

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

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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, Sunnī-Arabs.⁴ Some of their supposed representatives, recruited by the U.S. Embassy, participated as unelected members of the Constitutional Drafting Committee.⁵ When an impasse occurred, the elected representatives of the two other major ethnoconfessional groups, Shi'ī Arabs and Kurds, excluded them from the process.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 2006⁷ 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.

4. See BOB WOODWARD, *STATE OF DENIAL: BUSH AT WAR, PART III* 383 (2006) ("But the minority Sunnīs had effectively boycotted the election, leaving 20 percent of the population out—an important, critical segment . . ."). It is also possible that the Sunnīs 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 Sunnīs to participate despite the violence in their region).

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 Sunnīs in the Constitutional Drafting Committee).

6. See *id.* at 412–17 (discussing the isolation of the Sunnī negotiators and their ultimate rejection of the draft put forward for the referendum).

7. Many commentators refer to the permanent Constitution of Iraq as the "2005 Constitution." See, e.g., JONATHAN MORROW, U.S. INST. OF PEACE, *WEAK VIABILITY: THE IRAQI FEDERAL STATE AND THE CONSTITUTIONAL AMENDMENT PROCESS I* (2006), <http://www.usip.org/pubs/specialreports/sr168.pdf> (discussing the "2005 Iraqi constitution" and its failure to reconcile "competing visions of the Iraqi state"); REIDAR VISSER, *DEBATING DEVOLUTION IN IRAQ* (2008), <http://www.merip.org/mero/mero031008.html> (comparing the "gradual 'bottom-up' federalism" provided for in the "2005 Iraqi constitution" with the federalist structure that was ultimately implemented in 2008). This author retains the Iraqi usage of dating Iraqi constitutional documents from the year of their coming into force, in this case 2006.

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.⁹ So, for instance, the central government in Baghdad distributed the assets derived from the sale of oil.¹⁰ 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.¹¹ 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.¹² 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'athist Provisional Constitution thirty years earlier,¹³ 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.¹⁴ 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.¹⁵ 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.").

10. ABBAS ALNASRAWI, *IRAQ'S BURDENS: OIL, SANCTIONS, AND UNDERDEVELOPMENT* 161–63 (2002).

11. See *id.* at 163 (discussing the unchecked power of Saddam Hussein's Revolutionary Command Council 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).

13. See *IRAQ: A COUNTRY STUDY* 1 (Helen Chapin Metz ed., 4th ed. 1990) ("A March 1974 amendment to the Constitution provides for autonomy for the Kurds in the region where they constitute a majority of the population."); PHEBE MARR, *THE MODERN HISTORY OF IRAQ* 142 (2d ed. 2003) (stating that the Provisional Constitution of 1970 created a state "formed of two nationalities, Arab and Kurd, with recognition of Kurdish national rights").

14. See AL-DISTÛR AL-MU'AQQAT, 1970 [Constitution], art. 8(c), *translated in* 2 AMOS J. PEASLEE, *CONSTITUTIONS OF NATIONS* 378 (rev. 4th ed. 1985) ("The area whose majority of population is from Kurds, shall enjoy autonomy in accordance with what is defined by the law."); *IRAQ: A COUNTRY STUDY* 177 (Helen Chapin Metz ed., 4th ed. 1990) ("The Baathist government in 1970 granted the Kurdish minority a degree of autonomy . . ."); Phebe Marr, *Kurds and Arabs, Sunnis and Shiites: Can an Iraqi Identity Be Salvaged?*, in *RELIGION AND NATIONALISM IN IRAQ: A COMPARATIVE PERSPECTIVE* 63, 66–68 (David Little & Donald K. Swearer eds., 2006) (discussing the extent of separation between Kurdistan and the rest of the country over the preceding fifteen years).

15. See KENNETH KATZMAN, *CONG. RESEARCH SERV., THE KURDS IN POST-SADDAM IRAQ* 3 (2008), <http://www.fas.org/sgp/crs/mideast/RS22079.pdf> (describing Kurdish autonomy in the post-Saddam period and the Kurdish aversion to losing it).

the Kurdistan Regional Government (KRG) as the federated region with jurisdiction over the three governorates that constitute Iraqi Kurdistan.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.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 population¹⁸ 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.¹⁹ Even after much of the ethnosectarian violence, nearly six in ten Iraqis favored a unitary state over federation or partition.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,

16. DISTÜR JAMHÜRİYYAT AL-İRÂQ [DISTÜR] [Constitution] art. 113, *translated in* 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Rüdiger Wolfrum & Rainer Grote eds., 2009); QANÜN IDĀRAT AL-DAULAH AL-İRĀQIYYAH LIL MARHALAH AL-INTIĀLIYYAH [TAL] [Constitution], art. 53, para. A, *translated in* 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*.

17. See KATZMAN, *supra* note 15, at 3 (discussing the Kurdish method of retaining federal leverage by having the authority to alter certain laws and strike down a permanent constitution with veto power if it did not provide for them).

18. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: IRAQ (2009), <https://www.cia.gov/library/publications/the-world-factbook/geos/iz.html#People>. It should be noted that the last reliable census done in Iraq was in 1957, and that census neither asked for the respondent's national origin (Arab or Kurd) nor sectarian affiliation. The author perused the 1957 census during the drafting of the TAL.

19. ABC NEWS/USA TODAY/BBC/ARD POLL, EBBING HOPE IN A LANDSCAPE OF LOSS MARKS A NATIONAL SURVEY OF IRAQ 8 (2007), <http://abcnews.go.com/images/US/1033alraqpoll.pdf>.

20. *Id.*

failed miserably.²¹ It was unable to obtain the signatures of 10% of registered voters even to get the matter on the ballot for referendum.²²

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).²³ 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.²⁴ It shared, along with its Iranian allies, a vision of a state in which the Shī‘ah clergy ruled.²⁵ 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, Sunnī Arabs controlling the country’s center, and the Shī‘ah controlling the south.²⁶ The chairman of the Constitutional Drafting Committee in 2005 was a member of SCIRI/SIIC.²⁷

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.²⁸ The list was headed by a particularly distinguished gentleman, Hoshiyar Zibari, who was then, and is now, Iraq’s Minister for Foreign Affairs.²⁹ 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.³⁰ 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

21. Reidar Visser, *Basra, the Failed Gulf State, Part II: Wail Abd al-Latif Concedes Defeat*, HISTORIAE.ORG, Jan. 17, 2009, <http://historiae.org/latif.asp>.

22. *Id.*

23. *See id.* (discussing the Council’s plans to create a nine-governorate federal region extending all the way from Basra to Baghdad).

24. GlobalSecurity.org, Supreme Council for Islamic Revolution in Iraq, <http://www.globalsecurity.org/military/world/para/sciri.htm>.

25. *See id.* (“SCIRI was directly supported with funds by Tehran and with arms by Iran’s elite Revolutionary Guard.”).

26. Jeff Weintraub, *Thinking Seriously About “Centralism” and “Federalism” in Iraq*, SILOBREAKER, Mar. 3, 2009, http://www.silobreaker.com/DocumentReader.aspx?Item=5_2262151836490268672.

27. ALLAWI, *supra* note 5, at 404.

28. Kathleen Ridolfo, *Iraq: Political Parties (Re)Align For December Elections*, RADIO FREE EUROPE/RADIO LIBERTY, Nov. 1, 2005, <http://www.rferl.org/Content/Article/1062557.html>.

29. KATZMAN, *supra* note 15, at 3.

30. INT’L MISSION FOR IRAQI ELECTIONS, FINAL REPORT ON THE DECEMBER 15, 2005, IRAQI COUNCIL OF REPRESENTATIVES ELECTIONS 30 (2006), http://www.ihec.iq/content/file/other_reports/imie_final_report_2005_cor_elections_en.pdf.

representation system).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,³² stipulating that local laws have "priority" over federal laws.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.³⁴ It also permitted federated regions to create their own security forces³⁵ and created ambiguity respecting the management of newly discovered oil fields.³⁶ The new Constitution was widely seen by Iraqi nationalists as a de facto partition of the country.³⁷ Not surprisingly, violence ensued almost immediately upon ratification of the document.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.³⁹ That plan was discarded almost immediately, and an American imperator, Paul Bremer, was appointed instead.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.⁴¹ In July 2003, Ambassador Bremer appointed a twenty-five person Iraqi Governing Council (IGC)—"governing" in name only.⁴²

31. ALEX KIREEV, INDEP. ELECTORAL COMM'N OF IRAQ, IRAQ: LEGISLATIVE ELECTION 2005, <http://www.electoralgeography.com/new/en/countries/i/iraq/iraq-legislative-election-2005.html>.

32. DISTÜR art. 119.

33. *Id.* art. 115.

34. *See, e.g.*, MORROW, *supra* note 7, at 3 (arguing that Iraq's Constitution impedes the national government's ability to tax, thereby weakening the government's power).

35. DISTÜR art. 121, § 5.

36. *Id.* art. 112, § 1.

37. *See* DIAMOND, *supra* note 9, at 163 ("Iraq had always been highly centralized, and for many Iraqis, the unitary state was a bedrock principle of their nationalist identity.").

38. *See* ALLAWI, *supra* note 5, at 418 (discussing the intensification of insurgency and terrorist attacks aimed at undermining the public's confidence in the new government).

39. DIAMOND, *supra* note 9, at 32.

40. *Id.* at 36.

41. *Id.* at 47.

42. The international humanitarian law on occupation notwithstanding, the CPA believed that it was "the lawful government of Iraq." Michael A. Newton, *Legal Authorities for the Creation of the Iraqi High Tribunal*, in SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL 15, 20 (Michael P. Scharf & Gregory S. McNeal eds., 2006); *see also* Brett H. McGurk, *Revisiting the Law of Nation-Building: Iraq in Transition*, 45 VA. J. INT'L L. 451, 460 (2005) ("[T]he CPA was to exercise full governing authority, build new institutions, reform old ones, and

The IGC, in turn, appointed two bodies, a Council of Ministers and a Constitutional Preparatory Committee.⁴³ 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.⁴⁴ 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.⁴⁵ The Security Council made no mention of an interim constitution.⁴⁶ Yet exactly thirty days after having sponsored 1511, the United States abruptly changed course.⁴⁷ 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.⁴⁸

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.⁴⁹ 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.⁵⁰

establish conditions for economic growth. In other words, the CPA was to do everything the international law of occupation appeared to prohibit.”)

43. See S.C. Res. 1511, ¶ 2, U.N. Doc. S/RES/1511 (Oct. 16, 2003) (welcoming the appointment by the IGC of these two bodies).

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 Sunnī, appointed a Shīʿī to the post of Minister of Planning.

45. S.C. Res. 1511, *supra* note 43, ¶ 1–2.

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-Sīstānī, the most senior Shīʿī cleric in Iraq. He had issued a *fatwah* 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).

52. See Noah Feldman, *The Democratic Fatwa: Islam and Democracy in the Realm of Constitutional Politics*, 58 OKLA. L. REV. 1, 5–7 (2005) (quoting, in full, the *fatwa* that al-Sīstānī issued in June 2003 and expounding on the political impact of this democratic legal argument).

53. See *Agreement on Political Process*, AL-BAB, Nov. 15, 2003, <http://www.al-bab.com/arab/docs/iraq/cpa03a.htm> (announcing that Iraq’s permanent constitution would be drafted by a body directly elected by the Iraqi people).

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.⁵⁷ 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.⁵⁸ 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.⁵⁹ 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.⁶⁰

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.⁶¹ Revenues, however, would be distributed to regions and governorates, taking into account, *inter alia*, demographic distribution (*i.e.*, population).⁶² 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.⁶³ 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.⁶⁴ 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 2005.⁶⁵ It must be borne in mind that the TAL was

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 Shī'ī religious authorities ordered a boycott of the elections for the Constituent Assembly in the 1920s, which in turn led some of Iraq's Shī'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'athists 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

66. Dexter Filkins, *Iraq Council, with Reluctant Shiites, Signs Charter*, N.Y. TIMES, Mar. 9, 2004, at A1.

67. Dexter Filkins & Warren Hoge, *As January Nears, Iraq Waits for Promised Election Assistance*, N.Y. TIMES, Oct. 21, 2004, at A10 (reporting that a cleric, speaking for thousands of Sunnī mosques, threatened a boycott if the American and Iraqi military presence continued in Fallujah).

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 Shī'ah Muslim representatives were insistent that the elections be held by the end of January).

71. *Bush: Iraq Vote Shouldn't Be Delayed*, CNN, Dec. 3, 2004, <http://edition.cnn.com/2004/WORLD/meast/12/02/iraq.main/>.

72. Adnan Pachachi, Editorial, *Delay the Elections*, WASH. POST, Jan. 2, 2005, at B7.

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.⁷³

Whether because of the boycott or—equally likely—because of the violence that was especially gripping the predominately Sunnī areas,⁷⁴ many Sunnīs stayed home during balloting.⁷⁵ 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.⁷⁶ In Anbar Governorate, for instance, fewer than 2% of registered voters actually cast a vote.⁷⁷ The end result was precisely as Larry Diamond had predicted it would be when he too had urged a delay in the elections.⁷⁸ 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.⁷⁹ The effect of low Sunnī turnout would eliminate their representation and lead to civil strife.⁸⁰ Like Pachachi's earlier, Diamond's words were prophetic, as fewer than twenty Arab Sunnīs were elected to the 275-member National Assembly.⁸¹

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.⁸² Once the drafting was completed, the draft would be published and debated publicly for two months. Only then would the document be

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 Upbeat 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.*

77. PATRICK COCKBURN, *THE OCCUPATION: WAR AND RESISTANCE IN IRAQ* 187 (2006); see also ANTONIA JUHASZ, *THE BUSH AGENDA: INVADING THE WORLD, ONE ECONOMY AT A TIME* 245 (2006) (recounting the absence of Sunnī Arabs from the election).

78. Diamond, *supra* note 70.

79. See *id.* (“If turnout is much heavier in the Shī‘ah 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.*

81. JONATHAN MORROW, U.S. INST. OF PEACE, *IRAQ'S CONSTITUTIONAL PROCESS II: AN OPPORTUNITY LOST* 6 (2005), <http://www.usip.org/pubs/specialreports/sr155.pdf>.

82. TAL, art. 61, para. A.

submitted for a referendum in October.⁸³ This schedule turned out to be naively overoptimistic.

It took nearly four months for the Iraqi Transitional Government to form, after intense negotiations between Shīʿī religious parties and the Kurdish coalition.⁸⁴ Noticeably absent from these negotiations (over government posts and other political issues not including the Constitution) was any Sunnī representation.⁸⁵ By June, the National Assembly had failed to convene the Constitutional Drafting Committee, in particular because there was wrangling about Sunnī representation.⁸⁶ 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 Sunnīs.⁸⁷

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).⁸⁸ Accordingly, it contained two escape hatches.⁸⁹ 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.⁹⁰ Under such circumstances, the Assembly could vote itself for additional time.⁹¹ 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.⁹² Accordingly, he publicly requested a fifteen-day extension.⁹³ 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 Jaafri 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) (“Sunnī 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 Sunnīs 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 Sunnī 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.⁹⁴ 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.⁹⁵ 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.⁹⁶ This provision presented a real possibility for reversing course and opening up the process of drafting. Immediately after the January 2005 elections, the Sunnīs realized what a horrendous blunder they had made and regretted their lack of participation.⁹⁷ Given the inability of the negotiators to agree to a draft text, declaring an impasse, thereby triggering this provision, would have meant that the Sunnīs 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 Sunnī population.⁹⁸ These were individuals brought in from outside the National Assembly.⁹⁹ 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.¹⁰⁰ When the unelected Sunnī 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 Khalizad “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.*

97. *See* Rick Jervis, *Dem Senator Predicts More Sunni Participation*, USA TODAY ONLINE, July 5, 2005, http://www.usatoday.com/news/world/2005-07-05-sunni-involvement_x.htm (citing Laith Kubba, a spokesperson for the Iraqi Prime Minister, as saying the Sunnīs regretted not participating in the January election).

98. *See id.* (asserting that the “committee charged with drafting the constitution accepted 15 Sunni members Tuesday”).

99. *See* ALLAWI, *supra* note 5, at 404–06 (noting that, in addition to fifty-five members of the National Assembly, a group of unelected Sunnīs 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 Sunnī committee members).

on the deal, submitting the objectionable text to referendum notwithstanding the lack of consensus.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.¹⁰² It began to appear in early October that there would be a sufficient vote to reject the TAL in the three predominately Sunnī governorates.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.¹⁰⁴ The Ambassador then convinced one of the Sunnī religious parties that had been involved in the negotiations to endorse this amended text.¹⁰⁵

The result was that the Constitution was approved—barely.¹⁰⁶ Two Sunnī governorates rejected the text by at least two-thirds majorities.¹⁰⁷ In a third, the text was rejected, though not by the requisite two-thirds of the votes cast.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.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—

101. Rick Jervis, *Iraqi Parliament Fails Again to Complete Constitution*, USA TODAY ONLINE, Aug. 22, 2005, http://www.usatoday.com/news/world/iraq/2005-08-22-iraq_x.htm.

102. TAL, art. 61, para. C.

103. See Steven C. Welsh, *Iraq Constitutional Referendum*, CTR. DEF. INFO., Oct. 17, 2005, <http://www.cdi.org/news/law/iraq-referendum-101705.cfm> (“Fears of Sunni ‘no’ votes prompted a flurry of activity in the time leading up to the referendum.”).

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”).

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 Sunnī 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.”).

106. See Edward Wong, *Iraqi Officials Declare Charter Has Been Passed*, N.Y. TIMES, Oct. 26, 2005, at A1.

107. See *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 *Iraq Draft Constitution*] (“Only two other mostly Sunni provinces—Salahuddin and Anbar—had voted no by two-thirds or more.”).

108. See *id.* (“The election commission said the predominantly Sunni province of Ninevah had produced a ‘no’ vote of 55 percent.”).

109. See Kanan Makiya, *Present at the Disintegration*, N.Y. TIMES, Dec. 11, 2005, at C13 (“[I]f a mere 83,283 people in the province of Ninevah had voted no instead of yes, the draft constitution would have been defeated.”). Nineveh Governorate produced a 55% no vote, rather than two-thirds. *Iraq Draft Constitution*, *supra* note 107.

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 Sunnī 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.¹¹⁰ 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.¹¹¹ (From this vantage point, the United Nations solemnly declared the elections reasonably free and fair.)¹¹² 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.¹¹³ 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

110. See Douglas Jehl, *2 C.I.A. Reports Offer Warnings on Iraq’s Path*, N.Y. TIMES, Dec. 7, 2004, at A1 (detailing reports of violence on the streets of Iraq in the days leading up to the January 2005 Iraqi elections).

111. Hassan M. Fattah, *Foreign Observers, Watching from Safe Distance, Approve*, N.Y. TIMES, Jan. 31, 2005, at A9.

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.”).

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-^cAskariyyah 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 “[c]ockamamie,” 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

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.”).

115. Kathleen Ridolfo, *Iraq: Parties Call for Calm After Golden Mosque Bombing*, RADIO FREE EUROPE/RADIO LIBERTY, Feb. 23, 2006, <http://www.rferl.org/content/article/1066084.html>.

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.

117. Posting of Kyle Crichton to Baghdad Bureau Blog, <http://baghdadbureau.blogs.nytimes.com/2008/10/17/cockamamie-maybe-not/> (Oct. 17, 2008, 17:18 EST).

118. See Ned Parker & Raheem Salman, *A Divided Iraq Unites Against Partition Plan*, SAN JOSE MERCURY-NEWS, Oct. 1, 2007, available at <http://www.commondreams.org/archive/2007/10/01/4226> (explaining that some Iraqis believe the U.S. partition plan was intended to set off a sectarian war within Iraq).

119. *Autonomy Referendum for Iraq’s South Struck Down*, RADIO FREE EUROPE/RADIO LIBERTY, Jan. 20, 2009, http://www.rferl.org/content/Autonomy_Referendum_For_Iraqs_South_Struck_Down/1372452.html.

governorate, failed to garner the signatures of 10% of the registered voters.¹²⁰ 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 Elites¹²¹

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 rāsī"), 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.

123. *Profile: Massoud Barzani*, BBC NEWS, Nov. 26, 2002, available at http://news.bbc.co.uk/1/hi/world/middle_east/2480149.stm. The Clinton Administration, no doubt determined to deter Saddam from future such misconduct and to teach him a lesson, fired off a couple of missiles, hitting Iraqi Government positions in Basra, 350 miles away. *Barzani Gambles on Iraqi Sincerity*, AUSTL., Sept. 13, 1996, at 7.

124. See ANDREW COCKBURN & PATRICK COCKBURN, SADDAM HUSSEIN: AN AMERICAN OBSESSION 235 (2002) (characterizing Talabani as a mercurial "gambler in Kurdish politics" who "switched alliances with bewildering speed, even by local standards").

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).

128. See Charles Recknagel, *Iraq: Kurdish Factions Struggle to Achieve Unity*, RADIO FREE EUROPE/RADIO LIBERTY, Dec. 14, 2005, <http://www.rferl.org/content/Article/1063845.html>

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 Shī'ī religious parties, the fate of the Sunnīs 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).

129. See John McGarry & Brendan O'Leary, *Iraq's Constitution of 2005: Liberal Consociation As Political Prescription*, 5 INT'L J. CONST. L. 670, 678, 677–78 (2007) (describing the “near unanimity” of Kurdish political leaders on the issue of Kurdish autonomy and the need for Kurdish cooperation in the new Iraqi government).

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).

131. See Adam Roberts, *Transformative Military Occupation: Applying the Laws of War & Human Rights*, 100 AM. J. INT'L L. 580, 614–15 (2006) (detailing the dissolution of the Iraqi military).

132. See *Country Briefings: Iraq: Political Forces*, ECONOMIST.COM, Sept. 7, 2007, <http://www.economist.com/countries/Iraq/profile.cfm?folder=Profile%2DPolitical%20Forces> (noting that *peshmerga* forces continue to be strong, numbering approximately 25,000 troops).

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 Shī‘ah should get.” Furthermore, along the lines of Kurdistan, SCIRI/SIIC advocates a “Shī‘istan,” a federated super-region combining the nine predominately Shī‘ī governorates (which have, coincidentally, something like 90% of Iraq’s oil wealth).¹³⁷

The media have too often reported SCIRI/SIIC’s view on federalism as the “Shī‘ī position,” but it is not. The Shī‘ī religious parties, much less secular Shī‘ah, have very divergent views on the question of federalism. On the extreme end, the Sadrīst bloc comes very close to rejecting federalism outright, at least outside the Kurdish areas of Iraq.¹³⁸ In this sense, the Sadrīsts have a pan-national outlook. While there was much degeneration in the Sadrīst 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 Sunnī city. Al-Sadr’s discourse in those days was pan-Iraqīst.

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.¹³⁹ It rejected, however, the notion of “Shī‘istan,” preferring instead smaller federated regions consisting of one, two, or three governorates.¹⁴⁰ Moreover, Da‘wah favored—and favors—a stronger Baghdad government than the current Constitution allows.¹⁴¹ Another Shī‘ī religious party, the Fadhīlah Party, also generally followed this line of thinking.¹⁴²

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

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.

138. Kirk H. Sowell, *Federalism Delayed amid Sunni, Sadrīst Opposition*, THREATS WATCH, Sept. 19, 2006, <http://inbrief.threatswatch.org/2006/09/federalism-delayed-amid-sunni/>.

139. *Id.*

140. *See id.* (noting that the proposal to create a large Shī‘istan-type region is part of the larger federalism debate and constitutes one of the most divisive issues of that debate).

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).

142. Sowell, *supra* note 138.

National Assembly, which proffered the Constitution of 2006.¹⁴³ 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.¹⁴⁴ The first Iraqi prime minister after the fall of the previous regime, Ayad Allawi,¹⁴⁵ a man from a prominent Shī'ī family, was an exemplar of this political philosophy.¹⁴⁶ 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.¹⁴⁷ Instead, he thought purely in terms of ethnoconfessional identity and went in search of “Sunnī 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 Sunnī members of the drafting committee were thrown

143. *Id.*

144. See Haider Ala Hamoudi, *You Say You Want a Revolution: Interpretive Communities and the Origin of Islamic Finance*, 48 VA. J. INT'L L. 249, 270 (2008) (mentioning the existence of multiple secular nationalistic factions).

145. In the interest of full disclosure, the author notes that he belongs to the coalition headed by Dr. Ayad Allawi.

146. See Haider Ala Hamoudi, *Money Laundering Amidst Mortars: Legislative Process and State Authority in Post-invasion Iraq*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 523, 529 (2007) (describing Ayad Allawi's alliance as “secular, nationalist, [and] nonsectarian”).

147. MARC J. O'REILLY, *UNEXCEPTIONAL: AMERICA'S EMPIRE IN THE PERSIAN GULF, 1941–2007*, at 221 (2008).

out, those left thus adopted the extreme view of federalism reflected in the final draft.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.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.¹⁵⁰ Abdul Mahdi lost to Jaafari by a single vote when the Sadrists within the UIA voted for Jaafari.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.¹⁵²

148. See Noah Feldman & Roman Martinez, *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 *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).

149. See Kristina Arvanitis, *Lessons from Iraq: Electoral Legitimacy in the Shadow of Ethnoreligious Conflict*, 20 *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).

150. See Robert F. Worth, *Shiite Alliance Votes to Retain Iraq's Premier*, *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).

151. *Id.*

152. See Sami Moubayed, *Iraq's Next Premier: Spot the Difference*, *ASIA TIMES ONLINE*, Apr. 25, 2006, http://www.atimes.com/atimes/Middle_East/HD25Ak01.html (noting that al-Maliki replaced Jaafari after Shi'ah, Sunnis, and Kurds all called for Jaafari to step down).

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 2005.¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶ 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).

156. See GILBERT BURNHAM ET AL., THE HUMAN COST OF THE WAR IN IRAQ 5–8 (2006) (indicating that both the overall death rate and the death rate due to noncoalition violence increased sharply in the June 2005 to June 2006 timeframe).

were always suspicious of the American enterprise. Many suspected that dividing Iraq was the goal of the neoconservatives in the first place,¹⁵⁷ 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'idah and Ba'athist die-hards with whom no negotiations were ever possible.

It should be recalled in this context that one of the reasons for the Sunnī 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.¹⁵⁸ Yet it almost certainly would have ameliorated the objections of at least some Sunnī 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

157. See, e.g., Amit R. Paley & Saad Sarhan, *Sadr Holds Out Against Plan to Divide Iraq*, WASH. POST, Sept. 12, 2006, at A18 (describing distrust and criticism by Muqtada al-Sadr of a perceived U.S. plan to divide Iraq).

158. COALITION PROVISIONAL [A]UTHORITY ORDER NUMBER 2 (2003), http://www.cpa-iraq.org/regulations/20030823_CPAORD_2_Dissolution_of_Entities_with_Annex_A.pdf.

greater trust between the various actors, trust that would seem to be indispensable 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

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.

161. David C. Williams, *Constitutionalism Before Constitutions: Burma's Struggle to Build a New Order*, 87 TEXAS L. REV. 1657 (2009).

they begin to govern.¹⁶² 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 Sunnīs.¹⁶³ They nearly succeeded in defeating the referendum.¹⁶⁴ 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 Sunnī 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.