A Constitution Without Constitutionalism: Reflections on Iraq's Failed Constitutional Process

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A Constitution Without Constitutionalism: Reflections on Iraq’s Failed Constitutional Process

Feisal Amin Rasoul al-Istrabadi*

I. Introduction

Theoretical physicists hypothesize a “sum over histories,” a concept having its roots in the Heisenberg Uncertainty Principle and the Schrödinger equation postulated in quantum mechanics.¹ The idea is that there are universes parallel to the one we inhabit where, for example, the French Revolution did not occur and the Bourbon kings continue to rule to this day in an unbroken chain.² Moreover, there is an infinite number of parallel universes whereby the infinite chains of possible permutations relating to French history since July 14, 1789 (and, for that matter, before) have played themselves out.³ In this multiverse of infinite possibilities, the 2003 military intervention by the United States in Iraq was accomplished competently. A constitutional process unfolded a decade or so later; one in which Iraqis of all political and ethnoconfessional persuasions participated. Wise leadership prevailed, and compromises were struck that caused the efflorescence of national cohesion and harmony. The result has been a peaceful and fecund Iraq.

Regrettably, in our universe, virtually everything that could go wrong did so. Far from engendering national cohesion, the constitutional process

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1. See STEPHEN W. HAWKING, BLACK HOLES AND BABY UNIVERSES AND OTHER ESSAYS 78–79 (1993) (discussing the creation of the “concept of a sum over histories” to solve the “problems with quantum mechanics and the uncertainty principle” that troubled Einstein). The hypothesis was first elucidated by the late Nobel laureate in physics, Richard Feynman. Id. at 79.

2. See, e.g., MICHIO KAKU, PARALLEL WORLDS: A JOURNEY THROUGH CREATION, HIGHER DIMENSIONS, AND THE FUTURE OF THE COSMOS 168 (2005) (“[A]t each quantum juncture, the universe splits in half, in a never-ending sequence of splitting universes. All universes are possible in this scenario, each as real as the other.”).

3. Physicist Frank Wilczek also describes this principle by discussing many worlds in which Helen of Troy “was not a captivating beauty” and instead had “an ugly wart on her nose.” Id. at 169 (quoting Frank Wilczek). In each of these universes, presumably Paris would not have abducted Helen and the Trojan War would not have occurred. Id.
very nearly ripped the country apart and threatens still to do so. The process was initially boycotted by Iraq's second largest ethnoconfessional group, Sunnis.\textsuperscript{4} Some of their supposed representatives, recruited by the U.S. Embassy, participated as unelected members of the Constitutional Drafting Committee.\textsuperscript{5} When an impasse occurred, the elected representatives of the two other major ethnoconfessional groups, Shi'ite Arabs and Kurds, excluded them from the process.\textsuperscript{6} Those articulating a vision for the most radical restructuring of the country controlled the process, and they were in no mood for compromise. The result was the ignition almost immediately of a brutal, and in Iraq, unprecedented wave of ethnoconfessional violence that has left tens of thousands of civilians dead and up to 5 million externally and internally displaced persons. Why did the constitutional process fail so miserably after what was a collective sigh of relief that Iraq's brutal dictator had been removed from office?

This Article argues that there are two principal reasons for the failure of the Iraqi Constitution of 2006\textsuperscript{7} and the process surrounding it to engender national cohesion. First, the process of constitution drafting in Iraq was an insufficiently organic one. Rather, its terms of reference were too often dictated, or so it seemed, by U.S. interests, such as narrow partisan and electoral issues in Washington. Second, and equally important, the new political elites did not trust each other and had not arrived at a sufficiently common vision for what the new constitutional order should be. Because of factors exogenous to the constitutional process itself, those with a (probably minority) view favoring a radical reordering of the state were able to impose their vision on the draft text. The result has been constitutional tension that erupted into ethnoconfessional violence and that threatens further instability.

\textsuperscript{4} See Bob Woodward, State of Denial: Bush at War, Part III 383 (2006) ("But the minority Sunnis had effectively boycotted the election, leaving 20 percent of the population out—an important, critical segment ... "). It is also possible that the Sunnis stayed away not entirely as a result of a political boycott of the elections but at least in part due to the high level of violence in areas in which they predominated. See id. at 375 (describing President Bush pushing for ways for Sunnis to participate despite the violence in their region).

\textsuperscript{5} See Ali A. Allawi, The Occupation of Iraq: Winning the War, Losing the Peace 405-06 (2007) (describing the process leading to the inclusion of unelected Sunnis in the Constitutional Drafting Committee).

\textsuperscript{6} See id. at 412-17 (discussing the isolation of the Sunni negotiators and their ultimate rejection of the draft put forward for the referendum).

Ultimately, this Article concludes that early constitutional drafting in the case of Iraq was devastating. Instead, a modus vivendi should have been attempted, one which preserved the status quo. This would have allowed the political elites to engage in confidence-building measures, develop trust in one another, and develop a compromised, but shared, vision of the future for the state. Instead, before this process could be nurtured, the parties were forced into a negotiation “for all the marbles” in a zero-sum environment. The result has been disastrous, in no small part because positions in the post-constitutional period have hardened, as compromise now would result in more than one party losing face with its constituents.

The analysis in this Article is divided into three parts. Part II describes briefly the deeply divisive question of federalism as it occurred in the constitutional negotiations in post-2003 Iraq. This Article focuses on that issue, because it is singularly the most contentious one faced by the new political elites and because it was central to the constitutional deliberations. Part III, drawing to a significant extent on this author’s personal experiences, particularly in respect to the interim Constitution of 2004, is a reflection on the American role in the constitution-drafting process. Part IV is a preliminary, and perhaps inchoate, reflection on the divisive role that the new political elites played in the constitutional processes. It, too, is informed by the author’s personal acquaintance with, and knowledge of, many of the principal players and events involved.

One ought to approach Iraq with caution. Given the history of blunders there over the past six years, it is possible to claim any number of often contradictory “lessons learned” and to adduce evidence selectively in support of virtually any proposition. One of the interlocutors at the conference that gave rise to this Article proclaimed “the end of Iraq” three years ago.8 Yet rumors of my country’s demise—like Mark Twain’s death—may have been greatly exaggerated. Still, while caution is warranted—along perhaps with no small dose of humility—surely some conclusions can be stated about why the constitutional process in Iraq has failed to act as a catalyst of national unity.

II. A Brief Synopsis of the Federalism Divide

In Iraq the most emotionally charged issue, bar none—as charged as was the slavery debate in the United States in the eighteenth and nineteenth centuries—was the nature of federalism and the extent of the powers of the newly-created federal government in Baghdad. Historically, Iraq was a

8. See generally Peter Galbraith, The End of Iraq: How American Incompetence Created a War Without End 207 (2006) (describing the Iraqi Constitution as creating a three-state “solution,” one that might “lead to the country’s dissolution”). It seems to the author that Galbraith adopts a hypernationalist Kurdish viewpoint, and thus utterly and erroneously discounts the existence of an Iraqi nationalism and identity amongst Iraq’s Arab majority at the very least.
unitary state. So, for instance, the central government in Baghdad distributed the assets derived from the sale of oil. There were no meaningful checks and balances on decisions taken by Baghdad, as an example, on which parts of the country would receive funds for development and which regions would be ignored. Thus, the constitutional innovations made post-2003 aimed to make a federated state out of a unitary one, something unprecedented, at least in the Middle East. Given the importance of this topic, it is appropriate to set forth briefly the broad parameters of the issue before proceeding further.

The Iraqi Kurdish leadership was the principal driving force in the federalism debate. The Kurds had been promised autonomy by Iraq’s Ba’thist Provisional Constitution thirty years earlier, and although that promise had not been kept at the time, they had achieved much more than autonomy in 1991 in the wake of Saddam Hussein’s invasion of Kuwait: they had achieved de facto independence. No one wanted to turn the clock back and reassert centralized control over Iraqi Kurdistan, a suggestion that would have been totally unacceptable to the Kurdish leadership and to the rank-and-file in the region. The post-2003 constitutions thus expressly recognized

9. See LARRY DIAMOND, SQUANDERED VICTORY: THE AMERICAN OCCUPATION AND THE BUNGLED EFFORT TO BRING DEMOCRACY TO IRAQ 163 (2005) ("Iraq had always been highly centralized," and "for many Iraqis, the unitary state was a bedrock principle of their nationalist identity.").


11. See id. at 163 (discussing the unchecked power of Saddam Hussein’s Revolutionary Command Counsel to distribute funds).

12. See DIAMOND, supra note 9, at 163 (discussing “the introduction of federalism into a historically unitary state” and explaining that “[m]any in Iraq and the Arab world did not understand what federalism meant”). By contrast, the United Arab Emirates, similar to the experience in the United States, made in 1971 a federal state out of seven British Crown colonies, the Trucial States. ALI MOHAMMED KHALIFA, THE UNITED ARAB EMIRATES: UNITY IN FRAGMENTATION 27–30 (1979); Butti Sultan al-Muhairi, United Arab Emirates, in 4 LEGAL SYSTEMS OF THE WORLD 1690 (Herbert M. Kritzer ed., 2002).


the Kurdistan Regional Government (KRG) as the federated region with jurisdiction over the three governorates that constitute Iraqi Kurdistan.\textsuperscript{16} Thus, the Kurdish leadership was effectively offering the reintegration of Iraqi Kurdistan into the rest of the country on the condition that a federal arrangement would be enshrined in the new Constitution.\textsuperscript{17}

Creating a newly federated structure involved, of course, a number of highly contentious questions. Amongst these questions was whether the part of the country that was predominately Arab and represented some 80% of the population\textsuperscript{18} would be subject to a federated arrangement. In other words, would the rest of the country be a part of a symmetrical federation, or would Iraq be organized asymmetrically, with the Arab-majority areas ruled directly by Baghdad? The Kurdish leadership, for its part, promoted a symmetrical federation, evidently motivated by a desire to avoid a seemingly anomalous constitutional arrangement between Baghdad and Kurdistan. But even if that were acceptable to the rest of the country, there was still an issue of what precisely symmetrical federation meant. It could, for instance, be based on creating a federal arrangement with each of Iraq's remaining fifteen governorates, allowing (or more accurately, encouraging) the different governorates to combine into larger regional governorates, or employing some permutation thereof.

For the Arabs of Iraq, however, the situation was quite different. Opinion polls conducted after the referendum approving the regionalist Constitution showed the overwhelming majority of Iraq's population did not wish to live in a federated arrangement with Baghdad.\textsuperscript{19} Even after much of the ethnosectarian violence, nearly six in ten Iraqis favored a unitary state over federation or partition.\textsuperscript{20} That point was made emphatically in early 2009, when an attempt to create a federated region out of the oil-rich Governorate of Basra, whose population is overwhelmingly Arab Shi'ah,
failed miserably. It was unable to obtain the signatures of 10% of registered voters even to get the matter on the ballot for referendum.

Only one non-Kurdish party pressed for the radical vision of federalism or regionalism. It was the Supreme Council for the Islamic Revolution in Iraq (SCIRI), since renamed the Supreme Iraqi Islamic Council (SIIC). This party was formed in exile in Iran during the eight years of the Iraq-Iran War, and it had fought alongside Iran against Iraq during that war. It shared, along with its Iranian allies, a vision of a state in which the Shi'ah clergy ruled. It also shared, in common with the Kurdish leadership, a vision of a hyperfederation in which Iraq would largely be divided into ethnosectarian regions, with the Kurds controlling northern Iraq, Sunni Arabs controlling the country's center, and the Shi'ah controlling the south. The chairman of the Constitutional Drafting Committee in 2005 was a member of SCIRI/SIIC.

It would be a mistake to assume, however, that all of Iraq's Kurds favor hyperfederalism or regionalism. While no direct evidence exists about the views of Baghdadi Kurds, there is very strong circumstantial evidence suggesting that they reject the regionalist agenda of the two principal Kurdish nationalist parties. These two parties ran as a coalition in the December 2005 elections held under the permanent Constitution, and they fielded a list in Baghdad. The list was headed by a particularly distinguished gentleman, Hoshyar Zibari, who was then, and is now, Iraq's Minister for Foreign Affairs. Baghdad, still the largest Kurdish city in the country, is home to some 1 million Kurds, and only about 44,000 votes were needed to elect a member from the Kurdish Alliance to the new parliament. Yet not one single member was elected to parliament from this list in Baghdad (though some were seated due to the rounding that occurs in Iraq's proportional
representation system).\textsuperscript{31} It seems quite plausible to interpret this result as a rejection of the driving agenda of the Kurdish parties.

Notwithstanding the seeming ambivalence of most Iraqis, the 2006 Constitution adopted an extreme version of federalism. For instance, it allowed one or more of Iraq's governorates to form a federated region,\textsuperscript{32} stipulating that local laws have "priority" over federal laws.\textsuperscript{33} The Constitution also substantially weakened the powers of the federal government, to the extent that some observers argued that the federal government could not impose taxes.\textsuperscript{34} It also permitted federated regions to create their own security forces\textsuperscript{35} and created ambiguity respecting the management of newly discovered oil fields.\textsuperscript{36} The new Constitution was widely seen by Iraqi nationalists as a de facto partition of the country.\textsuperscript{37} Not surprisingly, violence ensued almost immediately upon ratification of the document.\textsuperscript{38}

III. An American Process for an Iraqi Constitution

It does not appear that the United States, acting through the Coalition Provisional Authority (CPA), had a clear idea of how the constitutional process should unfold in Iraq when it first intervened in 2003. Of course, the original "plan" was for the United States to turn over sovereignty to an Iraqi government very quickly.\textsuperscript{39} That plan was discarded almost immediately, and an American imperator, Paul Bremer, was appointed instead.\textsuperscript{40} His vision of a constitutional process initially was that he would appoint a group of Iraqi advisors who would in turn appoint a constitutional committee to advise on a way forward.\textsuperscript{41} In July 2003, Ambassador Bremer appointed a twenty-five person Iraqi Governing Council (IGC)—"governing" in name only.\textsuperscript{42}
The IGC, in turn, appointed two bodies, a Council of Ministers and a Constitutional Preparatory Committee. In no small part to maintain the ethnosectarian proportions of the IGC as determined by the CPA, each IGC member insisted on a right to appoint a minister and a member of the constitutional committee, with the consequence that each subsidiary body had twenty-five members. The manner of these appointments evinces a basic distrust amongst the IGC members and suggests that a reasonable compromise on membership of these bodies proved impossible.

On October 16, 2003, the United Nations Security Council passed Resolution 1511, recognizing that the U.S.-U.K. occupation authority would continue to exercise temporary authority in Iraq until after a permanent constitution came into effect and a government duly elected pursuant thereto came to power. The Security Council made no mention of an interim constitution. Yet exactly thirty days after having sponsored 1511, the United States abruptly changed course. Bremer forced the IGC to agree to the so-called November 15th Agreement, whereby the Iraqis would draft an interim constitution, authority would be transferred to an interim government by July 2004, and caucuses would be held to select a transitional parliament.

What could have accounted for such an instantaneous sea change in U.S. policy? It appears that U.S. policy makers decided soon after the passage of Resolution 1511 that the Iraqis were making insufficient progress in pushing the constitutional process forward. Rather than considering that perhaps the Iraqis might need more time to come to a meaningful consensus on the constitution, the Americans concluded that the Iraqis needed to be hurried along, hence the November 15th Agreement. It would not be the last time the United States pushed the process forward precisely when pulling back might have been more appropriate.

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44. See Adeed Dawisha & Larry Diamond, Iraq's Year of Voting Dangerously, J. DEMOCRACY, Apr. 2006, at 89, 102 n.4 (noting that the ethnosectarian balance was “replicated” in the cabinet appointments). It should be noted that not all IGC members appointed ministers who were their co-religionists. Adnan Pachachi, a Sunni, appointed a Shi'i to the post of Minister of Planning.
46. Id.
47. DIAMOND, supra note 9, at 51.
48. Id. at 51–52.
49. See Richard W. Stevenson, The Struggle for Iraq: Strategy; U.S. Aide in Iraq in Urgent Talks at White House, N.Y. TIMES, Nov. 12, 2003, at A1 (observing that Bremer’s trip to the White House was prompted by the growing sense that Bremer needed to abandon a “methodical” approach to the election of an Iraqi government in favor of a more rapid method).
50. See infra notes 113–21 and accompanying text.
There were a number of problems with the U.S. plan. Amongst them was the convening of a caucus to select the transitional parliament. To begin with, there was—and is—no Arabic word for "caucus."\(^{51}\) Explaining what the concept meant was cumbersome and, at times, comic. More substantively, the Americans had in mind that the members of the caucus would themselves be selected by having one-third of them appointed by the IGC, one-third by provincial councils, and one-third by local councils. But of course, it was the United States that had appointed the members of each of these bodies; it was no small matter explaining how a "caucus," selected by bodies that had themselves been appointed by the United States, could in turn appoint a transitional parliament with any colorable claim of legitimacy.

Moreover, U.S. policy in Iraq had headed into a buzz saw: The Grand Ayatullah Ali al-Sistani, the most senior Shi'i cleric in Iraq. He had issued a fatwa earlier, declaring that only an elected body could draft a constitution.\(^{52}\) The Grand Ayatullah—though himself an Iranian national who never acquired Iraqi citizenship—had single-handedly caused U.S. policy to change. Whereas previous U.S. policy had been that an unelected body would draft a permanent constitution, the November 15th Agreement provided for an elected body to do so.\(^{53}\) Not that many in the occupation authority seemed to consult Iraqi history, but there was also a historical precedent for an elected body. Eighty years earlier, an elected Constituent Assembly had ratified Iraq's first postindependence constitution, the Basic Law of 1925.\(^{54}\) It was difficult to justify why, eighty years later, a nonelected body should undertake the task.

An interim constitution, the Law of Administration of the State of Iraq for the Transitional Period (TAL), was promulgated by the IGC and the CPA in March 2004.\(^{55}\) Iraq would be governed under its terms until a permanent constitution could be drafted by an elected assembly and approved in a national referendum.\(^{56}\) This author has elsewhere described the salient provisions of, and some of the negotiations surrounding, the TAL and will

\(^{51}\) DAVID L. PHILLIPS, LOSING IRAQ: INSIDE THE POSTWAR RECONSTRUCTION FIasco 180 (2005); see also HANI LUBBADEH, AL-NIBRAS ENGLISH–ARABIC DICTIONARY 152 (1993) (using phrases, not any single word, to translate "caucus" into Arabic).


\(^{54}\) PHILIP W. IRELAND, IRAQ: A STUDY IN POLITICAL DEVELOPMENT 393 (1938); see also Feisal Amin al-Istrabadi, Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law, 50 N.Y.L. SCH. L. REV. 269, 269 & n.1 (2005–2006) (observing that Iraq's only legitimate, permanent constitution was ratified by an elected body).

\(^{55}\) TAL, pmbl.

\(^{56}\) Id.
not do so again here. It suffices for purposes of this discussion to recall that the TAL successfully disposed (albeit on a provisional basis) of four issues, at least two of which still prove contentious.

First, the TAL preserved the status quo with respect to Kurdish autonomy in northern Iraq. It recognized that the areas above the Green Line, which had been a de facto part of the Kurdistan Regional Government (KRG) as of the commencement of hostilities in 2003, would continue to be governed by the KRG, though the eighteen-governorate structure of Iraq (including the three governorates that principally formed the KRG) would also be preserved. Second, the TAL recognized the federal nature of the relationship between the KRG and the government in Baghdad. It thus gave de jure recognition to the KRG for the first time in an Iraqi constitutional text.

Third, and far more contentious, was the issue of control over Iraq’s natural resources. Yet this issue, too, was resolved, again on the basis of preserving the status quo and without prejudice to future negotiations. The government in Baghdad would continue to oversee the development and extraction of Iraq’s natural resources, the principal one obviously being oil. Revenues, however, would be distributed to regions and governorates, taking into account, inter alia, demographic distribution (i.e., population). Fourth, and equally contentious, was whether other federated regions could be formed during the interim period. Some believed that recognizing the status quo with respect to the Kurds was different qualitatively from affirmatively dividing the rest of the country into federated regions prior to the coming into effect of a permanent constitution. Nonetheless, a compromise was reached on this issue as well: up to three governorates could become a federated region, but doing so would be relatively cumbersome during the interim period. Without belaboring it further, the point here is that the foundations of a modus vivendi were laid in the TAL.

The TAL stipulated that elections would be held for a National Assembly in January 2005. It must be borne in mind that the TAL was

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57. Al-Istrabadi, supra note 54, at 269.
58. See TAL, art. 54, para. A ("The Kurdistan Regional Government shall continue to perform its current functions throughout the transitional period, except with regard to those issues which fall within the exclusive competence of the federal government as specified in this Law."); see also DIAMOND, supra note 9, at 163 (commenting that Iraqi Kurdistan has enjoyed more than a decade of autonomy).
59. TAL, art. 53, paras. A–B; see also DIAMOND, supra note 9, at 164 (noting that the Kurds pressed hard for all the territory north of the Green Line).
60. ALLAWI, supra note 5, at 224.
61. TAL, art. 25, para. E.
62. Id.
63. See DIAMOND, supra note 9, at 167–68 (highlighting the opinion that such a fundamental reorganization of the Iraqi state should not occur during this transitional period).
64. TAL, art. 53, para. C.
65. Id., art. 30, para. D.
ratified by the IGC in March 2004.66 By December of that year, the insurgency was in full swing, and major Arab Sunnī groups had announced their intention to boycott the January elections.67 These elections would of course elect the new parliament, but that parliament would also act as the constituent assembly to draft the permanent Constitution.68 The Sunnī boycott threatened to repeat an unfortunate episode in Iraq’s history: the Shi‘ī religious authorities ordered a boycott of the elections for the Constituent Assembly in the 1920s, which in turn led some of Iraq’s Shi‘ah to feel disenfranchised for generations.69

As tensions rose and security deteriorated, it was widely reported that the Iraqi Council of Ministers was nearly unanimous—with at most two or three dissenting voices—in its view that elections should be delayed.70 One voice stood adamantly against delay: President George W. Bush.71 One Arab diplomat has told this author that an Arab head of state attempting to explain to the American President the ramifications of a Sunnī boycott was interrupted with the rejoinder that no delay in elections would be contemplated and that there should be no further discussion of the issue. To delay elections, in the President’s view, would be to hand the terrorists a victory. An elder Iraqi statesman, Dr. Adnan Pachachi, who had served as Foreign Minister in the mid-1960s in the government overthrown by the Ba‘thists in 1968, and who, while serving as the IGC President, had chaired the TAL drafting committee, wrote a rejoinder to this line of reasoning.72 In words that appear now eerily prophetic, he wrote:

But there is more than one way for the terrorists to win in Iraq in January. Another would be for them to cause large numbers of Iraqis to stay away from the polls, not in protest but out of fear for their lives. That would result in elections whose legitimacy would be questioned. Whoever was perceived as having won such a flawed

68. TAL, art. 60.
69. See ALLAWI, supra note 5, at 205–06 (“It was a commonplace amongst the Shi‘a that by failing to cooperate with the British mandate authorities in the 1920s, and resisting occupation on the grounds of patriotism, they effectively handed over the governing of Iraq to the Sunni Arabs.”).
70. See, e.g., Larry Diamond, Editorial, How a Vote Could Derail Democracy, N.Y. TIMES, Jan. 9, 2005, at C13 (predicting that elections would increase political polarization and violence); Edward Wong, Big Iraqi Parties Are Urging Delay in Jan. 30 Voting, N.Y. TIMES, Nov. 27, 2004, at A1 (reporting that fifteen political groups petitioned for a six-month postponement of the elections to address security concerns and to make administrative arrangements, but Shi‘ah Muslim representatives were insistent that the elections be held by the end of January).
election would claim a mandate, while others would claim they had been disenfranchised. Very few scenarios take us deeper into chaos and civil unrest than this very likely outcome. I would argue that the prospect of these disastrous events unfolding is far worse than any short-lived claim of victory the terrorists might make.  

Whether because of the boycott or—equally likely—because of the violence that was especially gripping the predominately Sunnī areas, many Sunnīs stayed home during balloting. Although nationally the turnout was 58%—still meaning that 42% of the electorate did not cast a vote—in many predominately Sunnī Arab areas turnout was disastrously low. In Anbar Governorate, for instance, fewer than 2% of registered voters actually cast a vote. The end result was precisely as Larry Diamond had predicted it would be when he too had urged a delay in the elections. Writing three weeks before the elections, he noted that, if the Sunnīs failed to go to the polls, they would be catastrophically underrepresented in the National Assembly and hence in the constitutional drafting process because Iraq was operating under a proportional representation system in which the entire country was treated as a single district. The effect of low Sunnī turnout would eliminate their representation and lead to civil strife. Like Pachachi’s earlier, Diamond’s words were prophetic, as fewer than twenty Arab Sunnīs were elected to the 275-member National Assembly.

The TAL had posited that the process of constitution drafting would take some seven months and that a final draft would be proffered by mid-August. Once the drafting was completed, the draft would be published and debated publicly for two months. Only then would the document be

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73. Id.
74. The predominately Sunnī neighborhood of Adhamiyah in Baghdad, for instance, had no polling stations whatsoever because the violence was so rampant. See John F. Burns, Security Is Key Issue for Sunnis: Voters Turn Out in Uproar Mood, INT’L HERALD TRIB., Dec. 17, 2005, at 5 (describing the neighborhood as being completely deserted of voters during the January 2005 transitional elections).
75. See ALLAWI, supra note 5, at 392 (describing the boycott of Sunnīs as “near universal” but claiming that nearly 60% of all eligible voters did vote).
76. Id.
78. Diamond, supra note 70.
79. See id. (“If turnout is much heavier in the Shi’īh south and Kurdish north than in Sunni provinces... the Sunnis, who account for about 15 percent to 20 percent of the population, may win only a tiny percentage of the seats.”).
80. Id.
82. TAL, art. 61, para. A.
submitted for a referendum in October. This schedule turned out to be naively overoptimistic.

It took nearly four months for the Iraqi Transitional Government to form, after intense negotiations between Shi‘ī religious parties and the Kurdish coalition. Noticeably absent from these negotiations (over government posts and other political issues not including the Constitution) was any Sunni representation. By June, the National Assembly had failed to convene the Constitutional Drafting Committee, in particular because there was wrangling about Sunni representation. As it turned out, the entire drafting process took about six weeks, and the final text went to referendum without any significant input from any Arab Sunnis.

The TAL foresaw that there might be difficulty in proffering an agreed text on the tight schedule it had contemplated (let alone the schedule as it actually unfolded). Accordingly, it contained two escape hatches. The first was where, though unable to conclude a draft within the contemplated time frame, the National Assembly believed that it might be able to complete the drafting if it had an additional six months. Under such circumstances, the Assembly could vote itself for additional time. While this provision was not exactly utilized, an appeal was made to a variation on its theme. The chairman of the Constitutional Drafting Committee, a member of the SCIRI, recognized that it would be impossible to complete a text within the TAL’s strict time limits. Accordingly, he publicly requested a fifteen-day extension. Yet before any member of the Iraqi political class had the opportunity of responding, the American ambassador in Baghdad announced

83. Id., art. 61, para. B.
84. See ALLAWI, supra note 5, at 396 (chronicling the formation of the coalition and the swearing in of the Jaafari government on May 3, 2005).
85. See THOMAS MOWLE, HOPE IS NOT A PLAN: THE WAR IN IRAQ FROM INSIDE THE GREEN ZONE 9 (2007) (“Sunni Arabs were grievously underrepresented in the [Transitional National Assembly]. The Shia Arabs and Kurds were free to allocate government positions as they wished.”).
86. See ALLAWI, supra note 5, at 405–06 (describing the efforts of the United States to get Sunnis to join the government and the subsequent failure to convene the Constitutional Drafting Committee until July 2005).
87. Id. at 414, 412–14 (describing the constitution-drafting process and noting that “the draft constitution was finally read to the National Assembly with only three of the fifteen Arab Sunni members present”).
88. TAL, art. 61, para. F.
89. Id.
90. Id.
91. Id.
92. ALLAWI, supra note 5, at 413.
93. See Craig S. Smith & Dexter Filkins, U.S. and Iraq to Plan Military Transfer; Iraqis Push to Meet Constitution Deadline, N.Y. TIMES, Aug. 2, 2005, at A6 (“Iraqi leaders on Monday reaffirmed their decision to finish writing the country’s constitution by the middle of the month . . . .”).
that no extension would be needed. The possibility of extending the time line—and perhaps reaching a compromise—was stillborn.

The second escape hatch contained in the TAL was where there was a true impasse in the National Assembly. In that event, there would be new elections in December 2005, the transitional period would be extended for one more year, and the process would start all over again with the new National Assembly. This resetting of the clock would also occur in the event the referendum rejected the proposed draft: a new Assembly would be elected in December, and the process would begin again. This provision presented a real possibility for reversing course and opening up the process of drafting. Immediately after the January 2005 elections, the Sunnis realized what a horrendous blunder they had made and regretted their lack of participation. Given the inability of the negotiators to agree to a draft text, declaring an impasse, thereby triggering this provision, would have meant that the Sunnis could participate in the December 2005 elections, as indeed they did, and become full partners from within the elected National Assembly.

Again, the U.S. Embassy in Baghdad worked feverishly to ensure that this second provision would not become operative. Initially, the U.S. Ambassador had sponsored the inclusion into the drafting process of individuals he believed had colorable claim to be representatives of Iraq’s Arab Sunni population. These were individuals brought in from outside the National Assembly. He had brokered an agreement between these individuals and the elected members of the drafting committee that the final text would not be submitted for referendum unless the entire committee, including the elected and unelected members, agreed on the final text by consensus. When the unelected Sunni members balked at the text, the elected members—with the apparent blessing of the U.S. Embassy—reneged

94. See id. (U.S. Ambassador Zalmay Khalid "played an active part in pushing Iraqi leaders toward their decision on Sunday to stick to an Aug[ust] 15 deadline for drafting a new constitution, urging them to set aside any issues that could not be resolved by that date.").
95. TAL, art. 61, para. E.
96. Id.
98. See id. (asserting that the “committee charged with drafting the constitution accepted 15 Sunni members Tuesday").
99. See ALLA\textbackslash{}WI, supra note 5, at 404–06 (noting that, in addition to fifty-five members of the National Assembly, a group of unelected Sunnis were included in the Constitutional Drafting Committee).
100. See id. at 405 (mentioning promises that major decisions regarding the constitution would be by consensus, including the Sunni committee members).
on the deal, submitting the objectionable text to referendum notwithstanding the lack of consensus.\textsuperscript{101} The referendum was set for October 15, 2005.

Under the TAL's rules for approval of the draft permanent Constitution, any three governorates could veto the proposed Constitution if they rejected it by a two-thirds vote.\textsuperscript{102} It began to appear in early October that there would be a sufficient vote to reject the TAL in the three predominately Sunni governorates.\textsuperscript{103} The American Ambassador swung into action again. Whereas the text of the proposed Constitution, which had been published and circulated nationwide, contained a provision that the Constitution could not be amended for two parliamentary cycles (up to eight years), the Embassy brokered an eleventh-hour change whereby the first parliament would have a certain time within which it could—but was not required to—propose a package deal of amendments that would be subject to another referendum.\textsuperscript{104} The Ambassador then convinced one of the Sunni religious parties that had been involved in the negotiations to endorse this amended text.\textsuperscript{105}

The result was that the Constitution was approved—barely.\textsuperscript{106} Two Sunni governorates rejected the text by at least two-thirds majorities.\textsuperscript{107} In a third, the text was rejected, though not by the requisite two-thirds of the votes cast.\textsuperscript{108} A shift of some 83,000 votes in that governorate would have resulted in a two-thirds rejection of the text, and hence a rejection of the draft text by three governorates.\textsuperscript{109} To put the result into perspective, a shift of 83,000 votes out of a total of eleven million cast, or 0.75\% of the total, would have caused the Constitution to fail. Voter intimidation in this governorate—

\begin{itemize}
\item \textsuperscript{102} TAL, art. 61, para. C.
\item \textsuperscript{104} See id. (stating that there were last-minute amendments made and that one amendment was to change provisions in the draft permanent constitution that required "at least two parliamentary cycles before being amended").
\item \textsuperscript{105} See MORROW, supra note 7, at 5 (reporting that Ambassador Khalilzad brokered the agreement on October 12th between the Iraqi Islamic Party, composed mostly of Sunni Arabs, and Shi'a leaders); see also ALLAWI, supra note 5, at 416 ("The Islamic Party was mollified by these changes, and recommended to its supporters to vote in the affirmative on the constitution.").
\item \textsuperscript{107} See \textit{Iraq Draft Constitution Approved, Officials Say: Results from Oct. 15 Referendum Indicate 78.59 Percent Backed Charter}, MSNBC, Oct. 25, 2005, http://www.msnbc.msn.com/id/9803257/ [hereinafter \textit{Iraq Draft Constitution}] ("Only two other mostly Sunni provinces—Salahuddin and Anbar—had voted no by two-thirds or more.").
\item \textsuperscript{108} See id. ("The election commission said the predominantly Sunni province of Nineveh had produced a 'no' vote of 55 percent.").
\item \textsuperscript{109} See Kanan Makiya, \textit{Present at the Disintegration}, N.Y. TIMES, Dec. 11, 2005, at C13 ("If a mere 83,283 people in the province of Nineveh had voted no instead of yes, the draft constitution would have been defeated."). Nineveh Governorate produced a 55\% no vote, rather than two-thirds. \textit{Iraq Draft Constitution}, supra note 107.
\end{itemize}
especially by Kurdish militias—without a doubt contributed to suppressing the no vote. Needless to say, the promised constitutional reforms have yet to be acted upon by the Chamber of Deputies, more than three years after the "agreement" to do so was brokered by the U.S. Ambassador.

But the problems predated the 2005 process itself. Once Bremer arrived on the scene in May 2003, very little of what was to unfold over the next five years seemed meaningfully related to the needs of Iraq and Iraqis. Instead, the electoral needs of U.S. politicians seemed to drive the process—and, unfortunately, the United States is never more than two years away from elections. The November 15th, 2003 Agreement and its transfer of authority to an Iraqi government by July 2004 could not help but raise the suspicion that the Bush Administration wished to claim—as indeed it did—that political progress was being made in Iraq in advance of its bid for reelection. Later, virtually the entire political class in Iraq was convinced of the need to delay elections until the security situation improved and Sunni groups could be convinced to reenter the process. By the time elections were held, the security situation in Baghdad, as well as other provinces, was dismal, and armed militias were roaming the streets. Indeed, the situation was so bad that United Nations elections officials "monitored" the Iraqi elections from Amman, Jordan, without a single elections worker in Iraq. (From this vantage point, the United Nations solemnly declared the elections reasonably free and fair.)

It was not the facts on the ground in Iraq that dictated that the elections should go forward; rather, it was a seemingly Messianic belief by the White House in the redemptive power of elections—evidence from around the world to the contrary notwithstanding—that prevailed.

Similarly, during the negotiations for the permanent Constitution, it was U.S. pressure that drove the process forward. It cannot be gainsaid that pressure was applied in 2005, once again so that the U.S. Administration could claim—yet again as it in fact did—"victory" in democracy's march forward during the 2006 midterm elections. That the forward march of the political process was contributing directly to the downward spiral of violence seems to have mattered not a whit to U.S. policy makers, nor their Iraqi counterparts for that matter. The drafters continued their work behind the

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112. The Secretary-General, Report of the Secretary-General Pursuant to Paragraph 30 of Resolution 1546 (2004), ¶ 5, delivered to the Security Council, U.N. Doc. S/2005/141 (Mar. 5, 2005) ("The conduct of the elections met recognized standards in terms of organization, regulations and procedures. The number of serious irregularities and complaints conveyed to the Independent Electoral Commission was relatively small.").

113. See supra notes 45–58 and accompanying text; see also COCKBURN, supra note 77, at 195 ("The US wanted a constitution to be rushed through because this would show that there was political progress in Iraq.").
Constitution Without Constitutionalism

blast walls protecting the Green Zone even as multiple car bombs, death, and misery were increasingly the norm for ordinary citizens throughout the capital.114 It is unlikely that it was mere accident that the immediate proximate cause of the ethnoconfessional violence that engulfed the country in 2006 and 2007—the destruction of the al-Askariyyah Shrine in Samarra in February 2006—occurred four months after the referendum on the permanent Constitution and two months after elections under the Constitution.115

Such meddling was not limited, however, to the Republican Administration. The current U.S. Vice President, when he was running for the presidency, cowrote an op-ed with Leslie Gelb of the Council on Foreign Relations calling for what Biden characterized later as the “soft partition” of Iraq on the Bosnian model.116 One supposed defender of the Biden plan said that the plan might not be “cockamamie,” hardly a ringing endorsement.117 It seems almost beyond doubt that the phrase “soft partition” directly contributed to the insurgency in Iraq, many of whose elements believed that partition was the U.S. mission there in the first place.118

The Biden–Gelb idea was premised on two fundamental mistakes. The first mistake was that Bosnia was a model for Iraq. The flaw in this view—aside from its suffering from intellectual laziness—was that it denuded Iraq of its own history. The second mistake was that Iraqis wanted to divide themselves into ethnosectarian enclaves. The refutation of that premise occurred in January 2009.119 An attempt to hold a referendum on creating a federal region in Basra, supported by much of the local power elites in that

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114. See ALLAWI, supra note 5, at 372 (“[The Green Zone] turned into an enclave where the culture of small-town America combined with the trappings of vice-regal administration. This created a curious ‘bubble’ environment, divorced from the travails and life-threatening risks in the rest of the country, with ever more dense concentrations of . . . politicians.”); Stanley Reed, Iraq: The Deadly Cost of Excluding the Sunnis, BUS. Wk., Aug. 1, 2005, at 51 (“In Baghdad’s highly fortified Green Zone, committees drawn from Iraq’s major political parties and ethnic groups are trying to hammer out a constitution.’’).


116. Joseph R. Biden & Leslie H. Gelb, Editorial, Unity Through Autonomy in Iraq, N.Y. TIMES, May 1, 2006, at A19; see also Helene Cooper, A Plan to Heal Iraq by Splitting It Apart, INT’L HERALD TRIB., July 31, 2007, at 2 (describing Biden and Gelb’s “soft partition” plan, which called for “dividing Iraq into three semi-autonomous regions, held together by a central government”). The plan may have “gained momentum” in Washington, but, as discussed below, it seems to have fizzled in Iraq. See infra notes 119–22 and accompanying text.


governorate, failed to garner the signatures of 10% of the registered voters. There will, accordingly, be no such referendum. Far from dividing the country into ethnosectarian enclaves, it is likely that the solution to Iraq’s political crisis may well lie in asymmetrical federation. That would be an arrangement in which the Kurds have a federal arrangement, while the rest of the country is governed directly from Baghdad (à la Spain).

The above discussion about the U.S. role in Iraq is emblematic of the tension inherent in the U.S.–Iraqi relationship today. On the one hand, every Iraqi knows that but for the brave men and women of the U.S. armed forces—and the determination of George W. Bush—a brutal tyrant would still be ruling Iraq, a man whose record of barbarity matched that of the worst despots who came to power worldwide in the last half of the twentieth century. On the other hand, heavy-handedness, a deaf ear to Iraq’s own history, and an apparent indifference to exigencies as they were unfolding on the ground all combined to condemn the country to a deteriorating cycle of violence and destruction. It did not have to be thus.

IV. The New Iraqi Political Elites

It was early 2004, and the representatives of the twenty-five members of the IGC and CPA were negotiating who would control the revenues resulting from Iraq’s sale of oil during the interim period until a permanent constitution came into effect. The negotiators were each highly placed within their respective organizations, consisting mostly of deputies to the principals who were IGC members. Adil Abdul Mahdi, currently the Vice President of Iraq and then (as now) deputy to Abdul Aziz al-Hakim, represented the SCIRI/SIIC. Roge Shwais, who would become Vice President of Iraq in the first post-Saddam government and who was then Speaker of the Kurdistan Regional Parliament, represented his principal, Masoud Barzani, the head of the Kurdistan Democratic Party (KDP). Though this author was not the deputy to Adnan Pachachi, head of the Iraqi Independent Democrats and the chairman of the interim-constitution-drafting committee, he was his senior advisor for constitutional affairs and legal reform, served on the steering committee of his political party, and had the portfolio for drafting the interim constitution exclusively within the party (obviously under Pachachi’s supervision). Notwithstanding the high level of representation, this working group was unable to come to any compromise on the issue. Bremer’s deputy, Ambassador Dick Jones, suggested that the question be bracketed and resolved at the level of principals.

Accordingly, a meeting of the full IGC was convened to resolve the issue. In parallel with the debate as it occurred in the deputies’ committee,

120. Id.
121. The authority for many of the factual statements in this Part comes from the author’s personal knowledge, gained through his experiences in Iraq during the constitution-drafting process. To the author’s knowledge, descriptions of many of these events have not been published before.
the two camps boiled down to whether the allocation of the income from oil sales would be a prerogative exclusively of the Baghdad government or whether regional governments would have some right of joint ownership of those resources. The issue was particularly sensitive for those members who believed in a stronger role for regional governments and feared that the Baghdad government could strangle the regions if its hands alone were on the purse strings. The failure of the previous regime to allocate a sufficient budget for development outside Baghdad, and outside Saddam Hussein’s home governorate, was frequently cited. The Nationalists (including this author) feared too great a weakening of the new federal structures. The debate went nowhere for hours. Jalal Talabani, currently the President of the Republic, and then (as now) the leader of the Patriotic Union of Kurdistan (PUK), asked to be recognized. In evident frustration, he pled his case again and concluded:

If I knew that the result of all our efforts was going to be a genuinely democratic Iraq, I would place my life in your hands. But I do not know what the end product is going to be, and so I need assurances that I will not be strangled as I was by the previous regime.122

This vignette appears deeply revelatory of a central fact about the new political elites governing the country. They fundamentally do not trust each other. Talabani’s words are not mere metaphor: “strangulation” might well be taken quite literally. In such an atmosphere, every decision has possible life-and-death consequences. Talabani’s experience told him as much. During the years when the United States protected the northern safe haven in Iraq, he and Barzani decided to hold elections for a Kurdistan regional parliament. Their inability to decide how to allocate the seats—and thus their relative power—after the elections had resulted in the eruption of a fratricidal civil war between the two parties. Before the United States brokered a cease-fire, Barzani allied himself with Saddam Hussein, who, responding to Barzani’s appeal, sent in tanks and troops to confront Talabani.123 Talabani was himself a consummate practitioner of Realpolitik.124 When it became obvious in 1991 that the United States intended to allow Saddam Hussein to survive the Gulf War, he immediately traveled to Baghdad and was shown

122. Talabani used an Arabic colloquial expression in the Baghdad dialect (“asallimilkum rāṣī”), which literally translated is “I would submit my head to you,” meaning that the speaker would do so with the certain knowledge that it would not be chopped off by his interlocutors. It is akin to saying that he would trust his interlocutors with his life. The author was present in the IGC Chamber when Talabani made this intervention.


shaking hands with the despot who had butchered untold tens of thousands of Iraqi Kurds between 1987 and 1988.125

The Kurdish Civil War was a lesson not lost on Iraq’s new political leadership. Every decision was fraught with danger, even deciding to hold elections. After all, the losing candidate—or perhaps the winning, but militarily weaker, candidate—could not be assured of living to see the next sunrise after the election results. The mistrust amongst the political class was (and largely still is) at this basic level. Colleagues might mutually pledge “their sacred honor,” but few believed that the next fellow’s honor was altogether that sacred.

Equally fundamental, the parties did not share a mutual vision for how the new Iraq should be restructured. Most understood that the days of a strongly centralized Iraq were over, certainly with respect to Iraqi Kurdistan. Given the genocide perpetrated by the previous regime against Iraq’s Kurds, no Kurdish leader would accept the constitutional status quo ante. Most also understood that a majority of rank and file Kurds in northern Iraq would prefer independence if it were an option. The Kurdish leadership, not only Barzani and Talabani but their lieutenants as well, understood that fate had dealt the Kurds an unfortunate and unfair hand: even if their fellow Iraqis would agree amicably to a declaration of Kurdish independence, hostile regional powers would not. Turkey, Iran, and Syria—each with substantial Kurdish populations of their own—would not happily embrace Kurdish independence. Each, but especially Turkey, would regard such a statelet as an existential threat and react accordingly. Moreover, even if the Kurdish statelet managed to wrest control of the Kirkuk oil fields away from Iraq, being a landlocked area, it would depend on the largesse of hostile, surrounding powers for the ability to export that oil. Moreover, the Kurdish leadership understood, in any case, that a reasonable percentage of all of Iraq’s natural wealth would be far more valuable than 100% ownership of Kurdistan’s wealth.

The Kurdish parties thus came into the constitutional process with a very high degree of cohesion amongst themselves.126 Whatever the competing political and economic ambitions between the two groups, the KDP and PUK, might have been, they were set aside during this period.127 Whatever political differences existed between the two principal parties, they were largely, though not entirely, opaque to outsiders.128 The Kurds thus

125. Id.
126. See Kathleen Ridolfo, Iraq: Kurds Agree to Unify Administrations, RADIO FREE EUROPE/RADIO LIBERTY, Jan. 12, 2006, http://www.rferl.org/content/Article/1064623.html (announcing that the KDP and PUK agreed to joint administration of the Kurdish government and noting that in 2004 the two groups united to jointly draft a Kurdish regional constitution).
127. See id. (noting the historic level of cooperation between the KDP and PUK in the years 2004 through 2006).
presented a strong and united political front throughout the constitutional negotiations.129

Politics and the Americans aside, the Kurds were also militarily the strongest force on the ground within Iraq.130 That situation was certainly true in 2003, after Bremer’s disastrous decision to dissolve Iraq’s armed and security services,131 and it continued well into 2007 if not into early 2008.132 Logic and history might thus have dictated that this coalescing of factors made the negotiations then under way for a permanent constitution the perfect time for the Kurdish leadership to entertain compromise from a position of strength. Instead, in the evident belief that they would enjoy this position of superiority ad infinitum and egged on by paid foreign advisors indifferent to the fate of Iraq as a cohesive state, the Kurds insisted on pressing their maximal demands for autonomy, respecting which they would not compromise.133 Nor were they satisfied when the other parties conceded their demands with respect to Iraqi Kurdistan and the KRG; they insisted that this (con)federated arrangement should be normalized throughout the country.134 They absolutely rejected the notion of an asymmetric federation.135

The Iraqi Arab interlocutors during the negotiations consisted principally of Shi‘i religious parties, the fate of the Sunnis having been previously described.136 These groups represented a very wide range of views on the question of the nature and extent of federalism. The most extreme view—one that shared the Kurdish vision—was held by

(detailing the public presentation of a Kurdish united front in 2005, despite some continued infighting between factions).


130. See Siegfried Weissner, The Kurdish Issue and Beyond: Territorial Communities Rivaling the State, 98 AM. SOC’Y INT’L L. PROC. 107, 113, 112–13 (2004) (referring to the peshmerga, the Kurdish militias, as America’s “best all[y]” in Iraq and the Kurd’s strongest weapon, and noting the highly professional and well-trained nature of the militias).


133. See id. (stating that the Kurds were continuing their push for autonomy, including calling for a referendum on placing Kirkuk in Kurdish control).

134. See Ashley S. Deeks & Matthew D. Burton, Iraq’s Constitution: A Drafting History, 40 CORNELL INT’L L.J. 1, 79, 79–80 (2007) (describing the Kurds’ desire to have Iraq be a “voluntary federation” that would give extraordinary powers to the regions and governorates).

135. See Michael Rubner, The Much Too Promised Land, MIDDLE E. POL’Y, Fall 2008, at 139, 162 (book review) (noting that an asymmetric federation approach would weaken the influence of “robust regional powers” like the Kurds in Iraq).

136. See supra notes 65–69 and accompanying text.
SCIRI/SIIC. Their view can best be summarized by a statement made to this author by its deputy during the TAL negotiations. The author expressed the view that an interim constitution should only preserve the status quo with respect to federalism—i.e., recognize only the KRG as a federated region—allowing a permanent constitution to deal with the issue for the rest of the country. Adil Abdul Mahdi, speaking on behalf of SCIRI/SIIC, retorted, “Whatever the Kurds get, the Shi‘ah should get.” Furthermore, along the lines of Kurdistan, SCIRI/SIIC advocates a “Shi‘istan,” a federated super-region combining the nine predominately Shi‘i governorates (which have, coincidentally, something like 90% of Iraq’s oil wealth).\footnote{137}

The media have too often reported SCIRI/SIIC’s view on federalism as the “Shi‘i position,” but it is not. The Shi‘i religious parties, much less secular Shi‘ah, have very divergent views on the question of federalism. On the extreme end, the Sadrist bloc comes very close to rejecting federalism outright, at least outside the Kurdish areas of Iraq.\footnote{138} In this sense, the Sadrists have a pan-national outlook. While there was much degeneration in the Sadrist position with respect to this issue in 2006 to 2007, it is no accident that Muqtada al-Sadr supported both materially and rhetorically the insurgents in 2004 in Fallujah, a predominately Sunni city. Al-Sadr’s discourse in those days was pan-Iraqist.

The Da‘wah Party of the current Prime Minister and his immediate predecessor, who was in office at the time of the constitutional negotiations in 2005, took—and takes—an intermediate position. With respect to Iraq other than Iraqi Kurdistan, it was willing to accommodate a federalist arrangement.\footnote{139} It rejected, however, the notion of “Shi‘istan,” preferring instead smaller federated regions consisting of one, two, or three governorates.\footnote{140} Moreover, Da‘wah favored—and favors—a stronger Baghdad government than the current Constitution allows.\footnote{141} Another Shi‘i religious party, the Fadhilah Party, also generally followed this line of thinking.\footnote{142}

The above four Shi‘i religious parties, along with a group of independents, constituted the so-called United Iraqi Alliance (UIA), the grand Shi‘i coalition that controlled more than 50% of the seats in the

\footnote{137. ANTHONY CORDESMAN, CTR. FOR STRATEGIC AND INT’L STUDIES, UNDERSTANDING THE FIGHTING IN SOUTHERN IRAQ BETWEEN SADR AND THE IRAQI FORCES (2008), http://www.csis.org/media/csis/events/080327_schieffer_iraq.pdf.}
\footnote{139. Id.}
\footnote{140. See id. (noting that the proposal to create a large Shi‘istan-type region is part of the larger federalism debate and constitutes one of the most divisive issues of that debate).}
\footnote{141. See Anthony Shadid, The Political Dance in Iraq’s South, WASH. POST, Jan. 19, 2009, at A1 (noting that the Da‘wah party has resisted calls for federalism and opposed any move to take power from Baghdad).}
\footnote{142. Sowell, supra note 138.}
National Assembly, which proffered the Constitution of 2006. How, then, could SCIRI/SIIC’s view predominate and prevail if it represented only one—and a minority view at that—within the UIA? Even adding SCIRI/SIIC’s numbers to those of the Kurdish Alliance would not yield a majority. Again, how did this view come to predominate?

The answer lies in the worst kind of identity politics as practiced both by the Americans and the Iraqi leadership in the days leading up to the elections and thereafter. The CPA was so heavily focused on issues of ethnoconfessional identity that it failed to contemplate the existence of other identities in Iraq. It failed to contemplate, for instance, political identity: there had been a history of Iraqi nationalists who identified with a secular-liberal Iraq that had dominated Iraq throughout the twentieth century. The first Iraqi prime minister after the fall of the previous regime, Ayad Allawi, a man from a prominent Shī‘ī family, was an exemplar of this political philosophy. When the U.S. Ambassador undertook to “broaden the base” of the representatives in the drafting process in 2005, he did not support this group, even though it had garnered some 14% of the overall vote. Instead, he thought purely in terms of ethnoconfessional identity and went in search of “Sunni representatives.” The liberal-nationalists thus remained essentially locked out of the constitutional negotiations.

Capitalizing on this state of affairs, the Grand Ayatullah al-Sistānī formed the UIA with the clear intention of ensuring that a Shī‘ī religious sensibility dominated the proceedings. He had a sense that this was his one chance to ensure that a liberal, secular vision of the country would be smothered, reversing the philosophical basis of the TAL. He feared that the opportunity might not arise again. He thus insisted upon the cohesion of the UIA, which he was able to deliver through sheer force of his personality and influence (the latter having waned politically in the intervening years). Whether he shared SCIRI/SIIC’s vision cannot be known. But his insistence that the Shī‘ī religious parties hold together at least emboldened SCIRI/SIIC, which successfully cowed the other parties in the UIA to adopt its position. Once the nonelected Sunni members of the drafting committee were thrown

143. Id.
145. In the interest of full disclosure, the author notes that he belongs to the coalition headed by Dr. Ayad Allawi.
out, those left thus adopted the extreme view of federalism reflected in the final draft.\textsuperscript{148}

The leadership of the various parties thereafter did what leaderships do: it delivered its constituents, leading the electorate into voting in the affirmative in the referendum. In fact, there was very little discussion of the substance of what the draft text contained and little reason to have confidence that many in the electorate knew what they were voting for. As the negotiations continued in the lead-up to the vote, the text changed within the last two or three days before the referendum. It was not clear whether the last published text reflected the current draft as of the day Iraqis went to the polls. Even after the vote was held and the result was announced, it was not certain that the draft that had just been approved had been published verbatim. What was certain was that the very last draft had not been widely circulated, much less widely debated. In no way was the vote in the referendum, outside Iraqi Kurdistan, an informed one.

Once the Constitution was set and new elections held, a very different set of considerations evinced themselves. The UIA initially seemed to hold together, but fissures soon appeared.\textsuperscript{149} For instance, two candidates initially emerged in early 2006 for the premiership, Ibrahim Jaafari, the transitional Prime Minister, and SCIRI/SIIC’s Adel Abdul Mahdi.\textsuperscript{150} Abdul Mahdi lost to Jaafari by a single vote when the Sadrists within the UIA voted for Jaafari.\textsuperscript{151} The reason for the Sadrists’ backing of Jaafari might have had very little to do with the relative merits of the two men. Instead, they were likely motivated by Jaafari’s less radical view of federalism (in common with the Sadrists) as well as dynastic competition between the al-Sadr and SCIRI/SIIC’s al-Hakim dynasties, two families with generations of competing religious scholars. Later, when it became clear Jaafari did not enjoy the support of other, significant parliamentary blocs, he was replaced by the current incumbent, Nuri al-Maliki.\textsuperscript{152}

\begin{itemize}
  \item \textsuperscript{148} See Noah Feldman & Roman Martinez, \textit{The International Migration of Constitutional Norms in the New World Order: Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy}, 75 \textit{FORDHAM L. REV.} 883, 899–900 (2006) (stating that the Shi'ah and Kurds finished drafting the Iraqi Constitution in ad hoc gatherings and worked out key issues, such as federalism, without the Sunnis, and that the final document adopted the Shi'ah's federalist demands).
  \item \textsuperscript{149} See Kristina Arvanitis, \textit{Lessons from Iraq: Electoral Legitimacy in the Shadow of Ethnoreligious Conflict}, 20 \textit{TEMP. INT’L & COMP. L.J.} 529, 545–46 & n.121 (2006) (observing that, despite the “united” moniker, several of the parties that make up the UIA have been accused of infighting and many groups left the UIA before permanent elections were held).
  \item \textsuperscript{150} See Robert F. Worth, \textit{Shiite Alliance Votes to Retain Iraq’s Premier}, \textit{N.Y. TIMES}, Feb. 12, 2006, at A1 (reporting that Jaafari won the election by a single vote because followers of Moktada al-Sadr within parliament decided to vote for him).
  \item \textsuperscript{151} Id.
\end{itemize}
Political competition—and armed combat—between the parties over the next two years led to the dissolution of the UIA, certainly as it existed in 2005. Whilst al-Sadr withdrew his support of Maliki, SCIRI/SIIC changed its colors, providing the support necessary for Maliki’s government to avoid falling in a no-confidence motion. Ironically, while the UIA has been falling apart, the Kurdish Alliance, with the Marxist past of much of its old-line leadership, has remained faithful to the “strategic alliance” it announced in 2004 with SCIRI/SIIC, which seeks to introduce elements of religious law into Iraqi civil law. Politics has made strange bedfellows, indeed.

But the point is that, if the permanent Constitution were being negotiated today, it almost certainly would be a very different document. Whilst many of the provisions protecting Kurdish autonomy might remain intact, there is little doubt that there would be a much more robust federal government. In 2005, when no real governance occurred and when the constitutional negotiations were more or less the only—at the very least the main—activity taking place in Baghdad, natural fissures within alliances did not form, and natural alliances across disparate parties could not form. The result was a constitutional process that resulted in a text likely rejected by the majority of the non-Kurdish political class and almost certainly rejected by the majority of Iraq’s non-Kurdish citizens.

The lesson, it would seem, is this: after the trauma of thirty-five years of barbaric rule by the previous regime, and particularly in light of the distrust and suspicion with which many amongst Iraq’s political elite viewed one another, the process of constitution drafting should have been delayed, not rushed. Moreover, the timetable played out based upon the demands and needs of a foreign power, not those of the country itself. Drafting a constitution under the circumstances that existed in Iraq resulted in a highly controversial text and at the very least greatly exacerbated—and likely caused much of—the violence in Iraq. As the political and constitutional processes moved forward—and aside from al-Qa’idah suicide bombings—the Iraqi insurgency greatly intensified, reaching catastrophic levels in the aftermath of the approval of the permanent Constitution. Strengthening the regions at the expense of a Baghdad government perceived as too weak to hold the country together played into the worst fears of many Iraqis who

153. See Ned Parker, Radical Shiite Cleric’s Bloc Quits Iraqi Ruling Coalition, L.A. TIMES, Sept. 16, 2007, at A3 (describing the UIA’s drop to eighty-three seats since the election).
154. See id. (Maliki’s decision last month to form a coalition of the Islamic Dawa Party, Supreme Islamic Iraqi Council and the Kurdistan parliament alliance may have pushed the Sadr camp to abandon the United Iraqi Alliance).”
155. See BRENDAN O’LEARY, MEMORANDUM: WORK FOR NOT AGAINST IRAQ’S CONSTITUTION 6–8 (2007) (arguing that the 2004 interim constitution and 2005 constitutional conventions led to the alliance between Kurdistan’s parties and the Shia Arab coalition); Parker, supra note 153 (demonstrating that the Kurds are still part of the coalition).
were always suspicious of the American enterprise. Many suspected that dividing Iraq was the goal of the neoconservatives in the first place, and any constitution would have fed directly into such suspicions (whether rationally or not is immaterial).

Iraq's new political elites were simply not yet ready to draft a permanent constitution. It had taken months just to negotiate an interim constitution—as it turned out it took some four months to negotiate the TAL—but there would be less than six weeks to hammer out the radically different and far more controversial permanent constitution. The new political elites needed what in labor law is called a "cooling off period," or what in UN jargon is called time for "confidence-building measures." Assuming initial elections had been held when they actually were, the immediate task of the first elected government should have been to restore Iraq's shattered economy and infrastructure. Equally important, it should have set about the task of national reconciliation in a serious way, not the halfhearted, haphazard, ineffectual gestures that have been made. Undertaking these acts might have contributed to a consolidation with respect to the security situation, isolating those insurgent groups with more of a nationalist agenda and with which it might have been possible to negotiate with al-Qa'ida and Ba'thists with whom no negotiations were ever possible.

It should be recalled in this context that one of the reasons for the Sunni boycott was the objection of some that elections were occurring in the country whilst foreign troops were still on the ground. The presence of U.S. forces was unavoidable given Bremer's actions in the early days of the occupation in dissolving Iraq's own armed and security forces. Yet it almost certainly would have ameliorated the objections of at least some Sunni groups had the January 2005 elections not been for an assembly that would draft a permanent constitution with foreign troops in the country. As stated above, the elected assembly could have gone about the task of rebuilding the country and improving people's lives without making final determinations about the permanent future of the country.

Delaying the constitution-drafting process and focusing instead on the more urgent needs of the country could have resulted sooner in a process that may now be nascent. Crosscutting issues transcending ethnic or confessional affiliations might have emerged, issues that might have fostered a meaningful modus vivendi between the political actors. A recent vote in parliament relating to an interpretation of federalist powers, for instance, saw the emergence of a centrist alliance that cut across party affiliation as well as across ethnoconfessional divides. Such events cannot but help to foster

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greater trust between the various actors, trust that would seem to be indispensible in constitutional deliberations.

Of course it remains possible that, as the process of governance continues, and as greater consensus arises than has hitherto occurred, a consensus about constitutional amendments could also arise. The problem with such a utopian hope is the hard realities of what has transpired on the ground over the past four years. Supposing that SCIRI/SIIC and the Kurdish leadership awoke tomorrow to finally realize the economic absurdity of setting potentially different management criteria of Iraq's oil reserves based upon whether a field is classified as "present,"[159] there would still be huge barriers to being able to amend the 2006 Constitution. These parties have made such an important public issue of this and other provisions as to invest them with great symbolic significance. For them to agree to an amendment would thus encompass no small loss of face, a condition anathema to politicians throughout the world. Solving the problems now thus becomes far more difficult, even were there a will to do it, than before positions had become so publicly ossified.

The above-stated conclusions about Iraq's abortive constitutional process can be stated more generally. A statement of this particular lesson learnt might be that before one engages in the process of drafting a permanent constitution in a country attempting the arduous task of making the transition from dictatorship to democracy, that country's politics should be allowed to settle into a state of some natural equilibrium. This equilibrium allows the new political elites to factor in long-term interests as well as the short-term goals that otherwise tend to dominate in immediate constitution drafting. Under the best of circumstances, the drafting of a constitution can be a divisive process, one which can tear a country asunder. That is particularly true where the new elites have not yet acclimated and acculturated themselves to the realities of shifting from an oppositional mode to one of governance.[160]

Though these conclusions about Iraq can be stated in general terms, there is no intent to suggest that the conclusions are universal. Professor David Williams, a colleague at the Indiana University Maurer School of Law, makes a compelling case that the above-stated observations are inapplicable in Burma.[161] He states that it is not too early for the Burmese opposition to begin to think about a constitutional document, even before

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159. See DISTÜR art. 112, § 1 ("The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields.").

160. Of the twenty-five members of the IGC, only three had any real governance experience: Masoud Barzani and Jalal Talabani had run their respective enclaves in Iraqi Kurdistan, while Adnan Pachachi had served as Iraq's Foreign Minister and also as an advisor to the President of the United Arab Emirates.

It would be presumptuous for this author to opine about Burma, a country he does not know. But then, were he forced to make a universally applicable claim about the timing of constitution writing, the only proposition asserted would likely be that the situation in each country must be evaluated on its own merits. There is a class of countries where the opposition was unable to set aside parochialism in favor of considerations of a larger good and has failed to engender mutual trust and a spirit of genuine cooperation. For that class of countries, of which Iraq was unfortunately one, waiting to engender these institutions is a sine qua non to writing a permanent constitution.

V. Conclusion

Iraq’s new political elites were not ready to make the compromises necessary to draft what might truly have been a national charter. The proof of this fact was the impasse reached in August 2005, which subsequently resulted in an overwhelmingly negative vote of Iraq’s second largest ethnoconfessional group, Arab Sunnis. They nearly succeeded in defeating the referendum. The insistence that the process proceed apace to a successful resolution was motivated principally by the interference of a foreign power indifferent to local needs and motivated only by its own domestic political agenda. The result was calamitous ethnoconfessional violence, resulting in untold numbers of dead and the ethnic cleansing of Baghdad while U.S. forces looked on impotently—or worse, indifferently.

At least two factors interacted in a negative synergy that led to these tragic consequences. The first factor was the insistence of the United States, beyond any reason, that the process be completed on a time schedule measured in weeks, rather than months. At key junctures, when the Iraqi participants wanted additional time, the United States intervened to insist upon a shortened timetable. The second factor was a basic distrust amongst Iraq’s nascent political elites that, coupled with the shortened time constraints, contributed to a constitutional process that disunited the new elites and caused many to feel disenfranchised. The result, again, was violence from which it is not entirely clear Iraq will recover to preserve national cohesion.

A far wiser course for the cadre of state builders who descended upon Iraq would have been not to insist on adhering to an artificial deadline. Instead, they should have taken their cue from their Iraqi interlocutors and slowed the process down. It is obviously speculative whether doing so would have decreased the violence. This much, however, is certain: allowing

162. Id.
163. See Iraq Draft Constitution, supra note 107 (chronicling Sunni opposition to the referendum).
164. Id.
Iraq's political elites to develop a modus vivendi until a certain level of trust set in between them would most certainly not have contributed to the violence then occurring, and it might have actually avoided some of the violence that did occur.

Undoubtedly some countries may be able to engage in constitution writing at an early stage in their transition to democracy. Still, the state-building community risks engendering real harm when it insists that states that are not ready to incur the trauma of constitution writing do so. No doubt many in this community are motivated by a genuine desire to build constitutional democracy. It is naive in the extreme, however, to believe that constitutionalism can be engendered by the mere drafting of a document in a country where the political institutions necessary for constitutionalism are lacking. In fragile states attempting to heal themselves after despotic rule, the worst of all possible worlds may occur: the drafting process might cause breaches resulting in violence in an environment that is, in any case, incapable of supporting genuine constitutionalism and the rule of law. In such circumstances, the process—and the violence it engenders—risks becoming utterly pointless, no more than a thing-in-itself. Indeed, as in Iraq, an early constitutional process risks making real constitutional compromise for long-term stability nearly impossible to achieve.