

## BAGHDAD, TOKYO, KABUL ...: CONSTITUTION MAKING IN OCCUPIED STATES

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### INTRODUCTION

On October 15, 2005, Iraqis voted in overwhelming numbers to adopt a new constitution.<sup>1</sup> Although all hoped that the new document would mark a political settlement, the new constitutional structure has not been able to ameliorate, and may even have exacerbated, a problem of instability and political disintegration. At the very least, the constitution of Iraq—drafted under the Iraqi Governing Council of the occupying Coalition Provisional Authority<sup>2</sup>—has not produced a political reconstruction of the society.<sup>3</sup>

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1. IRAQ CONST., available at [http://trade.gov/static/iraq\\_newconstitution.pdf](http://trade.gov/static/iraq_newconstitution.pdf) (translated to English) (last visited Feb. 28, 2008); see also Edward Wong, *Iraqi Vote Approves Draft Constitution, Final Tally Divides on Sectarian Lines*, INT'L HERALD TRIB., Oct. 26, 2005, at 1. For details on the Constitution, see Zachary Elkins & Tom Ginsburg, Commentary on the Draft Iraqi Constitution (2005) (unpublished manuscript), available at <https://netfiles.uiuc.edu/zelkins/constitutions/publications.htm>.

2. See Coalition Provisional Authority, Homepage of the New Iraq, <http://www.cpa-iraq.org> (no longer updated due to the dissolution of the CPA in June 2004) (last visited Feb. 28, 2008).

3. See Sheryl Gay Stolberg & Jim Rutenberg, *A Step Away from Maliki*, N.Y. TIMES, Apr. 22, 2007, at A1 (discussing President George W. Bush's frustration with the Iraqi

As Baghdad burned, several thousand miles away a nationalist politician named Shinzo Abe prepared to assume the position of Prime Minister of Japan.<sup>4</sup> Abe's platform rested largely on a more aggressive foreign policy and a revision of the "Peace" Constitution of 1947.<sup>5</sup> Drafted largely by American occupying authorities in little more than a week in 1946, that constitution has provided a stable basis for Japan's phenomenal economic growth and political reconstruction as an industrial democracy. It has never been amended and this year will become, by our reckoning, the most stable written constitution in history.<sup>6</sup>

These two contrasting experiences prompt examination of the phenomenon of occupation constitutions—constitutions drafted or adopted in the extreme condition of one state having explicit sovereign power over another.<sup>7</sup> One may suppose that such constitutions would reflect, if not reproduce *in toto*, the constitutional tradition of the occupier, exemplifying what Professor Feldman calls "imposed constitutionalism."<sup>8</sup> A closer look at the process, however, suggests that even in cases of seemingly unilateral imposition, such as Japan, domestic input or negotiation may very well play a nontrivial role. Indeed, the form of the Japanese constitution—one that preserves a role for the emperor in a parliamentary

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government's "failure" to unify its warring factions, as well as Ambassador Ryan C. Crocker's belief that political progress in Iraq has been "extremely disappointing").

4. See Martin Fackler, *New Premier Seeks a Japan with Muscle and a Voice*, N.Y. TIMES, Sept. 27, 2006, at A3.

5. See Norimitsu Onishi, *Set To Lead, Japan's Next Premier Reconsiders Postwar Era*, N.Y. TIMES, Sept. 21, 2006, at A12. Abe's grandfather Nobosuke Kishi was implicated as a Class A war criminal and later became Prime Minister. *Id.* His father, Shintaro Abe, was a high-ranking leader within the ruling Liberal Democratic Party. James Sterngold, *Shintaro Abe, Japanese Politician and Ex-Cabinet Aide, Dies at 67*, N.Y. TIMES, May 16, 1991, at D23.

6. It will enjoy the longest period for a national constitution to survive without amendment. The previous record of sixty-one years was held by the United States between 1804 and 1865. See Robert Knowles, *The Balance of Forces and the Empire of Liberty: States' Rights and the Louisiana Purchase*, 88 IOWA L. REV. 343, 413 (2003).

7. See generally Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 CONN. L. REV. 907 (2005) (discussing imposed, transplanted, indigenous, and transnational constitutions).

8. Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 858-59 (2005); see also POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH 2-3 (Daniel P. Franklin & Michael J. Baun eds., 1995) [hereinafter POLITICAL CULTURE AND CONSTITUTIONALISM] (distinguishing imperialistic from preparatory occupations).

system<sup>9</sup>—suggests that MacArthur’s team was less interested in exporting U.S. institutions per se than in adapting a set of workable institutions, of whatever flavor, that fit local conditions. Similarly, the Iraqi Constitution, although written with substantial assistance by the U.S. government,<sup>10</sup> departs in significant ways from basic tenets of American constitutional belief.<sup>11</sup>

These cases raise basic empirical questions. For one, how many episodes of occupation result in a new constitution for the occupied state? Second, to what degree do such documents reflect the political principles and institutions of the occupying power? We are in a unique position to answer these questions, having compiled a dataset on both the constitutional chronology of states (i.e., dates of constitutional change) and the content of constitutions.<sup>12</sup> The answers to these questions inform us about the degree of imposition reflected in political reconstruction under occupations. They lead inevitably, however, to other questions concerning the performance and fate of occupation constitutions. When do such constitutions accomplish their goals? When do they not? What elements of local adaptation are necessary for institutions to work? Why do some occupation constitutions endure while others fail? As a group, are occupation constitutions at higher risk of replacement or revision than other constitutions?

This Essay proceeds by defining the universe of occupations since 1816 and identifying the set of constitutions written under these circumstances. Part II then analyzes the forty-two instances of constitutions adopted under occupation or shortly thereafter. Part III discusses the conditions under which occupation authorities seek to use constitutions to facilitate political reconstruction, as opposed to other methods. This Part next examines the content of these

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9. See, e.g., Yasuhiro Okudaira, *Forty Years of the Constitution and Its Various Influences: Japanese, American, and European*, in *JAPANESE CONSTITUTIONAL LAW 2-3* (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993).

10. See Ellen Knickmeyer & Jonathan Finor, *Iraqis Submit Charter, but Delay Vote*, *WASH. POST*, Aug. 23, 2005, at A1 (describing the “major role” played by American officials in the drafting process, including “typ[ing] up the draft and translat[ing] changes from English to Arabic for Iraqi lawmakers”).

11. See, e.g., *IRAQ CONST.* art. 2 (describing the role of Islam as a constraint on lawmaking).

12. See Zachary Elkins & Tom Ginsburg, Comparative Constitutions Project, <https://netfiles.uiuc.edu/zelkins/constitutions> (last visited Feb. 22, 2008).

constitutions and evaluates their similarity to those of the occupying power. Finally, it explores the determinants of “successful” (or at least *durable*) occupation constitutions, and argues that a key factor is that the constitution be self-enforcing in the game-theoretical sense.<sup>13</sup> The evidence suggests that self-enforcement is indeed a crucial quality.

The closing section returns to Tokyo and Baghdad. The Essay examines those two cases in some depth, in part because there is significant evidence that U.S. policymakers drew on the post-World War II experience of political reconstruction in Germany and Japan for inspiration in planning the post-Saddam Iraq, even though the results could not have been more different. Japanese success and Iraqi struggles, it turns out, cannot be ascribed to different motives on the part of the occupiers. Rather, general findings from the broad set of cases help one to understand the contrast between the two case studies. A careful accounting of constitution making in Japan marks it clearly as an exceptional case, but one with general lessons for understanding constitutional stability.

#### I. THE PROBLEMS OF POLITICAL RECONSTRUCTION AND THE ROLE OF CONSTITUTIONS

Every happy family, began Leo Tolstoy in *Anna Karenina*, is happy in the same way, whereas every unhappy family is unhappy in its own unique way.<sup>14</sup> In the case of occupation constitutions, the story often ends in one of many possible unhappy ways, but there are a few success stories in which an occupation constitution leads to the birth of a stable democratic polity. Although there may be differences in form, the community of democratic nations shares certain core characteristics, which are largely represented in written constitutions. Thus, the happy story is already written but too rarely realized.

To achieve this end, a constitutional scheme must deal with certain universal problems of political reconstruction. First, the

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13. For a discussion of game theory, institutional dynamics, and self-enforcing patterns of behavior, see AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE 10-11 (2006).

14. LEO TOLSTOY, ANNA KARENINA 17 (1877).

crimes, or even philosophical differences, of the old regime must be reconciled, either explicitly or implicitly, with the repudiating approach of the new regime.<sup>15</sup> These differences can be dealt with through purges, criminal trials, truth and reconciliation commissions,<sup>16</sup> or simply ignored, depending on the relative power of the remaining elite. Second, a corollary is that, unless totally defeated, the remnants of the past must be brought into the political process. There will always be some elements that were part of the state during the *ancien regime*, even if they were not committed to a particular leadership or governance structure.<sup>17</sup> Even autocrats rule with the implicit consent of many of the governed, if not always a majority.<sup>18</sup> What becomes important, then, is the question of how to offer the passive supporters of the old regime a combination of carrots and sticks to bring them into the fold and ensure that they do not act as spoilers for the new regime. Third, there is a need to ensure that the bargains that establish democracy endure over time.

To understand how constitutions can potentially resolve these problems and create an enduring basis for political order, this Essay follows recent work on self-enforcing constitutions.<sup>19</sup> Any constitutional agreement, whether in a dictatorship or democracy, involves

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15. See, e.g., Ruti Teitel, *Perspectives on Transnational Justice: Collective Memory, Command Responsibility, and the Political Psychology of Leadership: The Law and Politics of Contemporary Transnational Justice*, 38 CORNELL INT'L L.J. 837 (2005) (describing the process of trials, constitution drafting, and elections).

16. For a list and description of international truth and reconciliation commissions, see U.S. Inst. of Peace, Truth Commissions Digital Collection, <http://www.usip.org/library/truth.html> (last visited Feb. 22, 2008). Examples include Argentina, Nigeria, Sri Lanka, and South Africa.

17. See, e.g., Barry Weingast, *Self-enforcing Constitutions: With an Application to Democratic Stability in America's First Century* 31-33 (Hoover Inst., Stanford Univ., Working Paper, Nov. 2005), available at <http://politicalscience.stanford.edu/faculty/documents/weingast-self-enforcing%20constitutions.pdf> (discussing the reconciliation of elites after the U.S. Civil War).

18. See *id.*

19. See, e.g., Russell Hardin, *Why a Constitution?*, in THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 100, 100-20 (Bernard Grofman & Donald Wittman eds., 1989); Barry R. Weingast, *Designing Constitutional Stability*, in DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY: ANALYSIS AND EVIDENCE 343, 343-66 (Roger D. Congleton & Birgitta Swedenborg eds., 2006) [hereinafter Weingast, *Designing Constitutional Stability*]; Peter Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137 (1992); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997) [hereinafter Weingast, *Political Foundations*].

an agreement among powerful forces in the society.<sup>20</sup> Unlike ordinary contracts, however, constitutional agreements have no external guarantor to enforce the terms, independent of the parties.<sup>21</sup> To endure, constitutions must be self-enforcing, meaning they must give rise to an equilibrium from which no party has an incentive to deviate.<sup>22</sup> Even though constitutions may produce relative winners and relative losers, they will endure to the extent that the losers believe they are better off within the constitutional bargain than in taking a chance on negotiating a new one.<sup>23</sup>

What happens when a party to the constitutional bargain seeks to violate the terms of the agreement? One can conceive of violations occurring either because winners seek to enhance their power beyond the original bargain, or because relative losers seek to overturn the bargain to negotiate or impose a better deal.<sup>24</sup> When such violations occur, the enforcement mechanism of constitutions comes into play.

Enforcement in democracies ultimately relies on citizens or at least a broad group of elites.<sup>25</sup> Any such group, however, faces enormous collective action problems in enforcing the constitution. That is, all citizens may be better off acting collectively to confront government transgressions, but no individual citizen has the incentive to take the risky step of doing so alone.<sup>26</sup> If only some citizens challenge the government, their efforts are likely to be in vain. Given acquiescence on the part of others, the individual costs of challenging the sovereign are exorbitant (often the price will include loss of life or liberty). Moreover, because citizens have heterogeneous preferences and imperfect information about others' preferences, it may be the case in reality that they cannot coordinate to agree on when a violation has occurred and what steps to take.<sup>27</sup> Political acquiescence is required for every constitutional

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20. See, e.g., Hardin, *supra* note 19, at 108-09.

21. *Id.* at 111.

22. See GREIF, *supra* note 13, at 384 (describing self-enforcing endogenous institutions in which individuals and institutions follow the behavior expected of them, creating equilibria).

23. See Weingast, *Designing Constitutional Stability*, *supra* note 19, at 348-51.

24. *Id.* (describing how the rationality of citizens' fear renders constitutions necessarily delicate because of their broad implications).

25. See *id.* at 347; see also Weingast, *Political Foundations*, *supra* note 19, at 246.

26. See Weingast, *Designing Constitutional Stability*, *supra* note 19, at 349.

27. See Weingast, *Political Foundations*, *supra* note 19, at 251 (describing the difficulties

violation to succeed and acquiescence is the expected outcome, given the collective action problems citizens face.<sup>28</sup> Accordingly, citizens need to coordinate their behavior to ensure that enforcement is effective.

Written constitutions can solve the collective action problem among citizens by serving as a useful coordination device.<sup>29</sup> They allow actors to anticipate actions of others by providing focal points—a common understanding of what constitutes a constitutional violation—for enforcement.<sup>30</sup> In turn, a widely held expectation of strict enforcement can prevent parties from violating the bargain in the first place, ensuring constitutional self-enforcement.<sup>31</sup> This framework helps us understand why effective constitutional democracy is so rare in general: punishing transgressions by political leaders is extremely difficult.<sup>32</sup> It also helps us to understand, however, why written constitutions are important components of constitutional democracy: they provide focal points for coordinating enforcement efforts.<sup>33</sup>

In order to play this role in helping citizens to coordinate, constitutional provisions must be well known and widely respected. Unfortunately, these attributes are unlikely to inhere in the occupation constitution. The first criteria, that of well known rules, is handicapped by the process of drafting. Although military occupations may have various techniques of propaganda at their disposal, the process of generating the constitutional scheme is likely to be somewhat closed and rely heavily on the resources of the occupiers and local elites.<sup>34</sup> This makes it less likely that citizens

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of the citizen coordination that is required to police a sovereign).

28. *See id.*

29. *See, e.g.,* John Carey, *Parchment, Equilibria, and Institutions*, 33 COMP. POL. STUD. 735, 749-51 (2000) (describing coordination and constitutional stability); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1733-36 (2003) [hereinafter Strauss, *Common Ground*]; David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 910-11 (1996) (analogizing constitutional conventionalism to “focal points” in game theory) [hereinafter Strauss, *Common Law Constitutional Interpretation*].

30. *See* Strauss, *Common Ground*, *supra* note 29, at 1734.

31. *See* Weingast, *Designing Constitutional Stability*, *supra* note 19, at 344-46.

32. *See id.* at 344.

33. *See id.* at 345.

34. *See* Feldman, *supra* note 8, at 857-59 (describing recent examples of constitutions in post-conflict states being drafted under conditions of de facto or de jure occupation).

will know about the details of the constitutional text through any deliberative or participatory process.

The second criteria, wide respect for constitutional provisions, relates to their relevance and legitimacy, both of which are adversely affected by the occupation constitution's foreign character. Externally imposed provisions and institutions are less likely to match citizens' prior beliefs about rightful limits on government.<sup>35</sup> Moreover, citizens may be less likely to embrace a new set of rules that are noticeably imported, especially when there is an undercurrent of nationalism, as is common in post-war settings. The result is a set of rules that may very well be unclear, illogical, and unpalatable to a citizenry charged with defending them.<sup>36</sup>

Constitutions written at the behest of the occupier, then, are unlikely to develop into self-enforcing bargains and as a result will depend upon the occupier for their enforcement, at least in the short run.<sup>37</sup> Such external enforcement further discourages citizen action in two ways. First, if citizens believe a foreign power will punish transgressions, they will have little incentive to pay the costs necessary to organize and challenge the ruling elite. Second, citizens may become unaccustomed to challenging transgressions. Such habits may result in relative ignorance of constitutional limits and a general expectation that citizens are not responsible for monitoring the ruling elite. Occupation constitutions are likely to create a culture of acquiescence in which citizens are explicitly absolved of any responsibility for enforcement. Under such circumstances, the coordination function of constitutions is anemic at best. Leaders that anticipate citizen apathy become more likely to transgress constitutional terms.<sup>38</sup>

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35. See *id.* at 879-85 (describing external pressures and the tension between equality and autonomy).

36. See, e.g., Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663, 669 n.26 (2006) (noting that "the people have strongly rejected the constitutions in Nigeria and Bahrain, which were not at all participatory," because they were imposed on the people rather than made by them).

37. See, e.g., Michael J. Frank, *U.S. Military Courts and the War in Iraq*, 39 VAND. J. TRANSNAT'L L. 645, 696 (2006) (noting that many Iraqis, and the judges tasked with maintaining legal and constitutional order, "see [U.S.] soldiers primarily as foreign occupiers who may justly be attacked by their fellow Iraqis even though their very lives depend on the protection these 'infidel occupiers' provide").

38. See Weingast, *Designing Constitutional Stability*, *supra* note 19, at 349.



These effects are not wholly dependent upon an assumption of *citizen* enforcement. Even constitutions that are primarily elite bargains, in which coordination occurs among a small number of players, may suffer from the fact that they rely on external enforcement. When the enforcing authority departs, the internal players face a new strategic environment in which violations of the bargain face little apparent opposition.<sup>39</sup> In short, occupation constitutions would seem less likely to become self-enforcing.

These characteristics of occupation constitutions are evident in Professor Carrington's discussion of the United States's intervention in Cuba.<sup>40</sup> After the Spanish-American War, the United States occupied Cuba and proceeded to prepare the island for self-governance.<sup>41</sup> In a misguided maneuver, the U.S. Senate adopted the Platt Amendment to a military appropriations bill, embodying a policy wherein the United States would intervene when and if democratic institutions failed in an independent Cuba.<sup>42</sup> This provision was ultimately included in the 1902 Cuban Constitution.<sup>43</sup> As Carrington so well describes, this "begot the disorders that it had been intended to prevent."<sup>44</sup> Domestic factions refused to compromise and each sought to induce the United States to intervene on their own side, preventing a stable, self-enforcing democracy from taking hold.<sup>45</sup>

In summary, the circumstances of their birth mean that occupation constitutions are likely to lack essential features for long-run endurance and effectiveness. The more that constitutions seek to transform earlier understandings and unwritten norms without domestic involvement, it seems, the less likely they are to generate strong local legitimacy and enforceability.

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39. See Feldman, *supra* note 8, at 887.

40. See Paul D. Carrington, *Could and Should America Have Made an Ottoman Empire in 1919?*, 49 WM. & MARY L. REV. 1071 (2008).

41. *Id.* at 1086-87.

42. See *id.*

43. See *id.* at 1086.

44. *Id.* at 1087 (citing WHITNEY T. PERKINS, *CONSTRAINT OF EMPIRE: THE UNITED STATES AND CARIBBEAN INTERVENTIONS* 12-15 (1981)).

45. See *id.*

### *A. Identifying Occupation Constitutions*

This Section examines the incidence of occupation constitutions. The phenomenon is a relatively new one. The strategy of occupation and political reconstruction contrasts with the traditional approach of conquering powers: to amalgamate the territory of the conquered into the territory of the conqueror or to take it as a colony.<sup>46</sup> It is only in 1945 that taking territory by force became illegal in international law.<sup>47</sup> Thus, there are relatively few cases of occupation before the twentieth century, and virtually all of them involve American intervention in Latin America.<sup>48</sup>

The legal definition of an occupation in international law is remarkably simple. The Hague Conventions provide that a “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”<sup>49</sup> War is not a necessary condition of occupation *per se*: even a civil conflict can give rise to occupation if it prompts a foreign force to invade. The Fourth Geneva Convention of 1949, Part II, Section D.3 of which focuses largely on “Occupied Territory,” emphasizes *de facto* control of a territory: “the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly.” The relatively generous definition is motivated by the general concern in the Fourth Geneva Convention for the protection of civilians in occupied territory.<sup>50</sup> Occupation

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46. See, e.g., 5 MAX SAVELLE, *EMPIRES TO NATIONS: EXPANSION IN AMERICA: 1713-1824*, at 24 (1974) (describing how European colonizing states tended to extend and reproduce their own political institutions in the American colonies).

47. See U.N. Charter art. 2, para. 4.

48. See generally Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903, 907 n.15 (1993) (“During the Nineteenth Century ... [t]he ‘Civilized’ Nations of Europe and the United States had the right to control their own destinies free of foreign intrusion. The less civilized Asian and Latin American states, however, were fair targets of intervention.”).

49. Hague Convention Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2277.

50. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 (*entered into force* Oct. 21, 1950).

imposes responsibilities for such protection and duties to refrain from making fundamental changes in the governance or boundaries of the occupied territory.<sup>51</sup>

We distinguish occupation from colonization, at least for the purposes of this Essay.<sup>52</sup> The two phenomena clearly share many of the same characteristics, and it is undeniably relevant to our endeavor to ponder the character and fate of constitutions that emerge out of colonial situations. Both phenomena—to the extent we are concerned with ultimately independent states—assume a situation of subjugated authority followed by emergent sovereignty. Occupations, however, differ from colonialism with respect to the target state's status prior to contact with the outside power. Occupations, at least as we define them, presume that the target state is fully constituted as a state and independent prior to intervention. This difference, as we describe below, is critical to understanding whether the occupation has diverted a state's institutional path.

“Occupations” come in many flavors, some of which we exclude from our definition and, thus, our analysis. A number of actions involve the control of territory that had not been—and has yet to be—fully constituted as an independent state. For example, Morocco has controlled the territory of Western Sahara since Spain withdrew in 1975.<sup>53</sup> The Sahrawi Arab Democratic Republic has contested

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51. Note that occupations conducted before the establishment of the United Nations system are not governed by today's law of belligerent occupation. Japan and Germany were occupied under the legal principle of *debellatio*, which considers the right of conquest that no longer exists. See André Nollkaemper, *Concurrence Between Individual Responsibility and State Responsibility in International Law*, 52 INT'L & COMP. L.Q. 615, 625-26 (2003). Today's law emphasizes the duty to preserve the institutions in the occupied territory, and many believe that the United States occupation of Iraq violated these provisions. See, e.g., Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EUR. J. INT'L L. 661 (2005); see also Eyal Benvenisti, *The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 ISR. DEF. FORCES L. REV. 19 (2003); Philipp Dann & Zaid Al-Ali, *The Internationalized Pouvoir Constituant— Constitution-Making Under External Influence in Iraq, Sudan and East Timor*, 10 MAX PLANCK Y.B. U.N. L. 423, 453 (2006) (contending that the drafting of Iraqi Transitional Administrative Law violated international law); Brett H. McGurk, *A Lawyer in Baghdad*, 8 GREEN BAG 51, 55 (2004).

52. See generally JOHN HUXTABLE ELLIOTT, *EMPIRES OF THE ATLANTIC WORLD: BRITAIN AND SPAIN IN AMERICA 1492-1830* (2006) (describing the relationships between imperial defense, physical and symbolic occupation, societal changes, emerging elites, and war).

53. See generally Yahia H. Zoubir, *The Western Sahara Conflict: A Case Study in Failure*

these claims and is recognized by more than seventy-five governments as well as the African Union.<sup>54</sup> However we judge its current sovereignty, it was not an independent country before the occupation and so is not included in our sample. Israeli military control of the West Bank and Gaza continues despite the international recognition of a non-state Palestinian Authority<sup>55</sup> but is excluded under the same criteria. We also exclude cases in which the occupation does not cover the entire territory of the independent state. For example, Northern Cyprus, controlled by Turkey, is denounced as a case of occupation by Greek Cypriots,<sup>56</sup> but only constitutes a partial occupation and so we exclude it.

There are also a significant number of occupations that have been undertaken under authority of the United Nations.<sup>57</sup> We might think of this as the maximum extension of a peacekeeping mission, in which the international community takes over core governmental functions on a transitional basis. These actions meet our basic definition of occupation but are not included here because of their multilateral character. Examples include the United Nations Transitional Authority in Cambodia (UNTAC), which governed that country from 1992 to 1993,<sup>58</sup> and the United Nations Transitional Administration in East Timor (UNTAET), which ran that country from 1999-2002.<sup>59</sup> Some cases are excluded on multiple grounds. The United Nations Interim Administration Mission in Kosovo (UNMIK) and United Nations Transitional Authority in Eastern Slavonia,

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*of Prenegotiation and Prolongation of Conflict*, 26 CAL. W. INT'L L.J. 173, 175-83 (1996).

54. See Stephen Zunes, *The Future of Western Sahara*, FOREIGN POL'Y IN FOCUS, July 20, 2007, <http://www.fpif.org/fpiftxt/4410>.

55. See Institute for Middle East Understanding, 3.10 - How Many Countries Recognize Palestine as a State?, <http://imeu.net/news/article0065.shtml> (last visited Feb. 28, 2007).

56. See generally CLAIRE PALLEY, AN INTERNATIONAL RELATIONS DEBACLE: THE U.N. SECRETARY-GENERAL'S MISSION OF GOOD OFFICES IN CYPRUS: 1999-2004 (2005).

57. Indeed, international influence is probably a continuous variable, ranging from total imposition to more moderate influence. In the case of the Sudan, for example, the international community was extensively involved in a peace negotiation that served as the predicate for the constitutional bargain, in which the international community had little direct involvement. Dann & Al-Ali, *supra* note 51, at 457. Dann and Al-Ali also argue for distinguishing multilateral from national occupations. *Id.* at 456.

58. See EŞREF AKSU, THE UNITED NATIONS, INTRA-STATE PEACEKEEPING AND NORMATIVE CHANGE 197-201 (2003) (discussing UNTAC deployment).

59. RICHARD CAPLAN, INTERNATIONAL GOVERNANCE OF WAR-TORN TERRITORIES: RULE AND RECONSTRUCTION 19-20 (2005) (discussing the implementation of UNTAET).

Baranja, and Western Sirmium (UNTAES) were similar operations but did not involve occupation of an entire country.<sup>60</sup> Kosovo may one day become an independent state, but it was not one prior to U.N. occupation.<sup>61</sup>

An historical record of occupations, at least as we define them, is not available. In practical terms, because an occupation follows, or sometimes constitutes, an inter-state dispute, we base our census on the universe of such disputes. Using the Correlates of War (COW) project's data on militarized interstate disputes (MID),<sup>62</sup> we then identify the set of possible occupations as those disputes in which the highest action in the dispute is coded as "occupation or higher," leaving approximately 1600 disputes with possible occupations. We then read case-level material on each of these disputes to determine whether an occupation occurred surrounding that dispute. For those actions meeting our definition, we recorded the names of the occupiers as well as the start and end dates of the occupation. We find a total of 107 occupations occurring in 59 host countries.<sup>63</sup>

In order to match periods of occupation with constitutional development, we need an accounting of the constitutional chronology of states. As part of our larger project, we have collected data on the constitutional history of every independent state—as identified by Ward and Gleditsch—from 1789 to 2005.<sup>64</sup> For each country, we

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60. See, e.g., *id.* at 18-19.

61. E.g., TED GALEN CARPENTER, NATO'S EMPTY VICTORY: A POSTMORTEM ON THE BALKAN WAR (2000) (analyzing the prospect of partitioning Kosovo from Serbia).

62. Meredith Reid Sarkees, *The Correlates of War Data on War: An Update to 1997*, 18 CONFLICT MGMT. & PEACE SCI. 123 (2000).

63. We are confident that all the occupations identified are correctly scored. We may, however, have overlooked some cases of occupation. There are some occupations that arise from peacekeeping missions, and because of our focus on interstate disputes, these do not necessarily enter our sample. Moreover, Version 3.0 of the COW MID data provides information about disputes from 1816-1997. *Id.* We added cases outside these dates of which we are aware (Afghanistan in 2001 and Iraq in 2004), but we likely missed some occupations prior to 1816 and after 1997.

64. See Kristian S. Gleditsch & Michael D. Ward, *A Revised List of Independent States Since the Congress of Vienna*, 25 INT'L INTERACTIONS 393 (1999), updated at <http://privatewww.essex.ac.uk/nksg/data-4.html>. Ward and Gleditsch identify the existence of states from 1816-2006. For the years between 1789 and 1816, we use data about the birth of states from the Issue Correlates of War Project (ICOW). See Paul R. Hensel, Issue Correlates of War Project Data Archive: Colonial History, <http://garnet.acns.fsu.edu/~phensel/icow.html#colonies> (last visited Feb. 22, 2008). For years after 2002, we extended Ward and Gleditsch's colonies codings three years (the only change being a merger between Serbia and Montenegro). See

record the promulgation year of “new,” “interim,” or “reinstated” constitutions and the year of any amendments. Reconstructing constitutional chronologies for all independent states is not a simple matter and we rely upon a collection of cross-national, regional, and country-level sources in order to compile the data.<sup>65</sup> We count a total of 801 new, 90 interim, and 57 reinstated constitutions.<sup>66</sup>

We identify occupation constitutions by comparing the constitutional chronologies for each country to the occupation periods. We call occupation constitutions those written during the occupation period as well as those written within three years following the end of an occupation, to account for the possibility that the occupier’s influence extends past the period of occupation.

Certainly, there is some question as to whether those constitutions enacted subsequent to the occupation should be included. In part, we treat the issue as an empirical question, with the expectation that the similarity of these documents to those of the occupier will tell us much about the effect of the occupation. Of the 107 occupations, 42 result in new constitutions by our accounting. Table 1 lists the 42 occupation constitutions, of which 30 were drafted during the occupation and 12 within three years after the end of the occupation.<sup>67</sup> The table identifies both the occupied country and the *primary* occupying state. In most cases, only one country acted as occupier, but in others there were as many as eleven occupiers. For the cases with multiple occupiers, we identified the primary occupying state based on historical accounts of the occupation.

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also Kristian Gleditsch, *A Revised List of Wars Between and Within Independent States, 1816-2002*, 30 INT’L INTERACTIONS 335 (2004).

65. See CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz et al. eds., 2007) (providing invaluable background information for most countries); see also THE CONSTITUTIONS OF THE AMERICAS (AS OF JANUARY 1, 1948) (Russell H. Fitzgibbon ed., 1948); ROBERT L. MADDEX, CONSTITUTIONS OF THE WORLD (2001); AMOS J. PEASLEE, CONSTITUTIONS OF NATIONS (1971); Political Database of the Americas, <http://pdba.georgetown.edu> (last visited Feb. 22, 2008).

66. Although we are confident that we have identified nearly all “new” constitutions in the world, it is quite possible that we have overlooked a fair number of amendments, especially older ones, simply because they are documented to a lesser degree.

67. See Table 1 *infra*.

### III. CHARACTERISTICS OF OCCUPATION CONSTITUTIONS

#### A. *To State-build or Not?*

Not every military occupation leads to a new constitution. Indeed, occupation constitutions seem to be associated with certain occupying powers who are evidently partial to constitution making as a strategy. The three leading occupiers in our sample, by total number of constitutions drafted during or immediately following occupation, are Russia (fourteen), the United States (nine), and France (eight).<sup>68</sup> All three shared at least a formal ideological commitment to self-determination as a value, though of course no superpower wants client states to have functional independence on certain questions. This was especially true during the Cold War. A majority of the occupation constitutions were written during this time period.<sup>69</sup> The United States's and Soviet Union's desire to advance their respective ideological agendas likely played a role in the large number of occupations and occupation constitutions during this period as well.<sup>70</sup> Thus, occupation constitutions should be seen as a particular strategy of particular states, rather than a global phenomenon. They are not, moreover, limited to occupations conducted by democratic regimes.<sup>71</sup>

#### B. *State-building in Whose Image?*

To what degree do occupying states shape the constitutions of their host states? If one expects large-scale institutional transfer, the data we present below suggest a reappraisal of sorts. To begin

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68. Thirty-three percent of Russian occupations resulted in at least one constitution, with many resulting in multiple constitutions, whereas 28 percent of the United States's occupations and 22 percent of France's occupations resulted in at least one constitution. These percentages do not seem very high considering these countries are responsible for the largest number of occupation constitutions. On the other hand, 100 percent of Vietnam's occupations resulted in at least one constitution.

69. See Table 1 *infra*.

70. *Id.*

71. *But see* POLITICAL CULTURE AND CONSTITUTIONALISM, *supra* note 8, at 2-3 (arguing that the nature of occupying power, as an authoritarian or democratic regime, determines whether occupation is imperialistic or benign).

with, a majority of occupations do not result in new constitutions. Of the 107 occupations in our data, only 26 resulted in at least one new constitution being written—of course, several of these occupations produced multiple new constitutions.<sup>72</sup> Given that the life expectancy of all constitutions is remarkably short (seventeen years),<sup>73</sup> it is mildly surprising that preexisting constitutions would survive the occupation. Whether survival results from the occupying powers' indifference to domestic politics or their deference to local interests is unclear. In the case of Japan, MacArthur and the U.S. government were insistent upon a new constitutional framework, a demand that came as a bit of a surprise to the Japanese.<sup>74</sup> Their reading of the Potsdam Declaration suggested that they could get by with better enforcement of the venerable Meiji Constitution, not its revision and certainly not its replacement.<sup>75</sup> On the other hand, constitutional revision seemed to have the air of inevitability in the Iraqi reconstruction. Transitions to democracy have come to be marked by constitutional change, and it is hard to imagine a U.S. occupying force after 9/11 celebrating a democratic transition without a new slate of fundamental laws.

Constitutional replacement, then, is not an inevitable outcome of occupation, but it seems more likely than it would be absent intervention. Our analysis of the duration of constitutional systems suggests that defeat in war (whether resulting in a new occupation or not) increases the probability of a new constitution by about 50 percent.<sup>76</sup> Moreover, the resulting set of constitutions (forty-two, by our count), represent roughly 7 percent of the total number of new constitutions, a significant subset worthy of investigation.

When host states write a new constitution under occupation, do they reproduce the political structure of the occupying power? Our approach is to compare these occupation constitutions to the operant

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72. The Soviet occupation of Afghanistan is one example. See THE CONSTITUTIONS OF AFGHANISTAN 1923-1996 (on file with authors).

73. See Zachary Elkins, Tom Ginsburg & James Melton, The Lifespan of Written Constitutions 1 n.2 (Apr. 26, 2007) (unpublished manuscript, on file with authors) (life expectancy is calculated from a survival model of constitutions since 1789).

74. See RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR 51 (2002).

75. *Id.*

76. See generally Elkins, Ginsburg & Melton, *supra* note 73.



constitution of the occupying country, as well as to other available models. We do so by calculating similarities among constitutions based on a subset of variables from the Comparative Constitutions Project (CCP) dataset.<sup>77</sup> We begin with a set of 92 variables having to do with the provision of various political, civil, social, and economic rights.<sup>78</sup> For the most part, these are binary variables measuring the presence or not of a certain right. For several survey questions that allow for more qualified responses, we have collapsed the responses such that provision under any circumstance constitutes provision of that right. So, for example, constitutions that prohibit capital punishment under any condition are equivalent to those that prohibit it except in the case of war.

One could measure similarity across a wider set of variables. The CCP dataset includes over 600 questions and thus will allow for a fairly comprehensive omnibus test of similarity with respect to the content of constitutions. Nevertheless, given the near universality of rights provisions in constitutional design, we reason that these variables make for a fairly tractable, if not entirely representative, sample of constitutional provisions. Also, our estimates are, by necessity, based on a less than full sample of constitutions because our data collection is still in progress. Nonetheless, our sample is substantial, including approximately two-thirds of history's 654 "new" constitutions, as well as a set of amended constitutions from this set.<sup>79</sup>

We generate similarities between cases across the 92 binary variables using Pearson's Phi, one of several possible measures of similarity that are appropriate when the elements in the comparison set are binary variables. Given a cross-tabulation of matches between two constitutions in which  $a$  and  $d$  represent the cells in the diagonal of agreement, and  $b$  and  $c$  represent the cells in the diagonal of disagreement, Pearson's Phi is calculated as:

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77. See Elkins & Ginsburg, *supra* note 12.

78. For the questions from the CCP survey instrument used to generate the variables, please see our Codebook (Jan. 31, 2007 draft), <http://netfiles.uiuc.edu/zelkins/constitutions/files/codebook.pdf>.

79. The data collection protocol calls for cases to be coded by at least two independent coders. For 279 of these cases we have reconciled any differences among coders. For the rest, we have randomly selected one coding, if the case has been coded more than once.

$$\frac{ad-bc}{\sqrt{(a+b)(a+c)(d+b)(d+c)}}$$

and ranges from -1 to 1, where 1 = perfect agreement and -1 = perfect disagreement. When we calculate this quantity for each contemporaneous dyad among the 565 constitutions in our data, we obtain a mean similarity score of -0.35 with a standard deviation of 0.15. We are able to calculate this quantity for 33 of the 42 occupation constitutions and that of their principal occupier. On average the similarity between these 33 pairs is -0.28, suggesting that occupation constitutions are moderately more similar to the occupier's constitution than they are to the average constitution in force. It is useful, then, to take a closer look at several cases, particularly the Japanese and Iraqi cases that motivate this paper.

With respect to the Japanese case, we can compare the MacArthur-commissioned product<sup>80</sup> to the 63 constitutions in our sample that were in force in 1946. Using multidimensional scaling to reduce the matrix of similarities to two-dimensional space, we map the cases with respect to one another in Figure 1.<sup>81</sup> Cases that are positioned closer to one another are more similar across the set of 92 rights. The dimensions themselves may have substantive meaning, but at this point we are concerned mostly with their utility in displaying distances among constitutions. The United States's case is the current constitution as of 1992,<sup>82</sup> but of course is substantially similar to the constitution in place during the Japanese deliberations.

Strikingly, of the 63 constitutional models in force in or prior to 1946, the Japanese constitution of that year is most similar to its predecessor, the 1889 Meiji constitution.<sup>83</sup> On the other hand, signs

80. See generally MOORE & ROBINSON, *supra* note 74.

81. See Table 1 *infra*; Figure 1 *infra*.

82. The Twenty-Seventh Amendment to the U.S. Constitution was ratified in 1992, more than 202 years after its initial submission in 1789. See Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 260 n.33 (1996).

83. See generally TAKII KAZUHIRO, *THE MEIJI CONSTITUTION: THE JAPANESE EXPERIENCE OF THE WEST AND THE SHAPING OF THE MODERN STATE* (2007) (describing the intellectual

of U.S. authorship are evident as well. Of the 63 constitutions in force, the U.S. Constitution ranks sixth in similarity to the Japanese document.<sup>84</sup> Together these data suggest the persistence of a local constitutional tradition together with a heavy dose of guest-writing.

Turning to the Iraqi 2005 Constitution, we again see what appears to be a rather local affair, but this time with no evidence of the occupier's input, as is suggested by the data in Figure 2. In that case, the U.S. document (at least the rights component) bears almost no resemblance to the Iraqi Constitution.<sup>85</sup> Of the 191 constitutions in force, the U.S. Constitution ranks 176th in terms of similarity to the Iraqi Constitution, with a measure of similarity of -0.49.<sup>86</sup> The constitutions most similar to the Iraqi Constitution are all relatively recent documents from the developing world, with fourteen of the top twenty in Africa, the Middle East, and Central Asia. In short, the Japanese Constitution reflected imposed norms, but also a good deal of congruence with the preexisting understandings of the scope of the predecessor Meiji document. The Iraqi document seems to bear little resemblance to the U.S. Constitution, in contrast with popular views of the document as imposed from outside.<sup>87</sup>

### *C. Duration of Occupation Constitutions*

For reasons we outline above, occupation constitutions would seem less likely to be self-enforcing and, therefore, less likely to endure as long as those written under other circumstances.<sup>88</sup> In fact, most of these constitutions die before or very near the end of the occupation period, but there are a few that appear to become self-

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origins of the Meiji Constitution).

84. See Figure 2 *infra*.

85. See Deborah M. Weissman, *The Human Rights Dilemma: Rethinking the Humanitarian Project*, 35 COLUM. HUM. RTS. L. REV. 259, 336 (2004) ("Indeed, immediately upon the approval of an interim Iraqi Constitution which was drafted by a non-elected body appointed by U.S. administrators, a significant segment of the Iraqi population denounced the document and 'dismissed it as the work of the United States and its ... allies.'" (citation omitted)).

86. See Figure 3 *infra*.

87. See, e.g., Feldman, *supra* note 8, at 858-59.

88. See *supra* notes 19-38 and accompanying text.

enforcing, in the sense of lasting well beyond the end of the occupation period.

We report two measures of the duration of occupation constitutions in Table 1.<sup>89</sup> We define the lifespan of a constitution as the period of time between its entry into force and either its suspension or its formal replacement by another constitution. The lifespan column in Table 1 is simply the number of years the constitution was in force. Because occupations can persist for years (and, thus, provide external enforcement for the constitution), it is important to take occupation length into account. We also report, therefore, the post-occupation lifespan: the number of years the constitution persisted after the end of occupation. The post-occupation lifespan is irrelevant for those constitutions that do not survive the occupation and is redundant for constitutions written after the end of the occupation period.

As expected, life expectancy of imposed constitutions is substantially less than that of other constitutions. The life expectancy of occupation constitutions is about thirteen years, while the life expectancy for all constitutions is about seventeen years.<sup>90</sup> More importantly, of the few constitutions that last past the end of the occupation period, half are replaced within two years. This finding lends credence to our expectation about the fragility of constitutions once the occupier is no longer present to enforce them.

#### IV. TOKYO AND BAGHDAD

The preceding discussion leads us to revisit the two prominent cases that motivate our inquiry. In light of the short duration of occupation constitutions in general, the Japanese case is all the more remarkable. Our framework may also provide insights into what seem to be dim prospects for the Iraqi case.

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89. See Table 1 *infra*.

90. Estimates are from a survival model, which accounts for right-censored cases. In another work, we build a fully specified set of models of constitutional duration which may be useful in generating more precise estimates of the lifespan of occupation constitutions. See Elkins, Ginsburg & Melton, *supra* note 73. The general patterns evident in the bivariate data, however, do not change substantially.

*A. Japan**1. Drafting the Constitution*

The Japanese constitution would seem to be a paradigmatic case of imposition, as the document was largely drafted by the occupation authorities in February 1946.<sup>91</sup> But the facts are more complex, and recent scholarship has emphasized the collaborative nature of the enterprise.<sup>92</sup>

The first issue to be faced in Tokyo was whether constitutional reform was needed at all. From the Allied point of view, constitutional reform was necessary in order to accomplish the democratization of Japan.<sup>93</sup> Because pre-war Japan had rested its legitimacy on the concept of the *kokutai*, or national polity with the emperor as sovereign, a “constitutional moment” would be needed to reorder the polity.<sup>94</sup>

Despite relatively extensive planning for the occupation during the War, constitutional reform did not seem to be a major element of the American policy in the first months of the occupation. The Supreme Commander of the Allied Powers (SCAP) initially seemed agnostic regarding the scope of constitutional revision.<sup>95</sup> It was not until October 1945 that MacArthur told the new Prime Minister, Baron Shidehara, that he needed to undertake full constitutional reform (though he had suggested the same to Prince, and Prime Minister, Higashikuni Naruhiko as well as his Deputy Prime Minister Konoe Fumimaro the previous month).<sup>96</sup> Revision was initially conceived as an internal Japanese matter, without much guidance from Americans other than the Potsdam Declaration

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91. KYOKO INOUE, *MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING* 1 (1991).

92. See MOORE & ROBINSON, *supra* note 74, at 330-35. For a discussion of the Japanese role in the occupation generally, see JOHN DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* (1999); Yoshiro Miwa & J. Mark Ramseyer, *The Good Occupation* (Harvard Law & Econ. Discussion Paper No. 514, 2005), available at <http://ssrn.com/abstract=729463>.

93. MOORE & ROBINSON, *supra* note 74, at 50.

94. *Id.* at 177-80 (discussing sovereignty and *kokutai*).

95. See *id.* at 51.

96. *Id.* at 51, 62.

formula that governance would reflect the “freely expressed will of the Japanese people.”<sup>97</sup>

The Japanese government began the drafting process under the direction of Joji Matsumoto, a commercial law professor with close ties to the *zaibatsu* industrial conglomerates that had dominated the pre-war economy.<sup>98</sup> He produced a draft which was a minor revision of the Meiji Constitution, with the emperor retaining sovereignty.<sup>99</sup> When this draft was leaked to the press in very early February 1946, an outcry ensued in the press and SCAP seized the opportunity to take over the process.<sup>100</sup> General Courtney Whitney, in charge of civilian affairs for the occupation, convened a group within SCAP and gave them one week to complete a draft, in accordance with MacArthur’s brief outline of instructions that required the people to be sovereign with the emperor as head of state.<sup>101</sup> MacArthur’s instructions also included an outline of the famous peace clause that became Article 9, and noted that there would be no titles or nobility allowed.<sup>102</sup>

The schedule was extremely tight, in part because the Allied Powers in the Far Eastern Commission (FEC) believed that they had jurisdiction over the process under the Potsdam Declaration.<sup>103</sup> The Allies were aggressive about holding the emperor personally responsible for the war, and MacArthur continuously sought to control events rather than submit to direction from the FEC.<sup>104</sup>

One week later, in a remarkable meeting with the Japanese government, Whitney rejected the Matsumoto draft and presented the SCAP document in English as the basis for discussion.<sup>105</sup> The shocked Japanese soon learned that the document was more than a basis, but rather was to form the core of the new constitution from which any deviation would have to be justified.<sup>106</sup>

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97. *Id.* at 52.

98. *Id.* at 73.

99. *Id.* at 74-75.

100. *Id.* at 93.

101. *Id.* at 94-95.

102. *See id.* at 94.

103. *Id.*

104. *See id.* at 87-88, 117.

105. *See id.* at 108-09.

106. *See id.* at 109-11.

Moore and Robinson, in their recent magisterial study, use the term “conspiracy” to describe the production of the final Japanese document.<sup>107</sup> In large part, this approach was necessitated by the need for secrecy with regard to the authorship of the draft. From the American side, MacArthur needed the Japanese government to represent that the draft was their own, not only to make it legitimate locally but to convince the other Allied governments, who were calling for Hirohito’s head, that the matter was out of MacArthur’s control.<sup>108</sup> The Japanese, reluctant to cede all autonomy or at least to appear to do so, had an interest in de-emphasizing SCAP involvement as well.<sup>109</sup> Thus the two sides had a common interest in secrecy.<sup>110</sup>

When Matsumoto translated the SCAP draft into Japanese, he made substantial changes in the interests of “style.”<sup>111</sup> This was necessary partly because of the American use of terms that sounded quite foreign, such as the requirement of cabinet “advice and consent” for imperial action.<sup>112</sup> General Whitney insisted that the section on rights refer to the “age-old struggle of man to be free” and Matsumoto unsuccessfully tried to delete this.<sup>113</sup> But Matsumoto’s subterfuge also included deleting the preamble and the Diet’s role in passing the Imperial Household Law, the primary statute empowering and regulating the emperor.<sup>114</sup> Rights were granted only to *kokumin*, Japanese nationals, rather than all citizens or persons.<sup>115</sup> In this sense, the inevitable challenges of translation mattered for the substantive outcomes of the occupation constitution.

More importantly, the translation into colloquial Japanese represented a significant change. The Meiji Constitution had been

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107. See *id.* at 91-92; see also LAWRENCE WARD BEER & JOHN M. MAKI, FROM IMPERIAL MYTH TO DEMOCRACY: JAPAN’S TWO CONSTITUTIONS, 1889-2002, at 85-87 (2002) (listing Japanese contributions to the 1946 constitution).

108. See MOORE & ROBINSON, *supra* note 74, at 91-92.

109. See *id.* at 117, 141.

110. The Japanese concept of *tatemae* and *honne* (public presentation as contrasted with true inner feelings) is resonant here.

111. See MOORE & ROBINSON, *supra* note 74, at 117.

112. See *id.* at 125-26.

113. See *id.* at 129.

114. See *id.* at 127-28, 132-33, 136-37.

115. See *id.* at 130.

written in archaic, legalistic Japanese, scarcely more intelligible than the highly formal language of the Imperial Household.<sup>116</sup> By translating the document into colloquial Japanese (notwithstanding the wooden language of certain phrases drafted in English), the process facilitated self-enforcement, because of the clarity of the strictures. Furthermore, to the extent that the Meiji Constitution's rights provisions had been known, the fact that the new constitution apparently retained a similar though expanded set of rights may have meant that it was consistent with understandings of the proper scope of a constitution.<sup>117</sup>

The process of adopting the new constitution followed the revision requirements of the Meiji Constitution, proceeding by an imperial rescript followed by a two-thirds vote in both houses.<sup>118</sup> This required deliberation in the Privy Council first, but, perhaps because of the Emperor's own sense that the document would allow the imperial institution to survive, few changes were made.<sup>119</sup> The parliamentary approval required new elections,<sup>120</sup> inevitable anyway after an Allied purge of prewar politicians.<sup>121</sup> Though the election was characterized by the Allies as a referendum of sorts on the constitution,<sup>122</sup> few politicians seemed to discuss the document in the campaign.<sup>123</sup> Nevertheless, the summer debates in the newly constituted House of Representatives were vigorous and led to a number of minor changes in the draft.<sup>124</sup> The remarkable debate proceeded through the efforts of Tokujiro Kanamori, Minister of State for the Constitution, who explained the draft to the legislators and effectively maintained the fiction that the draft was Japanese in origin.<sup>125</sup> The constitution then went to the Emperor for signature

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116. See INOUE, *supra* note 91, at 29.

117. See *supra* text accompanying note 83.

118. MEIJI KENPŌ, art. 73.

119. See INOUE, *supra* note 91, at 31-32.

120. See MOORE & ROBINSON, *supra* note 74, at 144.

121. See *id.* at 147.

122. See *id.*

123. See *id.* at 150.

124. See INOUE, *supra* note 91, at 34 n.43.

125. See Harold S. Quigley, *Japan's Constitutions: 1890 and 1947*, 41 AM. POL. SCI. REV. 865, 868 (1947).



and was promulgated on November 3, 1946, taking effect six months thereafter.<sup>126</sup>

The story, then, is one of collusion more than imposition. One should recall that there were significant forces within Japan which were supportive of liberal ideals.<sup>127</sup> The Meiji period had seen an outpouring of liberal sentiment;<sup>128</sup> indeed the Meiji Constitution was widely viewed as a reactionary document to maintain the prerogatives of the statist system that was developing, a rearguard action to stop liberalism in its tracks.<sup>129</sup> The liberal forces were strong enough to be able to initiate the Taisho democracy period some three decades later, a brief period in the 1920s when democracy flourished.<sup>130</sup>

The MacArthur process contains a few extraordinary moments of negotiation and what might be called effective resistance on the part of the Japanese interlocutors. One famous example concerns the “red article” (article 38 in the SCAP draft), in which the New Deal-oriented American drafters provided that all land in Japan should belong ultimately to the state.<sup>131</sup> This no doubt struck the Japanese government figures who saw the draft as godless communism, and they rejected the clause.<sup>132</sup> The Japanese also successfully argued for a bicameral rather than a unicameral parliament.<sup>133</sup> The bicameral idea originated in a civilian Constitution Study Group, which had been influential on several key members of SCAP.<sup>134</sup> These two examples show that, far from attempting to impose American institutions on Japan, the SCAP authorities viewed the Japanese restructuring as an opportunity to assemble a set of

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126. See INOUE, *supra* note 91, at 36.

127. See *id.* at 12.

128. Misiko Hane, *Early Meiji Liberalism—An Assessment*, in 24 MONUMENTA NIPPONICA: STUDIES IN JAPANESE CULTURE 353, 353 (Edmund Skrzypczak ed., 1969).

129. Kazayuki Takahashi, *Contemporary Democracy in a Parliamentary System*, in JAPANESE CONSTITUTIONAL LAW 87, 91-92 (Percy R. Luney & Kazayuki Takahashi eds., 1993).

130. Even at the time the constitution was being drafted, many different forces in Japan had been drawing up new drafts of their own and providing ideas in the press about the structure of a new constitution. See INOUE, *supra* note 91, at 12.

131. MOORE & ROBINSON, *supra* note 74, at 131.

132. See *id.* at 131-32.

133. See *id.* at 132.

134. Takamichi Mito, Japan’s Constitutional Revision Debate Under Prime Minister Abe Shinzô and the Implications for Japan’s Foreign Relations 9-10 (2007) (unpublished manuscript, on file with authors).

proven democratic institutions, whether American or not. They sought to retain a unicameral parliamentary system, rather than impose a bicameral presidential one like that of the United States.<sup>135</sup> It was the Japanese, not the Americans, who sought to bring the draft into greater conformity with American constitutional structures, at least as far as property rights and the bicameral parliament.<sup>136</sup>

Even the famous “peace clause” of Article 9<sup>137</sup> *may* have had Japanese origins. MacArthur asserted that Prime Minister Shidehara suggested the inclusion of a peace clause in the constitution a few days before MacArthur drafted it in his brief note to the drafting group,<sup>138</sup> and Shidehara also claimed the idea was his own.<sup>139</sup> Mito traces the course of the drafting to show that, by the time of the second Matsumoto draft, the issue of imperial command of the army had already been taken off the table.<sup>140</sup> Thus there were internal forces on the Japanese side whose ideas, acquiescence, and active collaboration were necessary to complete the remarkable project of the 1946 Constitution.

## 2. A Self-enforcing Constitution

Once in place, Japan’s constitution has been incredibly resilient and has become genuinely entrenched in the public imagination.<sup>141</sup> It has been intensely contested but also remarkably stable—never amended, occasionally adjudicated, and ultimately grounded in a set of principles that the people understand and mostly accept.<sup>142</sup> How

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135. See MOORE & ROBINSON, *supra* note 74, at 108.

136. *Id.* at 131-33.

137. DOUGLAS MACARTHUR, REMINISCENCES 302-03 (1964). MacArthur cited to Article 9: Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea and air forces, as well as other war potential, will never be maintained. The right of belligerency of the State will not be recognized.

*Id.* at 303.

138. *Id.* at 302-03.

139. See Mito, *supra* note 134 (manuscript at \*\*12-13).

140. See *id.*

141. See BEER & MAKI, *supra* note 107, at 184.

142. GLENN D. HOOK & GAVAN MCCORMACK, JAPAN’S CONTESTED CONSTITUTION:

has the constitution been so resilient? This Section argues that the key factor is that Japan's constitution has been largely self-enforcing during the immediate post-war period. Importantly, the forces keeping it in equilibrium are in flux today, and it is widely anticipated that the current governing coalition will indeed be able to make changes in the next few years.<sup>143</sup> The Japanese example thus provides an excellent case study of how an imposed constitution can become self-enforcing, as well as the conditions under which constitutional change can occur.

The Japanese Constitution has been under attack from political conservatives from the very beginning,<sup>144</sup> and this intensified when the true story of its origins emerged some years later.<sup>145</sup> Domestic revisionists sought for Japan to become a "normal country" with armed forces.<sup>146</sup> Since its formation in 1955,<sup>147</sup> the Liberal Democratic Party (LDP) has sought to make changes but has never been able to muster the two-thirds support in the Diet.<sup>148</sup> In 1956, Japan created a Commission on the Constitution to study revision,<sup>149</sup> but after several years of deliberations, it was unable to reach consensus and its recommendations were never implemented.<sup>150</sup> The constitution was also attacked from abroad.<sup>151</sup> The Far Eastern Commission (FEC) attacked it almost immediately as not having gone through the process of FEC approval that they believed was required by the Moscow Declaration.<sup>152</sup> But despite promises, the Japanese government never effected a formal revision.<sup>153</sup>

One clue as to why the constitution has been stable lies in the Japanese debates over its adoption. In the debates in the Diet, two issues stood out: the treatment of the emperor and the pacifism of

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DOCUMENTS AND ANALYSIS 3 (2001).

143. *Id.*

144. MOORE & ROBINSON, *supra* note 74, at 317.

145. *See id.* at 320-21.

146. *See* JAPAN'S COMMISSION ON THE CONSTITUTION: THE FINAL REPORT 196 (John M. Maki trans. & ed., 1980) [hereinafter FINAL REPORT].

147. *Id.* at 19.

148. *Id.* at 9.

149. *Id.* at 21.

150. *Id.* at 8; John M. Maki, *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, in JAPANESE CONSTITUTIONAL LAW, *supra* note 129, at 38, 52.

151. *See* MOORE & ROBINSON, *supra* note 74, at 317-18.

152. *See* FINAL REPORT, *supra* note 146, at 84.

153. *See id.*

Article 9.<sup>154</sup> Substantial limitation on the role of the emperor was an unconditional demand of the American occupiers, faced as they were with the Allied powers demanding harsher treatment of the emperor.<sup>155</sup> The pacifism of Article 9, though of uncertain origin, also constituted a major constraint on sovereignty and was thus quite controversial.<sup>156</sup>

The bargain could be struck through *gaiatsu* (external pressure), but it could only be maintained through *naiatsu* (internal pressure). Here a key factor was that the Japanese were not in fact united on the key issues. The left wanted Article 9 to prevent a return to militarism.<sup>157</sup> The right wing, on the other hand, was concerned with the treatment of the emperor and the maintenance of his prerogatives.<sup>158</sup> Japanese elites were thus split on the two key issues of the postwar constitution. Had they united, they could certainly have rejected the draft, with the likely outcome that the FEC would have become involved and imposed a settlement on Japan.<sup>159</sup> That settlement might have included hanging the emperor as a war criminal.<sup>160</sup> One puzzle, then, is why the left did not seek to effect this outcome. Perhaps they too were sufficiently concerned with retaining a role for the emperor in some form, even a reduced one.

In any case, once adopted, postwar politics took over. After its foundation in 1955, the Liberal Democratic Party (LDP) governed Japan more or less continuously.<sup>161</sup> The LDP has also been split between revisionists, initially led by Hatoyama Ichiro and later Kishi Nobusuke, and the pragmatic conservatives led initially by Yoshida Shigeru, and later Ikeda Hayato, Sato Eisaku, and Miyazawa Kiichi.<sup>162</sup> The party system as a whole, however, was fairly stable during the Cold War, with the Socialists consistently

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154. See MOORE & ROBINSON, *supra* note 74, at 334.

155. See INOUE, *supra* note 91, at 219-20.

156. See MOORE & ROBINSON, *supra* note 74, at 334-35.

157. See *id.* at 280.

158. See *id.* at 334.

159. See generally BENGT ROLING, *THE TOKYO TRIAL AND BEYOND* 40 (1973).

160. Hal Brands, *The Emperor's New Clothes*, 68 *HISTORIAN* 10 (2006).

161. GERALD L. CURTIS, *THE JAPANESE WAY OF POLITICS* 15 (1988).

162. Richard J. Samuels, Dir., Ctr. for Int'l Studies, Mass. Inst. of Tech., Address Before the Brookings Institution Center for Northeast Asian Policy Studies: Constitutional Revision in Japan: The Future of Article 9, at 6 (Dec. 15, 2004), available at <http://www.brookings.edu/fp/cnaps/events/20041215.pdf>.

getting a fairly substantial minority of the vote.<sup>163</sup> This meant that the Socialists retained sufficient power to block the LDP from engineering constitutional amendments to abolish or modify Article 9. Of course, the Socialists also lacked a majority to propose any amendments to the economic system or to abolish the imperial house entirely.<sup>164</sup> They nevertheless were able to share in some spoils of the system, and always were better off than they would be in proposing a complete revision, which might lead to the replacement of Article 9.<sup>165</sup> Thus the constitution succeeded because it gave the *losers* a stake in maintaining it. This is the key quality of self-enforcing constitutions.

A critical juncture arose during the great protests surrounding the U.S.-Japan Security Treaty in 1960.<sup>166</sup> The Japanese government at the time was led by the revisionist Kishi Nobosuke, who sought to revise the Security Treaty to give Japan a larger role in its own defense.<sup>167</sup> Faced with opposition among Diet members who saw a threat to Article 9, Kishi “ramm[ed] through” the Treaty in a secret session when the opposition was absent.<sup>168</sup> This led to massive political protests, with thousands of citizens taking to the streets.<sup>169</sup> Kishi eventually resigned, and was replaced with the pragmatist Ikeda.<sup>170</sup> The incident illustrates an executive threat to transgress the constitutional order that provoked enforcement by the public. The public was able to overcome its collective action problem and effectively enforce the constitution. Though the Security Treaty survived, effectuating a *de facto* reinterpretation of Article 9, Kishi was punished for his procedural violation.<sup>171</sup> One can imagine an alternative ending to this story in which the constitution was overturned, either by leftist protest, rightist reaction, or Kishi’s

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163. CURTIS, *supra* note 161, at 16-19.

164. *See id.*

165. *See id.* at 18.

166. *See generally* GEORGE PACKARD, *PROTESTS IN TOKYO* (1966).

167. Samuels, *supra* note 162, at 6.

168. *See* Lawrence W. Beer, *Freedom of Expression: The Continuing Revolution*, in *JAPANESE CONSTITUTIONAL LAW*, *supra* note 129, at 221, 227.

169. *See, e.g.*, PACKARD, *supra* note 166; *Japan: Bonus To Be Wisely Spent*, *TIME*, Jan. 25, 1960, at 24.

170. CURTIS, *supra* note 161, at 3.

171. *See* BRADLEY RICHARDSON, *JAPANESE DEMOCRACY: POWER, COORDINATION, AND PERFORMANCE* 76 (1997).

routinization of the practice of calling secret sessions. The constitution survived, however, and Japan entered the high-growth era of the 1960s.<sup>172</sup>

The Cold War is now over, and the Socialists all but dead as a political force. Their last gasp was a brief period in government in the mid-1990s, in which they performed so poorly that they ensured their demise as a political faction.<sup>173</sup> At the same time, intra-factional politics within the LDP shifted power toward the constitutional revisionists associated with Yasuhiro Nakasone, Shintaro Abe, and others.<sup>174</sup> This group consolidated its position with the popular Koizumi prime ministership;<sup>175</sup> Koizumi established a new politics based more on public relations than on the traditional pork barrel.<sup>176</sup>

These changes had severe consequences for the self-enforcing nature of the constitution. As the party system recalibrated after an electoral reform, a new opposition Democratic Party emerged, made up in part of former LDP hawks who had left the party.<sup>177</sup> When the LDP proposed constitutional reform again in the mid-1990s, the DPJ and other small parties did not oppose it but scrambled to come up with proposals of their own.<sup>178</sup> The self-enforcing equilibrium has fallen apart, and reform of the key bargain seems likely to occur in some form in the next few years. The consensus view is that the bulk of the 1946 document will remain intact, and crucial features like the rights provisions will not be threatened.<sup>179</sup> Japan will remain a constitutional democracy. But the point is that the particular constitutional equilibrium will have shifted, and Japan will enter a (post-) post-occupation era.

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172. EDWARD J. LINCOLN, *ARTHRITIC JAPAN: THE SLOW PACE OF ECONOMIC REFORM* 59 (2001).

173. See Junko Kato, *When the Party Breaks Up: Exit and Voice Among Japanese Legislators*, 92 AM. POL. SCI. REV. 857, 857 (1998).

174. See Cheol Hee Park, *Factional Dynamics in Japan's LDP Since Political Reform: Continuity and Change*, 41 ASIAN SURV. 428, 428, 433-35 (2001).

175. Samuels, *supra* note 162, at 8.

176. Editorial, *Mr. Abe on the Ropes*, N.Y. TIMES, Aug. 1, 2007, at A18.

177. Samuels, *supra* note 162.

178. *Id.*

179. See Liberal Democratic Party, *New Draft Constitution* (Nov. 22, 2005), [http://www.jimin.jp/jimin/shin\\_kenpou/shiryoku/pdf/051122\\_a.pdf](http://www.jimin.jp/jimin/shin_kenpou/shiryoku/pdf/051122_a.pdf) (in Japanese); see also *Japan's LDP Begins Overhaul of Pacifist Constitution*, INT'L HERALD TRIB., Nov. 23, 2005, available at <http://www.iht.com/articles/2005/11/22/news/japan.php>.

*B. Baghdad*

Like pre-war Japan, Saddam's Iraq seemed to pose a challenge from the periphery of modernity to the established interstate system. Many believed Iraq in the 1970s would become the first Middle Eastern industrialized nation.<sup>180</sup> It had key ingredients including being formally secular, endowed with a literate, well-educated population, and being rich in oil and gas (a feature which has subsequently come to be seen as a hindrance to modernization).<sup>181</sup> Like pre-war Japan, Iraq then entered a period of misgovernment, taking a suicidal international course that provoked confrontation with, and ultimately defeat by, the United States.<sup>182</sup>

Despite these similarities, the circumstances giving rise to democratic transition each seem to reverberate with particularity. Japan in 1945 was a defeated nation that had carried out a decade-and-a-half militarist adventure with an emperor that was genuinely revered as divine.<sup>183</sup> Saddam Hussein's Iraq, by contrast, was ruled by a small group of his relatives and clansmen.<sup>184</sup> Aside from his Sunni followers, the majority of Iraqis were hardly willing to die for Saddam and his ilk.<sup>185</sup> When Emperor Hirohito renounced his divinity, there was an enormous ideological vacuum.<sup>186</sup> In contrast, when Saddam was removed from power, most Iraqis outside his hometown of Tikrit were relieved and overjoyed.<sup>187</sup> The only sadness was found among the non-Iraqi pan-Arabists and some of the journalists of Al-Jazeera, who appreciated his willingness to stand up to the West.<sup>188</sup>

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180. See Muqtedar Khan, *Iraq: Between Pain and Power*, GLOCALEYE, Aug. 8, 2001, <http://www.glocaleye.org/saddam.htm> (last visited Feb. 22, 2008).

181. *Id.*

182. See ALI N. ALLAWI, *THE OCCUPATION OF IRAQ: WINNING THE WAR, LOSING THE PEACE* 70 (2007); ROBERT JAY LIFTON, *DESTROYING THE WORLD TO SAVE IT* 253 (1999). Note that both countries have had their versions of suicide cults as well. IAN BURUMA, *OCCIDENTALISM* 64-65 (2004).

183. See Susan Chira, *Hirohito, 124th Emperor of Japan, Is Dead at 87*, N.Y. TIMES, Jan. 7, 1989, at 1.

184. See SANDRA MACKEY, *THE RECKONING: IRAQ AND THE LEGACY OF SADDAM HUSSEIN* 234 (2002).

185. See *id.* at 164.

186. See INOUE, *supra* note 91, at 3.

187. See *Tyranny Comes to an End*, N.Y. TIMES, Apr. 11, 2003, at B15.

188. See CONTROL ROOM (Artisan Home Entm't 2004).

An ideological vacuum was important because it facilitated the norms of liberal democracy. In the Iraqi case, there were already primal ideologies and Islamic religious affiliations ready to fill the void. Thus, ironically, Baathism's failure has made Iraq more difficult to reconstruct. A society with an established structure of internalized norms, even anti-liberal ones, may prove easier to reconstruct in a liberal vein *if* the previous regime is totally defeated. Japan's success in nation-building during the Meiji period laid the groundwork for post-war constitutional order.<sup>189</sup> In contrast, Iraqi society with its latent tensions and centrifugal features now appears to many to have *required* a good deal of government oppression. This is a disturbing lesson of the last few years.

Another key variable that many would identify is the degree of ethnic homogeneity. As Moore and Robinson note, "ethnic pluralism does not facilitate constitutional foundings."<sup>190</sup> Although there are important counterexamples, such as India, our work has found a negative association between ethnic fractionalization and constitutional duration.<sup>191</sup> Japan is a famously homogenous nation,<sup>192</sup> even if that homogeneity has often been overstated.<sup>193</sup> In part, this perception of homogeneity is a *result* of the successful Meiji project of modernization,<sup>194</sup> had it gone differently, Japanese might identify as members of their *han*, or regional origin, rather than as Japanese *kokutai*. In other words, ethnicity should not be taken for granted but is sometimes a *product* of constitutional arrangements.

Elements of constitutional culture may also play a role. Japan's ability to engage in selective adaptation dates back before the Meiji era, during the *sakoku* period when selective translations of Dutch books made available through the Port of Dejima facilitated

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189. See Joji Watanuki, *Social Structure and Voting Behavior*, in *THE JAPANESE VOTER* 49, 82 (Scott C. Flanagan et al. eds., 1991).

190. MOORE & ROBINSON, *supra* note 74, at 16.

191. See Elkins, Ginsburg & Melton, *supra* note 73, at 32.

192. See MOORE & ROBINSON, *supra* note 74, at 17.

193. David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 *LAW & SOC'Y REV.* 247, 296 (1998).

194. See generally Andrew Daisuke Stewart, *Kayano v. Hokkaido Expropriation Committee Revisited: Recognition of Ryukyuan as a Cultural Minority Under the International Covenant on Civil and Political Rights, an Alternative Paradigm for Okinawan Demilitarization*, 4 *ASIAN-PAC. L. & POL'Y J.* 307 (2003) (describing homogeneity and ethnic, cultural, linguistic, and religious solidarity in Japanese society).



knowledge.<sup>195</sup> Indeed, Keene notes that Japan in the Tokugawa knew more about the Dutch through their selective study than any other non-Western society.<sup>196</sup> The Meiji project of “selective adaptation” was widely seen as successful, and so invoking a new era of borrowing made sense.<sup>197</sup>

The endowment in the Mideast, however, was quite different indeed. The Arab cultural construct of occupation, spurred on by the Israeli-Palestinian conflict, is one of resistance.<sup>198</sup> This notion ensured that the population would hardly be docile recipients of Western knowledge. The construct of a society with its own moral ordering meant that transfers were to be resisted, not celebrated.

Two other factors deserve mention. The first is oil. The well-known phenomenon of the resource curse in political economy may also apply to problems of constitutional reconstruction.<sup>199</sup> Without natural resources, or an army, Japan’s total defeat meant that it was at the mercy of the victors. Iraq, on the other hand, had resources.<sup>200</sup> Even in the non-cooperative equilibrium of no constitutional bargain, there would be some viable basis for an economy in Iraq. At the same time, oil provided a high stakes issue to fight over. The logic of the ultimate constitutional agreement, namely to postpone the issue of oil allocation until a post-constitutional election that the Shia were sure to win,<sup>201</sup> hardly served to draw the Sunni into a self-enforcing constitutional scheme.

Another key factor is internal to the process. The Japanese process was carried out with great secrecy.<sup>202</sup> This was necessitated in part because both the Americans in SCAP and the Japanese had an incentive to conceal the true extent of American involvement in

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195. See ELLEN GARDNER NAKAMURA, *PRACTICAL PURSUITS: TAKANO CHŌEI, TAKAHASHI KEISAKU, AND WESTERN MEDICINE IN NINETEENTH CENTURY JAPAN* (2005).

196. DONALD KEENE, *THE JAPANESE DISCOVERY OF EUROPE, 1720-1830*, at 1 (1969).

197. *LABOR AND ECONOMIC DEVELOPMENT* 82 (Walter Galenson ed., 1959).

198. Note, however, that the instances of occupation by Arab or Muslim countries, such as the cases of Western Sahara and Northern Cyprus, never engender protest.

199. Jeffrey Sachs & Andrew Warner, *The Curse of Natural Resources*, 45 *EUR. ECON. REV.* 827 (2001) (noting the high correlation between abundance of natural resources and violent conflict).

200. See ENERGY INFO. ADMIN., *WORLD CRUDE OIL DISTILLATION CAPACITY, JAN. 1, 1970-JAN. 1, 2007*, available at <http://www.eia.doe.gov/pub/international/iealf/table36.xls>.

201. See CONG. RESEARCH SERV., *IRAQ: GOVERNMENT FORMATION AND BENCHMARKS 4-5* (Kenneth Katzman ed., 2007).

202. See MOORE & ROBINSON, *supra* note 74, at 91.

the drafting. The Americans were trying to avoid input of the Far Eastern Commission that sat in Washington, made up of hardliner Allied powers that hardly shared MacArthur's predisposition to retain the emperor.<sup>203</sup> Presenting the constitution as a product of Japanese internal processes certainly served these interests. On the Japanese side, the embarrassment the government would suffer had it become clear that the draft was a foreign creation would have been severe.<sup>204</sup> Indeed, several times in the deliberation in the House of Representatives, this issue came to a head.<sup>205</sup> The "conspiracy" on the part of the occupying authorities and the Japanese government allowed the process to go forward.

At the same time, there are a number of similarities between the Japanese and Iraqi contexts. MacArthur's hubris and imperial orientation as the "American Caesar" matched that of any neo-conservative, though his competence was evidently greater.<sup>206</sup> This meant that he characterized the Japanese problem as one of values rather than of institutions. MacArthur thought that Christianity was essential to the spiritual redemption of Japan, and this viewpoint allowed defenders of the emperor to represent the imperial institution as a potential ally in the Christianization of Japan.<sup>207</sup> This seems to have been an important step in MacArthur's momentous decision to save the emperor and allow him to retain his throne as a constitutional monarch, against the demand of the FEC.

Beyond that, the element of social engineering on the part of the occupiers is common to both instances. When the neo-conservatives broke with conservative orthodoxy to propose a large scale "project" of democratizing the Middle East, they evoked the earlier great era of faith in technocracy and social engineering—the New Deal, and before that Wilsonian idealism.<sup>208</sup> It is an astounding irony that the

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203. *See id.*

204. *See* INOUE, *supra* note 91, at 31.

205. MOORE & ROBINSON, *supra* note 74, at 92.

206. *See* WILLIAM MANCHESTER, AMERICAN CAESAR: DOUGLAS MACARTHUR 1880-1964, at 3 (1978).

207. *See* MOORE & ROBINSON, *supra* note 74, at 49.

208. *See, e.g.*, Press Release, White House, President Addresses the Nation (Sept. 7, 2003), available at <http://www.whitehouse.gov/news/releases/2003/09/20030907-1.html> ("Following World War II, we lifted up the defeated nations of Japan and Germany, and stood with them as they built representative governments. We committed years and resources to this cause. ... America today accepts the challenge of helping Iraq in the same spirit -- for their sake, and

political party built on principles of limited government in the United States proceeded to draw inspiration from the New Deal “project” of democratizing Japan.<sup>209</sup>

No two historical situations are identical, but this does not mean that understanding history has no bearing on the present. Our view is that the obvious lessons of the most successful occupation constitution in history were ignored by those who believed it formed a useful precedent for democratizing the Middle East. Ironically, Japanese successes in nation-building before the occupation and in locally enforcing the constitutional bargain thereafter made the occupation constitution succeed.<sup>210</sup> The key variables, then, lie not with the well-intentioned constitutional planner, but within the society that must live under the constitutional regime.

#### CONCLUSION

This Essay provides an initial examination of the phenomenon of occupation constitutions. We find that not all occupations give rise to new constitutions; instead, occupation constitutions seem to be associated with a small number of superpowers. The expectation that occupation constitutions are mere copies of those found in the occupying countries does not appear to be supported by the evidence.<sup>211</sup> Certainly, successful occupation constitutions seem to require both local adaptation and local enforcement in order to endure.<sup>212</sup> Of constitutions written under occupation, only a handful

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our own.”). See also James Kurth, *Iraq: Losing the American Way*, in *THE RIGHT WAR: THE CONSERVATIVE DEBATE ON IRAQ* 36, 43 (Gary Rosen ed., 2005); Kyoko Hasegawa, *Bush Comparison of Japan, Iraq Off the Mark*, SIFY NEWS, Sept. 2, 2005, available at <http://sify.com/news/fullstory.php?id=13930781>.

209. See James Kurth, *America’s Democratization Projects Abroad*, AM. SPECTATOR, Oct. 2006, at 14; see also DOUGLAS PORCH, STRATEGIC INSIGHT: GERMANY, JAPAN AND THE “DE-BAATHIFICATION” OF IRAQ (Mar. 7, 2003), <http://www.ccc.nps.navy.mil/rsepResources/si/mar03/middleEast3.pdf> (“Given the World War II analogy that apparently guides U.S. policy for a transition to a stable, democratic, post-Saddam Iraq, what lessons might American policymakers draw from our “nation-building” experience in post-1945 Germany and Japan?”); *Building a State in Iraq: Is There a Good Precedent?*, 57 J. INT’L AFF. 219 (Fall 2003) (interviewing N.Y.U. School of Law professor Simon Chesterman), available at [http://goliath.ecnext.com/coms2/summary\\_0199-3392921\\_ITM](http://goliath.ecnext.com/coms2/summary_0199-3392921_ITM) (subscription required).

210. See *supra* Part IV.A.

211. See *supra* Part III.

212. The same is true of legal institutions more generally. See, e.g., Daniel Berkowitz &

have survived an extended period after the withdrawal of the occupier, and overall lifespans of occupation constitutions are shorter than those of other constitutions.<sup>213</sup> We attribute this to the failure to establish self-enforcing institutions. Finally, in reviewing the two most prominent cases of occupation constitutions, we find that the Japanese case can be explained in part because of more extensive local involvement than is usually recognized and because of the self-enforcing structure of the bargain that was established.<sup>214</sup>

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Katharina Pistor, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003).

213. *See supra* Part III.C.

214. *See supra* Part IV.A.

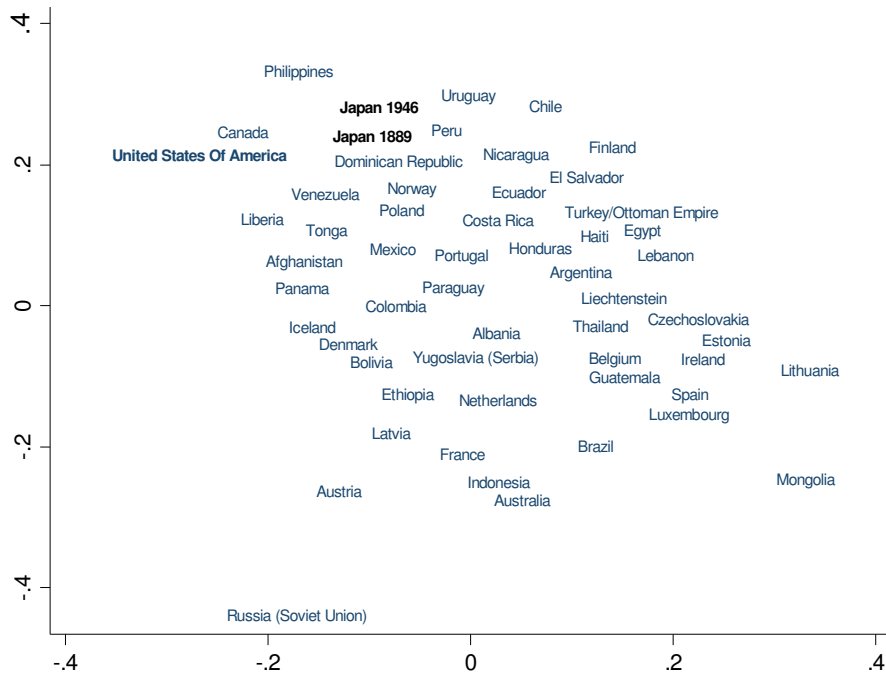
**Table 1 Occupation Constitutions**

Occupied	Primary Occupier	Constitution Year*	Occupation End Year	Lifespan	Post-Occupation Lifespan	Occupation Length
Afghanistan	Russia	1979	1989	1	-	10
Afghanistan	Russia	1980	1989	5	-	10
Afghanistan	Russia	1985	1989	2	-	10
Afghanistan	Russia	1987	1989	3	1	10
Afghanistan	Russia	1990	1989	2	2	10
Afghanistan	United States	2001	2001	2	-	4
Afghanistan	United States	2003	2001	2	-	4
Albania	Italy	1939	1943	4	-	4
Albania	Germany	1943	1944	3	2	1
Albania	Germany	1946	1944	30	30	1
Austria	Russia	1945	1955	10	-	10
Austria	Russia	1955	1955	50	50	10
Bulgaria	Russia	1947	1945	24	24	4
Cambodia	Vietnam	1981	1989	8	-	11
Cambodia	Vietnam	1989	1989	4	4	11
Chad	Libya	1982	1981	7	7	1
Dominican Republic	United States	1924	1924	3	3	8
Egypt	United Kingdom	1923	1922	7	7	4
France	Germany	1946	1944	12	12	4
Haiti	United States	1918	1934	14	-	19
Haiti	United States	1932	1934	3	1	19
Haiti	United States	1935	1934	11	11	19
Hungary	Russia	1946	1956	3	-	11
Hungary	Russia	1949	1989	40	-	33
Iraq	United States	2004	2004	1	1	1
Iraq	United States	2005	2004	1	1	1
Italy	Austria-Hungary	1848	1848	13	12	1
Italy	France	1943	1945	4	2	2
Italy	France	1947	1945	58	58	2
Japan	United States	1946	1952	59	53	7

Laos	Vietnam	1991	1989	14	-	47
Mexico	France	1865	1866	2	1	5
Mexico	France	1867	1866	50	50	5
Paraguay	Bolivia	1870	1876	70	64	7
Poland	Russia	1947	1989	5	-	44
Poland	Russia	1952	1989	40	3	44
Romania	Russia	1944	1944	4	4	5
Syria	France	1920	1944	10	-	24
Syria	France	1930	1944	13	-	24
Turkey	France	1920	1945	4	-	25
Turkey	France	1924	1945	37	16	25
Yugoslavia	Russia	1946	1945	7	7	4

\* "Constitution year" denotes the year that the constitution was promulgated.

**Figure 1 Constitutional Proximities (c. 1946)**  
Universe: Constitutions in Force in 1946 (n = 63)



**Figure 2 Constitutional Proximities (c. 2005)**

Universe: Constitutions in Force in 2005 (n = 191)

N.B. Cases shown are those whose similarity to Iraq is less than -0.45 and greater than -0.15—that is, those at either extreme.

