Foreword

Perspectives on Nation-Building

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I. INTRODUCTION

Since January 30, 2005, when eight million Iraqi men and women went to the polls, nation-building has been a phrase on many lips. For some, it is a question; for others, an answer. For Iraqis, it is a job. Not only a phrase susceptible of many definitions, however, nation-building also connotes an aspiration that has several facets, each of which makes possible a different vantage on problems and solutions. Each facet offers an independent lens, a separate way of looking at the world.

This paper strives to shine light on and through those lenses. It works a progressive mitosis, proceeding in three Sections. Each Section describes a dichotomy in the nation-building aspiration. Section II distinguishes between state-building, a concept that yields an institutional lens, and nation-building, a concept that produces a nationalist lens. Section III then divides the concept of nation-building into a republican perspective, which focuses on legal and political participation, and a communitarian perspective, which focuses on psychological and sociological participation. Finally, Section IV splits the concept of legal and political participation into group and individual participation. The goal of group participation yields a democratic lens, while the goal of individual participation goal invites a human rights lens.

This Foreword, adverting to contemporary experience in Lebanon, Iraq, and Afghanistan, describes the many ways of looking at nation-building in the Middle East and the broader Islamic world. It does not seek to answer the questions that have arisen and are likely to arise as Iraqis and others strive to realize the nation-building aspiration. Rather, it suggests that the answers and, in turn, the immediate goals of the nation-building process, depend on the way one examines the questions. Each author who has contributed to this Symposium looks at nation-building through one or more lenses. But none articulates a theory ordering them in importance or describing the priorities of nation-building in any detail. This Foreword aims to illuminate the importance of developing such a hierarchy.

1. I choose these three countries not only because each is in transition from one form of government to another, but also because each is in particular need of nation-building. Sectarian strife has wracked each of these three heterogeneous countries, and none has a strong institutional backbone.
II.

Nation-building requires the creation of both a state and a nation. A state is a territorial entity that provides certain services and public goods (usually including security); a nation is a legal and sociological idea to which those who live within the territory of a state may or may not subscribe. State and nation are intertwined. For instance, the state may provide freedoms of speech and assembly, and the participation those freedoms provoke, when full and robust, may conduce to national legitimacy. Yet the distinction between state-building and nation-building, at least in the Middle East, is more than an exercise in semantics. Each concept offers a distinct lens, a distinct epistemology.

Max Weber defined the state as that organ capable of monopolizing the use of force within certain boundaries. However, the night watchman state would not and does not satisfy most modern citizens. As Michael Walzer has put it, “every political community must attend to the needs of its members as they collectively understand those needs.” The list of needs is usually long, doubly so in the Middle East. Indeed, most Middle Eastern states are welfare states, offering services that the United States does not. For instance, the Transitional Administrative Law of Iraq proclaims the right of each citizen to receive services from the state, declaring that “[t]he individual has the right to security, education, health care, and social security.” State-building, therefore, requires a focus on institutions, and the state-building concept is best seen through an institutional lens.

In the Middle East, those in a position to offer protection, a key state service, are often sub-state actors, including but not limited to religious groups, civil society organizations, and tribal affiliates. In Iraq under occupation, for instance, denominational and tribal groups have been more effective than state police or coalition forces at providing security. Moreover, those same sub-state actors are purveyors of other state services of a more clearly discernible social character. In areas as disparate as Turkey and the Palestinian Territories, it has been religious groups that have brought food to the hungry and have healed the sick. Nor should this observation come as a

2. See generally MAX WEBER, THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 156 (Talcott Parsons ed., 1947).
5. NOAH FELDMAN, WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING 78 (2004) (stating that the most “reliable as guarantors of... security [are] associations forming around denominational identity”).
surprise. In Europe, those same groups are often responsible for realizing welfare mandates: in England, the local parish distributes food and offers public services; in Germany, the federal government relies on church hospitals and schools.

In the Middle East, moreover, not only are sub-state actors often the institutional source of state services, but it is also they who first sparked and announced the demand for those services. The impetus for the creation of Middle Eastern welfare states came, at least in large part, from Islam. Islamic law, with its requirement of charitable zakat (tithe) inspired the notion that the state should look after its citizens. Moreover, Islamic constitutionalism has been a source of procedural inspiration. Medieval secular law in the Middle East was subject to few procedural limits. Magistrates, who applied the secular law (qanun), were able to rely on intimidation and hearsay. Procedure was a matter of religious law. It has been by importing the procedures of religious law that modern Middle Eastern welfare states have been able to function.

Finally, groups such as the Muslim Brotherhood in Egypt, by reaching out to the dispossessed long before the state did, entrenched the welfare ideal.

State-building in the Middle East, ironically enough, may function best at the sub-state level. While sub-state actors are the institutions required for state-building, the nation-building project in the Middle East must be coextensive with the territory controlled by the state.

In the words of Benedict Anderson, a nation is an “imagined community.” One need look no farther than to contemporary Lebanon to see the perils of building that community at a sub-state level. Kamal Salibi was not joking when he described Lebanon as a “House of Many Mansions.” The country has nationalisms within nationalisms, and the territory controlled by the state is divided into petty fiefdoms. For instance, when the Lebanese parliament voted last fall to derogate from the Constitution and extend Maronite Christian President Emile Lahoud’s term by three years, three ministers tied to the Druze politician Walid Jumblatt resigned in protest. The Druze, who are shut out of the highest offices in the land by law, comprise a

http://www.crisisgroup.org/home/index.cfm?id=3033&l=1 (Apr. 2, 2003) ("[S]uch institutions [religious organizations in the Palestinian Territories] are more efficient than their . . . official counterparts, delivering aid without distinction as to religious belief or political affiliation.").


8. Gerhard Robbers, State and Church in Germany, in STATE AND CHURCH IN THE EUROPEAN UNION 57, 63 (Gerhard Robbers ed., 1996) ("Without [religious] services, the guarantees of a social State . . . would be mere empty postulates.").

9. See, e.g., PATRICIA CRONE, GOD’S RULE: GOVERNMENT AND ISLAM 393 (2004) (citing Al-Amiri for the proposition that “[r]eligious are never established for private benefit or individual advantage but always aim at collective welfare”).

10. For instance, the Ottoman Constitution of 1876 was one of the first to permit interpolation. See OTTOMAN CONSTITUTION art. 38.

11. L. CARL BROWN, RELIGION AND STATE: THE MUSLIM APPROACH TO POLITICS 155 (2000) (Sayyid Qutb once said, "[W]hen there are those who cannot even find rags to cover their bodies, it is an impossible luxury that a mosque should cost a hundred thousand guineas.").


sub-state nation. As the tumultuous aftermath of the recent assassination of former Prime Minister Rafiq Hariri has shown, too many nationalisms breed violence. Nation-building, therefore, requires a focus on all those who live within a state's territory, and the nation-building concept is best seen through a nationalist lens.

The nation-building aspiration appears differently through these two lenses; whether it is to be an institutionalist or a nationalist endeavor makes a difference. Take, for instance, the choice of electoral system. A new democracy could adopt either majoritarianism, where the winner takes all, or a proportional system, where seats are divvied up according to share of the vote.\footnote{14} There are wrinkles to each system—including, for instance, the Alternative Vote, which is a kind of modified majoritarianism—but majoritarianism encourages a strong central government, while a proportional system encourages the proliferation of small parties.

Iraq has chosen strict proportional representation. As expected, this choice has proven a boon to small parties—a party needed only roughly $1/275$ of the national vote in the January 2005 election to get a seat at the table. This choice reflects an unspoken emphasis on state-building at the possible expense of nation-building. Indeed, as of this writing, the Iraqi National Assembly had yet to agree on a presidency council, much less on a prime minister or a cabinet. Yet each party elected to the National Assembly has been able to bring electoral dividends to its constituents.\footnote{15} Those who designed the Iraqi electoral system were looking through the institutional lens. Their priority was to ensure that water ran and that streets remained as violence-free as possible.

III.

The nation-building concept—the project of creating an imagined community—is also susceptible of division. Citizenship in a nation, as Peter Schuck has intimated, has at least two distinct component concepts: legal and political participation, and psychological and sociological participation.\footnote{16} Encouraging the former requires a focus on formal mechanisms such as voting. Encouraging the latter, by contrast, requires a focus on emotive mechanisms such as pledging allegiance. Whereas legal and political participation require a republican point of view, the psychological and sociological facets of citizenship are best seen through a communitarian lens.\footnote{17}

Legal and political participation are essential to the creation of a nation. They represent a commitment to common goals and to the common good. Only when citizens are committed to a polity can that polity be termed a

\footnote{14. For a description of electoral systems, see Donald L. Horowitz, Electoral Systems: A Primer for Decision Makers, J. DEMOCRACY, Oct. 2003, at 115.}
\footnote{15. Cf. Edward Wong, Kurds' Return to City Shakes Politics in Iraq, N.Y. TIMES, Mar. 14, 2005, at A1 (discussing how the success of Kurdish candidates in the January election facilitated the Kurdish return to the city of Kirkuk).}
\footnote{17. I borrow these terms from Gerald L. Neuman, Justifying U.S. Naturalization Policies, 35 VA. J. INT'L L. 237 (1994).}
nation. Yet inducing such participation in territories in transition, such as Iraq, can be tricky. The Sunnis, for instance, were no-shows during the recent Iraqi elections. The task of wooing the Kurds has proven a tall one. When a new nation is to incorporate several sub-state groups, each with a strong sense of its own unique identity, it may prove hard to induce participation in the national political process.

In general, the solution to this kind of problem is federalism. In a federal system, individuals hold two citizenships—one local and one coextensive with the territory controlled by the state that aspires to nationhood. In part, this is a sop to disaffected minority groups, such as the Quebecois in Canada, a necessary part of the bargain pursuant to which they will show up to vote in national elections. Yet from the republican perspective, federalism also has intrinsic worth. Encouraging the creation of local governments precludes diseconomies of scale and fosters the kind of economic and political activity conducive to participation. Moreover, competition among various bodies—local and national—promotes responsiveness, which in turn leads inexorably to greater participation. As Justice Sandra Day O'Connor once put it, federalism "increases opportunity for citizen involvement in democratic processes" and "makes government more responsive by putting the States in competition for a mobile citizenry.'

Federalism is a solution congenial to many sub-state groups in the Middle East, and to Iraqis in particular. Kurds, for instance, not only desire it but also are apt representatives for its first-order worth. On the first point, the Kurds pressed the Iraqi Governing Council, during the drafting of the Transitional Administrative Law, to permit any three provinces to veto whatever permanent constitution might be proposed, enhancing provincial power. On the second, although a byproduct of the disgraced United Nations Oil for Food Program, the establishment of a Kurdish government for Iraq's autonomous northern regions fostered precisely the kind of engagement and participation to which federalism theoretically conduces.

Moreover, even the peculiar angle that Iraq is taking toward the adoption of a federal system—moving from a centralized to a decentralized government rather than vice-versa—has its precedents in the Middle East. During the middle of the nineteenth century, after barely quashing a revolt led by Muhammad Ali, a powerful governor of Egypt, the Ottoman Empire, once a heavily centralized state, devolved power to its provinces and offered a reform program, the tanzimat, that strengthened local government.

Since federalism encourages legal and political participation, the republican lens often focuses on local government. Unlike the institutional lens, the focus of the republican lens is not on groups or particular sub-state actors; its focus is structural, not personal. But like the institutional lens, the focus of the republican lens does not extend to a country's borders.

Yet psychological and sociological allegiances—concepts of emotional being—can be formed only at the national level. As Stephen Legomsky has

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citizenship is meaningful only if it “formaliz[es] an emotional attachment to . . . [a country and] to its other citizens.” Dual citizenship, whether given to another nation or to a local entity, makes this emotional attachment harder to create. It is perhaps for this reason that the United States requires those individuals naturalizing as U.S. citizens to renounce all other loyalties.

Afghanistan offers a prime lesson in the deleterious effects of a failure to inspire emotional attachment to the nation. The central government and the international community have acquiesced as local leaders have carved out vice-royalties—the North for the Uzbeks and the Panjshir for the Tajiks, for instance. At the same time, there is little love for the central government of President Hamid Karzai, who is perceived not to “say anything without checking with [the United States] first.” Day by day, it seems, people become more disaffected. Afghanistan cannot claim the psychological and sociological allegiance of its people.

Indeed, it can be hard to evoke such allegiance in the Middle East even in more established states. For instance, in Qatar, at least ostensibly, “[t]he people . . . are a part of the Arab nation.” Such supra-territorial nationalisms make territorial nationalism hard to generate and redouble its importance. The communitarian lens, like the nationalist lens, must therefore focus precisely on the territory controlled by the state.

The republican and communitarian lenses offer different perspectives. A republican point of view might evoke an endorsement of a prominent role for Islam and shariah. As Abdulaziz Al-Fahad has demonstrated, shariah can act as a constraint on a government susceptible to few limitations. Indeed, from the earliest times, Muslim thinkers have seen religion as a check on the power of the caliph or ruler. Neo-Platonist philosophers such as al-Farabi urged that “if it does not happen that a man exists with [the appropriate] qualifications, . . . [one should] adopt the Laws prescribed by the earlier [Kings].” Others, such as Ibn Khaldun, subscribed to similar, if more contractarian and less immanent, views. As Ibn Khaldun said, “[w]hen the Muslims got their religion from the Lawgiver (Muhammad), the restraining influence came from themselves.” Since Islam and the shariah can limit the power of the central government to the advantage of local governments, they may be republican goods.

Looking through the communitarian lens, on the other hand, might evoke an endorsement of a constitutional resolution of such pressing national questions as the control of a territory’s natural resources. The Transitional Administrative Law of Iraq declares that oil “belongs to all the people of all
If an Iraqi central government is to be strong, it must be able to enforce parity among provinces and control oil for the benefit of the entire Iraqi populace.

IV.

Even the legal and political component of the nation-building concept may be divided. Participation requires two senses of self. As George Herbert Mead has affirmed, "one has to be a member of a community to be a self." Yet, respect for certain rights that inhere in our common humanity is also a prerequisite to selfhood. Fostering the first sense of self requires a focus on groups, whereas encouraging the second sense of self requires a focus on individual human rights. Privileging the first sense of self favors participation regardless of its costs; privileging the second sense of self elevates the preconditions to democracy over democratic participation. The first sense of self is thus best seen through a democratic lens, the second sense of self through a human rights lens.

It is beyond cavil that political choices and legal actions are meaningful only when made or rendered against a rich backdrop of intersubjective norms. In the Middle East, when groups have been strong, citizens have participated in political processes. In late nineteenth- and early twentieth-century Lebanon, for instance, during the Arab Awakening, the nahda, political activity flourished. Reformers wrote political tracts, met as secret literary societies, and led revolutions.

Ensuring the flourishing of such norm-creating communities today may require affirmative action; rights may need to be given to groups qua groups. Group rights could include rights afforded to religious groups—for instance, a right to assistance from the state in collecting revenue (as in Germany), or a right to funding for schools (as in The Netherlands)—or rights granted to a burgeoning civil society—for instance, the kinds of commercial law reform recommended by Ian Ayres and Jonathan Macey.

Group rights not only facilitate and encourage participation but also foster an environment of tolerance, which in turn promotes group formation and participation. Tolerance is engendered by competition—when there are more groups, each has to make itself more appealing to draw or retain constituents.

Indeed, this is precisely what happened in the United States. Liberal laws permitted Catholics to establish themselves politically and socially during the nineteenth century. Once established, they began to press for equal treatment, and the once dominant Protestants responded by reforming and

26. TRANSITIONAL ADMINISTRATIVE LAW, supra note 4, art. 25(E).
pressing back. As United States Supreme Court Justice William O. Douglas is notoriously said to have remarked to fellow Justice Hugo Black, “if the Catholics get public money to finance their religious schools, we better insist on getting some good prayers in public schools or we Protestants are out of business.” 30 This competition between Catholics and Protestants inspired a move toward non-denominationalism in schools and public life around the United States. 31

Iraq has already begun to take steps to protect groups. The Transitional Administrative Law enshrines religious freedom and states that “[n]either the Iraqi Transitional Government nor the governments and administrations of the regions . . . may interfere with the right of the Iraqi people to develop the institutions of civil society.” 32 Yet norm-creating communities may stifle the voices of some of their members. To take an egregious example, in parts of Afghanistan it was impossible for women to vote in the recent presidential election. 33 Under the Pashtunwali, the tribal code of some Afghans and Pakistanis, when one group needs to make restitution to another, it supplies the aggrieved side with virgin women. 34 As Swanee Hunt and Isobel Coleman worried in a recent op-ed, female legal and political participation in Iraq is unlikely if the plight of women there comes to mirror that of women in neighboring Iran. 35

The democratic lens and the liberal lens are not as distinct from one another as are the republican and communitarian lenses. Although there is some intuitive appeal to the notion that empowering religious groups might lead to illiberal suppression of the human rights of their members, recent empirical work suggests that “[o]ne of the main reasons for the [detrimental] change in treatment of women in modern Shari’ah courts” was the replacement of flexible traditional methodology “by particular laws suitable to nineteenth-century Nation-State patriarchal hegemony.” 36 Moreover, it would be not only orientalist but also unjust to presume that there is a single, universal, undifferentiated content to the term liberalism.

Yet the democratic lens and the liberal lens should be distinguished, for they inspire different actions. For instance, one of the important questions that will come before the new Iraqi government will be how deeply to entrench any constitutional solution reached. The U.S. Constitution is notoriously hard to amend; others, such as the Hungarian or the Polish Constitutions, can be

32. TRANSITIONAL ADMINISTRATIVE LAW, supra note 4, art. 21.
amended by simple legislation. Looking through the democratic lens might inspire the promulgation of a constitution that is readily amendable, since such a constitution reflects a more perfect form of popular sovereignty. Looking through the human rights lens, however, might inspire the promulgation of an unamendable constitution, since it is only now that all parties are at the table, anxious to come to terms, no party is sure of its standing, and the international community is watching closely. While the democratic lens focuses on groups, the human rights lens zooms in on individuals.

V. CONCLUSION

This Foreword suggests the complexity of most nation-building heuristics. It has outlined six different lenses, each with a different focus. The institutional lens focuses on sub-state groups, while the nationalist lens focuses on the full territory of a state; the republican lens focuses on organs of local government, while the communitarian lens focuses on the state; and the democratic lens focuses on the group, while the liberal human rights lens focuses on the individual.

Each of the authors who follow seems to be looking through one lens. Abdulaziz Al-Fahad notes the power that popular, extra-constitutional protest may have. He seems to be looking through the democratic lens. By contrast, Ian Ayres and Jonathan Macey aspire to the creation of a robust civil society. They seem to be looking through the republican lens. Finally, Ash Bali suggests that the international community takes the moral high ground when it facilitates state-building rather than nation-building. This assertion reflects a predilection for institutional development.

None of these authors, with the possible exception of Bali, explains the reasons for choosing a particular lens. None answers questions such as: “Should state-building come before nation-building?” or “Is voting more important than pledging allegiance?” This failure to consider the diverse set of approaches subsumed within the nation-building aspiration is reflected on the ground today. The international community, Middle Eastern reformers, and Iraqi politicians are all in need of a hierarchical set of priorities. This need remains unfulfilled.

38. These groups are not necessarily the same as those responsible for the provision of state services, although they may be.