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## Post-Sovereign Constitution-Making and Its Pathology in Iraq

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## I. INTRODUCTION

Ever since things began to go wrong in Iraq, from almost the beginning, that is, analysts have disagreed concerning “the original sin” of America’s Iraq adventure, the source of all the other sins.<sup>1</sup>

For some it was the destruction of the Iraqi army, and de-Baathification, while for others it was the failure to hold early elections, local or national, or to produce a legitimate interim government some other way. For many, the Rumsfeld plan relying on insufficient ground forces — “boots on the ground” — and invading without a proper plan was the fundamental error of the enterprise.<sup>2</sup> For yet others, now the most numerous, the illegal and illegitimate war itself was its own original sin, that could not have been sufficiently atoned for, or redeemed subsequently.<sup>3</sup> While I have always been inclined to hold this later view, without dismissing the importance of the other considerations, I have nevertheless concentrated in five studies on a dimension largely neglected by others: the failures of the constitution-making process. This I have done not only because only in this area did I have the scholarly experience to draw on, but because of a perhaps all too naïve assumption that in principle, at least, constitution-making can almost everywhere lead to the reconstruction not only of regimes, but even of state structures compatible with democracy and rule of law at least in their minimal, least demanding versions. With an old distinction of Hannah Arendt in

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1. LARRY DIAMOND, *SQUANDERED VICTORY: THE AMERICAN OCCUPATION AND THE BUNGLED EFFORT TO BRING DEMOCRACY TO IRAQ* 280–81 (2005).
  2. *See, e.g.*, MICHAEL R. GORDON & BERNARD E. TRAINOR, *COBRA II: THE INSIDE STORY OF THE INVASION AND OCCUPATION OF IRAQ* (2006); GEORGE PACKER, *THE ASSASSINS’ GATE: AMERICA IN IRAQ* (2005); DAVID L. PHILLIPS, *LOSING IRAQ: INSIDE THE POSTWAR RECONSTRUCTION FIASCO* (2005). Each author combines at least some of the causal arguments mentioned here, stressing one factor or the other. While there are numerous examples of single-cause explanations in daily newspapers I will not attempt to cite them all here.
  3. For decency’s sake, I mention first only those who have always had this view. *See, e.g.*, JEREMY BRECHER ET AL., *IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND* (2005); *EMPIRE’S LAW: THE AMERICAN IMPERIAL PROJECT AND THE ‘WAR TO REMAKE THE WORLD’* (Amy Bartholomew ed., 2006). That position is now taken in a work I did not have a chance to use in a book form. *See* PETER GALBRAITH, *THE END OF IRAQ: HOW AMERICAN INCOMPETENCE CREATED A WAR WITHOUT END* (2006) [hereinafter GALBRAITH, *THE END OF IRAQ*]. Galbraith (or his editor) now flatly states on the front flap of his book that “George Bush broke up Iraq when he ordered its invasion in 2003.” What is very strange about that statement is that Galbraith tirelessly advocated and worked for that very breakup when it was not self-evidently pre-determined, at least not in my view and the view of many others. *See, e.g.*, DIAMOND, *supra* note 1. And this is clear from his many articles published in *The New York Review of Books* and a cursory glance at his book. *See, e.g.*, GALBRAITH, *THE END OF IRAQ, supra*, at 160–61 (claiming to have pushed the Kurds toward a much more radical position on “federalism”); Peter W. Galbraith, *How to Get out of Iraq*, N.Y. REV. BOOKS, May 13, 2004, at 42; Peter W. Galbraith, *Iraq: Bush’s Islamic Republic*, N.Y. REV. BOOKS, Aug. 11, 2005, at 6; Peter W. Galbraith, *Iraq: The Bungled Transition*, N.Y. REV. BOOKS, Sept. 23, 2004, at 70. While I cannot exclude the possibility that the invasion had to destroy the Iraqi State, and the destruction of the State had to destroy Iraq, it is also possible that both could have been reconstructed if it were not for the disastrous constitutional course adopted under Kurdish pressure.

mind, I tried not to conflate “liberation” and “constitution.”<sup>4</sup> Mindful of the inevitably violent nature of the former process, I considered even the externally imposed character of Iraq’s “revolution” or “liberation” to be something less than an absolute bar to the organization of a successful process of the design of stable institutions.<sup>5</sup> Everything ultimately depended on how the constitution-making process was organized. In Arendt’s terms my thesis was: The democratization process initiated by externally imposed liberation could succeed if the constitution-making process escaped the framework of imposition, and managed to become autonomous. But beyond Arendt, and under conditions of a divided society like Iraq’s previously held together by an authoritarian state, I also believed that autonomy would not be enough. The constitution-making process would have to follow the example of successful recent attempts in divided societies, most particularly South Africa.

This naïve assumption could have been wrong, and the conclusion of this article will make the case why it might have been. To anticipate a little, it is possible to argue that an externally imposed “liberation” is liberation in Arendt’s sense only if the liberators do not substitute themselves for the dictatorship of the past; that is, if they do not become occupiers who themselves repress autonomous politics. If they do, they will also sponsor a constitution-making process that cannot meet its stated goals, whether democracy, constitutionalism or even political stability.

Yet what makes Iraq difficult to interpret is that from the beginning the Americans were liberators to some while they were always oppressive occupiers to others. They freed the political energies of groups and organizations of the former, but suppressed the latter, driving them underground almost immediately. The ambiguity was visible also in the constitution-making process, having elements of imposition mixed with bargaining and even occasional flashes of intelligent design. Thus it was (and is?) not possible to know for sure until the bitter end that the project would fail. What is clear, however, is that given the fact of a multi-stage process, its partial failures at different stages greatly contributed to political exclusion and instability, making the prospect of final success ever more remote. This article will focus on this history of failure.

In the end, I am not going to resolve the question about the original sin of the enterprise. Instead, I will argue that even if the constitution-making process had been able to redeem the aggressive war and the occupation in principle — a big if — it still may very likely have been a failure because of its own deep flaws

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4. According to her what has been called revolution in modern history has two dimensions or moments, *liberation* from a failed or hated old regime, and *constitution* or *revolution* in the proper sense meaning the free, democratic construction of a new one. See HANNAH ARENDT, ON REVOLUTION (Penguin Books 1965) (1963).

5. See Andrew Arato, *The Occupation of Iraq and the Difficult Transition From Dictatorship*, 10 CONSTELLATIONS 408 (2003).

and pathologies. These were decisive in spite of the fact that relatively early in the process a promising many-stage model with an interim constitution was adopted, consciously or not, from some of the best recent experiences in constitution-making. In Part II of my article I describe the elements of the model of constitution-making that have been used recently in democratic forms of regime change and why these elements are important. In Part III, I discuss the applicability of the model, and in Part IV, I examine how the constitution-making process in Iraq evolved. In Part V, I discuss the four “pathologies” that occurred in Iraq’s constitution-making process and how these pathologies contributed to its failure. The conclusion then will argue that these pathologies were at the very least very difficult to avoid, given state destruction and the campaign against Iraqi nationalism, themselves rooted in the *type* of war that produced Iraq’s external liberation.

## II. CONSTITUTION-MAKING IN IRAQ: THE MODEL

In my earliest article on Iraq’s transition, I began playing with the idea that it would be possible to adopt the model of constitution-making dominant in recent democratic forms of regime change even to this case of an externally imposed revolution.<sup>6</sup> I did this in spite of the fact that all the major relevant cases of what I will call here “the new post-sovereign paradigm” come from countries of *indigenous* regime change involving non-revolutionary legal continuity, such as Spain, Poland, Hungary, Bulgaria, and South Africa.<sup>7</sup> In these countries, the strategic reason for the adoption of the model were that old regimes were still in place with intact forces of repression, and that these old regimes were too weak either to survive unreformed or to undertake programs of reforms from above. They were, however, strong enough to block new forces from imposing their own revolutionary solutions. Thus, the initial context of constitution-making in these countries could be almost always seen in strategic terms, involving two forces, neither being able to impose its preferred solution, top down reform in one case and revolutionary change in the other. Nevertheless, for a variety of normative reasons grouped around concepts of legitimacy and learning,<sup>8</sup> I considered this model to be superior to all others available, even if its use in Iraq may have

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6. *Id.* at 415. It was this article, written in May 2003, that got me involved in conversations, as an informal advisor, with Jamal Benomar of the United Nations Development Programme (“UNDP”), who became Lakhdar Brahimi’s chief of staff during his Iraq missions. I knew Mr. Benomar from a Washington workshop on conflict resolution and constitution-making, jointly held by the UNDP and United States Institute of Peace (“USIP”). For more on Benomar see DIAMOND, *supra* note 1, at 53–66.

7. I mean “non-revolutionary” in the legal sense. See generally ANDREW ARATO, CIVIL SOCIETY, CONSTITUTION AND LEGITIMACY 81–127 (2000); János Kis, *Between Reform and Revolution*, 1 CONSTELLATIONS 399 (1995).

8. For a more thorough discussion see Andrew Arato, *Interim Imposition*, ETHICS & INT’L AFF., Dec. 2004, at 25 [hereinafter Arato, *Interim Imposition*]; Andrew Arato, *Sistani v. Bush: Constitutional Politics in Iraq*, 11 CONSTELLATIONS 174 (2004) [hereinafter Arato, *Sistani v. Bush*].

seemed far-fetched.<sup>9</sup> To my amazement,<sup>10</sup> the so-called agreement of November 15, 2003, between the Coalition Provisional Authority (“CPA”) and its creation and subordinate, the Interim Governing Council (“GC”) began to adopt important elements of this model, centering on a many-stage process, an interim constitution, and a freely elected but non-sovereign constitutional assembly.

I will sum up first the advantages of the model in question, then explain why it was adopted in Iraq.

#### A. *Two-Stage Process and Interim Constitution*

In a sense, of course, all constitution-making involves many events, thus arguably several stages. What gradually emerged from Spain between 1975 and 1977<sup>11</sup> to South Africa between 1991 and 1996<sup>12</sup> was the new reliance on two drafting stages that foresaw from the outset the production of two constitutions, an interim and a final one, where the rules of the first constrain the making of the second. The existence of a fully developed, explicitly interim constitution is the most important component and documentary evidence of the new paradigm of constitution-making. It successfully combines the need of a provisional government with the requirement of subjecting this form to constitutional limitations, and connects the needs of constitutional learning in the early stages of constitution-making with the requirement that the new constitution be insulated against easy alteration.

In my view, it is this *reflexively* two-stage character that indicates that we are facing a new method of constitution-making, different from that of the most important democratic forerunners found in the United States or France, one that I call “*post-sovereign*” in the sense that no body or institution is allowed, or able, to claim full identity with the sovereign people.<sup>13</sup> In a reflexively designed process of two-stage constitution-making, there is no instance that can represent in the absolute sense the sovereign will of the people (in contrast to some versions in France). Nor is there an incorporation of the people in a “two body” version where the natural body of the people in a referendum (as in other French versions) or the organized body of the people in a convention (as in the American version) checks through its *yes* or *no* the compliance of the will of the assembly

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9. Subsequently, I had a chance to discuss this proposal and its elements with some of the experts involved in the U.S. and U.N. efforts to advise different Iraqi actors.

10. See Arato, Sistani v. Bush, *supra* note 8.

11. See ANDREA BONIME-BLANC, SPAIN’S TRANSITION TO DEMOCRACY: THE POLITICS OF CONSTITUTION-MAKING (1987).

12. See *generally* HASSEN EBRAHIM, SOUL OF A NATION (1998).

13. And definitely not “non-sovereign” in the sense that it does not presuppose the sovereignty of the state structure as a whole with respect to international law and external affairs. Indeed, as the problem of external imposition explored here shows, being non-sovereign in the external sense creates formidable roadblocks for the adoption of the post-sovereign paradigm.

with the people's will. If "the people" can be said to be present in the new type of constituent process this is so in a plural, complex, and always limited way that has neither the possibility of the absolute no of the referendum, nor the unlimited constituent power incorporated in an assembly.

*B. Round Table Agreements, Free Elections, and Non-Sovereign Constitutional Assemblies*

The interim constitution helps with subjecting the process of constitution-making to constitutionalism, but not with the vexing problem of how to begin democratically, or at least legitimately, where there is no pre-existing democracy.

In my opinion, the famous round tables from Poland and Hungary to Bulgaria and South Africa (under whatever name) partially solved the problem of the lack of democratic legitimacy by substituting principles like pluralistic inclusion of the main political forces, publicity, and adherence to the rule of law for the missing principle of democratic legitimacy. This act of replacement is accompanied by consciousness, in varying degrees, of the lack of representative status that only electoral legitimacy could provide, affecting the degree to which the round tables would fashion constitution-making rules for a subsequent freely elected constitutional assembly. Nevertheless, what would be a common element in this model, is that while the final constitution would have to be the work of a freely elected parliamentary assembly, and not some commission chosen by the executive, such an assembly would not, minimally, and usually, dispose over its own constitution-making rules, and, more maximally, and unusually, may be forced to adhere to substantive principles agreed upon by the round tables.

While the name constituent assembly and even convention (as in the November 15 Agreement) may reappear in this model, the bodies in question represent new types of institutions with respect to all great democratic models because of the limitations to which they are subjected. This is true even if they are given special names like the Grand National Assembly in Bulgaria, or where the distinction between *constitutional* and *constituent* assembly is fudged. The limitations can admittedly be as little as having to work under the amendment rule of the interim constitution or under ratification rules provided by that constitution for the final process. But in fact, much more can be regulated, including: the voting rules, the composition of constitution-making committee(s), its or their voting rules, the role of outside inputs, the length of time allowed for the process, mechanisms for new elections in case of failure, the nature of ratification, and so on. All such limits mean in effect that a previous assembly has participated in the work of drafting the next constitution, because difficult procedural rules can mean that the fall-back position for agreement will be the interim constitution. This was explicitly provided for in Hungary in 1996, and turned out to be even more the case in Iraq. Where substantive principles limit the constitutional as-

sembly, like the famous 34 in South Africa, the participation in the work of drafting of two bodies is even more clear.<sup>14</sup>

C. *Legal Continuity, the Use of Amendment Rules, and Enforcement*

We now come to somewhat more contingent, but nevertheless very characteristic elements of the new model. The first is legal continuity. The new model generally avoids the legal and institutional state of nature in which one line of thought from Sieyès to Schmitt<sup>15</sup> put the *pouvoir constituant*, but even the illegalities involved in the Philadelphia Convention's break with the amendment rules of the Articles of Confederation.<sup>16</sup> All the characteristic cases from Spain to South Africa involve no legal break between old regime and new, and generally they rely on using the old regime's amendment rule to accomplish revolutionary change through legal means.

Two reservations, however, need to be made regarding this important issue. First, there may be no structures like parliaments in place on which to base any legal continuity with an old regime. Second, even when there are, or can be easily restored as in Nepal recently, an old amendment rule in place involves the risk that it will be unusable in practice. In such situations, the example of the American framers seems to be a better one than that of the other relevant constitutional politicians, who blindly stick to legality.

At the same time one should be very careful with illegality. If initial legal continuity with the old regime, though important, is not an absolutely essential prerequisite of the model's applicability, once it is launched things radically change. Now, legal continuity between its procedures and stages, i.e., the strict legality of the actions of all who participate in the process, is absolutely important.<sup>17</sup> Without it, there is no post-sovereign model that requires each instance at all stages to be kept within legal limits. Since one of the very points of the model

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14. See Andrew Arato & Zoltán Miklósi, *Constitution Making and Transitional Politics in Hungary*, U.S. INST. OF PEACE (forthcoming) (on file with the New York Law School Law Review) (describing the benefits of a many-stage process); EBRAHIM, *supra* note 12.

15. CARL SCHMITT, *VERFASSUNGSLEHRE* (1928); Emmanuel Joseph Sieyès, *What is the Third Estate?*, in *POLITICAL WRITINGS: INCLUDING THE DEBATE BETWEEN SIEYÈS AND TOM PAINE 1791* (Michael Sonenscher ed., 2003).

16. For the most vigorous statement of this position see I BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 41–42 (1991); II BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 48, 89 (1998).

17. One might imagine that complete legal continuity with a past regime is required, so that we can speak of a genuinely post-sovereign model. Otherwise there is a “state of nature,” as Sieyès called it, and the instance that then sets the rules for all the rest, even in a multi-stage process, could be regarded as sovereign. Sieyès, *supra* note 15. That may be technically true in a revolutionary setting, where it would require self-renunciation by a sovereign instance to set the new model into motion. This was not, however, a problem in the case of the externally imposed revolution of Iraq, where the external revolutionary force is under international law, and specifically the Law of Occupation of the Hague and Geneva conventions.

is to impose constitutionalism on the period and the process of constitution-making itself, illegality and procedural violations by governing organs do the greatest possible harm. Moreover, the paradigm of constitution-making depends on the coordination and the compliance of many instances, and of course mutual trust which illegality destroys. Indeed, it may be that such trust cannot be built reliably without the possibility of enforcement.

Enforcement is, in fact, central for the model, logically if not historically. Once an interim constitution is drafted, it must be enforced to be the type of constitution that can regulate the constitution-making process itself. After opposing the premature setting up of a Constitutional Court, the Hungarian Democratic Opposition consented to this action once it had a constitution “worthy of defense.”<sup>18</sup> Nothing like the role of a Constitutional Court in original constitution-making exists in classical democratic models. Of course in the new model, too, such courts play no role in the making of interim constitutions. It is the role of the latter to set them up, even if some primitive forerunner tribunal already exists. What happens then is truly extraordinary, though we have only seen the full-fledged results only in the South African case. The constitutional assembly itself falls under the control of the Constitutional Court, in the sense that its constitutional product has to be certified by the Court as constitutional. Something remarkable thus becomes possible: an unconstitutional constitution. Interested parties can sue to have the Court declare parts of the constitutional draft unconstitutional, and the Court can issue guidelines to the Assembly concerning the forms of redrafting. Nowhere has anything like this been possible during the original constitution-making process.

### III. THE APPLICABILITY OF THE MODEL IN IRAQ?

After an early effort by Ulrich Preuss, there have been no general theoretical or normative efforts to argue for the new model of constitution-making, and it cannot be my task to do so here.<sup>19</sup> It is safe to say, however, that there is considerable enthusiasm today concerning its application and further development in South Africa, the case that can be regarded as paradigmatic despite some unusual features.<sup>20</sup> It is more relevant here, that there has also been much too little work in political science concerning the preconditions of its application, given especially the fact that authoritarians everywhere continue to favor top down, imposed

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18. See Arato & Miklósi, *supra* note 14, at 54.

19. ULRICH KLAUS PREUSS, *CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS* (Deborah Lucas Schneider trans., 1995). However, I am now working on such a project. For my early efforts see ARATO, *supra* note 7; Andrew Arato, *Constitutional Learning*, 52 *THEORIA* 1 (2005); Arato, *Interim Imposition*, *supra* note 8.

20. See EBRAHIM, *supra* note 12; *THE POST APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW* (Penelope Andrews & Stephen Ellmann, eds., 2001); *SOUTH AFRICAN REVIEW 7: THE SMALL MIRACLE: SOUTH AFRICA'S NEGOTIATED SETTLEMENT* (Steven Friedman & Doreen Atkinson eds., 1994).



forms of constitution-making, while democrats and democratic theory still tend to argue for traditional American and especially French models of sovereign constitution-making. It is exactly this type of clash of constitutional ideas, and the strategic balance of forces behind them, that provides the most likely context for the adoption of the new method.<sup>21</sup>

Note that both ideas and forces are important. Balance of forces may point to the plausibility of a compromise, a second best formula where no one initially values it as their first option. But would a balance alone lead to the required outcome, or are ideas necessary, though not necessarily ideas that anticipate the new model?<sup>22</sup> Furthermore, must it be a matter of an actual balance, or is the belief of actors that there is one that matters? It seems the latter consideration, namely belief or perception is more relevant, though evidently the belief itself should be influenced by realities. Actors, however, could be mistaken, especially when a sector within either side (“reformers” or “moderates”)<sup>23</sup> sells its allies the need for negotiations in terms of a claim that they cannot, together, force through their preferred solution. In such case, obviously, belief in negotiations as at worst a “second best,” may replace actual balance of forces, and can lead a stronger side to negotiations. Such an outcome would be all the more plausible if a stronger side became convinced of the new model as preferable to its imposed solution, something that may have happened in Spain, and may be increasingly possible with the growing prestige of the negotiated transitions of the 1980s and 1990s. But when political sides are too unequal, and there are radicals on the stronger side, it is in general difficult to completely stop them from pushing through a program of imposition.

#### IV. THE MODEL AS ADOPTED IN IRAQ

All these considerations are relevant to the initial implausibility of the new method of constitution-making being adopted in Iraq, where there was to begin with a revolutionary break, even if externally produced, rather than legal continuity of regimes. More important was the related fact that discredited old regime forces did not merely lose their legitimacy, a significant precondition of the

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21. One might very well ask why only starting in the 1970s? Were there no such clash of ideas cum balance of political forces before? The answer probably lies in the power of democratic ideology in 1970s and after initiating a period of post-revolutionary consciousness on the left, and a new acceptance of democracy on the right. Both sides were, in other words, more receptive to a second best type of negotiated solution on the question of constitution-making than their historical forerunners tended to be. At least, that is my hypothesis. To test it, relevant earlier contexts should be examined.

22. For an elegant solution to an analogous problem see ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* (1976).

23. See ADAM PRZEWORSKI, *DEMOCRACY AND MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA* (1991). Although I put much more emphasis on ideas and perceptions than he does, Przeworski's analysis has influenced me in the present context.

new model,<sup>24</sup> but, as in all revolutions, were eliminated from a position of formal power altogether. Thus, to the extent that a negotiated transition would have to be grafted onto a revolutionary model,<sup>25</sup> it would have to be arranged among new actors. Perforce, the actor occupying the position of *de facto* power, the U.S. occupying authority and its clients, would be stronger and arguably more legitimate, at least to significant population segments and internationally,<sup>26</sup> than the discredited old regime actors of this model. For the model to have a chance to be adopted, one would have to compensate for the difficulty either by having a very strong opponent on the other side pushing for classical democratic options, or by having the *de facto* power strongly influencing the process in the direction of such adoption. There was such political opposition led by the Shi'ite Grand Ayatollah Ali al-Sistani. But it cannot be said to have been strong enough to impose a revolutionary solution if a negotiated model were not conceded. And, there were (I am told) such ideas on the American side, but they were much less important than projects of imposed constitution-making.<sup>27</sup> The result: the model was adopted, but in a version deformed by continued efforts at external imposition.

There is no question, in any case, that the model adopted was the result of compromise between two other models: the model of (American) imposition from above and the model of populist democratic constitution-making on the classical

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24. See Kis, *supra* note 7.

25. See Arato, *supra* note 5.

26. These are two different matters and involve two senses of legitimacy. As to population segments, at issue is sociological legitimacy, in the sense of groups accepting American rule as valid or justified. International legitimacy, however, is in the strict legal sense, provided for by U.N. Security Council Resolution 1483 that authorized the occupation regime. See S.C. Res. 1483, ¶ 2, U.N. Doc. S/RES/1483 (May 22, 2003). Of course, old regimes in the model were internationally recognized. However, that recognition was not a new one that would lend prestige, and in all the relevant cases, they were also under strong international pressure to change.

27. When I first tried out my idea of an interim constitution on Noah Feldman, then still an expert advisor of the Coalition Provisional Authority ("CPA"), after his late October 2003 lecture at New York University School of Law, he was still advocating, as he had earlier that the GC as it was then constituted should and could produce a final constitution that would be approved in a referendum without provoking Sistani's opposition. See Noah Feldman, *Democracy, Closer Every Day*, N.Y. TIMES, Sept. 24, 2003, at 27. He subsequently, during a debate at Columbia University in the Spring of 2004, informed me that the idea of the interim constitution was discussed among advisors to the CPA earlier, but there was no sign of this in his earlier lecture. There is no trace of the idea of an "interim constitution" in Diamond's reconstruction, until the November 15 Agreement. See DIAMOND, *supra* note 1, at 14, 41–51. Previously, all models presupposed the making of a permanent constitution by some kind of co-opted body or assembly, and free elections only afterwards. In the most aggressive version, it was frankly advocated that the U.S. could and should impose a new constitution on Iraq. See generally *Constitutionalism, Human Rights, and the Rule of Law in Iraq: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (Statement of Prof. John Yoo), available at [http://judiciary.senate.gov/testimony.cfm?id=826&cwit\\_id=2352](http://judiciary.senate.gov/testimony.cfm?id=826&cwit_id=2352). The crude errors of this conception in interpreting that law do not change the fact that it was influential for a period where it counted. See generally Jean Cohen, *The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for "Interim Occupations,"* 51 N.Y.L. SCH. L. REV. 496 (2006–07).

pattern. I have told this story several times, and will now only focus on the main elements.<sup>28</sup> Once no weapons of mass destruction were found, the United States in Iraq faced not only the problem of having to legitimate its whole enterprise by a democratic transition of some kind, but obviously also considered it important that this democracy turn out in the right way, i.e., that the enemies of the United States, whether successors to the old Baath or the friends of Iran, do not inherit political power in the country.<sup>29</sup>

Thus, the democratic transition had to be managed. There were to be elections, but not too early, before entirely new forces, presumably friendly to the United States, could really organize themselves. There had to be a new constitution, but the process of its making as well as its contents had to be tightly controlled. The impossibility of early elections and the need to control constitution-making together gave birth to several projects of producing constitutions by executive bodies appointed by the United States. Their work would be confirmed, at best from a democratic point of view, in popular plebiscites, and at worst, in yet other appointed bodies, caucuses. These projects can be safely described as constitution-making through external imposition, whose nature could not be hidden in Iraq, as it was fifty years earlier for at least a few years in Japan.<sup>30</sup>

Imposed constitution-making was opposed by the Shi'ite clerics under Sistani's leadership, and in the name of the classical democratic program of a freely elected, *sovereign* constitutional assembly, whose product would be ratified in a popular referendum.<sup>31</sup> This model was the classical one in democratic revolutions since the 18th century and its power over European democratic and leftist thought has been undiminished through much of the 20th century.<sup>32</sup> It was all the same striking that it was Shi'ite clergy who championed it in Iraq, even if given the demographic advantages of this population group, they hoped to benefit from it more than others. The November 15 Agreement and the making of the interim constitution under the name of the Transitional Administrative Law ("TAL") thus represented a compromise between the two constitutional models. Note, however, that unlike in Central Europe and South Africa, the compromise itself was not the result of negotiations (i.e., of "talks about talks") but was itself

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28. See, e.g., Andrew Arato, *From Interim to "Permanent" Constitution* (forthcoming), available at [http://www.law.nyu.edu/kingsburyb/fall05/globalization/Arato\\_Interim\\_Iraq.pdf](http://www.law.nyu.edu/kingsburyb/fall05/globalization/Arato_Interim_Iraq.pdf) [hereinafter Arato, *From Interim to "Permanent" Constitution*]; Arato, *Sistani v. Bush*, *supra* note 8.

29. This idea was clearly articulated by former national security advisor Brent Scowcroft, who opposed the war itself because of this very consideration. See Walter Gibbs, *Scowcroft Urges Wider Role for the U.N. in Postwar Iraq*, N.Y. TIMES, Apr. 9, 2003, at B6. In all my writings on Iraq, I insisted on this difficulty inherent in the idea of imposing democracy so that it turn out "the right way." Diamond confirms that both the delay of elections and the idea of imposed constitution making were (failed) attempts to deal with just this problem. See DIAMOND, *supra* note 1, at 48-49.

30. See KOSEKI SHOICHI, *THE BIRTH OF JAPAN'S POST WAR CONSTITUTION* (Ray A. Moore trans., 1997).

31. See Arato, *Sistani v. Bush*, *supra* note 8; DIAMOND, *supra* note 1.

32. See ARATO, *supra* note 7, at 237.

imposed. The November 15 agreements were presented and forced through in a coup-like fashion, and were not negotiated with Sistani, who denounced them, or even the religious Shi'ites on the GC close to him.<sup>33</sup> It is true that subsequently, through the intermediary of the United Nations, Sistani managed to get rid of one objectionable feature of the arrangement, the establishment of an appointed legislature before free elections. But other features objectionable to him, like a three province veto binding the will of the constituent assembly, were simultaneously added, again without real discussion or bargaining and could not be removed in spite of the strongest protests.<sup>34</sup>

With this said, the constitution-making formula did bring together important dimensions of the alternatives, favored by the Americans on the one side, and Sistani on the other. A two-stage structure, adopted from the new model discussed here, permitted imposition to survive during the first stage, the making of the interim constitution, and a freely elected constitutional assembly to dominate the second stage, the making of the permanent constitution. The process as a whole would be brought under procedural rules worked out in advance, presumably inhibiting interim power holders from assuming dictatorial authority. Ultimately, the new constitution would be rooted in free elections and a constitutional assembly that did not share powers with another legislature, but that assembly nevertheless would not be sovereign. Its work would be bound in advance by procedural rules, and controlled after the fact by a process of popular ratification. It should be remembered that Sistani himself sought such a popular ratification process, though certainly not in the form of strongly entrenched minority vetoes that were imposed by the interim constitution.

Interestingly, the compromise enshrined in the TAL, and protected by its very difficult amendment rule(s),<sup>35</sup> was never fully accepted by the relevant parties. Sistani denounced it at several stages and, in the end, managed to block Security Council recognition. That failure led some of the Kurds and their advocates to claim that they too were not bound by the TAL.<sup>36</sup> In fact, and without any enforcement process, the TAL, in spite of repeated violations, and in a very crude way regulated the subsequent process of transitional government formation and constitution-making. Both its strict application and its violations, however, produced pathologies that made the process a farcical version of the model, with results that have contributed much more to the problems of Iraqi society than to their solutions.

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33. See DIAMOND, *supra* note 1, at 51–52.

34. See *id.* at 173–75.

35. See Arato, *Interim Imposition*, *supra* note 8.

36. See GALBRAITH, *THE END OF IRAQ*, *supra* note 3, at 162.

## V. THE FOUR PATHOLOGIES

The new, emergent, what I call the post-sovereign paradigm constitution-making, emerged in Iraq because of the need to compromise two mutually exclusive projects: constitutional imposition by the occupying power and populist democratic constitution-making. As I already argued, the imposition of this compromise formula itself was unusual with respect to historical precedents. Its roots lay in what distinguished Iraq from other countries where the method was used: the possession of *de facto* political power not by a decrepit old regime, but by a new power, optimistic about the future and capable of asserting legitimacy claims that worked, at least initially, for some of the population. This power could have stopped itself from imposing only in the possession of a theory of what the new method of constitution-making entailed, and with strong convictions based upon it. There was either no such theory available,<sup>37</sup> or no such convictions, or other theories and convictions outweighing these were more important. Only insiders would know the weight of these factors, but the issue is ultimately interesting only for theorists. It may be more relevant here to speculate what could have been done, had there been both knowledge and willingness to neutralize the initially unfavorable starting point, in order to understand the spreading of the pathology.

### A. *The Pathology of Illegitimacy*

First and foremost, the occupying power could and should have removed itself from the picture as the referee of the process. It was the combination of that role with its presence *within* the bargaining, through important clients, as one of the important parties that brought the logic of imposition, present before the process, into its very heart. An international body of referees could and should have been allowed to form, and the procedural regulation of the process should have been ceded to this instance. This was certainly not done. The CPA remained both referee and party, with a U.N. special representative, initially Sergio de Mello, playing a very subordinate advisory role.

Assuming, however, that the United States was not going to defer to any other instance, since such policy would not have been consistent with the country's whole international posture during this period, the whole logic of imposition could nevertheless have been mitigated if the referee had been scrupulously fair and non-intrusive. On the contrary, especially under the leadership of Ambassa-

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37. While the interim constitution as an instrument was certainly known to the advisers of the CPA, and their legal associates, I have the strongest reasons to believe that the theoretical meaning of the paradigm within which it was to function was not well understood. If it had been, we would see some relevant signs in the literature. Not even Diamond, who pragmatically understands many of the potential gains involved, like the delay of permanent constitution-making until sovereignty is re-established, does not seem to understand the meaning and the significance of the model, and the minimum prerequisites for its non-pathological institutionalization.

dor J. Paul Bremer, the United States followed an almost classical imperial policy of exclusion and hierarchization, of trying to divide and conquer.

It was essential to the new method of constitution-making that pluralistic, consensual legitimacy replace democratic legitimacy in the first stage of the process. This is why the Round Tables tried very hard to include all the major contending forces of society in the bargaining process. Their logic was incompatible with revolutionary purges, including de-Nazification and de-Communization processes. In Iraq, however, a policy of de-Baathification, responsible for a general disorganization of state structures, was applied by the CPA also to the political bargaining process. In spite of the protestations of de Mello, when the GC was formed, not only all neo-Baathist, but all Arab Nationalist parties were excluded based on the consideration that they, too, could be vehicles for a Baath revival. That was certainly true, but it was also true that most sectors of the traditional Baath, including the old army leadership, were for a long time not included in the central power structure of the Saddam regime. When they were, the U.S. policy supported Iraq against Iran for example, and it is thus not entirely clear why it was in the U.S. interest to de-Baathify, or why Iran friendly Shi'ite organizations would be more prudent to include in the politically process. I will return to this question in the conclusion. But, in any case, the exclusion of Arab nationalists amounted, in large part, to Sunni exclusion, which was papered over by constructing the GC on the basis of strict ethnic quotas, rather than representatives of viable political organizations, contributing to the ethnicization of Iraqi politics. The excluded were not fooled, but rather driven underground helping to fuel the insurgency that never would have gained its later strength without the destruction of the army, de-Baathification and political exclusion.

Thus from the outset, the forums in charge of the first phase of the transition, and in particular constructing the interim constitution and forming the interim government, had a severe legitimacy problem. And they were less than legitimate not only to the completely excluded. The differential treatment of the included — their hierarchization in terms of role, importance and veto powers — made the process illegitimate in the eyes of many other groups that actively participated. All this amounted to a general pathology of *illegitimacy* that went beyond the excluded minority, and could not be made up for, as Larry Diamond seems to think, by any subsequent public relations effort of selling the TAL.<sup>38</sup> There was not only an excluded minority, but also a preferred minority: the Kurds, who were allowed to participate in the only genuine, extended bargaining process where the American occupiers treated their Iraqi partners as equals. Everyone else, including the majority Shi'ites whose groups were represented, continued to think of the process in terms of coups and manipulation, as their

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38. See DIAMOND, *supra* note 1, at 179–210. Diamond, to be fair, tells us that he was fully conscious of the legitimacy problems of a document drafted by two illegitimate bodies, the GC and the CPA, but seems to have thought that this could be somehow made up for subsequently. *Id.* at 62.

occasional protest actions fully demonstrate.<sup>39</sup> Most importantly, the agreement concerning the structure of the state was made in early January, in a series of separate meetings between the CPA and the Kurdish leadership, and the Shi'ite groups were not only forced to agree to the deal, but also to the procedural rules in the interim constitution that almost completely enshrined it against later alteration.<sup>40</sup>

It is important to stress the link between asymmetric inclusion, or exclusionary bargaining, and resulting *learning pathologies*. The deals made between the Kurds and the Americans were useless to the former in the face of future Arab majorities, unless enshrined by rigid procedural rules in the interim constitution. And this indeed was done by the very difficult amendment rule of the TAL that was to give one-quarter of the deputies of the constitutional assembly the ability to block all revisions, and the even more rigid ratification rule that would give two-thirds of the voters of three provinces a veto over the permanent constitution if enacted by the constitutional assembly. The latter was again pushed through in a coup-like fashion.<sup>41</sup> These devices, born of one specific political purpose, defeated yet another important point of the new multi-stage constitution-making paradigm: the facilitation of learning. In contrast to other interim constitutions of this type, the TAL was never altered until the end, when the amendment rule was used to grant only a one week extension for the constitution-making process. This type of rigidity then militated against significantly extending the deadline for the constitution-makers during the summer of 2003.

It is true that when it came to ratification, the three-province veto was initially relevant only to issues the Kurds wished to keep rigid and unchangeable. Presumably, a Shi'ite majority would never pass a text out of harmony with its interests, and the Sunni did not reliably have, as it was later seen, two-thirds of the voters in three provinces.<sup>42</sup> But under the all important domain of "federalism," the Kurds were conceded a, more or less, confederal and decentralized arrangement, with their own legislature, in effect army, and rights of nullification of most federal laws. Here the rigidity of the arrangements established a maximum of centralization beyond which it was no longer possible to go, even when it was seen that this bottom line can lead to break-up and civil war, in either order, if Shi'ites chose to imitate the Kurds.<sup>43</sup> This was the pathology of *learning*,

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39. According to Diamond, Bremer refused to deal with the Shi'ites as a group. *Id.* at 171. That would have been a sensible decision, if he had not already done so in the case of the Kurds.

40. See *id.* at 162–67; PHILLIPS, *supra* note 2; Arato, *From Interim to "Permanent" Constitution*, *supra* note 28, at 11.

41. DIAMOND, *supra* note 1, at 173–75.

42. In its renewed version, under the compromise of October 2005, the three-province veto may enable some Shi'ite factions like the Supreme Council for the Islamic Revolution in Iraq ("SCIRI") to veto a new constitutional compromise that may diminish the power of Southern provinces to form regions.

43. In a recent interview, Abdul Aziz al-Hakim, who first introduced the notion of a Shi'ite mega-region derailing the chances of a compromise with the Sunni in regards to the permanent constitution, explains

which subsequently led Shi'ite leaders to advocate not only formulas of region formation bordering on break-up, but also came perilously close to freezing the Sunni parts out of oil resources, thereby adding fuel mainly to the insurrection.

*B. Pathology of False Sequencing*

That initial imposition was not per se incompatible with broader inclusion can be seen by what occurred immediately after the January 2005 free elections, boycotted by Sunni parties.<sup>44</sup> On the correct assumption that in a single country district proportional representation system their low turnout would produce very little representation, they chose not to participate at all. Whether or not this was a mistake, and I alone seem to think it was not, complete Sunni exclusion from the constitutional assembly in the context of the raging Sunni insurrection finally mobilized the U.S. government, mainly Secretary Condoleezza Rice and Ambassador Zalmay Khalilzad, to actively promote Sunni inclusion in the constitution drafting committees. This radical shift, of course, shows that full inclusion would have been possible earlier. Indeed even more possible, because in 2003 when the Americans picked and chose their partners no one had electoral legitimacy, and all participants were or would have been on the same level. In 2005, however, when the victorious Shi'ite and Kurd parties finally acceded to American pressure, and allowed Sunni party politicians into the expanded constitutional commission of the assembly, they never accepted them on an equal basis since they did not have electoral legitimacy, and were only "imposed" by the Americans. In the end the Sunni representatives (supposedly, not true representatives!) could be legitimately bypassed, and agreements with them did not have to be kept.<sup>45</sup> The result: further intensification of the insurrection, which certainly could have been split had Sunni inclusion become a viable proposition. I call this the pathology of *false sequencing*.

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the obvious logic: One "regional confederacy" like that of the Kurds makes Iraq "unbalanced and unstable" (i.e., the Shi'ites too weak) if other regions do not establish similar confederacies. Thus, given the Kurdish regional government, there can be no retreat from Shi'ite plans to establish an ethnically based confederation. See Posting of Juan Cole, Informed Comment Blog, [http://www.juancole.com/2006\\_07\\_01\\_juanricole\\_archive.html](http://www.juancole.com/2006_07_01_juanricole_archive.html) (July 4, 2006, 06:35 EST) (citing from *Agence France Presses* and *Al-Zaman*).

44. For a much more detailed discussion see Arato, *From Interim to "Permanent" Constitution*, *supra* note 28.
45. Peter Galbraith, *Last Chance for Iraq*, N.Y. REV. BOOKS, Oct. 6, 2005, at 22. It is particularly unfortunate when an American author who should know better expresses this point of view. Galbraith, in fact, supported the most extreme ideas seeking to disenfranchise the Sunni, including even the notion concerning the three-province veto, when there was a chance the Sunni would avail themselves of it, that two-third votes rejecting the constitution would have to be of all eligible voters, an impossible condition to meet. To their credit, many Kurdish leaders refused to so misrepresent their own earlier positions, and the idea was eventually defeated in the National Assembly.



*C. The Pathology of Illegality*

In the end, in order to be able to produce a “permanent” constitution at all, the first three pathologies — legitimacy, learning, and sequencing — were re-deemed by a veritable pathology of *legality* with methods that were variously unethical, border-line legal, and clearly illegal, representing the most dramatic violation of the new constitution-making paradigm whose minimal purpose is to impose legality on the period and process of constitution-making itself.<sup>46</sup> It was clearly unethical to agree on a consensual decision-making rule in the expanded constitutional commission with the Sunnis, and then simply repudiate the rule and offer a draft to parliament on the basis of a majority decision in quite another forum, the meeting of political principals that excluded the Sunni altogether. To be very charitable, moreover, it was highly unusual, and “legal” only in terms of the most stupidly literal reading of the TAL not to allow the National (Constitutional) Assembly to vote on the draft submitted, allowed by the fact that the word “vote” was not mentioned, but only the word “write.”<sup>47</sup> How does an assembly write anything if not by voting on a text written by smaller groups? Finally, it was clearly illegal, many times over, to keep amending the text of the constitution after the final deadline of August 22, 2005, even after the distribution of a text to the prospective voters in a referendum who never could have known the final compromise that the text contained concerning future constitutional amendments. It is true, of course, that it is that compromise (false sequencing again!) that put Sunni inclusion on the agenda once again. But the cost for accomplishing that worthwhile goal in this particular case, if it will be accomplished in the end, will be nevertheless highly significant. It is hard to believe that to any Iraqi a constitution is now any more than a piece of paper, one that can be used in any way a ruler considers expedient at any given time. Of course that was always the situation in Iraq, historically, but the whole point of the new approach to constitution-making should have been to introduce quite the opposite political mentality.

In the end, it took many months to form a National Unity Government, at least in name, starting the clock (four months) on yet another period of possible

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46. On the making of the supposedly permanent constitution, see the excellent reports of Nathan J. Brown for the Carnegie Endowment. See, e.g., NATHAN J. BROWN, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, IRAQ'S CONSTITUTIONAL PROCESS PLUNGES AHEAD (2005), available at <http://www.carnegieendowment.org/files/PO19Brown.pdf>; NATHAN J. BROWN, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, IRAQ'S CONSTITUTIONAL CONUNDRUM (2005), available at [http://www.carnegieendowment.org/files/brown8\\_314.pdf](http://www.carnegieendowment.org/files/brown8_314.pdf); NATHAN J. BROWN, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE FINAL DRAFT OF THE IRAQI CONSTITUTION: ANALYSIS AND COMMENTARY (2005), available at <http://www.carnegieendowment.org/files/FinalDraftSept16.pdf>; see also INT'L CRISIS GROUP, IRAQ: DON'T RUSH THE CONSTITUTION, MIDDLE EAST REPORT No. 42 (2005); INT'L CRISIS GROUP, UNMAKING IRAQ: A CONSTITUTIONAL PROCESS GONE AWRY MIDDLE EAST BRIEFING No. 19 (2005).

47. “The National Assembly shall write the draft of the permanent constitution by no later than 15 August 2005.” Transitional Admin. L. art. LX.

constitutional revisions. The Iraqi National Accord, a Sunni block dominated by the Iraqi Islamic Party, is in this government (though again not the Arab nationalists!) and it has been offered obviously some kind of compromise formula on amnesty and Sunni inclusion. The pressing questions are whether it will be offered a genuine compromise on region formation and oil resources that, and whether the mechanism in place, held over from the TAL, including a (now explicit) parliamentary vote and the two-thirds veto would allow any such compromise, acceptable to enough insurrectionists to matter to be approved. I remain very skeptical, even if the amnesty proposal turns out to be more genuine and more inclusive than reported in the press. If there is not a constitutional formula acceptable to all sides, or if it is vetoed by using the procedural rules in place by a Shi'ite or, less likely, Kurdish faction, there will not be the slightest prospect of ending the civil war even with a relatively broad offer of amnesty. With the presence of the American forces, who are there in effect to protect it from the consequences of its own acts, the government side will most likely either not offer an acceptable proposal, or will not be in position to get it accepted among its own allies, and possibly both: offering a proposal in the end unacceptable both to its allies and to its current enemies.

## VI. CONCLUSION

So I predict<sup>48</sup> a negative outcome, based on the freezing of confederal structures by the TAL (pathology of learning), based on an exclusionary process of bargaining (pathology of legitimacy), that could have been avoided if Sunni groups were brought in from the outset as they were later on (pathology of sequencing). All these pathologies were obviously linked to the dimension of imposition in the process, but we should clarify exactly what role imposition played. There was imposition, but was the source of the pathologies the wrong-headedness, the *manner* and *content*, rather than the *fact* of the imposition? After all, if Sunni groups were brought in, even with the United States as the main referee, and if the process was kept fair and consensual, legitimacy could have been generated, and the parties probably would not have agreed to a confederal arrangement regarding Kurdistan, but would have perhaps compromised around a version of provincial federalism with some special autonomy rights for the Kurds. That arrangement would not have required extreme insulation by amendment and ratification rules (indeed the Kurds themselves would have probably wished to keep it open and amend it in the future), thus no learning problems would have resulted, and the TAL could have been improved on the basis of experience.

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48. The prediction is now a description. But I first made it when I originally submitted the article, during the summer of 2006, and even earlier in my various editorials for Juan Cole's website, "Informed Comment," in 2005. See, e.g., Andrew Arato, Election, Government Formation and the Question of Historic Compromise in Iraq (Dec. 12, 2005), <http://www.juancole.com/2005/12/arato-guest-editorial-on-election.html>.

The making of the permanent constitution would not have had to be so rushed, with an amended TAL perhaps serving for an additional six months. More legitimate, it could have been considered more worthy of legal enforcement, and the directive of the TAL to set up a Supreme Court capable of constitutional review could have been followed, something that did not happen in the actual case. In any case, a permanent constitution could have then been passed without blatant illegalities.

Was, however, U.S. imposition really free to avoid the pathologies caused by imposition? To answer the question, we have to return to the context before the constitution-making process even began.

We know that the destruction of the Iraqi army and de-Baathification could be explained in a single, convenient phrase: state destruction, that brought the United States into violent conflict with Sunni elites, and nationalism. Once that happened, Sunni inclusion was probably very difficult to even try *until* both sides learned the bitter lessons of exclusion, when the pathology of sequencing could not be avoided. But was the destruction of the state necessary? It would probably be wrong to blame the relevant moves on the advice of Iraqi exiles alone, who were, of course, deeply interested parties. Another way of asking the question is whether the United States could have simply removed the Saddam government, and abolished the regime without attacking the Iraqi state.

Three factors in my view made this unlikely, though, of course, not impossible. First, the insufficient differentiation of regime and state structures in an authoritarian state such as Iraq meant that attacking the regime meant attacking the state as well. Second, the insufficient differentiation of state and nation meant that America's long-standing opposition to Arab nationalism (probably obsolete in the age of radical Islamic politics), and the inability to distinguish this on both sides from Iraqi nationalism, meant also very strong hostility to state elites.<sup>49</sup> And third, the fact that America's war was an aggressive one made it impossible for state elites and nationalist groupings not to mobilize against the occupation, whatever their previous attitude to the Saddam regime. Thus the aggressive nature of the war, instead of helping the differentiation of regime, state, and nation, tended to drive them together. As a result, statist and nationalist elites, to whom the overthrow of the regime was not a "liberation," could not be easily trusted by the occupiers, who then resolutely decided to include only

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49. Historically, Arab nationalism in Iraq has meant Sunni centered, pan-Arab conceptions, while Iraqi nationalism concentrated on the country's own political community primarily composed of mainly Arabs, but also Kurds. The Communist Party's and President Kassim's nationalism were Iraqi, whereas the Baath's was Arab. During the late stages of Saddam's rule, however, concern for Arab nationalism declined, and nationalism became state-centered, somewhat blending the categories, without, however, diminishing Sunni dominance. See HANNA BATATU, *THE OLD SOCIAL CLASSES AND THE REVOLUTIONARY MOVEMENTS OF IRAQ: A STUDY OF IRAQ'S OLD LANDED AND COMMERCIAL CLASSES AND OF ITS COMMUNISTS, BA'ATHISTS, AND FREE OFFICERS* (1978) for one of the best descriptions of the early history of the two forms.

previous outsiders, and to neglect and reject all important, intermediate strata that were previously not in explicit opposition to the regime.

Yes, state elites should have been spared to the greatest extent possible; the campaign against Arab nationalism should have been abandoned; and very important concessions should have been offered to those who felt from the outset that the American war is anything but a liberation. But all this was admittedly very difficult in the midst of a conflict and the propaganda war against a supposedly “totalitarian” regime that made it possible. There was also the question of previously excluded social groups and their actual or potential elites. Indeed, the Shi’ite majority and the Kurds may have soon mobilized against any concessions to the established state. With that said, a much more careful political balance among ideologies and groups, without the over-ethnicization that in fact occurred, could have supplied the answer, if the problem itself was recognized. But it was not.

In summary, three factors — the nature of the Saddam regime; American historical opposition to regional, i.e., Arab, nationalism; and the aggressive nature of the war — all conspired to turn the strategy of imposition into an especially mindless one, under the circumstances. These three factors were given, and could have been in large part neutralized only by the kind of internationalization entirely unacceptable to this particular American government. Whether or not there was theoretical knowledge and moral conviction available to institute a version of post-sovereign constitution-making that would have had a chance to contribute to the rebuilding of Iraq, the three factors worked against the possibility.

But did they make it impossible? Knowing only what happened and not what could have happened if things were done differently, we should nevertheless keep in mind that it is possible that the war itself would have produced the insurrection, that in itself would have made any political reconstruction under an occupation impossible. But it is also possible that a more reflective, more self-critical American policy could have changed things, and would have both led to a less pathological process of constitution-making, and also to a context in which success would have been possible.

The big question, resembling the one about the original sin, is when such a policy should have commenced. The obvious answer is: the earlier the better. Again, based on the recognition that an aggressive American war means a confrontation with Arab and probably also Iraqi nationalism, the earliest start would have meant internationalization of the occupation and its political control from the outset. A little later, de-Baathification and the dissolution of the Iraqi military could have still been avoided. Later still, the constitution-making process could have been made inclusive and fair. Each of these steps would have implied the others, presumably. Each would have given the next a better chance to succeed. Beginning with the constitution-making process would have been

very late both from the point of view of instituting it in a proper manner, and the chances of its success, but perhaps not impossibly late. Again, what was needed was a serious reflection concerning the factors that conspired to turn nationalism against the whole process, as well as deeper understanding of the normative requirements of the model of constitution-making that was adopted. Neither happened, and the disastrous consequences are there for all to see. Constitution, and constitution-making, instead of becoming tools of crisis management, and symbols of future political stability and identity, have become instead sources of special grievance for the excluded, a significant part of the fuel for the fires of a civil war.