BAGHDAD, TOKYO, KABUL,…: CONSTITUTION MAKING IN OCCUPIED STATES

Zachary Elkins
Tom Ginsburg
James Melton[*]

forthcoming, William and Mary Law Review

Introduction

On October 15, 2005, Iraqis voted in overwhelming numbers to adopt a new Constitution.[1] 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 -- drafted under the Transitional Iraqi Administration of the occupying "coalition" -- has not effectuated a political reconstruction of the society.

As Baghdad burned, several thousand miles away a nationalist politician named Shinzo Abe prepared to assume the position of Prime Minister of Japan. Abe's platform rested largely on a more aggressive foreign policy and a revision of the "Peace" Constitution of 1947.[2] 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

---

[*] Respectively, Assistant Professor of Political Science, Professor of Law and Political Science, and PhD Candidate, University of Illinois, Urbana-Champaign. Ginsburg and Elkins are Directors of the Comparative Constitutions Project, netfiles.uiuc.edu/zelkins/constitutions. Many thanks to Craig Martin and Mark Ramseyer for superb comments. Thanks also to audiences at the William and Mary Law School Conference on Constitution Making in Post-Conflict Societies, Creighton Law School Japanese Law Conference, and Harvard Law School. The authors gratefully acknowledge financial support from the Center for the Study of Democratic Governance, the University of Illinois College of Law, and the National Science Foundation, Award No. SES-0648288.

[1] Const of Iraq (2005). For details on the Constitution, see Elkins and Ginsburg, Commentary on the Draft Iraqi Constitution, https://netfiles.uiuc.edu/zelkins/constitutions/publications.htm

[2] Abe's grandfather Nobosuke Kishi was implicated as a Class A War Criminal and later became Prime Minister. His father Shintaro Abe was a hawk within the ruling Liberal Democratic Party.

constitution in history.[3] Even Abe called only for marginal and mostly symbolic amendments.

These two contrasting experiences motivate us to examine the phenomenon of occupation constitutions—constitutions drafted or adopted in the extreme condition of one state having explicit sovereign power over another. 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."[4] A closer look at the process, however, suggests that even in cases of seemingly unilateral imposition, such as Japan, domestic input or negotiation played a non-trivial role. Indeed, the form of the Japanese constitution – one that preserves a role for the emperor in a parliamentary system – suggests that Macarthur's team was less interested in exporting US 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 US government, departs in significant ways from basic tenets of American constitutional belief.[5]

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 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.[6] 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?

---

[3] It will enjoy the longest period for a national constitution to survive without amendment. The previous record of 61 years was held by the United States between 1804 and 1865.

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

[5] See e.g., Constitution of Iraq, Art. 1 (role of Islam as a constraint on lawmaking).

[6] See Elkins and Ginsburg. *The Comparative Constitutions Project*, https://netfiles.uiuc.edu/zelkins/constitutions/.

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?

We proceed by defining the universe of occupations since 1800 and identifying the set of constitutions written under these circumstances. We then analyze the 42 instances of constitutions adopted under occupation or shortly thereafter. We discuss the conditions under which occupation authorities seek to use constitutions to facilitate political reconstruction, as opposed to other methods. We next examine the content of these constitutions and evaluate their similarity to those of the occupying power. Finally, we explore the determinants of "successful" (or at least *durable*) occupation constitutions, and argue that a key factor is that the constitution be self-enforcing in the game theoretic sense.[7] We find evidence that self-enforcement is indeed a crucial quality.

The closing section returns to Tokyo and Baghdad. We are motivated to examine 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—but the results could not have been more different. Japanese success and Iraqi failure, it turns out, cannot be ascribed to different motives on the part of the occupiers. Rather, our general findings from the broad set of cases help to understand the contrast between the two cases. 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, while every unhappy family is unhappy in its own unique way.[8] In the case of occupation constitutions, the story often ends in one of many possible unhappy ways, but

[7] See generally AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY 10-11 (2006) ; sources cited *infra* n. 9.

[8] LEO TOLSTOY, ANNA KARENINA (1877).

there are a few success stories, in which an occupation constitution leads to the birth of a stable democratic polity. While there may be differences in form, the community of democratic nations shares certain core characteristics, and these 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 crimes, or even philosophical differences, of the old regime must be reconciled, either explicitly or implicitly, with the repudiating approach of the new regime. These differences can be dealt with through purges, criminal trials, a truth and reconciliation commission, 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. Even autocrats rule with the implicit consent of many of the governed, if not always a majority. How then to offer the passive supporters of the past regime a combination of carrots and sticks to bring them into the fold and to ensure 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, we follow recent work on self-enforcing constitutions.[9] Any constitutional agreement, whether in a dictatorship or democracy, involves an agreement among powerful forces in the society. Unlike ordinary contracts, however, constitutional agreements have no external guarantor to enforce the terms, independent of the parties. To endure, constitutions must be self-enforcing, meaning they must give rise to an equilibrium from which no party has an incentive to deviate.[10] Even though constitutions may produce relative winners and relative losers, they will endure to

[9]Russell Hardin, *Why a Constitution?* in THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 100-20 (Bernard Grofman and Donald Wittman, eds., 1989); Barry Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245-63 (1997); Barry Weingast, *Designing Constitutional Stability*, in DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY 343-66 (Roger Congleton and Birgitta Swedenborg, eds., 2006); Peter Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137 (1992).

[10] Greif, *supra* note 7.

the extent that the losers believe they are better off within the constitutional bargain than in taking a chance on negotiating a new one.

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 of winners who 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. 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.[11] 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. 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, since 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. Political acquiescence is required for every constitutional violation to succeed and acquiescence is the expected outcome, given the collective action problems citizens face. 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.[12] They allow actors to anticipate actions of others by providing focal points–a common understanding of what constitutes a constitutional violation–for enforcement. In turn, a widely held expectation of strict enforcement can prevent parties from violating the bargain in the first place, ensuring constitutional endurance. This framework helps us understand why effective

---

[11] This section relies on Weingast, *The Political Foundations of the Rule of Law* and *Designing Constitutional Stability*, id.

[12] THOMAS SCHELLING, THE STRATEGY OF CONFLICT (1964); John Carey, *Parchment, Equilibria and Institutions*, 33 COMP. POL. STUD. 735 (2000); David Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 Yale L. J. 1717, 1733-36 (2003); David Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 910-11(1996).

constitutional democracy is so rare in general: punishing transgressions by political leaders is extremely difficult. However, it also helps us to understand why written constitutions are important components of constitutional democracy: they provide focal points for coordinating enforcement efforts.

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. While 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. This makes it less likely that citizens 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. 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.

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. 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 anticipate citizen apathy and are more likely to transgress constitutional terms.

These effects are not wholly dependent upon an assumption of *citizen* enforcement. Even constitutions that are primarily elite bargains may suffer from the fact that they rely on external enforcement. When the enforcing authority departs, the internal players face a new strategic environment where violations of the bargain may be newly plausible. In short, occupation constitutions would seem less likely to become self-enforcing.

These characteristics of occupation constitutions are evident in Carrington's discussion of the United States' intervention in Cuba.[13] After the Spanish-American War, the United States occupied Cuba and proceeded to prepare the island for self-governance. 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. This provision was ultimately included in the 1902 Cuban Constitution. As Carrington so well describes, this "begot precisely the sorts of disorder it was designed to prevent."[14] Domestic factions refused to compromise and each sought to induce the United States to intervene on their own side, preventing stable self-enforcing democracy from taking hold.

In short, the circumstances of their birth mean that occupation constitutions are likely to lack essential features for long-run endurance and effectiveness. The more constitutions seek to transform earlier understandings and unwritten norms, it seems, the less likely are they to generate strong local legitimacy and enforceability.

II. Identifying Occupation Constitutions

In this section we discuss the universe 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. It is only in 1945 that taking territory by force became illegal in international law. Thus, there are

[13] Paul Carrington, Wm and Mary Law Review 2007

[14] Paul Carrington, Wm and Mary Law Review 2007, TAN 19.

relatively few cases of occupation before the 20th century, and virtually all of them involve American intervention in Latin America.

The legal definition of an occupation in international law is remarkably simple. The Hague Conventions provide that "a territory is 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."[15] 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, Section III 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."[16] Ths relatively generous definition is motivated by the general concern in the Fourth Geneva Convention for the protection of civilians in occupied territory. Occupation imposes responsibilities for such protection and duties to refrain from making fundamental changes in the governance or territory of the occupied territory.[17]

We distinguish, at least for the purposes of this paper, occupation from colonization. Clearly, the two phenomena 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

---

[15] Article 42 of 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land.

[16] Paragraph 2 of Article 2 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War.

[17]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. 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. Sassoli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers* 16 EUR. J. INT'L L. 661 (2005); see also Eyal Benvinisti, *The Security Council and the Law of Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 Israel Defence Forces L.Rev. 19 (2003); McGurk, *A Lawyer in Baghdad*, 8 THE GREEN BAG 51 (2004); Philipp Dann and Zaid Al-Ali, *The Internationalized* Pouvoir Constituant—*Constitution-Making Under External Influence in Iraq, Sudan and East Timor*, 10 MAX PLANCK YEARBOOK OF UNITED NATIONS Law 423, 453 (2006) (drafting of Iraqi Transitional Administrative Law violated international law).

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. So, the territory of Western Sahara has been controlled by Morocco since Spain withdrew in 1975. The Sahrawi Arab Democratic Republic has contested these claims, and is recognized by some 45 governments as well as the African Union, but 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, but is excluded under the same criteria. identification 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, but only constitutes a partial occupation and so we exclude it.

There are also significant number of multilateral occupations that have been undertaken under authority of the United Nations.[18] 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 administration for Cambodia (UNTAC), which governed that country from 1992 to 1993, and the United Nations Transitional Administration in East Timor (UNTAET), which ran the country from 1999-2002. Some cases are excluded on multiple grounds. The United Nations

[18] Indeed, international influence is probably a continuous variable, ranging from total imposition, to more moderate influence. In the case of Sudan for example, the international community was extensively involved in a peace negotiation that laid the basis for the constitutional bargain, in which the international community had little direct involvement. Dann and Al-Ali, *id.* at 438. Dann and Al-Ali also argue for distinguishing multilateral from national occupations. Id at 456.

Interim Administration Mission in Kosovo (UNMIK) and United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium (UNTAES) were similar operations but did not involve occupation of an entire country. Kosovo may one day become an independent state, but it was not one prior to UN occupation.

An historical record of occupations, at least as we define them, is not available. Since, in practical terms, an occupation follows (or even 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 international disputes (MID),[19] 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. Using secondary sources, we then read case-level material on each of these disputes to determine whether or not 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 ends dates of the occupation. We find a total of 107 occupations occurring in 59 host countries.[20]

In order to match periods of occupation with constitutional development, we need an accounting of the constitutional chronology of states. We have, as part of our larger project, collected data on the constitutional history of every independent state (as identified by Ward and Gleditsch) from 1789 to 2005.[21] For each country, we 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-

---

[19] Meredith Reed Sarkees, *The Correlates of War Database v. 3.0*, 37 CONFLICT MGMT. PEACE SCIENCE 123 (2000).

[20] We are confident all the occupations identified are *real* occupations. However, we may have unintentionally missed some cases of occupation. There are some occupations which arise from peacekeeping missions, and due to 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 we are aware of (Afghanistan 2001 and Iraq 2004), but we likely missed some occupations prior to 1816 and after 1997.

[21] Ward and Gleditsch identify the existence of states from 1816-2002. For the years between 1789 and 1816, we use data about the birth of states from the Issue Correlates of War Project (ICOW), and for years after 2002, we extended Ward and Gleditsch's codings three years (the only change being a merger between Serbia and Montenegro).

level sources in order to compile the data. The magisterial *Constitutions of the Countries of the World* (Flanz and Blaustein 1971-present) provides invaluable background information for most countries. Other useful cross-national and regional sources include Maddex (2001), Fitzgibbon (1948), Peaslee (1950-1971), and the Political Database of the Americas at Georgetown. Of course, country-level studies are at the root of these multi-country sources and we use these more specific studies when available.[22] We count a total of 654 new, 84 interim, and 44 reinstated constitutions.

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.

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 of the end of the occupation. 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. 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.

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 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

[22] While 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.

(14), the United States (9) and France (8).[23] 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. This is partly due to the large number of occupations during this period. However, the United States and Soviet Union's desire to advance their respective ideological agendas certainly played a role in the large number of occupation constitutions during this period as well. Thus occupation constitutions should be seen as a particular strategy of particular states, rather than a global phenomenon. They are not, however, limited to occupations conducted by democratic regimes.[24]

B. State-building in whose image?

To what degree do occupying states shape the constitutions of their host states? If one's expectation is large-scale institutional transfer, the data we present below suggest a reappraisal of sorts. To begin 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 (e.g., the Soviet occupation of Afghanistan) produced multiple new constitutions. Given that the median lifespan of all constitutions is remarkably short (nine years),[25] it is mildly surprising that pre-existing 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 US government were insistent upon a new constitutional framework, a demand that came as a bit of a surprise to the Japanese. Their reading of the Potsdam Declaration suggested that they could get

[23] 33% of Russian occupations resulted in at least one constitution, with many resulting in multiple constitutions, while 28% of the United State's occupations and 22% 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% of Vietnam's occupations resulted in at least one constitution.

[24] Compare Franklin and Baun, *supra* note 4(nature of occupying power, as authoritarian or democratic regime, determines whether occupation is imperialistic or benign).

[25] Elkins, Ginsburg, and Melton, *The Lifespan of Written Constitutions*. Unpublished manuscript on file with authors (hereinafter *Lifespan)*..

by with better enforcement of their venerable Meiji Constitution, not its revision and certainly not its replacement.[26] 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 US 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 is more likely than it would be absent intervention. Our analysis of the duration of constitutional systems (reported elsewhere) suggests that occupations increase the probability of a new constitution by about 15%.[27] Moreover, the resulting set of constitutions (42, by our count), represent roughly 7% 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 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. We begin with a set of 92 variables having to do with the provision of various political, civil, social, and economic rights.[28] 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 variables and thus will allow for a fairly comprehensive omnibus test of similarity. Nevertheless, given the near universality of rights to constitutional design, we reason that these variables make for a fairly tractable, if not entirely representative,

---

[26] RAY A. MOORE AND DONALD ROBINSON, PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR 51 (2004).

[27] Elkins, Ginsburg, and Melton, *Lifespan Supra* n.25

[28] For the questions from the CCP survey instrument used to generate the variables, please contact authors.

sample of constitutional provisions. Also, our estimates are, by necessity, based on a less than full sample of constitutions since our data collection is still in progress. Nonetheless, our sample is substantial, including approximately half of history's 654 "new" constitutions, as well as a set of amended constitutions from this set.[29]

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

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

and ranges from -1 to 1, where 1 = perfect agreement and -1 = perfect disagreement. When we calculate this quantity for each dyadic relationship among the 534 constitutions in our data, we obtain a mean similarity score of -0.48 with a standard deviation of 0.15. Ideally we would calculate this quantity for every occupation constitution and that of its occupier. At this point, our sample includes only 10 complete occupier-occupied pairs, so it is difficulty to generalize about the amount of "guest writing" in the typical occupation constitution. It is useful, however, 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 to the 70 constitutions in our sample that were written on or before 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. 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're concerned mostly with

[29] The data collection protocol calls for cases to be coded by at least two independent coders. For 174 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.

their utility in displaying distances among constitutions. Table 2 aids the identification of points in the scatterplot and reports the measures of similarity between each pre-1947 and the Japanese constitution. The United States case is the current constitution as of 1992, but of course is substantially similar to the constitution in place during the Japanese deliberations.

Strikingly, of the 70 constitutional models in our sample prior to 1946, the Japanese constitution of that year is most similar to its predecessor, the 1889 Meiji constitution.[30] On the other hand, signs of US authorship are evident as well. After the German 1924 constitution, the Chilean 1925, and (surprisingly), the Mexican document of 1825, the US bears the strongest resemblance to the Japanese document. 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. In that case, the US document (at least the rights component) bears almost no resemblance to the Iraqi. Of the 534 cases in the data, the US constitution ranks 422 in terms of similarity to the Iraqi constitution, with a measure of similarity of -0.62. The constitutions most similar to the Iraqi are all relatively recent documents from the developing world, with 14 of the top 20 in Africa, Middle East, and Central Asia. In short, the Japanese Constituton reflected imposed norms, but also a good deal of congruence with the pre-existing understandings of the scope of the predecessor Meiji document. The Iraq document seems to bear little resemblance to the US, in contrast with popular views of the document as imposed from outside.[31]

C. Duration of Occupation Constitutions

For reasons we sketch above, occupation constitutions would seem less likely to be self-enforcing and, therefore, as durable as those written under other circumstances.

---

[30] *See generally* KAZUHIRO TAKII, THE MEIJI CONSTITUTION: THE JAPANESE EXPERIENCE OF THE WEST AND THE SHAPING OF THE MODERN STATE (2007) (describing intellectual origins of the Meiji Constitution).

[31] Feldman, *supra* note 4.

In fact, most of these constitutions die before or very near the end of occupation period, but there are a few that appear to be self-enforcing, in the sense of lasting well beyond the end of the occupation period.

We report two measures of the duration of occupation constitutions (see Table 1). 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. Since occupations can persist for years (and, thus, provide external enforcement for the constitution), it is important to take occupation length into account. We also, therefore, report 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 equals the overall lifespan 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 mean lifespan of occupation constitutions is about 13 years (median=4 years), while the mean lifespan for all constitutions is about 17 years (median=9 years).[32] 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.[33]

IV Tokyo and Baghdad

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

---

[32] Some of these cases are right-censored in the sense that they are still alive when our observation period ends (e.g., all current constitutions), but taking this right censoring into account does not significantly change our estimates of lifespan.

[33] In other 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 and Melton, Lifespans, supra note 27. However, the general patterns evident in the bivariate data do not change substantially.

A. Japan

a. 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. But the facts are more complex, and recent scholarship has emphasized the collaborative nature of the enterprise.[34]

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. 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.

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, and 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). Revision was initially conceived as an internal Japanese matter, without much guidance from Americans other than the Potsdam Declaration formula that governance would reflect the "freely expressed will of the Japanese people."

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. He produced a draft which was a minor revision of the Meiji Constitution, with the emperor retaining sovereignty. 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. General Courtney

---

[34] MOORE AND ROBINSON, *supra* note 26; on the Japanese role in the occupation generally, see J. Mark Ramseyer and Yoshiro Miwa, *The Good Occupation*, Harvard Law School John M. Olin Discussion Paper No. 514 (2005); JOHN DOWER, EMBRACING DEFEAT (2000).

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. 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.

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. 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.

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. The shocked Japanese soon learned that the document was more than a basis, but was to form the core of the new constitution, from which any deviation would have to be justified.

Moore and Robinson, in their recent magisterial study, use the term "conspiracy" to describe the production of the final Japanese document.[35] In large part this 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. 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. Thus the two sides had a common interest in secrecy.[36]

When Matsumoto translated the SCAP draft into Japanese, he made substantial changes in the interests of "style." Partly this was necessitated through the American use of terms that sounded quite foreign, such as the requirement of cabinet "advice and

---

[35] MOORE AND ROBINSON *supra* note 26; SEE ALSO LAWRENCE W. BEER AND JOHN M. MAKI, FROM IMPERIAL MYTH TO DEMOCRACY: JAPAN'S TWO CONSTITUTIONS 1889-2002 84-85 (2002) (listing Japanese contributions to the 1946 Constitution).

[36] The Japanese concept of *tatemae* (public presentation as contrasted with true inner feelings) is resonant here.

consent" for imperial action. 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. But Matsumoto's subterfuge also included deleting the preamble and the Diet's role in passing imperial household law, the primary statute empowering and regulating the emperor. Rights were successfully granted to *kokumin*, Japanese nationals, rather than all citizens or persons. 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 written in archaic, legalistic Japanese, scarcely more intelligible than the highly formal language of the Imperial Household. 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.[37]

The process of adopting the new constitution followed the revision requirements of the Meiji Constitution, meaning an imperial rescript followed by a two-thirds vote in both houses. 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. The parliamentary approval required new elections, inevitable anyway after an Allied purge of prewar politicians. Though the election was characterized by the Allies as a referendum of sorts on the constitution, few politicians seemed to discuss the document.[38] Nevertheless, the summer debates in the newly constituted House of Representatives were vigorous and led to a number of minor changes in the draft. 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.

[37] See text at note 30, *supra.*

[38] Moore and Robinson, *supra* note 26.

The Constitution then went to the Emperor for signature and was promulgated on November 3, 1946, taking effect six months thereafter.

The story, then, is one of collusion more than imposition. Or is it? One should also recall that there were significant forces within Japan which were supportive of liberal ideals. The Meiji period had seen an outpouring of liberal sentiment; indeed the Meiji Constitution is 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. 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.[39]

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 clause" in which the New Deal-oriented American drafters provided that all land in Japan should belong ultimately to the state. This no doubt struck the Japanese government figures who saw the draft as Godless communism and they rejected the clause. The Japanese also successfully argued for a bicameral rather than a unicameral parliament. The bicameral idea originated in a civilian Constitution Study Group, which had been influential on several key members of SCAP.[40] 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 proven democratic institutions, whether American or not. They sought to retain a unicameral parliamentary system, rather than impose a presidential one. It was the *Japanese*, not the Americans, who sought to bring the draft into conformity with American constitutional structures, at least as far as property rights and the bicameral parliament.

---

[39] 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.Eiji Takemae, Fuminobu Okabe, Daiichimaki Kenpo Seitei Shi (Shogakukan 2000) cited in Mito 2007.

[40] Takamichi Mito, *Contending Views on Security Held by Framers of Japan's Postwar Constitution*, manuscript on file with author, 2007, at 7-8.

Even the famous "Peace clause" of Article Nine *may* have had Japanese origins, though the scholarship is unclear on this point. 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 (though Shidehara never confirmed this).[41] 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. 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.

b. A Self Enforcing Constitution

Once in place, Japan's constitution has been incredibly resilient, and has become genuinely entrenched in the public imagination.[42] It has also been intensely contested, but also remarkably stable—never amended, occasionally adjudicated, and ultimately grounded in a set of principles that the people understand and many accept. How 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. The Japanese case 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, and this intensified when the true story of its origins emerged some years later. Domestic revisionists sought for Japan to become a "normal country" with armed forces. Since its formation in 1955, the Liberal Democratic Party (LDP) has sought to make changes, but has never been able to muster the two-thirds support in the Diet. In 1956 they created a Commission on the Constitution to study revision, but after several years of deliberations, it was unable to reach consensus and its recommendations

[41] MACARTHUR, REMINISCENCES (1964) at 303.

[42]Beer and Maki, *supra* note 35.

were never implemented.[43] The Constitution was also attacked from abroad. The Far Eastern Commission attacked it almost immediately as not having gone through the process of FEC approval that they believed was required by the Moscow Declaration. But despite promises, the Japanese government never formally tried to change it.

One clue as to why the Constitution was stable lies in the Japanese debates over its adoption. In the such debates in the Diet, two issues stood out: the treatment of the emperor and the pacifism of Article 9.[44] The former issue was an unconditional demand of the American occupiers, faced as they were with the Allied powers demanding harsher treatment of the emperor. The latter, though of uncertain origin, also constituted a major imposition and was thus quite controversial.

The bargain could be struck through *gaiatsu* (outside 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. The right wing, on the other hand, was concerned with the treatment of the Emperor and the maintenance of his prerogatives. 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 become involved and impose a settlement on Japan. That settlement would no doubt have included hanging the Emperor as a War Criminal. One puzzle, then, is why the left did not seek to push 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 governed Japan more or less continuously. The LDP, of course, was also split between revisionists, initially led by Hatoyama Ichiro and later Kishi Nobusuke, and the pragmatic conservatives led initially by Yoshida Shigeru, and

---

[43] See John Maki, trans. Commission on the Constitution: The Final Report of the Commission on the Constitution (1958-64) (University of Washington Press, 1980), and John Maki, *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights,* in Percy R. Luney Jr. and Kazuyuki Takahashi, eds. JAPANESE CONSTITUTIONAL LAW (1993).

[44] Moore and Robison, *supra* note 26, at 334.

later Ikeda Hayato, Sato Eisaku, and Miyazawa Kiichi.[45] The party system as a whole, however, was fairly stable during the Cold War, with the Socialists consistently getting a fairly substantial minority of the vote. 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. 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. 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 US-Japan Security Treaty in 1960. The 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. Faced with opposition among Diet members who saw a threat to Article 9, Kishi rammed through the Treaty in a secret session when the opposition was absent. This led to massive political protests, with several hundred thousand citizens taking to the streets. Kishi eventually resigned, and was replaced with the pragmatist Ikeda. 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. One can imagine an alternative ending to this story in which the Constitution was overturned, either by leftist protest, rightist reaction, or Kishi's routinization of the practice of calling secret sessions. But the Constitution survived, and Japan entered the high-growth era of the 1960s.

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 they ensured their demise as a political factor. At the same time, intra-factional politics within the LDP shifted power toward the constitutional

[45] Richard J. Samuels, "Constitutional Revision in Japan: The Future of Article 9" The Brookings Institution Center for Northeast Asian Policy Studies, Dec. 15, 2004.

revisionists, associated with Yasuhiro Nakasone, Shintaro Abe and others. This group consolidated its position with the popular Koizumi prime ministership; Koizumi established a new politics based more on public relations than the traditional pork barrel.

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. 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. The self-enforcing equilibrium has fallen apart, and reform of the key bargain will likely 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. Japan will remain a constitutional democracy. But the point is that the particular bargain will change—and Japan will enter a (post-) post-occupation era.

B. Baghdad

Like pre-war Japan, Saddam's Iraq seemed to pose a challenge from the periphery of modernity to the established inter-state system. Many believed Iraq in the 1970s would become the first Middle Eastern industrialized nation. 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). Both countries then entered a period of misgovernment, taking a suicidal international course that provoked confrontation with, and ultimately defeat by, the United States.[46]

Despite these similarities, the circumstances giving rise to democratic transition each seem to reverberate with particularity. Tokyo 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. Saddam Hussein's Iraq, by contrast, was ruled by small group of his relatives and clansmen. Aside from his Sunni followers, the majority of

[46] Note that both countries have had their versions of suicide cults as well. IAN BURUMA, OCCIDENTALISM (2004); ROBERT JAY LIFTON, DESTROYING THE WORLD IN ORDER TO SAVE IT (2000).

Iraqis were hardly willing to die for Saddam and his ilk. When Emperor Hirohito renounced his divinity, there was an enormous ideological vacuum. In contrast, when Saddam was removed from power, most Iraqis outside his hometown of Tikrit were relieved and overjoyed. The only sadness was found among the non-Iraqi pan-Arabists and the journalists of Al-Jazeera, who appreciated his willingness to stand up to the West.[47]

An ideological vacuum is 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, it is the failure of Baathism that made Iraq more difficult to reconstruct. A society that has 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 postwar constitutional order. 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 founding."[48] While there are important counterexamples, such as India, our own work has found a negative association between ethnic fractionalization and constitutional duration.[49] Japan is a famously homogenous nation, even if that homogeneity has often been over-stated. In part this perception of homogeneity is a *result* of the successful Meiji project of modernization; 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.

What might be called elements of constitutional culture may also play a role. Japan's ability to engage in selective adaptation dates back before the Meiji era, during

[47] Control Room, Documentary.

[48] Moore and Robinson, *supra* note 26, at 10.

[49] Lifespan, *supra* n.25

the *sakoku* period when selective translations of Dutch books made available through the Treaty Port of Dejima facilitated knowledge. Indeed, Keene notes that Japan in the Tokugawa knew more about the West through their selective study than any other non-western society.[50] The Meiji project of selective adaptation was widely seen as successful, and so invoking a new era of borrowing made sense

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.[51] This 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. First is oil. The well–known phenomenon of the resource curse in political economy may also apply to problems of constitutional reconstruction. Without natural resources, with no army, Japan's total defeat meant that they were at the mercy of the victors. Iraq, on the other hand, had resources. 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, hardly served to draw in 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. This was in part necessitated because both the Americans in SCAP and the Japanese had an incentive to conceal the true extent of American involvement in 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 of MacArthur's predisposition to retain the emperor. 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 be severe. Indeed, several times in the deliberation

[50] Donald Keene, THE JAPANESE DISCOVERY OF EUROPE 1720-1830 (1969).

[51] 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.

in the House of Representatives, this issue came to a head.[52] 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 neoconservative, though his competence was evidently greater.[53] 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 him as a potential ally in the Christianization of Japan. 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. It is an astounding irony that the political party that ended its long political sojourn in the desert through calls for less government in the United States proceeded to draw inspiration from the New Deal "project" of democratizing Japan.

No two historical situations are identical, but this does not mean that understanding history has no bearing on the present. Our own 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, it was Japanese success, both in nation-building before the Occupation and in locally enforcing the constitutional bargain thereafter, that made the occupation constitution succeed. The key variables then lie not with the well-intentioned constitutional planner—but within the society that must live under the constitutional regime.

IV Conclusion

[52] Moore and Robinson, *supra* note 26 at

[53] William Manchester, AMERICAN CAESAR: DOUGLAS MACARTHUR 1880-1964 (1983).

This paper has provided 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 widespread belief that occupation constitutions are mere copies of those found in the occupying countries does not appear to be supported by the evidence. Certainly, successful occupation constitutions seem to require both local adaptation and local enforcement in order to endure.[54] Of constitutions written under occupation, most do not survive an extended period after the withdrawal of the occupier, and overall lifespans of occupation constitutions are shorter than other constitutions. 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.

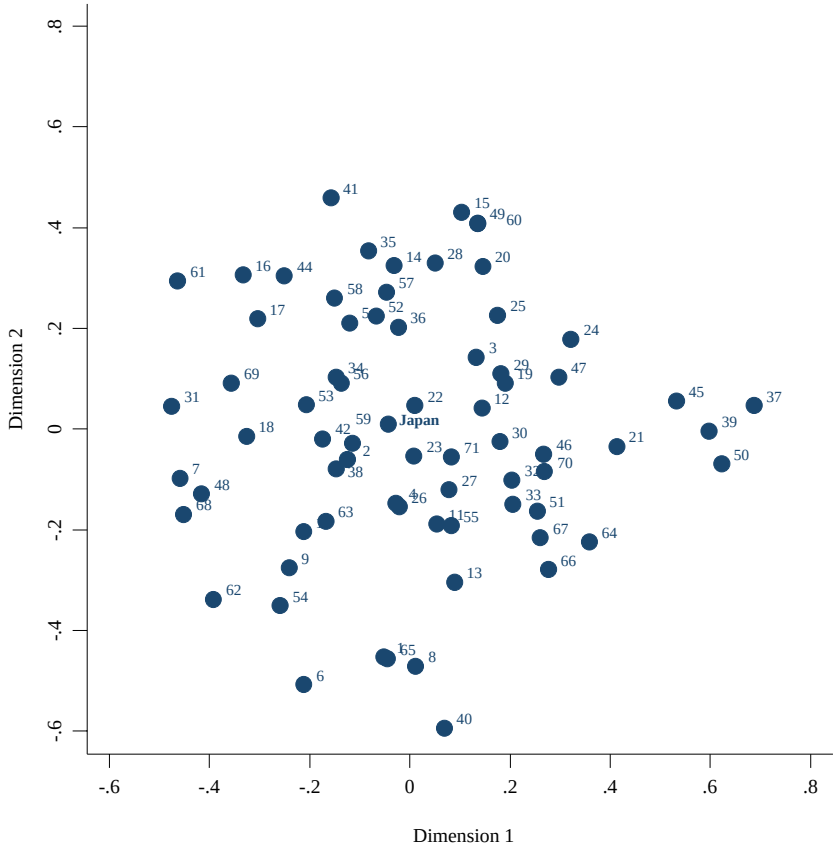
[54] As is true of legal institutions more generally. See Daniel Berkowitz and Katharina Pistor, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003).

Table 1 Occupation Constitutions

Occupied	Primary Occupier	Constitution Year	Occupation End Year	Lifespan	Post-Occupation Lifespan
Afghanistan	Russia	1979	1989	1	.
Afghanistan	Russia	1980	1989	5	.
Afghanistan	Russia	1985	1989	2	.
Afghanistan	Russia	1987	1989	3	1
Afghanistan	Russia	1990	1989	2	2
Afghanistan	United States of America	2001	2001	2	.
Afghanistan	United States of America	2003	2001	2	.
Albania	Italy	1939	1943	4	.
Albania	Germany	1943	1944	3	2
Albania	Germany	1946	1944	30	30
Austria	Russia	1945	1955	10	.
Austria	Russia	1955	1955	50	50
Bulgaria	Russia	1947	1945	24	24
Cambodia	Vietnam	1981	1989	8	.
Cambodia	Vietnam	1989	1989	4	4
Chad	Libya	1982	1981	7	7
Dominican Republic	United States of America	1924	1924	3	3
Egypt	United Kingdom	1923	1922	7	7
France	Germany	1946	1944	12	12
Haiti	United States of America	1918	1934	14	
Haiti	United States of America	1932	1934	3	1
Haiti	United States of America	1935	1934	11	11
Hungary	Russia	1946	1956	3	.
Hungary	Russia	1949	1989	40	
Iraq	United States of America	2004	2004	1	1
Iraq	United States of America	2005	2004	1	1
Italy	Austria-Hungary	1848	1848	13	12
Italy	France	1943	1945	4	2
Italy	France	1947	1945	58	58
Japan	United States of America	1946	1952	59	53
Laos	Vietnam	1991	1989	14	.
Mexico	France	1865	1866	2	1
Mexico	France	1867	1866	50	50

Paraguay	Bolivia	1870	1876	70	64
Poland	Russia	1947	1989	5	.
Poland	Russia	1952	1989	40	3
Romania	Russia	1944	1944	4	4
Syria	France	1920	1944	10	
Syria	France	1930	1944	13	
Turkey	France	1920	1945	4	.
Turkey	France	1924	1945	37	16
Yugoslavia	Russia	1946	1945	7	7

Figure 1 Constitutional Proximities (c. 1946)
Proximities calculated with Pearson's Phi



* See the following table for case IDs

Table 2 Case Identification (for Figure 1) and Proximity to the Japan 1946 Constitution
Proximities calculated by proportion of rights items in agreement
N = 69

Constitution	ID	Proximity
Japan_1889	42	0.60
Germany_1924	33	0.56
Chile_1925	14	0.52
Mexico_1824	48	0.52
United States of America_1992	68	0.52
Egypt_1923	28	0.49
Paraguay_1940	57	0.49
Philippines_1935	59	0.49
Russia (Soviet Union)_1918	64	0.49
Colombia_1832	17	0.48
Haiti_1889	35	0.48
Iceland_1944	38	0.48
Jordan_1946	44	0.48
Norway_1814	53	0.48
Albania_1946	3	0.47
Brazil_1937	12	0.47
China_1923	15	0.47
Columbia_1830	16	0.47
Columbia_1858	20	0.47
Ethiopia_1931	31	0.47
Haiti_1946	36	0.47
Italy/Sardinia_1848	41	0.47
Lithuania_1922	46	0.47
Monaco_1911	49	0.47
Poland_1921	60	0.47
Bolivia_1880	7	0.45
Czech Republic_1920	24	0.45
Dominican Republic_1896	25	0.45
Estonia_1920	29	0.45
Estonia_1937	30	0.45
Guatemala_1945	34	0.45
Peru_1860	58	0.45
Uruguay_1830	69	0.45
Costa Rica_1946	22	0.44
Cuba_1940	23	0.44
Germany (Prussia)_1871	32	0.44
Indonesia_1945	39	0.44
Mongolia_1924	50	0.44
Poland_1935	61	0.44
Afghanistan_1931	2	0.43
Argentina_1853	4	0.43
Brazil_1891	10	0.43
Columbia_1853	19	0.43
Columbia_1863	21	0.43
Hungary_1946	37	0.43
Lithuania_1938	47	0.43
Mongolia_1940	51	0.43
Portugal_1911	63	0.43
Russia (Soviet Union)_1941	66	0.43
Yugoslavia_1931	70	0.43
Yugoslavia_1946	71	0.43
Austria_1934	5	0.42
Columbia_1843	18	0.42
Latvia_1922	45	0.42
Nicaragua_1905	52	0.42
Paraguay_1870	56	0.42
Afghanistan_1923	1	0.40
Brazil_1824	9	0.40
Ecuador_1897	26	0.40
Panama_1904	54	0.40
Panama_1946	55	0.40
Portugal_1822	62	0.40
Bolivia_1945	8	0.39
Russia (Soviet Union)_1924	65	0.39
Bolivia_1826	6	0.38
Brazil_1946	13	0.38
Ireland_1922	40	0.38
Switzerland_1848	67	0.38
Brazil_1934	11	0.36
Ecuador_1946	27	0.35

Table 3 Proximity to Iraq's 2005 Constitution

Proximities calculated by proportion of rights items in agreement

N = 534 (not all listed)

Constitution	Proximity	Rank
Benin_1990	0.80	1
Bahrain_2002	0.80	2
Niger_1999	0.80	3
Syria_2000	0.79	4
Namibia_1998	0.77	5
Bangladesh_1996	0.77	6
Mali_1992	0.76	7
Afghanistan_2003	0.75	8
Cameroon_1996	0.75	9
Trinidad and Tobago_2000	0.75	10
Rwanda_2003	0.75	11
Niger_1996	0.74	12
Tajikistan_2003	0.73	13
Burundi_2004	0.72	14
Sierra Leone_2002	0.72	15
Taiwan_1947	0.72	16
United Arab Emirates_1971	0.72	17
United Arab Emirates_1996	0.72	18
Macedonia (Former Yugoslav Republic of)_	0.72	19
Djibouti_1992	0.72	20
Guinea_1990	0.72	21
Afghanistan_1964	0.70	22
Nauru_1968	0.70	23
Sudan_2005	0.70	24
Zambia_1996	0.70	25
Chad_1996	0.69	26
Grenada_1992	0.69	27
Kuwait_1962	0.69	28
Oman_1996	0.69	29
Vanuatu_1983	0.69	30
Iceland_1999	0.69	31
.	.	.
.	.	.
.	.	.
United States of America_1992	0.38	422
.	.	.
.	.	.
.	.	.
Afghanistan_1979	0.34	493
Bhutan_1981	0.34	494
Ethiopia_1991	0.34	495
Israel_2003	0.34	496
Lesotho_1983	0.34	497
Mauritania_1985	0.34	498
New Zealand_1986	0.34	499
Nigeria_1978	0.34	500
Russia (Soviet Union)_1978	0.34	501
Swaziland_1982	0.34	502
Swaziland_1983	0.34	503
Thailand_1959	0.34	504
Thailand_1972	0.34	505
Thailand_1976	0.34	506
Thailand_1977	0.34	507
Vatican City_2000	0.34	508
Micronesia_1981	0.34	509
Ecuador_1967	0.33	510
Nicaragua_1974	0.33	511
Costa Rica_2003	0.33	512
Panama_1946	0.33	513
Guinea_1982	0.32	514
Guatemala_1965	0.32	515
Columbia_1843	0.32	516
Portugal_1911	0.32	517
Yugoslavia_1946	0.32	518
Mongolia_1992	0.32	519
Mongolia_1960	0.31	520
Ecuador_1946	0.31	521
Comoros_1975	0.31	522
Portugal_1822	0.30	523
Switzerland_1848	0.30	524
Brazil_2004	0.30	525
Argentina_1957	0.29	526
Argentina_1972	0.29	527
Brazil_1967	0.29	528
Bolivia_1945	0.28	529
Bolivia_1826	0.28	530
Brazil_1934	0.28	531

Constitution	Proximity	Rank
Austria_2000	0.27	532
Brazil_1946	0.26	533
Austria_2004	0.23	534