

*Gun Barrel Democracy? Democratic Constitutionalism Following Military
Occupation: Reflections on the US Experience in Japan, Germany, Afghanistan and
Iraq*

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Let me start with two vignettes. In 1943, arguably before it was even clear that the Allies would win the Second World War, the US government set up training programs at the University of Virginia and at Yale to provide those who might later have to oversee transitions from authoritarianism to democracy in post-conflict Japan and Germany with the language and administrative skills they would need to do so efficiently. Sixty years later, we read in the *New York Times* of a senior US staff officer noting that on entering Baghdad last year, his division had no further orders whatsoever -- no instructions about where to go, who to see, how or what to occupy, what to do.¹

It is the level of forethought and preparedness and level-headedness -- admittedly, amongst other things -- revealed by the US's administrator-training program in 1943 that helped make the nation-building and democratization experiments in Japan and Germany so successful. And it is, I fear, the level of unpreparedness and muddle-headedness that left that division without orders in Baghdad that puts at great risk our nation-building and democratization experiments in Iraq and Afghanistan. But our ineptness with regard to these practical, local and immediate issues is much less significant than our *conceptual*

¹ Michael Doyle mentions these two episodes in his contribution to Carnegie Council on Ethics and International Affairs, *Multilateral Strategies to Promote Democracy: Edited Transcript of High-Level Panel* (New York: Carnegie Council, 2003), p. 39.

unpreparedness, a shortage of both analysis and imagination about the possibility of different, equally legitimate shapes democratic constitutionalism might take in these places.

That is, I think that our challenge in promoting post-conflict democracy in Iraq and Afghanistan is two-fold: first, we may both know too little and have made too many mistaken assumptions about the workings of politics, economics, culture and religion in these places; second, and more important, we may have too undifferentiated and unsophisticated a conception of what democracy and democratic constitutionalism are and can be under different cultural circumstances. What this means is that the democratization projects in Afghanistan and Iraq would not suddenly become feasible if only we could get better information about these places; there would still remain the challenge of accepting that democracy and democratic constitutionalism as we have come to know them might simply be bad fits for these places.

Bearing this dual difficulty in mind, my aim in today's talk is to think about the odds that our occupations of Iraq and Afghanistan will lead to the sort of happy outcome that the post-war occupations of Japan and Germany did, and also about what might be done to improve those odds. I am going to try to avoid the question of whether we should be in Iraq and Afghanistan at all, because it is rather too late for that. Whatever one's view of the need to intervene militarily in either Afghanistan or Iraq, we can all agree that a democratic nation that chooses to intervene to overthrow anti-democratic regimes surely carries the burden of leaving some sort of stable and (ideally) democratic constitutionalist state behind it. The minimum required is to provide for the rule of law and some sort of consent-based government. But I do not believe the Bush administration

took the challenges of doing this sufficiently seriously, and I think that it made assumptions about these regions and countries that were badly flawed.

The exercise for this lecture is to put ourselves in the position of planners for post-war Afghanistan and Iraq, and to ask what sound, realistic, assumptions would have been, and what, on that basis, we should have aspired to accomplish. I think that if we can develop a better-informed and more nuanced understanding of the problem of establishing constitutional democracy in places that have no history of such institutions, we will be in a better position to pick up the pieces of a failing policy and consider what realistic options there are for political and legal re-engineering of the existing interim constitutional settlements in Afghanistan and Iraq.

I therefore want to focus on three related issues in this talk. First, I want to talk about the issue of democratic constitutionalism itself -- about the different meanings it has and could have in different places. I'm going to expand on this point substantially in the first part of this talk, but let me just quickly lay out my basic claim here: we need to be very careful about mistaking the trappings of democratic constitutionalism for its substance. Constitutional documents and elections alone do not make true democratic constitutionalism. My fear is that too many of our current war planners are improvising in their post-war (if that is the correct term) planning, and mistaking the democratic superstructure for the democratic base.

My second point develops from the first. I want to examine the similarities and differences (mostly glaring differences, it seems to me) between the cultural and military contexts in which democratization took place in post-war Japan and Germany, on the one hand, and in which it is hoped to take place in Iraq and Afghanistan. I believe -- and I

know I am not the first to make this point -- that some of us too easily assume that what we did in the first two democratic reconstructions we can do in the second two, and in the same sorts of ways. I think that this view is dangerously incorrect. What I want to argue is that the attempts to democratize Afghanistan and Iraq are *sui generis*, and while we would be silly not to learn from the history of successful democratization endeavors, I think that the main lesson may be that we simply may not be able to learn from those earlier episodes what we should do at the present time.

The link between my first and second points is fairly simple. I think a good case can be made that part of the reason that Japan and Germany were successfully democratized is that both exhibited, in one form or another, the stirrings of a base for democratic constitutionalism, and I am not convinced that a similar base exists in either Iraq or Afghanistan. My third point will expand on the second, and consider the challenges our nation-builders face in creating constitutional democracy in specifically Islamic contexts.

1. The Nature of Democratic Constitutionalism

I want to start on ground with which I can claim some familiarity. While I confess that I am not nearly as well-versed in the history and politics of the Middle East and Central Asia as I would like to be, I have, however, worked for many years on the theory and practice of democratic constitutionalism, both in the United States and in other parts of the world. Some years ago I directed an ambitious ACLS comparative constitutionalism project for the Ford Foundation. We organized conferences that attempted to understand what constitutionalism meant around the world. Most of the

participants came from outside of the European and North American world that takes for granted an Enlightenment view of constitutionalism, one that sees the process as the more or less inevitable result of human progress in identifying and institutionalizing the fundamental principles of democratic government.

One of the participants in the project was the Kenyan lawyer H.W.O. Okoth-Ogendo. He began the essay he contributed to the project by observing that the dilemma of African constitutionalism is that “no body of *constitutional law or principles of constitutionalism* appears to be developing in Africa, and might well fail to do so . . . The paradox lies in the simultaneous existence of what appears as a clear commitment by African political elites to the idea of the constitution and an equally clear rejection of the classical or at any rate liberal democratic notion of constitutionalism.”² What Okoth-Ogendo is getting at is that “[t]he process of *constitution making* . . . cannot be regarded as a simple reproduction of some basic principles that particular societies may have found operational.”³ Like many constitutionalists in new democracies- and our own new democracy was no exception in its time- Okoth-Ogendo regards constitutionalism as something to be achieved, not announced; he regards it as a *struggle*. He writes that even if there is:

. . . broad agreement . . . on the essence of constitutionalism, fidelity to the principle that the exercise of state power must seek to advance the ends of society, that attainment has not been an easy matter. The political history of many societies is replete with struggles for an optimal balance between the few on whom constitutions confer power and the vast majority for whose benefit it is supposed to be exercised. What is clear is that in no society has that balance been achieved through the promulgation of a constitution, per se.⁴

² H.W.O. Okoth-Ogendo, “???” in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, Steven C. Wheatley, eds., *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993), p. 66.

³ Okoth-Ogendo, “???” p. 67.

⁴ Okoth-Ogendo, “???” pp.79-80

The contributions of Okoth-Ogondo and others involved in the project left me convinced that the Enlightenment interpretation did not provide a sufficiently common basis for understanding principles and behaviors thought “constitutional” by the diverse peoples and cultures outside the world of the North Atlantic. Accordingly, in the collection of essays, *Constitutionalism and Democracy*, that summed up the ACLS conferences on constitutionalism we concluded:

Over the course of the project, it became clear that there were two dramatically differing thrusts in defining constitutionalism. The first led toward a highly formalistic view that relied principally on the structural features of constitutional documents. The second tended to regard the constitutionalism of a particular society as a dynamic process, rooted in underlying, local social realities.⁵

This is a bit of a generalization, but the two poles were represented by European and American Enlightenment constitutional formalism on the one hand, and the sort of non-Western, developing country thinking represented by Okoth-Ogondo on the other. Ultimately, I think we found ourselves most persuaded by Okoth-Ogondo and his colleagues, with the result that in the Introduction to our book we claimed that “constitutionalism is a dynamic, political process, rather than a fixed mode of distributing power, rights, and duties”; “[c]onstitutional legitimacy thus is more often validated by political and social realities than by formal legal criteria”; and “constitutionalism, if it is to emerge, must arise out of such indigenous political controversies, and that its final form [is] not necessarily predictable.”⁶ We came down, then, strongly in the realist, functionalist camp, although this did not mean we thought that a somewhat overarching conception of democratic constitutionalism was impossible. On the contrary, we settled on this “approximate definition” of it:

⁵ Greenberg, Katz, Oliviero and Wheatley, eds., *Constitutionalism and Democracy*, p.xvii

⁶ Greenberg, Katz, Oliviero and Wheatley, eds., *Constitutionalism and Democracy*, p.xix.

[Democratic constitutionalism is] a commitment to limitations on ordinary political power; it revolves around a political process, one that overlaps with democracy in seeking to balance state power and individual and collective rights; it draws on particular cultural and historical contexts from which it emanates; and it resides in public consciousness.⁷

Later work on the development of constitutionalism -- this time in post-Communist East Central Europe -- reinforced my conviction that constitutionalism is a continuing political and social process, issuing out of contestation and admitting few absolutes. This is how I put the matter then:

[S]horn of universals, what is constitutionalism? To my mind, if there is an essence of constitutionalism (and I believe there is) it is not to be found in the structure of the constitutional arrangements and institutions that are established in a particular country. Rather, it is to be found in the *practice* of constitutionalism, in a form of politics that is based on the notion of respect for the rule of law, in which the government, however it is configured, reflects the basic values and aspirations of the community.

That is to say that generic constitutionalism consists in a process within a society by which the community commits itself to the rule of law, specifies its basic values, and agrees to abide by a legal/institutional structure which guarantees that formal social institutions will respect the agreed-upon values.⁸

And while I don't want to harp on this point, I do want to read you one more expression of this view.

In her wonderful 1987 AALS talk on "The Idea of a Constitution," Hanna Fenichel Pitkin does an excellent job of expressing the sense of the matter I have been driving at. Hers is a functional notion of constitutions that works against the idealist reification of the idea of constitutionalism. She argues that:

. . . . constitutions are *made*, not found. . . . [T]hey are human creations, products of convention, choice, the specific history of a particular people, and (almost always) a political struggle in which some win and others lose. . . . one might even want to argue that our constitution is more something we do than something we make: we (re)shape it all the time through our collective activity. Our

⁷ Greenberg, Katz, Oliviero and Wheatley, eds., *Constitutionalism and Democracy*, p.xxi.

⁸ Stanley N. Katz, *Constitutionalism in East Central Europe: Some Negative Lessons From the American Experience* (Providence: Berghen Books, 1994), p. 14.

constitution is (what is relatively stable in) our activity; a stranger learns its principles by watching our conduct.⁹

This is a highly realistic account that posits a tight fit between constitutional behavior and constitutionalism, and it seems compelling to me as an account of the U.S. constitutional experience, as well as a basis for thinking about comparative constitutionalism. Each society must, I think, develop its own culture of constitutionalism. Such national cultures will indeed bear certain generic similarities to one another, but they will be living cultures, constantly evolving in dialectical tension with the larger cultures of which they are a part. Almost always successful constitutionalism represents the conclusion of long domestic struggle for democracy and the rule of law. It does not come easily.

I imagine that you can see by now where this argument is going. If constitutionalism is the difficult, contextual, contested process I have been arguing it is, then we are making a very serious mistake if we think constitutionalism can be the gift of one country and one culture to another. And yet there have been many worrying indications that this is just how the Bush administration is approaching the building of democratic constitutionalism in Iraq and Afghanistan. Even though there may now be some reason for optimism on this score, I am on the whole pessimistic and would like to show you why I think they are taking the wrong way to go about building democratic constitutionalism abroad.

Consider the “Future of Iraq” conference convened by the US Department of State in 2002 in Cobham, England. The aim of this project was “to bring together Iraqi experts in different fields who could formulate plans for Iraq on the proverbial ‘day after.’” One of the groups set to work at this conference was the “Democratic Principles

⁹Hanna F. Pitkin, “The Idea of a Constitution,” *Journal of Legal Education*, 1987, vol. 37, p. 167

Working Group,” and in July 2003 the *Journal of Democracy* published excerpts of its report about what an Iraqi constitution should look like. There is some sensible stuff in this report. It notes that the “governing idea behind any Iraqi constitution should be that power is not to be trusted; it always needs to be checked,” and that the “sources and symbols of authority, which are often spelled out in constitutional documents, are less important than these checks and balances on the exercise of power.”¹⁰ These general concerns seem very well-founded to me; if you are a constitutionalist trained in an American law school, I don’t think you can get away from a commitment that looks something very like this. But when the “Democratic Principles Working Group” spells out in a little more detail what Iraqi constitutionalism would look like, I begin to feel a little uneasy. Take this, for example:

A new Iraqi constitution ... must rest on the concept of the separation of powers among the legislative, the judiciary, and the executive, and it must set forth the relations of these three powers in practical ways. To deter abuse, the guardian of the Constitution must not be the Executive or Legislative branch of the state. The only Guardian of the Constitution is the Supreme Court of Iraq, consisting of a Chief Justice and other judges. This court stands at the apex of a single judicial system for the whole country (inclusive of all its regions, provinces and/or governorates). This Supreme Court is the final court of appeal in the land on all constitutional questions.¹¹

This constitution will also contain a bill of rights, “the goal of which would be to define those inviolable human rights of all Iraqi citizens, irrespective of their sex, ethnic background, nationality, religion, sect, and political beliefs. ... The point of a bill of rights is to guarantee the equal protection of all individuals, regardless of sex, ethnicity, nationality or religion.”

¹⁰ Democratic Principles Working Group, “Iraqi Opposition Report on the Transition to Democracy,” *Journal of Democracy*, July 2003, Vol. 14/3, p. 19.

¹¹ Democratic Principles Working Group, “Iraqi Opposition Report,” pp. 19-20.

This should sound familiar to all of us. It mimics the US constitution, with some proper names changed. Now, this is not to say that separation of powers might not be appropriate for Iraq, nor that a bill of rights would be a bad thing, nor that the judiciary should not be supreme. But if the constitutional provisions one suggests for Iraq are indistinguishable from our own constitutional provisions, that should give us pause. The danger is twofold: first, in assuming that all constitutions ought to be modeled on our own; and second, in thinking that simply the writing of constitutions in states emerging from authoritarianism is sufficient to assure progress toward democracy. We have been here before in recent years. Anyone involved in attempts to help post-communist nations draft new constitutions in the 1990s will remember the inability of too many American legal experts to contemplate alternatives to separation of powers, presidential government, and judicial review.

More important, new constitutions, whatever their character, may constitute no more than false symbols of progress toward institutionalizing democracy. This is what Walter Murphy terms “constitutionism” – nothing more than formal adherence to constitutional textualism. Constitutionism is frequently in fact the false flag of constitutionalism, all too recognizable in the recent past from the practice of Communist countries, whose constitutions were formally beautiful documents that were unenforceable and had no meaningful relationship to the limitation of governmental authority over individuals.

The 2002 Cobham Conference seems to me to illustrate perfectly the Bush Administration’s initial approach to democracy-building in Iraq. As Marina Ottaway has put it, “[b]efore the invasion, officials of the Bush administration envisioned the new

Iraqi constitution as a state-of-the-art document written largely by experts and bestowed on the country after a long period of occupation.”¹² To be fair, this is not altogether how things have transpired. As Ottaway goes on to note, that first, constitution-bestowing plan was “short lived,” and as “the difficulty of the occupation became evident, the Coalition Provisional Authority accepted the need for a faster return of sovereignty to Iraq and realized that Iraqis would have to be involved from the outset in writing the constitution.”¹³

And some members of the State Department have indicated an awareness of the importance of indigenizing constitutionalism. At a conference in the middle of last year, this one organized by the Center for the Study of Islam and Democracy, Lorne Craner, the State Department’s Assistant Secretary of State for Democracy, Human Rights, and Labor had this to say: “[W]hen I hear people accusing the U.S. of wanting to impose our model of democracy on Iraq or other countries, I laugh. We know that such an approach is doomed to failure. The United States cannot impose democracy on a country. We can only help those who want to bring democracy to their own country. Democracy must come from within.”¹⁴ And at the same conference, another State Department speaker, William J. Burns, the Assistant Secretary for Near Eastern Affairs, noted that “enduring democratic change and economic modernization must be driven from within Arab

¹² Marina Ottaway, “An Effective Iraqi Constitution Cannot Be Imposed by Fiat,” *The Chronicle of Higher Education*, February 20 2004.

¹³ Ottaway, “An Effective Iraqi Constitution.”

¹⁴ Lorne Craner, “Building Democracy in the Muslim World,” presented at the Center for Islam and Democracy’s Fourth Annual Conference, Washington DC, May 16 2003 (accessed online).

societies. They can't be imposed from without" and that "[t]here's no single path by which countries achieve democracy, no one-size-fits-all prescription."¹⁵

These are encouraging attitudes, to be sure, and I think they do provide some grounds for hope that we may not commit the error of trying either to export or impose democratic constitutionalism, and will instead simply do everything we can to make possible the encouragement of those elements of constitutionalism that have a chance of taking root in Iraq and Afghanistan. And while there is still a very long and hard road to tread, I think that some of what has actually happened is somewhat propitious as well. The Transitional Administrative Law -- the legal arrangement that will serve as Iraq's Constitution until the transitional period is over -- has taken much more account of the society to which it is going to apply than it originally looked like it would, and certainly looks like a more Iraqi document than what I imagine the "Democratic Principles Working Group" might, at its worst, have presented Iraq with. Most crucially, the TAL acknowledges the importance of Islam to Iraqis. Article 7(A) of the First Chapter reads: "Islam is the official religion of the State and is to be considered a source of legislation. No law that contradicts the universally agreed tenets of Islam, the principles of democracy, or the rights cited in Chapter Two of this Law may be enacted during the transitional period. This Law respects the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice." But, as I will try to show in the third section of this lecture, there may be less here than meets the eye. Who is to say which laws "contradict the tenets of

¹⁵ William F. Burns, "Democratic Change and American Policy in the Middle East," presented at the Center for Islam and Democracy's Fourth Annual Conference, Washington DC, May 16 2003 (accessed online).

Islam,” and what those tenets are? I hope that the United States will not foster a mere constitutionism in place of a genuine constitutionalism in Iraq.

Nonetheless, we would do well to bear in mind the sobering words of James Dobbins in testimony before the Senate Committee on Foreign Relations this past March. Dobbins is more concerned with the sorts of practical issues I’ll be getting to in the next part of this talk, but the spirit of his caution applies just as much to the more abstract issues of democratic constitutionalism I have been discussing. He notes that there is a depressing tendency for the US to go wrong in the same ways over and over again in its attempts to foster democracy around the world:

[S]uccessive administrations have treated each new [nation-building] mission as if it were the first and, more importantly, as if it were the last. Each time we have sent out new people to face old problems, and seen them make old mistakes. Each time we have dissipated accumulated expertise after an operation has been concluded, failing to study the lessons and integrate the results in our doctrine, training and future planning, or to retrain and make use of the experienced personnel in ways that ensure their availability for the next mission when it arrives.¹⁶

My conclusion, then, and this will not shock anyone, I suspect, is that even though there are at least some indications that we are thinking about the issue of encouraging democratic constitutionalism in the right way, there is still room for grave concern. I am inclined to think that the glass is half-empty, but we shall see.

2. *Germany and Japan vs. Afghanistan and Iraq*

I want to turn now to the second issue I mentioned -- whether the nation-building and democratization projects in Germany and Japan can and should serve as models for our actions in Afghanistan and Iraq. It takes no great acumen to see why Japan and

¹⁶ James Dobbins, “Statement before the Committee on Foreign Relations, United States Senate,” March 3 2004, p. 2.

Germany might be held up as examples in this regard. Japan and Germany waged a declared war against the US, were brutally defeated by the US and her allies, and yet became functioning, prosperous liberal democracies and (at least until recently) amongst our staunchest allies and supporters. If we could achieve in Afghanistan and Iraq what was achieved in Germany and Japan, we would be doing very well indeed.

Moreover, to hear George W. Bush tell it, we *are* doing as well -- at least in Iraq -- as we did in Germany and Japan. During his trip to the United Kingdom in November last year, President Bush described developments in Iraq in glowing terms.

A new Iraqi police force protects the people, instead of bullying them. More than 150 Iraqi newspapers are now in circulation, printing what they choose, not what they're ordered. Schools are open with textbooks free of propaganda. Hospitals are functioning and are well-supplied. Iraq has a new currency, the first battalion of a new army, representative local governments, and a Governing Council with an aggressive timetable for national sovereignty.

He then went on to say: "This is substantial progress. And much of it has proceeded faster than similar efforts in Germany and Japan after World War II."¹⁷ Now, if we give these words their strictest and most literal interpretation, there may be some truth to them. There may not have been 150 newspapers in Japan or Germany six months after the surrender; and new Japanese and German army battalions had certainly not been formed, for good and obvious reasons.

But the spirit of Bush's claim is worrying -- it seems either deeply disingenuous, or evidence of a severe misapprehension of the historical record. As the distinguished historian of postwar Japan, John Dower, has noted of this speech, it represents a "murky use of history," for "what is happening in Iraq presents a stunning and

¹⁷ President Bush Discusses Iraq Policy at Whitehall Palace in London: Remarks by the President at Whitehall Palace, Royal Banqueting House-Whitehall Palace, London, England, November 19 2003 (accessed online)

fundamental contrast to what took place in occupied Japan and Germany over half a century ago, and not a positive one.”¹⁸ If President Bush intended to imply that the democratization projects in Afghanistan and Iraq are likely to follow the course of those in Japan and Germany, and if he intends those efforts to serve as models for our current efforts, we will not succeed.

Let me say just a few words first about the post-war characteristics and situations of Japan and Germany. The economic and political reconstructions of these countries took place after a war fought by a genuine international coalition. There really was an Axis of Evil then, and the victory of the Allies was generally acknowledged to be the victory of the good over the bad, of democracy over dictatorship. There was general approval of the Franklin Delano Roosevelt’s conception of “Four Freedoms” as universal truths that should guide the reconstruction of the world. Japan and Germany were both thoroughly beaten militarily, their surrenders were unconditional, and their citizens did not contest the legitimacy of their occupations. Not a single instance of violence against occupying forces in Japan, for instance, was recorded. Japan and Germany were highly homogeneous, “natural” nations -- or at least as natural as nations come. Weimar Germany had developed a quite sophisticated constitutional democratic political system after World War I, and even Japan, before the takeover of the militarists, contained democratic and civil society institutions consistent with the rather long traditions of Meiji constitutionalism. And, as I have already noted, the US had been making preparations to administer post-conflict Japan and Germany for several years before the event.

Are Afghanistan and Iraq as nations anything like Germany and Japan? Is the situation in which the United States finds itself in Afghanistan and Iraq in any way

¹⁸ John Dower, “History in the Remaking,” *Los Angeles Times*, December 8 2003.

comparable? I do not see how a knowledgeable person could think so. To start with, although the US has claimed to head a coalition, not everyone is convinced that this is a genuine coalition. Surely, no one would claim the “coalition of the willing” bears any strong resemblance to that of the Allies in World War II – and never mind that the number of coalition members has started to decline recently. So too, it seems that the universal sense of justice following World War II cannot be matched by the perception of justice of the wars in Iraq and Afghanistan – either within the “liberated” countries or across the community of nations. In Iraq, especially, the perception that the United States is an aggressor nation, and that it is acting unjustly, is growing every day.

I do not have time this afternoon to discuss this aspect of the problem, but I think one of our difficulties is both public and governmental confusion over when the war against tyrants (Saddam Hussein and the Taliban) ends and when the “war” against terrorism begins. In the late 1940s hostilities reached a definitive end, and democratic reconstruction was clearly a logical successor phase. But the wars in Iraq and Afghanistan have not ended, and there is now no clear distinction between the anti-terrorist project and the democracy-building project. This is entirely new territory for U.S. nation builders, who have thus far failed to articulate their goals honestly and clearly. On top of this conceptual difficulty, the facts on the ground are that Afghanistan and Iraq are both riven and fractured nations, cobbled-together, multi-ethnic post-colonial inventions which have almost no history or tradition of representative or consultative institutions or civil society. So it seems to me that even a cursory comparison of Iraq and Afghanistan and Japan and Germany suggests that it is utterly misleading to mention them in the same breath.

On the other hand, James Dobbins and a group of collaborators have convincingly argued, on the basis of a thorough review of nation-building and democratization efforts since World War II, that more important to success than the characteristics of the country being democratized is the material commitment of the country attempting to democratize it. What principally distinguishes more from less successful cases of democratization, they claim, “is the level of effort the United States and the international community put into ... democratic transformations.” They demonstrate quantitatively the huge commitment of continuing military occupation forces and economic investment the U.S. committed to reconstruction in Germany and Japan. Does this suggest that the obstacles it seems Iraq and Afghanistan will face on the road to democratization may be overcome if the United States and the international community put enough effort into supporting the democratization process?

The first problem here is that it looks like the bulk of any effort that goes into supporting the democratization effort will have to come from the United States, not only because the missions in Afghanistan and Iraq were very largely carried out by the US (of some 160 000 troops in Iraq, almost 140 000 are American), but because the US is rather jealously guarding its prerogative to decide unilaterally how matters in these countries should be managed. We will see soon enough how genuine our proffer of authority to the United Nations is – and whether the U.N. will accept it. There is less support and input from the international community into the democratization process than there needs to be.

This might not pose too serious a problem if the US were itself prepared to shoulder the extremely significant burdens that democratization processes entail. But it is not clear that we are. There are many ways to suggest that this is the case, but one is

especially instructive. At the end of World War II, the number of US soldiers stationed in Germany stood at 100 for every thousand Germans, and it took two years before that number fell to about ten. In Japan that figure was about five soldiers for every thousand Japanese. And this was, remember, in countries which showed no inclination whatsoever to menace the occupation forces. By contrast, in Iraq and Afghanistan, where the population is anything but compliant, there are fewer than six soldiers for every thousand Iraqis, and about two-tenths of a soldier for every thousand Afghans. If Japan and Germany are indeed to serve as models for the occupation and democratization of Iraq and Afghanistan, we should, it seems to be, be thinking more like General Eric Shinseki and less like Secretary of Defense Donald Rumsfeld about the numbers of troops needed in these countries. But even then our current nation-building efforts face a new and difficult challenge, since Afghanistan and Iraq are Islamic nations.

3. What difference does it make that Afghanistan and Iraq are Islamic nations?

How does Islam relate to constitutional democracy? I suppose the obvious answer is “not necessarily.” Part of the problem is the remarkable diversity within Islam itself and across nations with majority Islamic populations. The constitutional and political situation in Indonesia or Malaysia is very different from that in the Islamic nations of the Mahgreb or sub-Saharan Africa. Islamic Central Asia is equally diverse, and South Asia is a particularly contested part of the Muslim world. The Arab world is something else again, and Iran is a case unto itself. There is also significant diversity within Muslim nations. Islam has become, in effect, multi-hierarchical, with numerous religious authorities commanding the allegiances of portions of the population.

Very few of these regions boast Islamic countries with more than nominal experience of democracy – consider the experiences of Indonesia, Malaysia, Pakistan, Bangladesh or Algeria. Turkey, which has the longest and strongest democratic tradition of them all, based upon an adamant, undemocratic and militant commitment to secularism, which is increasingly challenged by political Islam. Insofar as any of these countries is technically a democracy, the situation on the ground is one of *constitutionism*, not constitutionalism. Noah Feldman has remarked that in “most Muslim countries, elections are not meaningful, either because the elected body has little power or because the elections are not free. . . . Freeing elections is unlikely to have enough impact on its own to change the political structure in productive ways, unless new political parties are allowed to emerge and new ideas can be expressed.”

The way to make that happen is to increase basic individual rights, so people can make controversial political arguments and form new political associations. One important effect of increasing individual rights in this way is that multiple points of view will have the chance to emerge, so that Islamist political parties are not the only organized parties when elections are held. (pp. 83-84)

But is this likely to be the case, or is Feldman taking for granted the universality of political behavior (reflecting the Western Aristotelian assumption of *zoon politikon*, the idea that man is a political animal), and simply assuming that individual rights-based western constitutionalism is inevitable?

His liberal assumptions makes Feldman somewhat optimistic about the prospects for democracy in Afghanistan, mainly because he believes that the pressure on the United States to produce democracy after conquest will be so strong – “because the United States eliminated the existing government, it is perceived as having a duty to make sure

that what replaces the old government is something better.” He notes that the constitutional assembly, the *loya jirga*, held under our auspices in June, 2002 “began the democratic process in Afghanistan:

Members were elected locally and spoke freely while Afghans listened on the radio. This astonishingly democratic event was not always edifying, with warlord jockeying for seats up front, participating in background deals, and condoning the intimidation of some of the more outspoken delegates, but it certainly counted as nascent democracy, and it followed directly from U.S. intervention. (pp.85-6)

But this strikes me as naïve and uncritical. “Nascent” suggests that something natural is growing, and that it will follow a predetermined course, more or less. But the significant fact is that none of this would be happening if it were not for U.S. “intervention.”

Feldman wrote these words in 2002 (or early 2003), and he would probably point out that in Afghanistan we now do have a formally democratic, elected government and a constitution. But the President of Afghanistan, Hamid Karzai, is famously the “Mayor of Kabul,” the country outside of the capital is run by the traditional warlords, peace (such as it is) is kept by NATO in Kabul and by the U.S. in the rest of the country, The Taliban are alive and well in much of the country, and Karzai appears to be heavily influenced by the American ambassador, an Afghan-American. Do any of these elements predict the maturation of the seedling of democracy in Afghanistan? Permit me to doubt that they do.

This is not to maintain that Islam is incompatible with democracy. Many Muslim intellectuals believe in the prospect of Islamic democracy. Take the distinguished theologian Abdolkarim Soroush, currently resident at Princeton University. This eminent Shiite philosopher has written at length about the prospects for democracy in Islam.

Speaking at Georgetown University in 2001, he said that:

In an Islamic milieu, there is no contradiction whatsoever between having a democratic rule and basing it on religious duties. There is no separation of church and state, as it were. Since Islam enjoins no particular form of governance, the specifics of governance are left in the hands of the people. The Prophet has left no rulings about whether a society should be led by a President, Prime Minister, or other type of leader, for example. It is for us to decide.

Soroush admits, however, that Islam must come to terms with Western values if it is to create an indigenous democratic environment:

In a democracy, we need a new epistemological grounding today to calmly and reasonably engage with modern ideas; we need to embrace these new democratic ideas rather than reject them as foreign to Islam. We can appropriate them—they are not the exclusive property of the West—and make them our own. I'm not saying that we should uncritically accept Western ideas, either; all ideas must be carefully examined in light of our tradition.

But he recognizes that the job will not be easy:

Though there are democratic values in Islam and though there is no conflict between democracy and Islam on a procedural level, the theoretical basis of democracy is problematic. Values of democracy and its criteria are extrareligious values which *Ash'arite* theologians reject, which makes it very difficult to explore this topic. Due to its secular value system, democracy cannot be reconciled with Islam without first unearthing sources for democratic values within Islam itself. Otherwise, the task is futile, as without this grounding, democracy will never be acceptable to a religious mind.

There is in fact a modern (twentieth century) Islamic idea that the Qur'anic ideal of *shura* (consultation) is somehow to be identified with democratic process. The practice has been more complicated, however, since Islamist parties who participate in free elections and “talk democratic talk” are often suspected of secret commitment to the idea of “one man, one vote, one time.” This is an extremely complex subject and I am hardly a specialist in Islamic thought, but I suspect that the high level of generality of Muslim definitions of the potential for the growth of democratic ideas within the body of Islamic thought should make us hesitate to assume that democracy is inevitable in Islamic

nations generally, and even less in countries adopting democracy under pressure from foreign conquerors. A social scientist must have serious doubts.

And there is a further complication. It may be the idea of democracy can be accepted or rationalized by Muslims, but that is not the same thing as saying that Islamic law, *Shari'ah*, is compatible with functional constitutionalism. Islamic law derives from the Word of the Prophet and from the interpretative tradition of that law, and it is interpreted by the clerics who devote their lives to the study of religious law. Clerics (and other similarly learned persons) can issue *fatwas*, legal holdings, although these are theoretically supposed to be hermeneutic rather than representative. But frequently these are on subjects that seem remote from religious principle – last week on NPR I heard a report of a *fatwa* issued in Najaf requiring residents to vote in local elections.

But of course the larger question is how *Shari'ah* relates to western notions of constitutionalism, in which the basic rules are fixed upon the basis of popular consent and the rest of the legal system is left to democratic legislation and secular adjudication. The outstanding example of the integration of traditional religious law with modern constitutionalism is probably in Israel, where *halakha*, or Jewish religious law, has formal constitutional status – or at least a carve-out in an otherwise secular constitutional system. But there are many critics who feel that the Israeli compromise is fragile and creates a potentially serious democratic deficit – what would happen if Israeli Arabs even came to constitute a political majority?

Of course almost all modern nations are peopled by citizens who have well-defined theological views, and we do not assume that this renders them unfit for democracy, even in countries where there is no rigid separation of church and state such

as we have in the United States. At the same time, there have always been jurisdictions and governmental institutions in Islamic societies that were not based on *Shari'ah*. The Ottomans, for instance, were the first state to have substantial success in creating a really comprehensive Islamic court system and eliminating other competing legal jurisdictions, but the Ottomans administered their own secular legislation as well as purely Islamic law.

It is probably unfair to talk about whether Islam is compatible with democracy as if it were a given that Muslims must always start out from the assumption that their political life will be dictated by religious texts. Nevertheless, in the current state of international political and cultural conflict, and with the struggles of post-revolutionary Iran with constitutionalism in mind, it does seem fair to worry about how hard it may be to work out a balance between formal constitutionalism, secular law and *Shari'ah* in newly democratic Muslim nations. Iran seems a case in point.

And Iraq is a much more complex case for constitutionalizing Islam than Afghanistan. The most obvious problem is that the country has a Shi'a majority and a Sunni minority, and that it borders both Iran and Syria. And the country also has significant Kurdish and Turkoman minorities (and Turkey on another of its borders). It contains the most important Shi'a holy places. It is a country in which Islam was effectively repressed by the Saddam Hussein regime for a generation, and in which Muslim religious leaders are only now finding their true voices. And at least one of them has a small army. But the possibility of democracy is surely there, for, as Chandran Kukathas has remarked:

Given its nature and traditions, then, there is nothing in Islam that should give us cause for concern if our interest is in the flourishing of a democratic civil society marked by diversity. This is not to say that Islamic political movements have not, or never will, pose any danger. For any political movement can be dangerous. But

it is to say that Islam as a creed is not the problem, and may even hold within it some of the resources that supply a solution. Most important among these resources is the tradition of toleration; but not less significant may be the fact that, in the end, it is also distrustful of nationalism.”¹⁹

Nevertheless, for the moment the reference to respect for Islam in the provisional constitution seems unlikely to provide the basis for a long-term integration of Islam into the constitutional order. Consider the two pertinent articles in the new Afghan constitution and ask whether they address the problem noted earlier:

Article Two

The religion of the state of the Islamic Republic of Afghanistan is the sacred religion of Islam. Followers of other religions are free to exercise their faith and perform their religious rites within the limits of the provisions of law.

Article Three

In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam.

J. Alexander Their, a legal adviser to Afghanistan’s judicial reform and constitutional commissions has observed that:

Afghanistan’s new Constitution is mostly a model of moderation, guaranteeing many rights and freedoms for men and women. But it has a very dangerous loophole: it states that no law can be contrary to the “beliefs and provisions” of Islam. (This formulation replaced the more liberal phrase, “principles of Islam,” in last minute politicking at the loya jirga, Afghanistan’s constitutional convention.) “Provisions” can be interpreted by extremists to allow for the imposition of Sharia, or strict Islamic law. Another section of the Constitution gives the Supreme Court [in Afghanistan] the power to determine whether laws and treaties made by the government are in accordance with the Constitution. Together, these two articles give the Supreme Court the power to reject virtually any law or treaty as un-Islamic.²⁰

In Iraq, as in Afghanistan, everything will depend upon the operational significance given to the constitutional embeddedness of the role of religion and religious norms.

¹⁹ “Islam, Democracy and Civil Society” paper presented at the “Islam, Civil Society and Market Economy” symposium on May 18-19 1998, in Istanbul, Turkey (accessed online).

²⁰ J. Alexander Their, “Attacking Democracy from the Bench,” Op-Ed, NYT, January 26 2004

I remarked at the beginning of this lecture that the exercise at hand is to put ourselves in the role of planners for constitutional democracy in America's latest attempt at nation-building. Your assignment now is to think through the difficulties and uncertainties I have outlined, and to imagine what, realistically, we can do to promote constitutional democracy. I am not here to tell you the answers, for I do not know them, except to say that they will not be found by imitating what the United States did following World War II. These are different times, different nations and different challenges. How likely do you think we are to meet them successfully?