

Old Imperial Dilemmas and the New Nation-Building: Constitutive Constitutional Politics in Multinational Polities

SUJIT CHOUDHRY*

I. NATION-BUILDING, NEW AND OLD

As Noah Feldman observes in his insightful and provocative paper, imposed constitutionalism and nation-building are nothing new.¹ Many imperial powers drafted the post-independence constitutions of colonies as part of the process of decolonization. Occupying military powers have re-crafted the constitutional orders of vanquished foes, as the United States did in Japan after the Second World War. Although the contexts varied both in space and time, a basic pattern repeated itself. A foreign power would design the institutional and legal architecture of another political community without its consent. The constitution was presented as a *fait accompli*. Local participation—there was usually some—did not entail meaningful, substantive decision-making power. Rather, it was directed at ensuring the acquiescence of local elites, with fundamental questions of constitutional choice safely remaining in foreign hands.

Practiced in this form, nation-building poses a serious dilemma for liberal democrats, because of the deep and irreconcilable tension between the outside imposition of a constitutional order and the right of all peoples to self-determination. On this account, the right to self-determination encompasses more than merely the right of a political community to exercise power within an extant constitutional-legal order with democratic features. Rather, that right extends down to the very structure within which a community exercises its power of self-government, encompassing the most basic questions of institutional design. This is what is meant by the phrase that the right to self-government is the right of rights.

The liberal democrats' dilemma is particularly acute for the United

* Faculty of Law, University of Toronto. Email: sujit.choudhry@utoronto.ca; web: www.law.utoronto.ca/faculty/choudhry. Copyright Sujit Choudhry, 2005.

¹ Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 859 (2005).

States. The United States was born in an armed revolt against imperial rule that has served as the inspiration for countless national liberation movements for over two centuries. It is governed by a constitution whose revolutionary break with the British constitutional order was self-conscious and deliberate, and whose democratic pedigree as a constitution given by the people to themselves is the principal source of its legitimacy. Moreover, America has championed the right to self-determination in its foreign policy. First at Versailles, and later at San Francisco, it was the United States that took the lead among the most powerful nations to establish the right to self-determination as a central pillar of the international legal order.

Imposed constitutionalism therefore poses a fundamental challenge for liberal democrats, and is especially embarrassing for the United States. Feldman courageously responds to these challenges through an imaginative recasting of the ends and means of imposed constitutionalism. He begins his argument in his recently published book, *What We Owe Iraq*,² which deserves to be widely read and discussed. On Feldman's model, the occupying power acts as a trustee, the beneficiaries of the trust are the members of a political community, and what is held in trust is the right of that people to self-determination. As trustee, the specific duties of the occupying power are limited but nonetheless fundamental—"to produce order in the very literal sense of monopolizing violence"³ and "to preside over the formation of the basic institutions necessary for a stable, democratic state."⁴ To be clear, Feldman states that the latter duty does not entail "the mistaken, paternalistic, patronizing view that we know how to design institutions for the Iraqis better than they know themselves."⁵ Rather, the occupying power should act as an "impartial mediator" or "honest broker" whose task is to "facilitate the process of negotiation."⁶

In *Imposed Constitutionalism*, Feldman explains that the scope of domestic constitutional choice within such a process is extremely broad. Indeed, he faces squarely the possibility that an occupying power deeply committed to liberal democracy might create and protect a constitutional process that yields a constitution bearing illiberal features—such as the lack of a clear separation of religion and state, and inadequate protection for women's rights.⁷ At the end of the day, largely because it would be futile to do otherwise, an occupying power should encourage, but never

² NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* 79 (2004).

³ *Id.* at 79.

⁴ *Id.* at 81.

⁵ *Id.* at 82.

⁶ *Id.* at 83.

⁷ See Feldman, *supra* note 1, at 864–65, 869–70.

impose, substantive outcomes.⁸ Likewise, the occupying power should also resist the temptation to arbitrate or adjudicate among competing political factions.⁹ The local beneficiaries of this political trust should be free to draft and adopt the constitution of their choosing. Finally, in addition to being an occupation of limited purposes, it should be one of limited duration, ending when “things are running suitably smoothly.”¹⁰

Feldman’s defense of the legitimacy of his version of imposed constitutionalism relies on a sharp distinction between what we can term the “old” and the “new” nation-building. The old nation-building was an imperialist enterprise that was motivated by a mixture of self-interest and patronizing noblesse oblige, and which paid lip service to the right to self-determination. By contrast, the new nation-building structures the obligations of the occupying (not imperial) power to take the right to self-determination seriously. Feldman here joins the ranks of Michael Ignatieff¹¹ and Simon Chesterman¹² in defining and defending a form of temporary foreign occupation that furthers liberal democracy, as opposed to undermining it.

Now an obvious criticism to make is that the normative ideals of the new nation-building rarely match up to reality. The new nation-building looks a lot like its discredited imperial predecessor. As Ignatieff suggests, although superficially justified by appeals to the right to self-determination, the new nation-building as currently practiced is imperialism under a new guise—an “empire lite” in which the trappings of self-government mask a new form of “imperial tutelage.”¹³

To be sure, the gap between practice and theory is an interesting question of which Feldman is acutely aware, as a result of his unique first-hand experience in Iraq. However, I think there is a more fundamental conceptual challenge to Feldman’s distinction that the proponents and defenders of the new nation-building must address. The idea of letting the people of a country under trusteeship exercise the right to self-determination presupposes that *who* the people are who possess this right and wish to exercise it is an uncontroversial question. Ignatieff writes, for example, “[w]hat help *local people* need from their temporary imperial rulers should be up to them. *They* should be the ones who decide what kinds of democracy, rule of law and stability of property can be successfully absorbed in their cul-

⁸ FELDMAN, *supra* note 2, at 83.

⁹ *Id.* at 83, 86.

¹⁰ *Id.* at 86.

¹¹ See MICHAEL IGNATIEFF, EMPIRE LITE: NATION-BUILDING IN BOSNIA, KOSOVO AND AFGHANISTAN 24 (2003).

¹² See SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING 9, 257 (2004).

¹³ IGNATIEFF, *supra* note 11, at 2.

ture and context.”¹⁴ But of course, the central problem in nation-building is often *precisely* what the boundaries of the “they” or “local people” whose right to self-determination foreign trusteeship seeks to protect are, and the terms of association among the various ethnic and cultural groups who co-exist within a nation-state. Indeed, in two of the most prominent cases of the new nation-building—Bosnia and Kosovo—the very reason for the breakdown of the previous constitutional order was that members of different ethnic and cultural groups could not agree on the answer to this question.¹⁵

So while building a theory of legitimate nation-building around the right to self-determination may solve or attenuate one dilemma, in many countries, it exposes another. In these countries, present-day occupiers with the noblest of liberal democratic motives are faced with a dilemma largely indistinguishable from that which faced their imperial predecessors. And as the situation in Iraq makes clear, this is a dilemma that an occupying power that acts as a trustee cannot possibly avoid. Certain imperial dilemmas inhere in the very project of nation-building, and no amount of liberal democratic reinterpretation can make them disappear. In this fundamental respect, the distinction between the new and the old nation-building does not always hold.

II. CONSTITUTIVE CONSTITUTIONAL POLITICS IN MULTINATIONAL DEMOCRACIES

To get a handle on the character of this imperial dilemma, and to understand why it is unavoidable in certain nation-building contexts, we need to further understand what its sources are. Fortunately, there is a large political-theory literature, focusing on multinational polities, which addresses these problems. Multinational polities, as Will Kymlicka has famously explained, are nation states that contain one or more nations.¹⁶ Nations, in turn, are defined as “a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language or culture.”¹⁷ In multinational polities, one nation will often predominate, and others will be in the minority—so-called national minorities.¹⁸ In many cases, national minorities are territorially concentrated, and were previously self-governing political communities which

¹⁴ *Id.* at 24 (emphasis added).

¹⁵ *See id.* at 32–39, 67–74.

¹⁶ WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 11 (1995). For an extensive discussion of Kymlicka’s theory of cultural rights, see Sujit Choudhry, *National Minorities and Ethnic Immigrants: Liberalism’s Political Sociology*, 10 J. POL. PHIL. 54 (2002).

¹⁷ KYMLICKA, *supra* note 16, at 11.

¹⁸ *See id.* at 10–11.

were later incorporated (often involuntarily) into the larger state.¹⁹ As Kymlicka explains, politics in multinational polities can be understood as the interplay between competing nation-building projects that pull in opposite directions.²⁰ The predominant nation encourages national minorities to integrate into common national institutions that operate according to its language and culture—that is, to identify with the national political community as a whole. National minorities in turn strive to maintain their distinct cultural and linguistic identities, often in defense to the broader nation-building agenda. Their goal is “to live and work in their own educational, economic, and political institutions, operating in their own language.”²¹

The political dynamics of multinational polities have concrete implications for the nature and content of constitutional politics. To understand how, consider the sorts of issues that would dominate the constitutional agenda in states that are *not* multinational polities. In these states, the existence of a single national political community is a widely shared assumption that is presupposed by political actors. For liberal democrats, the basic question of constitutional design would accordingly be how *this* political community should grapple with the task of democratic self-government and strike the right balance between democratic rule and individual rights. Constitutional politics would focus on the creation and allocation of power to governmental institutions to enable democratic decision-making to take place. And it would also address whether and to what extent the constitution should disable those institutions, through the design of decision-rules (*e.g.*, vetoes, super-majority requirements) and outright substantive limits on government conduct (*e.g.*, constitutional bills of rights). In *Imposed Constitutionalism*, Feldman frames his discussion of constitutional design in Iraq in these terms. He supposes that the difficult constitutional question is “the conflict between egalitarianism and autonomy”—that is, between equality on the basis of sex and religion and the right to democratic self-government of the majority.²² This way of framing the problem assumes, of course, that we know who the relevant majority is. It seems that the majority here is the majority of the people of Iraq.

But for national minorities in multinational polities, the basic questions of constitutional politics are rather different. The issue is not simply how a national political community should structure its decision-making institutions and constrain itself through constitutional mechanisms. Additionally,

¹⁹ *Id.*

²⁰ WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP 1–2 (2001). For further discussion, see Sujit Choudhry, *Citizenship and Federations: Some Preliminary Reflections*, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 377 (Kalypso Nicolaidis & Robert Howse eds., 2001).

²¹ KYMLICKA, *supra* note 20, at 51.

²² Feldman, *supra* note 1, at 862.

there is the *existential* question of whether a multinational polity should exist as a unified, national political community at all among the various nations (majority and minority) who occupy a state, and, if so, on what terms. Put another way, this means that constitutional politics in multinational polities take place on two levels. On the one hand, there is the sort of constitutional politics that presupposes the existence of a national political community—the kind that Feldman describes so well. But in parallel and simultaneously, multinational polities also engage in what I term *constitutive constitutional politics*, which concern existential questions that go to the very identity of the political community as a multinational political entity.²³ In practice, it is hard to disentangle these two sorts of constitutional politics, because they often touch on similar sorts of issues—the structure of national institutions, federalism, and bills of rights. This is particularly the case because normal and constitutive constitutional politics often occur simultaneously, with political actors shuttling back and forth between them. However, viewed through the lens of constitutive constitutional politics, these issues take on a different political significance. Moreover, there are some aspects of constitutional design in multinational democracies that respond directly to constitutive questions.

The example of Quebec and its place in Canada, which has attracted wide comparative interest in the vast literature on ethnic nationalism, federalism, and secession, powerfully illustrates these points.²⁴ From its origins, the adoption of a federal form of government was a direct response to the existence of Canada's large French-speaking minority—the Quebecois—and its desire to preserve its distinct cultural and linguistic identity in the face of demands for integration on the part of the English-speaking majority. Quebec made a series of constitutional demands for institutional separateness that were aimed at preserving its distinct identity. Thus, as a condition for entering the Canadian federation, the Quebecois demanded a federal form of government, and the drawing of provincial boundaries to ensure a substantial French-speaking majority in the province of Quebec.²⁵ Moreover, they demanded that provinces be accorded jurisdiction over questions of identity, such as language and education.²⁶ Federalism, on the multinational conception, is not justified as a means to promote local self-government. Rather, it is designed to permit the co-existence of different national groups in the same territory. Moreover, in multinational polities,

²³ For further development of the idea of constitutive constitutional politics, see Sujit Choudhry, Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures? (unpublished manuscript, on file with author).

²⁴ These arguments will be worked out more fully in Sujit Choudhry, *Multinational Federations and Constitutional Failure: The Constitutional Politics of Quebec Secession* (unpublished manuscript, on file with author).

²⁵ *Id.*

²⁶ *Id.*

constitutional debates surrounding the reform of common national institutions are often shaped by minority nationalism. For example, in Canada, proposals to constitutionally entrench the Supreme Court of Canada—to recognize its unique responsibility as an independent organ of government charged with enforcing the Canadian constitution—have led to demands by Quebec that three of the Court's nine seats be guaranteed for judges from that province, because of the Court's role as the final judicial arbiter of disputes over Canadian federalism.²⁷

Where the constitutive character of constitutional politics in multinational polities comes into sharpest focus is with respect to the procedures for constitutional amendment. The basic function of rules of constitutional amendment is to constitute and regulate constitutional politics. In an important sense, rules governing constitutional amendment are only able to perform this function by being viewed as furnishing a decision-making procedure that is indifferent or neutral among substantive constitutional proposals, such that the decisions made under those rules are accepted as authoritative and binding. However, by assigning the power of constitutional change to certain populations and/or institutions, in various combinations, rules governing constitutional amendment are far from substantively neutral. In fact, they stipulate where the ultimate locus of political sovereignty lies, and are the most basic statement of a community's political identity. In multinational polities, assigning roles to national minorities as part of the procedure for constitutional change accordingly acknowledges the fundamentally multinational nature of the political community. Not surprisingly, in Canada, Quebec has consistently taken the view that the rules governing constitutional amendment should reflect its distinct status as a province created for Canada's French-speaking national minority. In practical terms, this meant that Quebec has sought a veto over constitutional amendments.

The idea that constitutive disagreements lie at the heart of constitutional politics sheds considerable light on the causes of state failure. Some of the most prominent examples of failed states are also multinational polities. In these cases, the reason why the old political settlement broke down—leading to the cycle of civil war, international intervention, international occupation, and internationally-led attempts at nation-building—may be understood through the lens of minority nationalism. The leading example, of course, is the former Yugoslavia, which has generated two leading examples of the new nation-building: Bosnia and Kosovo. The break-up of the Yugoslav federation took place when the constituent republics of Slovenia, Croatia, Macedonia, and Bosnia and Herzegovina seceded in 1991 and 1992. The cause for secession was the rise of Serbian nationalism. Serbian nationalists were highly critical of Yugoslavia's federal

²⁷ *Id.*

framework and supported increased centralization, which would have concentrated power in the hands of the Serbs, the largest ethnic group. The Yugoslavian conflict can be best understood as a constitutive constitutional disagreement among different nations—the Muslims, Croats, Slovenes, Kosovars, Macedonians, Serbians and Montenegrans—over whether Yugoslavia should be a multinational political community or not. Any round of post-conflict constitutional politics that did not address this issue would very likely be doomed to failure. Without understanding the multinational nature of the former Yugoslavia, we would misunderstand what the causes of state failure were, and how merely building the institutions of liberal democracy would be an inadequate response.

A recent example from Sri Lanka illustrates the peril of failing to attend to these constitutive constitutional concerns in the course of nation-building in multinational polities. Sri Lanka is a multinational political community. It has a Sinhalese-speaking majority, and a Tamil-speaking minority that is culturally, ethnically, and religiously distinct.²⁸ The history of ethnic relations on the island fits the pattern of politics in multinational polities—the clash between the nation-building project of the Sinhalese majority and the desire of the Tamils to maintain their distinct identity. The two sides fought a civil war for over twenty years to a standstill, and have been engaged in a fitful peace process since 2002 (with which I have been involved). The parties have agreed that a final settlement to the civil war would require Sri Lanka to be reconstituted as a federation, with a Tamil majority unit in the Northeast.²⁹ To some extent, this would be recognition of the current situation, since Tamil guerillas already control large parts of the Northeast.³⁰ A major issue that has arisen during peace negotiations is whether the Tamils ought to be able to form an interim administration as a precursor to full provincial status.³¹ In addition to the expected disagreement over the *scope* of the powers of an interim authority, an equally contested point was the *source* of its authority. Sinhalese nationalists insisted that the interim authority exercise powers under statute, consistent with the existing Sri Lankan constitution. But Tamil guerillas objected, because the existing Sri Lankan constitution vests the locus of sovereignty in the Sri Lankan parliament, which represents the national majority. As a consequence, the constitution enjoys no legitimacy in the eyes of the Tamil guerillas, because it refuses to acknowledge the multina-

²⁸ John Lancaster, *In Some Ways, Rebels Without a Cause; Sri Lanka's Tamil Tigers Have Already Achieved De Facto Independence*, WASH. POST, Jan. 14, 2003, at A14, available at LEXIS, News Library, Wpost File.

²⁹ Catherine Philp, *Sri Lanka and Tamil Tigers Ready to End 19-Year War and Share Power*, TIMES (UK), Dec. 6, 2002, at 1, available at 2002 WLRN 3933082.

³⁰ *Id.*

³¹ Ray Marcelo, *Sri Lanka "Stable" Despite Tamils' Departure*, FIN. TIMES (LONDON), Feb. 28, 2005, at 2, available at LEXIS, News Library, Fintimes File.

tional nature of Sri Lanka. Understood this way, the Tamil guerillas' fight against the Sri Lankan government flows from a rejection of the Sri Lankan constitutional order.

III. IRAQ AND THE KURDS

Our final stop on this global tour of constitutive constitutional politics in comparative perspective is Iraq. I want to focus on the process leading to the adoption of the Transitional Administrative Law ("TAL") by the Coalition Provisional Authority in the summer of 2004. During various stages in the negotiations, Shi'a and Kurdish negotiators threatened to walk away from the TAL—the Shi'a in February 2004, the Kurds in June 2004. The interesting question is what precipitated this near-breakdown. One likely candidate would be disagreement over whether the TAL should protect basic human rights. The TAL contains rights-protecting provisions that one would find in the constitutions of liberal democracies.³² However, representatives of the Shi'a majority and the Kurdish minority seemed to agree that the TAL should contain such provisions. Another cause of the breakdown would be disagreement between the religious Shi'a and the secular Kurds over the relationship between Islam and the exercise of public power by the Iraqi Interim Government under the TAL.³³ Again, however, although certainly a contested issue, this does not appear to be what provoked the near collapse of the constitutional discussions.

Rather, the near fatal disagreement concerned the rules governing the coming-into-force of Iraq's "permanent" constitution. The TAL is Iraq's interim constitution, and provides a temporary framework for self-government and protection of human rights.³⁴ It continues in force until the process of drafting and adopting Iraq's permanent constitution is complete. The key provision governing the adoption of the final constitution is Article 61(C). Article 61(C) stipulates that the permanent constitution shall only come into force if it is approved by a majority of Iraqis voting in a national referendum.³⁵ But there is a caveat. Iraq is currently organized into "governorates" or provinces. Article 61(C) states that the permanent constitution shall not be adopted if two-thirds of the voters in three or more governorates reject it.³⁶ The effect of Article 61(C) is to grant a veto over constitutional change to the super-majorities in three governorates. Since

³² See Coalition Provisional Authority, Law of Administration for the State of Iraq for the Transitional Period, art. 12–13 (Mar. 8, 2004), at <http://www.cpa-iraq.org/government/TAL.html> [hereinafter TAL] (last visited May 18, 2005) (on file with the Connecticut Law Review).

³³ See Richard Beeston, *Another Stumble Along Road to the New Iraq*, TIMES (UK), Mar. 1, 2004, at 4, available at 2004 WL RN 5530764.

³⁴ See TAL, *supra* note 32, at pmb1.

³⁵ *Id.* at art. 61(C).

³⁶ *Id.*

Kurds constitute a majority in three governorates, the net effect is to give the Kurds a veto over the adoption of the permanent constitution. Indeed, this veto was a basic Kurdish demand.³⁷

There is a history here. The Kurds are often described as one the largest nations in the world without a state.³⁸ Estimates put the total Kurdish population at approximately twenty-four to twenty-seven million, largely concentrated in Turkey, Iraq, and Iran.³⁹ They have maintained their cultural, linguistic, and ethnic distinctiveness for centuries. At the end of World War One, as part of the dismantling of the Ottoman Empire, the Kurds were promised a nation of their own under the Treaty of Sèvres in 1920.⁴⁰ However, the British—who were the dominant imperial presence in the area—decided that the Kurds should instead be incorporated into a Hashemite-ruled Iraq as a Sunni counterweight to the Shi'a.⁴¹ A resurgent Turkey also made a large Kurdistan politically more difficult. Kurds never accepted their involuntary incorporation into Iraq. To make matters worse, Iraqi governments, especially under Saddam Hussein, oppressed the Kurds, particularly during the Iran-Iraq war.⁴² Encouraged by the United States, the Kurds rose up in rebellion after the Gulf War of 1991. The Iraq military went on the offensive, and, overnight, turned an estimated two million Kurds into refugees. In response to global outrage, international forces created a “safe haven” for the Kurds in Northern Iraq, which quickly became a de facto state over which Hussein never reasserted control.⁴³ For the Kurds, a constitutional veto was a defensive mechanism to ensure that they would continue to enjoy significant autonomy within a united Iraq. Indeed, the veto is so important to the Kurds that when the TAL was not appended to UN Security Council Resolution 1546,⁴⁴ which accepted the authority of the Iraqi Interim Government, the Kurds were afraid that this omission could lead the government to walk away from the TAL. The Kurds threatened to secede, and forced Prime Minister Allawi to promise that the interim government would respect the TAL until after the January

³⁷ See Kirk Semple, *Charter Is Awaiting Signatures in Baghdad; Bremer Still Hopeful for Monday, but an Attack Underlines Risk*, INT'L HERALD TRIB., Mar. 8, 2004, at 1, available at LEXIS, News Library, lht File.

³⁸ *How the Kurds Were Stranded by History: Edward Mortimer Describes a People Fighting for a State of Their Own on Three Fronts*, FIN. TIMES (LONDON), Sept. 6, 1996, at 3, available at LEXIS, News Library, Fintimes File.

³⁹ See *id.*

⁴⁰ The Treaty of Peace between the Allied and Associated Powers and Turkey, Aug. 10, 1920 (negotiated but not signed), sect. III, art. 62, available at <http://www.lib.byu.edu/~rdh/wwi/versa/sevres1.html>.

⁴¹ See Natasha Carver, *Is Iraq/Kurdistan a State Such that It Can Be Said to Operate State Systems and Thereby Offer Protection to Its “Citizens”?*, 14 INT'L J. REFUGEE L. 57, 64 (2002).

⁴² See *id.* at 66.

⁴³ See *id.* at 76–77.

⁴⁴ See S.C. Res. 1546, U.N. SCOR, 59th Sess., 4987th mtg., U.N. Doc. S/RES/1546 (2004).

2005 elections.⁴⁵

Opposition to Article 61(C) is equally strong on the part of the Shi'a. Indeed, it led five Shi'a members of the Iraqi Governing Council to threaten to refuse to sign the TAL in March 2004.⁴⁶ Just as the Kurds saw a veto as integral to their conception of the new Iraq, the Shi'a viewed the veto as inconsistent with their own. Larry Diamond, who worked as a senior advisor to the CPA, has described the Shi'a's view of Article 61(C) in a recent article in *Foreign Affairs*:

I encountered the popular discontent firsthand at public lectures and smaller seminars . . . where I tried to explain the key principles of the TAL and to stimulate discussion. There was plenty of discussion, but almost all of it was critical. Many Iraqis—provincial and local council members, clerics, sheikhs, civic activists, and other opinion leaders . . . passionately denounced the document. Repeatedly I was asked . . . Why was one section of the country given so much power? . . . The anger and frustration were palpable and suggested several things: that Iraqis wanted democracy, though they had a very partial and majoritarian understanding of what it entailed . . .⁴⁷

If the Kurds conceive of Iraq as a multinational polity, in which the locus of sovereignty resides in its constituent nations, the Shi'a conceive of Iraq in dramatically different terms. For them, the Iraqi people—undifferentiated by ethnicity or religious sect—are the sovereign entity in Iraq, and a majority of Iraqis, speaking directly or through their representatives, possess the constituent power to alter the terms of the constitutional order. The debate between the Shi'a and Kurds over Article 61(C) is clearly far from over, and will figure prominently as the National Assembly turns its mind to the drafting of the permanent constitution.

Whatever we think about the constitutional issues facing Iraq, it is clear that Article 61(C) is at the top of the agenda. Indeed, Peter Galbraith, who has written passionately and intelligently about the need for a federal Iraq,⁴⁸ recently wrote that the failure to reach an accommodation on Kurdish autonomy acceptable to all parties could lead to the breakup of Iraq.⁴⁹ But the broader lesson is that Iraqis are engaging in a familiar pattern of

⁴⁵ Dexter Filkins, *Iraqi Leader Says He'll Respect Kurd Desire for Autonomy, at Least for Now*, N.Y. TIMES, June 10, 2004, at A13.

⁴⁶ Dexter Filkins, *Iraqi Shiites, in Setback to U.S., Fail to Sign Temporary Charter*, N.Y. TIMES, Mar. 6, 2004, at A1.

⁴⁷ Larry Diamond, *What Went Wrong in Iraq*, FOREIGN AFF., Sept.-Oct. 2004, at 34, 53.

⁴⁸ See, e.g., Peter W. Galbraith, *How to Get Out of Iraq*, N.Y. REV. BOOKS, May 13, 2004, at 42.

⁴⁹ Peter W. Galbraith, *Peril in Iraq's Constitution*, L.A. TIMES, Feb. 14, 2005, at B11, available at LEXIS, News Library, LAT File.

constitutive constitutional politics that we have seen in a variety of multinational polities, whereby the collision between competing nation-building projects manifests itself in disagreements over basic aspects of constitutional design. Indeed, the parallels with Canadian constitutional politics are striking. If one understands the validity of the permanent constitution as deriving from its adoption according to the procedure in Article 61, then Article 61 is, in other words, a rule governing constitutional amendment. It is not at all surprising that the provision should lie at the heart of Iraq's high constitutional politics.

IV. UNAVOIDABLE IMPERIAL DILEMMAS

These examples of situations that have given rise to nation-building projects of different kinds—the former Yugoslavia, Sri Lanka and Iraq—illustrate how constitutive questions are integral to making sense of constitutional politics in multinational polities. It follows that an integral and unavoidable part of the nation-building agenda in these situations is to determine the boundaries of the political community whose right to self-determination international trusteeship protects. Indeed, since the refusal of one nation to accept a multinational definition of a polity is often the reason for the failure of a state in the first place, to fail to recognize this cause and respond to it directly is to doom nation-building to failure.

So the question remains: can a liberal democratic nation-builder in a multinational polity studiously avoid substantively engaging with these existential questions? Can an occupying power act simply as a protector and facilitator of a constitutional process in which substantive decision-making power rests solely with local participants? Or is the imperial dilemma unavoidable?

I am afraid that it is. Even if the task of the international trustee were entirely procedural, determining who should be involved in constitutional negotiations presupposes a substantive judgment regarding what the boundaries of the relevant political community are. And so merely inviting the Kurds to join the Governing Council was a judgment that Kurds were part of the Iraqi political community. The refusal of the Kurds to participate in these negotiations would not have changed the substantive character of the decision made by the United States to include them in the process. An election of a constituent assembly which was organized and supervised by an occupying power throughout the entire territory of a multinational polity would similarly be based on a substantive decision regarding the boundaries of that political community.

But once an occupying power answers *this* question, in a multinational polity, it must address the next one—*i.e.* whether the polity is multinational in character or not—in order to design the constitution-drafting process. A position of strict neutrality is not possible. In the case of Iraq, for example,

had Article 61(C) of the TAL *not* provided for a Kurdish veto, it would have reflected a theory of political sovereignty in which the *pouvoir constituant* was the Iraqi people. Designating both the participants and the decision-rules of any constitutional adoption or amending procedure entails critical substantive judgments that cannot be avoided.

Indeed, the United States has done much more in Iraq. In a series of UN resolutions, the UN Security Council has affirmed the territorial integrity of Iraq—*i.e.* an Iraq that includes Kurdistan.⁵⁰ The CPA chose to exercise its powers under the international law of occupation,⁵¹ which obliged it to accept the territorial integrity of Iraq.⁵² But at the same time, the TAL confers legal status on the enormous degree of *de facto* autonomy enjoyed by the Kurds since 1991.⁵³ Yet by construing Kurdish sovereignty as flowing from the Iraqi constitutional order, which proclaims its supremacy throughout Iraqi territory,⁵⁴ as opposed to from the separate and sovereign status of Kurdistan flowing from international law, the TAL affirms that Kurdish autonomy lies *within* Iraq.

So although there is much to criticize about nation-building as it is currently practiced, perhaps the occupying powers have got it right in one respect. Liberal democratic nation-builders can protect the right to self-determination all they want, but they can only do so by defining what the boundaries of that self are.

⁵⁰ See S.C. Res. 1483, U.N. SCOR, 57th Sess., 4651st mtg., U.N. Doc. S/RES/1483 (2003); S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg., U.N. Doc. S/RES/1511 (2004); S.C. Res. 1546, U.N. SCOR, 58th Sess., 4987th mtg., U.N. Doc. S/RES/1546 (2004).

⁵¹ See Coalition Provisional Authority, Regulation No. 1, § 1(2) (May 16, 2003), at http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf (last visited May 18, 2005) (on file with the Connecticut Law Review).

⁵² Fourth Hague Convention Respecting the Laws and Customs of War on Land, art. 42, Oct. 18, 1907, in THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, at 100, 122 (James Brown Scott ed., 1915).

⁵³ See TAL, *supra* note 32, ch. 8.

⁵⁴ *Id.* ch. 1, art. 3.