TRANSPARENCY INTERNATIONAL, <http://www.transparency.org/cpi2015#downloads> (last visited Mar. 26, 2016). For the other two sources and details concerning the calculations, see *supra* note 2.

106. FİLİZ BİKMEN, *THE LANDSCAPE OF PHILANTHROPY AND CIVIL SOCIETY IN TURKEY* 14 (2006).

bors. Few participate in, or financially support, organizations working toward shared social goals. People exhibit a preference for individual-to-individual giving over organized collective giving.<sup>107</sup>

TABLE 4. FOUR INDICES OF CIVIC LIFE, 2013: THE MIDDLE EAST AND OECD.<sup>108</sup>

	Participation in civic activities	Philanthropy	Policy dialogue	Political participation
Arab League	0.36	0.30	0.31	0.39
Iran	—	0.28	0.22	0.28
Turkey	0.55	0.20	0.67	0.39
OECD (except Turkey)	0.55	0.45	0.76	0.67

Source: CIVICUS ENABLING ENVIRONMENT INDEX 2013, <http://civicus.org/eei>.

These patterns are legacies of Turkey's institutional history. When organized philanthropy was limited to Islamic waqfs, giving was necessarily individual-to-individual for all but a few. Under the circumstances, the individual skills needed for a vigorous civil society failed to develop.

#### CONCLUSION: THE LONG SHADOW OF THE MIDDLE EAST'S CIVIC PAST

Theories of why the Middle East is the world's least democratized region often point to coalitions among families in control of critical resources, military officers who share in the spoils, and busi-

107. Ali Çarkoğlu, *Trends in Individual Giving and Foundation Practices, in PHILANTHROPY IN TURKEY: CITIZENS, FOUNDATIONS AND THE PURSUIT OF SOCIAL JUSTICE* 95, 98–108 (Filiz Bikmen & Rana Zincir eds., 2006). See also EL DALY, *supra* note 80, at 158–67 (observing the same pattern in Egypt).

108. The Arab League and OECD indices are population-weighted averages of the member country figures in the Enabling Environment Index 2013 (EEI). "Participation in civic activities" refers to the percentage of people who say they "have done" or "might do" any of three suggested activities: signing petitions, joining boycotts, or attending peaceful demonstrations (labeled as the "propensity to participate" subdimension of the "socio-cultural" dimension in the EEI). "Philanthropy" captures the propensity of people to get involved in "formal charitable activities" (the "giving and volunteering" subdivision of the "socio-cultural" dimension). Finally, "policy dialogue" (a subdimension of the EEI "governance environment" dimension) assesses the openness of institutional processes to civil society organization inputs. It is derived from variables such as the extent to which "there [is] a network of cooperative associations or interest groups to mediate between society and the political system" and the degree to which "the political leadership enable[s] the participation of civil society in the political process." *Dimensions and Indicators for the CIVICUS Civil Society Enabling Environment Index*, ENABLING ENVIRONMENT INDEX 2013: A CIVICUS INITIATIVE, <http://civicus.org/eei/downloads/Final%20Table%20of%20Dimensions%20and%20Sources.doc>.

nesses sheltered from competition.<sup>109</sup> Well-organized vested interests do indeed suppress basic freedoms and rig elections. But by themselves, these theories fail to explain why the masses have endured dictatorship for so long. After all, other regions, including those now home to democracies, have featured coalitions designed to monopolize political power.<sup>110</sup> Why did enforceable rules to prevent extreme concentrations of power not take hold in the Middle East?

Reflecting on this question leads inexorably to civil society. What does civil society lack in the Middle East that is present in advanced democracies? NGOs are not missing; they exist in the tens of thousands. Nor are the prevailing laws keeping private organizations too small or too rigid. For at least a century, the organizational forms formed by private groups in advanced democracies have been available in the Middle East too. True, the region's authoritarian states keep NGOs from using their capabilities to the fullest. But this returns us to the initial puzzle. If in some countries NGOs have managed to extend and protect their legal rights, what has stood in the way in the Middle East?

The Middle East's distinct institutional history has kept its NGOs persistently weak, limiting their ability to restrain authoritarian rule. Although the region's legal systems now support private corporations, the Islamic legal system, until modern times the basis for the region's governance, greatly restricted the organizational options of private groups. Necessarily organized as waqfs, NGOs could not be used for political advocacy. Islamic waqfs also limited society's ability to constrain arbitrary rule through their rigidities, their inability to enter into coalitions, and their lack of accountability to their beneficiaries. Civic life was thereby impoverished. Skills critical to the effectiveness of civil society, such as the capacity to solve collective action problems privately and the ability to form perpetual private coalitions, remained undeveloped.

The remarkable expansion of civil society in the Middle East has been accompanied, in some places, by the waqf's rebirth as a modern organizational form akin to the charitable corporation of the West. If this development has not generated advanced democracies, it is because of the region's longstanding tradition of civic passivity. By limiting participation in civic organizations and thus hampering

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109. For two variants, see MELANI CAMMETT, ISHAC DIWAN, ALAN RICHARDS & JOHN WATERBURY, *A POLITICAL ECONOMY OF THE MIDDLE EAST* chs. 3, 8, 11 (4th ed. 2015); PAUL RIVLIN, *ARAB ECONOMIES IN THE TWENTY-FIRST CENTURY* (2009).

110. See DOUGLASS C. NORTH, JOHN JOSEPH WALLIS & BARRY R. WEINGAST, *VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HISTORY* (2009) (showing that every "open access order," which allows a broad set of personal and associational freedoms, emerged from a "natural order," in which a ruling clique suppresses freedoms).

their political effectiveness, this passivity has also facilitated capture of these organizations by the state.

Thus, the proximate factors that have made authoritarianism the Middle Eastern political norm rest on longstanding historical patterns. Oppressive coalitions have been able to establish entrenched autocracies because the region's masses entered the modern era with stunted political capabilities. These capabilities depend on whatever organizational skills, civic concerns, and expressive means that individuals acquire as part of their socialization. They also depend on precedents regarding civic engagement. In both these respects, the Middle East has faced handicaps that have constrained, and still constrain, its political development. Patterns of political passivity were carried from premodern to modern organizations by people socialized in communities habituated to such patterns.

The vicious circle that long kept the Middle East politically authoritarian has thus mutated, but not disappeared. Before the modern reforms that enabled the formation of flexible non-governmental organizations, the lack of waqf autonomy kept civil society weak; in turn, the weakness of civil society hindered the development of alternatives to founder-controlled, rigid organizations. Thus, politically effective private organizations could not be founded, absolutist rulers faced no challenges from below, ideologies supportive of structural reforms failed to emerge, and political checks and balances did not arise. Since the emergence of new organizational alternatives outside of government, these constraints have all weakened, but generally not enough to support transitions to self-sustaining democracies. The requisite organizational capabilities will take time to develop, as will the social norms that support them.